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## **RUAHA LAW REVIEW**

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## **RUAHA LAW REVIEW (RLR)**

Law remains a central pillar in the promotion of justice, good governance, and sustainable social development. Its effectiveness, however, depends largely on continuous scholarly engagement that critically examines legal norms, institutional practices, and emerging societal challenges. In this regard, academic legal journals play a vital role in shaping jurisprudence and informing legal reform. It is, therefore, with great pleasure that I present Volume 6 of the Ruaha Law Review (RLR), December 2025.

This Volume of Ruaha Law Review comprises scholarly contributions that address contemporary legal issues of relevance to Tanzania, the region, and the wider international community. The articles exhibit rigorous legal analysis and thoughtful engagement with statutory interpretation, constitutional principles, judicial practice, and evolving areas of law. Such scholarship contributes significantly to the strengthening of the rule of law and the effective administration of justice.

The Ruaha Law Review serves as an important forum for intellectual exchange among academics, legal practitioners, judges, policymakers, and students. By bridging legal theory and practice, the journal enhances informed discourse and supports evidence-based legal development. It also reflects the commitment of the Faculty of Law Ruaha Catholic University to excellence in legal education, research, and ethical professional formation.

I commend the Editorial Board, contributors, and peer reviews of their dedication and professionalism in producing this volume. Their efforts uphold the academic integrity of the journal and promote a strong culture of legal research within the University.

It is my expectation that the, Ruaha Law Review shall continue to serve as a valuable reference for the legal community and a catalyst for progressive legal thought and reform.

Dr. Adv. Anne Malipula

**Ag. Dean, Faculty of Law**

Ruaha Catholic University (RUCU)

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**CRITICAL EXAMINATION OF PLEA BARGAINING IN MAINLAND TANZANIA:  
JURISPRUDENTIAL CHALLENGES, ETHICAL CONCERNS, AND PATHWAYS TO LEGAL  
REFORM**

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***Abstract***

*This article critically examines the jurisprudence surrounding plea bargaining in Mainland Tanzania, focusing on its legal framework, practical application, and implications for justice administration. By employing a doctrinal legal analysis complemented by empirical research, the article highlights the role of law enforcement, prosecution, and judicial officers in plea negotiations. Key challenges, including ethical concerns, fairness in sentencing, and the balance between prosecutorial discretion and defendants' rights, are explored. The findings underscore the necessity for legal reforms to enhance transparency and fairness in plea bargaining practices, ensuring equitable access to justice. Recommendations are provided to improve the procedural safeguards and institutional mechanisms governing plea negotiations in Mainland Tanzania.*

## 1.0 HISTORICAL CONTEXT AND UNDERLYING FACTORS

### 1.1 Introduction

Plea bargaining is a legal mechanism rooted in the principle of "*Nolo Contendere*," which translates to "I do not wish to contest." It is a pre-trial negotiation between the prosecution and the defence, wherein the accused agrees to plead guilty in exchange for certain concessions. *Nolo contendere* began in 16th-century English law, letting defendants accept punishment without admitting guilt. It became formalized in U.S. courts, used to avoid civil liability after criminal cases.

Today, it's allowed in many states but subject to judge approval.<sup>1</sup> These concessions may include a reduced charge, a lighter sentence, or other favourable legal considerations, ultimately allowing for the resolution of a case without proceeding to a full trial. Legal scholar Martin, J<sup>2</sup> describes plea bargaining as an arrangement where the prosecution agrees to drop a more serious charge if the accused accepts responsibility for a lesser offense.

This negotiation facilitates efficiency within the judicial system by reducing caseloads, expediting case resolutions, and offering a strategic approach to sentencing. Despite its widespread application, plea bargaining remains subject to debates concerning fairness, coercion, and the integrity of legal negotiations, necessitating continuous scrutiny and refinement of legal frameworks to ensure just outcomes.<sup>3</sup>

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1 J Martin, J. (2003) "Introduction." Special Issue on Appraisal, 2003.

2 -Ibid-

3 Kapinga, W. B (1990) *The Police Force and Human Rights in Tanzania*, Third World Legal Studies

Somewhere between here or elsewhere, it will be great if you insert the historical background information by telling the reader on (i) the origin of the practice and how it was practiced (ii) its growth in applicability (iii) when and how it came into the United Republic of Tanzania.

## 1.2 Plea Bargaining: A Shift from Adversarial Justice to Bureaucratic Negotiation

Plea bargaining has become an essential feature of modern legal systems, providing an alternative to lengthy trials through negotiated settlements between the prosecution and the defence. While this process enhances judicial efficiency, scholars such as Feeley, M.<sup>4</sup> argue that it reflects a departure from the adversarial nature of justice, evolving into a form of bureaucratic justice that prioritizes organizational convenience and financial interests over the pursuit of truth and fairness.<sup>5</sup> This article explores the various types of plea bargaining, its implications on judicial integrity, and the ethical concerns surrounding its practice.

## 1.3 The Nature of Plea Bargaining

A plea is a formal statement made by or on behalf of an accused person in court, responding to charges brought against them (Martin, 2003)<sup>6</sup>. Within plea bargaining, legal scholars distinguish between: Vertical plea bargaining, where charges are reduced in severity, and Horizontal plea bargaining, where the number of charges is minimized. Regardless of the type, every plea agreement must be supported by a stipulated factual basis that justifies the accused's guilty plea.<sup>7</sup>

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4 Feeley, M (1982) *Plea Bargaining and the Structure of the Criminal Process*, Justice System Journal Volume: 7, 1982 pages 338–339

5 Ntemi, K.N (2018) "*Learning from contemporary examples in Africa: Referral mechanisms for restorative justice in Tanzania.*" South African Crime Quarterly 63 (2018): pages 17-26

6 Martin, J (n1)

7 Hessick, C. B (2021) *Punishment Without Trial: Why Plea Bargaining is A Bad Deal* 1st edition, Abrams Press.

However, there are forms of Plea Bargaining which take multiple forms, which include and note limited to: First, Explicit Bargaining; - The prosecutor offers a specific sentence, and the judge indicates the expected penalty upon a guilty plea. Secondly, Implicit Bargaining; - The accused pleads guilty with the understanding that sentencing discounts are available and third and last negotiated Diversion: - The judge issues a warning or reprimand in exchange for some form of restitution instead of criminal penalties.<sup>8</sup> Each of these mechanisms serves different judicial interests, balancing the need for case resolution against concerns over fairness, justice, and coercion.

#### **1.4 Judicial Efficiency vs. Ethical Concerns**

While proponents of plea bargaining emphasize its role in reducing case backlogs and expediting justice, critics argue that it undermines the moral responsibility of legal practitioners to seek truth and ensure fairness. M Feeley's<sup>9</sup> assertion that plea bargaining operates within a bureaucratic framework suggests that legal professionals prioritize efficiency over ethical responsibility, sometimes leading to coerced guilty pleas or unfair sentencing agreements.

Additionally, concerns regarding financial obligations in plea agreements remain prevalent. Some jurisdictions enforce plea deals that require monetary payments within a specified timeframe, failure to comply often results in forfeiture of payments and reinstatement of formal criminal proceedings. Such practices raise ethical questions about justice, procedural fairness, and the accused's rights within negotiated settlements.

## **2.0 Classifications of Plea-Bargaining Mechanisms**

Plea bargaining is a crucial component of modern criminal justice systems, allowing defendants to negotiate agreements with prosecutors to resolve cases efficiently. The

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<sup>8</sup> Adelistein, R (2019) "*Plea Bargaining in South Africa: An Economic Perspective.*" Constitutional Court Review. Volume 9, pages 81–111.

<sup>9</sup> Feeley, M (1980) *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* t Michigan Law Review, 1980

classifications of plea-bargaining mechanisms refer to the different forms in which these negotiations occur, each serving distinct legal and procedural purposes.<sup>10</sup> Broadly, plea bargaining can be categorized into charge bargaining,<sup>11</sup> sentence bargaining, and fact bargaining.

Charge bargaining involves negotiating a lesser charge in exchange for a guilty plea, while sentence bargaining allows defendants to plead guilty in return for a reduced sentence. Whereas, fact bargaining, though less common, entails an agreement to stipulate certain facts to avoid harsher penalties.<sup>12</sup> The adoption and implementation of plea bargaining vary across jurisdictions, influenced by legal traditions, judicial discretion, and policy considerations. Some legal systems emphasize efficiency and case backlog reduction, while others focus on safeguarding defendants' rights and ensuring fairness in negotiations.

It is not disputed that in today's criminal justice system trials are prolonged, and it causes untold harassment to the accused, victims and witnesses. Various strategies and tools have been used in various jurisdictions to lessen the burden of trials, and ensure speedy disposal of cases and less harassment for parties. Plea bargaining has been introduced as a prescription to the problem of overcrowded jails, overburdened courts and abnormal delays.<sup>13</sup> Principally the system of plea-bargaining could be construed as posing a threat to one of the cornerstones of criminal jurisprudence- right of the accused to a fair trial. It also goes against the theories of punishment- like retribution, deterrence, proportionality.

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10 Phillips, A and Charles, A (2023) "*The Evolution and Practice of Guilty Pleas in International Criminal Law.*" *Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability for Africa and the World.* The Hague: TMC Asser Press, 2023.

11 Feeley, M (n8)

12 *The Legal Impact of Plea Bargain in Settlement of High Profile Financial Criminal Cases in Nigeria.*" *Sriwijaya Law Review* 5.2 (2021): 161-174.

13 *ibid*

Plea-bargaining poses a great deal of power and responsibility in the prosecutor or prosecution agency. The prosecutor may decide to frame the highest charges in a case, which does not deserve to be charged with these provisions. The richer accused may get away easily with paying compensation.<sup>14</sup> There is a shift which we find from the criminal justice system, the public has a trust on the system that the truth would be found through fact-finding trial process.

A plea bargain will begin with a prompt or trigger by either party that it is willing to engage in a discussion and agreement over pleas and charges. The process often involves a proffer to plead guilty to a specific charge by defense counsel, initially, and then by the defendant. An interactive discussion will then follow over the „terms“ of the plea agreement, revolving around an analysis of the prosecutor’s evidence. This may cover such issues as the number and scope of charges, sentence (including the level of fine or prison time) and any amount of restitution.<sup>15</sup>

In negotiating the penalty, the prosecutor may follow sentencing guidelines which enhance predictability and transparency in the processes. An agreement could be entered into either before or after charges are laid, and, in theory, up to the very moment before a case reaches the court door. However, the procedural savings and, therefore, the defendant’s credit for co-operating (in terms of reduced penalty) can be expected to be proportionately reduced the later a plea is proffered.<sup>16</sup> Ultimately, the outcome can involve insistence on a guilty plea in return for a reduced sentence and co-operation with ongoing and related investigations. Although jurisdictions which have employed plea bargaining may differ on the scope

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14 Alschuler, A.W. (1979) "Plea Bargaining and Its History." *Columbia Law Review*, vol. 79, no. 1, 1979, pp. 1–43.

15 Ibid

16 Kenneth, B (2020) *Plea Bargaining in Tanzania: An Assessment of Its Implication on The Rule of Natural Justice*. Dissertation Mzumbe University, 2020.

of judicial discretion afforded, liability and penalty are definitively established on approval by the court.<sup>17</sup>

In the main even though 'plea bargaining' is available after the introduction of the said amendment is available, in cases of offences which are not punishable either with death or with imprisonment for life or with imprisonment for a term exceeding seven years, the chapter contemplates a mutually satisfactory disposition of the case which may also include giving compensation to victim and other expenses. The same cannot be done without involving the victim in the process of arriving at such settlement.

### **3.0 EMERGENCE OF PLEA BARGAINING IN TANZANIA**

#### **3.1 Introduction**

In the year 2019 the Parliament of United Republic of Tanzania made amendments to several Criminal Laws in Tanzania, aiming at, among others to introduce the Plea Bargain in Criminal Justice System. To that effect, the Parliament passed Written Laws (Miscellaneous Amendments) Act (No. 4) 2019 (Act No. 11 of 2019) whereas numerous amendments were made including the Amendment of the Criminal Procedure Act, (Cap. 20). This Legal modernization highlights the amendments done in particular to the Criminal Procedure Act, Cap. 20 through the introduction of the Plea Bargaining in Tanzania, its procedure and administration.

In essence, as highlighted in the preceding chapter, plea bargaining is a legal arrangement in criminal proceedings where the accused negotiates with the prosecutor to plead guilty in exchange for certain benefits. These benefits may include a reduced sentence or other concessions granted by the prosecution. The Criminal Procedure Act, Cap 20 in Tanzania has been revised to incorporate plea bargaining into criminal justice processes. Under these amendments, plea bargaining is formally defined as a negotiation between the prosecutor and the accused, whereby the accused agrees to: Plead guilty to a specific offense or a lesser charge; or

Cooperate with the prosecution by providing information that may contribute to uncovering additional facts related to the case. In return, the accused may receive concessions such as a reduced sentence or the withdrawal of certain charges. These provisions aim to enhance judicial efficiency while ensuring fairness in criminal case resolutions.

### **3.2 Legal Framework and Practical Challenges**

Plea bargaining has emerged as an integral component of modern criminal justice systems worldwide, aimed at expediting case resolutions and reducing court congestion. In Tanzania, the formal incorporation of plea bargaining into legal practice was established through amendments to the Criminal Procedure Act, Cap 20. Despite its potential benefits, concerns have arisen regarding its implementation, fairness, and procedural transparency.

#### **3.2.1 The Legal Framework of Plea Bargaining**

Under sections 194A, 194B, and 194C of the Criminal Procedure Act, plea bargaining is defined as a formal negotiation between the prosecution and the accused, wherein the accused agrees to: Plead guilty to either the charged offense or a lesser offense; or Provide information that may assist in uncovering further details related to the case. In return, the accused receives concessions, such as a reduced sentence or the withdrawal of certain charges. This mechanism aims to enhance judicial efficiency while promoting fairness in criminal case resolution.

#### **3.2.2 Challenges in Implementation**

Although plea bargaining is a relatively new concept in Tanzania, reports indicate that some defendants have expressed dissatisfaction with the process, citing concerns of coercion and lack of transparency. In certain cases, individuals who agreed to plea deals involving financial settlements have faced severe consequences upon failing to meet payment deadlines. If an accused fails to pay within the specified period, any advance payment is forfeited, and they are subjected to the standard criminal justice process. A significant point of contention is the absence of legal provisions allowing the return of

forfeited payments. Many argue that this practice contradicts the principles of justice and fairness, particularly when conducted within institutions dedicated to upholding the rule of law.

The Author justifies her argument by cited a case of **Republic v. Said Suleiman Said & Another, High Court of Tanzania at Dar es Salaam, Criminal Sessions Case No. 89 of 2021** whereas: the accused entered a plea-bargaining agreement involving financial compensation. They failed to pay the agreed amount within the deadline. As a result, the advance payment was forfeited, and the case reverted to full criminal trial. The court noted the absence of legal provisions for refunding forfeited payments, raising concerns about fairness and transparency.

Another case is **Republic v. Mohamed Said Mohamed, High Court of Tanzania at Mtwara, Criminal Case No. 12 of 2022.**

The accused entered a plea-bargaining agreement involving partial financial compensation. He failed to complete payment within the agreed timeframe. The court ordered forfeiture of the initial payment and reinstated full criminal proceedings. The judgment raised concerns about the lack of legal safeguards for defendants in plea deals, especially regarding payment enforcement and transparency.

This case further illustrates the tension between procedural efficiency and fairness in Tanzania's emerging plea-bargaining framework.

### **3.2.3 Financial Concerns and Accountability**

Another area of concern revolves around the management and collection of financial settlements from accused individuals. The Controller and Auditor General (CAG) has raised questions regarding the transparency of these financial dealings, prompting further scrutiny of the plea-bargaining process. Ensuring accountability in handling monetary aspects of plea agreements is critical to maintaining public trust and safeguarding legal integrity.<sup>18</sup>

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18 The Citizen of 8<sup>th</sup> April, 2023

The justification of the above statement is based on the case of **Republic v. Director of Public Prosecutions (DPP)**. The CAG revealed that the DPP's office mismanaged plea-bargaining agreements, including improper handling of over TZS 219 billion in financial settlements. Only TZS 55.87 billion was deposited, with TZS 170.61 billion unpaid by defendants who breached agreements. Funds were deposited into incorrect accounts, including Sh6.1 billion meant for asset forfeiture being placed in plea bargaining accounts. The CAG recommended forming an independent commission to investigate misconduct, citing lack of transparency, accountability, and legal safeguards. This case underscores the urgent need for financial oversight and legal clarity in Tanzania's plea-bargaining system to uphold justice and public trust.<sup>19</sup>

As stated under item 2.1. of this article Plea bargaining was introduced in Tanzania criminal justice system in 2019 this necessitated the amendment of the Criminal Procedure Act. Cap 20 to add Section 194A-104H which provide for procedures to be followed in handling plea bargaining. The basis is under Section 194A (1) which states that: -

*A public prosecutor, after consultation with the victim or investigator where the circumstances so permit, may at any time before the judgment, enter a plea-bargaining arrangement with the accused person and his advocate if represented or, if not represented, a relative, friend or any other person legally competent to represent the accused person.*

#### **4.0 Ensuring Justice in Plea Bargaining: The Need for Legal Structure and Accountability**

##### **4.1 Introduction**

Justice is a foundational principle of any democratic society, predicated on the ideals of fairness, consistency, and impartiality. If an individual is subjected to punishment, there must be clear and justified reasons for the sentence they receive, and two individuals who commit similar offenses should face equitable legal consequences. While plea bargaining was introduced as a tool to enhance judicial efficiency and expedite case resolution,

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<sup>19</sup> ibid

concerns have arisen regarding its fairness, arbitrariness, and impact on the integrity of legal processes.<sup>20</sup>

## **4.2 The Role of Plea Bargaining in Criminal Justice**

Plea bargaining is designed as a pre-trial negotiation between the prosecution and the accused, wherein the accused agrees to plead guilty in exchange for leniency in sentencing or a reduction in charges. Ideally, this mechanism serves as a practical solution to overburdened courts, reducing costs and expediting justice. However, the inconsistent application of plea-bargaining raises concerns about fairness and transparency, particularly when prosecutorial discretion lack oversight.

## **4.3 The Need for Legal Structure and Accountability**

To counteract potential arbitrariness in plea bargaining, legal systems must establish clear statutory guidelines outlining the conditions under which plea deals may be offered, accepted, or rejected. These frameworks should define: Firstly; Criteria for offering plea agreements, ensuring uniformity across cases. Secondly; Limits on prosecutorial discretion, preventing unjustified disparities in sentencing and thirdly; oversight mechanisms to uarantee that plea bargains uphold principles of fairness, proportionality, and due process.

Additionally, prosecutors must be held accountable to established legal procedures to ensure justice is served. Independent judicial reviews, mandatory justifications for plea deals, and increased transparency in prosecutorial decisions would help mitigate the risks associated with unregulated bargaining processes. Conclusively, in this part while plea bargaining remains an indispensable tool in modern legal systems, its execution must adhere to strict principles of fairness and consistency.

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**20** "The Impact of Plea Bargaining on the Right to a Fair Trial: A Critical Analysis of Its Role in Modern Criminal Justice System" Published by the International Journal of Innovative Research in Law (IJIRL), April 2025

Prosecutorial discretion must be guided by structured legal frameworks, ensuring that plea agreements do not compromise justice or due process. By implementing accountability measures, judicial systems can preserve public confidence and ensure that plea bargaining serves as a means of equitable legal resolution rather than an instrument of arbitrary negotiations.

## **5.0 Legal Ambiguities in Plea Bargaining and Property Rights in Tanzania**

### **5.1 Legal Ambiguities in Plea Bargaining**

Critical challenges revolve around the following: First is lack of Clear Statutory Refund Mechanisms in the sense that if a defendant fails to meet payment terms in a plea deal, any advance payment is forfeited also there is no legal provision which exist for refunding forfeited payments, raising fairness concerns. Secondly, Transparency and Oversight issues as the Controller and Auditor General (CAG) has flagged mismanagement of plea-related funds, including improper account handling and missing deposits. Thirdly, Coercion and Unequal Bargaining Power meaning that Defendants may feel pressured to accept deals without fully understanding their rights or consequences and lastly under this research is presence of Judicial Discretion vs. Consistency that is courts have wide discretion in accepting or rejecting plea deals, leading to inconsistent outcomes across similar cases.<sup>21</sup>

### **5.2 Legal Ambiguities in Property Rights**

Legal Ambiguities in Property Rights revolve around the following: Firstly, Legal ambiguities in Property Rights revolve around the Overlap Between Criminal and Civil Jurisdictions to be more precise property seized during criminal investigations may lack clear restitution procedures if charges are dropped or plea deals collapse. Secondly, Asset

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**21** *Akyoo, D ( 2023) Plea Bargaining Procedures In Tanzania: An Analysis Of The Efficacy Of The Laws, Volume 9, Commonwealth Law Review Journal, 725-747, Published On 12/12/2023, available at <https://Clrj.TheLawbrigade.Com/Article/Plea-Bargaining-Procedures-In-Tanzania-An-Analysis-Of-The-Efficacy-Of-The-Laws>*

Forfeiture Confusion meaning Funds meant for asset forfeiture have been misdirected into plea bargaining accounts, distorting the legal boundaries between punishment and compensation. Thirdly, Weak Legal Protection for Third Parties in the sense that: Innocent third parties (e.g., family members) may lose property tied to criminal cases without adequate legal recourse. To conclude this party, it is clear that these ambiguities highlight the need for clearer legislation and stronger institutional safeguards to ensure justice and protect property rights.<sup>22</sup>

### **5.3 Legal Considerations and Constitutional Implications**

The Constitution of the United Republic of Tanzania, 1977, under Article 24(1), guarantees individuals the right to own property. Furthermore, Article 24(2) stipulates that:

*"It shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation."*

Despite these constitutional safeguards, the absence of explicit legal guidelines regarding the financial aspects of plea-bargaining agreements raises concerns about procedural fairness and legal certainty. The fact that payments made under plea agreements are forfeited without refund upon failure to fulfil the full financial obligation suggests an inherent lack of legal clarity, contributing to perceptions of arbitrariness in the plea-bargaining process.

### **5.4 Legal Framework and Procedures for Plea Bargaining in Tanzania**

Section 194A describes the procedure for Plea bargaining whereby Plea Bargaining can be done through Consultation by Public Prosecutor or through Consultation by the Accused or his Advocate. According to Section 194(2) the accused or his advocate or a public prosecutor may initiate a plea bargaining and notify the court of their

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22 -ibid-

intention to negotiate a plea agreement. It is important to note thus, the law allows Plea Bargaining to be initiated either by the Prosecutor or by the Accused or any person acting on his behalf.

During the Plea bargaining between the public prosecution and accused, it is the requirement of the law that Courts shall not participate in plea negotiations. Crucial important is the requirement that no plea bargain shall be concluded without a written consent of the Director of Public Prosecution (DPP).

### **5.5 Consequences for entering Plea bargaining**

Section 194B lays down the consequences of Plea bargaining whereby, upon successful Plea-bargaining arrangement, the public prosecutor may either impose a lesser charge on the accused, or the accused may plead guilty in exchange for withdrawal of charges, or the accused may be ordered to pay compensation, or be subjected to forfeiture of the proceeds and instrumentalities that were used to commit the crime in question. It is therefore important to note that, Plea bargaining is not meant to exonerate the accused from the criminal liability but rather, to offer a suitable option for both the Prosecution and the Accused to deal and relinquish the Accused from offenses charged.

### **5.6 Requirements for Plea Agreement**

The new Section 194C stipulates the requirements of the plea agreement. Accordingly, the section requires that: - a plea agreement must be in writing and with prior written consent of the DPP; Plea agreement must be witnessed by Advocate of the Accused or, if not represented, a relative, friend or any other person legally competent to represent the accused; the Plea agreement must state fully the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person.

Apart from the above plea agreement must be read and explained to the Accused person in a language that he understands; additionally, the Plea agreement must be accepted and signed by the Accused person and his advocate, if represented or if not

represented, a relative, friend or any other person competent to represent the accused and also must be signed by the Prosecutor. Finally, in case the Plea agreement was negotiated through an interpreter, the interpreter must certify his language proficiency and that he interpreted accurately during the negotiations.

### **5.7 Plea Agreement Registration**

It is the requirement of the law that any Plea agreement entered must be registered in court (Section 194D). The court registering such Plea agreement must satisfy itself that the agreement was voluntarily obtained, and the accused was competent to enter into such agreement. Therefore, when the court accepts and register the Plea agreement, it becomes binding document upon the parties (the Accused and Prosecution) and forms the record of the Court. Consequently, the court can proceed to convict the accused person accordingly. Section 194E imposes upon Courts to observe the procedure before registration of the Plea agreements. It is mandatory for the Court to require the accused to be under oaths but also the court must address and inform the accused of his rights that: - by accepting the Plea agreement the accused is waiving his right to a full trial, by entering the Plea agreement the accused is waiving the right to appeal except as to the extent or legality of sentence; and the prosecution has the right, in case of false statement, to use any statement that the Accused gives in the agreement against him.

### **5.8 Exceptions to Plea Agreement**

Plea agreement has exceptions. Section 194F provides for offences which are excluded for plea bargaining and plea agreement. These includes and not limited to: Sexual offences whose punishment exceeds 5 years or involving victims under 18 years; Treason and treasonable offences; Possession or trafficking narcotic drugs whose market value is above 20 million shillings; Terrorism; Possession of Government trophy whose value is above 20 million shillings; and any other offence as the Minister may prescribe. So far, the Minister is yet to prescribe the offenses which are excluded under Plea Bargaining.

## 5.9 Challenging Plea Bargaining

For purposes of public interest, section 194G empowers the Director of Public Prosecution to apply to the court to set aside the sentence and conviction that were procured on the grounds of fraud or misrepresentation pursuant to the plea agreement. Likewise, the law allows the accused person in a plea agreement to apply to the court to have the conviction and sentence procured involuntarily or by misrepresentation be set aside.

## 5.10 Plea Bargaining Rules/Regulations

The Rules set out the procedure for initiating a plea agreement.<sup>23</sup> Before making of the Rules, the practice has been that the accused initiates a plea-bargaining request by writing a letter to the Director of Public Prosecutions through the prison authority. Under the current practice, the Court was only involved after the conclusion of the agreement between the prosecution and the defense.<sup>24</sup> The Rules however requires the parties to a criminal offence to engage the Court from the beginning by notifying it orally or in writing of the intention to negotiate a plea agreement.

Statutorily the Court is vested with the power to fix a time within which a plea agreement should be concluded.<sup>25</sup> The maximum time that can be granted is 30 days. Unlike under the Act where disclosure of evidence depended on the type of Court an accused was charged, under the Rules, the prosecutor is duty bound to fully disclose to the accused the evidence obtained during investigation to enable the accused make an informed decision.<sup>26</sup>

This is a big step in improving the administration of criminal justice in Tanzania. The Rules also gives the victims the right to be involved in the plea-bargaining processes

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23 Criminal Procedure (Plea Bargaining) Rules 2021 (Rules) under section 194H of the Criminal Procedure Act [Cap.20 R.E 2019] (Act) vide GN No.180 of 2021 The Guidelines were released on 5 February 2021.

24 -ibid-

25 The Criminal Procedure (Plea Bargaining Agreement) Rules, 2021 Rule 22

26 The Criminal Procedure (Plea Bargaining Agreement) Rules (n25)

specially to protect their right to compensation or restitution. The victim can even initiate a proposal to include compensation to him in the agreement.

The Rules has cleared the fear of many accused and defense counsel of entering into a plea agreement of an offence punishable with a minimum statutory penalty. In the main, In Tanzania all economic offences, sexual offences, drug offences and many other offences attract severe minimum statutory penalties. Many accused have been hesitant to enter into a plea agreement for fear of being sentenced to such severe minimum statutory custodial sentences.

The Rules allow the accused and public prosecutor to propose a penalty in the final plea agreement.<sup>27</sup> Although the rules give the Court discretion to impose a lesser penalty than the statutory minimum penalty prescribed by the law as suggested by the parties, the Court is not bound by the sentence recommended by the parties. The Rules prescribes the format of a plea agreement and the form of an application for setting aside a conviction founded on plea agreement.<sup>28</sup> Formerly there was no statutory format of the plea agreement.

Conclusively, Plea bargaining is a new system and concept in criminal justice in Tanzania. It is expected that, the system will allow fair negotiation in criminal cases between Prosecutor and the Accused so as to enable speedier and efficient disposal of criminal cases. If well handled, Plea bargaining will tremendously reduce Criminal case backlogs and ensure timely delivery of criminal justice. More importantly, the system would decongest the criminal inmates in prison facilities in Tanzania.

Basically, the criminal justice system is designed to deliver “justice for all.” This means protecting the innocent, convicting criminals, and providing a fair justice process to help

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27 Ibid

28 The Criminal Procedure (Plea Bargaining Agreement) Rules, 2021 Rule 22

keep order across the country. To take somebody's property it is unconstitutional. This is violation of Art 24. -(1) which states that: <sup>29</sup>

*Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.*

(2) which states that:

*it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation*

## 6.0 Conclusion

While plea-bargaining presents an opportunity for efficient case management and judicial reform, its execution must prioritize fairness, transparency, and accountability. Addressing existing concerns through policy refinements and oversight mechanisms will be crucial in ensuring that plea bargaining serves its intended purpose without compromising fundamental legal principles. As Tanzania continues to adapt to this legal practice, reforms should focus on protecting defendants' rights and enhancing procedural safeguards to foster a more just and equitable criminal justice system.

In the main, Plea bargaining continues to be a contentious subject within legal scholarship and judicial practice. While it undeniably facilitates judicial efficiency, its bureaucratic nature often leads to concerns about justice, transparency, and coercion. Moving forward, legal reforms should aim to strike a balance between expedited case resolution and safeguarding defendants' rights, ensuring that plea bargaining serves its intended purpose without compromising fairness in the justice system.

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<sup>29</sup> *Ibid*

Before I close my conclusion let me highlight two important aspects; Firstly; Economic Benefits of Plea Bargaining in Tanzania and Secondly, Why Recommend Plea Bargaining in Criminal Justice as hereunder:

### 5.1 Economic Benefits of Plea Bargaining in Tanzania

However, there are economic benefits of Plea Bargaining in Tanzania these include and not limited to:

Firstly, **Reduced Trial Costs** meaning by avoiding lengthy trials, plea bargaining significantly cuts down on the financial burden of prosecuting cases. This includes savings on judicial time, legal representation, and administrative expenses.

Secondly: **Efficient Use of Resources; this allows** Prosecutors and courts can allocate their limited resources to more complex or serious cases, improving overall system efficiency.

Thirdly; **Decongestion of Prisons** Plea deals often result in reduced sentences or alternative penalties, helping to alleviate overcrowding in Tanzanian prisons a major cost driver for the government.

Fourthly: **Faster Case Resolution**, Speedier resolutions mean less time spent in remand, which reduces state expenditures on detainee welfare and logistics.

Fifthly; **Victim Compensation and Restitution** Plea bargaining can include terms for compensating victims, which not only promotes restorative justice but also reduces the need for separate civil proceedings.

### 6.1 Why Recommend Plea Bargaining in Criminal Justice

There are some good reasons why the author recommends Plea Bargaining in Criminal Justice to mention few include and not limited to:

Firstly, **Expedited Justice meaning** it accelerates the judicial process, ensuring timely justice and reducing case backlogs that plague Tanzanian courts.

Secondly; **Promotes Accountability** meaning offenders who accept responsibility through plea deals demonstrate remorse and are more likely to rehabilitate, aligning with restorative justice principles.

Thirdly; **Protects Victims and Witnesses** meaning avoiding trials spares victims and witnesses from the trauma of testifying, especially in sensitive cases.

Fourthly; **Encourages Cooperation** meaning Plea bargaining can incentivize defendants to cooperate with law enforcement, aiding in the prosecution of more serious offenders.

Fifthly and lastly; **Supports Constitutional Values:** The practice aligns with Tanzania's constitutional mandate to promote fair and efficient justice, as it respects the rights of the accused while streamlining legal processes.

# ANALYSIS OF THE LEGAL FRAMEWORK GOVERNING THE PROSECUTION OF JUVENILE OFFENCES IN MAINLAND TANZANIA

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## ***Abstract***

*Prosecution of children cases has got its unique way of doing it, it does not follow the procedure narrated under the Criminal Procedure Act Cap. 20 [R.E. 2019] but follows its own procedures narrated under Part IV of the Law of the Child (Juvenile Court Rules), 2016 which was published on 20th May, 2016 under Government Notice No. 182. The LCA was enacted as a way of adhering to what is enshrined to the United Nations Convention of the Rights of the Child abbreviated as UNCRC and the African Charter on the Rights and Welfare of the Child also abbreviated as ACRWC. Prosecution agencies and courts are at the heart and Centre of juvenile justice system. They serve as stages of case processing that follow the police arrest and precede the delivery of convicted juvenile to correctional authorities. Prosecutors, carries out an administrative function within the executive branch of government. The guiding Principle in prosecuting juvenile cases is the best interests of the child as primary consideration. This principle has to be adhered by all stake holders of juvenile justice*

## 1.0 General Introduction

Tanzania's legal system is based on English common law. According to the Judicature and Application of Laws Act<sup>30</sup>, common law, doctrines of equity and statutes of general application are enforceable in Tanzania [but only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary]. The supreme law of the country is the Constitution of the United Republic of Tanzania<sup>31</sup>. The Constitution vests in the state authorities the responsibility to ensure that, in discharging their duties, human dignity and other human rights are respected and cherished and that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights of 1948<sup>32</sup>.

The Constitution also provides for the Bill of Rights and Duties<sup>33</sup>. The rights enshrined include; the right to equality right to life; right to personal freedom; right to privacy and personal security; right to freedom of movement; freedom of expression and right to information; freedom of religion; freedom of association and the right to take part in public affairs.<sup>34</sup> The redress for violation of human rights in Tanzania is sought in court through the Basic Rights and Duties Enforcement Act<sup>35</sup>. Moreover, other non-human rights procedures can as well be invoked to acquire appropriate legal remedy through the Criminal Procedure Act. and Civil Procedure Act.<sup>36</sup>

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30 Section 2 of the Judicature and Application of Laws Act, Cap. 358 of 1920.

31 The Constitution of the United Republic of Tanzania, 1977

32 See Article 9, Article 9(f)).

33 See Part Three of the Constitution Articles 12 to 29

34 See Article 12 - 21 of the Constitution (n)1

35 Basic Rights and Duties Enforcement Act, Cap. 3 of 1994

36 Criminal Procedure Act, Cap. 20 of 1985 and Civil Procedure Act, Cap. 33

Consequently, all matters related to juvenile justice are governed by the Law of the Child Act<sup>37</sup>. The statute upholds what is enshrined in the spirit of the United Nations Convention on the Rights of the Child (UN-CRC)<sup>38</sup> and The African Charter on the Rights and Welfare of the Child ACRWC.<sup>39</sup> All the principle three documents in matters related to children stress that:

*In all actions concerning the child undertaken by any person or authority the best interests of a/the child shall be the primary consideration.....*

The Law of the Child Act No. 21 of 2009 was enacted to replace The Children and Young Persons Ordinance Cap. 13 and to comply with the regional and international requirements in relation to treatment of children especially to what is enshrined in the ACRWC and UN CRC as the LCA clearly states in its preamble:

*Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.<sup>40</sup>*

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<sup>37</sup>The Law of the Child Act No. 21 of 2009

<sup>38</sup>The United Nations Convention on the Rights of the Child (commonly abbreviated as the **CRC** or **UN-CRC**) which was ratified by Tanzania on 10th June, 1991, two years after it was opened for signature is an international human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children

<sup>39</sup>The African Charter on the Rights and Welfare of the Child was adopted in 1990, it came into force in 1999. Tanzania ratified this regional guidance of the rights and welfare of the child on 16th March, 2003. As of August 2012, it had been ratified by 46 AU Member States out of 53.

<sup>40</sup> See the Preamble of The Law of the Child Act No. 21 of 2009

Therefore, is so much expected that Tanzanian juvenile justice should match to what is enshrined in the two major documents for juvenile justice, these are none other than the UN CRC and ACRWC as afore said.

## 2.0 Overview of Juvenile Justice in Tanzania

### 2.1 Introduction

Tanzania as a country has zero tolerance on matters related to violations of children's rights or the none adherence of the best interests of the child particularly in juvenile justice. This is evidenced by several factors but notably is the enactment of the Law of the Child Act No. 21 of 2009 as a way of complying to what are enshrined in the regional and international instruments concerning children's rights, the major instruments being UN-CRC and ACWRC. The launching of the Five-Year Strategy for Progressive Child Justice Reform 2013-2017 aiming at reforming and strengthening child justice in Tanzania is also another evidence.

The Strategy was commissioned in 2011 by the then newly-established Child Justice Forum (CJF), under the patronage of the Ministry of Constitutional and Legal Affairs (MoCLA), and was premised on two studies, *The Assessment of the Access to Justice System for Under-18s* and *The Analysis of the Situation for Children in Conflict with the Law in Tanzania*. Notable achievements made in child justice law reform in the course of implementing the Strategy, include and not limited to the amendments made to the Law of the Child Act (2009) through the Written Laws (Miscellaneous Amendments) (No. 2) Act, No. 4 of 2016, which introduced a number of progressive provisions such as removing the *voire dire* test requirement for children prior to testifying and the adoption of the Juvenile Court Rules in May, 2016.

Other achievements since the development of the Strategy include passage of the Legal Aid Act in 2017 (and its Regulations in 2018) which, for the first time, extends legal aid to children in both civil and criminal cases. The Legal Aid Act also recognizes the provision of legal aid by paralegals, significantly expanding the cadre of professionals who can provide support to children.

In addition, there was enactment of the Whistle-blowers and Witness Protection Act in 2015. Although this law does not have specific reference to children, it generally provides for the protection of whistle-blowers and witnesses against potential retaliation or victimization. Sensibly, whistle-blowers and witnesses include children in light of the provisions of Section 4 of the Interpretation of Laws Act Cap.1 [R.E.2002]. Furthermore, the Whistle-blowers and Witness Protection Act provides for a legal mechanism to reward and compensate whistle-blowers and witnesses.

Other enactments are the promulgation of the Child Protection Regulations in 2015, and the issuance of a Circular by the Commissioner for Social Welfare under Section 16(q) of the LCA designating children in conflict with the law as children who are in need of care and protection in 2012.<sup>41</sup> Several major achievements also took place in the realm of strengthening child justice, including the designation of 130 and later 236 primary courts as juvenile courts under GN. No. 314 of 2016 and GN No. 158 of 22/2/2019 respectively as opposed to one juvenile court known as Kisutu which survived alone for almost 22 years. A lot of training has been conducted aiming at strengthening the capacity of the prosecutors, police and social welfare officers to handle children's cases, and working with the prisons and correctional services to ensure that; as much as possible policies and procedures are in place to meet the needs of children in detention.

### **3.0 The National Prosecutions Services Office**

#### **3.1 Introduction**

The National Prosecutions Services Office is the sole institution mandated by law to institute, conduct and control prosecutions for any offence other than court martial in the country. Offences may include criminal cases for adults and Juvenile cases for children. This office is created by the National Prosecution's Services Act abbreviated as NPSA<sup>42</sup>. The office consists of a director<sup>43</sup> which is the head of operations in

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<sup>41</sup>Commissioner for Social Welfare, Circular No. 1 of 2012, made under Section 16(q) of the LCA designating children in conflict with the law as children who are in need of care and protection.

<sup>42</sup> The National Prosecutions Services Act, No. 27/2008

relation to prosecutions and coordination of investigation duties which are conducted by the investigative organs. Under the Director there is a Deputy Director of Public Prosecution who is the Accounting Officer of the institution, Directors, Assistant Directors and other officers who are given instrument by the Director of Public Prosecutions to perform prosecutorial duties on his behalf. Basically, these officers are State Attorneys who perform prosecutorial functions and other functions as mandated to them by the law.

The Director is also mandated with power to appoint any other person from other institutions to assist prosecutions these are Police, Prevention and Combating of Corruption Bureau officers, Immigration officers, officers from wild life etc. All these categories together with State Attorneys form part of Public Prosecutors.<sup>44</sup> This is provided under Section 22 (1) and (2) of the NPSA the Section reads:

*The Director may appoint a person to be a public prosecutor from other departments of the Government, local government authority or private practice to prosecute a specified case or cases on his behalf*

### **3.2 Definition of Public Prosecutors**

A public prosecutor means a person appointed in accordance with the national prosecution service act No.27/2008<sup>45</sup> to conduct prosecution of a criminal case in the court of law. These include Director of Public Prosecutions, the Attorney General, Deputy Attorney General, a Parliamentary Draftsman, a State Attorney and any other person acting in criminal proceedings under the directions of the Director of Public Prosecutions.

Prosecutors are mandated to control criminal proceedings and coordination of investigation for end of justice. Section 9(1) of the national Prosecution's service act

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<sup>43</sup> The Director of Public Prosecutions appointed by virtue Article 59 B of The Constitution of the United Republic of Tanzania, 1977 as amended from time to time

<sup>44</sup>Section 22 (1) and (2) of the NPSA (n14)

<sup>45</sup> Section 31 of NPSA (n14)

No.27/200846 provides for the roles of the prosecutors which they exercise by virtue of the Director of Public Prosecution's instructions, these are;

### **3.3 Duties of a Public Prosecutor**

The duties of the Public Prosecutor is well enumerated under Section 9 (1) (a) (b) (c) (d) and (e) of the NPSA this includes and not limited to (a) decide to prosecute or not to prosecute in relation of an offence, (b) to institute, conduct and control prosecution's for any offence other than court martial, (c) to take over and continue prosecution of any criminal case instituted by another person or authority,(d) to discontinue at any stage before judgment is delivered any criminal proceeding brought to the court by another person or authority and to direct the Police and other investigative organs to investigate any information of criminal nature and to report expeditiously<sup>47</sup>

### **3.4 Guiding Principles in Prosecutions of juvenile cases**

In deciding whether or not to prosecute a juvenile a public prosecutor shall be guided by the best interests of a child. In considering what amounts to the best interests of a child, regard shall include but not limited to rehabilitation and reintegration, restorative justice objective, and; public safety and the rights of the victim<sup>48</sup>

### **3.5 Children in Conflict with the Law**

The issue of managing or dealing with children who are coming in conflict with the law has historically haunted the global community, and Tanzania is no exception.<sup>49</sup> Although there have already been important headways, much remains to be done in ensuring child justice in Tanzania, Africa and the world at large. The term "children in conflict with the law" has historically developed to refer to the situation whereby anyone defined by the relevant law as a child comes into contact with the justice

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46 The NPSA (n14)

<sup>47</sup> Section 9 (1) (a) (b) (c) (d) and (e) of NPSA (14)

48 Rule 49 (1) (b) and (c) of The Juvenile Court Rules of May, 2016

49 Mgimba, L.M. Ensuring Fair Trial in Cases of Children in Conflict with the Laws; The Tanzania Paradox, May, 2012

system as a result of being suspected, accused or adjudged of committing an offence.<sup>50</sup> Notably, the main problem has for ages risen when children come in contact with a justice system that does not comprehend the requirement of the best interests of the child principle, which is expected by the international treaties particularly the UN CRC and ACWRC not only deprives them of their liberty, but also increases their vulnerability to abuse, violence, exploitation and health related risks such as injury and HIV/ AIDS infection.

Accordingly, child needs exceptional attention, not only by the State, but also from the international community as a whole. Once the importance of children's issues is put in place, then all countries in the world will endeavor to look for alternative forms of the settlement for the children in conflict with the law. The term “children in conflict with the law” according to UNICEF,<sup>51</sup> refers to anyone under 18 years who comes into conflict with the justice system as a result of being suspected or accused of committing an offence. Some children in conflict with the law commit petty crimes but some commit serious offences like murder, rape, unnatural offences, armed robbery, drug trafficking etc.

### **3.6 Institution of Criminal Proceedings of the Child**

As afore indicated the prosecution of children cases has got its unique way of doing it, it does not follow the procedure narrated in the Criminal Procedure Act Cap. 20 [R.E. 2002]<sup>52</sup> rather it follows procedures narrated under Part IV of the Juvenile Court Rules.

The rules require where the decision is made to prosecute a child who is on police bail with a criminal offence facing him/her that child shall be served with a summons to appear before the court, the summons to be issued to the child shall be in writing, in duplicate signed and sealed by the magistrate<sup>53</sup> The rules states further that the

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51 UNICEF Tanzania (2011), „*Violence Against Children in Tanzania*”, Report on Findings from a National Survey of 2009, Dar Es Salaam p. 9

52 Criminal Procedure Act Cap 20 [R.E 2002]

53 Rule 21 (1) and (2) of the Juvenile Court Procedure (n20)

summons shall requires the child to appear before the court at a time and place to be specified therein, but where the child is in the care of the local government authority, the summons shall be served on the head of the social welfare department of that authority, the summons will include the charge sheet, particulars of the offence and any statements given by the child shall be attached there to.<sup>54</sup>

The rules prohibit the child to be arrested, summoned or to be brought before the court unless is for the purpose of answering a complaint of charge against him, making an application to remand him in custody, when the child is remanded in custody for purposes of affording a child a right to fair hearing, the court issues removal order of the child.<sup>55</sup> When the child fails to appear in response of the summons the court may issue a warrant of arrest, but subject to complaint to be made on oath by a police officer. The above can be done only if an attempt to contact the child following failure to respond to the first summons has been made without success and the child cannot be contacted or found and a second summons has been issued for the child attendance before the court and the child has failed to respond.<sup>56</sup>

Consequently, the rules to impose duties to the person arresting the child under warrant of arrest to immediately inform and notify the parent, guardian and the head of the social welfare department of the district where the child is arrested, of the arrest of the child, the reason for the arrest; and the child's whereabouts.<sup>57</sup> The rules goes further to impose the duty to the police where a child has been arrested under the warrant that, that child shall be brought before the court on the day of arrest and not later than the next day following the arrest, save that where the offence is a serious one, and-the child is arrested after the end of business on Friday, a child may be detained and brought before the court on a Monday morning; or the child is

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54 Juvenile Court Rules (n 20) Rule 21 (3), (4) and (5)

55 Juvenile Court Rules (n 20) Rule 22 (1) (a), (b) and (2)

56 Juvenile Court Rules (n20) Rule 23 (1), (2) (a),(b) and (c)

57 Juvenile Court Rules (n20) Rule 23 (5) (a), (b) and (c)

arrested after the end of business on the day before a public holiday, that child shall be brought before the court on the next working day.<sup>58</sup>

If the child is not brought before the court within 24 hours it is mandatory to the police to inform the social welfare department of the area in which the child is arrested and it is mandatory to the social welfare department to cooperate with the police to place the child in an approved residential home, institution or with a fit person until he is brought before the court.<sup>59</sup> The child is supposed to be provided with sufficient food, water, bedding and light and be placed in a separate cell from the adults cell if it happens that he/she is kept overnight at the police station on warrant of arrest. It is also mandatory for a warrant of arrest to remain in force until it is executed or cancelled.<sup>60</sup>

### **3.7 A Charge Sheet**

The guiding rules for children who are in conflict with the law specify what the charge concerning a child shall contain this is and not limited to a statement of specific offence or offences with which the accused child is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. The rules go on to impose other requirements that, before the commencement of the trial, the court shall ensure that the prosecution provide the child or, the child's representative or social welfare department, with a copy of the charge sheet, in sufficient time for the child to prepare his/her defense. It is also mandatory for the charge and statement of facts to be in language which a child understands<sup>61</sup>

### **3.8 The Requirement of Attendance of Parents, Guardians /Care**

As enshrined in the UN CRC and UNCWRC on the requirement of the child who is in conflict with the law to be accompanied with parents or guardians the guiding rules in

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58. Juvenile Court Rules (n 20) Rule 23 (4) (a) and (b)

59. Juvenile Rules (n 20) Rule 23 95) (a) and (b)

61. Juvenile Court Rules (n 20) Rule 23 (6) and (7)

62. Juvenile Court Rules (n 20) Rule 24 (1), (2) and (3)

handling children's proceedings has incorporated that requirement. Parents and guardians who have the information of child's case and fails to attend court proceedings relating to his child, to that the court may, it is mandatory that a summons be issued requiring a parent or guardian to attend at the court on a specified date, unless it is not in the child's best interests that the parent or, guardian should attend; or it is not practicable for the parent or guardian to attend.<sup>62</sup>

Likewise, a parent or guardian, who has been issued with a summons to appear before the court for the child's proceedings and fails to appear before the court, without sufficient excuse, the court has the power to issue a warrant to bring him before the court at such time and place as shall be specified in the warrant. This is also applied where the court satisfies itself that a parent or guardian is not willing to attend the court proceeding relating to his/her child unless compelled to do so, then, the court may issue a warrant for the arrest and production of the witness before the court at a time and place to be specified in the warrant of arrest.

None the less the above position does not apply where the parents, guardians or carers were not informed in sufficient time to permit attendance, or were unable to attend for good reason, the court has got power for the interests of justice, to set aside any finding or order. The law and the rules have left no room for the child to attend alone in court for it also gives power to the local government authority, the assigned social welfare officer shall attend the hearing where the child is in their care to that effect it is mandatory that they will have the same rights as a parent. <sup>63</sup>

### **3.9 Disqualification of Parent or Guardian to Assist the Child**

For the purposes of protecting the child and for the purposes of his best interests the rules are not silent in regard to powers of the court in disqualification of parent or guardian to assist the child if the court is satisfied that; the parent or guardian is charged with an offence based on the same facts, the parent or guardian has been convicted of an offence against the child; it is not in the child's best interests to be so

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63. Juvenile Court Rules (n20) Rule 25 (1) (a) and (b)

64. Juvenile Court Rules (n 20) Rule 25 (2) (3) (4) and (5)

assisted; or the child is in the care of the local government authority and the local government authority, in exercising its parental rights under the Child Protection Regulations, 2015 has determined that it is not in the best interests of the child for the parent or guardian to assist the child.<sup>64</sup>

### **3.10 Prohibition of Proceedings in the Absence of a Representative for an Accused Child**

The rules are also very clear on the issues of representation in proceedings involving a child who has conflicted the law. It provides for the mandatory requirement for the child to be represented at all hearings. where the child does not have representation, the magistrate has a mandatory duty to adjourn the proceedings at the first hearing to allow a representative to be appointed and for the child to meet and speak with his representative but this adjournment shall not exceed fourteen days. On the hearing day the case will also be adjourned for short period of time where a child representative is present in the court, this is done to allow the child to speak to the representative and the hearing is supposed to continue on that day.

### **3.11 Bail in Relation to Children in Conflict with the Law**

Generally, the issue of bail of a child who has conflicted the law carries important consideration, bail matters starts when the child has been brought before the court. For purposes of clarity is better to define what bail means generally in relation to offenders. Bail is a set of restrictions that are imposed on a suspect while awaiting trial, to ensure they comply with the judicial process. In some countries including Tanzania, bail usually implies a bail bond. This is money or some form of property that is deposited to the court by the suspect, in return for the release from pre-trial detention. If the suspect does not return to court, the bail is forfeited, and the suspect may possibly be brought up on charges of the crime of failure to appear. If the suspect returns to make all their required appearances, bail is returned after the trial is concluded.<sup>65</sup>

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65. Juvenile Court Rules (n 20) Rule 26 (a) (b) (c) and (d)

66. <https://en.wikipedia> accessed on 11/05/2018

In other countries, such as the United Kingdom, bail is more likely to consist of set of restrictions that the suspect will have to abide by for a certain period of time. Under this usage, bail can be given both before and after charge.<sup>66</sup> For minor crimes, a suspect may be summoned to court without the need for bail. For serious crimes, or for suspects who are deemed likely to fail to turn up in court, they may be remanded or detained while awaiting trial. A suspect is given bail in cases where remand is not justified but there is a need to provide an incentive for the suspect to appear in court. Bail amounts may vary depending on the type and severity of crime the suspect is accused of; practices for determining bail amounts vary between countries.<sup>67</sup> The law of the child and its Juvenile Court Rules have also considered treatment of bail issues for children in conflict with the law separately from those of adults.

The Juvenile Court Rules require a child who appears or is brought before the court for the purpose of hearing any charges against him, must, unless the offence with which the child is charged is not bailable, be granted bail and be released into the care of his parent, guardian, a fit person, fit institution or the Commissioner of Social Welfare, to return to the court at a date to be specified.<sup>68</sup> Consequently, where the child is released into the care of the Commissioner of Social Welfare, the child care must be delegated to the head of the social welfare department of the district where the child ordinarily resides. But where the child is of no fixed abode, the care must be delegated to the head of the social welfare department in the district in which the child was arrested or such other social welfare department as the Commissioner deems appropriate.<sup>69</sup>

In case another local government authority has taken responsibility for that child, that local government must continue to take care of the child on behalf of the

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<sup>67</sup> <https://en.wikipedia> (n44)

<sup>68</sup> Juvenile Court Rules (n 56) Rule 28 (1), (2), (3) and (4)

<sup>69</sup>. Juvenile Court Rules (n 56)

Commissioner. Finally, in considering bail of the child the court must, in releasing the child on bail, not require a financial surety.<sup>70</sup>

The situation becomes different where the child has committed unbailable offences, our laws allow the child to be placed under police custody, remanded in a home or in prison. Importantly to note prosecutors have a strong arm in matters of bail, if the prosecutor is of the opinion that bailing out the child who has conflicted the law will be to his/her own risk/jeopardy or it will endanger public safety or rights of the victim the prosecutor will assist the court on whether to grant bail or not to the child according to the circumstances.

#### **4.0 Duty to Disclose Prosecution Case in Criminal Trials Involving a Child**

Essentially the Juvenile Court Procedure, which governs the conduct of all cases in juvenile court, plays the role which The Criminal Procedure Act. plays in conducting criminal trials against adult offenders. The duty to disclose the case which the child is prosecuted lies on the prosecution side. It is mandatory that the prosecutor must file the details of the prosecution case in duplicate to the court before the preliminary hearing (PH).

A preliminary hearing is best described as a "trial before the trial" at which the magistrate/judge decides, whether the child offender is "guilty" or "not guilty," but whether there is enough evidence to force the child offender to stand trial. In making this determination, the Judge/Magistrate uses the "probable cause" legal standard, deciding whether the government has produced enough evidence to convince reasonable Judges/Magistrates that the child suspect committed the crime(s) charged.<sup>71</sup>

The "probable cause" standard is different from the standard for conviction, which is typically guilt "beyond a reasonable doubt." Probable cause refers to the existence of a logical basis for the prosecution, as opposed to strong evidence of guilt suggested by the conviction standard of "beyond a reasonable doubt." This means that winning at a

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<sup>70</sup> Ibid

<sup>71</sup> See Children and Court Bail - Queensland Law Handbook Online accessed on 11/05/2018

preliminary hearing can be more difficult than winning at trial. Difficulty doesn't mean impossibility though, a success at this stage can result in charges being dropped.<sup>72</sup>

### **5.0 What to Expect at the Preliminary Hearing**

The Juvenile Court Rules mandates the prosecutor to file the details of the prosecution case in duplicate to the court before the preliminary hearing. Whereas mandatorily supplies a copy of the details of the prosecution case to the child or child's representative before the date of the first hearing. The details of the prosecution case must include; the charge sheet and the particulars of the offence, a statement of facts, any document or extract on which the case will be based and any previous convictions of the child.

In the main, the rules mandate the prosecutor to disclose to the court any witness statements and any other evidence upon which the prosecution seeks to rely within fourteen days before the final proceedings. Likewise, the rules require the prosecutor during the court proceedings, mandatorily to keep under review whether there is prosecution material, which might reasonably be considered capable of undermining the case for the prosecution against the accused child or of assisting the case for the child, which has not been disclosed to the court. The prosecutor is also duty bound to disclose to the material encountered during the proceedings. The prosecution material referred to includes and not limited to materials which is in the prosecutor's possession and came into his possession in connection with the prosecution case against the accused; or materials which he has inspected in connection with the case for the prosecution against the accused.<sup>73</sup>

In the circumstance where the prosecution fails to file the details of the prosecution case within the required times, the court has mandate on the application of the accused or on its own motion, order the prosecution to file such documents within

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<sup>72</sup> Ibid

<sup>73</sup> Juvenile Court Rules (n20) Rule 36 (1)- (9)

three days. It is also mandatory for the court before it exercises its above power under, give the prosecution the right to make representations against disclosure.<sup>74</sup>

Importantly to note, the Juvenile Court Rules provide for juvenile court environments to be child friendly and not to subject the child into adversarial proceedings, likewise tricky questions in cross examination are not allowed. Ultimately the court when sentencing the juvenile who has been found guilty of infringing the law, the general principle is that detention should be as a matter of last resort and for the shortest period of time. That means alternative sentences have to be explored first before considering the harsher punishments. Likewise, while in custody the child should be placed in a separate wing not those which are normally used by adults. This is well articulated in the UN CRC and ACRWC. Again, for purposes of insuring juvenile justice the DPP or officers under him are mandatorily required to visit children who are placed under custody by courts to ensure that good administration of juvenile justice takes its course.

## **6.0 Conclusion**

As a concluding remark undisputedly, prosecution and courts are at the heart and centre of our juvenile justice system. They serve as stages of case processes that follow the police arrest and precede the delivery of convicted defendants to correctional authorities. The prosecutor has an important role to play like the giving opinion as to whether a child who has conflicted with the law be subjected to juvenile justice processes or not. The prosecutor plays a central role between the Courts and the Police. When the police arrest the suspect or a child who is suspected to be in conflict with the law the file is being sent to the National Prosecutions Services Office where State Attorneys/ Prosecutors are mandated to opine on whether the child be charged or not. Upon deciding that the child who has conflicted the law be charged, again is the duty of the prosecutor to draft the charges and the facts of the case and to institute criminal proceedings against that child offender. Therefore, internationally and nationally prosecutors are key players in juvenile justice whether involve adults

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<sup>74</sup>Ibid

or children who have been subjected into criminal processes for prosecutorial measures to take its course.

# EXAMINATION OF LEGAL REGULATION OF COMPULSORY LAND ACQUISITION AND PROTECTION OF THE RIGHT TO COMPENSATION IN TANZANIA.

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## **Abstract**

*It is hard to say that the government guarantees the right to compensation when it acquires any land in Tanzania. This is due to the fact that; Tanzania has experiences of some sad stories with respect to right to compensation. This article addresses three key issues with regard to compulsory land acquisition by the government namely; whether the President has right to acquire any land in Tanzania, whether there are procedures to be followed and finally whether there is right to compensation to the landholders from whom the land has been acquired.*

*The author reviewed domestic and international legal instruments with emphasis on compulsory acquisition and the right to compensation before, after the Bill of Rights was enshrined in the Constitution of the United Republic of Tanzania of 1977 as amended from time to time and under the Land Act [Cap 113 R.E 2019]. The article reveals that, right to compensation is not yet constitutional and the current law governing acquisition does not categorically define some of the grounds used by the president to acquire any land in Tanzania. Also problems of entitlement to compensation, time of compensation, nature and the amount of compensation need to be addressed by the law.*

**Key words:** Legal regulation, Compulsory land acquisition, protection of the right to compensation in Tanzania

## **1.0 Land ownership in Tanzania**

The current land ownership structure in Tanzania is characterized by dual systems of tenure, comprising both statutory and customary tenure system.<sup>75</sup> All land in Tanzania continue to be public and remain in vested in the President as trustee for

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<sup>75</sup> Section 22 and 29 of the Land Act Cap, 113 R.E 2019 and Section 18 of the Village Land Act Cap, 114 R.E 2019

and on behalf of all the citizens of Tanzania.<sup>76</sup> It therefore, follows that, land in Tanzania is not owned per se but rather people only enjoy possessory rights of it. As a trustee, the President's key responsibilities include; performing duties and skill and making informed decisions about land, acting in the best interests of all citizens of Tanzania and managing and investment of the land on behalf of all citizens of Tanzania.

### **1.1 Compulsory Land Acquisition by the Government.**

Compulsory land acquisition by the state means power of the government to acquire private land without the willing consent of its possessor or occupant in order to benefit the society. Records<sup>77</sup> indicate that there are three issues to be determined in the process. These include; whether or not the government has rights to compulsorily acquire private land without the willing consent of occupants; whether or not there are procedures involved and; whether or not there are rights available to the original occupants from whom the land has been acquired.

With respect to the first issue, Land Acquisition Act<sup>78</sup> provides powers and rights to the President of the United Republic of Tanzania to acquire any land in Tanzania. Thus, it is apparent that the President is the one who does acquire private land without the willing consent of occupants. Thus, the president has that right to acquire any land in Tanzania and that is according to the law. Although it is arguable whether the president can do the same in Zanzibar. However, to do so in Tanzania mainland, the president on behalf of all citizens of Tanzania, has legal right and power to acquire any land for for any public purpose<sup>79</sup> or in his opinion the use of such land for construction by the cooperation would be of utility or public interests.<sup>80</sup> The term public purpose may be defined by laws in different ways. According to the Land Acquisition Act,<sup>81</sup> land is deemed to be required by the president for a public purpose where it is required for the following:

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<sup>76</sup> Section 4(1) of the Land Act [Cap, 113 R.E 2019]

<sup>77</sup> ABDON, Rwegasira (2012): *Land as Human Right: A History of Land Law and Practice in Tanzania*, Mkuki na Nyota, at page 203

<sup>78</sup> Section 3 of the Land Acquisition Act, [Cap 118 R.E 2019]

<sup>79</sup> Sections 3 and 4 of the Land Acquisition Act, [Cap 118 R.E 2019]

<sup>80</sup> Section 4(2) of the Land Acquisition Act [Cap, 118 R.E 2019]

<sup>81</sup> Section 4 of Land Acquisition Act, [Cap, 118 R.E 2019]

*Land shall be deemed to be required for public purpose where it is;*

*(a) for exclusive Government use, for general public use, for any Government scheme, for the development of agricultural land or for the provision of sites for industrial, agricultural or commercial development, social services or housing;*

*(b) for or in connection with sanitary improvement of any kind, including reclamations;*

*(c) for or in connection with the laying out of any new city, municipality, township or minor settlement or the extension or improvement of any existing city, municipality, township or minor settlement;*

*(d) for or in connection with the development of any airfield, port or harbor;*

*(e) for or in connection with mining for minerals or oil; (f) for use by any person or group of persons who, in the opinion of the President, should be granted such land for agricultural development.<sup>82</sup>*

The law categorically provides what constitutes public purposes but silent about public utility and public interests. Public utility and public interests remain under the opinion of the president.

However, the issue has been whether or not can the president carry out compulsory land acquisition on grounds other than public purposes. For instance, land disputes between individuals and the government due compulsory land acquisition resulting into evictions of people from their ancestral land for the expansion of tourism activities, expansion of roads and other government investments. The Land Acquisition Act<sup>83</sup> requires that where the president is satisfied that a corporation requires any land for the purposes of construction of any work which in his opinion would be of public utility or in the public interest or in the interest of the national economy, may with the approval, to be signified by resolution, of the National Assembly and by order published in the Gazette, declare the purpose for which such

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<sup>82</sup> Read section. 4(1) and (2) of the Land Acquisition Act, Cap 118 [R.E 2019]

<sup>83</sup> Section 4(2) of the Land Acquisition Act [Cap 118 R.E 2019]

land is required to be a public purpose and upon such order being made such purpose must be deemed to be a public purpose for the purposes of the Law.

It can be submitted that, technically the law legalizes the acquisition any land based on public utility, public interests or the national economy. There has been a legal debate on what exactly constitute public interests. The case of *Agro Industries Ltd vs. AG*<sup>84</sup> defines public interests that it must include a purpose, that is, an aim or subject in which the general interests of the community is concerned as opposed to individual interests. It can be submitted that the acquisition of any land in Tanzania must include a purpose, that is, an aim or subject in which the general interests of the community is concerned as opposed to individual interests. The same should be listed in the law to guide the executive. Public utility and national economy ought to be categorically listed by the law to guide the process.

## **2.0 Procedures for Compulsory Land Acquisition in Tanzania**

### **2.1 Examination of land for its possible acquisition;**

Despite of the president's powers to acquire land, such acquisition is subject to the procedures provided by the law. Land acquisition in Tanzania is subject to the procedures set by the law. The Land Acquisition Act<sup>85</sup> provides preliminary requirements in that, if the president considers it desirable that land in any locality should be examined with a view to its possible acquisition for any public purpose, any person either generally or specially authorized by the minister in his behalf, and for his assistants and workmen, is required to do all or any of the following things before acquiring land.

First, the person authorized by him/her is obliged to give at least three days' notice to occupants about their intention to enter into the land or any building or upon any enclosed courtyard or garden attached to a dwelling house.<sup>86</sup> Second, conduct survey and take levels of any land in such locality and dig or bore under the subsoil or do all other acts necessary to ascertain whether the land is adapted for such purpose;

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84 *Agro Industries vs. AG* [1994] TLR 43

85 Section 5(1) of the Land Acquisition Act [Cap 118 R.E 2019]

86 Section 5(1) of the Land Acquisition Act, Cap 118 [R.E 2019].

third, clear, set out and mark the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made on that land.<sup>87</sup> At this stage occupants' consent must be obtained so as to give way for preliminary investigation about the land subject to acquisition. Third, as soon as conveniently after any entry into land, the government is required to pay for all damage done in consequence of the exercise of any of the powers conferred by agents of the government in carrying out the exercise.

In the case of the amount to be paid, the person claiming compensation may refer such dispute to the regional commissioner for the region in which the land is situated and the decision of the regional commissioner is final.<sup>88</sup> It can be submitted that the law makes the decision for payment of compensation by the regional commissioner as final even where occupants are aggrieved by the decision.

## **2.2 Issuance of Notice of intention to give way possession and power to take possession of land.**

After the preliminary investigation and if the land is adapted for public interests, the minister is required to issue a notice to occupants or any person having interests in the land about the government's intention to acquire land.<sup>89</sup> If the president resolves that land in any locality is required for a public interests, the minister is required by the law<sup>90</sup> to give not less than six weeks' notice of intention to acquire the land to the persons interested or claiming to be interested in such land, or to the persons entitled to sell or convey the same, or to such of them as is, after reasonable inquiry, be known to him.<sup>91</sup> The rationale behind this is to safeguard all interests of all or each interested party to such land subject to acquisition.

The minister responsible for land is also required by law<sup>92</sup> through the notice to inform the persons upon whom the notice is required to be served to surrender possession in not less than six weeks from the date of the publication of the notice in

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87 Read section. 5(1) of the Land Acquisition Act, Cap 118 [R.E 2019]

88 Read section. 5(2) of the Land Acquisition Act, Cap 118 [R.E 2019].

89 Read section. 6 of the Land Acquisition Act, [Cap 118 R.E 2019]

90 Section 6 and Section 7(1) of the Land Acquisition Act, [Cap 118 R.E 2019]

91 Read section. 6 of the Land Acquisition Act, [Cap 118 R.E 2019]

92 Section 7(2) of the Land Acquisition Act, [Cap 118 R.E 2019]

the Gazette. It can be submitted that, surrendering of possession may be communicated in the initial or subsequent notice and the time is limited to six weeks. The Land Acquisition Act maintains<sup>93</sup> that, provided that where the president has certified that the land is urgently required for a public interest such persons are required to yield up possession of the land within such lesser period as the president may direct. Principally, the time stipulated is neither reasonable time for persons interested in land to safeguard their rights nor is it convenient if the occupants have stayed on the land for centuries or decades.

### **2.3 Service and publication of Notice**

The Land Acquisition Act<sup>94</sup> requires service of notice be done personally on the persons to be served. If occupants or interested persons are not physically served, the notice should be left at their last usual place of abode or business, where such place can after reasonable inquiry be found.<sup>95</sup> In case any such person is absent from Tanzania or if such person or his last usual place of abode or business after reasonable inquiry cannot be found, such notice must be left with the occupier of such land.<sup>96</sup> If there be no such occupier, the same must be affixed upon some conspicuous part of such land.<sup>97</sup>

The law requires also that, at the expiration of the period specified as per the notice, the president and all persons authorized by him must be entitled to enter into and take possession of such land accordingly.<sup>98</sup> The Land Acquisition Act<sup>99</sup> requires that where a notice has been published in the Gazette the acquisition of the land to which such notice relates must not be invalid by reason only of any irregularity in the service of the notice or by reason of it having been published prior to its service on any person required to be served therewith.<sup>100</sup> It should be noted that the law justifies that no dispute concerning irregularities for service may be filled after the notice has

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93 Section 7(2) of the Land Acquisition Act, [Cap 118 R.E 2019]

94 Section 8(1) of the Land Acquisition Act, [Cap 118 R.E 2019]

95 Ibid.

96 Section 8 of the Land Acquisition Act, [Cap 118 R.E 2019]

97 Read section. 8(1) and (3) of the Land Acquisition Act, [Cap 118 R.E 2019]

98 Read section. 7(2) of the Land Acquisition Act, 1967 [Cap 118 R.E 2019]

99 Read section. 8(4) of the Land Acquisition Act, 1967 [Cap 118 R.E 2019]

100 Ibid.

been published in the Gazette. This makes the procedures for service to have no sense after the notice has been published. The issue of service and publication of notice is well discussed in the case of *National Bank of Commerce vs. Suleman Nassor Ally*<sup>101</sup> and *Attorney General vs. Sisi Enterprises Ltd.*<sup>102</sup>

## 2.4 Effect of acquisition

It is also worthy to note that, where land is acquired by the government for the reasons stated above the persons from whom land has been acquired must not only be compensated but also procedures for acquiring land must be observed. In the case of *Mulbadaw Village Council and 67 Others vs. National Agricultural and Food Corporation*.<sup>103</sup> fortifies the procedures to be followed under the Land Acquisition Act.<sup>104</sup> The matter was approached under the issues Whether the Land Acquisition Act<sup>105</sup> applies to the land belonging to peasants; whether land held under customary tenure falls under the definition of granted right of occupancy and whether authorities can grant a formal right of occupancy in respect of land held under customary tenure, (deemed right of occupancy). The court held that;

*The Land Acquisition Act<sup>106</sup> applies also to land held under customary tenure;*

*The definition of rights of occupancy under the land Act and the Land Acquisition Act includes titles of peasants holding land under customary tenure;*

*The Mulbadaw Village Council and Mulbadaw Villagers were lawfully possessing land and they could only be deprived of their land by due operation of Law, not by mere blessings of the government and party leaders in Hanang District and Arusha Region;*

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<sup>101</sup> *National Bank of Commerce vs. Suleman Nassor Ally* [1989] TLR 67 CA

<sup>102</sup> *Attorney General vs. Sisi Enterprises Ltd, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 30 of 2004.*

<sup>103</sup> *Mulbadaw Village Council and 67 Others vs. National Agricultural and Food Corporation 1984 TLR 15 (HC)*

<sup>104</sup> Land Acquisition Act, [Cap, 118 R.E 2019]

<sup>105</sup> Ibid

<sup>106</sup> Land Acquisition Act, 118 R.E 2019]

*The provisions of the Land Acquisition Act<sup>107</sup> were not followed in acquiring land belonging to Mulbadaw Village Council and Mulbadaw Villagers and therefore such acquisition was unlawful;*

*Where someone is in lawful occupation of land no valid right of occupancy can be offered to anyone else over the same land unless the provisions of the Land Acquisition Act<sup>108</sup> have been complied with.*

Having seen the powers of the president and procedures involved in compulsory land acquisition, the third issue is about whether or not original occupants from whom the land has been acquired have right to compensation. This is discussed below under compensation and the law in Tanzania.

## **2.5 The right to compensation in international jurisprudence**

The right to compensation arise in deprivation or where there is compulsory acquisition of land by the state. The right seems to have been emphasized even before having formal states with legal and regulatory frameworks. It is on records<sup>109</sup> that God has given the world to men in common, given men reason to use it at the best advantage and that, men put labor and work of his hands to convert it to his benefits.

With respect to international instruments, the Universal Declaration of Human Rights<sup>110</sup> provides for the right to compensation when someone's property is acquired. The European Convention for the Protection of Fundamental Freedoms<sup>111</sup> provides for the right to compensation to persons whose property has been acquired of deprived. The African Charter on Human and People's Right<sup>112</sup> underscores and calls upon member states to ensure the right to compensation when property is taken from a person. The International Labour Organization Convention concerning

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107 Ibid.

108 Ibid

109 John Locke (1632 – 1704) see also Genesis 1:28

110 Article 17 of the UDHR 1948

111 Article 1 (1) of the Protocol to the European Convention for the Protection of Fundamental Freedoms, 1952

112 Article 21(2) of the African Charter on Human and People's Rights of 1981

Indigenous and Tribal People in Independent Countries<sup>113</sup> prohibits removal of people from their traditional land. Thus, the right to compensation is a fundamental right. Compensation is for all kinds of deprivation and where deprivation is according to the law.

### 3.0 Compensation and the Law in Tanzania

Currently the law in Tanzania recognizes the right to compensation<sup>114</sup> but records<sup>115</sup> indicate that the same has been historically been infringed by the abuse of law and procedures. It is also on records<sup>116</sup> that, there is a bad history and some sad stories of evictions of landholders from their traditional land without compensation. Some of these sad stories include, the Meru land case<sup>117</sup> briefly, Meru land in the slopes of mount Meru was taken by the colonial government in Tanganyika for the use of colonial government. Thus, Meru community were evicted by the colonial government from their fertile and good climatic traditional land without compensation. This case was led by Kirilo Japhet who mobilized his community to defend their right to the United Nations.<sup>118</sup> Another famous sad story about compensation in Tanzania is the famous case of *Mulbadaw Village Council and 67 other vs. NAFCO*.<sup>119</sup> This case involved government parastatal National Agricultural and Food Cooperation known as NAFCO and Mulbadaw Village Council and 67 others. NAFCO was a statutory government institution granted land including Mulbadaw Village to produce wheat in Arusha region. As a result, Mulbadaw Village land was acquired without compensation hence litigation in court.

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113 Article 14 of the International Labour Organization Convention concerning Indigenous and Tribal People in Independent Countries, 1989

114 Section 3(1)(g) of the Land Act, [Cap, 113 R.E 2019]

115 *Mulbadaw Village Council and 67 Others vs. NAFCO* (1989) TLR 15,

116 ABDON Rwegasira, (2012), *Land as Human Right, A history of Land Law and practice in Tanzania*, Mkuki na Nyotga

117 Leslie B Tate and Jackson D Carvalho, (1952), The 1952 Meru Land Case, A Pan African Mission, Journal of Education and Social Policy, Volume 6, No, 3 of 2019

118 Leslie B Tate and Jackson D Carvalho, (1952), The 1952 Meru Land Case, A Pan African Mission, Journal of Education and Social Policy, Volume 6, No, 3 of 2019

119 *Mulbadaw Village Council and 67 Others vs. NAFCO* (1989) TLR 15,

### 3.1 Compensation before the Bill of Rights

The right to compensation was hardly implemented in Tanzania before the Bill of Rights. The government circular<sup>120</sup> extinguished customary right in urban areas. The right to compensation was partially protected by TANU constitution which was attached as a schedule to the interim constitution of the United Republic of Tanzania.<sup>121</sup> The Land Acquisition Act<sup>122</sup> which came in force in 1967 provides the right to compensation by imposing a duty to the minister to pay compensation where any land is acquired by the president under section 3.<sup>123</sup>

The Land Acquisition Act<sup>124</sup> requires that, the president may, with the consent of the person entitled to compensation under subsection (1) of section 11,<sup>125</sup> grant of public land not exceeding in value the value of the land acquired, for an estate not exceeding the estate acquired and upon the same terms and conditions as the land acquired was held, so far as the same may be practicable, in lieu of or in addition to any compensation payable under section 11(1).<sup>126</sup> This means therefore, that compensation may be in terms of monetary or land depending on the circumstance of each case.

Records<sup>127</sup> indicate that, courts of law in Tanzania played a great role in supervising the right to compensation before the Bill of Rights. The case of *Berabera Ujamaa Village vs. Abubakar Bura*,<sup>128</sup> is a good example, the facts in this case were as follows; the appellant, an Ujamaa Village through its leaders, destroyed respondent's grown crops in his shamba. They were ordered to compensate the respondent for the damage. They appealed against the order on the ground that the amount of compensation awarded against them was excessive. The court held that

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<sup>120</sup> Government Circular No. 4 of 1954

<sup>121</sup> The Constitution of the United Republic of Tanzania, 1965

<sup>122</sup> Section 11(1) of the Land Acquisition Act [Cap, 118 R.E 2019]

<sup>123</sup> The Land Acquisition Act, [Cap 118 R.E 2019]

<sup>124</sup> Section 12(2) of the Land Acquisition Act [Cap, 118 R.E 2019]

<sup>125</sup> The Land Acquisition Act [Cap, 118 R.E 2019]

<sup>126</sup> The Land Acquisition Act [Cap, 118 R.E 2019]

<sup>127</sup> *Lalata Msangawale vs. Henry Mwamlima* [1979] LRT No. 3; *Berabera Ujamaa Village vs. Abubakar Bura* [1983] TLR 219 see also *Ntiyahela Boneka vs. Kijiji cha Ujamaa* [1988] TLR 156

<sup>128</sup> *Berabera Ujamaa Village vs. Abubakar Bura* [1983] TLR 219

compensation is a fundamental human right no man should be deprived of his property without adequate compensation. That Ujamaa Village was liable for violation of the right to compensation. It can be submitted that, this case was of 1983 before the Bill of Rights was enshrined in our constitution thus, the court used the existed laws to defend the right to compensation.

Another is the case of *Ntiyahela Boneka vs. Kijiji cha Ujamaa*,<sup>129</sup> the facts of the case were as follows; the appellant was in lawful occupation of piece of land for many years. The authorities measured 10 acres of virgin land and authorized the appellant to develop the same for his own use. The appellant cleared the bush, and by 1979 he had 477 banana trees and was also growing therein seasonal crops. In October, 1981 the respondent moved into the shamba and told the appellant to vacate the shamba because they had nationalized it on the ground of newly drawn boundaries between Kasengezi Village<sup>130</sup> and Mutala Vilage.<sup>131</sup> When the appellant asked the respondent to compensate him for his labour, they refused and told him to remove his crops from the shamba. the appellant file a suit in Kasuru Primary Court. Aggrieved by the decision of the Primary Court, the appellant appealed to the District Court and eventually to the High Court. The issue was whether or not the appellant was entitled to compensation for his labour.

The Court held that, a person is entitled to compensation for his improvements effected on the land provided that at the time of carrying out such improvements he had apparent jurisdiction for doing so. The Court also held that, the law of this country does not sanction seizure of an individual's property in the absence of any enabling written law and without adequate compensation. It can be submitted that, courts of law stood for individual's rights to compensation even before the Bill of Rights was enshrined in the constitution.

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129 *Ntiyahela Boneka vs. Kijiji cha Ujamaa* [1988] TLR 156

130 The appellant's Village

131 The respondent's Village

### 3.2 Compensation after the Bill of Rights

With respect to fundamental rights, it was not until the year 1984 when the Bill of Rights was enshrined into the Constitution.<sup>132</sup> The Constitution asserted equality and non-discrimination in that, individual are born free and equal prohibiting discrimination on multiple grounds also it provided right to life and participation. Property right was also given consideration under the Constitution,<sup>133</sup> in that it provided explicitly the right to own property.<sup>134</sup> Records<sup>135</sup> indicate that, two major problems persisted with respect to the right to compensation in Tanzania.

The application of the Land Acquisition Act<sup>136</sup> was limited and there was no law in place by that time that provided for compensation, time for compensation, nature of compensation and the amount of compensation payable. The second problem was that the government was prepared to discourage promotion of right to compensation.<sup>137</sup>

Courts of law took the position of watching against violation of the right to compensation. For instance we have in records the case of *AG vs. Lohay Akonaay and Joseph Lohay*<sup>138</sup> the material facts of this case were as follows; the respondents, father and son, had acquired land rights under customary law recognized as deemed right of occupancy under section 2 of the Land Ordinance<sup>139</sup> over 20 acres in Mbulu District, Arusha Region, which they had cleared in 1943. They occupied and used the land until they were disposed of during operation vijiji, under the Villages and Ujamaa Villages Act.<sup>140</sup>

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<sup>132</sup> Reference is made to the Fifth Amendment in 1984 by the Written Law Miscellaneous Amendment Act No. 15 of 1984

<sup>133</sup> Ibid

<sup>134</sup> Article 24 of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time

<sup>135</sup> BADON Rwegasira, (2012), Land as Human Right: A History of Land Law Practice in Tanzania. Mkuki na Nyota.

<sup>136</sup> Section 11 and 12 of the Land Acquisition Act [Cap, 118 R.E 2019]

<sup>137</sup> See the Land Tenure (Established Villages) Act. 1092

<sup>138</sup> *AG vs. Lohay Akonaay and Joseph Lohay* [1994] TLR 80

<sup>139</sup> Section 2 of the Land Ordinance Cap 113 of 1923

<sup>140</sup> The Village and Ujamaa Villages Act, 1975.

They successfully sued for the recovery of that land and regained possession of it in 1990 under a court decree. While an appeal against that judgment was still pending in the High Court, the government passed the Regulation of Land Tenure (Established Villages) Act.<sup>141</sup> The effect of this Act<sup>142</sup> was among others things to extinguish customary rights in land acquired before operation Vijiji in an established Village and to prohibit the right to compensation for such extinction.

The respondents then petitioned the high court alleging breach of fundamental rights and obtained a declaration from the High Court of Tanzania that, the 1992 Act<sup>143</sup> was invalid for inconsistency with the constitution in that its provisions violated the petitioner's rights including freedom of deprivation of property without fair compensation. The court ordered the offending Act<sup>144</sup> to be struck out the statutes book.

The Attorney General of Tanzania appealed to the Court of Appeal of the United Republic of Tanzania on the ground that, those holdings were erroneous, that customary land rights were not forms of property protected by the constitution and that although certain sections of the 1992 Act<sup>145</sup> violated the constitution the whole Act could not be invalidated on that ground alone.

The Court of Appeal held that, fair compensation is not confined to unexhausted improvements; where there are no unexhausted impairments but some effort has been put into the land by the occupier, that occupier becomes entitled to compensation under Article 24(2)<sup>146</sup> of the constitution and fair compensation is payable for deprivation of property and land.

The Court of Appeal held further that, section 3 and 4<sup>147</sup> of the Act which provide for extinction of customary rights in land but prohibit the payment of compensation

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<sup>141</sup> Regulation of Land Tenure (Established Villages) Act, 1992

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

<sup>146</sup> Article 24(2) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time

<sup>147</sup> Sections 3 and 4 of the Regulation of Land Tenure (Established Villages) Act, 1992

with the implicit exception of unexhausted impairments only violate Article 24(2) of the constitution and are null and void. It can be submitted that courts of law stood up again against government preparation to discourage the promotion of the rights to compensation despite of the right being guaranteed by the constitution.

### 3.4 Compensation under the Land Acts

The Land Acts,<sup>148</sup> in Tanzania represent a significant shift in land management and governance, aiming to addressing historical grievance and modern economic pressure. These legislations emerged from a context of intense land disputes and the need for more decentralization approach to land administration. For instance, the Land Act<sup>149</sup> distinguishes between Village land and General Land attempting to formalize land rights while promoting rural development and investment.

However, its implementation has faced challenges including inefficiencies and conflict arising under unclear regulations and inadequate surveying practices. Records,<sup>150</sup> indicate that the 1990's saw a push for liberalization in land policies due to pressure from international financial institutions like the IMF and World Bank. The Land Acts come to smooth among other things the platforms by addressing areas of compensation more sufficiently and in clear terms.

First, the Land Act<sup>151</sup> acknowledges some of the principles of National Land Policy<sup>152</sup> in that the government is required to guarantee a right to full, fair and prompt compensation to any person whose right of occupancy or recognized long use, occupation or customary right is revoked or acquired as per the Land Acquisition Act.<sup>153</sup> It can be submitted that, the Land Act<sup>154</sup> provides principles to be observed when a person is deprived of the right to property.

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148 The Land Act 9[Cap 113 R.E 2019] and the Village Land Act [Cap 114 R.E 2019]

149 Section 4(4) of the land Act [Cap 113 R.E 2019]

150 Godfrey E Massay, (2015), *Compensating Landholders in Tanzania, The Law and Practice*, LARRI/HAKIARDHI

151 Section 3(1)(g) of the Land Act [Cap, 113 R.E 2019]

152 The National Land Policy, 1995

153 Section 3 of the Land Acquisition Act [Cap, 118 R.E 2019]

154 The Land Act [Cap, 113 R.E 2019]

Second, the Land Act<sup>155</sup> requires, provided that, in assessing the compensation of land acquired the concept of opportunity is required to be based on; market value of market value of real property, disturbance allowance, transport allowance, loss of profit and accommodation, cost of acquiring the subject land any other cost loss or capital expenditure incurred to the development of the subject land and; interest in market rate should be charged.

It can be argued that the Land Act<sup>156</sup> provides criteria to be observed with respect to payment of compensation to person from the land has been acquired. Third, the Land Act<sup>157</sup> requires compensation payable to landholders from whom the land has been acquired to equal the value of unexhausted improvements made on land in accordance with the terms and conditions of the granted right of occupancy.

Therefore, the law provides the mode of compensation but the argument is, it is not clear under the said provision whether or not compensation is payable not based on ownership or on unexhausted improvements but not in accordance with the terms and conditions of granted right of occupancy.

Fourth, the Land Act<sup>158</sup> establishes the Fund for payment of compensation to the victims as a result of acquisition done by the government authorities. However, problems such as entitlement to compensation, time for compensation and the amount of compensation remain to be points litigation in courts.

With respect to entitlement to compensation, it is on records,<sup>159</sup> that any person is entitled to compensation if he/she establishes that at the time of carrying out improvements on land had apparent justification for doing so. In the case of *Mtumwa Shahame Baya Kondo and 111 others vs. Principle Secretary, Minister of Works and the Attorney General*,<sup>160</sup> the court held in favor of the plaintiffs that, there was no

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<sup>155</sup> Section 3(1)(g) of the Land Act [Cap, 113 R.E 2019]

<sup>156</sup> The Land Act [Cap, 113 R.E 2019]

<sup>157</sup> Section 49(3) of the Land Act [Cap, 113 R.E 2019]

<sup>158</sup> Section 173(1) (4) of the Land Act [Cap, 113 R.E 2019]

<sup>159</sup> *Alli Mangosongo vs. Christina Magenje* [1977] LRT No. 18

<sup>160</sup> *Mtumwa Shahame Baya Kondo and 111 others vs. Principle Secretary, Minister of Works and the Attorney General, High Court of Tanzania at Dar es Salaam, Land case No. 31 of 2004*

disprove in court for the plaintiffs to have been in continuous possession of land and the defense did not take note of the presence of people in the area.

Also the defense failed to produce evidence to show compensation paid to the plaintiffs. It can therefore, be submitted that compensation is awarded to person not only based on prove of unexhausted improvements made on land in accordance to the conditions of the granted right of occupancy but also by uninterrupted continuous possession of land with apparent justification such as buying the land and developing it in good faith.

Contrary to that, no compensation is payable as per the case of *Abass vs. Peter Sylvester*<sup>161</sup> and the case of *Ramadhan Kambi Mkinga vs. Ramadhan Said*.<sup>162</sup> It can therefore, be argued that entitlement to compensation is a principle of courts of law rather than statutes governing compulsory land acquisition in Tanzania. Also compensation is based not on proof of ownership of land but on unexhausted improvements made on it.

With regard to time of payment, nature and amount of payable compensation, the laws are silent. It is true that the Land Acts<sup>163</sup> provide for full, fair and prompt compensation but they are silent on what is full, fair and prompt compensation. It can therefore be argued that, the Land Act<sup>164</sup> only provides the methods of compensation with less clarification of entitlement to compensation, time of payment, nature and the amount of payable compensation. In all cases fair compensation depends on circumstances of each case as per the case of *Mtumwa Shahame, Baya Kondo and 111 others vs. Principal Secretary, Minister of Works and the AG*<sup>165</sup> and the case of *AG vs. Lohay Akonaay*.<sup>166</sup>

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161 *Abass vs. Peter Sylvester* Land Case No 5 of 2006

162 *Ramadhan Kambi Mkinga vs. Ramadhan Said* [1985] TLR 140

163 Common section 3 of the Land Acts [Cap 113 and Cap, 114 R.E 2019]

164 Section 3(g), 49(3), 78 of the Land Act, [Cap 113 R.E 2019]

165 *Mtumwa Shahame Baya Kondo and 111 others vs. Principle Secretary, Minister of Works and the Attorney General, High Court of Tanzania at Dar es Salaam, Land case No. 31 of 2004*

166 *AG vs. Lohay Akonaay and Joseph Lohayr* [1994] TLR 80

## **4.0 Conclusion and recommendations**

### **4.1 Conclusion**

Generally, the executive has legal right to acquire any land in Tanzania whether such land is registered or unregistered. The president has right to do so under the law.<sup>167</sup> It can be observed that, the right to acquire any land in Tanzania is exercisable where acquisition is for public purpose or public interests, but public interests are not defined by the same law. Historically it is hard to say that there has been a right to compensation in Tanzania because records indicate the government as violator of the right to compensation. It can also be observed that compulsory land acquisition was carried out even before 1984 when the Bill of Rights was enshrined in the Constitution. The same was subject to right to compensation provided under the law but with no clear mechanisms of effecting it. It can therefore, be observed that, the absence of the Bill of Rights in the constitution in a way prevented the right to compensation. However, some court's decisions indicate protection of the victims' right to compensation even in the absence of the Bill of Rights.

The right to compensation after the bill of Rights faces two major problems including the abuse of the law whose application is limited and the Land Act in place only provides criterial or methods of compensation but it does not categorically provide entitlement to compensation, time of compensation, the amount of payable compensation. On top of that, the law is silent on what is fair, full and prompt compensation. The second problem is that the government appears to be reluctant in promotion, protecting, fulling and refraining from violating the right to compensation. It can therefore, be observed that only some courts' decisions indicate courts of law assuming the role of protecting victims of compulsory land acquisition by the government.

### **4.2 Recommendations**

Compulsory land acquisition in Tanzania should be justified first by constitutional principles with clear public interests. Where it is necessary that land should be acquired subject to law, procedures for compensation should not be abused and the

law should be enacted or amended to emphasize that compensation be paid first before evicting people from their land. A decision to acquire any land in Tanzania should be legalized by the people through people's representatives in their respective locality or the national assembly.

Powers for compulsory land acquisition should be derived from the people and from the people the same powers should be exercised. The case of *Agro Industries Ltd vs. AG168* defines public purpose or interests that it must include a purpose, that is, an aim or subject in which the general interests of the community is concerned as opposed to individual interests. Legal regulation of compulsory land acquisition in Tanzania should be amended to define public purpose or interests that must include a purpose, that is, an aim or subject in which the general interests of the community is concerned as opposed to individual interests.

# SNAP SHOT OF GATE KEEPERS: EVOLUTION OF LAW ENFORCEMENT AGENCIES IN COMBATING ILLICIT FINANCIAL FLOW IN TANZANIA.

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## ***Abstract***

*This article evaluates the role of the Law Enforcement Agency in combating Illicit Financial Flow in Tanzania. It works on the premise that proper prevention of loss of tax revenue through cross border transactions and enforcement of tax compliance by taxpayers, with law enforcement agencies better placed to understand principles, laws and procedures of enforcement of IFF laws than taxpayers. Yet, law enforcement agencies are not always impartial in enforcing anti IFF laws due to lack of institutional autonomy. Therefore, this article argues that law enforcement agencies in Tanzania must acquaint themselves with laws governing combating IFF ,independent and adhere to their core values to enhance tax compliance and boost revenue for the country's development. Moreover, the article calls for the amendment of the IFF laws to encourage institutional autonomy ,fairness ,transparency and rule of law to facilitate compliance and further boost government coffers and mitigate loss of tax revenue through IFF.*

**Keywords :** *Illicit Financial Flows ,Law Enforcement Agencies, Combating*

## **1.0 INTRODUCTION**

The evolution of law enforcement agencies in addressing Illicit Financial Flows (IFFs) on a global scale has progressed considerably over the years, starting from disjointed national initiatives and leading to a sophisticated, multilateral institutional framework. Before the 1980s, the majority of nations tackled financial crime in a haphazard way, mainly concentrating on underlying crimes like drug trafficking, corruption, and tax evasion. Law enforcement agencies did not have dedicated units for tackling financial crimes, and the issue of illicit financial flows (IFFs) had not yet become part of global policy discussions. Nonetheless, the 1980s represented a significant shift, especially with the implementation of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, often referred to as the Vienna

Convention. This Convention established, for the first time, an international requirement to criminalize money laundering linked to drug trafficking and urged countries to enhance their asset seizure and extradition processes. It also set the foundation for global collaboration in financial investigations and encouraged the integration of financial intelligence into law enforcement activities.<sup>169</sup>

In 1989, the G7 countries established the Financial Action Task Force (FATF), representing a significant advancement in formalizing anti-money laundering (AML) efforts. The FATF's release of the Forty Recommendations created a detailed framework for national AML legislation and institutional reforms, resulting in the global formation of Financial Intelligence Units (FIUs) and the rise of regional FATF-like organizations such as the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), the Asia/Pacific Group (APG), among others.<sup>170</sup> These advancements greatly improved the investigative abilities of national law enforcement bodies by providing them with financial intelligence and promoting cooperation across borders. In 1995, the Egmont Group of Financial Intelligence Units was established to enable the safe sharing of financial intelligence among different jurisdictions, thereby strengthening global collaboration.<sup>171</sup> The United Nations Office on Drugs and Crime (UNODC) has been instrumental through its Global Programme Against Money Laundering (GPML), offering legislative and technical support to enhance the capabilities of law enforcement officials in developing nations.<sup>172</sup>

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169 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

(adopted 20 December 1988, entered into force 11 November 1990) 1582 UNTS 95.

170 Financial Action Task Force (FATF), The FATF Recommendations (updated March 2022)

<https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatfrecommendations.html> (accessed on 2 August 2025).

171 Egmont Group, Charter of the Egmont Group (1995, amended 2013).

<https://egmontgroup.org/en/content/charter-egmont-group> (accessed on 2 August 2025).

172 United Nations Office on Drugs and Crime (UNODC), Global Programme Against Money Laundering,

Proceeds of Crime and the Financing of Terrorism (GPML) (1997).

<https://www.unodc.org/unodc/en/money-laundering/overview.html> (accessed on 2 August 2025).

The attacks on September 11, 2001, prompted a critical change in attention toward the funding of terrorism, resulting in the implementation of the International Convention for the Suppression of the Financing of Terrorism (1999), which became active in 2002. This Convention broadened the range of legal enforcement responsibilities to cover financial transactions related to terrorism and highlighted the importance of strong international collaboration in investigative efforts.<sup>173</sup>

This was backed by the FATF's Nine Special Recommendations on Terrorist Financing introduced in 2001, which called on nations to make the financing of terrorism a criminal offense and to enhance their institutional abilities to identify and prosecute these crimes.<sup>174</sup> Throughout this time, international law enforcement organizations like INTERPOL and Europol increased their engagement in the fight against financial crimes by creating specialized units focused on financial intelligence and the identification of criminal assets, improving the sharing of intelligence, and conducting collaborative operations.<sup>175</sup> Additionally, global financial institutions such as the International Monetary Fund (IMF) and the World Bank have started to integrate AML/CFT standards within their Financial Sector Assessment Programs (FSAPs) and Reports on the Observance of Standards and Codes (ROSCs), thus encouraging reforms in the legal and institutional frameworks of national law enforcement.<sup>176</sup>

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<sup>173</sup> International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

<sup>174</sup> Financial Action Task Force, *Special Recommendations on Terrorist Financing* (2001)

<https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Special-recommendations.html>

(accessed on 2 August 2025).

<sup>175</sup> INTERPOL, 'Financial Crimes and Anti-Corruption' (2024)

<https://www.interpol.int/en/Crimes/Financial-crime> (accessed on 2 August 2025);

Europol, 'Economic

and Financial Crime Centre' (2023) [https://www.europol.europa.eu/about-europol/european-](https://www.europol.europa.eu/about-europol/european-financial-and-economic-crime-centre-efecc)

[financial-and-economic-crime-centre-efecc](https://www.europol.europa.eu/about-europol/european-financial-and-economic-crime-centre-efecc) (accessed on 2 August 2025).

<sup>176</sup> International Monetary Fund and World Bank, *Financial Sector Assessment Program: Handbook*

(2005) Vol 1, 35–45.

Beginning in the 2010s, the worldwide strategy for tackling illicit financial flows (IFFs) evolved to be more holistic and was officially included in international development policies. The establishment of Sustainable Development Goal (SDG) 16.4 in 2015 represented the inaugural instance of IFFs being directly acknowledged in the global development framework, calling on nations to substantially diminish these flows by the year 2030.<sup>177</sup> Prominent leaks like the Panama Papers (2016), Paradise Papers (2017), and Pandora Papers (2021) highlighted the scale and intricacy of international financial secrecy, tax avoidance, and corporate lack of transparency. These disclosures prompted increased law enforcement actions worldwide and resulted in policy changes and investigations coordinated across different jurisdictions.<sup>178</sup> Organizations like the OECD have enhanced tax enforcement strategies via the Base Erosion and Profit Shifting (BEPS) Action Plan. This plan acknowledged that aggressive tax avoidance contributes to illicit financial flows (IFFs) and equipped revenue authorities and law enforcement with resources to combat these financial movements.<sup>179</sup> Recently, new multilateral alliances have formed to tackle financial crime, with the most notable being the Joint Chiefs of Global Tax Enforcement (J5).<sup>180</sup> This coalition unites law enforcement and tax organizations from the United States, the United Kingdom, Canada, the Netherlands, and Australia to address cross-border tax evasion and money laundering operations.<sup>181</sup> In recent times, the rise of digital financial technologies and cryptocurrencies has increasingly impacted law enforcement approaches to combating illicit financial flows (IFFs). Global organizations like INTERPOL, UNODC, and Europol are now utilizing sophisticated tools such as blockchain analysis, AI-driven transaction surveillance, and unified data-sharing

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177 United Nations General Assembly, Transforming our world: the 2030 Agenda for Sustainable

Development UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1.

178 International Consortium of Investigative Journalists (ICIJ), 'Panama Papers' (2016), 'Paradise Papers'

(2017), 'Pandora Papers' (2021) <https://www.icij.org> (accessed on 2 August 2025).

179 Organization for Economic Co-operation and Development (OECD), Action Plan on Base Erosion and Profit Shifting (OECD Publishing 2013) Vol 1, pp.18–42.

180 Ibid.

181 Joint Chiefs of Global Tax Enforcement (J5), Annual Report (2020)

<https://www.fiscaleinlichtingen-en-ondersteuningsdienst.nl/english> (accessed on 2 August 2025).

systems to track illegal financial operations across national boundaries.<sup>182</sup> Furthermore, the United Nations High-Level Panel on International Financial Accountability, Transparency and Integrity (FACTI Panel), which was launched in 2020, emphasized the importance of enhanced global collaboration, transparency in beneficial ownership, and the development of institutional capabilities in the battle against illicit financial flows (IFFs).<sup>183</sup> Although substantial advancements have been made, global law enforcement initiatives encounter serious obstacles, such as differences in legal systems, restricted investigative capabilities in developing nations, and the growing prevalence of cyber-related financial crimes. However, the ongoing development of law enforcement bodies and international institutions reflects a growing worldwide dedication to addressing illicit financial flows (IFFs) through collaboration, strengthening capabilities, innovative legal measures, and strong political resolve.

## 2.0 METHODOLOGY

This article applied doctrinal methodology in addressing the concern surrounding combating of illicit financial flow by law enforcement agencies in Tanzania. Typically, the doctrinal method focuses on statutes and case laws because the primary legal data are obtained from legislation through critical reading .<sup>184</sup> This descriptive article interprets the application of IFF laws in combating IFF. The historical approach was used in outlining the challenges the Law Enforcement Agencies counters in combating IFF since its inception. The article critically evaluates how IFF laws have been enforced by the Law Enforcement Agencies to mitigate cross border loss of tax revenue with a view of increasing revenue collection. The focus is to establish the

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<sup>182</sup> Europol, *Cryptocurrency Tracing: Investigative Strategies and Techniques* (2020) <https://www.europol.europa.eu/publications-documents/cryptocurrency-tracing> (accessed on 2

August 2025); INTERPOL, 'Virtual Assets and Cryptocurrencies' (2023) <https://www.interpol.int/en/Crimes/Financial-crime/Virtual-assets> (accessed on 2 August 2025).

<sup>183</sup> United Nations, *Final Report of the High-Level Panel on International Financial Accountability,*

*Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel)* (February 2021) <https://www.factipanel.org/report> (accessed 2 August 2025).

<sup>184</sup> McConville, M., and Chui, W.H., (2007) (eds.), *Research Methods for Law*, Edinburgh University Press.

extent to which IFF legislation addresses the current issue raised. The doctrinal qualitative data was analyzed through canons of statutory interpretation particularly literal meaning.

### 3.0 COMBATING ILLICIT FINANCIAL FLOW IN TANZANIA

Law enforcement agencies (LEAs) are critical in the fight against Illicit Financial Flows (IFFs) through their roles in detection, investigation, and prosecution of financial crimes. International instruments such as the United Nations Convention against Transnational Organized Crime (UNTOC) define “law enforcement authorities” as public bodies authorized to detect, investigate or prosecute criminal offences, including those related to transnational financial crimes.<sup>185</sup>

Similarly, the Financial Action Task Force (FATF) describes LEAs as public authorities responsible for investigating and enforcing laws against criminal conduct, particularly in the context of money laundering and terrorism financing.<sup>186</sup> In Tanzania, law enforcement agency means the Police Force, Prevention and Combating of Corruption Bureau, Immigration Services, Tanzania Revenue Authority and any other body dealing with criminal investigations,<sup>187</sup> and several law enforcement institutions are legally mandated to address IFFs. Nonetheless, a thorough evaluation of their responsibilities and institutional independence uncovers disunity, legal uncertainties, and a deficiency in coordination, all of which hinder efficient enforcement.

The Financial Intelligence Unit (FIU), established under section 4 of the *Anti-Money Laundering Act, Cap 423 R.E. 2022*, functions as the national agency for receiving,

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<sup>185</sup> United Nations Convention Against Transnational Organized Crime (adopted 15 November 2000,

entered into force 29 September 2003) 2225 UNTS 209, art 2(b). United Nations Convention

Against Transnational Organized Crime (adopted 15 November 2000, entered into force 29

September 2003) 2225 UNTS 209, art 2(b).

<sup>186</sup> Financial Action Task Force (FATF), *International Standards on Combating Money Laundering and*

*the Financing of Terrorism & Proliferation (The FATF Recommendations) (FATF 2023) 35.*

<sup>187</sup> *Anti-Money Laundering Act, s 3*

analyzing, and disseminating financial intelligence related to suspected proceeds of crime.<sup>188</sup> While the FIU is crucial in identifying IFFs, it does not possess direct authority for investigations or prosecutions. Additionally, its administrative connection to the Ministry of Finance restricts its operational independence.<sup>189</sup> While the law refers to it as an independent body, the executive appointment of its leadership for instance the Commissioner of FIU who is CEO of FIU is appointed by The President of United Republic of Tanzania, and its financial dependency on a ministry undermine its autonomy in politically sensitive or complex cases.<sup>190</sup> Additionally, the FIU is dependent on other organizations to take action based on its findings, resulting in a fragmented enforcement process that can delay or even halt prosecutions.<sup>191</sup> Since FIU does not possess power and duty to prosecute thus falling sort of teeth to bite. The Prevention and Combating of Corruption Bureau (PCCB) is established under the *Prevention and Combating of Corruption Act, Cap 329 R.E. 2022*, and is mandated to investigate and prosecute corruption offences. <sup>192</sup>

While corruption significantly contributes to illicit financial flows (IFFs), the Bureau's mandate specifically focuses on corruption and associated crimes, and it does not have authority over wider financial offenses like trade-based money laundering, tax evasion, and capital flight.<sup>193</sup> In theory, the PCCB is independent, but in practice, its Director General and Deputy Director General are appointed by The President of United Republic of Tanzania, which exposes the agency to potential executive influence.<sup>194</sup> This can affect the prioritization of cases, especially where suspects are politically

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188 Ibid ,s 4,6.

189 Ibid,s 5

190 Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Mutual Evaluation Report –

United Republic of Tanzania (ESAAMLG 2018) 40–43.

191 Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Mutual Evaluation Report –

United Republic of Tanzania (ESAAMLG 2018) 44.

192 Prevention and Combating of Corruption Act, s 5,9,10.

193 Mely Caballero-Anthony and Alistair D.B. Cook (eds), *Non-Traditional Security in Asia: Issues,*

*Challenges and Framework for Action* (ISEAS Publishing 2010) 197.

194 Prevention and Combating of Corruption Act,s 6(2).

connected. The absence of a broader financial crime mandate restricts the PCCB's involvement in the country's strategy for addressing IFFs.

The Tanzania Revenue Authority (TRA), under the *TRA Act, Cap 399*, is primarily mandated to assess, collect, and account for government revenue.<sup>195</sup> The Commissioner General of TRA who is the CEO of the authority is appointed by the President,<sup>196</sup> and the Deputy Commissioner General of TRA is also an appointee of The President of United Republic of Tanzania.<sup>197</sup> It has the authority to examine tax-related crimes like tax evasion, smuggling, and abuses of transfer pricing—all of which are major contributors to illicit financial flows (IFFs).<sup>198</sup>

Although the TRA functions with a degree of administrative independence via a governing board, its primary role is to collect revenue rather than enforce laws. Criminal investigations usually necessitate cooperation with law enforcement or the DPP. Furthermore, the TRA's independence has sometimes been undermined by political pressures, particularly in situations involving powerful businesses or individuals.<sup>199</sup> The Police Force is constituted by The President of the United Republic of Tanzania and placed under IGP as highest in rank in terms of command.<sup>200</sup> The Economic and Cyber Crime Unit of the Tanzania Police Force handles investigations related to fraud, money laundering, and cybercrime. This unit operates under the authority granted to the police by the Police Force and Auxiliary Services Act, Cap 322.<sup>201</sup> Nonetheless, there is no specific legal structure or specialised institutional role aimed solely at addressing financial crimes or illicit financial flows (IFFs). The police department is entirely overseen by the Ministry of Home Affairs, which restricts its independence.<sup>202</sup> The absence of autonomy renders it susceptible to political

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<sup>195</sup> Tanzania Revenue Authority Act, s 4,5,6.

<sup>196</sup> *Ibid*, s 17.

<sup>197</sup> *Ibid*,s 18.

<sup>198</sup> Global Financial Integrity, *Illicit Financial Flows to and from Developing Countries: 2005–2014* (GFI 2017) 47.

<sup>199</sup> ESAAMLG (n<sup>o</sup> 5) 53.

<sup>200</sup> Police Force and Auxiliary Services Act, s 4.

<sup>201</sup> *Ibid* s,5.

<sup>202</sup> *Ibid* s,7.

influences, especially in probes concerning significant corruption or global financial systems.

Additionally, law enforcement frequently lacks the specialized skills and resources necessary to successfully tackle intricate transnational financial offenses.<sup>203</sup>The Director of Public Prosecutions (DPP) is appointed by The President of the United Republic of Tanzania and constitutionally empowered under Article 59B of the *Constitution of the United Republic of Tanzania, 1977* to institute and conduct criminal prosecutions.<sup>204</sup>Although the DPP's office operates autonomously in legal terms, its leaders are appointed politically and depend significantly on investigative reports from various agencies.<sup>205</sup> In cases involving illicit financial flows (IFF), this reliance can obstruct successful prosecutions, especially when investigations are slow, inadequately performed, or swayed by political motives. The Director of Public Prosecutions (DPP) does not have a dedicated division for financial crimes, which restricts the attention and expertise necessary to handle intricate international IFF prosecutions.

#### **4.0 COMBATING IFF LEGAL FRAMEWORK**

The Anti-Money Laundering Act, Cap. 423 (R.E. 2022) serves as the foundation of Tanzania's efforts to address illicit financial flows (IFFs). It establishes the Financial Intelligence Unit (FIU), outlines the reporting requirements for financial institutions, and describes penalties for non-compliance. The legislation incorporates various recommendations from the Financial Action Task Force (FATF), reflecting Tanzania's dedication to upholding international anti-money laundering (AML) standards. Nonetheless, a significant issue resides in the FIU's administrative affiliation with the Ministry of Finance. This connection undermines its functional autonomy and exposes the Unit to potential political interference, especially in cases involving politically exposed individuals.<sup>206</sup> The absence of prosecutorial authority diminishes the FIU's

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<sup>203</sup> Raymond Wushe and Teresa Nkomo, 'A Critical Analysis of Law Enforcement Capacity to Curb

Money Laundering in East Africa' (2020) 17(3) *Journal of Money Laundering Control* 425

<sup>204</sup> Constitution of the United Republic of Tanzania 1977, art 59B.

<sup>205</sup> Ibid, art 59B(4)–(5).

<sup>206</sup> Anti-Money Laundering Act, s 4–5.

capacity to take swift action based on the intelligence it collects, as it depends on law enforcement and prosecutorial agencies that are frequently lacking resources or hindered by political limitations.<sup>207</sup>

Tax legislation, including the Income Tax Act, Cap. 332, and the Tax Administration Act, Cap. 438, plays a crucial role in combating illicit financial flows (IFFs) resulting from tax avoidance, evasion, and manipulation of transfer pricing. Although these laws grant the Tanzania Revenue Authority (TRA) the authority to investigate and impose penalties for tax violations, enforcement is challenged by insufficient resources and the intricate nature of contemporary multinational tax systems.<sup>208</sup> Tanzania has implemented transfer pricing rules and documentation requirements; however, the absence of country-by-country reporting obligations and public beneficial ownership registries hampers the assessment of tax liability and the prevention of base erosion and profit shifting (BEPS).<sup>209</sup>

This enables multinational corporations to shift profits out of Tanzania with minimal legal consequences. Addressing corruption, a primary cause of IFFs, is the goal of the Prevention and Combating of Corruption Act, Cap. 329, which is implemented by the Prevention and Combating of Corruption Bureau (PCCB). However, the absence of true operational autonomy limits the PCCB's efficacy. Even though it is a statutory body, the public's trust in its impartiality is undermined by the perception that it operates in a politically biased manner.<sup>210</sup>

Furthermore, weak whistleblower protection laws and the absence of anonymous reporting channels disincentivize reporting, especially where powerful individuals are

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207 Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), Mutual Evaluation

Report of the United Republic of Tanzania (2022) vol 1, 45–48.

208 Tax Justice Network Africa, Tanzania Country Report on IFFs and Tax Justice (2021) 11–14.

209 African Development Bank, Tanzania Economic Outlook 2022 (2022) 19–20.

210 Human Rights Watch, *As Long as I Am Quiet, I Am Safe* (2020) 27–30.

involved.<sup>211</sup>The movement of capital across borders is governed by the Foreign Exchange Act, Cap. 271. Theoretically, the Bank of Tanzania (BoT) is given supervision over foreign exchange operations and reporting requirements. However, the regulation is not adequately enforced in industries where illegal capital outflows are still prevalent, such as mining and informal trading.<sup>212</sup> Furthermore, the law has not kept up with new forms of illegal capital flight, like money laundering based on trade and the abuse of mobile financial services.

## 5.0 FINDINGS AND DISCUSSION

The study finds that Tanzanian law enforcement agency lack institutional autonomy. In order to effectively combat Illicit Financial Flows (IFFs), law enforcement agencies (LEAs) must have the institutional authority to function without excessive external, administrative, or political influence. Institutions that enjoy autonomy are able to look into and prosecute financial crimes, such as capital flight, money laundering, and tax evasion, without fear or favour. This idea is emphasised internationally by Article 36 of the United Nations Convention against Corruption (UNCAC), which requires States to provide anti-corruption investigating agencies with the autonomy they need to carry out their duties.<sup>213</sup> Likewise, the Financial Action Task Force (FATF) Recommendation 30 stresses the need for LEAs involved in financial crime investigations to maintain operational independence and freedom from interference.<sup>214</sup>

The Tanzania Police Force, the Financial Intelligence Unit (FIU), the Prevention and Combating of Corruption Bureau (PCCB), and the Tanzania Revenue Authority (TRA) are important organizations in Tanzania with missions related to fighting IFFs. All of these organizations do, however, have institutional constraints that impede their

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<sup>211</sup> Transparency International, Corruption Perceptions Index – Tanzania Profile (2023) vol 2, 3–4.

<sup>212</sup> Bank of Tanzania, Annual Report 2023 (BoT, 2023) 41–43.

<sup>213</sup> United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14

December 2005) 2349 UNTS 41, art 36.

<sup>214</sup> Financial Action Task Force (FATF), International Standards on Combating Money Laundering and

The Financing of Terrorism & Proliferation – The FATF Recommendations (updated March 2022) Recommendation 30.

independence. Although the Prevention and Combating of Corruption Act of 2007 assigned the PCCB the responsibility of looking into corruption, the PCCB reports administratively to the President's Office. Investigating high-profile corruption or IFF-related crimes may be discouraged by this executive control, which can also politicise enforcement priorities. Comparably, administrative oversight impedes the FIU's ability to make independent decisions regarding the identification and dissemination of financial intelligence.

The FIU is headquartered within the Ministry of Finance. The Tanzania Revenue Authority (TRA), established under the Tanzania Revenue Authority Act, plays a critical role in identifying and curbing tax-related illicit flows, such as base erosion, profit shifting, and trade mis invoicing.<sup>215</sup> However, its autonomy is constrained both legally and practically. While TRA is governed by a board, the appointment of its leadership and the approval of key administrative decisions remain subject to ministerial discretion.<sup>216</sup> This dependence on political authorities can hinder the agency's ability to pursue aggressive investigations into tax evasion by politically connected individuals or corporations for the Commissioner General and Deputy Commissioner General of TRA are appointees of the President. Furthermore, despite having quasi-enforcement powers under the Tax Administration Act, TRA relies heavily on cooperation with other agencies like the PCCB and Police for full criminal investigations, which creates operational bottlenecks and exposes the agency to external interference.

The article further reveals lack of prosecution power by FIU. The lack of prosecutorial powers further weakens the FIU's ability to act decisively on intelligence gathered, as it must rely on law enforcement and prosecutorial bodies that are often under-resourced or politically constrained. The article finds out that the Law enforcement agencies in Tanzania do not enjoy guaranteed or ring-fenced budgets. Their resource allocations are determined by central government processes, exposing them to financial leverage from the executive, especially when pursuing politically

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<sup>215</sup> Tanzania Revenue Authority Act, s 4.

<sup>216</sup> Ibid ,s 6(1).

sensitive investigations. The article also reveals that the PCCB, TRA, FIU, and Police have overlapping and disjointed responsibilities, which result in poor coordination and jurisdictional misunderstandings and further erode the entire enforcement system. Political appointments, financial limitations, a lack of coordination, and a lack of legal independence all work together to make an enforcement regime susceptible to regulatory capture and selective prosecution. This leads to a large number of IFF cases going un-investigated or unsolved, particularly those involving high-level individuals or multinational organizations.

There is no single legislative or operational framework to harmonize the functions of several institutions, despite Tanzania's efforts to coordinate law enforcement through the Anti-Money Laundering Act, which designates several authorities as "law enforcement agencies."<sup>217</sup> Inter-agency competition, function duplication, and enforcement inefficiencies are the outcomes. It's important to note that no agency has been assigned as the national lead for organizing responses to IFFs. The absence of cross-agency coordination and central leadership severely impairs Tanzania's capacity to address the complex nature of IFFs. Enforcement is still dispersed despite the existence of numerous legal tools. Sophisticated criminal networks can take advantage of legal and procedural gaps as a result of efforts being frequently duplicated or functioning in silos.

## **6.0 CONCLUSIONS AND RECOMMENDATIONS**

The article recommends amendment of provision of laws pertaining to appointment of law enforcement agency heads for instance ,Article 59B of the Constitution of United Republic of Tanzania regarding appointment of DPP by The President of the United Republic of Tanzania should be amended .The following provision in the legislation also needs amendment regarding appointment of heads of LEA by The President of the United Republic of Tanzania : section 6(2) of the Prevention and Combating of Corruption Act (CAP.329 R.E 2022) regarding appointment of the Director General and Deputy Director of PCCB ,section 5 (1) of the Anti-Money Laundering Act (CAP 423 R.E 2022) regarding appointment of Commissioner of

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<sup>217</sup> Ibid, s 3.

FIU ,section 17 and 18 of the TRA Act (CAP .399 R.E 2023) regarding appointment of the Commissioner General and Deputy Commissioner General of TRA on recommendation by the Minister of Finance , section 4 of the Police Force and Auxiliary Services Act granting the President powers to constitute the Police Force and appoint the IGP to command police force . To bolster the operational independence of these agencies, it is essential to amend the laws governing the appointment of their leaders to ensure transparency, fairness, and competitiveness in the recruitment process. To improve the effectiveness of addressing illicit financial flows (IFFs) in Tanzania, it is suggested that key law enforcement and regulatory bodies including the Director of Public Prosecutions (DPP), Tanzania Revenue Authority (TRA), Police Force, and the Prevention and Combating of Corruption Bureau (PCCB) be provided with increased operational independence, particularly in responding to intelligence from the Financial Intelligence Unit (FIU). Additionally, the selection of heads of these agencies should be carried out through clear and competitive methods to protect against political interference, foster professionalism, and enhance public trust. The article further recommends amendment of section 6 of the Anti-Money Laundering Act (CAP.423 R.E.2022) regarding the responsibilities and powers of the FIU by considering granting FIU prosecution powers .The article further recommends amendment of the legal framework with aim to revise the mandate of inter-agency cooperation, enforce time-bound responses to Suspicious Transaction Reports (STRs), and institutionalize joint task forces among the FIU, DPP, TRA, Police, and PCCB. The article further recommends amendment of the law to encourage budgetary independence or ring fenced budget, and institutional capacity should also be enhanced through continuous training and resource allocation, while coordination platforms such as the National Multi-Disciplinary Committee (NAMLC) and the APNIFFT parliamentary caucus should be legally empowered to ensure a unified, transparent, and accountable national strategy against IFFs.

In summary, although Tanzania has made considerable legal advancements to align with global best practices for addressing IFFs, the actual implementation of these laws is still hindered. It is essential to enhance the institutional independence of entities like the FIU and PCCB to protect enforcement from political interference. Legal reforms

should focus on encouraging independence of LEA, transparent and competitive recruitment LEA heads, ring fenced budget of LEA and creating a cohesive national strategy to tackle IFFs. If these systemic issues are not resolved, the current legal framework will continue to be insufficient in effectively addressing the complex and changing challenges posed by illicit financial flows and tax revenue loss due to IFF.

# THE DIGITALIZATION OF TANZANIA'S ELECTORAL PROCESSES: LEARNING FROM THE KENYAN LAWS AND PRACTICE

By

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## ***Abstract***

*After a thorough review of the current manual and paper-based method in elections, this paper examines how a legislation that incorporates the use of ICT can enhance free, fair, transparent, and credible elections in the United Republic of Tanzania with reference to the Kenyan legal framework and practice. This article questions the integrity, credibility, and reliability of the electoral processes in the United Republic of Tanzania which still use paper-based methods as its only elections' processing tools. This method is unreliable in checking the voter's identity and may facilitate some people to vote more than once. Tanzania does not have an easy and readily available system of publishing the provisional voter register for inspection. The current system requires the person to be physically present where he or she has registered. Those who live outside the country cannot inspect the register as required by the law. Moreover, the transfer of the results to the Commission provides for a temptation to alter the elections' outcome during transportation. The findings show that the diligent use of ICT during general elections can help Tanzania to dispense an electoral process which leads to an effective and functioning democracy. The study concludes that there is a pressing necessity of a law that authorizes the use of ICT in electoral processes in Tanzania. Such a law shall provide for the digitalization of the key electoral processes including the identification of the qualifying voters, the publication of the provisional voters' register, electronic voting, counting and publication of provisional and final results.*

**Keywords:** *Technology, Free and Fair Elections, Electoral Integrity.*

## 1.0 Introduction

This paper is questioning the integrity, credibility, and reliability of the electoral processes in the United Republic of Tanzania which still uses paper-based methods as its only elections' processing tools. In the near neighborhood, Kenya has enacted provisions that pave the way to use Information and Communication Technologies (ICTs) in most of its elections processes and the practice follows suit. It is time that Tanzania learns the lesson and adopt laws that allow the use of this system in its elections at all levels.

Therefore, this paper intends to highlight the weaknesses of the existing electoral legal framework in identifying the rightful voter, the publication of provisional voter register, the transfer of election results which challenge Tanzania electoral system to conduct free, transparent, credible, and fair elections. Other processes associated with any election will, likewise, be looked at.

This paper proposal that the reform required now concerns mostly the electoral laws with the digitalization of the key processes including the identification of the qualifying voters, the publication of the provisional voter(s) register, electronic voting, counting and publication of provisional and final results, and any other associated processes that need digitalization. These technologies shall be simple, accurate, verifiable, secure, accountable, and transparent.

To achieve this objective, this paper looked at how the Kenyan electoral law provides for the use of ICT to enhance free and fair elections. Indeed, the use of electronic identification of the rightful voter, the online publication of provisional voters' register, and the electronic transfer and publication of provisional and final results feature most prominently in that law.

In the United Republic of Tanzania, up to now, all these processes, procedures and bodies are still manually based. This cannot be justified if one considers how far the Republic has advanced in the use of technology in other sectors like the banking sector (i.e., Electronic Money Transaction) surveillance sector, road traffic management, communication, etc. Additionally, Tanzania reached an important milestone in July 2020, when it formally graduated to lower-middle-income country

status.<sup>218</sup> Moreover, Tanzania is undergoing a digital transformation, reflected by the growing number of people connected to communications and internet services. This is having a profound impact on the country's social, cultural and economic frameworks, through enhanced access to key services and improved productivity and efficiency across economic sectors.<sup>219</sup> The legal reform, followed by practical implementation has become a must and no longer an option for the United Republic of Tanzania.

The current laws that govern elections in Tanzania are not self-sufficient to provide free, fair, and transparent elections since there are many cases reported in elections' processes pointing to the problems of double voting<sup>220</sup>, the existence of an inaccurate system to identify the proper voters, the number of votes exceeding that of registered voters and the transfer of results by unsafe means.<sup>221</sup> This is caused by the system of a paper-based procedure as provided under Regulation 65 and 66 of the National Election (Presidential and Parliamentary Elections) Regulations.<sup>222</sup> This law is silent on the means that the returning officer will use to transfer the results to the Commission. It also points to the lack of an adequate method of transferring the results to the Commission and safeguard the accuracy of the outcome of elections including the lack of security of the results during transportation provides for an opportunity to alter the elections' results.<sup>223</sup>

There is a pressing need to reform election laws to include the use of ICT at all stages and processes of elections. This would specifically apply from the identification and establishment of lists of rightful voters and voters' registry, the inspection and transfer

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218 The World Bank, Report on Maintaining Tanzania's Lower-Middle Income Status Post-COVID-19 Will Depend on Strengthening Resilience. Maintaining Tanzania's Lower-Middle Income Status Post-COVID-19 Will Depend on Strengthening Resilience (worldbank.org). 21 March 2021 (Accessed on 8 September 2022)

219 K. Okeleke . et al. "Digital Transformation in Tanzania: The role of mobile technology and impact on development" goals, GSMA, research-file-download (gsmaintelligence.com).2007, 84-85 (Accessed on 8 September 2022)

220 DW Media report on "Tanzania votes in Election marred by fraud accusations" on 28 October 2020 www.dw.com/en/tanzania-votes-in-election-marred-by-fraud-accusations/a-55424333 . (Acceded on 9 August 2021)

221 C. Michaela, "Tanzania's 2020 Election: Return of the one-party state" Etudes de l'Ifri, 2021 at, 29. Wwww.Ifri.org. (Accessed on 9 August 2021).

222 National Election (Presidential and Parliamentary Elections) Regulations 2015 [GN No. 307 of 2015]. regulation 8

223 *Ibid*,

of results: and any other process requiring digitalization. In the *Masaka vs Khalwale & 2 others*<sup>224</sup>, Lenaola, J (as he then was) held that "...where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results". In a qualitative context, the election results are as good as the process that led to those results.

As to this point, the current paper-based procedures in election process festers the opportunities for human element error, bias, and possibly election rigging. Likewise, paper-based procedure in election process lacks the reliable method of checking the voter's identity which allows many people to vote more than once. With paper-based means, collecting and calculating results from thousands of polling stations country-wide is often the slowest and unsecured part of the process.

Nkasah and Kisangiri<sup>225</sup> discuss organizational challenges that hinder the implementation of secure remote electronic voting in Tanzania. They observe that electronic voting is seen as a tool for advancing democracy, building trust in electoral management, and increasing the overall efficiency of electoral process. Moreover, if well implemented, remote electronic voting solutions can increase accessibility and make voting more convenient for citizen.<sup>226</sup>

Their view is that, through remote electronic voting, voters can vote remotely via mobile phones or Internet. However, this system has challenges including the lack of security. They say that the main idea of holistic model for secure electronic voting is that various practices must be seen as an entire system to achieve the maximum level of security. Such a system must incorporate both technical and non- technical security solutions and must be implemented in accordance with information security best practices.

Though Tanzania still does not use the electronic voting system, but these authors recommend that the country shall consider when it is ready to use the new technology. One of their recommendations includes changing the law to allow this system to be used as they observe the issue from a legal perspective.

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224 (2011)1 KLR 390 at p, 392

225 K. Silvesta, et al. "*ACJSIJ Advance in Computer Science*" an International Journal, 2018 Vol. 3.No, 2, 34-35.

226 Sylvester, *supra*, note 33, 16-17.

They emphasize that the *National Elections Act of 2010* and its provisions are based on traditional voting procedures by which the voters insert a paper ballot in the ballot box at polling stations. Therefore, they suggest that the current legal and regulatory frameworks must be revisited to support an electronic voting project to enable the election to take place correctly without the occurrence of error associated to the use the traditionally system.<sup>227</sup>

Bryan and Dan<sup>228</sup> identify the issues a legal framework should address to minimize the risks associated with e-voting and ensure that Canadians can have confidence in electoral process. They observe that the push for Internet voting and other electoral processes is arguably a continuation of attempts to make elections more accessible. Instantaneous interaction with centralized computers has the potential to facilitate voting from home or abroad and allow electoral officials to consider alternative methods of casting votes and transmitting them to the electoral authority.

With an online system, a voter will be able to visit a website, enter a user identification number and password, and cast a ballot securely and privately. Though this system has many advantages, there is a need to know that any introduction of the technology into the voting process is accompanied by substantial number of risks, both known and unforeseeable that have the potential to affect the results.<sup>229</sup> It is the responsibility of the government looking to implements electronic voting to take appropriate legislative measures to mitigate and prepare for factors that may affect the results of elections, as well as ensuring that the public can have confidence in the process used.

They, further, state that the legal framework for e-voting should deliver facilitated accessibility and reasonable accommodation, ensure voters are treated fairly and their choices remain secret, and guarantee accurate and prompt results.<sup>230</sup> To do so, the legal framework should ensure there are comprehensible and transparent processes, a high level of risk assessment and security, adequate remedial contingencies, legislative

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<sup>227</sup> Misheni, *supra*, note 29, 34.

<sup>228</sup> S. Bryan. And G. Dan, “*Establishing a Legal Frame work for E-Voting in Canada.*” Department of Law, University of Manitoba Canada. 2018, .32.

<sup>229</sup> *Ibid*,

<sup>230</sup> *Ibid*,

certainty for all major electoral tasks and effective and independent oversight. This should be done in a way that can justify the costs and efficient use of resources.<sup>231</sup>

Mwighusa<sup>232</sup> proposes the use of biometrics' voter registration system to prevent some malpractices, namely, voter identification inaccuracy, multiple registrations from the same persons and ensure the voter registration information integrity. He states that a biometrics' voter registration system plays an important role to protect the accuracy of the electoral roll. The new technology will help to address the challenges such as double registration, identify voters during elections and transfer of voter information from one place to another especially when a person has moved from where he registered.<sup>233</sup>

Currently Tanzania uses biometrics' voter registration in its election process, but it does not have a legal back up to authorize it. There is therefore a need to have a single legislation that authorizes the use of ICTs in the elections' processes including Biometric Voter Registration. However, the Biometric Voter Registration itself is not enough to resolve the problem of double voting because it was recorded that many people have more than one voter's card and therefore, they can be in position to vote more than once.

To work efficiently, the Biometric Voter Registration needs the support of electronic voter identification so that it can help to reduce the problem of double voting and enhance the accuracy of election results. This justifies the need of reforming Tanzania election law and having a standalone legislation on the use of ICTs in election processes.

This legislation shall include Biometric Voter Registration, Electronic Voter Identification, Electronic Transmission of Results, and On-line publication of voters' registry. Publishing polling result forms of presidential elections on an online public portal maintained by the Commission shall also feature in that law.

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<sup>231</sup> *Ibid*,

<sup>232</sup> D. Mwighusa, "Transforming Voters Registration of Paradigm in Tanzania, The Shift from OMR to BVR" *International Journal of Science and Research (IJSR)* 2015,14

<sup>233</sup> *Ibid*,

## 2.0 Concept of free, fair, transparent, and credible elections

A free and fair election is the one which is done without violence, intimidation, improper influence, or corruption. The electoral process must be transparent and administered in an impartial, neutral, and efficient manner.<sup>234</sup> Conducting regular and comprehensive elections has long been regarded as important for the consolidation and affirmation of democracy.<sup>235</sup> It is electoral integrity and credibility, rather than the mere running of elections that contribute to the achievement of representative and responsible institutions.<sup>236</sup>

A country cannot be truly democratic until its citizens have the opportunity to choose their representatives through elections that are free and fair.<sup>237</sup> An impartial electoral framework, credible electoral administration and effective oversight of electoral process is among essential elements of a free and fair election in a country.<sup>238</sup>

It may thus be argued that a free and fair election begins with efficient and transparent electoral management, which impacts on electoral credibility, is integral to establishing and sustaining a healthy and vibrant democracy in the country.<sup>239</sup> The authority of the government can only derive from the will of the people as expressed in the genuine, free, and fair elections held at regular intervals based on universal, equal and secret suffrage.<sup>240</sup>

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234 International IDEA, *supra*, note 52, 16.

235 *Ibid*,

236 S. Birch, (2 ed). *Electoral management bodies and the electoral integrity: Evidence from Eastern Europe and the former Soviet Union*. Working Paper 1(2). 2015, 27.

237 USAID, 2012-2017 report on “*supporting free and fair election.*” <http://2012-2017.usaid.gov/what-we-do/democracy-human-rights-andgovernance/support-free-andfair-election#: :text=for%20an%and%20expand%political%20participacion>. (Acceded on 16 June 2022)

238 *Ibid*,

239 T. S, James, “*Comparative Electoral Management: Performance, Networks and Instruments.*” New York: Routledge. 2014, 25

240Jega AM Report on “*the 2011 General Elections Independent National Electoral Commission.*” “*Www. Characteristics and forms of democracy,* (Accessed on 12 March, 2022)

### 3.0 Tanzania's election legal framework with regards to free, fair, credible, and reliable elections

The *National Election Act*<sup>241</sup> which governs the General Election in Tanzania reflects the system of voting which is based on paper.<sup>242</sup> This system festers the opportunities for human element error and bias, and it is a system that is lagging behind in development. Considering that Tanzania is one of the countries that go at a high speed with new information and communication technologies, it is imperative to embrace such technology as a tool for advancing democracy, building trust in electoral management, and increasing the overall efficiency of electoral processes.<sup>243</sup>

### 4.0 Registration and identification of qualifying voters

The paper-based system to identify qualifying voter<sup>244</sup> is questionable. The act of producing a voter's card by the voter itself is not sufficient to prove that the person has not already voted. This is so because it was reported on several occasions during election days that some people had more than one voter's card,<sup>245</sup> and therefore being in position of voting more than once.

Section 61 (3) (a) of the *National Election Act*<sup>246</sup> providing for voting procedures, states the following:

every voter who wishes to vote shall present himself at the polling station allotted to him in the polling district for which he is registered, and shall satisfy the presiding officer or polling assistant at such polling station that he is the voter he claims to be and that he has not voted already at such polling station or elsewhere and such person may satisfy the presiding

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241The National Election Act of 2010

242[Paper-based procedure in election process lacks the reliable method of checking voter identity which allows many people to vote more than once. With paper-based means, collecting and calculating results from thousands of polling stations country-wide is often the slowest and unsecured part of the process.]

243 *Ibid*,

244 The Election Act, *supra*, note 79, section. 61 (3) (a).

245 *Ibid*,

246 *Ibid*,

officer or a polling assistant that he is the voter he claims to be by producing to that officer or a polling assistant a voter's card[...].<sup>247</sup>

The identification of the person who has the right to vote and be able to constitute the voters' registry is questionable because it is a manual or analogy system. The manual system may lead to having duplicate or multiple lists of voters depending on who has the upper hand in the process.<sup>248</sup> The researcher suggests that; Tanzania should resort to the use of electronic identification of voter in order to eliminate the above challenge.

The electronic identification of voters will enable the election to take place correctly without the occurrence of error associated to the use the traditional system.<sup>249</sup> Block chain and the Internet of Things (IoT) would enable the country to get the highest possible speed in obtaining, processing, and announcing election results. Such a system, if adopted, will also lead to the highest possible accuracy of the results and provide for maximum transparency of the electoral process, eliminating the possibility of any violation such as registration and voting of the dead, multiple voting, etc.<sup>250</sup>

### **5.0 Accessibility of provisional voters' registry by voters for inspection**

The *National Election Act*<sup>251</sup> under section 11A provides for the establishment of provisional voters' register. The register will be used for the following purpose including:

- (a) Displaying for inspection by the public.
- (b) Amendment regarding change of residence or any other particulars of the voters.
- (c) Making objection against registration of any voter.
- (d) Inclusion or deletion of the name of the voter in the register; and
- (e) Effecting any other correction or amendment as may be required under the law.<sup>252</sup>

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247 *Ibid*, s. 61(3) (a)

248 *Ibid*,

249 *Ibid*,

250 *Ibid*,

251 *Ibid*, section.11A

252 *Ibid*, section.11A

Currently Tanzania does not have an adequate system of publishing the provisional voter register. The system currently in use requires the person to be physically present in a place that he or she must register. For those who live outside the country, they cannot exercise their right to inspect the provisional voter register as required by the law.<sup>253</sup>

This method is helpful for those who are physically available in the places at the time when the voter registry is published for inspection. For those who, by some reasons, are unable to show up in person, or if they are outside the country, they will not be able to access the voters' registry for inspection. This constitutes a deprivation of citizens of their constitutional rights.

With the use of ICTs, the provisional voters' registry can be posted online so that any person wherever he or she is can exercise his or her right to inspect it electronically.<sup>254</sup> If one can transact and authorize a debit order or accept payment online; he or she may be able to do the same with the election exercise. All that it requires is the legal availability of the electronic means and other practical measures the election commission will put in place to that end. The use of information and related technologies can bring great benefit in accuracy, speed, efficiency, and effectiveness to the election's process.

## **6.0 Counting and recording elections' results**

The weakness of paper-based procedure is shown under section 73 (4) (c) of the Act which pose the duty of counting and recording votes. - It states that: -

The presiding officer shall count aloud and record the votes in each lot and verify their total with the total of all the ballot papers which were found in the ballot box and the number of voters who cast their votes at the polling station.<sup>255</sup>

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<sup>253</sup> *Ibid*,

<sup>254</sup>Kenya National Commission on Human Rights (KNCHR), an Advisory Opinion on the Proposed Elections Laws (Amendment Bill, 2017 (Presented to the National Assembly, 5 October 2017.

<sup>255</sup> *Ibid*, section. 73 (4) (c)

This system is not trustful to many people regarding the dispensation of democracy since the system has high a chance of lowering democracy when the results of elections are late to be announced. It may also lead to polling workers being tempted to change the results in favour or to the disadvantage of some contenders.<sup>256</sup> Moreover, this system may become prone to vote's rigging or multiple voting. This challenge might make the government to fails to dispense election democracy as it supposed to be and meet international minimum standards.<sup>257</sup>

In some countries citizens have the opportunity to check all parts of electoral process including the counting process. Currently the use of ICTs in election process and output provides the opportunity to increase transparence of election among stakeholder, election officers, polling workers, voters and election observer.<sup>258</sup>

Credible electoral administration and effective oversight of process is among the essential element of free and fair election in the country.<sup>259</sup> It may thus be argued that, free and fair election begin with an efficient and transparent electoral process, which impacts on credibility, is integral to establishing and sustaining a healthy and vibrant democracy in the country.<sup>260</sup>

## 7.0 Methods used to transfer the results to the commission

The *National Election (Presidential and Parliamentary Elections) Regulations*,<sup>261</sup> is silent on the means that the returning officer will use to transfer the results to the Commission. The lack of an adequate method of transferring the results to the Commission and safeguard the accuracy of the outcome of elections including the lack of security of the results during transportation provides for an opportunity to alter the elections' results.<sup>262</sup>

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256 *Ibid*,

257The Constitution of 1977, (n. 164) article 8 (1) state that, the United Republic of Tanzania is a state which adheres to the principle of democracy and social justice...

258 I. Susha, and J. Kripp, "How to successfully implement Internet Voting" 2015, 9.

259 *Ibid*,

260 T. S James,." *Comparative Electoral Management: Performance, Networks and Instruments.*" New York: Routledge.2019, 24

261National Election (Presidential and Parliamentary Elections) Regulations 2015 [GN No. 307 of 2015]

262 *Ibid*, regulation 5.

The laws do not specify the adequate method of transferring the presidential and parliamentary results from constituencies to the Electoral Commission, They only provide for the duty vested in the returning officer to submit to the Commission the partial results of the presidential<sup>263</sup> and parliamentary results.<sup>264</sup> The laws are silent on the means that the returning officer will use to transfer the results to the Commission.

The lack of the adequate means to transfer the results to the Commission fails to safeguard the accuracy of the outcome of elections and the security of the results during transportation. It leads citizens to lose confidence in the process and their acceptance of election's results especially for opposition political party. The time has come for the government to accept and legislate for the use of ICTs in the elections' processes in order to build trustworthiness and to generate broad acceptance of election's result to the citizens specifically to the opposition political party.

The utility of ICTs in elections' processes ensures that all information produced during the process particularly the election results and electoral roll is correct and trustworthy and generates broader acceptance that the elections' outcome is a true and fair reflection of the citizen's will.<sup>265</sup>

## **8.0 Analysis, Discussion and Findings.**

This part presents the views and opinion of different individuals regarding the problem stated in this study. These views and opinions have been obtained from literally works as well as interview and questionnaires administered to some participants. The findings from these sources prove each hypothesis raised in this study. This study has adopted the approach of answering each hypothesis separately by linking it with information obtained starting with the process of voter's registration, registry inspection, voting, counting, transmitting results, announcing provisional results, and announcing final results. As stated, above the findings are presented under each hypothesis separately.

## **9.0 Presentation and analysis of the findings**

The following are presentation and analysis of the findings and questionnaire review.

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263GN No. 307 (n, 185), regulation 64.

264 *Ibid*,

265 Certification of ICTs in General Election 2015 Report (n. 29), 12

Whether there is no standalone law on elections and the piecemeal legislation that caters for the same purpose is not effective to ensure free, fair, transparent, and credible elections in Tanzania

## 9.1 The findings from documentary review

The following are the presentation and analysis of the finding from documentary review

### 9.1.1 Biometric Voter Registration (BVR) and Electronic Voter Identification System (EVIs)

The voter registration and identification of qualifying voters is a crucial electoral process that establishes which individuals are eligible to vote.<sup>266</sup> With that case, to conduct free and fair elections the voter registration process must be the one which prevents ineligible people from voting and preventing multiple voting.<sup>267</sup>

From the analysis, it was found that with the manual voter registration in election processes proved to fail to safeguard elections from preventing ineligible people from voting and prevention of multiple voting compared to the use of technology in identification of voter in election processes.<sup>268</sup>

The study questioned the efficient of the manual identification of voter' process in Tanzania wondering whether it can establish which individuals are eligible to vote as per the Constitution of United Republic of Tanzania.<sup>269</sup>

It is the researcher's opinion that the act of producing a voter's card by voters itself is not sufficient to prove the person has not already voted.

According to section 61(3) (a) alluded to before, the manual system of identifying the voter is problematic. It must be replaced by technology, at least in part. The use of technology has proved to improve the mechanisms for voters' identification at the

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266Voter Registration. "Voter Registration/ Open Election Data Initiative"

[Openelectiondata.net, //www.openelectiondata.net/en/guide/key-categories/voter-registration/](https://www.openelectiondata.net/en/guide/key-categories/voter-registration/). (Accessed on 25 August 2022)

267 *Ibid*,

268Schwart P, p.31

269The Constitution of 1977, article 5 (1)

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point of polling.<sup>270</sup> Biometric recognition systems such as automated fingerprint identification or the use of multiple factor authentication (smartcard and personal identification number) can significantly reduce voters' registration fraud and can ensure that the person voting is the person on the voter register.<sup>271</sup>

The smartcard technology is the one which permits the storage of digital information that can be updated and accessed with reading device.<sup>272</sup> It contains a small chip which includes memory and microprocessor that keeps the voter's relevant data, including biometric data and non-permanent data like the polling station where the voter is supposed to vote.<sup>273</sup> The automated fingerprint identification systems is a system that record, store, search, match and identify finger prints.<sup>274</sup> It can be integrated in a suite of applications that work together to provide a comprehensive fingerprint and palm print identification system.<sup>275</sup>

Biometric voter registration (BVR) is one of the technologies used in electoral process worldwide to enhance the credibility of election results.<sup>276</sup> The biometric voter registration is used for voter registration which comprises a laptop, a fingerprint scanner, and a camera.<sup>277</sup> The BVR keeps a facial image, fingerprints and civil data or personal identifiable information including name, gender, identity card/passport number, telephone number, etc.<sup>278</sup>

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270Technology for voter identification and authentication.//acep\roject.org/aceen/topics/et/eth/eth02/mobile\_browsing (Accessed on 26 Aug 2022).

271 G. Ben.,, "Electronic Voting And Counting Technologies" A Guide to Conducting Feasibility Studies. International Foundation for Electoral System (IFES). Washington, D.C. 20006, 2011.,.3

272What is a Smartcard Technology? ://www.securetechalliance.org/smart-cards-frq/ (Accessed on 26 Aug 2022)

273 *Ibid*,

274Automated Fingerprint Identification. <https://www.innovatrics.com/innovatrics-abis/?gclid=CjwKCAjwx7GYBhB7EiwA0d8oe-ywnk-y4YKII72ce32nhmqONmB69ZzYm1E0-Qcp4nmooRr>.(Accessed on 26 Aug 2022)

275 *Ibid*,

276 A. Gelb., and A. Diofasi., " Biometric Election in Poor Countries: wasteful or a Worthwhile Investment?". Review of Policy Research, 36(3). 2019.,.45

277 *Ibid*,

278 *Ibid*,

Using biometric technology in the registration of voters was found to reduce opportunities for multiple voting significantly.<sup>279</sup> During registration, biometrics were used to detect and prevent multiple registration. At polling stations, biometrics establish a voter's identity and mitigate the risk of impersonation, identity theft, the misuse of record of deceased voters, carousel voting and ballot-box stuffing hence improving the credibility of the results.<sup>280</sup>

Therefore, biometrics technology is very efficient for reducing and eliminating multiple registrations and multiple voting as well as producing high quality, tamper resistant voter ID cards.<sup>281</sup>

From the analysis, it was found that, currently Tanzania uses biometrics' voter registration without electronic voter identification system in its election process.<sup>282</sup> Yet, such use does not have a legal back up to authorize it. For Tanzania to benefit from technology, it needs to have a legislation that authorizes the use of ICTs in the election process including Biometric Voter Registration and electronic voter identification system. These two systems work together in preventing voter identification inaccuracy, multiple registrations from the same persons and ensure the voter registration information integrity. One system cannot work alone to obtain the benefits mentioned above, they dependently on each other.<sup>283</sup> The electronic voter identification verifies and confirms voters electronically. Both are used to check voters at the polling station on the polling day and help streamline the voting system. The electronic voter identification prevents impersonation and ensures that only those who have been registered to vote are allowed to vote.<sup>284</sup>

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279 Gelb, A. *supra*, note 114, 24

280 *Ibid*,

281 *Ibid*,

282 D. Mwigusa, "Transforming Voters Registration of Paradigm in Tanzania, the Shift from OMR to BVR" *International Journal of Science and Research (IJSR)* 2015, 21.

283 K.L. Jacobsen, "Biometric Voter Registration: A new modality of democracy assistance?" *Cooperation and Conflict*. 2019, 3

284 Y. Saurabh, et al "A biometric Traits based Authentication system for India Voting System" *International Journal for Computer Applications*, Volume 65- No.15. 2017, p. 56

Owino and Mwakinya<sup>285</sup> agree that Biometric Voter Registration (BVR) and Electronic Voter Identification (EVID) positively affect the credibility of the electoral process where the biometric voter registration is very efficient in reducing and eliminating multiple registrations and voting.<sup>286</sup> BVR and EVIDs improve the implementation of the principle of “one voter, one vote” which is a necessary condition for free and transparent elections.<sup>287</sup> The BVR and EVIDs make possible to compensate for the lack of the mechanism for the identification of voters and guarantee the elimination of multiple enrollments on voter’s list. There should, however, be adequate and strict protocols for supervision, management, and storage of electoral data.<sup>288</sup>

### 9.1.2 Online Publication of Voter Registry

From the analysis, it was found that the manual system of publishing provisional voter registry in Tanzania deprives citizens of their constitutional rights of inspecting the registry before the day of election because this system requires the person to be physically present in a place that he or she has resided.

This method will only be of assistance to those who are physically available in the places at the time when the voter registry is published for inspection. For those who, by some reasons, are unable to show up in person, or if they are outside the country, they will not be able to access the voters’ registry for inspection. This constitutes a deprivation of citizens of their constitutional rights. With the use of ICTs, the provisional voters’ registry can be posted online so that any person wherever he or she is can exercise his or her right to inspect it electronically.<sup>289</sup> A bit of confidentiality can be imagined to only allow crosschecking one’s personal details and not indulging into the details pertaining to others. A full inspection can be authorized if there is a legitimate contestation; which may require more administrative approaches beyond the simple exercise of everyone’s constitutional right.

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285 O Marjorie, and J. Mwakiya ., “Biometric Voter Registration and Electronic Voter Identification System on Credibility of the Electoral System in Kenya: A case study of Nairobi County” *Global Scientific Journals GSJ*:V8,2020, 23

286 *Ibid*,

287 *Ibid*,

288 Marjorie, *supra*, note 123, 45

289 Kenya National Commission on Human Rights (KNCHR), an Advisory Opinion on the Proposed Elections Laws (Amendment Bill, 2017 (Presented to the National Assembly, 5 October 2017.

Another benefit of having accurate voter registry is to protect against fraud by ensuring only eligible electors can cast a ballot. In the United State of America, the *Help America Vote Act* of 2002 requires the chief election official of each state to implement a single, uniform, official, centralized, interactive computerized statewide provisional voter registry.<sup>290</sup> The provisional voter registry is to be defined, maintained and administered at the state level. The aim is to allow states to have a computerized provisional voter registry. This allows voter, state, and local election officials' immediate electronic access to check the registration status of a voter. The computerized provisional voter registry allows quick verification of voter information by the voter and election officers and tracks certain appropriate voting history. With that exercise, the computerized provisional voter registry can facilitate the protection of electoral processes against election fraud and ensure that only those who are registered as a voter can vote<sup>291</sup>

### **9.1.3 Electronic counting and recording votes.**

From the analysis, it was found that The *National Election Act*<sup>292</sup> which governs the General Election in Tanzania reflects the system of voting which is paper-based voting.<sup>293</sup> This system festers the opportunities for human element error and bias and other kind of compromising the whole exercise, including filling boxes with hoax or ghost votes. Dishonest is inherent in the human nature. The system may become prone to vote's rigging or multiple voting. This challenge may make the government

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290 The Help Americas Vote Act. S section .303 (a) (1)

291Access To and Use of Voter Registration Lists, National Conference of State Legislatures. <https://www.ncsl.org/research/elections-and-campaings/access-to-anduse-of-voter-registration-lists.aspx>. (ascended on 28 Aug 2022)

292The National Election Act of 2010

293[Paper-based procedure in election process lacks the reliable method of checking voter identity which allows many people to vote more than once. With paper-based means, collecting and calculating results from thousands of polling stations country-wide is often the slowest and unsecured part of the process.]

to fail to dispense electoral democracy and failing to meet international minimum standards<sup>294</sup>in addition to violating Tanzania’s own laws.

For an example, one of the weaknesses of a paper-based procedure is shown under section 73 (4) (c) of the Act which poses the duty of counting and recording votes. It states that:

The presiding officer shall count aloud and record the votes in each lot and verify their total with the total of all the ballot papers which were found in the ballot box and the number of voters who cast their votes at the polling station.<sup>295</sup>

The system of counting votes manually is not trustful to many people regarding the dispensation of democracy since the system has high a chance of lowering democracy when the results of elections are late to be announced. It may also lead to polling workers being tempted to change the results in favour or to the disadvantage of some contenders.<sup>296</sup>

Electronic counting and recording results is a potential tool for increasing citizens’ trust in the electoral process and can help to overcome the barriers of political participation by citizens.<sup>297</sup>It enhances the quality of governance, the credibility, and legitimacy of electoral processes, which in turn leads to electoral integrity.<sup>298</sup>

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294The Constitution of 1977, (n. 181) article 8 (1) state that, the United Republic of Tanzania is a state which adheres to the principle of democracy and social justice...

295*Ibid*, section.73 (4) (c).

297 T. Ayed, “A Conceptual Secure Block chain-Based Electronic Voting System.” International Journal of Network Security & Its Applications (IJNSA), 9(3) 2017, 3

298Bennan Center for Justice at New York University School of Law. , the Machinery of Democracy: Protecting Election in an Electronic Voting, Bennan Center Task Force on Voting System Security.2006, 41

Moreover, Goldsmith<sup>299</sup> considers that electronic counting paper ballots ensures that the same kind of ballot marking is adjudicated in the same manner across all polling stations. This ensures consistency on which ballots are counted and which are determined to be invalid. This is often not the case with manual counting of ballots. In elections using electronic counting or electronic voting or both processes are automated using an electronic device.

In electronic voting, a device records the voting preference of the voter.<sup>300</sup> This voting device may be located at the polling station or a remote location. For example, a personal computer or a mobile phone is used to cast a ballot over the Internet or via text message or SMS, respectively. In electronic counting an electronic device is used to count the ballots casted whether paper or electronic.<sup>301</sup>

Sartori<sup>302</sup> argues that, when the results are recorded electronically and transmitted to the election body for tabulation, the possibility of data entry errors during results tabulation is great diminished.

Tokaji<sup>303</sup> considers that the electronic counting paper ballots can mitigate some frauds in polling stations.<sup>304</sup> For instances, electronic counting only allows votes to be cast at a certain speed, thus mitigating ballot stuffing. Electronic counting of ballots also

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299 G. Ben, “Electronic Voting And Counting Technologies” A Guide to Conducting Feasibility Studies. International Foundation for Electoral System (IFES). Washington, D.C. 20006. 2011, 27

300Ibid, 23

301Ben., supra, note 140, 23

302 S. Goldin., “The Influence of Electoral Systems: Faulty Laws or Faulty Method?” in electoral law and their political Consequences, New York Agathon Press. [Google Scholar] 2014, 12

303D. Tokaji,., “*The paperless chase: Electronic Voting and Democratic Values*”, Mortiz College of Law, Ohio State University. 2004, p. 43

304Ibid,

mitigates fraud during the counting process.<sup>305</sup> With this advantage, however, the electronic counting of ballots alone cannot eliminate all aspects of electoral frauds.<sup>306</sup>

### 9.3 The electronic transmission of results

From the analysis, it was found that, in Tanzania, there is no adequate methods of transferring the presidential and parliamentary results from constituencies to the commission. This contributes to the electoral commission to fail to safeguard the accuracy of the outcome of elections and the security of the results during transportations and possibility of electoral officers to temper with the results.

The utility of ICTs in elections' processes ensures that all information produced during the electoral process particularly the election results and electoral roll is correct and trustworthy and generates broader acceptance that the elections' outcome is a true and fair reflection of the citizen's will.<sup>307</sup>

The electronic transmission of results can be summed up in three words, which is efficiency, trust, and safety. The electronic transmission of results makes results management more efficient and increase public confidence in the electoral process and quickly makes the announcement of election results. This is because timely and efficient results management and announcement are critical ways for the integrity of elections. The excessive delays in collating and announcing results makes feeling that outcomes could be undermined and may be conducive to violence and negative mobilization by losers of elections<sup>308</sup> be they individuals or political parties.

The electronic transmission of results improves the quality of election results management, transparency, accountability, and reduce negative human intervention in the processes. The electronic transmission of results strengthens the openness of

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305National Conference of state Legislature “*Types of Voting Equipment’s*”  
<https://www.ncsl.org/research/elections-and-campaigns/voting-equipment.aspx>.  
Accessed on 25<sup>th</sup> Aug 2022.

306*Ibid*,

307Certification of ICTs in General Election 2015 Report, (n. 185)

308*Ibid*,

results management and make it possible for election officials to be held accountable for their actions where necessary.<sup>309</sup>

Auditing and verification of results will be difficult with the use of manual transmission of result in a large country like Tanzania. Results are handled in thousands of locations. Transmitting results electronically is more practical than handling tons and tons of papers some of which would have been mutilated and defaced<sup>310</sup> or lost in the process.

Electronic transmission of results facilitates for quicker and more transparent election adjudication.

#### **9.4 The findings from interview and questionnaire**

Twenty-two respondents were given questionnaires by the researcher. Out of the total number of the distributed questionnaires only twenty questionnaires were filled and returned to the researcher. Fifteen respondents responded positively to the first hypothesis that there is no standalone law on elections and the piecemeal legislation that caters for the same purpose is not effective to ensure free, fair, transparent, and credible elections in Tanzania. The respondents agree that there is a need to have a law in Tanzania that allows the use of ICTs because it can work efficiently in electoral process such as the identification of the voters, the publication of voter registry for inspection, and the transfer of elections' results. They point that the proper use of technological devices ensure a credible, transparent, free, and fair election and will help to improve the dispensation of democracy in the country.

The remaining respondents did not agree with this hypothesis. They maintain that although there are problems associated with paper-based procedures in Tanzania electoral process, but the use of technology will be dangerous compared to the manual paper-based procedure because technology can be easily hacked and compromise the results of the elections.

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309Electronic Transmission of election Results. Position paper No. 1 of 2021www.inecnigeria.org. (Ascended on 27 Aug 2022).

310Council of Europe, 11a. Legal, operational and technical standard for e-voting. 2004

The researcher also interviewed 15 individuals from the legal fraternity and higher learning institutions at Ruaha Catholic University, University of Dodoma, University of Iringa and Mzumbe University. Twelve interviewees were in support of the hypothesis that there is no standalone law on elections and the piecemeal legislation that caters for the same purpose is not effective to ensure free, fair, transparent and credible elections in Tanzania.

One of the interviewees stated that with the adoption of a single legislation that allows the proper use of ICTs in Tanzania electoral processes can help to enhance the quality of governance, the credibility, and the legitimacy of electoral processes, which in turn leads to electoral integrity.

Other interviewees maintain that the use of ICTs in electoral process can strengthen the openness of results management and make it possible for elections' officials to be held accountable for their actions where necessary. They suggest that the law is needed to make sure that the technology introduced is protected from hackers or any other interference.

There were interviewees who did not agree with the first hypothesis. They maintain that the ICT is not a tool that will offer free and fair elections because of its likelihood of being hacked by strangers or simply manipulated by the operators in a Dishonest perspective to offer advantages or disadvantage some contenders.

Whether the experience of Kenya is a lesson in point that can help Tanzania to improve its own electoral processes with the use of ICTs

The legal framework for Kenya's electoral system is contained in article 81(e) and 86 of the Kenya Constitution of 2010.<sup>311</sup> Article 81(e) of the Constitution of Kenya of 2010 establishes the principle of free and fair election as the keystone of the electoral system in Kenya.

The article provides that the election must be conducted in a free and fair environment and the voting must be by secret ballot. This means an election that is free from violence, intimidation, improper influence, or corruption.<sup>312</sup> The electoral process must be transparent and administered in an impartial, neutral, efficient, and

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311The Constitution of Kenya of 2010

312 *Ibid*, article 81 (e)

accurate manner. In fact, the electoral process conducted determines the quality, integrity, and credibility of electoral results.<sup>313</sup>

## 9.5 Election technology law in Kenya

Election technology law in Kenya is contained under Sections 6A, 44 and 39 of the Elections Act as amended in 2016 and Section 44 A of the Elections Act as amended in 2017 as read with Article 86 (a), article 86 (a) of the Constitution of Kenya of 2010 these clauses provide that the method, techniques, and instrumentalism through which elections are conducted on the voting day must be simple, accurate, verifiable, secure, accountable, and transparent.<sup>314</sup>

Section 44 of the Elections Act as amended in 2016 provides that:

(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(4) The Commission shall, in an open and transparent manner -  
(a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and

(b) Test, verify and deploy such technology at least sixty days before a general election.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall —

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313 O, Otiene, “Election Technology law and the Concept of “did the irregularity affect the result of elections?” 2012, 5

314 *Ibid*, article 86

- (a) Be restricted to the process of voter registration, identification of voters and results transmission; and
- (b) Be procured at least eight months before the general election.<sup>315</sup>

Section 44 A of the Elections Act as amended in 2017 provides that:-

Notwithstanding the provisions of Section 39 and Section 44 of the Act, the Commission shall put in place a complementary mechanism for identification of voters and transmission of electoral results that is simple, accurate, verifiable, secure, accountable and transparent to ensure the Commission complies with Article 38 of the Constitution.<sup>316</sup>

Section 6A (3) (b) of the Kenya Elections Act<sup>317</sup> as amended in 2016 require the Electoral Commission to publish the Register of Voters online and in such other manner as may be prescribed by regulations. The requirement to publish the Register of Voters online puts to rest the incessant arguments on where to find the Register of Voters. The on-line Register is critical in an election petition particularly where an allegation is made that the number of votes cast exceeds the registered voters.<sup>318</sup> The law requires the publication of the register of voters as a means to increase transparency in electoral processes and prevent situations where deceased voters supposedly cast votes.<sup>319</sup>

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315The Constitution of Kenya, article 44

316*ibid*, article 44A.

317The Kenya Election Act , section 6A (3) (b).

318*ibid*, article 6A (3) (b).

319 M. Rose “in Kenya’s 2022 Elections, Technology and Data protection Must go hand in hand” Carnegie endowment for international peace. Washington DC. 20036-2103. <https://carnegieendowment.org/2022/08/08/in-kenya-s-2022-elections-technology-and-data-protection-must-go-hand-in-hand-87647>. 2022, p. 5 (Ascended on 29 August 2022)

In support of the use of technology in electoral system, the Court of Appeal of Kenya in the case of *IEBC vs. Maina Kiai & 5 Others*<sup>320</sup> held that the use of information technology is to guarantee the accuracy and integrity of the results of the election.

The Court expressed further:

...We are satisfied that the electronic transmission of the already tabulated results from the polling station is a critical way of safeguarding the accuracy of the outcome of the elections [...].<sup>321</sup>

In the case of *National Super Alliance (NASA) Kenya vs. The Independent Electoral and Boundaries Commission & 2 others*<sup>322</sup> it was held that the technology employed in electoral process must be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution.<sup>323</sup>

Regulations 69 of the Elections (General) Regulations 2012 provides follows:

- (e) In case the electronic voter identification device fails to identify a voter the presiding officer shall:
  - (i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;
  - (ii) complete verification Form 32A in the presence of agents and candidates;
  - (iii) identify the voter using the printed Register of voters; and
  - (iv) Once identified proceed to issue the voter with the ballot paper to vote.<sup>324</sup>

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320 Civil Appeal No. 105 of 2017

321 *Ibid*,

322 Civil Appeal No. 258 of 2017

323 *Ibid*,

324 The Elections (General) Regulations 2012 (n.185) Regulation 69.

Regulation 3(1) provides that the Commission shall regularly conduct an analysis to determine the specific requirements to upgrade or supplement existing election technology, or to acquire new one with the purpose of enhancing the integrity, efficiency, and transparency of the election process.<sup>325</sup>

Regulations 6 and 7 require the Commission to carry out regular inspection and servicing of the election technology, as well as establish a support and maintenance contract with a service level agreement to ensure the serviceability, reliability and availability of the election technology.<sup>326</sup>

Regulation 17 provides that all electronic data relating to an election shall be retained in data retention and safe custody by the Commission for a period of three years after the results of the elections have been declared, and shall, unless the Commission or the court otherwise directs, be archived in accordance with procedures prescribed by the Commission subject to the *Public Archives and Documentation Service Act* and the *Kenya Information and Communications Act, 1998*.<sup>327</sup>

Regulations 31 and 32 establish the Elections Technology Committee whose mandate is to advise the Commission on adoption and implementation of election technology.<sup>328</sup>

Section 39 (1) (C) of the Elections Act<sup>329</sup> stipulates that for the purposes of a presidential election the Commission shall —

- (a) Electronically transmit, in the prescribed form, the tabulated results of an election from a polling station to the constituency tallying Centre and to the national tallying center.
- (b) Tally and verify the results received at the national tallying centre; and

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325 *Ibid*, regulation 3(1)

326 *Ibid*, regulation 6 and 7.

327 The Elections (General) Regulations 2012 (n.314) regulation 17

328 *Ibid*, regulation 31

329 The Kenya Elections Act, section. 39 (1) (C)

(c) Publish the polling result forms on an online public portal maintained by the Commission.<sup>330</sup>

Regulations 26 and 27 of the Technology Regulations provide that on termination or suspension, the Commission shall suspend or terminate the use of election technology if the reliability of a system cannot be assured according to the requirements of the Act and Regulations.<sup>331</sup>

#### **9.6 What does the law of Kenya provide when the election technology fails?**

Before suspending or terminating the use of election technology, the clerk at the polling station shall inform the presiding officer of the failure of the technology. The presiding officer at the polling station shall retry the system to confirm the failure of the technology.<sup>332</sup>

The presiding officer at the polling station shall document the incident on an incident report in the polling station diary which shall be signed by all the agents.<sup>333</sup> The presiding officer shall notify the returning officer of the failure and submit a copy of the incident report. The returning officer shall inform the director in charge of information communication and technology of the incident and the director shall investigate the incident and advise on the suspension or termination of the use of the election technology.<sup>334</sup> The returning officer shall approve the request for suspension of the use of technology based on the advice from the Director of ICT and invoke the mechanism.<sup>335</sup>

It must be noted that, the election technology law of Kenya does not establish electronic voting or electronic balloting. The law only establishes the use of electronic

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330 *Ibid*, section .39 (1) (C)

331 *Ibid*, regulation 26

332 The Elections (General) Regulations 2012 (n.321)

333 *Ibid*,

334 *Ibid*,

335 *Ibid*, regulation 27

voter identification device (EVID), electronically transmit the result using ETS, Biometric Voter Registration, and online publication of voter registry.<sup>336</sup>

### **9.7 Challenges faced by Kenya's election on the use of election technologies.**

Apart from the benefits elaborated on above on the use of technology in electoral process which including being cheaper, faster, and more accurate, enhances the quality of governance, the credibility, and the legitimacy of electoral processes than manual paper-based procedure there are challenges on the use of technology that Kenya's election is faced with.

The use of electronic voter identification brought some challenges in the 2022 Kenya election.<sup>337</sup> In some polling stations the device used to identify the voter failed to recognize the voter's fingerprints and this made the process to take time. Regulation 27 of Elections (General) Regulations 2012 allows the elections officers to suspend the use of technology when the technology fails. In the 2022 Kenya elections some polling stations used manual identification because of the device that failed to recognize some voters' fingerprints and made the process to turn in manual methods.<sup>338</sup>

Likewise, in electronic transmissions of results in Kenya there is always the potential for hackers to temper with results if the technology is weak. On choosing the best technology to replace the paper-based procedures the country must consider the technology, which is simple to use, accurate, verifiable, secure, accountable, and transparent.

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336The Kenya Election Act of 2011, section. 44

337The Citizen, "EAC observers laud IEBC for successful use of technology." <https://www.thecitizen.co.tz/tanzania/news/eac-observers-laud-iebc-for-succesful-use-of-technology-3911496?view=htmlamp>. (Acceded August, 11-2022).

338EAC said the technology has improved efficiency and increased transparency in the country in the 2022 Kenya election unlike in the previous elections. However the observer mission said that there were a few cases related to identification of voters by the KIEMS kit, asking the commission to note such issues and resolve in future. The EAC observer recommend that the problems relating to KIEMS kit should be identified and necessary corrective measures be taken for better performance in future.

In the 2022 Kenya elections, three Venezuelans were arrested at Jomo Kenyatta International Airport after their bags were found to have elections materials which raised questions among Kenyans and the authority as to why the items had been brought into the country as a personal property.<sup>339</sup> Few days Later after the presidential election's result was announced, Raila Odinga one of the presidential candidates challenging the winning of elected president William Ruto before the Kenyan Supreme Court by ground that the IEBC's server system was interfered by the Venezuelans. The Supreme Court of Kenya was on the view that IEBC's server was not interfered because Raila Odinga and his team failed to bring the sufficient evidence to prove this allegation.<sup>340</sup>

So, in the 2022 elections Kenya used both manual and technology in transmitting presidential results from constituencies. It was reported by IEBC that it received first the results electronically and waited to receive paper-based results in order to make verification and counting before announcing to the public. The IEBC examined whether the electronic results from constituencies are matched with the paper-based results.<sup>341</sup> There is also a technical way of cross-checking whether the system is properly working and not interfered with by the hackers.<sup>342</sup>

Bensmith<sup>343</sup> recommends that to improve election technology security, the country should look for a system that uses encryption to protect the data. The system must be tested by independent security experts before use.<sup>344</sup>

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339 Kenya 2022: Three Venezuelans arrested with election Material, causing confusion. [www.theafricanreport.com /226769/Kenya-2022-three-Venezuelans-arrested-with-eletion-material-causes confusion](http://www.theafricanreport.com/226769/Kenya-2022-three-Venezuelans-arrested-with-eletion-material-causes-confusion). (Ascended on 25 September 2022)

340 BBC news: Kenya election 2022: Supreme Court confirms William Ruto's Victory against Raila Odinga. [www.bbc.com/news/world-africa-62785434](http://www.bbc.com/news/world-africa-62785434). (Ascended on 25 September 2022)

341 *Ibid*,

342 BBC New. "Kenya elections 2022: while Kenya waits, unfounded election claims spread" <https://www.bbc.com/news/62495970.amp> (Ascended, 11, August 2022)

343 Ben Goldsmith, *supra*, note 291,

344 *Ibid*,

## 10.0 The findings from interview and questionnaire

Twenty two respondents were given a questionnaire by the researcher. Out of the total number of the distributed questionnaires only twenty questionnaires each were filled and returned to the researcher. Fifteen respondents responded positively to the second hypothesis whether the experience of Kenya is a lesson in point that can help Tanzania to improve its own electoral processes with the use of ICTs.

Fifteen respondents maintain that although Kenya has little experience in the use of technology in its electoral process, Tanzania can still learn the steps that Kenya has reached in using technology. Such steps that Tanzania can adopt to improve its electoral process include biometric voter registration, for on the identification of voters electronically, an online publication of voter registry, and an electronic transfer of election results. The digitalization of these processes can speed up the associated work leading to the announcement of elections final results.

Some of the respondents say that Tanzania has a lot to learn from Kenya in the use of ICT in the electoral process. When Tanzania decides to adopt technology in its elections processes, it will have learned a lot from the challenges that Kenya has faced and gone through positively.

The remaining five respondent did not agree with this second hypothesis. They maintain that although there is problem associated with paper-based procedures in Tanzania electoral process, but the use of technology will be problematic compared to the manual paper-based procedure because technology can be easily hacked and compromise the results of the elections.

They insist that Tanzania should not learn from Kenya on the use of technology and continues to use paper-based electoral process.

The researcher also interviewed 15 individuals from the legal fraternity and higher learning institution at Ruaha Catholic University, University of Dodoma, University of Iringa and Mzumbe University. Twelve interviewees were in support of the hypothesis of learning from Kenya's experience as a lesson in point that can help Tanzania to improve its own electoral processes with the use of ICTs.

They maintain that Tanzania must learn much in the use of election technology from Kenya together with the way that Kenya allows political parties to challenge the presidential elections in court.

They specifically responded that currently the world is shifting to the most use of technology in every sector and that Tanzania cannot continue to resist these changes which go with technology advancement, including in its electoral processes. This is the opportune moment to do so. If Tanzania adopts technology in other sectors, there is no justification for it to resist using it even in electoral processes.

They continue to point out that Tanzania should start now to consider the use of technology because of the many benefits that the election technology offers. They maintain that election technology can indeed be instrumental in enhancing the transparency and efficiency of the electoral process than manual processes.

There were interviewees who did not agree with the second hypothesis. They were of the view that Tanzania has nothing to learn from Kenya because the Kenyans' elections have not reached to the point to be a lesson to other countries. They argue that even Kenya is struggling to make its election to be fair and free. The Kenyan elections are still in the process on the use of ICTs and that it is not successful on that.

Whether there is need for a legal and regulatory framework for the use of ICT during elections processes

The following are the presentation and analysis of the findings from documentary review and questionnaire review.

### **10.1 The findings from documentary review.**

Law is a statement of fact deduced from observation to the effect that a particular natural or scientific phenomenon always occurs if certain conditions are present. It is in the form of principles and regulations established in a community by some authority and applicable to its people in the form of legislation and enforced by judicial decisions.<sup>345</sup> There are arguments around the world as to whether the establishment of election technology necessitates having a law or if it is just a normal practice that does not need a legal framework when introduced.<sup>346</sup> .

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345 Meaning of Law: [//www.dictionary.com/browse/law](http://www.dictionary.com/browse/law). (Ascended on 29 Aug 2022)

346 I. Jibrin. , "legislation and electoral process: The third Term Agenda and future of Nigerian Democracy" Paper for Centre for Democracy and Development (CDD) Nigeria Roundtable. (2006) 23

Oguech<sup>347</sup> considers that it is not proper to introduce the use of election technology without having the legal framework which regulates such use. He says that credible elections cannot be guaranteed in the absence of a good legal framework. There must be a law to give it legal backing.<sup>348</sup>

Nkasah and Kisangiri<sup>349</sup> discuss organizational challenges that hinder the implementation of secure remote electronic voting in Tanzania. They observe that the election technology is seen as a tool for advancing democracy, building trust in electoral management, and increasing the overall efficiency of electoral process. The authors considers that Tanzania needs to change the law to allow election technology to be used as they observe the issue through legal lenses.<sup>350</sup>

The Supreme Court of India in the case of *A. C. Jose vs. Sivan Pillai & Others*<sup>351</sup> held that there was no statutory law permitting electronic voting machines (EVM). However, the Indian Electoral Commission used EVM at 50 polling stations. The Supreme Court declared the election results in the 50 polling stations void as having been conducted contrary to law. The Court expressed the following:

The Electoral Commission has to conduct elections according to law enacted by Parliament, it can supplement the law but cannot supplant it.<sup>352</sup>

Therefore, Tanzania needs to change the law to allow election technology to be used.

## 10.2 The findings from interview and questionnaire

Twenty-two respondents were given a questionnaire by the researcher. Out of the total number of the distributed questionnaires only twenty questionnaires were filled and returned to the researcher. Fifteen respondents responded positively to the third

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347Samuel O, "Electoral Law Reform in Nigeria: Proposals for Amendment of the Electoral Act 2010 and the Imperative of ICT", 6 I.J.L.D.LR.47, 2017, p. 56

348*Ibid*,

349Sylvester K, *supra*, note 37. 34.

350Nkasa, *supra*, note 67. 12

351Civil Appeal No. 3839 of 1982.

352*Ibid*,

hypothesis supporting the view that there is a need for a legal and regulatory framework for the use of ICT during elections processes. They maintain that Tanzania must introduce a law for the use of ICTs in the electoral process to benefit from the advantages election technology offers. One of the respondents suggested that the law is needed first before the implementation of the use of electoral technology to make the use legal.

The remaining five respondent did not agree with this third hypothesis. They maintain that Tanzania should not enact laws to introduce election technology since the election technology will not bring free and fair election. Tanzania should rather look other ways of resolving the challenges associated to the use of manual paper-based procedure. They maintain that the manual paper-based procedure is best compared to election technology because the paper-based procedure can resist cybercriminals.

The researcher also interviewed 15 participants from the legal fraternity and higher learning institution at Ruaha Catholic University, University of Dodoma, University of Iringa and Mzumbe University. Twelve interviewees were in support of the third hypothesis that there is need for a legal and regulatory framework for the use of ICT during elections processes. They maintain that the law is needed to introduce the use of ICTs in the electoral processes to resolve the problem associated with paper-based procedure. By doing this, the United Republic of Tanzania, will be like any other developing country in the digital age.

Other interviewees did not agree with this hypothesis. They refuted the suggestion of a law to back up the use of technology in elections. They invoke issues of the likelihood of hacking the process. For them, election technology will not bring free and fair elections.

## **11.0 Conclusion and Recommendations**

A credible electoral administration and effective oversight of electoral process is among essential elements of free and fair elections in a democratic country. The researcher contends that the paper-based procedure is not trustworthy to many people regarding the dispensation of democracy since the system has high a chance of lowering democratic expectations when the results of elections are late to be announced or have been compromised one way or another.

The study concludes that there is a necessity of law that authorizes the use of ICT in electoral processes in Tanzania. Such a law shall provide for the voter's identification through biometrics recognition, anything associated with voters' registration and inspection of the registry. It shall, moreover, provide for electronic voting of those who are outside of the country or in distant polling stations, the transfer of provisional results and announcement of final results.

The biometric voter registration positively affects the credibility of the electoral system. The biometric voter registration is very efficient in reducing and eliminating multiple registrations and voting as well as producing high quality, temper resistant voter ID cards. Furthermore, the current paper-based procedures fester the opportunities for human element error and bias. Likewise, paper-based procedure in election processes lacks the reliable method of checking the voter's identity which allows many people to vote more than once.

The electronic voter identification serves to ensure that only those registered are also the ones to vote. The electronic voter identification helps in verifying and confirming voters electronically as registered by biometrics' voter registration.

It has also been found that Tanzania has no adequate system of publishing provisional voter register. Currently, this system requires the person to be physically present at a place where he or she has registered. For those who live outside the country, they cannot exercise their right to inspect the provisional voter register as required by the law. With these challenges associated with manual publication of voters' registry, it will be difficult to conduct free, fair, and credible elections as required by the international standards and good practices and the Constitution of the United Republic of Tanzania of 1977.

And, therefore, the study concludes that, Tanzania needs to enact a law which will allows the on-line publication of voter register to increase transparency in electoral processes and prevent situations like the number of votes cast exceeding the registered voters. For those who are outside of the country will exercise their right to inspect the provisional voter register online.

Furthermore, Tanzania uses the manual system to count votes. With paper-based means, collecting and calculating results from thousands of polling stations country-wide is often the slowest and unsecured part of the process. This manual system of

counting votes is not trustful to many people regarding the dispensation of democracy in elections since the system has high a chance of lowering democracy when the results of elections are late to be announced. It may also lead to polling workers being tempted to change the results in favour or to the disadvantage of some contenders.

This study concludes that, Tanzania should enact a law which allows the electronic counting and recording of results. This digital platform is a potential tool for increasing citizens' trust in the electoral process and can help to overcome the barriers of political participation by citizens. Likewise, it enhances the quality of governance, the credibility and the legitimacy of electoral processes, which in turn leads to electoral integrity.

Additionally, the finding shows that Tanzania lacks an adequate method of transferring the results to the Commission. This provides for an opportunity to alter the elections' results during transportation. For that reason, the researcher proposes the enactment of a standalone law on elections processes in the United Republic of Tanzania that substantially uses the electronic transmission of results to improve the quality of election result management, transparency, and accountability at the root of good election management and reduce negative human intervention in the result management process. The electronic transmission of results will strengthen the openness of results management and make it possible for election officials to be held accountable for their actions where necessary.

The diligent use of ICT during general elections will help Tanzania to dispense an electoral process which is one of the key factors that leads to an effective and functioning democracy. The use of ICTs in electoral process would enable Tanzania to get the highest possible speed in obtaining, processing, and announcing election results as accurate as that exercise is expected to be, and the highest possible accuracy. It will also provide for maximum transparency of the electoral process, eliminating the possibility of any violations like registration and voting of the dead or multiple voting.

The researcher suggest that the reform required now concerns mostly the electoral laws with the digitalization of the key processes including the identification of the qualifying voters, the publication of the provisional voter(s) register, electronic voting,

counting and publication of provisional and results, and any other associated processes that need digitalization.

It has been proven that when technology is effectively incorporated, it can lead to free, fair, and credible elections. For that reason, Tanzania needs to reform the law to allow election technology to be applicable because credible elections cannot be guaranteed in the absence of an enabling legislation. There must be a law to give the election technology a legal foundation.

Tanzania shall also reform its *Cybercrime Act of 2015* to allow the efficient protection of election technology against hackers and other cyber criminals who may deliberately compromise the electoral process. The *Cybercrime Act of 2015*, as it now stands, is not enough to protect election technology. The Act should stipulate a strict prohibition on the election technology and provides heavy penalties for those attempting to illegally interfere with the technology.

In choosing the best technology to replace the paper-based procedures, Tanzania should consider the one which is simple to use, accurate, verifiable, secure, accountable, and transparent. This will ensure that all information produced during the electoral process particularly the election results and electoral roll is correct and trustworthy and generates broader acceptance that the elections' outcome is a true and fair reflection of the citizen's will.

Most importantly, the researcher recommends that Tanzania should think of using electronic voter identification through smartcard reader. This technology will detect and prevent multiple registration, and mitigate the risk of impersonation, identity theft, the misuse of record of deceased voters, carousel voting and ballot-box stuffing hence improving the credibility of the results and reinforce the principle of "one voter one vote".

Lastly, Tanzania should also prepare sufficient budget to maintain the technology, train a specialized elections' personnel and provide education to the voters on how to use the technology.

# CHILD RIGHTS TO EDUCATION IN RWANDA AT THE OUTSET OF GENOCIDE TO THE COMMEMORATION OF 35<sup>TH</sup> YEARS OF AFRICAN CHILDREN'S CHARTER

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## **ABSTRACT**

*As the African Union and Africans recall the 31<sup>st</sup> Rwandan genocide commemoration and 35<sup>th</sup> anniversary of the adoption of the African Charter on the Rights and Welfare of the Child (herein called the African Children's Charter and denoted as ACRWC). The article assesses, the implementation of the ACRWC in Rwanda, the child rights treaties signed and ratified by the Republic of Rwanda at the continental level in particular the African Children's Charter and other instruments in the Regional Economic Communities (RECs). The Rwanda's Constitution of 2003, statutes, policies and strategic plans relating to child right to education are the central focus of this study. The author examines as to what extent children enjoy[ed] the right to education before and after the ratification of the African Children's Charter in Rwanda. This work also, makes a critical analysis on the way the education sector was before and after the outset of genocide, challenges encountered in education systems and recommendations on how to address the status quo.*

**KEY WORDS:** *The African Charter on the Rights and Welfare of the Child, Rwanda, law, constitution, genocide, child rights to education.*

## 1.0 INTRODUCTION

As a result of civil wars and genocide in 1990-1994 in the Republic of Rwanda (herein referred as Rwanda), the African Union (AU) has been making an annual commemoration for purposes of sending sentiments to Rwanda, Africa and the globe 'NEVER AGAIN'. This year, 2025, marks the 31<sup>st</sup> Commemoration of Rwandan genocide and the author decided to write a paper in connection with the 35<sup>st</sup> anniversary of the adoption of the ACRWC. The article addresses the implementation of the ACRWC and other child rights treaties in Rwanda. The paper discusses on how and the way human rights, child rights and thus, child right to education was and is enforced in Rwanda.

The article assesses the treaties in the RECs, signed and ratified by Rwanda such as the Common Market for East and Southern Africa (COMESA), East African Community (EAC) and Economic Community of Central African States (ECCAS) treaties. Unfortunately, Rwanda is yet to sign and ratify the COMESA Social Charter, 2015. More is performed by EAC on educational angle than both COMESA and ECCAS. This work addresses child right to education in the chronological manner by analysing treaties at the continental level and in the regional frameworks. This work offers no extensive discussion on detail the Convention on the Rights of the Child (CRC). The article scrutinises all the national legal frameworks in terms of the Constitutions of Rwanda, the Organic Laws (statutes) and policies. The paper able to explain the Rwanda's Constitutional history, human rights and the nature of educational systems from the colonial era to the present in Rwanda. The paper evaluates the nature of education in 1884-1962 (1884-1918 for German colonial rule and 1919-1962 for the Belgian colonial administration); 1962-1973 and 1973-1994 for the Presidential Republicans and Post-genocide regime which is still in power. Education system in the colonial era was full of division and discrimination and regarded *Tutsi* as the mornach and alien residents. The first republic continued to the great extent favouring the colonial trends. Habyarimana's regime regarded *Tutsi* as natives and the post genocidal government declared Rwandans as Rwandan, no need of Tribal identification like *Hutu, Tutsi and Twa* in neither the educational sphere nor elsewhere.

This article focuses on the implementation of the ACRWC in Rwanda whereby the role of the Rwanda's Constitution and right to education were put forward, the legal salient features of child right to education in Rwanda. The comparative analysis between the Rwandan laws, policies and ACRWC was made. Child rights principles like Best interest of the child; Equality and non-discrimination; Survival and development; Inclusion and participatory are discussed. Another section under the implementation is the Basic and Secondary school education after post genocide period to the present where education transformation that aimed at non-discrimination, equality and the use of technology was developed, policies like the 9 and 12 Year Basic Education (9YBE & 12YBE) were launched and yielded results in terms of the Universal Primary Education.

Generally, challenges were put forward with some solutions and this work only centred mostly on child rights to education in public schools, though the applicable laws for the establishment and operation of schools are the same even for private schools. The legal frameworks in Rwanda that govern child matters cut across the pre primary, primary, secondary schools, Technical Vocational Educational Training (TVET), Teachers Training College (TTC) and the Higher Learning Institutions such as colleges and universities.

## 2.0 RWANDA AND THE AFRICAN CHILDREN'S TREATIES

Rwanda as a member state to the African Charter on Human and Peoples' Rights (ACHPR- Banjul Charter), 1981<sup>353</sup> signed and ratified the ACRWC<sup>354</sup> on 2<sup>nd</sup>

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<sup>353</sup> Rwanda signed and ratified the African Charter on Human and Peoples' Rights on 11<sup>th</sup> November 1981 and 15<sup>th</sup> July 1983 retrospectively. Documents for the ratification were deposited on the 22<sup>nd</sup> July, 1983; See the List of countries, which have signed, ratified/acceded to the African Charter on Human And People's Right <[https://au.int/sites/default/files/treaties/36390-sl-african\\_charter\\_on\\_human\\_and\\_peoples\\_rights\\_2.pdf](https://au.int/sites/default/files/treaties/36390-sl-african_charter_on_human_and_peoples_rights_2.pdf)> accessed 26 April 2025. It is paramount to note that on 22<sup>nd</sup> October 2021, the African Charter on Human and Peoples' Rights celebrated its 40<sup>th</sup> birthday since its adoption.

October, 1991 and 5<sup>th</sup> November, 2002 respectively.<sup>355</sup> Rwanda never took a long time to sign the ACRWC and the ACRWC was signed immediate after the signing and ratification of the United Nations(UN) Convention on the Rights of the Child (CRC).<sup>356</sup> Rwanda signed and acceded the CRC on 26<sup>th</sup> January, 1990 and 24<sup>th</sup>January, 1991 and later signed the ACRWC<sup>357</sup> which was its commitment to the CRC. It took more than a decade for Rwanda to sign the ACRWC until the ratification.<sup>358</sup> Had it not been the delays for the ACRWC to come into force for want of 15 ratifications<sup>359</sup> and genocide<sup>360</sup> probably Rwanda would have ratified

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354 OAU Doc. CAB/LEG/24.9/49 (1990); Adopted by by the 26<sup>th</sup> Ordinary Session of the Assembly of Heads of State and Government of the OAU Addis Ababa, Ethiopia – 11 July 1990 Entered into force on 29 November, 1999; <<https://au.int/en/treaties/african-charter-rights-and-welfare-child>; [https://au.int/sites/default/files/treaties/36804-treaty-african\\_charter\\_on\\_rights\\_welfare\\_of\\_the\\_child.pdf](https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf)> accessed 26 April 2025.

355 Rwanda deposited the instruments for the ACRWC on May 17, 2001;<<https://treaties.au.int>; <https://au.int/sites/default/files/treaties/36804AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf>> accessed 26 April 2025.

356 CRC also signifies the Committee on the Rights of the Child which oversee the same UN Convention (UN Treatybody); Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49: <<https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx>;<https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>;<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>;<https://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>> ‘accessed 26 April 2021’; ‘Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography’ on 23 April 2002 and 14 March 2002 respectively <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=145&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=145&Lang=EN)> re-accessed 15 August 2025.

357 Ibid (n 4 above).

358 Ibid.

359 ACRWC, art 47(3); Frans Viljoen *International Human Rights in Africa* (2nd edn, OUP 2012) 396.

360<sup>31<sup>st</sup></sup> *Commemoration of the 1994 Genocide against Tutsi in Rwanda* [https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://au.int/en/newsevents/20250407/commemoration-1994-genocide-against-tutsi-rwanda&ved=2ahUKEwiqyvHEqfuOAxX58rsIHQHFMZgQFnoECBgQAQ&usq=AOvRUAHA](https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://au.int/en/newsevents/20250407/commemoration-1994-genocide-against-tutsi-rwanda&ved=2ahUKEwiqyvHEqfuOAxX58rsIHQHFMZgQFnoECBgQAQ&usq=AOvRUAHA LAW REVIEW(RLR), Volume 6, December 2025) LAW REVIEW(RLR), Volume 6, December 2025

the treaty abt earlier. The central point of this article is the child right to education in Rwanda and the provision of the continental child rights framework under article 11 of the ACRWC<sup>361</sup> which states that ‘Every child shall have the right to education’... and states parties to the ACRWC as Rwanda, must make sure that they put in place all proper gauges in ‘achieving the full realisation’ of the child right to education.<sup>362</sup> Article 11 of ACRWC provides the proper criteria on how states including Rwanda provide education.<sup>363</sup>

Regardless of the fact whether Rwanda has already domesticated the ACRWC in this aspect or not, as a matter of legality, Rwanda is duty bound to enforce, promote and protect child rights<sup>364</sup> and as it ratified both the international and regional

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Vaw3JqjBsZYt9qBbY5\_Ny1VRh accessed 8<sup>th</sup> August 2025 ;see also the ‘27<sup>th</sup> Commemoration of the 1994 Genocide against Tutsi in Rwanda’ <<https://au.int/en/newsevents/20210407/27th-commemoration-1994-genocide-against-tutsi-rwanda>>; <[https://au.int/sites/default/files/newsevents/mediaadvisories/40156-ma-ma-the\\_27th\\_commemoration\\_of\\_the\\_genocide\\_against\\_the\\_tutsi\\_in\\_rwanda\\_0.pdf](https://au.int/sites/default/files/newsevents/mediaadvisories/40156-ma-ma-the_27th_commemoration_of_the_genocide_against_the_tutsi_in_rwanda_0.pdf)> re-accessed 8<sup>th</sup> August 2025.  
361 ACRWC, art 11.

362 Ibid, art 11(3): Michael Gose in his book *The African Charter on the Rights and Welfare of the Child* ( Community Law Centre, 2002) 30, makes a critical comperative analysis on the said articles 11(3) and 13(3)(e) on rights of handcapped children (Children with Disabilities). Gose states that the articles comprise socio economic rights for the progressive realisation.

363 Ibid, art 11(3)(a), (b), (c) & ACRWC, 11(3)(d); see also Art 11 of ACRWC and art 28 of the CRC: On the 4 November 2021 during the physcial presentation of this work at the Centre for Human Rights, University of Prestoria, South Africa, Musavengana Chibwana, Senior Child Protection Officer of the African Committee of Experts on the Rights and Welfare of the Child stated that African Children’s Charter and the CRC complement each other.

364 The Vienna Convention on the Law of Treaties (VCLT), 1961, para 3 & art 26.

treaties.<sup>365</sup> Rwanda as one of member states<sup>366</sup> never entered any reservations like other states<sup>367</sup> in the ACRWC at the time of ratification or accession.<sup>368</sup>

### 3.0 RWANDA AND CHILD RIGHTS INSTRUMENTS IN THE REGIONAL ECONOMIC COMMUNITIES

Rwanda is one of the member states<sup>369</sup> of COMESA.<sup>370</sup> COMESA priority areas is trade.<sup>371</sup> However, without education no ‘development of natural and human resources’.<sup>372</sup> In 2015 COMESA adopted the COMESA Social Charter<sup>373</sup>, which promotes human rights.<sup>374</sup> This is an extension of COMESA Treaty on the ‘Scope of

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<sup>365</sup> The CRC (n 4 above) & the ACRWC (n 2 above).

<sup>366</sup> The Centre for Human Rights, Faculty of Law, University of Pretoria, in collaboration with the African Commission, *A Guide to the African human Rights System*, PULP, Pretoria 2021, 76&77.

<sup>367</sup> Viljoen ( n 7 above) 396&397.

<sup>368</sup> Art 48 of the Amended and Revised ACRWC; <[https://au.int/sites/default/files/treaties/36804-treaty-african\\_charter\\_on\\_rights\\_welfare\\_of\\_the\\_child.pdf](https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf)> reaccessed 4 July 2025; Rwanda ratified CRC without any reservation; P Abbott ‘*Rwanda Schooling and the Right to Primary Education*’ *Institute of Policy Analysis and Research-Rwanda*’ (2012) 2; <<https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/9741/Rwanda%20Schooling%20and%20the%20Right%20to%20Education.pdf?sequence=1>> re-accessed 26 April 2025; W Paxton ‘*IPAR Observatory Report: The Rwandan Education and Skills System*’ *Institute of Policy Analysis and Research-Rwanda*’ (2012) 11.

<sup>369</sup> <<https://www.comesa.int/members/>> ‘re-accessed 26 July 2025’.

<sup>370</sup> Ibid.

<sup>371</sup> <<https://www.comesa.int/what-is-comesa/>> ‘re-accessed 26 July 2025’.

<sup>372</sup> Ibid.

<sup>373</sup> <<https://www.comesa.int/gender-social-affairs/>> ‘re-accessed 26 July 2025’.

<sup>374</sup> COMESA Social Charter, 2015 <[https://www.comesa.int/wp-content/uploads/2020/05/ENG\\_COMESA-Social-Charter.pdf](https://www.comesa.int/wp-content/uploads/2020/05/ENG_COMESA-Social-Charter.pdf)> ‘re-accessed 26 July 2025’.

Coperation'.<sup>375</sup> The right to education is mentioned and 'human rights is handled by the governance, peace and security unit in the COMESA Social Charter.'<sup>376</sup>

The COMESA Social Charter is the fundamental instrument that governs child right to education in the sub-region. The Preamble in COMESA Social Charter among the eleven strategic pillars is 'Education Training and Skills development'.<sup>377</sup> Member states are required to work hard in providing education through all forms not limited to 'formal, non-formal, informal distance learning and lifelong learning' for the individual needs in the community.<sup>378</sup> The ACRWC<sup>379</sup> calls on states parties to promote 'education, training and skills development to the full extent possible.'<sup>380</sup> State members should respect all rights and freedoms pertaining to education particularly 'gender parity in access and quality education'<sup>381</sup>; free education from pre-school, technical, vocational, education and training to universities, rehabilitations and removal of all discriminatory tenets.<sup>382</sup>

The question is if COMESA Social Charter has already come into force and whether Rwanda is the member state to the said treaty.<sup>383</sup> The answer is negative.<sup>384</sup>

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375 COMESA Treaty, 2009, art 127(c), art 154(c) & art 155(1)(e).

376 Telephone Interview with DS Raumnauth, COMESA Senior Social Officer, 4 July 2025; darsheene@gmail.com.

377 The COMESA Social Charter, 2015, para 4, (h) of the preamble.

378 Ibid, art XII (1).

379 Ibid (n 9 ).

380 Ibid (n 25 above) art XII(2).

381 Ibid, art XII(2)(a).

382 Ibid, art XII(2)(b), art XII(2)(c), art XII(2)(d), art XII(2)(e), art XII(2)(g) and art XII(2)(h).

383 COM/AUTH/3, October 2016, *Communiqué of the Nineteenth Summit of the COMESA Authority of Heads of State and Government. Theme: "Inclusive and Sustainable Industrialisation."* In October, During the Summit, republics of Madagascar, Malawi and Mauritius were commended for the signing of the COMESA Social Charter and COMESA Member States that have not yet signed the Charter were urged to sign it so that it can enter into force for implementation <<https://www.mfa.go.ke/wp-content/uploads/2016/10/COMESA-Summit-Communique-19.10.16.pdf> > 're-accessed 26 July 2025'.

Member states should resort to necessary measures in the enforcement of ‘compulsory and comprehensive early and primary education.’<sup>385</sup> The COMESA-Intellectual Property Rights<sup>386</sup> provides that ‘health and education services assist in keeping a healthy population and work force; and in equipping our people’.<sup>387</sup> COMESA priority is trade, which cannot move on without education in all levels for children, youth and adults.

Apart from COMESA, Rwanda is a partner state to EAC since July 2007.<sup>388</sup> Rwanda ‘hosts the East African Science and Technology Commission (EASCTC).’<sup>389</sup> EASCTC aims at the promotion and coordination of ‘development, management and application of science and technology in’<sup>390</sup> EAC. This objective cannot be met without education and training for purposes of having work force to run the systems in both EAC and partner states. Therefore, Rwanda embraces the EAC treaty.<sup>391</sup> Chapter sixteen of the law<sup>392</sup> confirms that among other things without ‘education and training’<sup>393</sup> no ‘co-operation in the development of human resources, science and technology’.<sup>394</sup> Education and training is regarded as a machinery wheel for carrying out the objectives of the EAC. Rwanda takes part also into the Inter-

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384 <<https://www.comesa.int/gender-social-affairs/>> ‘re-accessed 26 July 2025’.

385 ‘*COMESA Health Framework*’ (2016) 16 <[https://www.comesa.int/wp-content/uploads/2020/05/ENG\\_COMESA-Health-Framework.pdf](https://www.comesa.int/wp-content/uploads/2020/05/ENG_COMESA-Health-Framework.pdf)> ‘re-accessed 26 July 2025’.

386 ‘*COMESA Policy on Intellectual Property Rights*’ <<http://www.ip-watch.org/weblog/wp-content/uploads/2013/05/Comesa-IP-policy-May-2013.pdf>> ‘re-accessed 26 July 2025’.

387 Ibid, para 16.

388 <<https://www.eac.int/eac-partner-states/rwanda>> ‘accessed 26 July 2025’.

389 Ibid.

390 Ibid.

391 EAC Treaty, 2007 (As amended on 14<sup>th</sup> December 2006 and 20<sup>th</sup> August 2007).

392 Ibid.

393 Ibid, art 102.

394 Ibid, Chapter sixteen, article 5 of EAC treaty’

University Council for East Africa (IUCEA)<sup>395</sup> , the Draft Harmonised Curriculum Structures and Framework for the East African Community<sup>396</sup>, the East African Community Higher Education Area (EACHEA)<sup>397</sup> , the Declaration of the Heads of the State of the East African Community Partner States on the Transformation of the East African Community into a Common Higher Education<sup>398</sup>, Harmonisation of the East African Education Systems and Training Curricula<sup>399</sup> and Innovation Forum<sup>400</sup> African Centres of Excellence (ACE)<sup>401</sup>, discussions, projects and educational programmes.<sup>402</sup> Lastly, Rwanda is a member state<sup>403</sup> of Economic Community of Central African States(ECCAS) formed in 1983.<sup>404</sup> ECCAS is also called

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395 <<https://www.eac.int/eac-institutions>; <https://www.eac.int/press-releases/138-education,-science-technology-news/1041-6th-eac-academia-public-private-partnership-forum-and-exhibition-concludes-in-nairobi>> ‘re-accessed 2 August 2025’.

396 <<https://kicd.ac.ke/wpcontent/uploads/2017/11/DraftHarmonisedCurriculumStructureandFrameworkforPrimaryEducation070814.pdf>> re-accessed 2 August 2025.

397 IO Oanda and F Matiang’i ‘The East African Higher Education Area: A Global or Regional Higher Education Space?’ (2018) *FIRE: Forum for International Research in Education* 56-76.

398 <<https://www.iucea.org/declaration-chea/>> ‘re-accessed 2 August 2025’.

399 <<https://www.eac.int/education>> ‘re-accessed 2 August 2025’; <<https://www.eac.int/eac-institutions>> ‘re-accessed 2 August 2025’; <<https://www.eac.int/eac-sectors>> ‘re-accessed 2 August 2025’; <<https://www.eac.int/education>> ‘re-accessed 2 August 2025’.

400 <<https://www.iucea.org/terms-of-reference-tor-for-developing-a-regional-harmonized-tvet-qualification-framework-and-a-regional-harmonized-occupational-standards-in-at-least-ten-10-priority-areas-of-eastrip/>> ‘re-accessed 2 August 2025’.

401 ‘10th IUCEA Annual Meeting 2019 held in Kigali Rwanda’ <<https://www.iucea.org/terms-of-reference-tor-for-developing-a-regional-harmonized-tvet-qualification-framework-and-a-regional-harmonized-occupational-standards-in-at-least-ten-10-priority-areas-of-eastrip/>> ‘re-accessed 2 August 2025’.

402 <https://www.ace2.iucea.org>> ‘re-accessed 2 August 2025’; (n 74 )above; ‘*The Draft Harmonised Curriculum Structures and Framework for the East African Community: Primary Education*’ (2014) 12.

403 <<https://ceeac-eccas.org/pays-membres/republic-of-rwanda/>> ‘re-accessed 2 August 2025’.

404 <<https://au.int/en/recs/eccas>> ‘re-accessed 2 August 2025’.

Communauté Économique des États de l'Afrique Centrale (CEEAC) in French<sup>405</sup> and active since 1985.<sup>406</sup> Following 1994 genocide, Rwanda pulled out and joined in 2002 as 'a full member.'<sup>407</sup> In 2008 withdrew its membership status from ECCAS with the aim of concentrating with EAC.<sup>408</sup> On August 18, 2018 it returned officially to ECCAS.<sup>409</sup> Education is regulated by ECCAS Directorate of Education, Culture, Development and Technologies which is under the Department of Gender Promotion and Human and Social Development.<sup>410</sup> Education is overseen Commission through the Commissioner of Gender Promotion and Human and Social Development.<sup>411</sup> In March 2021, ECCAS learned some experiences from ECOWAS, however, educational experience was not one of them.<sup>412</sup> Education has a central role to play in the efforts to end conflicts the region.<sup>413</sup>

Generally, one of the objectives of ECCAS while 'promoting and strengthening' a peaceful cooperation' for the realisation of 'a balanced and sustainable economic development' in terms of specific areas including '*education*' for African development

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405 <<https://ceeac-eccas.org/#presentation>> 're-accessed 2 August 2025'.

406 Ibid, note 53.

407 Ibid.

408 <<https://www.pacci.org/economic-community-of-central-african-states-eccas/>> 'accessed 2 August 2021'.

409 Ibid.

410 <<https://ceeac-eccas.org/en/uncategorized/ecowas-and-eccas-advance-inter-regional-cooperation-in-gender-social-affairs-and-health/>> 're-accessed 2 August 2025'.

411 <<https://ceeac-eccas.org/en/#structure>> 're-accessed 2 August 2025'.

412 <<https://ceeac-eccas.org/en/uncategorized/ecowas-and-eccas-advance-inter-regional-cooperation-in-gender-social-affairs-and-health/>> 're-accessed 2 August 2025'..

413 *Report of the Secretary-General: Regional confidence-building measures: activities of the United Nations Standing Advisory Committee on Security Questions in Central Africa*; <<https://undocs.org/pdf?symbol=en/A/74/218>> 're-accessed 2 August 2025'. (UNGA: Seventy-fourth session Item 101 of the provisional agenda\* Review and implementation of the Concluding Document of the Twelfth Special Session of the General Assembly).

common goal.<sup>414</sup> Like both COMESA and EAC treaties, ECCAS treaty emphasizes on ‘Cooperation in Education, Training and Culture.’<sup>415</sup> ECCAS Member states must ‘prepare a common educational policy’<sup>416</sup> which is a big picture that reflects a small picture in terms of educational policies from each member states. This policy shall shape ‘the economic and socio-cultural realities of ECCAS so as to impart skills and knowledge to indigenous people and capable to ‘promote the changes necessary for social progress and development.’<sup>417</sup> Member States should make sure there is the improvement of ‘ the existing educational systems’ by the promotion of ‘training of trainers’ and proper application of approaches and aids<sup>418</sup>; the establishment of new domestic and sub-regional training institutions and reinforce the current systems<sup>419</sup>; preparation of common training plans intended for problems solving progressively and ‘self-sufficiency in skilled personnel’<sup>420</sup>and systematic promotional exchange of informational experiences on educational policy and planning.<sup>421</sup>

#### **4.0 RWANDESE NATIONAL LAWS AND POLICIES ON CHILD RIGHT TO EDUCATION**

This section draws it reference from domestic laws governing child rights, right to education and child rights to education. The Rwanda's Constitution of 2003 with Amendments through 2015, in brief the Rwanda's Constitution, 2003 is ‘the supreme law of the country.’<sup>422</sup> Any legislation, decision or action against this source of laws

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<sup>414</sup> Ibid: ECCAS treaty, art 4, 51(1)(b) & 59(2)(b).

<sup>415</sup> ECCAS treaty, chapter XIII.

<sup>416</sup> Ibid, art 61(1).

<sup>417</sup> Ibid.

<sup>418</sup> Ibid, art 61(2)(a).

<sup>419</sup> Ibid, art 61(2)(b).

<sup>420</sup> Ibid, art 61(2)(c).

<sup>421</sup> Ibid, art 61(2)(d).

<sup>422</sup> Rwanda's Constitution, 2003, art 3.

is void.<sup>423</sup> The ‘constitutionality of legislation’<sup>424</sup> in Rwanda owes its foundation in this Constitution.<sup>425</sup> The section is also on Law National Education in the Republic of Rwanda ,1985<sup>426</sup> ; the Law Relating to Protection of Disabled Persons (herein called Disabled Persons Law)<sup>427</sup>; Law Relating to Rwandan Nationality<sup>428</sup>; Law Regulating Labour in Rwanda<sup>429</sup>; Law on Prevention and Punishment of Gender-Based Violence<sup>430</sup>; Law on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism, 2001<sup>431</sup>; Law of Relating to the Rights and the Protection of the Child, 2011<sup>432</sup>; Law Relating to Rights and Protection of the Child against Violence<sup>433</sup>; and Organic Law Organising Education, 2003.<sup>434</sup> Policies relating to child rights, right to education and child right to education in Rwanda such as Education Sector Policy, 2003, Girls’ Education Policy, 2008; the Education Sector Strategic Plan 2010-2015 and National Integrated Child Rights Policy, 2011 are vital. Through scopic lens, any child rights expert may observe that the signing and ratification of CRC and ACRWC piloted multi enactments in Rwanda.

#### **4.1.1 Rwanda’s Constitutional History and Human Rights**

Any repugnant law to any costitution of the land bears no effects.<sup>435</sup> This paper deals with neither colonialism nor politics, but they are nexus for the advancement of

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423 Ibid.

424 Ibid, a margin of the Constitution.

425 Ibid.

426 Law No. 14/1985 on National Education in the Republic of Rwanda amended by Law No. 48/91 of 25 October 1991.

427 Law No. 01/2007 of 20/01/2007 Relating to Protection of Disabled Persons in General.

428 Law No. 30/2008.

429 Law No. 13/2009.

430 Law No. 59/2008.

431 Law No. 47/2001 promulgated on December 18, 2002.

432 Law No. 54/2011.

433 Law No. 27/2001 promulgated in 2001.

434 Organic Law No. 20/2003.

435 The Rwanda's Constitution (n 108 above).

human rights, profoundly child rights to education. There were no human rights during the reign of the first President, Gregoire Kayibanda in 1962-1973.<sup>436</sup>The regime was a creature of discriminative colonial rule and divided Rwandan people<sup>437</sup> by continual regarding Tutsi as foreign tribe.<sup>438</sup> Persistently, favours were accorded to both Tutsi monarch and Roman Catholic church.<sup>439</sup> The initiated coup d'etat mandate of President Juvenal Habyarimana in 1973-1994 stopped the Tutsi monarch and regarded them as citizens.<sup>440</sup> Thus, the growth of opposition and refugee status among both Tutsi and Hutu was inevitable in both regimes.<sup>441</sup> Notably, whether the Rwandan Constitution contained explicit Bill of Rights or not, no implementation of human rights was realised in 1962-1994. The Rwandan Constitution, 1962 written without Rwandese legal experts was to be replaced by the Rwandan Constitution, 1978.<sup>442</sup> This Constitution came into force after 5 years and scholars argue that Rwanda was without the Constitution.<sup>443</sup> The human rights section existed but stipulations such as judicial review were not incorporated.<sup>444</sup> As a result of an alignment of 'Rwandans in the diaspora mostly that formed by the Rwandese Patriotic Front (RPF)' and the opposition, Rwanda broke into conflict in 1990<sup>445</sup> and led to the adoption of Rwandan Constitution of 1991.<sup>446</sup> The war lasted for 4 years with the genocide that costed 1 million lives of people for 3 months

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436 PY Ankut 'The Role of Constitution-Building Processes in Democratization: Case Study Rwanda' (2005) *International IDEA Democracy-building & Conflict Management* 6.

437 Ankut (n 122 above) 5.

438 Ibid, 6.

439 Ibid.

440 Ibid.

441 Ibid; the second regime favored the President and his family members.

442 Ibid, 7.

443 Ibid.

444 Ibid,8.

445 Ibid.

446 Ibid.

highly Tutsi who were pro Arusha Accords or Peace agreement.<sup>447</sup> The genocide was committed by Presidential guard and *interahamwe* ethnic militia on April 6, 1994.<sup>448</sup> No any child could go to school during bloodsheds and many children and women were killed via various ways. In July 1994, RPF the current ideological ruling political party seized the power and stopped genocide. Rwandan Constitution of 1991, the series of Arusha Peace Accords and other laws led to the adoption of the current Constitution of 2003.<sup>449</sup> Endeavours to absolute end of human rights violations were spearheaded by this Constitution<sup>450</sup> and it incorporated many institutions like ‘the National Human Rights Commission aiming at a human rights state<sup>451</sup> the National Unity and Reconciliation Commission (NURC)<sup>452</sup> and a commission for the fight against the genocide ideology.’<sup>453</sup> All in all the Rwanda’s Constitution and right to education have passed through several developments and with scrutiny, one could not that Rwanda’s Constitution, 2003 and other laws such as the Suppression and Punishment of the Crime of Discrimination and Sectarianism<sup>454</sup>, the Law Relating to Rights and Protection of the Child against Violence<sup>455</sup>, the Organic Law Organising Education<sup>456</sup>, were enacted to curb discrimination and division in the education sectors and end genocide too. It is imperative to note that much as the genocide was one of main factors led to delay in ratifying the ACRWC.<sup>457</sup> This paper contributes

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447 Ibid

448 Ibid.

449 Ibid; EW Warden ‘Why Waning Wars Wax; a Relook at the Failure of Arusha Peace Accord, the Peace Agreement-Implementation Gap and the Onset of the Rwandan Genocide’ (2016) *Journal of Global Peace and Conflict* 34.

450 Ankut (n 85) 12&27.

451 Ankut (n 98) 27; Rwanda’s Constitution, 2003, art 177.

452 Rwanda’s Constitution, 2003, art 178.

453 Ibid, art 179.

454 Law No. 47/2001 (n 117 above).

455 Law No. 27/2001 (n 119 above).

456 Organic Law No. 20/2003 (n 120 above).

457 Viljoen (n 7 above).

that both outbreaks of civil wars in Rwanda (1990-1994) and Sierra Leone (1991-2002)<sup>458</sup> paralysed the move towards the ratification and implementation of ACRWC in Africa. The same factor also impeded the growth of the African Court on Human and Peoples' Rights.<sup>459</sup>

#### 4.1.2 The Nature of Education Systems from Colonial Era to the Present (Historical development of education) in Rwanda

From the historical point of view with the Berlin Conference in 1884-1885, Rwanda was under the German colonial rule. As a result of World War I in 1914-1918, this colony was entrusted to Belgium which ruled from 1919 to 1962. The intention of education was to facilitate colonial rule. The Roman Catholic set mission schools that preferred *Tutsi* over the *Hutu*.<sup>460</sup> This Church had 'special schools' for preparing Tutsi as future country leaders and public schools trained the Tutsi as colonial rule supporting staff.<sup>461</sup> Secondary schools were only for 'an aristocratic class destined to rule.'<sup>462</sup> The later were recruited for menial works, the former were trained for 'political, administrative, cultural and economic monopoly on power.'<sup>463</sup> German and Belgian colonial textbooks stressed on discrimination and division.<sup>464</sup> Intellectuals based on physical appearance and the Hutu were not brilliant<sup>465</sup> and identity cards were provided that showed one's ethnic group. No big difference between 1884-1962 and 1962-1973, Tutsi were still regarded as alien residents<sup>466</sup>; difference was that

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458 Read cases of *The Prosecutor v Jean Paul Akayesu*, Case No ICTR-96-4-T and *Prosecutor v Charles Ghankay Taylor*, Case No SCSL-03-01-T to understand better these wars.

459 Viljoen (n 143 above) 410.

460 KD Bush and D Saltarelli (eds) *The Two Faces of Education in Ethnic Conflict: Towards A Peacebuilding Education for Children United Nations Children's Fund Innocenti Research Centre* (2000) 10.

461 Bush and Saltarelli (n 108 above).

462 Ibid.

463 Ibid.

464 Ibid.

465 Ibid.

466 Ankut (n 98 above) 5.

Rwanda was ruled by an African President for the first time<sup>467</sup> and his family members and closely friends' family members noting an African extended family benefited from the educational system.<sup>468</sup> In 1973 -1994 during President Habyarimana's regime, the only notable laws governing education were to begin with, the National Education in the Republic of Rwanda, 1985 amended in 1991.<sup>469</sup> That regime regarded Tutsi as natives and need for 'organisation of primary, integrated rural and vocation, and secondary education.'<sup>470</sup> The law provided that primary education must be free and compulsory to all children without discrimination.<sup>471</sup> The duration for primary education was to be six years.<sup>472</sup> Organic Law on National Education in the Republic of Rwanda, 1985<sup>473</sup> aims at developing children moral sense and intellectual physical capabilities and preparing them for the role as adults and as citizens.<sup>474</sup> The said laws and orders were not implemented and that why the outbreak of wars in 1990 to 1994. '300,000 children were killed and '66% of teachers fled or were killed. No schooling during the wars until July 1994 when RPF took over.<sup>475</sup> David Moshman argues that there was complete closure of schools; schools became battlefields and destructions of infrastructures around 1990-1994.<sup>476</sup> He reiterates that 75% of teachers killed, fled or charged on genocide.<sup>477</sup> The

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467 Ibid.

468 Ibid.

469 Law No. 14 (n 112 above).

470 P Abbott and F Sapsford 'Rwandan Public Policy Observatory Report: Legal and Policy Framework for Children's Rights in Rwanda' (2012) *Institute of Policy Analysis and Research-Rwanda* 2.

471 Law No. 14, art 2.

472 Ibid, art 40.

473 Law No. 01/1985.

474 Ibid, art 2; Ibid, art 11; Abbott and Sapsford (n 118 above) 13 and Presidential Order No. 509/1985, art 7.

475 Bush and Saltarelli ( n 109 above), viii on the introduction.

476 D Moshman 'Identity, history, and education in Rwanda: Reflections on the 2014 Nobel Peace Prize' (2015) 44 *Child Abuse & Neglect* 6.

477 Moshman (n 124 above).

educational structure is marked with educational transitions and reforms as a result of new RPF government in July 1994<sup>478</sup> that decreed that all Rwandans are Rwandan, no identity cards portraying that one is a *Hutu*, *Tutsi* or *Twa*.<sup>479</sup> Schools resumed in September 1994.<sup>480</sup> The Tanzanian experience is that no one asks one's tribe or ethnicity during registrations in primary, secondary or high learning institutions and the same applies in employment.<sup>481</sup> Many scholars wonder as to why endless division in the hearts of some people who speak similar natural language<sup>482</sup> 'Kinyarwanda' or 'Kirundi' for Burundi<sup>483</sup> not as in Tanzania where 'Swahili' language was not common to all was and is used for unification and unity in various ways.

## 5.0 THE IMPLEMENTATION OF AFRICAN CHILDREN'S CHARTER IN RWANDA

It is already noted that timing for ratification of ACRWC, the Rwanda's Constitution, 2003 and the enactments of most legislation relating to child rights and child right to education were around 2003. This portion addresses as to what extent the African Children's Charter has been implemented in the Rwandese or Rwandan laws.

### 5.1 The Ambits of the Law and Child Rights to Education

The Rwanda's Constitution of 2003 with Amendments through 2015 protects the right to education: all Rwandans including children are entitled to the right to education.<sup>484</sup> Most of the contents of Article 11 of ACRWC are reciprocated in the Rwanda's Constitution, 2003 and the National Education under articles 3, 25 and 47.

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478 Japan International Cooperation Agency (JICA) 'Basic Education Sector Analysis Report- Rwanda' (2012) *Japan International Cooperation Agency International Development Center of Japan Inc* 4.

479 Moshman (n 124 above).

480 Ibid.

481 (Author's emphasis).

482 Moshman (n 125 above) 2.

483 Bush and Saltarelli (n 123 above) 10.

484 The Rwanda's Constitution (n 108 above), art 20; ACRWC (n 10 above).

## 5.2 Legal Salient Features and Child Rights in Rwanda

This area describes fundamental principles pertaining to the child rights as provided for by the African Charter on the Rights and Welfare of the Child.

### 5.2.1 The Best Interests of Child

This principle requires that in all life aspects or solutions including ‘judicial and administrative proceedings’ relating to children, the first consideration ‘shall be in the best interests of the child.’<sup>485</sup> The Law Relating to the Rights and the Protection of the interests of the child.<sup>486</sup> This is the fundamental complement to the Organic Law Organising Education, 2003<sup>487</sup> under article 6 comprises identical part of the ACRWC.<sup>488</sup> The law states everything concerning children must be dealt by Public or private social welfare institutions, *schools*, legal guardians.<sup>489</sup> In *Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of children of Nubian Descent in Kenya) v Kenya*, the African Committee of Experts on the Rights and Welfare of the Child (ACRWC) ‘held that was not in the best interest of Nubian children to wait to turn 18 years of age before they could apply for Kenyan citizenship.’<sup>490</sup>

### 5.2.2 Equality and Non Discrimination

The legal requirement<sup>491</sup> is that all children are supposed to enjoy all rights and freedoms on equal basis without discrimination in Rwanda.<sup>492</sup> Every child is

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<sup>485</sup> ACRWC, art 4: d’Orsi (n 136 below) 300.

<sup>486</sup> Law No. 54/2011.

<sup>487</sup> Organic Law No. 20/2003.

<sup>488</sup> C d’Orsi ‘Legal protection of refugee children in Africa: positive aspects and shortcomings’ in *Human Rights Yearbook* (2019) 303.

<sup>489</sup> The Centre for Human Rights, Faculty of Law, University of Pretoria, in collaboration with the African Commission, *A Guide to the African human Rights System* (2021) 78.

<sup>490</sup> Ibid 90.

<sup>491</sup> Law No. 54/2011, Article 3(7) of the Law Relating to the Rights and the Protection of the Child, 2011 and (n 193 above), art 54 on disability rights; art 55.

<sup>492</sup> The ACRWC, art 3.

guaranteed to enjoy all rights and freedoms such as right to education regardless of 'child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'<sup>493</sup> The constitutional provision is very extensive and intensive<sup>494</sup> confirmed the substance of article 3 of the ACRWC on equality and non-discrimination.<sup>495</sup> Other laws against discrimination in education sectors include but not limited to Organising Education, 2003<sup>496</sup>; Suppression and Punishment of the Crime of Discrimination and Sectarianism<sup>497</sup>; Law Relating to Protection of Disabled Persons<sup>498</sup>; the Law Relating to Rights and Protection of the Child against Violence<sup>499</sup>; the Law on Prevention and Punishment of Gender- Based Violence.<sup>500</sup>

### 5.2.3 Survival and Development

Article 12 of the Constitution defends the principle of survival and development. It states that 'Everyone has the right to life and No one shall be arbitrarily deprived of life.' The Educational Law<sup>501</sup> emphasises the same position that 'the child enjoys right to life and no one can take it away even deliberate abortion is limited and punished by the law.'<sup>502</sup> Rwanda laws are in line with the ACRWC.<sup>503</sup> The law is silent on capital punishment or death penalty<sup>504</sup> but it states that at the age of 14 years old

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493 Ibid.

494 The Rwanda's Constitution 2003, art 16.

495 Ibid; art 5 on births; art 54 on disability rights; art 55 on the issue of HIV/AIDS.

496 Organic Law, art 2(a) &36(e).

497 Law No. 47/2001.

498 Law No. 01/2007(n 113 above) art 27 and the Criminal Code.

499 Law No. 27/2001 .

500 Law No. 27/2001, art 9; no discrimination against pregnant girls; Rwanda ratified the Convention on the Elimination of All Forms of Discrimination against Women, 1980 by the Presidential Order No. 431/1981.

501 Law No. 27/2001.

502 As above, art 8.

503 (n 150 above), art 12.

504 *International Pen and Others (Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212  
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one is criminally liable.<sup>505</sup>

#### 5.2.4 Inclusion and Participation

This principle rests on the ground that other special groups in one way or the other without being included in the ambit of the law cannot take part or participate in the enjoyment of rights and freedoms. Under article 15 and 16 of the Rwandan Constitution<sup>506</sup> an inference can be drawn to protect children with disabilities<sup>507</sup>, refugee children<sup>508</sup> and girl children. <sup>509</sup> in the education sphere. Thus, Rwanda has implemented article 11(3) on the advantaged children, article 13 on the handicapped children and article 23 of the ACRWC.<sup>510</sup> Rwanda uses a vague language like handicapped, disabled instead of children with disabilities.

### 5.3 The Basic and Secondary School Education After Post Genocide Period to the Present

Education affairs in Rwanda are governed by by the Ministry of Education (MINEDUC).<sup>511</sup> The Rwandan government apart from other data submitted during the presentation of the Period Report to the African Commission on Human and Peoples' Rights<sup>512</sup> in February 2003 noted in its report that: Regardless of persistent shortage of qualified teachers and shortage of teaching materials at the primary level,

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(AHRLR 1998).

<sup>505</sup> As above, Cap. VII, art 58-64; children in conflict with the law.

<sup>506</sup> (n 205 above).

<sup>507</sup> (n 193 above), art 54.

<sup>508</sup> Ibid (n 226 above), art 49; Rwanda ratified the Refugee Convention, 1951 by the Presidential Order No. 29/1979.

<sup>509</sup> (n 116 & 213 above).

<sup>510</sup> (n 1 above), art 18(4).

<sup>511</sup> <<https://www.mineduc.gov.rw>> 'accessed 19 November 2024'. 'Education Budget Brief: Investing in child education in Rwanda 2019/2020' United Nations Children's Fund (UNICEF) Rwanda (2019) 4 <<https://www.unicef.org/rwanda/media/1911/file/Education-Budget-Brief-2019-2020.pdf>> 'accessed 2 July 2025'.

<sup>512</sup> DOC/OS/(XXXVI) 373b, Rwandan Republic Ministry of Justice and Institutional Relations 'Seventh Periodic Report of Rwanda to The African Commission on Human and Peoples' Rights 1999 – 2002' (2003) 48.

Rwanda progressed from 46% in 1998 to 81% in February 2001. Also, the school drop-out rate was constantly diminishing from 24% in 1998 to 12.4% in 2001/2002.<sup>513</sup> The educational statistics in both primary and secondary schools for the academic years from 1996/97 to 2001/02 which is period before the adoption of Rwanda's Constitution, 2003 show how Rwanda undertook drastic changes prior the implementation of the ACRWC.<sup>514</sup> Also school children were imparted with 'knowledge in human rights and international laws.'<sup>515</sup> After analysing and seeing that the results were low, the government had to reforms the education system.

The Nine Years Basic Education Policy (9YBE) began in 2006.<sup>516</sup> The free and compulsory basic education which was started in 2003 persisted and it was extended from 6 years covering Primary 1 (P1) to Primary 6 (P6)<sup>517</sup> and the age of the child was between 7 to 12 years to encompassing 9 years covering Primary 1 (P1) to Senior 3 (S3) (school age 7 to 15 years old).<sup>518</sup> The basic education was made free of charge for the academic year in 2003/04 and the free 9YBE started being implemented from 2007.<sup>519</sup> The description of secondary school, it begins within Senior 1 (S1) to Senior 6 (S6).<sup>520</sup> The secondary education is divided into two levels such as 'the lower secondary education' comprising senior of S1 to S3 and the 'upper

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513 Ibid.

514 <<https://www.mineduc.gov.rw>> 're-accessed 19 November 2024'.

515 Japan International Cooperation Agency (JICA) 'Basic Education Sector Analysis Report- Rwanda' (2012) *Japan International Cooperation Agency International Development Center of Japan Inc* 7&8 and Romain Mrenzi *Successes and Challenges in Education Success and Challenges of Education and Development of National Science and Strategy* (2005) *Presentation to 5th Annual Government of Rwanda Development Partners Meeting 1st and 2nd December 2005* 47.

516 Ibid.

517 Ibid.

518 Ibid.

519 Ibid; Law No. 54/2011, art 3 & 47.

520 Rwandan Republic Ministry of Justice and Institutional Relations '*Seventh Periodic Report of Rwanda to The African Commission on Human and Peoples' Rights 1999 – 2002*' (2003) 49.

secondary education' including S4 to S6 (the age of the child is 16 to 18).<sup>521</sup>

Therefore, after a critical analysis of secondary materials, this article gives a proper explanation for the better understanding of 9YBE:

- i. Primary school or education (P1-P6) takes six (06) years and the schooling age is 7-12 years old
- ii. Lower Secondary school or education (S1-S3) takes three (03) years and the schooling age is 13-15 years old
- iii. The Primary Educational Level to Lower Secondary Level (P1-S3) takes nine (09) years and the schooling age is 7 -15 years old
- iv. The six (06) year primary basic education was made free in the academic year of 2003/04<sup>522</sup>. This is similar to Universal Primary Education (UPE) and also Education For All (EFA).<sup>523</sup>
- v. The nine (09) year basic education (9YBE) became operational in practice in 2007. This concerned P1-S3. This seems to the implementation of African Children's Charter.<sup>524</sup>

There were steps for the eradication of 'gender disparity in education' and affirmative actions were performed in order to make sure that both girls and boys access quality education on equal and equitable basis without any distinction.<sup>525</sup> All hindrances towards enjoyment of education should be eradicated. Gender parity should be a focus in education. Affirmative action which entail positive discrimination for thematic measures in life spheres were encouraged by policy in political, economic and education sector.<sup>526</sup> Preveouly, girls had been not doing well in education, according to the this Gender Policy, MINEDUC reported that the performances in

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<sup>521</sup> Ibid.

<sup>522</sup> Rwanda implemented the ACRWC, art 11(3)(a) and both Organic Law No. 20/2003 (n 120 above), art 35 and Education Sector Policy, 2003.

<sup>523</sup> Girls' Education Policy, 2008 7.

<sup>524</sup> As above, art 11(3)(a).

<sup>525</sup> Girls' Education Policy, 4.

<sup>526</sup> Ibid.

2006 were: 62.09% for boys and 37.91% for girls in Primary schools; 68.3% for boys and 31.7% for girls in Primary schools and in higher learning it was horrific just 26% for undergraduates.<sup>527</sup> Also, the same policy submits that in the Economic Development and Poverty Reduction Strategy (EDPRS) in 2006 gender parity was higher for girls (85) than for boys (83). In terms of classrooms technically called 'learning environment' and materials were not sufficient but re-election of President Kagame in 2010 that had pledged to advance the education systems for the 12YBE when he would with the elections.<sup>528</sup> In 2012, 12YBE was launched. 12YBE through the EDPRS led to the great achievements in all levels especially access to education of Science and technology and ICT.<sup>529</sup>

2YBE was supposed to be implemented countrywide and pupils and students were required to sit for obligatory examinations at the end of studies of P6 and S3530 and graduates were given leaving certificates after completion of schools.<sup>531</sup> Examinations were marked for grades and winners were placed in higher level of education.<sup>532</sup> The upper secondary education is categories into 'General Secondary; Teaching Training College (TTC) and Technical and Vocational Education and Training (TVET).'<sup>533</sup> This paper analyses the education systems as longer as the beneficiaries of the training or instruction is a child. Depending on the education system, it is possible to have minors schooling in the universities. The Launching of both 9YBE and 12YBE is the basis of the growth of standards and demand of inputs in the education systems. The learning environment national average of the number of pupils or students per classroom for primary schools was 81 and for 42 for secondary school. As registration increases, various infrastructures (human and material resources, water supply, electronics, electricity) are inevitable to keep pace with the number children per

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<sup>527</sup> Ibid.

<sup>528</sup> JICA (n 126 above) 8.

<sup>529</sup> Ibid.

<sup>530</sup> Ibid.

<sup>531</sup> Ibid.

<sup>532</sup> JICA (n 176 above) 28.

<sup>533</sup> Ibid.

classroom.<sup>534</sup> One may think some factors do not apply to education system, however even children need Internets to accomplish their home works. All in all, goes without saying that the government through the MINEDUC achieved to the great extent Universal Primary Education consider the enrollment in primary schools was '95.4% in 2010 to 98.3% in 2018.'<sup>535</sup> The World Bank in 2012, revealed that this country was the first one with 98.7% net enrollment out 10 countries in Africa (2010).<sup>536</sup> However, the registration in secondary education still varies and not very high to be satisfactory. The registration increased from '18.3% in 2011 to 27.2% in 2018.'<sup>537</sup> The question of dropout is uncertain and difficult to settle. In 2013 it was 14.7% declined to 6.3% in 2016/17 and later increased to 7.1% in 2017/18.

## 6.0 RECOMMENDATIONS AND CONCLUSION

This paper discussed to what extent Rwanda implements the child right to education as provided in the ACRWC and others treaties in the RECs. The article analysed the historical backdrops and laws during colonial epoch in 1884-1962, post-colonial regime in 1962-1994 and the post genocide government in 1994 to the present in relation to child right to education. However, some challenges came in the course of discussion and this part points out such concerns, gives solutions prior the last conclusion. Ratification and coming into force of the COMESA Social Charter. Let Rwanda take a step to sign and ratify this treaty.<sup>538</sup> Difficult in controlling dropouts from schools. Despite all MINEDUC's initiatives to eradicate dropouts but still continues in schools.

The government and stake holders should persist in bringing awareness. Acquisition of wealth for the shorttime and through short cuts. Some students prefer more job than

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<sup>534</sup> Ibid.

<sup>535</sup> A Dufitumukiza, E Ntakarutimana, E Niyibizi and J Mukanziza 'The nine year basic education policy and secondary school internal efficiency: A case study in Rwanda' (2020) 9 *International Journal of Research in Business and Social Science* 204.

<sup>536</sup> JICA (n 180)<sup>56</sup>.

<sup>537</sup> Dufitumukiza *et al* (n 183) above).

<sup>538</sup> The COMESA Social Charter.

schooling.<sup>539</sup> Persistence dissemination of knowledge, skills and awareness by the governmental sectors, CSO and other stake holders should continue. Mashrooming of child laws relating to child right to education. Rwandan laws should be consolidated. A Tanzanian legislation, the Law of the Child Act, 2009 is an example that consolidated vast child laws. The question of learning environment. <sup>540</sup> However, ‘new teachers’ challenges in teaching<sup>541</sup> in relation to gender and ICT especially to new teachers during the first year of teaching career should be treated. Increase of the educational capitation grant and budgets is encouraged.<sup>542</sup> All in all, Rwanda’s education systems are revolutionary and commendable and so far Rwanda has implemented the ACRWC to the great extent on child right to education. Considering the status of reporting on the A ACRWC, Rwanda is one of the few countries that have submitted Periodic Reports.<sup>543</sup>

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<sup>539</sup> A Dufitumukiza *et al* (n 185 above)206.

<sup>540</sup> UNESCO ‘Improving quality and relevance of education through mobile learning in Rwanda: A promise to deliver ‘ (2019) *Case Study By The UNESCO-Fazheng project on the best practices in mobile learning 2*.

<sup>541</sup> Needs Assessment Study Report: Leading, Teaching and Learning Together in Secondary Education (2017-2021) (2018) 7 and 12.

<sup>542</sup> The Sustaining the Momentum Rwanda’s 2019/20 National Budget Bulletin (2019) 16 &17. The budget for the education sector was second comprising 273 billion Rwadese Francs.

<sup>543</sup> <<https://web.facebook.com/acerwc>> re-accessed 19 November 2024.

# FUNDAMENTAL PROCEDURAL STEPS IN COURT-ANNEXED MEDIATION IN TANZANIA: AN APPRAISAL OF THE CONTEMPORARY DEVELOPMENTS IN THE LAW AND PRACTICE

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## **Abstract**

*Court-annexed mediation was introduced in the First Schedule to the Civil Procedure Code (CPC) in 1994, but without procedural elaborations. It was not until 2019 when the First Schedule to the CPC was amended to provide for, inter alia, further procedural elaborations. Moreover, in 2024, the Chief Justice adopted the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules to provide for the appointment of non-judicial mediators, their remuneration and disciplinary conducts. Additionally, in 2024, the Judiciary of Tanzania adopted the Court Annexed Mediation Guidelines ‘to assist parties and mediators in the effective, proper and expeditious conduct of mediation proceedings’ in ‘all civil cases instituted in the High Court, courts of resident magistrate and district courts.’*

*As this article notes, unlike the 1994 amendments to the CPC, the 2019 and 2024 amendments have brought about several progressive procedural steps and developments in court-annexed mediation. Apart from introducing the mandatory requirement to refer a civil suit to, inter alia, mediation before full trial commences; these amendments provide for the recognition, appointment, remuneration and disciplinary conduct of non-judicial mediators in court-annexed mediation. As well as making it mandatory for the parties to appoint a mediator (and where they fail to do so, the court has power to appoint a default mediator on their behalf), these amendments have introduced the requirement for parties to mediation to have the authority to settle the disputes as well as emphasising the need for confidentiality in court-annexed mediation proceedings. Additionally, these developments have specified the duration of court-annexed mediation and elaborated the duty of the mediator to remit the case back to the trial court after completion of mediation for onward recognition of a mediation agreement as a decree of the court or proceeding to full trial where mediation has failed.*

*Despite these elaborate and progressive procedural steps, there are numerous challenges constraining court-annexed mediation, including confusion amongst practitioners as to when and how a given ADR mechanism is to be resorted to and conducted; eroding the principle of confidentiality of mediation; lack of ADR curricular for higher learning institutions. Other challenges include legal practitioners' incompetence and reluctance to utilise court-annexed mediation; lack of specialized training programmes before accrediting ADR practitioners; lack of continuing professional development (CPD) programme for ADR practitioners; and lack of public awareness on ADR. Therefore, this article recommends that concerned and relevant institutions (including the Judiciary) should undertake specific interventions to mitigate these challenges in order to ensure that ADR and court-annexed mediation achieve their intended objectives – i.e., settling disputes amicably, expediently, effectively and with less costs while preserving the harmonious relationship of the parties to relevant disputes.*

**Key words**

*Court-annexed mediation – procedural steps – Civil Procedure Code – challenges facing court-annexed mediation – mitigation factors.*

## 1.0 General Overview

Court-annexed mediation was introduced in Tanzania's civil justice system since 1994<sup>544</sup> without procedural elaborations. It was not until 2019 and 2024 when the First Schedule to the Civil Procedure Code<sup>545</sup> ('the CPC') was amended to provide for, *inter alia*, further procedural elaborations.<sup>546</sup> In order to further recognize and appoint non-judicial officers to preside over court-annexed mediation, in 2024, the Chief Justice adopted the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).<sup>547</sup> Moreover, in 2024, the Judiciary of Tanzania adopted the Court Annexed Mediation Guidelines 'to assist parties and mediators in the effective, proper and expeditious conduct of mediation proceedings' in 'all civil cases instituted in the High Court, courts of resident magistrate and district courts.'<sup>548</sup>

Unlike the 1994 amendments to the CPC, the 2019 and 2024 amendments have brought about several procedural steps and developments that now form key features of the Tanzanian civil justice system. They include: firstly, the mandatory requirement to refer a civil suit to, *inter alia*, mediation before full trial commences;<sup>549</sup> secondly, recognition, appointment, remuneration and disciplinary conduct of non-judicial mediators in court-annexed mediation;<sup>550</sup> and, thirdly, the mandatory requirement

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544 Vide the Civil Procedure Code (Amendment of Schedules) Rules (G.N. No. 422 of 1994).

545 The Civil Procedure Code (Cap. 33 R.E. 2023).

546 Vide the Civil Procedure Code (Amendment of the First Schedule) Rules (G.N. No. 381 of 2019) and the Civil Procedure Code (Amendment of the First Schedule) Rules (G.N. No. 821 of 2024).

547 the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (G.N. No. 820 of 2024).

548 Judiciary of Tanzania, *Court Annexed Mediation Guidelines* (Dar es Salaam: Judiciary of Tanzania, 2024), p. 1.

549 Order VIIIIC Rule 24 of the CPC.

550 This was done through the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).

for the parties to appoint a mediator<sup>551</sup> (and where they fail to do so, the court has power to appoint a mediator on their behalf).<sup>552</sup> Fourthly, these developments have clearly stipulated the qualifications of mediators in court-annexed mediation.<sup>553</sup>

Fifthly, these developments have provided clarification about the purpose and nature of mediation.<sup>554</sup> Sixthly, they have brought about provisions relating to attendance,<sup>555</sup> non-attendance of parties at mediation<sup>556</sup> and remedies for non-attendance.<sup>557</sup> Seventhly, they have introduced requirement for parties to mediation to have the authority to settle the disputes.<sup>558</sup> Eighthly, they have emphasised the need for confidentiality in court-annexed mediation proceedings.<sup>559</sup> Ninthly, these developments have specified the duration of court-annexed mediation;<sup>560</sup> and, tenthly, they have laid down the duty of the mediator to remit the case back to the trial court after completion or failure of mediation.<sup>561</sup>

Despite these elaborate and progressive procedural steps in court-annexed mediation, this article notes that practitioners (both mediators and advocates) still have not mastered them. This has been leading to a number of further challenges, including the inherent confusion amongst practitioners as to when and how a given ADR mechanism is to be resorted to and conducted; eroding the principle of confidentiality of mediation; and lack of ADR curricular for higher learning institutions. Other

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<sup>551</sup> Order VIII C Rule 25(1) of the CPC.

<sup>552</sup> Ibid, Order VIII C Rule 25(2).

<sup>553</sup> Ibid, Order VIII C Rule 25(6).

<sup>554</sup> Ibid, Order VIII C Rule 26.

<sup>555</sup> Ibid, Order VIII C Rule 27.

<sup>556</sup> Ibid, Order VIII C Rule 29.

<sup>557</sup> Ibid, Order VIII C Rule 30.

<sup>558</sup> Ibid, Order VIII C Rule 28.

<sup>559</sup> Ibid, Order VIII C Rule 31.

<sup>560</sup> Ibid, Order VIII C Rule 32.

<sup>561</sup> Ibid, Order VIII C Rule 34.

challenges include legal practitioners' incompetence and reluctance to utilise court-annexed mediation; lack of specialized training programmes before accrediting ADR Practitioners; lack of a continuing professional development (CPD) programme for ADR Practitioners; and lack of public awareness on ADR, in general, and court-annexed mediation, in particular.

Therefore, this article contends that concerned and relevant institutions (including the Judiciary) should undertake specific interventions to mitigate these challenges. This will ensure that ADR and court-annexed mediation achieve their intended objectives – settling disputes amicably, expediently, effectively and with less costs while preserving the harmonious relationship of the parties to civil disputes.

## **2.0 Preliminary Steps in Court-Annexed Mediation Proceedings**

Before the court-annexed mediation process commences, the following preliminary steps are undertaken: (i) initial appearance of the parties for necessary court orders and/or directions; (ii) first pre-trial conference in relation to mediation; and (iii) court's order referring a civil action to the mediation process. These preliminary steps in court-annexed mediation are canvassed below.

### **2.1 Initial Appearance of the Parties for Necessary Orders and Directions**

Within fourteen days after the completion of pleadings the court is required to direct the parties to appear before it for (necessary) orders or directions<sup>562</sup> in relation to 'any interim applications' or 'other preliminary matters which the parties have raised or intend to raise.'<sup>563</sup> The aim of this procedural step is to ensure 'just, expeditious, and economical disposal of the suit.'<sup>564</sup> At this session, the court may hear the parties on any interim application or preliminary matters raised; and, within fourteen days after

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<sup>562</sup> In terms of Order VIII B Rule 17(3) of the CPC, appearance at this session is mandatory. Where a party fails to appear at this session, the court may: (i) dismiss the suit; (ii) strike out the defence or counterclaim, as the case may be; or (iii) make such other order as it 'considers just.' However, such order or direction may be set aside or varied by the court (on application made within 30 days in terms of Order VIII B Rule 17(4) of the CPC) on such terms as the court considers just.

<sup>563</sup> Ibid, Order VIII B Rule 17(1).

<sup>564</sup> Ibid.

such hearing, the court should deliver its ruling on any matter, which may include making any such order as to costs ‘as it considers just.’<sup>565</sup>

## 2.2 The First Pre-Trial Conference in Relation to Mediation

Within a period of twenty-one days after the conclusion of pleadings, a presiding judge/magistrate should hold and preside over the first pre-trial settlement and scheduling conference<sup>566</sup> (‘the first pre-trial conference’) where the parties/their recognised agents, or their advocates, are required to appear.<sup>567</sup> The conference is held for the purpose of, *inter alia*, resolving the case ‘through the use of procedures for alternative dispute resolution such as negotiation, conciliation, mediation, arbitration or such other procedures not involving a trial.’<sup>568</sup> So, it is at this session where the court, in consultation with the parties, determines the appropriate ADR method through which the parties will amicably and expeditiously resolve their dispute.

## 2.3 Court’s Mandatory Obligation to Refer Civil Suits to Mediation

As noted above, by virtue of the 1994, 2019 and 2024 amendments to the CPC, it is now mandatory<sup>569</sup> for the court to refer “every civil action” to negotiation,<sup>570</sup> conciliation,<sup>571</sup> mediation<sup>572</sup> or arbitration,<sup>573</sup> or a ‘similar alternative procedure’,

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<sup>565</sup> Ibid, Order VIII B Rule 17(2).

<sup>566</sup> Ibid, Order VIII B Rule 22(1).

<sup>567</sup> Ibid.

<sup>568</sup> Ibid.

<sup>569</sup> Ibid, Order VIII C rule 24.

<sup>570</sup> Some procedure for court-annexed negotiation and conciliation is set out in Rules 36-39 of Order VIII C of the CPC.

<sup>571</sup> Ibid.

<sup>572</sup> Elaborate procedure for court-annexed mediation is set out in Rules 25-34 of Order VIII C of the CPC.

<sup>573</sup> Elaborate procedure for arbitration conducted under the auspices of the court is contained in Rule 35 of Order VIII C of, and in the Second Schedule to, the CPC. As a distinct branch of civil litigation, arbitration is generally governed by the Arbitration

before proceeding to trial. Therefore, during the first pre-trial conference the court, in consultation with the parties, makes an order referring a dispute to mediation where it considers this to be the most ADR mode to be applied in the circumstances of the case.

### **3.0 Commencement of the Court-Annexed Mediation Process**

Before the 2019 and 2024 Amendments to the CPC, the CPC did not provide for the procedure applicable in mediation processes conducted under the auspices of the court; rather, such procedure was contained in the *Manual for Mediation Training in Tanzania*. But, with these amendments, now there is an elaborate procedure regulating court-annexed mediation proceedings, which should be applied in tandem with universal procedural steps applicable in mediation processes.<sup>574</sup> In addition, the Court Annexed Mediation Guidelines (2024) have been adopted ‘to assist parties and mediators in the effective, proper and expeditious conduct of mediation proceedings and other connected purposes.’<sup>575</sup>

#### **3.1 Appointment of the Mediator**

In particular, the first step towards the commencement of court-annexed mediation proceedings is the appointment of a mediator. As a general rule, a mediator is appointed by the parties, failure of which the court is enjoined to make a default appointment, as indicated below.

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Act (Cap. 15 R.E. 2023) and the Arbitration Rules made thereunder as well as institutional Arbitration Rules that the parties may voluntarily choose to govern the arbitral proceedings

<sup>574</sup> Global Justice Solutions, *Alternative Dispute Resolution (ADR) Training Manual* (Dar es Salaam: Project for the Court of Appeal of Tanzania, 2010), p. 54 (quoting the *Manual for Mediation Training in Tanzania*, which stated that: ‘Procedures in conducting mediation proceedings vary from one jurisdiction to another. But those variations would appear to be in details rather than in substance.’).

<sup>575</sup> Preamble to the Court Annexed Mediation Guidelines (2024).

### **(a) Party Appointed Mediator**

Under Order VIII C Rule 25(1) of the CPC, the court should require the parties to appoint and submit the name of a “qualified”<sup>576</sup> mediator of their choice ‘within fourteen days after pleadings are complete.’<sup>577</sup> While informing the parties of their right to appoint a mediator of their choice, the court is enjoined to ‘give them necessary guidance on the persons qualified for selection as mediators and where available, may avail them with the register of those mediators.’<sup>578</sup>

### **(b) Default Appointment of a Mediator**

Where the parties fail to appoint a mediator as such, the court ‘shall, manually or electronically, appoint a mediator and notify the parties accordingly.’<sup>579</sup> While making this default appointment, the court is required to appoint a mediator who is a serving Judge, Registrar, Deputy Registrar or Magistrate within the jurisdiction of that

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<sup>576</sup> Under Order VIII C Rule 25(6) of the CPC, the following persons shall qualify to be nominated under Order VIII C Rule 25 (1) to act as mediators:

- ‘(a) a Judge;
- (b) a registrar or deputy registrar;
- (c) a magistrate in case of a magistrates’ court;
- (d) a person with the relevant qualifications and experience in mediation appointed by the Chief Justice;
- (e) a retired judge or magistrate; or
- (f) a person with the relevant qualifications and experience in mediation and chosen by the parties.’

<sup>577</sup> It should be noted that; before the CPC was amended vide the Civil Procedure Code (Amendment of the First Schedule) Rules (G.N. No. 821 of 2024), parties were required to appoint the mediator ‘within fourteen days after the pleadings [were] complete[d].’

<sup>578</sup> Paragraph 4.1 of the Court Annexed Mediation Guidelines (2024).

<sup>579</sup> Order VIII C Rule 25(2) of the CPC.

court.<sup>580</sup> However, where necessary the court may appoint any other person who is accredited and mandated to serve as mediator under the law.<sup>581</sup>

### **(c) Notification of the Appointment of a Mediator**

Upon the appointment of the mediator, the court is obliged, within two days, to notify the mediator of his/her appointment and require him/her to confirm the appointment within two days.<sup>582</sup> Under the Court Annexed Mediation Guidelines (2024), the notification of the appointment of a mediator should state, *inter alia*, the names and addresses of the parties and of their advocates (if any) and the subject matter of the dispute.<sup>583</sup> Notably, the notification should appear in the format prescribed by **Form MD/1** annexed to the Guidelines.<sup>584</sup>

However, the appointed mediator may accept, refuse or default to accept the appointment within the prescribed time. Procedurally, the mediator should communicate his/her acceptance or refusal of the appointment within two days of his/her appointment by way of a notice prescribed in **Form MD/2** annexed to the Court Annexed Mediation Guidelines (2024).<sup>585</sup> Therefore, where the mediator does not confirm or refuse the appointment within the prescribed time, the court should, within five days of the refusal or non-confirmation, appoint another mediator by the same method used to make the previous appointment.<sup>586</sup> Where the court is called upon to appoint another mediator, it should use the same method used to

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<sup>580</sup> Paragraph 4.2 of the Court Annexed Mediation Guidelines (2024).

<sup>581</sup> Ibid. See also the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).

<sup>582</sup> Oder VIIC Rule 25(3) of the CPC.

<sup>583</sup> Paragraph 5.1 of the Court Annexed Mediation Guidelines (2024).

<sup>584</sup> Ibid.

<sup>585</sup> Ibid, paragraph 6.

<sup>586</sup> Oder VIIC Rule 25(3) of the CPC.

make the first default appointment within five days of the said non-confirmation or refusal.<sup>587</sup>

#### **(d) Withdrawal and Replacement of a Mediator**

Like in private mediation, in court-annexed mediation, a mediator may, on his/her own accord or upon a party's request, withdraw from mediation.<sup>588</sup> Upon the withdrawal of the mediator, a new mediator should be appointed by the same method used to make the previous selection.<sup>589</sup>

#### **(e) Mediator's Disclosure**

The appointed mediator is obliged, at any time after accepting the appointment, to disclose any circumstance that could potentially give rise to a probable apprehension of lack of impartiality in the conduct of mediation.<sup>590</sup> It should be noted, however, that; the mediator who makes a disclosure of any such circumstance should continue 'to serve as a mediator if all parties to the dispute waive, in writing, the right to object to any probable apprehension of lack of impartiality or conflict of interest that may arise as a result of such disclosure.'<sup>591</sup>

### **3.2 Submission of Pleadings and Statement of Issues to the Mediator**

One of the progressive salient features introduced in the court-annexed mediation process by the 2019 and 2024 amendments to the CPC is the requirement for the court to transmit copies of pleadings to the mediator within three days of the confirmation of mediator's appointment.<sup>592</sup> Notably, copies of the pleadings may be transmitted to the mediator manually or electronically.<sup>593</sup> Another equally important

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<sup>587</sup> Paragraph 5.2 of the Court Annexed Mediation Guidelines (2024).

<sup>588</sup> Ibid, paragraph 9.1.

<sup>589</sup> Ibid, paragraph 9.2.

<sup>590</sup> Ibid, paragraph 8.1.

<sup>591</sup> Ibid, paragraph 8.2.

<sup>592</sup> Ibid, Order VIII C Rule 25(4).

<sup>593</sup> Paragraph 7.1 of the Court Annexed Mediation Guidelines (2024).

procedural step introduced by these amendments is the duty imposed on the mediator to set a date for the first mediation session and communicate it to the parties, in writing or any other available means, within seven days of his/her confirmation.<sup>594</sup> The mediator is also duty-bound to convene the first mediation session not later than fourteen days from the date of his/her confirmation.<sup>595</sup>

#### **4.0 Modality and Appearance of Parties in Court-Annexed Mediation Sessions**

As noted above, the 2019 and 2024 amendments to the CPC have introduced more elaborate provisions relating to attendance,<sup>596</sup> non-attendance<sup>597</sup> and remedies for non-attendance of parties at court-annexed mediation sessions.<sup>598</sup> These aspects concerning parties' appearance at court-annexed mediation sessions are considered below.

#### **4.1 Modality of Conducting Mediation**

Ordinarily, appearance of parties at court-annexed mediation sessions is done physically. However, with the contemporary advancement in technology, it has become necessary for many procedural rules in civil litigation, including in ADR proceedings, to also adopt online appearance of parties. As such, the Court Annexed Mediation Guidelines (2024) stipulate that mediation may be conducted physically or electronically,<sup>599</sup> depending on the parties' agreement that mediation be conducted either physically or electronically in which case they should notify the mediator before mediation commences.<sup>600</sup>

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<sup>594</sup> Order VIII C Rule 25(5)(a) of the CPC and paragraph 7.2 of the Court Annexed Mediation Guidelines (2024).

<sup>595</sup> Ibid, Order VIII C Rule 25(5)(b).

<sup>596</sup> Ibid, Order VIII C Rule 27.

<sup>597</sup> Ibid, Order VIII C Rule 29.

<sup>598</sup> Ibid, Order VIII C Rule 30.

<sup>599</sup> Paragraph 3.1 of the Court Annexed Mediation Guidelines (2024).

<sup>600</sup> Ibid, paragraph 3.2.

However, three things should be noted where parties agree to mediate physically or virtually. Firstly, where mediation is to be conducted electronically, either party may, by notice, at any stage, indicate his/her intention to proceed with mediation electronically, in a manner agreed by the parties.<sup>601</sup> Secondly, where mediation is to be conducted physically, the venue should be within the premises of the court which referred the matter to mediation, unless the parties agree otherwise.<sup>602</sup> Thirdly, where parties agree to any other venue than the referring court, they should jointly meet the costs of the venue.<sup>603</sup>

#### 4.2 Parties' Appearance at Mediation Sessions

Appearance of parties in proceedings in any form of ADR is necessary in achieving the very goal of ADR – *i.e.*, to resolve a dispute out of court through amicable and mutual discussions and dialogue. It is only through being present at an ADR session that a party can manage to communicate its position, present its offer, evaluate the other party's offer, and make an informed consent to amicably settle the dispute.

While the CPC does not provide any procedure for party appearance in conciliation and negotiation, it does provide express procedure governing the appearance of parties in mediation sessions. Under Order VIII C Rule 27(1) of the CPC, appearance at mediation session is by the party in person or his/her advocate or both.<sup>604</sup> Prior to entering appearance, the party and his/her advocate, where the parties are represented, must be notified of the date of mediation.

It should be that; where a third party may be held liable to satisfy all or part of a judgment in the suit or to indemnify or reimburse a party for money paid in satisfaction of all or part of a judgment in the suit, unless the court orders otherwise, that third party or his/her advocate may also attend the mediation session in

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601 Ibid, paragraph 3.3.

602 Ibid, paragraph 3.4.

603 Ibid paragraph 3.5.

604 *Sigori Investment (T) Ltd. & Another v. Equity Bank of Tanzania Ltd. & Another*, High of Tanzania at Dar es Salaam, Land Case No. 46/2019 (Unreported) ('*Sigori v. Equity Bank*'), *op. cit.*

question.<sup>605</sup> It should also be noted that; an interested party may, at his/her request or upon the mediator's direction, attend a scheduled mediation session.<sup>606</sup>

### 4.3 Parties' Non-Appearance in Mediation and its Consequences

Unlike in conciliation and negotiation proceedings where there are no provisions governing non-appearance of parties in such processes; the CPC has express provisions regulating a party's failure to appear in mediation sessions.<sup>607</sup> In particular, where it is not practicable to conduct a scheduled mediation session because a party fails, without good cause, to attend within the time appointed for the commencement of the session, the mediator is obliged to remit the file back to the trial judge or magistrate who may (i) dismiss the suit, if the noncomplying party is a plaintiff,<sup>608</sup> or strike out the defence, if the noncomplying party is a defendant;<sup>609</sup> (ii) order a party to pay costs;<sup>610</sup> or (iii) make any other order that he/she may deem just to grant.<sup>611</sup> The implication of remitting the file back to the trial judge or magistrate for the orders stated herein above is that mediation will be marked failed<sup>612</sup> due to non-appearance of a party or both parties at the mediation session.<sup>613</sup>

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<sup>605</sup> Order VIII C Rule 27(2) of the CPC.

<sup>606</sup> Ibid, Order VIII C Rule 27(3).

<sup>607</sup> Ibid, VIII C Rule 29.

<sup>608</sup> In *M/S CIDE Co. v. Tanzania Forest Services (TFS) Agency & Another*, High Court of Tanzania at Dar es Salam, Land Case No. 65/2015 (Unreported) ('*M/S CIDE. v. TFS*'), it was held that, one of the Consequences of plaintiff's failure to attend at mediation session is to dismiss the suit.

<sup>609</sup> VIII C Rule 29(a) of the CPC.

<sup>610</sup> Ibid, VIII C Rule 29(b).

<sup>611</sup> Ibid, VIII C Rule 29(c).

<sup>612</sup> *Tanzania Harbours Authority v. Mathew Mtakula & 8 Others*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 46 of 1999 (Unreported) ('*THA v. Mtakula*').

<sup>613</sup> *A.G. v. M/S JP International Ltd.*, High Court of Tanzania at Dar es Salaam, Civil Case No. 158 of 2002 (Unreported) ('*A.G. v. JP*').

However, before remitting the file back to the presiding judge, the mediator may take any other appropriate action to ensure that mediation is sustained. This position was elaborated by the court in *Kitenge v. Mshoro*.<sup>614</sup> In that case, the court held that; where one of the parties to the suit does not appear on a date fixed for mediation or if both of them do not appear, the appropriate action for a mediator to take is to adjourn the mediation until another date, and accordingly notify parties of the date where mediation would resume. Moreover, in *Sigori v. Equity Bank*,<sup>615</sup> the court held that there is quite a wide range of choices to remedy the situation where a party fails to attend a mediation session and continue with the mediation as intended by law, including adjournment and applying for restoration of the matter where it is dismissed for want of appearance on the part of the plaintiff. This is intended to give the parties more time to continue with mediation where there are justified reasons to do so.

#### 4.4 Restoration of a Suit Dismissed for Party Non-Appearance in Mediation

Where a suit is dismissed for non-appearance of a party or parties at mediation, the court may make an order for the restoration of such a suit or a written statement of defence.<sup>616</sup> For that matter, any party aggrieved by an order made under Order VIIC Rule 29 of the CPC should file in court an application for restoration of a suit or a written statement of defence within seven days from the date of the order.<sup>617</sup> Upon the applicant showing good cause,<sup>618</sup> the court 'shall set aside orders made under rule

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614 *Salama O. Kitenge v. Sophia Mshoro*, High Court of Tanzania at Dar es Salaam, Civil Appeal No. 100/2003 (Unreported) ('*Kitenge v. Mshoro*').

615 *Sigori Investment (T) Ltd. & Another v. Equity Bank of Tanzania Ltd. & Another*, High of Tanzania at Dar es Salaam, Land Case No. 46/2019 (Unreported) ('*Sigori v. Equity Bank*').

616 Order VIIC Rule 30(1) of the CPC. See also *Sigori v. Equity Bank*, *ibid*.

617 *Ibid*, Order VIIC Rule 30(1). See also *Sigori v. Equity Bank*, *ibid*.

618 In terms of Order VIIC Rule 30(2), the court is obliged to hear and determine such application 'within fourteen (14) days from the date of lodging the application.'

29 of [Order VIII C of the CPC] and restore the suit or the defence and remit the case to the mediator who shall issue a notice for mediation.’<sup>619</sup>

### **5.0 Parties’ Authority to Settle Dispute Amicably in Court-Annexed Mediation**

One of the underlying principles in the mediation process is the parties’ autonomy to agree to go for any of the ADR mechanisms to settle their dispute amicably and consensually. This presupposes that parties have the authority to settle the dispute consensually. It is on the basis of this underlying principle that Order VIII C Rule 28(1) of the CPC requires every party to a mediation session, as a mandatory undertaking, to ‘have authority to settle any matter during the mediation session.’<sup>620</sup>

In *Sigori v. Equity Bank*, the court held that pursuant to Order VIII C Rule 28(1) of the CPC, in order to ensure mediation is conducted in a more accurate way and to reach its maiden goal, parties who attend mediation sessions must have the authority to settle the issues raised and discussed during the mediation sessions. Therefore, to ensure this is done effectively, the mediator is obliged to ‘confirm the identities of the parties or their representatives and in case of the representatives, their authority to settle the matter before recording their attendance.’<sup>621</sup>

In addition, this provision obliges a party who requires the approval of another person before agreeing to a settlement, prior to the mediation session, to ‘arrange to have ready means of communication to that other person throughout the session, whether it takes place during or after regular business hours.’<sup>622</sup> This requirement strives to ensure that a person who appears in mediation session on behalf of a corporate person or as an agent of a party to the suit, actually has the mandate (and does not, indeed, exceed that mandate) to reach a binding decision in mediation.

Where mediation proceeds with a person without the mandate (or one exceeding the mandate) to make a binding decision in mediation, any aggrieved party may raise it

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<sup>619</sup> Ibid, Order VIII C Rule 30(3).

<sup>620</sup> *M/S CIDE. v. TFS*, op. cit.

<sup>621</sup> Order VIII C Rule 28(3) of the CPC.

<sup>622</sup> Ibid, Order VIII C Rule 28(2).

as a ground to subsequently challenge the outcome of the mediation (*i.e.*, the mediation agreement).<sup>623</sup> For example, in *Guru v. CORECU*,<sup>624</sup> a mediation agreement in the form of a Consent Settlement Order was successfully challenged and reviewed by the High Court for misrepresentation because those who attended the mediation session in this case did not have the authority to make final decisions for the applicant firm. So, the order was set aside and the court ordered for another mediation session to be conducted.

## 6.0 Procedural Steps in Court-Annexed Mediation Sessions

Like in conciliation and negotiation proceedings, the CPC does not have detailed provisions setting out the specific procedural steps to be taken during the mediation proceedings. However, the Court Annexed Mediation Guidelines (2024) lay down the procedural steps that are usually followed in the court-annexed mediation process. Before we canvass the procedural steps in mediation, we first lay down the underlying principles in mediation as well as the duties and obligations of the mediator in the court-annexed mediation process.

### 6.1 Principles Underlying Court-Annexed Mediation

In conducting mediation, the mediator should be guided by principles of objectivity, fairness and observance of natural justice. In facilitating mediation, the mediator is obliged to take into account, *inter alia*: (i) the rights and obligations of the parties;<sup>625</sup> (ii) facilitating expeditious and fair resolution of disputes;<sup>626</sup> (iii) reducing costs in dispute resolution;<sup>627</sup> (iv) facilitating communication between or among the parties

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<sup>623</sup> See particularly *Guru Engineering Works Ltd. v. CORECU*, High Court of Tanzania at Dar es Salaam, Civil Case No. 320/1996 (Unreported) (*'Guru v. CORECU'*); and *Miombo Safaris Ltd. v. Jumanne Hamisi*, High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Revision No. 8 of 2008 (Unreported) (*'Miombo Safaris v. Hamisi'*).

<sup>624</sup> *Guru v. CORECU*, *ibid.*

<sup>625</sup> Paragraph 10.1(a) of the Court Annexed Mediation Guidelines (2024).

<sup>626</sup> Order VIII C Rule 26(2)(a) of the CPC; and paragraph 10.1(b) of the Court Annexed Mediation Guidelines (2024).

<sup>627</sup> *Ibid.*, paragraph 10.1(c).

to the disputes;<sup>628</sup> (v) assisting the parties in reaching a mutually acceptable resolution;<sup>629</sup> (vi) the usages of the trade concerned;<sup>630</sup> and (vii) the circumstances surrounding the dispute, including any previous business practices between the parties.<sup>631</sup>

## 6.2 Duties of the Mediator

In the conduct of the mediation process, the mediator has several duties. They include: firstly, the duty to uphold the principles of objectivity, fairness and natural justice.<sup>632</sup> In doing so, the mediator is duty-bound to, *inter alia*: (i) uphold the rights and obligations of the parties;<sup>633</sup> (ii) observe the usages of the trade concerned;<sup>634</sup> and (iii) take into account the circumstances surrounding the dispute, including any previous business practices between the parties.<sup>635</sup> Secondly, where necessary and upon the consent of the parties, the mediator has the duty to invite any person to appear for questioning, hearing, producing a document or providing any information which may appear to the mediator to be relevant to resolve the dispute.<sup>636</sup>

Thirdly, the mediator has the duty to control the mediation proceedings to ensure orderly and effective conduct of the proceedings including: (i) setting ground rules for conducting mediation – such as parties’ respect to each other, avoiding abusive language and maintaining the mediation room at ease by discouraging abusive exchange of words, not to blame or attack each other, putting questions to each

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628 Order VIIIIC Rule 26(1)(b) of the CPC; and paragraph 10.1(d) of the Court Annexed Mediation Guidelines (2024).

629 Ibid, paragraph 10.1(e).

630 Ibid, paragraph 10.1(f).

631 Ibid, paragraph 10.1(g).

632 Order VIIIIC Rule 26(2)(d) of the CPC.

633 Ibid, Order VIIIIC Rule 26(2)(d)(i).

634 Ibid, Order VIIIIC Rule 26(2)(d)(ii).

635 Ibid, Order VIIIIC Rule 26(2)(d)(iii).

636 Paragraph 10.2(a) of the Court Annexed Mediation Guidelines (2024).

other for the purposes of gaining clarity and understanding and ensuring conducive environment for the conduct of mediation;<sup>637</sup> (ii) guiding the parties in identifying and refining the issues for mediation without imposing his/her own opinion on the issues;<sup>638</sup> (iii) intervening and moderating questions for clarification and responses during mediation; (iv) directing cooling off periods and recess for parties;<sup>639</sup> and (v) ensuring effective communication of procedural agreements, notices and information to the parties.<sup>640</sup>

Fourthly, the mediator has the duty to propose further mediation sessions taking into consideration (i) the nature of the dispute and interests of the parties;<sup>641</sup> (ii) the consequence of settlement or non-settlement of the dispute;<sup>642</sup> and (iii) the progress of the process towards settlement.<sup>643</sup> Fifthly, the mediator has the duty, at any stage of the mediation proceedings and in a manner that the mediator considers appropriate, to take into account the wishes of the parties, including any request by either of the parties that the mediator should hear oral statements for a speedy settlement of the dispute.<sup>644</sup> Sixthly, the mediator has the duty, at any stage of the mediation proceedings, to make proposals for the settlement of the dispute.<sup>645</sup>

### **6.3 Confidentiality of Court-Annexed Mediation**

One of the underlying principles of mediation is the confidentiality of the mediation process. All communications at a mediation session (and the mediation notes and

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<sup>637</sup> Ibid, paragraph 10.2(b)(i).

<sup>638</sup> Ibid, paragraph 10.2(b)(ii).

<sup>639</sup> Ibid, paragraph 10.2(b)(iii).

<sup>640</sup> Ibid, paragraph 10.2(b)(iv).

<sup>641</sup> Ibid, paragraph 10.2(c)(i).

<sup>642</sup> Ibid, paragraph 10.2(c)(ii).

<sup>643</sup> Ibid, paragraph 10.2(c)(iii).

<sup>644</sup> Order VIII C Rule 26(2)(e) of the CPC.

<sup>645</sup> Ibid, Order VIII C Rule 26(2)(f).

records of the mediator) are strictly confidential.<sup>646</sup> As such, a party to court-annexed mediation cannot rely on the record of statement made at, or any information obtained during, the mediation session as evidence in subsequent court proceedings or any other subsequent settlement initiatives, except in relation to proceedings brought by either party to vitiate the settlement agreement on any ground, including fraud.<sup>647</sup>

In addition, parties or the mediator cannot be required to testify in any proceedings relating to matters that occurred during the mediation process and they cannot be subjected to any process requiring disclosure of confidential information or data relating to, or arising out of, the matter in dispute.<sup>648</sup> Moreover, a party to mediation and the mediator is under the obligation not to disclose, in any way, the information obtained during the mediation proceedings except where required to do so by law.<sup>649</sup>

Several court decisions have been, so far, rendered on the confidentiality of court-annexed mediation. For example, in *Sasa v. KCGA*,<sup>650</sup> when composing a judgment in appeal, the High Court Judge noticed that; during mediation, the mediator recorded the proceedings of the mediation process in the case file, with the parties' offers and counter-offers being on record as well. The court had to grapple with two issues: (i) whether confidentiality of court-annexed mediation is of essence; and (ii) whether the mediation records should be kept in the court's case file. The court held, *inter alia*, that; since court-annexed mediation proceedings are confidential, records of mediation proceedings (including offers and counter-offers) should not be kept in the

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646 Ibid, Order VIII C Rule 31; and paragraph 10.3(a) of the Court Annexed Mediation Guidelines (2024).

647 Order VIII C Rule 31 of the CPC; and paragraph 10.3(b) of the Court Annexed Mediation Guidelines (2024).

648 Ibid, paragraph 10.3(d)

649 Ibid, paragraph 10.3(e).

650 *Sasa General Supply v. Kilombero Cane Growers Association (KCGA)*, High Court of Tanzania at Tanzania at Dar es Salaam, Civil Appeal No. 104/2017 (Unreported) ('*Sasa v. KCGA*').

court's case file.<sup>651</sup> According to the court, while the mediator is entitled to take notes of the mediation, such information is for his/her use only. As such, a mediator is supposed to record in the court file the outcome of the mediation only.

Similarly, in *MIC Tanzania v. Ben Paul*,<sup>652</sup> the court had to determine the extent of confidentiality of the court-annexed mediation process and whether the mediator can keep records of mediation proceedings in the court's case file. In this case, while composing its judgment in appeal, the High Court noticed an irregularity that was glaring on the face of the record: in the proceeding of mediation conducted during the trial, the mediator recorded everything that transpired in court including the reason that led to the failure of mediation. The court held, *inter alia*, that; since court-annexed mediation proceedings are confidential between the parties and the mediator, it is a procedural irregularity for the mediator to record everything that transpired during mediation proceedings in the court's case file, including the reason that led to the failure of mediation.

Yet again, in *EAC Logistic v. Falcony*,<sup>653</sup> while determining an appeal, the High Court noted one irregularity in which the mediator conducted mediation during the trial. In fact, the mediator recorded the final orders after mediation process failed:

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<sup>651</sup> Such irregularities are also prevalent in mediation sessions conducted under the auspices of the Commission for Mediation and Arbitration (CMA). For instance, in *Charles Petro v. St. Carol Institution* [2014] LCCD 96 (*Petro v. St. Carol*) (at p. 435), it was alleged that the mediator did not put into writing what was agreed upon, but rather an offer which was made by the employer and also that the employee was forced to sign the agreement by the mediator. For a discussion on this issue, see particularly Nkobogo, J.J., "Legal and Institutional Challenges on Mediation of Labour Disputes in Tanzania," *East Africa Law Review (EALR)*, Vol. 48 No. 2, December 2021, pp. 27-60, at pp. 55-57.

<sup>652</sup> *MIC Tanzania Limited v. Bernard Paul Mnyang'anga @ Mnyang'anga (Ben Paul)*, High Court of Tanzania at Dar es Salaam, Civil Appeal No. 165 of 2017 (Unreported) (*MIC Tanzania v. Ben Paul*).

<sup>653</sup> *EAC Logistic Solution Ltd. v. Falcony Marines Transportation Ltd.*, High Court of Tanzania at Kingdome, Civil Appeal No. 1 of 2021 (Unreported) (*EAC Logistic v. Falcony*).

Mediator, Parties are not interested with [*sic*] this mediation have marked failed [*sic*]. The matter be remitted to the trial magistrate so as to fix the final [pre-trial conference] PTC date.

The court had to determine two fundamental issues in relation to this irregularity: (*i*) whether a mediator can give reasons and reduce them into writing where court-annexed mediation fails; and (*ii*) what are the consequences of the mediator's act of giving reasons as to why mediation failed? According to the High Court, it is a settled rule of practice that; when mediation fails, mediators are not supposed to put on record reasons that broke it down. As the court held, the rationale for such prohibition is simple: since ADR processes and proceedings are confidential, if amicable settlement is not reached, disclosure of information can subsequently prejudice the subsequent trial magistrate/judge. The High Court counselled that; in such cases the duty of the mediator is limited to recording the failure in this form: "*Court/Order - Mediation has failed*".

#### **6.4 The Mediation Procedure**

In both court-annexed and out-of-court mediation, the following are most common procedural steps undertaken by the parties and the mediator: (*i*) issuance of a notice of first mediation session; (*ii*) introduction; (*iii*) signing of a statement of understanding; (*iv*) mediation sessions – *i.e.*, first joint session, separate sessions (or caucuses), and final joint sessions; and (*v*) closure and implementation of the mediation agreement. These mediation procedural steps are canvassed below.

##### **6.4.1 Procedural Step #1: Issuance of Notice of First Mediation Session**

As noted above, Rule 25(5) of the CPC obliges the mediator to undertake two procedural actions immediately after confirmation of his/her appointment. Firstly, within seven days of his/her confirmation, the mediator is obliged to set a date for the first mediation session and communicate it to the parties in writing or any other available means.<sup>654</sup> Secondly, the mediator is duty-bound to convene the first

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<sup>654</sup> Order VIII C Rule 25(5)(a) of the CPC.

mediation session not later than fourteen days from the date of his/her confirmation.<sup>655</sup>

Upon fixing a date for mediation, it is best practice for the mediator to send to the parties and/ or their advocates a Notice of Mediation Session (NMS), informing them of the date, time and place of mediation. In case of firms or companies, it may also inform them who should attend – *i.e.*, people with authority to make a final decision in the case.<sup>656</sup> The NMS also informs parties: (i) to bring with them relevant documents, including a written proof that a person attending the mediation has authority to settle; (ii) strict adherence to confidentiality of the mediation proceedings; and (iii) failure to attend may result in subsequent adverse judicial sanction(s).

#### 6.4.2 Procedural Step #2: Introduction

On the mediation day, the mediator should ensure that the following introductory undertakings are made:

- (i) Welcoming remarks, which should be made by the mediator;<sup>657</sup>
- (ii) Self- introductions by the parties, their advocates and/any other representative;<sup>658</sup>
- (iii) A declaration of conflict of interest, if any, and, if it appears to him/her that there is such a conflict – having a bearing on his/her impartiality – he/she shall cease to act and communicate to the court his/her inability to act;<sup>659</sup>
- (iv) Recording the appearance and confirmation of authority to settle in **Form MD/3** as set out in the Court Annexed Mediation Guidelines (2024) where the appearance is by representation;<sup>660</sup>

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<sup>655</sup> Ibid, Order VIII C Rule 25(5)(b).

<sup>656</sup> *Guru v. CORECU*, op. cit.

<sup>657</sup> Paragraph 10.4.1(a) of the Court Annexed Mediation Guidelines (2024).

<sup>658</sup> Ibid, paragraph 10.4.1(b).

<sup>659</sup> Ibid, paragraph 10.4.1(c).

<sup>660</sup> Ibid, paragraph 10.4.1(d).

- (v) Information to the parties of the essence of mediation and the consequences from failure of mediation in terms of further costs, time and relationship;<sup>661</sup>
- (vi) An outline of the process and how any query or concern should be dealt with during the mediation process;<sup>662</sup>
- (vii) An outline of the rights, roles and obligations of the parties during the mediation process;<sup>663</sup>
- (viii) An agreement by the parties on the language to be used in the mediation proceedings and on the service of translation where needed;<sup>664</sup> and
- (ix) The requirement to sign a statement of understanding and adherence to confidentiality in **Form MD/4** as set out in the Court Annexed Mediation Guidelines (2024).<sup>665</sup>

#### **6.4.3 Procedural Step #3: Signing of a Statement of Understanding**

Upon ascertaining that the parties or their advocates have clearly understood the privileged confidential nature of mediation and the consequences of success or failure thereof during the first mediation, the mediator will ask the parties to sign a *Statement of Understanding*.<sup>666</sup>

#### **6.4.4 Procedural Step #4: The Mediation Session**

Universally, there are three mediation sessions: (i) first joint session; (ii) separate sessions (or caucuses); and (iii) final joint session. The three sessions are elaborated below. It should be noted from the onset that the mediator may commence exploring options with the parties either in a joint session or separate sessions, depending on which mode would best facilitate progress towards settlement, and switch between

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<sup>661</sup> Ibid, paragraph 10.4.1(e).

<sup>662</sup> Ibid, paragraph 10.4.1(f).

<sup>663</sup> Ibid, paragraph 10.4.1(g).

<sup>664</sup> Ibid, paragraph 10.4.1(h).

<sup>665</sup> Ibid, paragraph 10.4.1(i).

<sup>666</sup> Ibid.

these options and consider other process such as: (i) convening several meetings with either party where necessary;<sup>667</sup> (ii) where appropriate, establish sub-committees from the parties to discuss particular issues;<sup>668</sup> and (iii) where necessary, and in agreement with the parties, invite experts or interested parties for the purpose of facilitating a settlement.<sup>669</sup>

The mediator may consider the manner in which issues are to be addressed and ‘shall attempt to generate possible trade-offs or concessions between issues.’<sup>670</sup> The mediator should assist the parties ‘to reflect on the consequences of options available to them and ensure that they have considered the implications involved.’<sup>671</sup> The mediator should ‘record the proposals and counter proposals made by each party and at an appropriate stage draw a document reflecting their consensus.’<sup>672</sup>

#### **(a) First Joint Session (FJS)**

During the mediation session, the mediator usually begins by holding a joint session.<sup>673</sup> In the first joint session, the mediator should meet with both or all of the parties to the dispute for the first time. So, as soon as the introductory part of the mediation process is over, the mediator will call upon one of the parties, usually the plaintiff or claimant, to begin briefly stating his/her case. Thereafter, the mediator will call upon the defendant or respondent to do the same. At this stage, the mediator gathers information from both sides; so, he/she will not interfere with the party’s narrative.

In particular, the mediator should gather information about the dispute from the parties in a joint session through the following procedure:

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<sup>667</sup> Ibid, paragraph 10.4.3(a).

<sup>668</sup> Ibid, paragraph 10.4.3(b).

<sup>669</sup> Ibid, paragraph 10.4.3(c).

<sup>670</sup> Ibid, paragraph 10.4.3.1.

<sup>671</sup> Ibid, paragraph 10.4.3.2.

<sup>672</sup> Ibid, paragraph 10.4.3.3.

<sup>673</sup> Order VIII C Rule 26(2)(b) of the CPC allows the mediator hold joint sessions.

- (i) Inviting each party to make a brief opening statement of his/her case and indicate his/her interests and position in the case;<sup>674</sup>
- (ii) Allowing either party to pose questions for clarifications and responding to questions raised;<sup>675</sup>
- (iii) Asking the parties questions in order to understand their respective interests and positions and what they intend to achieve;<sup>676</sup>
- (iv) Summarizing the facts and narrations from either party for obtaining clarity as to their positions, interests and objectives;<sup>677</sup> and
- (v) From what the parties have agreed, preparing a list of contested and uncontested facts.<sup>678</sup>

The mediator also uses the FJS to start developing his/her strategies to enhance settlement opportunities, to try to detect hidden interests and motives of the parties, and to identify the *wants* and *needs* of the parties as well as the real issues in the dispute. While the term “wants” means those things which are desirable to have but are not crucial or necessary to a party; the term “needs” refers to those things which are necessary and basic to a party and so should be taken care of. After a party has made his/her brief presentation, the mediator will summarize what has been said and, in so doing, also clarify what appears to have been left obscure.

Three things should be noted during the FJS: firstly, at this stage, parties will still be angry at each other, labouring under their prejudices of winning the case; secondly, the mediator should be patient at this stage (he/she should not think that the mediation is likely to fail); and, thirdly, if the parties are angry and furious, the mediator should adjourn the joint session and move into *separate sessions*.

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<sup>674</sup> Ibid, paragraph 10.4.2(a).

<sup>675</sup> Ibid, paragraph 10.4.2(b).

<sup>676</sup> Ibid, paragraph 10.4.2(c).

<sup>677</sup> Ibid, paragraph 10.4.2(d).

<sup>678</sup> Ibid, paragraph 10.4.2(e).

### **(b) Separate Sessions (or Caucuses)**

Order VIII C Rule 26(2)(b) of the CPC allows the mediator to hold separate sessions with each party. This is a meeting between the mediator and one of the parties in the absence of the other. A mediator uses separate sessions for *many different reasons*, depending on the circumstances of the case and the parties. He/she may break into separate sessions in order to calm frayed tempers; so as to probe more into the facts of the case and hidden motives behind a party's negotiating strategy more closely; to discover the real needs of the party; or to enable a shy and withdrawn party to talk more freely in private and reveal his or her hopes and fears, and so on.<sup>679</sup>

It is in separate sessions that mediators often make headways: timid parties talk more freely, secrets are more easily revealed, and definite or tentative offers made. Again, it is in separate sessions that the mediator tries to persuade the parties to judiciously brainstorm and share information which will assist them to, as we say, "*expand the pie*" so that each party may get as much as possible of what he would like.<sup>680</sup>

Furthermore, it is in separate sessions that the mediator translates and transmits offers, clears wrong impressions and suggests options for the parties to consider. The mediator also uses this session to reassure the parties that a settlement will be reached if they tackle the process in a positive manner. A mediator can, thus, hold as many separate sessions as he/she wishes, so long as he/she believes he/she is making progress towards reaching an amicable resolution of the dispute. For the same reason, there is no limit to the number of joint sessions which the mediator may hold.<sup>681</sup>

### **(c) Final Joint Sessions**

Final joint sessions are held at the conclusion of the mediation process, whether the mediation has succeeded or failed. In case of a successful mediation, an agreement should be carefully drafted and all its aspects carefully tested with each party in a joint

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<sup>679</sup> See generally Mashamba, J.C., *Alternative Dispute Resolution in Tanzania: Law and Practice* (2<sup>nd</sup> edn.) (Dar es Salaam: LexLaw Publishers, 2025).

<sup>680</sup> Ibid.

<sup>681</sup> Ibid.

or separate session. It should be noted that the final joint session must be held only when there is a whole agreement or there is no amicable settlement and there are no chances of reviving the mediation session, at which the mediator will announce that the mediation has failed and thank the parties for their effort to settle the matter out of the adversarial judicial process. In case mediation succeeds, the mediator will then congratulate the parties for their efforts, give a copy of the agreement to each of them, shake hands with them and then bid them farewell.<sup>682</sup>

#### **6.4.5 Procedural Step #5: Closure and Implementation**

Where mediation succeeds, the parties should execute a settlement agreement in terms of Order VIII C Rule 33(a) of the CPC to flag the completion of the mediation session. If the settlement agreement is executed by the parties, it should also spell out the manner of its implementation in accordance to the parties' agreement. However, in some cases, an impasse may be reached where the mediator, after consultation with the parties, should make a declaration to the effect that further mediation is not worthwhile.<sup>683</sup>

### **7.0 Outcomes in Court-Annexed Mediation Proceedings**

Like in conciliation and negotiation, there are usually three categories of outcomes in court-annexed mediation proceedings: (i) full amicable settlement; (ii) partial settlement; and (iii) an impasse. These outcomes are briefly highlighted below.

#### **7.1 Full Amicable Settlement**

It is generally taken for granted that parties opt to resolve their disputes through the mediation mechanism with the ultimate goal of reaching an amicable settlement. This is reflected in Order VIII C 26(1)(a) and (b) of the CPC, which obliges both the mediator and parties to strive to reach “an early resolution of the dispute” that is “mutually acceptable”. Where parties amicably settle on all issues, a settlement agreement should be drawn and signed by the parties, marking the matter as fully

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<sup>682</sup> Ibid.

<sup>683</sup> Order VIII C Rule 33(b) of the CPC.

settled. As noted above, the settlement agreement should set out all the fundamental terms and conditions of settlement as well as the timelines for performance of covenants on which the parties have mutually and amicably agreed to settle.

## 7.2 Partial Settlement

In some cases, the parties may reach at a partial settlement where they may only agree on some issues and disagree on others. Where there is partial settlement, the parties and the third-party assisting them (if applicable) will draw a settlement agreement in respect of only those issues that the parties have agreed to settle. Conversely, the unsettled issues should be referred back to the trial court for determination in terms of Order VIIIID Rule 40 and Order XIV of the CPC.

## 7.3 An Impasse

Although the ultimate goal of referring a matter to the mediation processes is to reach an amicable settlement that is mutually acceptable to both parties, in some cases parties to mediation may not be able to reach an agreement on all the issues in dispute. This is a situation where the parties fail to agree on a mutually acceptable amicable settlement of all issues referred to mediation. Where parties do not reach an agreement on all issues in the dispute, the mediator is obliged to declare an impasse – *i.e.*, mediation has failed.<sup>684</sup> Therefore, the mediator is required to ‘destroy notes made during the proceedings and ensure that parties do the same in his presence.’<sup>685</sup> In such a situation, the mediator should submit a report of such failure of mediation to the trial judge or magistrate and the entire matter will be referred back to the court for determination of the issues in terms of Order VIIIID Rule 40 of the CPC.<sup>686</sup>

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684 Paragraph 10.4.4.3 of the Court Annexed Mediation Guidelines (2024).

685 *Ibid*, paragraph 10.4.4.4.

<sup>686</sup> In particular, Order VIIIID Rule 40(1) of the CPC provides that:

‘(1) Where a suit is not resolved by negotiation, conciliation, mediation or arbitration or other similar alternative procedure it shall revert to the trial judge or magistrate for a final pre-trial settlement and scheduling conference, to enable the court to schedule the future events and steps which are bound or likely to arise in the conduct of the case, including framing of issues and the date or dates for trial.’

## 7.4 Drafting the Settlement Agreement

The Court Annexed Mediation Guidelines (2024) stipulate that; upon the parties reaching a consensus on the whole or part of the dispute, the ‘mediator shall draft a settlement agreement.’<sup>687</sup> In drafting the settlement agreement, the mediator may employ any of the following approaches: (i) draft the agreement and present it to the parties for their consideration and if both parties agree on the draft, finalize it for signing;<sup>688</sup> or (ii) let each party or their counsel to propose terms and submit to the mediator for drafting a settlement agreement which, if agreed upon by the parties, shall be signed accordingly.<sup>689</sup>

In this process, the mediator is obliged to ensure that the settlement agreement (i) is a result of consensus and clearly understood by the parties;<sup>690</sup> (ii) is clear, concise and settles the dispute either in whole or in part and capable of being enforced as a decree of the court;<sup>691</sup> (iii) contains modality and duration of implementation of the agreement;<sup>692</sup> and (iv) is signed by the mediator, parties and advocates, if any.<sup>693</sup>

## 8.0 Duration of Court-Annexed Mediation Proceedings

One of the progressive salient features brought about by the 2019 Amendments to the CPC is the setting of a time-bound duration of the court-annexed mediation proceedings. Under Order VIII C Rule 32 of the CPC, the duration for mediation is a period not exceeding thirty days running from the date of the first session of mediation.<sup>694</sup> Although the law is silent on the need for extension of this duration set

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687 Paragraph 10.4.4.1 of the Court Annexed Mediation Guidelines (2024).

688 Ibid, paragraph 10.4.4.1(a).

689 Paragraph 10.4.4.1(b).

690 Ibid, paragraph 10.4.4.2(a).

691 Ibid, paragraph 10.4.4.2(b).

692 Ibid, paragraph 10.4.4.2(c).

693 Ibid, paragraph 10.4.4.2(d).

<sup>694</sup> Case law is replete with decisions on the practice relating to calculation of time set for mediation, which, before the 2019 Amendments to the CPC, was done from the date when the case was ordered for mediation by a Judge or Magistrate, not from the

for mediation; in practice, mediating court-annexed mediators have been, in consultation with the parties, requesting the trial Magistrates or Judges for extension of time.

## 9.0 Closure of Court-Annexed Mediation Proceedings

All court-annexed mediation proceedings must be closed and the matter remitted back to the trial court for further procedural actions. For that matter, court-annexed mediation proceedings must be closed after coming to an end by the occurrence of any of the following events: (i) the parties have executed a settlement agreement;<sup>695</sup> (ii) the mediator, after consultation with the parties, makes a declaration to the effect that further mediation is not worthwhile;<sup>696</sup> (iii) one of the parties or both make(s) a declaration to the effect that further negotiation or conciliation is not worthwhile;<sup>697</sup> or (iv) thirty days expire from the date of the first session of mediation.<sup>698</sup>

## 10.0 Duty to Remit the Matter to the Trial Court After Conclusion of Mediation

It is now trite law that when court-annexed ADR proceedings come to an end, the matter must be remitted back to the trial court for further procedural steps.<sup>699</sup> In case mediation proceedings come to a conclusion, the mediator has the duty, within forty-

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time of filing of the suit in court. See particularly *CRDB Bank Ltd. v. Seif Ahmed Sharji*, High Court of Tanzania at Mbeya, Civil Case No. 11 of 2002 (Unreported) ('*CRDB v. Sharji*'); *Azania Bancorp Ltd. v. Frederick Oldenburg*, High Court of Tanzania at Dar es Salaam, Civil Case No. 234 of 2001 (Unreported) ('*Azania Bancorp v. Oldenburg*'); *David N. Mushi v. Joseph Massawe*, High Court of Tanzania at Dar es Salaam, Civil Case No. 109 of 2001 (Unreported) ('*Mushi v. Massawe*'); *Zamda Salum Bozen v. Front Party & 2 Others*, High Court of Tanzania at Dar es Salaam, Civil Case No. 3 of 2001 (Unreported) ('*Bozen v. Front Party*'); *Konoike Construction Co. Ltd. v. Mechanical Heavy Industries SDN BNF*, High Court of Tanzania at Dar es Salaam, Civil Case No. 342 of 2000 (Unreported) ('*Konoike Construction v. SDN BNF*'); and *Flora Kilasi & Sikitu Kilasi v. Safeguard (T) Ltd.*, High Court of Tanzania at Mbeya, Civil Case No. 5 of 2001 (Unreported) ('*Kilasi v. Safeguard*').

<sup>695</sup> Order VIIIIC Rule 33(a) of the CPC.

<sup>696</sup> Ibid, Rule 33(b) of the CPC.

<sup>697</sup> Ibid, Rule 38(b) of the CPC.

<sup>698</sup> Ibid, Order VIIIIC Rule 32.

<sup>699</sup> Ibid, Order VIIIIC Rules 34 and 39.

eight hours of the conclusion of the mediation, to 'submit a report to the trial court showing the outcome of the mediation.'<sup>700</sup> Where the mediation is successful, the report should be accompanied with the settlement agreement.<sup>701</sup>

### **11.0 Costs in Court-Annexed Mediation Proceedings**

Being voluntary and consensual, the court-annexed mediation process is embarked upon at the instance of the parties in a civil action. However, this consensual pursuit of court-annexed mediation process has cost implications since some costs are borne by the parties. Basically, such costs cover fees for mediators (if the appointed mediator is not a judicial officer), or any other costs incidental to this ADR process. For that matter, mediators appointed under Order VIIC Rule 25(6)(d)<sup>702</sup> and (e)<sup>703</sup> of the CPC are remunerated or compensated in a manner determined by the Chief Justice and published in the *Official Gazette*.<sup>704</sup>

For a person appointed as a mediator by the parties under Order VIIC Rule 25(6)(f) of the CPC,<sup>705</sup> it is the responsibility of the parties to pay fees of that mediator.<sup>706</sup> Notably, the fee scale for non-judicial mediators conducting court-mediation is set out in the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).<sup>707</sup> Remarkably, these Rules apply to mediators conducting court-annexed mediation or appointed as such.<sup>708</sup> They

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<sup>700</sup> Ibid, Order VIIC Rules 34(1).

<sup>701</sup> Ibid, Order VIIC Rules 34(2).

<sup>702</sup> That is, a person with the relevant qualifications and experience in mediation appointed by the Chief Justice.

<sup>703</sup> That is, a retired judge or magistrate.

<sup>704</sup> Order VIIC Rule 25(7) of the CPC.

<sup>705</sup> Order VIIC Rule 25(6)(f) of the CPC recognises as a mediator any 'person with the relevant qualifications and experience in mediation and chosen by the parties.'

<sup>706</sup> Ibid, Order VIIC Rule 25(8) of the CPC.

<sup>707</sup> G.N. No. 820 of 2024.

<sup>708</sup> Rule 2 of the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).

particularly provide for the procedure for appointment of court-annexed mediators,<sup>709</sup> their remuneration<sup>710</sup> and disciplinary conduct.<sup>711</sup>

In terms of remuneration, these Rules apply to all mediators other than a mediator chosen by the parties under Order VIII Rule 25(6)(f) of the CPC.<sup>712</sup> In particular, a non-judicial mediator is entitled to be paid service/professional fee for each mediated case as set out in the Second Schedule to the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).<sup>713</sup> Part A of the Second Schedule pegs the professional fee due to the mediator for each successful mediation at the rate of TZS. 500,000/= . It also sets TZS. 300,000/= for each partial successful mediation and TZS. 200,000/= for each unsuccessful mediation.

In addition, Part B of the Second Schedule provides for mediators' entitlement to transport and subsistence allowance when they have to travel outside their duty stations. Accordingly, where it is necessary for the mediator to travel, he/she is entitled to travelling and subsistence allowances as set out in the Second Schedule.<sup>714</sup> In particular, a mediator is entitled to travel by air (Economy Class), by sea (First Class), by train (First Class) and/or by road (Luxury Class). The mediator is also entitled to a daily subsistence allowance when on safari not exceeding TZS 250,000/= per night. However, where a mediator is a serving judicial officer, expenses under this rule 'shall be payable in accordance with his terms of service.'<sup>715</sup> It should be noted that remunerations, expenses and costs payable to the mediator under these Rules are borne by the Judiciary.<sup>716</sup>

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<sup>709</sup> Ibid, Part II (Rules 4-8).

<sup>710</sup> Ibid, Part III (Rules 9-11).

<sup>711</sup> Ibid, Part IV (Rules 12-15).

<sup>712</sup> Ibid, Rule 9.

<sup>713</sup> Ibid, Rule 10(1).

<sup>714</sup> Ibid, Rule 10(2).

<sup>715</sup> See Proviso to Rule 10(2) of the Judicature and Application of Laws (Appointment, Remuneration and Disciplinary of Mediators) Rules (2024).

<sup>716</sup> Ibid, Rule 11.

## 12.0 Enforcement of Agreements in Mediation Proceedings

As noted above, court-annexed mediation is one of the mandatory ADR processes that are part and parcel of the civil litigation. As such, where there is a successful settlement in the court-annexed mediation process, such outcome will be rendered by the presiding judicial officer as a decree of the court capable of being enforced in ordinary manner under Sections 37-61 and Order XXI of the CPC. It should be noted that the execution of court decrees is well elaborated in *The Execution Guidelines* (2020).<sup>717</sup>

## 13.0 Challenges Facing Court-Annexed Mediation

Despite these elaborate and progressive procedural steps in court-annexed mediation, this article notes that practitioners (both mediators and advocates) still have not mastered them. This has been leading to a number of challenges, including the fact that there is still a confusion amongst practitioners and presiding officers in relation to when and how a given ADR mechanism is to be resorted to and conducted.

### 13.1 Confusion Among Practitioners As to when and How a Given Mediation is to be Resorted to and Conducted

As considered above, there is still a confusion amongst practitioners and presiding officers in relation to when and how a given ADR mechanism is to be resorted to and conducted. For example, in *Mbeba v. Mohamed*,<sup>718</sup> a presiding Resident Magistrate in the Juvenile Court was not sure of how to apply mediation in proceedings before her. While considering an application made under Rule 63(1) of the Juvenile Court Rules (2016)<sup>719</sup> for custody of a child, the Juvenile Court learnt that Rule 71(1)-(2) of the Juvenile Court Rules empowers the court to enquire with the parties whether they have consulted a mediator. According to this provision, if the parties indicate that

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<sup>717</sup> Judiciary of Tanzania, *The Execution Guidelines* (Dar es Salaam: Judiciary of Tanzania, September 2020).

<sup>718</sup> *Stephen Mbeba v. Hassan Maulid Mohamed*, High Court of Tanzania at Dodoma, Civil Revision No. 2/2019 (Unreported) (*'Mbeba v. Mohamed'*).

<sup>719</sup> The Law of the Child (Juvenile Court Procedure) Rules (G.N. No. 182 of 2016) ('the Juvenile Court Rules').

they have not done so, and where it is practicable and appropriate to do so, the court should adjourn the hearing for a period of not more than 28 days to allow the parties to resolve the issues through mediation. The law stipulates further that; it is only after the parties have engaged a mediator and evidence is provided that they have not been able to resolve their differences amicably, that the Juvenile Court can proceed to hear the case.

In addition, the Juvenile Court found that the word “mediator” has not been interpreted in Rule 3 of the Juvenile Court Rules and that her perusal of the Law of the Child Act was not helpful as well; although Rule 65(6) of the Juvenile Court Rules provides that the procedure for issuance and service of summons should be the procedure provided under Order V of the Civil Procedure Code. The said Juvenile Court was of the position that the term “mediator” named in Civil Procedure Code applies to issuance and service of summons only; hence, she forwarded the case to the High Court for guidance.

Among other issues, the High Court had to determine the issue: whether the Juvenile Court has jurisdiction to mediate parties in cases concerning child custody, maintenance and access. According to the High Court, it is prudent and advisable that the Juvenile Court should encourage and facilitate the parties to a dispute before it to conduct out-of-court amicable settlement between themselves or before a mediator of their own choice and then report back to the said court for further action in accordance with the law.

### **13.2 Eroding the Principle of Confidentiality of Mediation**

As considered above, it is elementary that court-annexed mediation is confidential and any information relating to the ADR proceedings should be kept confidential.<sup>720</sup> However, some mediating judicial officers have been disclosing some information relating to court-annexed mediation. Several court decisions have been, so far, rendered on this anomaly. For example, in *Sasa v. KCGA*,<sup>721</sup> when composing a

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<sup>720</sup> Order VIIIC rule 31 of the CPC.

<sup>721</sup> *Sasa v. KCGA*, op. cit.

judgment in appeal, the High Court Judge noticed that; during mediation, the mediator recorded the proceedings of mediation in the case file with the parties' offers and counter-offers being on record as well. The court held that; since mediation proceedings are confidential, records of mediation proceedings (including offers and counter-offers) should not be kept in the court case file.<sup>722</sup> According to the court, while the mediator is entitled to take notes of the mediation, such information is for his/her use only. As such, a mediator is supposed to record in the court file the outcome of the mediation only.

Similarly, in *MIC Tanzania v. Ben Paul*,<sup>723</sup> the court determined the extent of confidentiality of the mediation process and whether a mediator in court-annexed mediation can keep records of mediation proceedings in the court case file. In this case, while composing its judgment in appeal, the High Court noticed to an irregularity that was glaring on the face of the record: in the proceeding of mediation conducted during the trial, the mediator recorded everything that transpired in court including a reason which led to the failure of mediation. The court held that; since mediation proceedings are confidential between the parties and the mediator, it is a procedural irregularity for the mediator to record everything that transpired during mediation proceedings in the court case file, including a reason which led to the failure of mediation.

Yet again, in *EAC Logistic v. Falcony*,<sup>724</sup> while determining an appeal, the High Court noted one irregularity in which the mediator conducted mediation during the trial: the mediator recorded in the court's case file that the parties were not interested

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<sup>722</sup> Such irregularities are also prevalent in mediation sessions conducted under the auspices of the Commission for Mediation and Arbitration (CMA). For instance, in *Charles Petro v. St. Carol Institution* [2014] LCCD 96 (*Petro v. St. Carol*) (at p. 435), it was alleged that the mediator did not put into writing what was agreed upon, but rather an offer which was made by the employer and also that the employee was forced to sign the agreement by the mediator. For a discussion on this issue, see particularly Nkobogo, J.J., "Legal and Institutional Challenges on Mediation of Labour Disputes in Tanzania," *East Africa Law Review (EALR)*, Vol. 48 No. 2, December 2021, pp. 27-60, at pp. 55-57

<sup>723</sup> *MIC Tanzania v. Ben Paul*, op. cit.

<sup>724</sup> *EAC Logistic v. Falcony*, op. cit.

in the said mediation and proceeded to mark mediation as failed. As noted above, the court had to determine, *inter alia*, whether a mediator can give reasons and reduce them into writing where court-annexed mediation fails; and what are the consequences of the mediator's act of giving reasons as to why mediation failed? According to the High Court, it is a settled rule of practice that when mediation fails, mediators are not supposed to put on record reasons that broke it down. As the court held, the rationale for such prohibition is simple; since ADR processes and proceedings are confidential, if amicable settlement is not reached, disclosure of information can subsequently prejudice the subsequent trial magistrate/judge. The High Court counselled that; in such cases the duty of the mediator is limited to recording the failure in this form: "*Court/Order - Mediation has failed*".

An analysis of this anomaly has revealed that the sheer lack of express provisions in ADR laws that could clearly provide guidance on the scope, extent and implications of confidentiality in ADR is responsible for the foregoing irregularities in the practice of court-annexed ADR.

### **13.3 Lack of ADR Curricular for Higher Learning Institutions**

Despite the fact that ADR, as a whole, and, mediation in particular, is now a mandatory procedural step in all civil proceedings under the CPC and sectoral laws not canvassed in this article, there is no any policy or statutory stipulation making it a mandatory course for law students in Tanzania. As a consequence, most universities do not train beginners in law about ADR (and mediation) principles, procedures and practices as a mandatory course. It is only recently that the Law School of Tanzania (LST) has introduced a special module on ADR and quasi-judicial practice.<sup>725</sup> This special module strives to achieve a two-pronged learning objective – *i.e.*, at the end of this module, students should be able: (i) to resolve civil disputes using ADR (including mediation) approaches, and (ii) to apply proper procedures and practices in handling cases before quasi-judicial and administrative bodies.

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<sup>725</sup> See Law School of Tanzania, *Practice-Based Professional Learning Curriculum for Post-Graduate Diploma in Legal Practice* (Dar es Salaam: Law School of Tanzania, 2023).

The delay in making ADR a compulsory and independent subject in most higher learning institutions teaching law in Tanzania has far-reaching consequences. Foremost, students in law in Tanzania graduate without being equipped with requisite skills in ADR and mediation. As considered below, when they become advocates, State Attorneys or judicial officers; such lawyers fail to effectively utilize the ADR mechanisms apparently due to lack of the indispensable ADR and mediation skills. For instance, in *Sasa v. KCGA*, *MIC Tanzania v. Ben Paul*, *EAC Logistic v. Falcony*, and *Petro v. St. Carol* (all cases are discussed above), presiding ADR officers and counsel failed to abide by the basic ADR principle of confidentiality, consequent to which the ADR proceedings in question were quashed by superior courts.

#### **13.4 Legal Practitioners' Incompetence and Reluctance to Utilise Court-Annexed Mediation**

The role of advocates in civil proceedings, particularly in court-annexed mediation, cannot be over emphasised.<sup>726</sup> However, concerns have been expressed on the role of advocates in court-annexed mediation proceedings, including in the labour mediation process.<sup>727</sup> In most cases, advocates have been responsible for unnecessary delays and sometimes failure of court-annexed mediation processes and proceedings. This is partly due to a lack of expertise among mediators,<sup>728</sup> lack of knowledge, poor understanding and skills on ADR and mediation principles, procedures and practices amongst many legal practitioners (particularly advocates). In a study conducted in 2018, it was revealed that; in mediation proceedings conducted under

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<sup>726</sup> See particularly Regulations 20(a), 58 and 59 of the Advocates (Professional Conduct and Etiquette) Regulations (G.N. No. 118 of 2018); and paragraph 11(5)(c) of the Code of Ethics and Professional Conduct for Law Officers and State Attorneys (G.N. No. 600 of 2019).

<sup>727</sup> Nkobogo, op. cit, p. 59.

<sup>728</sup> See particularly Maro, F., "ADR Mechanisms in Tanzania: A Critical Assessment," *East African Journal of Law*, Vol. 14 No. 1, 2022, pp. 77–101; and Shemdoe, R. and C. Kihamba, "The Political Economy of Land Disputes in Tanzania," *Journal of Development Studies*, Vol. 19 No. 3, 2023, pp. 67–88..

the auspices of the CMA, ‘a good number of advocates have minimal skills on the process.’<sup>729</sup> According to that study,

Some [advocates] are very passive and do not help their clients to fully understand the nature and advantages of mediation, while others persuade their clients to reject mediation so that the dispute proceeds to arbitration [or litigation]. Besides, sometimes advocates have been the cause for adjournment of CMA proceedings due to their absence.<sup>730</sup>

This constraint is exacerbated by yet another major challenge relating to cynicism held by many lawyers to the effect that ADR is a threat to their legal profession.<sup>731</sup> This distrust stems from the notion held by ‘amongst most lawyers that frequent referral of cases to ADR services might affect their revenue streams’<sup>732</sup> since most legal practitioners do not bill their clients per hour, rather they peg their fees on the basis of the volume of time they spent on a specific cases, including court appearances.

### **13.5 Lack of Specialized Training Programmes Before Accrediting ADR Practitioners**

Lack of tailor-made training programmes for different cadres of accredited ADR practitioners, including advocates in private practice, is yet another challenge constraining effective ADR (and mediation) practice in Tanzania, as in other parts of

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<sup>729</sup> Nkobogo, op. cit.

<sup>730</sup> Ibid.

<sup>731</sup> Chipeta, B.D., *Civil Procedure in Tanzania: A Students’ Manual* (Dar es Salaam: Mkuki na Nyota Publishers, 2002).

<sup>732</sup> Alfred, A.M., “Land Disputes Settlement Through Alternative Dispute Resolutions in Tanzania: A Case Study of Bagamoyo District,” LL.M. Thesis, Open University of Tanzania, 2019, p. 68. Speaking at the occasion to launch of a report prepared by the High Court Mediation Centre on the study of the use of alternative dispute resolution in Dar es Salaam on 16 January 2024, Chief Justice Prof. Ibrahim Juma was reported saying that: ‘That’s why lawyers will tell you that’s where we get our food, without those corners we can’t get anything. Therefore, the delay for others is a benefit that provides them with income, so there is an absolute need to review our laws.’ See Kapama, F., “CJ Calls for Amendments in Justice Laws,” *Daily News* (Dar es Salaam, 19 January 2024; available at <https://dailynews.co.tz/cj-calls-for-amendments-in-justice-laws/> (accessed 30 October 2025)).

Africa.<sup>733</sup> It has been contented that there is a training deficit of ADR practitioners in Tanzania. This stems ‘from inadequate funding and logistic constraints needed to train such practitioners and the effect being that few practitioners are attending to numerous [court-annexed mediation] cases.’<sup>734</sup> Nevertheless, international best practice require that an ADR practitioner (including a mediator) should undergo ‘a compulsory training to be equipped with the right skills to prudently and professionally handle [ADR] cases to the admiration of all parties.’<sup>735</sup>

In contrast to the Tanzanian situation, other countries in the East African region have introduced compulsory training before one is accredited or registered as an ADR practitioner. In Kenya, for example, for one to be accredited and achieve a CIArb qualification in avoiding, managing and resolving disputes; he or she must first pursue an intensive training in ADR offered by the Chartered Institute of Arbitrators (CIArb).<sup>736</sup> As well as conducting introductory courses on ADR, the CIArb (Kenya Branch) has a three-pronged pathway for one to qualify for accreditation.<sup>737</sup>

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<sup>733</sup> In Kenya, for example, there is a similar shortage of trained mediators. See particularly Juma, W., “Barriers to Effective ADR in Land Disputes: A Kenyan Perspective,” *African Journal of Legal Studies*, Vol. 13 No. 4, 2021, pp. 301–319.

<sup>734</sup> Alfred, op. cit, p. 69.

<sup>735</sup> Ibid.

<sup>736</sup> CIArb Kenya Branch, “Train With Us,” available at <https://ciarbkenya.org/training/#:~:text=Our%20Courses,avoiding%2C%20managing%20and%20resolving%20disputes.> (accessed 31 October 2025).

<sup>737</sup> Ibid [noting that: Candidates who successfully complete Module 1, and its assessment, can apply for Membership of CIArb at a member level (MCIArb). Candidates who complete Modules 2 and 3, along with their assessments and a Peer Interview, can apply for Membership of CIArb at a fellow level (FCIArb). In addition, the CIArb (Kenya Branch) conducts accelerated routes to Membership (MCIArb) and Fellowship (FCIArb) through a 3-day Accelerated Route to Membership (ARM) in construction adjudication, international arbitration or domestic arbitration. This allows those with a minimum of three years of practical experience in law and some knowledge of these forms of ADR to be assessed and, upon passing, have the opportunity to become a Member of CIArb (MCIArb). Moreover, it offers as 5-day Accelerated Route to Fellowship (ARF) in construction adjudication, international arbitration or domestic arbitration for those with a minimum of 10 years of practical experience in the relevant field of ADR either as a representative or a practitioner. On

Moreover, the ADR ODR International (AOI)<sup>738</sup> runs an Internationally Accredited Civil/Commercial Mediation Training Programme in Kenya.<sup>739</sup> This is an internationally recognised six-day civil/commercial mediation course offered in Nairobi, Kenya. It provides learners with first class training as civil/commercial mediators. The programme is written and delivered by a pool of global experts who have decades of alternative dispute resolution experience. On successful completion of the programme, a candidate is allowed to gain the status of ‘ADR ODR International Accredited Civil/Commercial Mediator.’ This programme is recognised by the UK Civil Mediation Council (CMC), certified by the International Mediation Institute (IMI) and accredited by the Singapore International Mediation Institute (SIMI), ensuring its graduates obtain a prestigious qualification and have greater opportunities to begin their mediation practice in multiple jurisdictions across the world. This means that upon a successful completion of the course, graduates ‘are automatically eligible to apply for SIMI membership and to become a SIMI Accredited Mediator, Level 1.’<sup>740</sup>

Similarly, in Rwanda, the Kigali International Arbitration Centre (KIAC),<sup>741</sup> in collaboration with the Chartered Institute of Arbitrators (CIArb) – Rwanda Branch,<sup>742</sup> offers pre-registration training for persons aspiring to be members of the

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successfully completing the assessments provided, candidates can apply for peer interviews to become CIArb Fellow (FCIArb).].

738 The AOI runs this programme in collaboration with J. Miles & Co., a Nairobi-based law firm, as course delivery partner.

739 ADR ODR International (AOI), “Course Overview,” available at <https://www.adrodrinternational.com/kenya-civil-commercial-mediation-training> (accessed 31 October 2025).

740 Ibid.

741 The KIAC was established in 2010 under Law No. 51/2010 of 10/10/2010 Establishing the Kigali International Arbitration Centre.

742 The CIArb (Rwanda Branch) was established in 2020 and officially registered in May 2022. *See* Kigali International Arbitration Centre (KIAC), “Call for Application to the Introduction to Arbitration Training Program leading to Associate to CIArb”; RUAHA LAW REVIEW(RLR), Volume 6, December 2025

KIAC panel of domestic arbitrators as well as associates to the CIArb. Up until 2023, KIAC was the sole provider of dispute resolution training in Rwanda. But with the establishment of CIArb (Rwanda Branch), the two institutions now do collaborate with CIArb Headquarters and other local and international stakeholders in offering training, thereby building a broader cohort of qualified arbitrators and mediators with specialist ADR knowledge, skills, and expertise across a variety of professional sectors.<sup>743</sup>

Therefore, this training and accreditation pathway ensures that a person can only qualify for accreditation as an ADR practitioner after having gone through an intensive professional pre-qualification training and acquired requisite skills to enable them preside, manage and resolve disputes both professionally and efficiently. As such, Tanzania also needs to introduce this kind of professional pre-qualification training to persons aspiring to be accredited as ADR practitioners.

### **13.6 Lack of Continuing Professional Development Programme for ADR Practitioners**

Continuing, or continuous, professional development (CPD)<sup>744</sup> can be broadly explained as any type of learning a practitioner in a given profession (*e.g.*, legal profession) undertakes, which increases his/her knowledge, skills, expertise, understanding and experience in/of a subject area or role in relation to his/her practice. CPD is now globally recognized as entailing learning activities professionals engage in order to develop and enhance their skills, expertise and abilities to perform certain professional undertakings. CPD is a wholistic approach towards the enhancement of personal skills and proficiency throughout a professional's career.<sup>745</sup> Universally,

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available at [https://kiac.org.rw/wp-content/uploads/2023/05/Call-for-Application\\_ACIARB-Training.pdf](https://kiac.org.rw/wp-content/uploads/2023/05/Call-for-Application_ACIARB-Training.pdf) (accessed 30 October 2025).

<sup>743</sup> CIArb, "CIArb Rwanda Branch Launch," 01 June 2023; available at <https://www.ciarb.org/news-listing/ciarb-rwanda-branch-launch/> (accessed 30 October 2025).

<sup>744</sup> On its part, the Tanganyika Law Society (TLS) has formalized continuing legal education (CLE) and has made it mandatory for an advocate to undergo professional training and earn at least 10 points in each calendar year before renewing his/her practising certificate.

<sup>745</sup> CPD UK, "CPD Explained," available at <https://cpduk.co.uk//explained> (accessed 30 October 2025).

CPD is ‘an ongoing and planned learning and development process.’<sup>746</sup> It focuses on what a practitioner learns and how he/she develops his/her professional skills.

Nowadays, CPD is practiced by many professions, such as lawyers, engineers, accountants, and medical practitioners, to mention just a few. Through CPD, practitioners in a given profession may go through work-based learning (either through supervision, short-term and focused training courses, job-shadowing, mentoring or coaching), undertake a peer support buddying opportunity through professional bodies such as the Tanganyika Law Society (TLS), completing a professional qualification training programme, going through an informal or experiential learning (which takes place through life and work experience), and undertaking peer mentoring or job-shadowing.

Despite its paramount importance to the development of professionals in a given vocation, most ADR institutions in Tanzania do not have specific and time-bound CPD programmes for their accredited members. A few of the existing ADR institutions have devised CPD programmes, but they do not run them regularly and as a mandatory requirement for their members. For example, on its website, the Tanzania International Arbitration Centre (TIAC) advertises that it runs

[...] a programme that ensures competent continuing professional development on ADR, aiming at creating a new generation of competent domestic and international ADR practitioners with a common understanding of global ADR best practices, and increased awareness of domestic and international ADR systems by conducting a number of seminars, trainings, workshops and dialogues which are meant to provide skills and knowledge to ADR practitioners as well as

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746 Nottinghamshire County Council, “Continuing Professional Development (CPD),” available at <https://www.nottinghamshire.gov.uk/care/early-years-and-childcare/childcare-providers/cpd#:~:text=Continuing%2C%20or%20continuous%2C%20professional%20development,planned%20learning%20and%20development%20process.> (accessed 30 October 2025).

tailor made training basing on the needs of a particular profession and institutions.<sup>747</sup>

SIMILARLY, THE TANZANIA INSTITUTE OF ARBITRATORS (TIARB)<sup>748</sup> AND THE NATIONAL CONSTRUCTION COUNCIL (NCC) OFFER SHORT COURSE TRAINING TO THEIR MEMBERS, PARTICULARLY DURING THEIR ANNUAL GENERAL MEETINGS/CONFERENCES. HOWEVER, THESE PROGRAMMES ARE NOT CARRIED OUT REGULARLY AND DO NOT ATTACH A MANDATORY REQUIREMENT FOR MEMBERS OF TIAC, TIARB OR NCC TO ATTEND AND EARN A SPECIFIED NUMBER OF CPD HOURS/POINTS JUST LIKE OTHER PROFESSIONAL BODIES – SUCH AS THE TLS AND NATIONAL BOARD OF ACCOUNTANTS AND AUDITORS (NBAA) – DO.<sup>749</sup> AS A RESULT, ACCREDITED ADR PRACTITIONERS (INCLUDING MEDIATORS) DO NOT HAVE AN OPPORTUNITY TO REGULARLY SHARPEN THEIR SKILLS AND EXPERTISE, PARTICULARLY IN EMERGING AREAS OF ADR PRACTICE BOTH DOMESTICALLY AND INTERNATIONALLY.

This challenge is exacerbated by yet another constraint to effective ADR practice in Tanzania. Judicial and quasi-judicial bodies do not have coordinated and synchronized capacity building programmes for their personnel involved in ADR. As a result, there is a serious discrepancy in training programmes offered to officials who preside over ADR processes and proceedings in judicial and quasi-judicial bodies,

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747 TIAC, “Our Services,” available at <https://tiac.or.tz/our-services/> (accessed 30 October 2025).

748 See, for example, TIARB, “Rescheduling of Training on Introduction to Commercial Mediation: Conduct and Procedure,” available at [https://www.linkedin.com/posts/tiarbtz\\_opportunity-training-experience-activity-7070396664292753408-7kXT](https://www.linkedin.com/posts/tiarbtz_opportunity-training-experience-activity-7070396664292753408-7kXT) (accessed 30 October 2025).

749 See generally Mwinuka, W. and R., Farrelly, R., “Continuing Professional Development in Tanzania: Best Practices and Challenges,” in *Continuing Professional Development of TESOL Practitioners* (2023), pp.365-392 (2023) (DOI -10.1007/978-3-031-42675-9\_16); available at [https://www.researchgate.net/publication/375971599\\_Continuing\\_Professional\\_Development\\_in\\_Tanzania\\_Best\\_Practices\\_and\\_Challenges](https://www.researchgate.net/publication/375971599_Continuing_Professional_Development_in_Tanzania_Best_Practices_and_Challenges) (accessed 30 October 2025).

which, in turn, creates an incongruity in the delivery modes of ADR in judicial, quasi-judicial and non-judicial ADR settings.

### 13.7 Lack of Public Awareness on and Trust in ADR

As we have contended above, two court-annexed ADR mechanisms (*i.e.*, arbitration and mediation) were introduced into the country's civil litigation in 1994. In 2019, the list of ADR mechanisms was enlarged to also include court-annexed negotiation and conciliation. In addition, in 2020, the Arbitration Act<sup>750</sup> was enacted to domesticate international norms guiding the arbitration practice. The Arbitration Act also amended the CPC to introduce an ADR system and accreditation of ADR practitioners.<sup>751</sup> It also amended the Criminal Procedure Act (CPA) thereby introducing reconciliation in criminal litigation in relation to compoundable offences.<sup>752</sup> Moreover, between 1994 and 2024, several laws were enacted and/or amended to incorporate some ADR mechanisms for resolving disputes arising from sector-specific disputes. In early 2000s, a constitutional amendment also recognised ADR in both criminal and civil matters.<sup>753</sup>

One would have expected that the period within which ADR (and, particularly so, court-annexed mediation) has been formally and legally recognized and practiced in Tanzania is 'long enough to warrant its popularity or familiarity in the public, as it is already an inherent component of the country's legal system.'<sup>754</sup> However, this is not the case. Today, ADR (including court-annexed mediation) remains less known to most people, including court users, who also tend to have less trust in mediation. As in other parts of Africa,<sup>755</sup> mediation in Tanzania is often hindered by, *inter alia*,

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<sup>750</sup> Cap. 20 R.E. 2023.

<sup>751</sup> Sections 64A-64D of the Arbitration Act (No. 1 of 2020). Following the publication of the Revised Editions of the Tanzanian Laws in 2023, these provisions have incorporated in the CPC and redesignated as Sections 72-74 of the CPC.

<sup>752</sup> Sections 163 and 170 of the CPA.

<sup>753</sup> See particularly Article 107A(2)(d) of the Constitution of Tanzania (1977).

<sup>754</sup> Alfred, *op. cit.*, p. 76.

<sup>755</sup> See particularly Juma, A., "Institutional weaknesses in ADR mechanisms in East Africa," *African Journal of Law and Conflict Resolution*, Vol. 16 No. 4, 2021, pp. 99–

resistance from parties involved in disputes,<sup>756</sup> and a general lack of trust in the ADR process. Less efforts have been exerted to raise public awareness on the benefits and advantages of resolving civil disputes and some criminal cases through ADR in Tanzania.

#### 14.0 Conclusion and Recommendations

This article has noted that; despite the progressive and elaborate procedural steps that have been made to the CPC in 2019 and 2024, there are several legal and practical challenges constraining its effectiveness and efficiency. Therefore, it is recommended several mitigating actions should be undertaken. Foremost, in order to remove the confusion inherent amongst practitioners as to when and how a given mediation is to be resorted to and conducted, it is recommended that mediation procedures should be one of overarching components of the continuing legal education (CLE) programmes for both advocates and mediators. Moreover, in order to ensure that confidentiality in mediation is maintained by both mediators and counsel, it is high time further elaboration is provided for in the First Schedule to the CPC to provide more elaborate provisions on what constitutes confidentiality in court-annexed mediation. It is also high time that regular training is conducted to court-annexed mediators and counsel to equip them with the pre-requisite knowledge and skills on the fundamental principles of mediation, including confidentiality.

Furthermore, in a bid to equip legal practitioners and mediators with the requisite skills in mediation, there is a need for the Council of Legal Education (CLE) to prescribe a mandatory requirement obliging higher learning institutions teaching law to introduce a mandatory ADR subject in their curricular for undergraduate law

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121; and Maina, J. and E. Gathumbi, “Community resistance to ADR in rural Kenya,” *Kenya Journal of Social Justice*, Vol. 8 No. 3, 2022, pp. 34–57..

756 Kamau, W., “Law, Culture and Dispute Resolution: Prospects for Alternative Dispute Resolution (ADR) in Africa,” *East African Journal of Peace and Human Rights*, Vol. 15 No. 2, 2009, pp. 336–360 (arguing that; the superimposition of Western ADR methods onto African societies often ignores local sociocultural dynamics, leading to resistance and reduced effectiveness.) Such resistance often stems from traditional practices for conflict resolution perceived as more aligned with communal norms. See also Richards, A.I., *Land, Labour, and Diet in Northern Rhodesia: An Economic Study of the Bemba Tribe* (London: Oxford University Press, 1939).

students. In addition, in order to do away with legal practitioners' incompetence and reluctance to utilise court-annexed mediation, mediators in court-annexed mediation should continue reminding advocates of their professional duty 'to advise and encourage [their] client to compromise or settle a dispute whenever possible on a reasonable basis.'<sup>757</sup> This is because the law obliges an advocate to 'advise and encourage the client to settle a case rather than commence or continue legal proceedings where the case can be settled timely, fairly and reasonably.'<sup>758</sup>

The law also imposes a duty on an advocate to 'consider the appropriateness of alternative dispute resolution (ADR) to the resolution of issues in every case and inform the client of ADR options and advantages and, if so instructed, take steps to pursue those options.'<sup>759</sup> In addition, mediators in court-annexed mediation should continue reminding State Attorneys and Law Officers of their professional duty to assist the Government in reaching amicable settlements in civil disputes in order to 'ensure that the best interests of the Government and other parties involved are justly and fairly met.'<sup>760</sup>

In order to ensure that a person can qualify for accreditation as an ADR practitioner (including being a mediator), there is a need for both the Judiciary of Tanzania and the Ministry responsible for justice to introduce a mandatory training and accreditation pathway that ensures a person can only be accredited as an ADR practitioner after having gone through an intensive professional pre-qualification training and acquire requisite skills to enable them to preside, manage and resolve disputes both professionally and efficiently.

Moreover, in order to develop and enhance requisite and respective skills, expertise and abilities of ADR practitioners (and particularly court-annexed mediators) to perform

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<sup>757</sup> See particularly Regulation 20(a) of the Advocates (Professional Conduct and Etiquette) Regulations (2018).

<sup>758</sup> Ibid, Regulation 58.

<sup>759</sup> Ibid, Regulation 59.

<sup>760</sup> See particularly Paragraph 11(5)(c) of the Code of Ethics and Professional Conduct for Law Officers and State Attorneys (G.N. No. 600 of 2019).

certain professional undertakings; there is a need for relevant authorities in Tanzania (including the Judiciary) to introduce mandatory CPD. In addition, judicial and quasi-judicial bodies should have coordinated and synchronized capacity building programmes for their personnel involved in ADR in order to do away with the inherent serious discrepancy in training programmes offered to officials who preside over ADR processes and proceedings in judicial and quasi-judicial bodies. Lastly, all relevant stakeholders (including the Judiciary) should devise and run tailor-made public awareness programmes to increase public awareness on ADR (including court-annexed mediation) amongst Tanzanians. As such, these specific interventions will mitigate the foregoing challenges in order to ensure that ADR and court-annexed mediation achieve their intended objectives – settling disputes amicably, expediently, effectively and with less costs while preserving the harmonious relationship of the parties to relevant disputes.

# ANALYSIS OF TANZANIA'S REGULATORY REGIME FOR CURTAILING ILLICIT FINANCIAL FLOW IN DIGITAL ERA.

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## **ABSTRACT**

*This article reviews the Tanzania's regulatory regime for curtailing illicit financial flow in digital era including some of the unanswered questions by the current regulatory framework. The study focusses on critical analysis of regulatory gaps in the regulatory regime curtailing cross border loss of tax revenue under digital era. It also examines whether international principles and standards governing the combating IFF are fully complied with by Tanzania. In finding answers to the existing legal problems under the study, doctrinal legal research methodology complemented by comparative legal research methodology is employed. The article identifies that there are opportunities and challenges in the current regulatory framework and the regulatory regime should strike the required balance. The study reveals that the objective of increasing public revenue through combating IFF seems not to be fully realized. This is because the existing law governing IFF is not well articulated, lacks clarity in some areas, and does not reflect well the international principles and standards governing the combating of IFF. Consequently, the legal challenges in respect of IFF affect the effective administration and collection of public revenue since IFF causes leakage or wastage of the very needed public revenue. The study recommends for enactment and amendment of the anti-illicit financial flow law to address the identified legal challenges and also fully ratify international standards with the aim of combating wastages and leakages of public revenue. The enactment and amendment will guard against the loss of Government revenue.*

**Keywords :** *Illicit Financial Flows ,Fintech, Virtual Asset, Virtual Asset Service Provider*

## 1.0 INTRODUCTION

The rapid advancement in transportation and communication technologies has accelerated the globalization of the world economy, and has led to increase productivity and economic growth, and a higher standard of living in some countries through cross border transactions. The same have brought about an era of e-commerce, internet banking, mobile banking, sim-banking and electronic money transfers, all of which are instantaneous thus accelerating cross border transactions. On the other hand, the same have brought many side effects, such as illicit financial flow (IFF) and other black-market activities resulting into erosion of much needed public revenue. Illicit financial flows (IFFs) in Tanzania's digital age, on the other hand, date back to the 2000s, when digital financial services like internet banking and mobile money grew quickly, increasing access while also posing new hazards.<sup>761</sup>Tanzania responded by establishing organizations like the Financial Intelligence Unit (FIU) and passing laws like the Anti-Money Laundering Act 2006, however implementation is still lacking because of the outdated oversight instruments and institutional capabilities.<sup>762</sup> While monitoring beneficial ownership and real-time financial data gaps still exist, the emergence of cryptocurrencies and other mostly unregulated digital assets in recent years has opened up new avenues for IFFs.<sup>763</sup> Tanzania's experience shows that in order to effectively address IFFs, regulatory reforms must keep up with the rapid speed of digital innovation and be supported by interagency cooperation and technical capability.<sup>764</sup>

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<sup>761</sup>GSMA, State of the Industry Report on Mobile Money 2022 (GSMA 2022) <https://www.gsma.com/sotir> (accessed on 7 June 2025)

<sup>762</sup> Anti-Money Laundering Act 2006 (Tanzania); Financial Intelligence Unit, *Annual Report 2022* (FIU 2023); ESAAMLG, *Tanzania Mutual Evaluation Report 2021* (ESAAMLG 2021) <https://www.esaamlg.org> (accessed on 7 June 2025).

<sup>763</sup> Bank of Tanzania, 'Notice on the Use of Cryptocurrencies' (2019); World Bank, *Tanzania Digital Economy Diagnostic Report* (World Bank 2021) <https://www.worldbank.org> (accessed on 7 June 2025).

<sup>764</sup>OECD Global Forum, *Peer Review Report: Exchange of Information on Request – United Republic of Tanzania (2021)* <https://www.oecd.org/tax/transparency/>(accessed on 7 June 2025).

The objective of this article is to examine regulatory framework governing control of illicit financial flow in digital era in Tanzania in order to disclose the existing gaps and abridge them, ascertaining the extent to which existing regulations are in conformity with international standards/instruments, and suggesting necessary legal reforms on laws governing illicit financial flows in line with prevailing socio-economic condition in Tanzania. Thus the article seeks to ascertain loop holes in anti IFF regulatory frame work in digital era and extend of conformity of the same to international instruments and standards, asks how can the regulatory frameworks of IFF in digital era may be reformed inline with the strategic needs and prevailing local environment in Tanzania to solve problem of loss of tax revenue through IFF in digital era.

## **2.0 METHODOLOGY**

The article employed both doctrinal and comparative methodology. Doctrinal methodology was employed to evaluate laws pertaining to illicit financial flows in digital era and examine literature on the subject.<sup>765</sup> The article also utilized a comparative approach by contrasting international and regional standards with national legislation, particularly focusing on the global frameworks addressing illicit financial flows and FATF recommendations. This methodology facilitated an examination of how well Tanzania's IFF regulations align with international and regional standards and principles. Generally, this approach helps determine if these standards and principles can be incorporated into national laws as they are or with modifications to fit the local context. Additionally, such instruments may serve as benchmarks for enhancing Tanzania's legal and institutional framework to effectively address the legal challenges presented. The principles of statutory interpretation, including the literal rule, golden rule, and mischief rule, were employed in the analysis of data through doctrinal and comparative methods. Based on the aforementioned review and analysis, the article reached conclusions and put forth recommendations on measures that should be taken to effectively safeguard against the loss of tax revenue in Tanzania through IFF in the digital era.

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<sup>765</sup> Singhal A.K. and Malik I., Doctrinal and Social Legal Methods: Merits and Demerits, Educational Research Journal, 2012, Vol. 2, No.7, pp .252-256

### 3.0 CONCEPTUALIZING ILLICIT FINANCIAL FLOW IN DIGITAL ERA IN TANZANIA

The nature of Illicit Financial Flows (IFFs) in Tanzania has changed significantly due to the swift digitalization of financial institutions. IFFs are historically linked to activities like Organised crime, tax evasion, corruption, and trade mis invoicing. They are often characterized as cross-border movements of money that are illegally earned, transferred, or used. But as the world has gone digital, IFFs have become more sophisticated because to digital commerce platforms, online financial services, cryptocurrencies, and mobile money systems that enable quick, anonymous transactions with little governmental control.<sup>766</sup> Digital financial services have grown rapidly in Tanzania. More than 30 million mobile money accounts were registered as of 2023 thanks to mobile money systems like M-Pesa, Tigo Pesa, and Airtel Money, which have helped promote financial inclusion.<sup>767</sup> Although the unbanked population has benefited much from this progress, new vulnerabilities have also been brought about. Because mobile platforms allow for high-volume, real-time digital transactions, they can be exploited by criminal actors who use them to finance illegal businesses, avoid taxes, or launder money.<sup>768</sup> Cryptocurrency adds a further layer of complexity in curtailing IFF in Tanzania in digital era.

### 4.0 REGULATORY FRAMEWORK FOR CURTAILING IFF IN DIGITAL ERA IN

In the fight against Illicit Financial Flows (IFFs), Tanzania has both new potential and problems as digital platforms, mobile money, and fintech transform financial institutions. In order to reduce the loss of tax revenue through IFF in the digital age, the nation has responded by gradually modernizing its institutional and legislative framework. However, the Bank of Tanzania warned the public on November 12,

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<sup>766</sup> Global Financial Integrity, *Illicit Financial Flows: The Most Damaging Economic Condition Facing the*

*Developing World* (2013) <https://gfintegrity.org> (accessed on 7 June 2025)

<sup>767</sup> Tanzania Communications Regulatory Authority (TCRA), *Quarterly Communications Statistics Report,*

December 2023 <https://tcra.go.tz> (accessed on 7 June 2025).

<sup>768</sup> Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), *Second Round Mutual*

*Evaluation Report of Tanzania* (2022) <https://esaamlg.org> (accessed on 7 June 2025).

2019, that the Tanzanian Shilling was the only legal and acceptable form of payment in the nation and that trading, marketing, and using virtual currency was against current foreign exchange regulations. However, a recent ruling in *Yellow Card Tanzania Limited v. Nyamwero Michael Nyamwero*, Commercial Case No. 12171 of 2024 HCTZ, handed down by the High Court of Tanzania on December 13, 2024, has changed the legal environment around the use of virtual assets like cryptocurrencies in Tanzania. In this case, a virtual currency trading corporation (the Plaintiff) filed a breach of contract lawsuit against its former employee (the Defendant) using a deed of settlement. After the employee was charged with embezzlement and consented to pay back USD 1.193 million to the corporation, the parties signed the Settlement document. The defendant disputed the allegation, claiming that the deed of settlement was null and void since its purpose and consideration related to bitcoin enterprises that were prohibited in Tanzania. The Court pointed out that the majority of nations, including Tanzania, have been using service providers to operate on digital PR cryptocurrencies while disputing the defendant's claim. The required taxes must be paid by all cryptocurrency operators and service providers who enable these kinds of online transactions. The Court decided that a transaction involving digital assets and money cannot be deemed unlawful because the parties involved have been paying taxes in accordance with the tax regulations. Following its conclusion that bitcoin trading is legal, the Court found that the Defendant had violated the provisions of the agreement and granted the Plaintiff USD 1.193 million, which was the remaining amount owed under the terms of the Settlement contract, among other reliefs.

To mitigate loss of tax revenue on digital transactions, government introduced key reforms which included amendments to the Income Tax Act and VAT Act, which now require non-resident providers of digital services to register and pay taxes in Tanzania.<sup>769</sup>The Finance Acts of 2020–2022 effectively introduced a Digital Services

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<sup>769</sup> Regulation six (6) of the Income Tax (Registration of Non-resident Electronic Service

Providers/Suppliers) Regulations, 2022 and the Value Added Tax (Registration of Non-resident

Electronic Service Providers/Suppliers) Regulations, 2022 requires non-residents to electronically file

tax returns and make tax payments. Section 90 A (2) of the Income Tax Act, Cap. 332, and Regulation 6 of the Value Added Tax (Registration of Non-resident

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Tax (DST), expanding the tax base to include e-commerce and streaming services.<sup>770</sup>The Tax Administration Act strengthens enforcement by allowing digital audits and mandatory record-keeping.<sup>771</sup>

Despite not being recognized as legal tender, cryptocurrencies are increasingly used informally within Tanzania, posing a serious challenge to law enforcement and financial regulators due to their anonymity and borderless nature.<sup>772</sup> With the Finance Act of 2022, Tanzania implemented the Digital Services Tax (DST) in recognition of the growing regulatory and economic risks associated with the digital economy. Section 69(m) was added to the Income Tax Act, Cap. 332 by the Finance Act, 2022. This provision creates a source of income within the United Republic for payments made by people (who are not conducting business) for services provided by non-residents. This law amended the Income Tax Act, Cap. 332,<sup>773</sup> by introducing a 2% tax on gross payments received by non-resident digital service providers offering services such as online streaming, advertising, cloud computing, and software services to Tanzanian consumers.<sup>774</sup> In order to combat profit shifting and erosion of the tax base, the DST makes sure that global digital companies who make money in Tanzania pay their fair share of taxes, which in turn reduces tax-related IFFs. Nevertheless, the identification and enforcement of compliance against foreign organizations that do not have a physical presence in Tanzania have proven to be challenging, making the implementation of this tax challenging. By adding Section 64(5), the Finance Act of 2022 modified the Value Added Tax Act, Cap. 148, enabling non-resident individuals to register for VAT without a tax representative. In order to facilitate the

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Electronic Service Providers/Suppliers) (Amendments) Regulations, 2023 set the 20th day of the following month as the due date for return filing and tax payment.

<sup>770</sup>Ibid.

<sup>771</sup>Tax Administration Act, ss 29–30.

<sup>772</sup>Bank of Tanzania, *Public Notice on Cryptocurrency Use in Tanzania* (2019) <https://bot.go.tz> (accessed on 7 June 2025).

<sup>773</sup> Additionally, Section 90 A of the Income Tax Act requires non-resident persons to pay income tax at a rate of 2% on payments received from individuals not conducting business, for services rendered through a digital marketplace.

<sup>774</sup> Income Tax Act, s 90A.

implementation of these provisions, comprehensive guidance was introduced in the Income Tax (Registration of Non-resident Electronic Service Providers/Suppliers) Regulations, 2022 and the Value Added Tax (Registration of Non-resident Electronic Service Providers/Suppliers) Regulations, 2022. In addition, the Finance Act of 2023 modified Section 90A of the Income Tax Act to broaden the range of services beyond those offered through digital marketplaces to encompass all electronic services.<sup>775</sup>

In response, the Finance Act of 2024 introduced further reforms to strengthen DST enforcement.<sup>776</sup> These changes include the Tanzania Revenue Authority's (TRA) Commissioner General designating simplified tax filing procedures for non-resident digital service providers, requiring their registration, and establishing withholding mechanisms through domestic payment intermediaries.<sup>777</sup> These steps are intended to increase tax revenue from online sales and lower the possibility of underreporting or hiding revenue from Tanzanian customers. Several legislation further underpin Tanzania's larger legal framework for preventing IFFs in the digital age. The Anti-Money Laundering Act (Cap. 423) requires banks, mobile money providers, and other financial institutions to report suspicious transactions, including those that are carried

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<sup>775</sup>Attention to Section 90A of the Income Tax Act- Cap 332 (reference to Finance Act, 2022, page 25,

and the subsequent amendments in Finance Act, 2023, page 29, Margin Note: Amendment of

section 90A), and Section 64(5) of the Value Added Tax Act- Cap.148 (reference to Finance Act,

2022, page 45, Margin Note: Amendment of section 64) as outlined in the Income Tax (Registration

of Non-Resident Electronic Service Providers) Regulations, 2022, and the Value Added Tax

(Registration of Non-Resident Electronic Service Suppliers) Regulations, 2022.

<sup>776</sup> The Finance Act, 2024 introduced new provisions under the Income Tax Act, Cap. 332:Section 83B:

Mandates residents or non-residents making payments to resident digital content creators to withhold

tax at a rate of 5% on such payments. Section 83C: Mandates residents or non-residents owning

digital asset exchange platforms or facilitating digital asset exchanges or transfers to withhold tax at a

rate of 3% on payments made to resident persons for the exchange or transfer of digital assets.

<sup>777</sup>Tanzania Revenue Authority (TRA), *Guidelines on Digital Service Tax*, April 2024.

out online.<sup>778</sup> But virtual assets service providers are not included in the definition of reporting persons by the Act,<sup>779</sup> and therefore the same may operate outside the regulatory framework. The Proceeds of Crime Act (Cap. 256) enables the state to seize and recover assets acquired through unlawful financial activity, including digital fraud and tax evasion.<sup>780</sup> The conviction based forfeiture is long and cumbersome. The Cybercrimes Act of 2015 complements these laws by criminalizing various cyber-enabled offenses such as computer related forgery, computer related fraud, child pornography, pornography, and identity theft.<sup>781</sup>

Despite this legislative architecture, enforcement remains constrained by limited technological capacity, lack of digital forensic skills, and gaps in cross-border cooperation and wanting institutional autonomy. For instance, The Anti-Money Laundering Act defines law enforcement agency to mean the Police Force, Prevention and Combating of Corruption Bureau, Immigration Services, Tanzania Revenue Authority and any other body dealing with criminal investigations.<sup>782</sup> The Police Force is headed by Inspector General of Police (IGP), Prevention and Combating of Corruption Bureau is headed by Director General,<sup>783</sup> Immigration Services is headed by Inspector General of Immigration Services and TRA is headed by Commissioner General, the heads of the law enforcement agency are appointees of The President of the United Republic of Tanzania. The Anti-Money Laundering Act establishment of the Financial Intelligence Unit (FIU) reflect efforts to track suspicious digital transactions.<sup>784</sup> FIU is headed by the Commissioner who is appointed by The President of the United Republic of Tanzania,<sup>785</sup> and the Commissioner is the Chief Executive officer of the Extra Ministerial Department.<sup>786</sup> Other supporting laws, like the Cybercrimes Act, Electronic Transactions Act, and Personal Data Protection Act,

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<sup>778</sup> Anti-Money Laundering Act, Cap. 423 (R.E. 2022), ss 17–18.

<sup>779</sup> Anti-Money Laundering Act, Cap. 423 (R.E. 2022), ss 3.

<sup>780</sup> Proceeds of Crime Act, Cap. 256 (R.E. 2019), ss 12–15

<sup>781</sup> Cybercrimes Act 2015, ss 11–16.

<sup>782</sup> Anti-Money Laundering Act, ss 3.

<sup>783</sup> Prevention and Combating of Corruption Act, ss 6(2). Director General and Deputy Director

General are appointed by the President.

<sup>784</sup> Anti-Money Laundering Act, Cap. 423 (R.E. 2019), ss 4–10.

<sup>785</sup> *Ibid.*, ss 5(1).

<sup>786</sup> *Ibid.*, ss 5(3).

reinforce security and oversight across digital platforms.<sup>787</sup> Institutions such as the Tanzania Revenue Authority (TRA), Bank of Tanzania, and Tanzania Communications Regulatory Authority (TCRA) play critical roles in enforcing these laws and coordinating compliance. Regionally, Tanzania is active in bodies like ESAAMLG and ATAF, aligning its strategy with international standards such as the FATF recommendations and the OECD's BEPS framework.<sup>788</sup>

## **5.0 LEGAL CHALLENGES IN THE REGULATORY FRAMEWORK FOR CURTAILING ILLICIT FINANCIAL FLOWS UNDER DIGITAL ERA IN TANZANIA.**

Tanzania's regulatory systems aimed at reducing illicit financial flows (IFFs) face new difficulties as the digital economy grows. Even if current rules provide as a basis for taxes and anti-money laundering, there are substantial loopholes that make it difficult to implement them effectively, particularly when it comes to cross-border and digital activities. Financial technology advancements outpace the law, and there are enforcement gaps. For example, Tanzania does not regulate cryptocurrencies or virtual asset service providers (VASPs), which opens the door for tax evasion and money laundering. VASPs are allowed to operate outside of the legal system because they are not listed as reporting persons under Section 3 of AML. Many small-scale online traders continue to conduct their business informally, and enforcement against foreign digital operators is difficult. Effective compliance is further hampered by the lack of strong digital ID verification and the restricted capacity for digital audits.

The Anti-Money Laundering Act (AML Act) of 2006 in Tanzania doesn't fully address new digital financial instruments like cryptocurrencies or mobile money platforms, which have turned into conduits for IFFs. Instead, it focusses mostly on existing banking institutions. Due to the Act's narrow scope, there are enforcement loopholes, especially as fintech companies and digital service providers are frequently not subject

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<sup>787</sup> Cybercrimes Act, No. 14 of 2015, ss 16–20; Electronic Transactions Act, Cap. 442 (R.E. 2019);

Personal Data Protection Act, 2022.

<sup>788</sup> Financial Action Task Force, 'Updated Guidance for a Risk-Based Approach to Virtual Assets and

Virtual Asset Service Providers' (October 2021); OECD, 'Addressing the Tax Challenges of the

Digital Economy' (2019); ESAAMLG, 'Second Round Mutual Evaluation Report of Tanzania' (2022)

to the complete AML framework regulations. The Banking and Financial Institutions Act (BFIA), which regulates traditional banking but makes no special exemptions for non-bank suppliers of digital financial services, exacerbates this deficiency. Many digital transactions thus evade adequate regulatory inspection.

On the taxation front, Tanzania introduced the Digital Service Tax (DST) in 2020 to capture revenue from digital services, including those rendered by non-resident providers. However, the DST suffers from definitional ambiguities, limited enforcement capacity, and inadequate cross-border information exchange mechanisms. This hampers the Tanzania Revenue Authority's (TRA) ability to track and tax income from digital platforms effectively.<sup>789</sup> For example, many international digital companies operating virtually in Tanzania do not have a physical presence, complicating compliance and enforcement efforts.

Moreover, Tanzania's broader tax laws, including the Income Tax Act (ITA) and the Value Added Tax (VAT) Act, face challenges in addressing digital and e-commerce activities. These laws were originally designed for conventional economic activities and often lack clear provisions for digital transactions, resulting in weak compliance and reporting requirements for digital service providers, particularly small or informal operators.<sup>790</sup> Transfer pricing rules, critical for curbing base erosion and profit shifting through digital channels, are also inadequately enforced, enabling profit shifting and tax avoidance.

Weak autonomy of the heads of the law enforcement agency because of the nature of their appointments thus their decision may not be independent when investigating relatives or close associates of the appointing authority due to fear of repercussions. The office should not only be independent but seen to be independent. Weak autonomy often results in heads of agencies being susceptible to political pressure, leading to selective enforcement of anti-IFF laws. Politically exposed persons (PEPs)

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<sup>789</sup> OECD, 'Addressing the Tax Challenges of the Digitalization of the Economy' (OECD/G20

Inclusive Framework on BEPS, 2019) <https://www.oecd.org/tax/beps/publications-and-products/addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.htm> (accessed on 6 June 2025).

<sup>790</sup> Ibid.

and influential individuals may be shielded from investigation. This erodes public trust and undermines the credibility of anti-IFF initiatives. Furthermore FIU who receives suspicious financial information lacks prosecution powers rendering them toothless ,and the same water downs the quality of evidence as the same are passed over from one person to another.<sup>791</sup>

Weak institutional coordination, for example , with limited information sharing between TRA, the Financial Intelligence Unit (FIU), and other enforcement agencies.<sup>792</sup>This undermines the detection of inconsistencies between declared taxable income and suspicious financial transactions, facilitating the movement of illicit funds under the guise of legitimate digital earnings. Additionally, technological and human resource limitations within regulatory bodies restrict real-time monitoring and analysis of digital transactions, further weakening enforcement. Inadequate adherence to international standards, for instance, underscores the importance of incorporating AML/CFT strategies within tax frameworks to effectively tackle IFFs in the digital era. The Financial Action Task Force (FATF) advises a risk-based methodology for virtual assets and service providers, stressing the need for regulatory oversight that extends beyond conventional financial institutions. The OECD's initiatives on taxation in the digital economy highlight the necessity for clear and enforceable tax regulations that respond to the digital transformation of business models, promoting increased transparency and global collaboration.

## **6.0 RECOMMENDATIONS**

Following the legal challenges in curtailing IFF in Tanzania ,the suggested amendment of the IFF laws in Tanzania should take into account the following aspects:- To tackle these concerns, the article suggests amending Section 3 of the AML to classify virtual asset service providers and forex traders as reporting entities to guarantee compliance with the regulatory framework. Additionally, the article advocates for modifications to the Income Tax Act and VAT Act regarding the taxation of digital transactions to improve the management, collection, and enforcement of digital taxes.

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<sup>791</sup> Anti Money Laundering Act,ss 6.

<sup>792</sup> Financial Action Task Force (FATF), 'Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers' (FATF, 2019) <https://www.fatf-gafi.org/publications/fatfrecommendations/documents/guidance-rba-virtual-assets.html> (accessed 6 June 2025).

To guarantee autonomy and independence of the law enforcement agency engaged in the investigation of IFF, it is essential to amend the legal provisions related to the appointment of the heads of these agencies to prevent influence from the appointing authority. To enhance the efficiency of investigations related to IFF, it is necessary to amend Section 6 of the AML concerning the responsibilities and authorities of the FIU to provide them with prosecutorial powers. This article also suggests that the Tanzanian government should promote cooperation among various law enforcement agencies, invest in capacity-building efforts, and equip them with advanced enforcement technologies such as AI-based data analytics. Furthermore, the study advocates for modifications to legal provisions to address shortcomings in compliance with international standards, particularly in relation to digital transactions.

## **7.0 CONCLUSION**

The article analyzed the regulatory framework for curtailing IFF in digital era in Tanzania .The article reveals that Tanzania’s legal framework for curtailing illicit financial flows in the digital era is hampered by outdated laws (laws out paced by fintech) and enforcement gaps, inadequate inter-agency cooperation and deficiency in compliance with international standards. The limited scope of AML legislation, weaknesses in digital service taxation, and insufficient institutional capacity collectively undermine efforts to curb IFFs. While Tanzania has made significant strides in amending its legal framework to curtail IFF in digital era ,there still legal challenges in regulatory framework for curtailing IFF in digital era. The article recommends amendments to key pieces of legislation, such as the Anti-Money Laundering Act, Tax Administration Act, and compliance with international standards. Effectively addressing IFFs in Tanzania’s digital economy thus requires not only robust legislation but also investment in digital infrastructure, capacity-building for law enforcement, and regulatory technology (RegTech) for real-time transaction monitoring. Regional cooperation through the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) and adherence to global standards such as those set by the Financial Action Task Force (FATF) are also essential. As Tanzania continues to pursue digitalization through national strategies such as the Digital Tanzania Project, aligning financial governance with technological advancement is vital to protect the national economy from evolving illicit financial threats.

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