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Table of Content

Foreword

Greetings and welcome to the Law Reformer Journal, Volume 5. The primary objective of the Law Reformer Journal is to establish a platform that encourages a diverse range of individuals to engage in productive and intellectually rigorous discussions on matters of national and international significance. The Journal's objective is to emphasize the deficiencies in the existing legislation of the nation, foster discourse on possibilities for reforms and acknowledge notable advancements in laws and legal procedures.

The Law Reformer Journal was a biannual publication. However, for various reasons, it has not been published since 2013. The Law Reform Commission of Tanzania (Commission) apologizes to its esteemed readers and authors for the long silence. The good news is that this year onwards the Journal will be published annually with a new design and look.

The Journal has five topics in this edition. These are the legal challenges involved in dividing co-owned real property after divorce in Tanzania; the laws and procedures relating to extradition in Tanzania; the requirement to pursue civil or administrative remedies before initiating criminal proceedings; the protection of third parties' rights in real property during the division of marital assets in Mainland Tanzania; and the issue of statelessness in Tanzania.

The Commission expresses its profound appreciation to authors, blind peer reviewers, the Chief Editor, the Editorial Board and Secretariat for their exemplary performance.

George Nathaniel Mandepo
Executive Secretary
Law Reform Commission of Tanzania

Editor's Note

Dear Readers,

With great pleasure, I introduce the most recent Volume of the Law Reformer Journal, a publication devoted to exploring a wide range of legal discourses. Our distinguished contributors have explored a variety of topics in this Volume, providing perceptive assessments and insightful viewpoints.

I extend my sincere appreciation to the authors for sharing their knowledge and expertise. I also express my gratitude to our peer reviewers whose diligent perusal ensures the standards of quality of the content published. Thank you for your consistent support of the Law Reformer Journal.

We invite our esteemed readers to engage with the articles presented in this Volume. I believe that this Volume will contribute to the process of reforming laws as well as inspire you to submit your manuscript for future publication.

Professor Hamudi I. Majamba
Chief Editor

Analysis of Legal Conundrums in Division of Co-owned Real Property Following Divorce in Tanzania

Luckness W. Jangu*

Abstract

Ownership of real property among spouses is regulated by the Constitution, land and marriage laws. The Constitution guarantees the right to own property while the Land Act specifies conditions permitting spouses to co-own land. The Law of Marriage Act (LMA) unifies and harmonizes existing multiple regimes of marriage and recognizes all forms marriages.However, the LMA is silent, and its provisions have notable challenges and or irrelevant in the distribution of co-owned real property upon divorce in monogamous and polygamous marriages. Likewise, there is a legal conundrum attached to provisions of the LMA, the Land Act and the Land Registration Act. This Article analyses these challenges and concludes that the LMA has not been aligned with property laws. In this regard, it is irrelevant in the distribution of co-owned real property between spouses at the time of divorce. The Article recommends for the amendment of the LMA and its rules to accommodate division of co-owned real property during divorce.

Key Words; *Co-ownership of land, divorce, division of real matrimonial property, Tanzania.*

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1.0 Introduction

The Article focuses on co-ownership (joint tenancy and tenancy in common) as the nature of land ownership between spouses stipulated in the Land Act. Although joint occupancy is an intended tenure for spouses under the law, spouses can acquire an interest in another spouse's land in through tenancy in common. Likewise, at the time of divorce, a joint tenancy converges into a tenancy in common through the doctrine of severance to allow the distribution of such property.[1]

In the context of this Article, marriage is a union of man and woman that is contracted in accordance with and recognized as valid by the LMA.[2] A monogamous marriage is a voluntary union of a man and a woman, intended to last for their joint lives.[3] A polygamous marriage on the other hand is a union in which a man, during the subsistence of the marriage, marries another woman or women.[4] Furthermore, a polyandry is a form of marriage where a woman is married to more than one man. However, this form of marriage is prohibited in Tanzania.

Monogamy originates from the scriptures[5] so is polygamous marriage which is evident from the Bible[6], Quran[7] and African tradition.[8] African native laws and customs espouse polygamy, both as a religious fact and a cultural facet of African traditional life.[9] Polygamous marriages are of two categories: Islamic marriages in which a husband can marry up to four wives; Customary marriage where a man can marry more than one wife without restriction provided, they can maintain and treat the wives equally.[10]

1 *Chelangat v. Samuel Tiro Rotich & 5 Others (2012) EKLR.*
2 The Interpretation of Laws Act, [Cap. 1 R. E 2019].
3 Section 9(1), the Law of Marriage Act.
4 *Ibid.,* section 9(3).
5 The Holy Bible, 1 Corinthians 7:2, likewise it is recommended in Islam if a husband cannot deal justly with the wives, Al- Nisaa:3.
6 Exodus 21:10, Timothy 3: 1-6, 1Chronicles 3: 1-9, 2 Chronicles 11: 21, 2 Chronicles 24:3, Deuteronomy 25:5-12, Deuteronomy 21:15-17, Isiah 4:1, 2 Samuel 12-8, Judges 8: Genesis 4:19, 2 Chronicles 13:21, 2 Samuel 5:15, Genesis 30:9, 1Kings 11:1-4, among other verses.
7 Al- Nisaa :3.
8 Howland, R. J., and Ashley, K., "Divorce and Polygamy in Tanzania," *Social Justice*, Vol.15, 2014, pp. 1-39 at p. 6.
9 Marasinghe, M. L, "Polygamous Marriages and the Principle of Mutation in the Conflict of Laws," in *McGill LJ,* Vol. 24, 1978, p. 395-421 at p. 395. *See* also Fenske, J., "African Polygamy: Past and Present," *Journal of Development Economics*, Vol. 177, 2015, pp. 1-62 at p.6.
10 Section 56, the Law of Marriage Act.

Divorce arises when a married couple legally ends the marriage before the death of either spouse(s) by court order under national laws.[11] In Tanzania, divorce is granted when the marriage has broken down irreparably.[12] The burden lies on the petitioner to establish by evidence that the marriage has breakdown beyond repair.[13] Likewise, the petitioner must have referred the matter to the marriage conciliatory board which must certify the failure to reconcile the parties.[14]

Division of real matrimonial property is effected once divorce is issued considering the nature of land ownership between the spouses and the contribution towards the acquisition of the subject real property. From the year 1971 to 1995, the LMA and Land Ordinance did not have provisions on ownership of land between spouses[15] nor was it included in the National Land Policy.[16] This principle was incorporated for the first time in the Land Act of 1999.[17] The inclusion of co-ownership of real properties between spouses in the Land Act did not result in changes in the LMA leaving the stipulated provision in the LMA questionable in the event of spouses who co-owned land divorce and their real property is to be distributed. Co-occupancy or co-ownership means the occupation of land under a right of occupancy or lease for two or, more undivided shares and may be either joint or occupancy in common.[18] It is a system where two or more persons hold land concurrently or severally.[19]

2.0 Theories

A partnership theory of marriage and the labour theory of distribution underpin this article's topic. According to partnership theory, the distribution of property is akin to the distribution of assets on dissolution of a partnership.[20]Each spouse is liable for the

11 General Comment No. 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted at the 27th Extra Ordinary Session of the African Commission on Human and Peoples' Rights in 2020 in Banjul, Gambia, at p. 10.

12 Sections 99, 108 (d) and 110(1), the Law of Marriage Act. See also Gladness Jackson Mujinja v. Sosper Crispine Makene [2017] T.L.S. L.R. 217, at p. 218.

13 Section 108(a), the Law of Marriage Act.

14 *Ibid*., section 101.

15 This is a principle developed in common law particularly in England, see Mitchell, T. W., "Reforming Property Law to Address Devastating Land Loss," *Ala. L. Rev.,* Vol. Vol,1, No. 66, 2014, pp.1-61 at p. 8.

16 National Land Policy of Tanzania, p.12.

17 Sections 159 and 161, the Land Act.

18 *Ibid*., sections 2 and 159 (1) and (2).

19 Raulencio, P., *Basic Principles of Modern Land Policy and Law in Tanzania*, Institute of Judicial Administration (IJA), 2008, at p. 228.

20 Newman, A.," Incorporating the Partnership Theory of Marriage into Elective –Share Law: The Approximation System of the Uniform Probate Code and Deferred Community- Property, *Emory Law Journal*, Vol. 49, pp.1-103 at p. 4.

debts to the same extent as the other spouse.[21] Accordingly, whatever is earned by a spouse during the existence of the marital partnership accrues to the benefit of both marital partners.[22]The theory requires equal division of community property at the termination of marriage regardless of economic circumstances, moral conduct and contribution made by spouses except where there is an agreement to the contrary.[23]Upon the death of one, the remaining spouse(s) retains one-half of the property, and one-half of the deceased property can be easily distributed to the surviving legatees or heirs.[24]

The theory presumes equal contributions of spouses which can give room to some spouses to reap what they did not generate but assist spouses who have foregone jobs or those who perform full domestic activities and have lost their earning capacity. Likewise, the theory recognizes rights vested in agreements. Thus, it is relevant to joint and occupancy in common as they are formed by agreements. Likewise, in co-occupancy, spouses are like partners sharing some aspects of real property such as possession.

Unlike the foregoing theory, the labour theory of value requires the produce of labour to belong to the labourer[25] since labourers have rights to the fruits of their labour.[26] The taking of the fruits of somebody's labour is equated to robbery and it thus unjust exploitation.[27]The theory is adopted because in real property, the contribution made by other spouses in terms of labour, improvement or development of the property gives the other spouse (s) a share in the property.[28] The LMA also acknowledges contribution in terms of labour towards the acquisition of matrimonial properties[29] which entitles the spouse to the right to division of matrimonial property as stipulated under section 114 (1) and 114 (3) of the LMA.

21 Section 203, the Law of Contract Act, [Cap. 345 R.E 2019].

22 Mutiso B. P., "Getting too Equal: Resolving the Judicial Impasse on the Weight of Non-Monetary Contribution in Kenya's Marital Asset Division," *Mich. J. Gender & L.* Vol. 26, No. 1, 2019, pp. 121-173, at p.136.

23 Grant, H. H., "How Much of a Partnership is a Marriage," *Hastings Law Journal,* Vol. 23, 1973, pp. 249-257 at p. 250.

24 Oliphant, R.E., and Ver Steegh, N., (eds), *Family Law,* 2nd edn., Aspen Publishers: Boston, 2007, at pp. 241- 242.

25 Doley, P.C., *The Labour Theory of Value,* Rutledge: London, 2005, at p.1.

26 *Ibid.,* p. 2. See also Screpanti, E., *Labour and Value: Rethinking Marx's Theory of Exploitation,* Open Book Publishers:Cambridge, 2019, at p. 1.

27 *Ibid.*

28 Section 161(2), the Land Act.

29 Section 114(2) (b), the Law of Marriage Act.

3.0 Methodology and Approach

Doctrinal legal research was used to identify, analyse, and synthesize the contents of the law.[30] Legislation, case law and literature relevant to the theme formed the key sources of data for understanding positive laws.[31]

An analytical approach was applied. This entailed an analysis of legal materials to know the meanings of the concepts used, as well as to know their application in practice and legal decisions.[32] The approach was adopted to ascertain the adequacy and relevancy of the concepts in the Article.A critical approach has also been used to examine and judge issues carefully, point out inadequacies, drawbacks or disadvantages.

4.0 Legal Framework of Co-owned Land between Spouses

Co-ownership of land between spouses is regulated by international, regional, and domestic legal instruments in relation to the division of properties after divorce.

4.1 International Level

International instruments are not explicit on the concept of co-ownership of land between spouses. The Universal Declaration of Human Rights (UDHR)[33] provides that every person has the right to own property alone as well as in association with others.[34] It provides further that no person should be arbitrarily deprived of his property.[35] The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[36] advocates for equal rights between spouses in respect to ownership, acquisition, management, enjoyment and disposition of property free of charge or for valuable consideration.[37]

30 Watkins, D., and Barton, M., (eds.), *Research Method in Law*, 11th edn., Rutledge: London, 2013, at pp. 33 -36.

31 Langbroek, P., et al, "Methodologies of Legal Research: Challenges and Opportunities," *Utrecht Law Review,* Vol. 13, No. 3, 2017, pp. 1-8, at p. 7.

32 *Ibid*.

33 Adopted by the United Nations General Assembly resolution 217 (A) (III) on 10 December 1948.

34 Article 17 (1), UDHR.

35 *Ibid.,* Article 17(2).

36 18 December 1979, A/RES/34/180.

37 *Ibid*, Article, 16 (1) (h).

The Committee on the CEDAW noted that property distribution and post-dissolution maintenance regimes often favour husbands due to the classification of marital property, insufficient recognition of non-financial contributions, women's lack of legal capacity to manage property and gendered family roles. In addition, laws, customs, and practices affecting women's right to matrimonial property[38]prevent women's right to separate property and increase their individual property during marriage.[39] The Committee recommended that the economic advantages and disadvantages related to the relationship and its dissolution should be borne equally by both parties. The division of roles and functions among the spouses should not affect the division of property between spouses.[40]

Thus, State Parties should also review their legislation to ensure that married women have equal rights in the ownership and administration of such property.[41] Where necessary States must also ensure equality in the dissolution of marriage,[42] the grounds for divorce and annulment should be the same for men and women, as well as decisions on property distribution.

4.2 Regional Level

According to the African Charter on Human and People's Rights (Banjul Charter) the right to own properties is guaranteed and should not be encroached upon except in the public interest or for the needs of the community and in accordance with law.[43] The Banjul Charter states that all people are free to dispose of their wealth and natural resources. This right is an exclusive interest of the people and in no case, they shall be deprived of it.[44] Under the Southern African Development Community Protocol on Gender and Development (SADC Protocol),[45] State Parties are required to adopt legislative and other measures that promote and ensure the practical realization of equality for women. The measures adopted must ensure equal legal

38 Clause 43, Committee on the CEDAW, General Recommendation on Article 16 of the CEDAW (Economic consequences of marriage, family relations and their dissolution) of 30th October 2013.

39 *Ibid.,* clause 44.

40 *Ibid.,* clause 45.

41 Clause No.25, General Comment No. 28 Article 3 of the ICCPR (The Equality of Rights between men and Women) adopted on 29 March 2000.

42 *Ibid*., clause No. 26.

43 Article 14, African Charter on Human and People's Rights.

44 *Ibid*., Article 21.

45 The Southern African Development Community (SADC) Protocol on Gender and Development), 2002.

status and capacity in civil and customary law. This includes full contractual rights and the rights to acquire and hold property and the right to equal inheritance and the right to secure credit.[46]

The SADC Protocol also mandates States to recognise and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies.[47] States are required to conduct a review of all policies and laws that determine access to, control of and benefit from productive resources by women in order to end discrimination against women and girls with regard to water rights, property among other important rights for economic and social development.[48]

Under the Protocol to the African Charter on Human and People's Rights on the Rights of Woman in Africa (Maputo Protocol)[49] a woman, just like a man, has the same right to seek divorce.[50] During divorce, women and men have the same rights to *equitable sharing of joint property* derived from the marriage.[51] This provision has been addressed by courts of law. For example, in the case of *Perus Lucas v. Shomari Bahabi,* [52] the court observed that Tanzania has ratified CEDAW and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. In line with the court's observation, Article 7 of the Maputo Protocol clearly provides that in case of divorce, women, and men shall have the right to an equitable sharing of joint property. This infers the apportionment of marital property more than half of the property based on awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.[53]

46 *Ibid.,* Article 7(b).
47 *Ibid., A*rticle 16 (1) (b).
48 *Ibid.,* Article 18 (1) (a).
49 Adopted by Heads of State and Government on 11 July, 2003.
50 Article 7 (b), Maputo Protocol.
51 *Ibid.,* Article 7(d).
52 PC Matrimonial Appeal No. 06 of 2021, [2021] TZHC 3403, at p. 9*; Apolonia Kanome v. Nestory Mponda*, PC Matrimonial Appeal No.11 of 2020, [2020] TZHC 1511, at pp.14 -15*; and Mnyonge Idrisa v. Kiumbe Hussein,* PC Matrimonial Appeal No. 04 of 2020, HCT, [2020] TZHC 1792, at p. 13.
53 General Comment No 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted at the 27th Extra Ordinary Session of the African Commission on Human and Peoples' Rights, held from 19 February to 4 March 2020 in Banjul, Gambia.

The right to property incorporated under the Banjul Charter and the Maputo Protocol is not only the right to ownership but also the right to access one's property and freedom from violation of the enjoyment of such property or injury to it and the free possession and utilization and control of such property, in a manner that the owner deems adequate. As noted above, this right entails that women can exercise decision-making over the use, disposal of, mortgage or transfer of the property.[54]

Article 7(d) of the Maputo Protocol requires substantive equality which recognizes equality and mandates States to remove historical, social, religious, political and economic conditions that affect the exercise and enjoyment of rights by individuals.[55]The case of*Nestory Ludovick v. Merina Mahundi ,*[56]approved Article 16 (1) (a) and (c) of the CEDAW and Article 7(d) of the Maputo Protocoland noted that the principle of equality as embodied in these instruments is domesticated under section 114(2) of the LMA which requires courts to have regard to the extent of the contributions made by each party in the form of money, property or work and this includes the wifely duties performed by women during the subsistence of the marriage referring to the case of *Bi Hawa Mohamed v. Ally Sefu*.[57]

The purpose of equitable distribution under Article 7(d) of the Maputo Protocol is to avoid injustice and ensure equality between men and women taking into consideration all forms of contribution made towards the acquisition of marital property.[58]Likewise, to give due recognition to the reproductive role of women and make contributions to the household, the Maputo Protocol recognizes and requires the community regime to align with the requirements of Article 7(d) of the Maputo Protocol.[59] The principle of equitable distribution and its condition would not apply in co-owned properties owned by spouses at the time of divorce.

54 *Ibid.,* clause 36.
55 *Ibid.,* clause 40.
56 PC Civil Appeal No. 95 of 2020, [2020] TZHC 1792, at p. 7.
57 [1983] TLR 32.
58 Clause 43, General Comment No. 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2020.
59 *Ibid.,* clause 47.

4.3 National Level

The Constitution of the United Republic of Tanzania provides for the right to own property and guarantees non-deprivation of a person's property without due process of law and adequate, prompt and fair compensation.[60] Section 56 of the LMA guarantees equal rights to spouses (women and men) to acquire, hold and dispose of movable or immovable property. The section also gives spouses the right to contract, sue and be sued in contract, tort among other actions. Marriage, however, is not intended to change the ownership of any property which the husband or the wife is entitled to and does not prevent the husband or the wife from acquiring, holding and disposing of any property of any kind.[61] These properties will remain separate except if there is an agreement making it a matrimonial home or if it was improved by the efforts of the other spouse. In such a case, the other spouse will acquire beneficial interest over the property which must be compensated at the time of distribution during divorce.[62]

The LMA presumes co-ownership of property in a marriage if the property is acquired in the names of the spouses equally except where there is evidence to the contrary.[63]Property in the name of one of the spouses is taken to be owned by the person whose name such property is legally registered[64] except where the other spouse has contributed through labour or towards its acquisition and there is evidence to prove the same.[65]

The LMA protects the interest of spouses in the matrimonial home by requiring the disposition of whatever kind to have consent from the other spouse(s). A spouse also has a right to protect his/her interest in matrimonial proper by caveat and caution.[66] This kind of protection would not be easy in unregistered land. The Land Act declares that any disposition misleading the lender, assignee, or transferee to the detriment of the interest of spouses, such disposition is voidable at the option of the spouse (s) consented to the disposition after being misled.[67]

60 Article 24, the Constitution of the United Republic of Tanzania.
61 Section 58, the Law of Marriage Act.
62 *Ibid.,* sections 59 and 114(3).
63 *Ibid.,* section 60(b).
64 *Ibid.,* section 60(a).
65 *Ibid.,* section 114(3).
66 *Ibid.,* section 59(1).
67 Section 161(3) (b), the Land Act.

Under the Land Act, spouses are allowed to form joint occupancy without leave of the court. Any other joint occupancy created without the leave of the court takes effect as occupancy in common.[68] Where land is obtained for the benefit or co-occupation and uses of both spouse (s) in monogamy or polygamy the law presumes that they are taking the occupancy as occupiers in common except where the right of occupancy indicates otherwise or the presumption is rebutted.[69]If the property is in the name of one spouse, and the other spouse(s) contributed by their labour, upkeep or improvement, the contributing spouse(s) acquires interest in that land, in the nature of occupancy in common.[70]

In joint tenancy, the shares and interest over the said property of the co-occupiers are ordinarily equal.[71]The difference between joint and occupancy in common is that in joint tenancy, the death of a joint occupier causes his interest to vest in the surviving occupier.[72] Likewise, the disposition can only be done by all occupiers.[73] Although the four unities (possession, interest, titles and time) of joint occupancy may be present in occupancy in common, the only unit which is essential is that of possession. On the other hand, in land occupied in common, each occupier in common is entitled to the physical possession of every part of the property as well as every other occupier. Each occupier is entitled to undivided shares in the whole of the property and upon the death of one occupier, his shares are treated as part of his estate.[74]Any disposition in a tenancy in common must be consented to by the other tenants in common.[75]

In a tenancy in common, any contribution or improvement made by spouses in real property entitles a spouse(s) interest in that land in the nature of occupancy in common to undivided shares in the whole property[76] in shared resources.[77] Share means the part allotted or belonging to one of a number owning together property or interest or belonging to, due to, or contributed by an individual or group.[78] Both the occupier in common and a joint occupier are entitled to receive a certificate of title

68 *Ibid.,* section 159(8).
69 *Ibid.,* section 161(1).
70 *Ibid.,* section 161(2).
71 *Ibid.,* sections 159 (5) & (6).
72 *Ibid.,* section 159 (4) (b).
73 *Ibid.,* section 159 (4) (a).
74 *Ibid.,* section 159 (5).
75 *Ibid.,* section 159 (6).
76 Tenga, W. R., and Mramba, S. J., (eds.), *Theoretical Foundation of Land Law in Tanzania, Law Africa* Publishing (T) Ltd: Dar es Salaam, 2017, at p. 241.
77 Waldeck S. E., "Rethinking the Intersection of Inheritance and the Law of Tenancy in Common," *Notre Dame Law Review*, Vol. 87, 2011, pp. 737- 780 at p. 740.
78 Raulencio, P., *op.cit.,* p. 82.

for that right of occupancy.[79] The certificate is issued by the Registrar of Lands and is a proof that an individual is an occupier of shares in the property held together by others.[80]

5.0 Co-owned Land in Polygamous Relations: The Legal Conundrums

It is noted that the Land Act and the LMA are at variance with respect to the division of co-owned landed property during divorce both in polygamous and monogamous marriages. A critical analysis of the challenges follows below.

5.1 Nature of Land Ownership between Spouses

Notably, the Land Act does not reflect the aspect of land ownership between spouses as provided for under the National Land Policy. The Policy[81] provides that land ownership between spouses is not subject to legislation.[82] Despite this provision, the Land Act allows spouses to own land in a joint tenancy if they so aspire.[83] Accordingly, any joint occupancy other than by spouses is treated as a tenancy in common.[84] This provision is clear that the Act intended joint occupancy to be a tenure for co-occupation between spouses. However, the same Act permits spouse to obtain in the nature of occupancy in common, equitable interest in a land registered in the name of one spouse by improvement or development of the land labour.[85] If this happens, the owner of the title will not use his/her title to the detriment of such spouse(s). This provision implies that a spouse can own or have an interest in real property in a tenancy in common or in a joint tenancy. The challenging part is that of recognizing interest by virtue of labour. This is because the acquisition of an interest in land by virtue of labour in one person's property is not among the modes of land acquisition recognized by the Land Act. Furthermore, the Land Registration Act[86] does not recognize the interest in land acquired by spouses by labour or domestic contribution as registrable estate or interest.[87]

79 Section 161(1), the Land Act.
80 *Ibid.,* section 160 (2) (3).
81 National Land Policy, p.12.
82 *Ibid.*
83 Section 159 (8), the Land Act.
84 *Ibid*.
85 *Ibid.,* section 161(1) (2).
86 The Land Registration Act, [Cap 334 R.E 2019].
87 *Ibid.,* section 8.

Likewise, an owner of land under the Land Registration Act in relation to any estate or interest in land is a person whose name that estate or interest is registered.[88] Thus, such interest acquired by domestic contribution or labour by spouses is not recognized and protected.In addition, such interest is not declared by law as overriding interest in land. Likewise, in order for spouses who have required interest as tenants in common by virtue of section 161(2) of the Land Act to be registered, the shares of each owner must be specified.[89]Shares or interest in land acquired by labour cannot be easily specified and transferred even by operation of law[90] and is even complicated in polygamous marriages at the time of divorce.

In a polygamous marriage, these provisions pose several issues at the time of divorce. For example, the issue of who determines the interest in such land before divorce and on the death of one spouse. Further, who determines the interest in land at the time of divorce? Is it the registrar of properties, parties or the judge or magistrate hearing the petition for divorce? Are all spouses parties to such determination at the time of divorce?What about the rights of the spouses not party to divorce in polygamous marriages? What are the rules for determining this contribution by labour of spouses and what are the rights of the title holder?The Land Act and the LMA are silent on the rules for the determination of the interest acquired by virtue of labour as it would be highlighted in this Article.

Furthermore, section 60(b) of the LMA presumes that when the property is in the name of the husband and wife jointly, their beneficial interest is equal unless the presumption is rebutted by evidence.The LMA does not mandate that the shares of the husband and wife be specified. Under the Land Act, for spouses to be joint occupiers, they should be registered and shares of each joint or occupier in common must be indicated.[91]However, shares obtained by virtue of labour under provision 161(2) of the Land Act do not give spouses the presumption of equal beneficial interest.Only the spouse with title will hold the interest of the spouse(s) interest in the property as a trustee.[92]

88 *Ibid.,* section 2(1).
89 *Ibid.,* section 45.
90 *Ibid.,* section 71.
91 *Ibid.,* section 45.
92 Section 161(2), the Land Act.

Likewise, to divide joint owned properties, there should be severance which converts the joint tenancy into a tenancy in common.[93]Without severance a joint tenancy property cannot be divided or sold to other members apart from the joint tenants.[94] This can be exemplified by the case of *Chelangat v. Samuel Tiro Rotich & 5 others*[95] where the court held that: 'A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders remain[96] effect of severance of the joint occupancy under the Land Act is to bring the joint tenancy into a tenancy in common between spouses. On the other hand, section 45 of the Land Registration Act is silent on the restriction given by section 159(8) of the Land Act on the registration of spouses as tenants in common thus a gap in tenure required by spouses.

5.2 Distribution of Co-Owned Land during Divorce

Section 114(1) of the LMA empowers courts to divide matrimonial property acquired by joint efforts when granting or subsequent to the grant of decree of divorce. The court can also order the sale of the matrimonial property and divide the proceeds thereof among the spouses.[97] This section was introduced in the LMA purposely to allow spouses to have shares of what they contributed to the assets as an entitlement based on sweat.[98]While the LMA allows division or sale of the real property at the time of divorce, in a co-owned land the Land Act however does not allow partitions of the property jointly tenanted between joint occupiers.

Section 159 (7) of the Land Act allows spouses to severance of the joint property. The severance is complete by registration in the prescribed register of the joint occupiers and occupiers common.[99]Likewise, a joint occupier is restricted from transferring his interest to another person outside the joint occupancy. He can just transfer among the joint occupiers. If the joint occupier transfers the property apart from the joint

93 *Ibid.,* section 159(7).
94 *Ibid.,* section 159(4) (c).
95 (2012) EKLR.
96 Section 159(7), the Land Act.
97 Section 114(1), the Law of Marriage Act.
98 *Hansard,* No. 579281, Second Sitting of the National Assembly deliberation on the Law of Marriage Bill, dated 19th of January 1971.
99 Section 159(7), the Land Act.

tenancy members, the transfer is void.[100] Consequently, disposition of this property should be made by all the spouses[101] as such the interest of children and all other persons who acquired an equitable interest by virtue of labour in the real property is jeopardized.

The division of shares in a tenancy in common is done through an application in a prescribed Form to the Registrar of Lands who will terminate the tenancy.[102] This procedure also addresses, among other things, the interest of the spouses and children so that they are not rendered homeless or affecting the partition of other spouses.[103] In *Muhuri Muchiri v. Hanna Nyamunya (Sued as the Administrator of the estate of Njenga Muchiri also known as Samuel Njenga Muchiri (deceased)*[104] the court allowed a severance of a common tenancy by way of partition or sale of the land.This principle is not in line with section 114 of the LMA since it does not give an avenue to spouses in tenancy in common to partition their property at the time of divorce. The provision intends to sell the whole property and not the share of the divorced spouse in the property. Partition is not an option availed under the LMA.

The implication of this provision is that joint tenancy and tenancy in common are different as such in the event of divorce, different rules should apply to spouses owning real property under tenancy in common and those who are joint tenants. For example, if it is a question of sale in joint tenancies, disposition must be made by all tenants.While in tenancy in common disposition is done by the owner of the shares who is interested in disposal but subject to the consent of other co-owners. This is because each tenant in common is required to get his or her certificate of title in that parcel of land. Thus, the remedies availed at the time of the division of real property co-owned by the spouses under the provision of section 114(1) of the LMA are not practical in real property co-owned by spouses. Thus, there is a *lacuna* in the LMA at the time of distribution upon divorce in monogamy and polygamous marriage.

100 *Ibid.,* section 159(4) (c).
101 *Ibid.,* section 159(4) (a).
102 *Ibid.,* section 162 (1-2).
103 *Ibid.,* section 162(3) (e).
104 [2015] eKLR.

5.3 Interest of the Title Holder vs. the Equitable Interest Holder

The fact that unregistrable interests have not been declared overriding interest to a title holder or any other person with interest in the title affects the equitable interest holders. The joint tenants have the right to charge the property without the knowledge and consent of the equitable owners. If this happens then an equitable ownership of shares may be affected.Further, the interest of spouses obtained by virtue of labour, being merely an equitable interest, could be overreached by a party entitled to the charge over the property. The rights that are thus divided from the outset between those named in the title in the Land Register are rights of ownership. There are no intervening equitable interests. The presumption that the common owners are entitled to share the value of the property equally is however capable of being displaced by evidence to the contrary.

5.4 The Principle of Compensation and Proof of Equitable Interest in Land

The provisions of the LMA on the division of matrimonial assets is based on the principle of compensation whether direct monetary contribution or domestic contribution.[105]This is challenging in a polygamous marriage where non-divorcing wives are not parties to the divorce as such their contribution cannot be assessed.Furthermore, in co-owned land the principle of compensation would not apply in tenancy in common or joint tenancy. This is because each spouse has his/her own shares registered.[106] Where a spouse has acquired an interest in the property of another spouse in whose name the property is written under section 161(2) of the Land Act, the Land Act and LMA are silent on how this should be proved.

A common law proof of equitable interest in the nature of tenancy in common requires the court to scrutinize the intention of the parties towards the property which is not stipulated in the LMA. In addition, in polygamous marriages, spouses would have been married at different times and therefore the yardstick of the principle of compensation in equitable interest would be very hard to gauge.The challenge is articulated in the case of *Beatrice Kerubo Bosire v Evans Omosa Bosire*.[107] In this

105 *Mohamed Abdallah v. Halima Lisangwe*[1988] TLR 197; *Pulcheria Pundugu v. Samwel Huma Pundugu* [1985] TLR 7; *Ramadhani Leaso v. Felix Deanatus Nyangai* (Civil Appeal 104 of 2017) [2019] TZHC 70.

106 Section 159 (2) (b), the Land Act.

107 [2022] eKLR.

casethe judge referred to a paper by Human Rights Watch[108]whichemphasized on the requirement to provide receipts to establish proof of contribution during marriage without considering whether the marriage in question in polygamous or monogamous one. Such a difficult requirement discourages women from laying claims to matrimonial property.

Furthermore, some women may not have knowledge of how to preserve the receipts, if they had them. In addition, keeping receipts as evidence of contribution during the union negates the premise of marriage trust. Families are governed by a higher level of trust. Since marriage is considered sacred, pre-nuptial agreements are uncommon, and couples' function as an economic and domestic unit is impractical. Yet the principle of a trustee in matrimonial property is not incorporated in the LMA and the principles of division of such property are not equally stipulated under section 114 of the LMA. Such a principle may be adopted in our matrimonial regime to avoid unjust enrichment, pursuant to the Judicature and Application of Laws Act[109] and the Land Act,[110]which allows the application of common law and the doctrines of equity in Tanzania.

Thus, if a property is in the name of one spouse and the other spouses by the labour whose interest has not been registered the spouses should be treated as having acquired an interest in the property equal to the contribution made[111] but should not treat it as matrimonial property. Rather the person in whose name the property is registered should be taken as a trustee of other spouses with equitable or beneficial interest in the property if there is no agreement to the contrary.[112]In the case of *N W*

108 Human Rights Watch, "*Once You Get Out, You Lose Everything*" Women and Matrimonial Property Rights in Kenya, Human Rights Watch: United States of America, 2020, pp. 17-19.

109 Section 2(3), the Judicature and Application of Laws Act, [Cap. 358 R.E 2091].

110 Section 180(1) (b), the Land Act.

111 *Ibid.,* section 161(2).

112 *Peter Mburu Echaria* v. *Priscilla Njeri Echaria* [2007] EKLR. *See* also a common law case of *Gissing v. Gissing [1970] 2 All ER 780,* where in it was stated:

Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as a trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust.The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts the law relating to the creation and operation of 'resulting implied or constructive trusts….

K v. J K M & Another[113] citing Halsbury's Laws of England, 5th Edition Vol. 72 para 280, the Court stated that: -

> Subject to any express declaration of trust, where the property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust.

A constructive trust arises in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny the other party a beneficial interest in the property acquired.[114]It is a trust imposed by a court of equity regardless of the intention of the owner of the property.[115] It imposes law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.[116] Under the constructive trust theory, the common intention to share the beneficial ownership can be inferred from express agreement or understanding; drawing inferences from conduct that a claimant's contributions may be characterised as having been motivated by expectations of a personal relationship rather than expectations of ownership.[117]

On the question of how the courts should be quantifying the beneficial interests in sole name, courts have noted that the common intention of the parties may be determined based on when the property was purchased or later by showing a common intention that the parties' respective shares should change. Thus, the intention with respect to interest in the property can be deduced objectively from their words or conduct while sharing the house as their home and managing their joint affairs.[118] Alternatively, if at any time prior to acquisition, or exceptionally at some later date, there had been any agreement or understanding reached between them that the property is to be shared beneficially.[119] The presumption resulting from the trust will be rebutted if there is evidence in the form of testimony from the parties themselves as to what their intentions were when the property was acquired.[120]

113 [2013] eKLR.
114 *Ibid*.
115 *Githere v. George Kagia & 4 Others,* [2008] eKLR.
116 *Hussy v. Palmer* [1972] 3 ALL ER 744.
117 *Thomson v. Humphrey* [2010] 2 FLR 107.
118 *Jones v. Kernott* [2011] UKSC 53 HL.
119 *N W K v. J K M & Another* [2013] eKLR.
120 *Stack* v. *Dowden* [2007] UKHL 17.

Therefore, the non-legal owner is required to establish a common intention to share the beneficial ownership with the title holder. Such owner must be able to show a shared intention communicated between them which must relate to the beneficial ownership of the property and can only be based on evidence of express discussion between the parties.[121]Likewise, the party asserting a claim to a beneficial interest against the party is entitled to the legal state to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to the doctrine of constructive trust or propriety estoppels.[122] In line with this, he or she should show the relevant intention of each party, whether the intention is reasonably understood by the other party or manifested by that party's words or conduct.[123]The presumption resulting from the trust will be rebutted if there is evidence in the form of testimony from the parties themselves as to what their intentions were when the property was acquired.[124]

5.5 Division of Property *vs*. Division of Shares/Interest in the Property

The LMA is couched in a manner that deals with the division of the property or orders the sale of the property and divides its proceeds thereof.[125] In the division of the said property, the court is mandated to evaluate the contribution of the spouses, in money, property, work or domestic contribution towards the acquisition or improvement of the real property.[126] Looking at this provision in line with the Land Act it is noted that the LMA is silent on the division of real property of co-owned real property at the time of divorce in polygamous marriage. Thus, while the LMA covers the aspect of properties generally the Land Act entails that land owned by spouses in tenancy in common presupposes undivided shares owned by occupiers in common in a property.[127]Joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as joint tenants have separate rights, as against everyone else they are in the position of a single owner.[128] One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he/she could, then this would be separate ownership and not joint co-ownership. No co-owner has a better right to the property than the other/s so an action for trespass cannot lie against another co-owner.[129]

121 *N W K v. J K M & Another* [2013] eKLR.
122 *Ibid*.
123 *Ibid*.
124 *Stack* v. *Dowden* [2007] UKHL 17.
125 Section 114(1), the Law of Marriage Act.
126 *Ibid.,* sections 114(2) (b) and 114(3).
127 Sections 159(3) (b) and 159(5), the Land Act.
128 *Chelangat v. Samuel Tiro Rotich & 5 others* (2012) eKLR.
129 *Ibid.*

The LMA is silent on the questions of division or the manner of dealing with undivided shares in land owned by spouses in a tenancy in common at the time of divorce. It does not stipulate how the court should deal with a joint-owned land (joint tenancy) at the time of divorce in polygamous marriage as the LMA does not refer to the Land Act and the Land Registration Act.

Even the concept of matrimonial property in the LMA is likely to term land owned in a tenancy in common or joint occupancy by spouses as matrimonial property while spouses have their own shares in the property. The presumption one gets under the Land Act is that in a tenancy in common ownership of properties, where spouses have registered their shares in land in common;[130] such property should not be treated as matrimonial property. This means that the courts should ignore the provision of section 114 of the LMA and treat the undivided shares of the spouses as separate property and not subject to division as it is in actual separate properties stipulated under section 58 of the LMA.

5.6 The LMA and Division of Co-owned Land during Divorce

The relevancy of section 114 of the LMA during the division of co-owned land between spouses in a polygamous marriage is questionable for the reasons alluded to below:

5.6.1 The Relevancy of Customs and Traditions

The LMA mandates the court to consider customs and traditions to which the parties belong at the time of divorce.[131] Section 114(2) (a) of the LMA is, however, too general. It does not state in clear terms the nature of customs the court should pay regard to, for example, whether it is the customs relating to marriage, dissolution of marriages, or customs relating to property rights and ownership of real property between spouses. In a polygamous marriage, this is even worse as they can be different in respect of each spouse given the fact that Tanzania has close to 126 ethnic tribes and each ethnic group has its own customary rules, which regulate ownership of land.[132]

130 Section 45, Land Registration Act and section159 (3) (b), the Land Act.
131 Section 114(2) (a), the Law of Marriage Act.
132 Magawa G. L., and Michelo, H., "Unlocking the Dilemmas: Women's Land Rights in Tanzania," J. *Law Crim. Justice,* Vol. 6, 2018, pp. 1-19 at p. 14.

Further, in co-occupancy each spouse has his or her own shares in property, one need not rely on customs in contravention of express provisions of the law which are contrary to written laws. This is based on the footing that shares or equitable interest tenancy in common by spouses are regulated by the Land Act and the Land Registration Act. These laws have procedures for proving the rights and interest of the spouses.In co-owned land by a spouse, the provision is irrelevant, and it brings principles contrary to the law of realty specified in the Land Act and Land Registration Act.

5.6.2 The Relevancy of Extent of Contribution

The LMA requires the court to consider the extent of contribution made by a spouse in money, property or work towards the acquisition of the property.[133] Section 161(2) of the Land Act provides that contribution by labour also entails domestic contribution entitling a spouse to equitable interest. The term contribution is not defined in the statute.The problem with section 114(2)(a) of the LMA is that courts tend to misinterpret the concept of domestic services. They have been focusing more on women's rights, and women's right to property instead of all spouses(man and women). Contribution is not only in respect to who will leave the matrimonial home but the contribution of all spouses remaining in respect of the marriage and in this case the contribution of the wife, wives and their husband. There is no guidance on how to deal with the contribution of other spouses who are not interested in divorce or division of property as they are still in the marriage.

In a tenancy in common properties, each occupies his/her share, and they can pass their property to their heirs on intestacy or through a will.[134]So, divorce should not affect their separate shares in the property.[135]In cases of land occupied by husband and wife without indicating the shares, then the court takes their shares in the property as equal[136] unless there is evidence to the contrary, they should be treated as separate properties. However, contribution by labour by other spouses requires the equitable interest to be proved by evidence and intention of the parties pursuant to the law of trusts which is not stated in the LMA as explained above. This intention should be investigated where the spouses divorcing and those who are not divorcing before the division or the sale of such property.

133 Section 114 (2) (b), the Law of Marriage Act.
134 Section 159(5), the Land Act.
135 *Ibid.,* section 159(3) (b).
136 Section 60(b), the Law of Marriage Act.

5.6.3 Division of Debts and Attribution of the Debt to Spouses

The LMA requires the court to have regard to debts owed by the spouses which were contracted for the joint benefit.[137]If the debts were contracted for the joint benefit of the family the presumption is that it will be divided equally among the spouses. The law is silent on how the debts can be attributed to a real property owned by the spouses in co-owned property and how the property will assist in paying the debts. Apart from consent, the law does not state how debts will be distributed after divorce; the conditions upon which debts are to be shared between spouses; how the shares in a tenancy in common owned by spouses will cover the debts in case it is a family debt; how the spouses' debts will be dealt with between those who were married earlier and those who were married later; andimpact of debts to spouse(s) who did not consent to the debt as they were not present at the time the loan was taken but have made substantial contributions to the property through their domestic labour. These are some of the questions have not been answered by the matrimonial regime.

5.6.4 The Relevancy of Needs of Infant Children

The LMA provides that during the division of matrimonial property, the court must pay regard to the needs of the infant children of the marriage.[138] At all times during the division of matrimonial property focus must be on equality.[139]The essence of this consideration is to ensure that the spouse who plays a greater role in the care and raising of infant children is not jeopardized in the distribution process.The law, however, does not define the needs of the children during the distribution of the property in the event of divorce. The LMA also carries other provisions handling the needs of infant children relating to custody and maintenance.[140]

The Law of Child Act,[141]provides that a person should not deprive a child of reasonable enjoyment out of the estate of a parent.[142] A child also has the right to shelter from his parents or guardian.[143]Further, the Act provides that every parent has the duty

137 *Ibid.,* section 114 (2) (c).
138 *Ibid.,* section, 114 (2) (d).
139 *Ibid*.
140 *Ibid.,* sections 125-137.
141 The Law of the Child Act, [Cap. 13 R.E. 2019].
142 *Ibid.,* section 10.
143 *Ibid.,* sections 8(1) (b) and 9(1).

and responsibility to protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression.[144] The Act also imposes the duty and responsibility of maintaining the child and assurance of the child's survival and development.[145]It is worth to note that the LMA does not stipulate clearly the interest of children to be addressed.The Act provides for custody and maintenance of children.[146] The aspect of interest of infant children as reflected under the provision of section 114(2) (d) of the LMA appears misplaced. This is because children have the right to enjoy their parents' property.[147]

In tenancy in common property regime, each spouse has his/her shares in the property and upon death they can pass to the heirs. It is noted that the interest of the children during the division of matrimonial property during divorce is usually a forgotten and overlooked aspect.[148] Some courts have noted that the interest of children is subsidiary.[149] In co-owned land, the relevancy of section 114(2) (d) at the time of division appears redundant, given the fact that parents' property cannot pass to children who lack capacity. Tenancy in common allows the right of survivorship as such addressing the unknown interests of children is a challenge.

6.0 Conclusion

Division of matrimonial real property depends on the nature of ownership of the property. The LMA addresses the division of all property without paying regard to the nature of ownership of real property. Section 114 of LMA is used in movable and immovable property divisions at the time of divorce in monogamy and polygamy.

7.0 Recommendations

It is evident that the matrimonial property regimes in the LMA have not been aligned with the land ownership regime. Thus, the challenges relate to the division of co-

144 *Ibid.,* section 9 (3) (a).
145 Section 9 (3) (b), the Law of the Child Act.
146 *Ibid*., sections 127-137.
147 *Ibid.,* section 10.
148 Binamungu, C.S.M, "What can Tanzanian Court Learn from England and Wales in Interpretation of section 114 of the Law of Marriage Act," *The Tanzanian Lawyer*, Vol. 1, No. 1, 2011, pp. 1-32, at pp. 28 -29.
149 *Isidori Balaga v. Chezalina Balaga,* Civil Appeal No. 41 of 1995, Court of Appeal of Tanzania, Dar es Salaam, (Unreported).

owned land between spouses in polygamous marriage in co-ownership. In that regard, the following recommendations are issued: -

Revisit the Land Policy and amend the LMA and Land Act to specifically and categorically provide for the nature of land ownership between spouses and incidental rules at the time of division of such property in the event of divorce taking into consideration types of marriages (polygamous and monogamous.)

Amend section 114 (2-3) of the LMA to include rules on the division of co-owned land between spouses at the time of divorce both in polygamy and monogamy marriages.

Amend section 114(1) of the LMA to take on board remedies provided for under the Land Act regarding to the termination of co-owned property.

Amend section 58 of the LMA to include the concept of undivided shares in a property to allow spouses under tenancy in common to deal with their shares in their real property as separate property in line with the Land Act.

Reconcile provisions of the LMA and the Land Act in respect of equitable interest to allow the common law principles articulated by the principle of trust to address common intention of the parties to be included in the statutes as it is in other common law jurisdictions.

Amend the LMA to allow the concept of tenancy in its entirety. Thus, at the time of divorce the joint tenancy by spouses convert to tenancy in common to enable courts to determine the shares of each spouse. Under the current joint tenancy arrangement, spouses are forced to remain in a joint tenancy while the marriage has been terminated.

Since section 114 of the LMA appears irrelevant, division of co-owned land at the time of divorce in a polygamous marriage then:

Amend section 114(2) (a) of the LMA to specify the nature of the customs which the courts will pay regard to in general property and in co-owned real

property and provide an exception on its non-applicability in co-owned real properties.

Amend the LMA to comprehensively define the term contribution. Likewise, Section 114(2) (b) of the LMA should allow the contribution of the exiting spouse and that of the remaining spouses to be assessed at the time of divorce or before divorce by offering appropriate remedies to non-divorcing wives. The proviso in co-owned land between spouses in polygamy save for those with equitable interest where the intent of the spouses towards the property should be assessed.

Amend section 114(2) (c) of the LMA to set criteria for how shares or co-owned property can be used in debt-related issues between spouses in polygamous and monogamous marriages.

Amend the LMA by deleting section 114(2) (d) as the provision appears to be misplaced and it intends to give children the right to property of their parents before death. The provision is also in conflict with the provision relating to the maintenance of custody of children.

The principle of compensation should be excluded in a tenancy in common or joint-owned properties by spouses. This is because each spouse has his/her own shares registered. Even the equitable interest obtained by virtue of labour pursuant to section 161(2) of the Land Act has its own criteria for assessing it following the law of trust and common intention of the spouses explained above.

Extradition: Law, Practice and Procedure in Tanzania

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If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country but in many, then those who defend it cannot limit themselves to purely national means.

Kofi A. Annan.

Abstract

In the modern days where transnational organised crimes have gained prominence and rampancy, international judicial cooperation between countries has become an agenda as the international community acknowledges it as the most effective tool in suppressing transnational organised crime. In addition, mutual legal assistance and extradition are the most common and widely used tools across nations. The article expounds on the challenges relating to procedures and practices of extradition in Tanzania. It is observed that there are several challenges experienced in extradition which include but not limited to difficulties in extraditing nationals, absence of extradition treaties, requirement of dual criminality and human rights concerns. Based on the challenges pointed out it is recommended that the Extradition Act be reviewed to ensure that the extradition process is fair, just and consistent with international standards.

Key Words: *Extradition, fugitive, crime, agreement, treaties.*

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1.0 Introduction

The concept of extradition is often traced to ancient times to places where civilization was first appreciated, especially in Greece and Rome.[1] In the 13th century, the Pharaoh of Egypt negotiated an extradition treaty with a Hittite King.[2] The mechanism took some shape in the 19th century with the growth of international trade, industry and travel and the emergence of international law. At this time, extradition treaties were signed between countries to provide a framework for the extradition of fugitive criminals who committed offences and escaped to other countries. The treaties provided for the extradition of criminal fugitives who had committed certain offences, such as murder, piracy, and arson. The treaties entered between states laid down the procedures for extradition, including the evidence required, the grounds on which extradition could be refused, and the rights of the accused.

As time passed, extradition practices spread in many states. Many countries since 1872 signed extradition treaties with each other to facilitate the extradition of fugitives. The principles of international law and judicial cooperation triggering extradition have continued to evolve, with international treaties and agreements being promulgated to address new challenges associated with transnational organised crime and terrorism. These include the United Nations Convention against Transnational Organised Crime. The Convention encourages member states to cooperate and enter into treaties or bilateral agreements among themselves aiming at bolstering judicial cooperation in combating Transnational Organised crimes.[3] In cases where there is no extradition treaty, countries are urged to use the provisions of the United Nations Conventions against Crime to extradite fugitive criminals.[4]

In Africa on the other hand, the practice of extradition was developed during the colonial era. The colonial powers introduced extradition laws and procedures in their colonies, which were often used to extradite African nationals accused of crimes to their home countries or other colonies. After independence, most countries

1 Miguel J.C., *Human Rights in Extradition,* at pp. 73-114.https://brill.com/display/book/9789004411210/BP000005.xml. (Accessed on 10 June 2023).

2 Stigall, D.E., "The Legal Architecture of Sovereignty, the Principle of Non-intervention, and the Exercise of Extraterritorial Jurisdiction", *Notre Dame Journal International & Comparative Law* 3/1, pp. 10-22 at 2013, p. 19.

3 Article 16(17), United Nations Convention against Transnational Organised Crime.

4 *Ibid.,* Article 16(4).

developed their extradition laws and procedures.[5] Most African countriesalso signed bilateral and multilateral treaties on extradition with other countries. Such treaties provide a framework for the extradition of fugitive criminals who have committed crimes or have been convicted of a criminal offence in one country and sought refuge in another country. This arrangement assists in facilitating international judicial cooperation in the fight against crime.

2.0 The Concept and Practice of Extradition

Extradition is a mechanism of international judicial cooperation, through which vide formal request, one state obtains from another state a fugitive criminal for prosecution or punishment for crimes committed in the requesting country's jurisdiction. In transnational criminal law, extradition has critical implications. This is because states are obligated to surrender a criminal fugitive within their jurisdiction to the requesting state wishing to prosecute such criminal fugitive or to prosecute the criminal in courts of law of its jurisdiction. This has its genesis in the Latin maxim *aut dedere aut judicare*.[6] According to Hugo Grotius, a state should, either surrender the fugitive offender to the requesting state or prosecute the offender in its jurisdiction and has no option:

> …..that a general obligation to extradite or punish exists concerning all offences by which another state is particularly injured. Moreover, a state that had been so particularly injured obtained a natural right to punish the offender, and any state holding the offender should not interfere with that right. Thus, such a holding state should be considered bound to either extradite or punish; there was no third alternative.[7]

According to this formulation, the obligation is in three alternatives: firstly, states should extradite or punish; secondly, states should extradite or prosecute; and thirdly, states should extradite or surrender to an international court.[8] This position, however, was improvised since it was not taken as an obligation under the customary international law concerning all offences, but rather a clause relating to specific crimes. In

5 Tanzania enacted its Extradition Act in 1965.

6 Steven, L.A.," Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *39 VA. J. INT'L L*, 1999, pp. 425-466 at p. 425 and 447.

7 Michael J. Kelly, Cheating Justice by Cheating *Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut* Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty, 20 ARIZ. J. INT'L & COMP. L. 491, 496–97 (2003).

8 Zdzislaw, G., *Report the Obligation to Extradite or Prosecute* (*aut dedere aut judicare*], 2006. [Agenda item 10] Document A/CN.4/571.

addition, the obligation exists where a state has voluntarily assumed the obligation. Concerning international crime, the maxim has become both a rule of customary international law and a peremptory norm.

In this regard, one may note that extradition encompasses political, diplomatic and legal processes enabled by bilateral or multilateral arrangements. It is political as it was based on informal relations between heads of sovereign states which increased the need for more formal arrangements. In this case, one sovereign state formally requests from another sovereignty to facilitate the return of the criminal to the requesting state. It is diplomatic as it requires diplomatic channels to facilitate the legal (judicial) process for the removal of the criminal fugitive from the requested to the requesting state. Courts play a crucial role in reviewing extradition requests, considering the evidence, and legal arguments and making decisions whether the request should be granted or not. Mostly, extradition requests are governed by domestic laws and bilateral and multilateral treaties between nations. As it will be discussed later in the discourse, the Tanzania Extradition Act requires the existence of a bilateral arrangement before an extradition request is granted.[9] Nevertheless, there are cases where requests for surrender of fugitives between states are made without bilateral or multilateral treaties.[10]

3.0 Extradition Treaties

In order enhance cooperation in combating transnational crimes, states have signed various international, regional, and sub-regional instruments on extradition. At the global level, the leading instrument among many others is the United Nations Convention against Transnational Organized Crime (Palermo Convention). The Convention, among other things, fosters and encourages State Parties to provide one another with the widest measure of international judicial cooperation to curb challenges posed by transnational organised crimes. States that adopt and ratify the Convention signify to commit themselves to taking concrete steps and necessary measures geared towards advancing the fight against transnational organized crime.

9 Section 3, the Extradition Act, Cap. 368.

10 Kennedy O. and Another vs. Anor vs The United Republic of Tanzania (Application No. 003/2015) [2018] ACHPR 120. Also see section 11, Cap 368.

Apart from the Palermo Convention, multiple countries have signed extradition agreements to facilitate the extradition of fugitives between such contracting states. Some examples of multilateral treaties on extradition include the European Convention on Extradition[11]the Inter-American Convention on Extradition;[12] the United Nations Convention against Corruption;[13] the African Union Convention on Preventing and Combating Corruption;[14] and the South Asian Association for Regional Cooperation (SAARC) Convention on Mutual Assistance in Criminal Matters.[15] Others are the Southern African Development Community Protocol on Extradition and the East African Community Protocol on Extradition. The treaties set out the procedures for extradition and the grounds on which extradition may be refused. The treaties also facilitate international cooperation in the fight against transnational crimes by providing an international legal framework for the extradition of fugitives between countries.

On the other hand, and as the extradition process requires, many countries have signed bilateral extradition agreements to facilitate the return of criminal fugitives to the jurisdiction where they are requested to face charges arraigned against them or serving a sentence for fugitive convicts. Some countries, especially those which were under colonial rule, extended the treaties with countries that had treaties with their former colonizers. By signing international, multilateral, and bilateral arrangements, countries demonstrate their commitment to cooperate with other countries in the fight against transnational crime and to ensure that fugitives are brought to justice.

4.0 Extradition Process in Tanzania

In Tanzania, the procedure for extradition is governed by the Extradition Act.[16] Accordingly, for an extradition request to be granted there has to be an agreement between the requested and the requesting state to cooperate in extraditing fugitive criminals.[17] In giving effect to its international obligations in judicial cooperation,

11 Signed in 1957 and provides for the extradition of fugitives between European countries.
12 Signed in 1981 and provides for the extradition of fugitives between countries in the Americas.
13 Signed in 2003, it provides for the extradition of fugitives who are accused of or convicted of corruption offences.
14 Signed in 2003, it provides for the extradition of fugitives who are accused of or convicted of corruption offences in Africa.
15 Signed in 2008, provides for the extradition of fugitives between countries in South Asia.
16 Cap. 368.
17 Section 3, the Extradition Act.

Tanzania has signed several bilateral extradition treaties that include provisions for reciprocity in extradition matters.Examples include the extradition treaty with the United States of America and other countries like the United Kingdom.

The central authority on matters relating to extradition requests in Tanzania is the Minister responsible for legal affairs who is mandated to deal with the issuance of various orders on surrender of fugitive offenders. As stated earlier, extradition is a diplomatic process. Thus, the Minister for Legal Affairs, through the Ministry of Foreign Affairs receives an extradition request from a requesting state. This is usually made by a diplomatic representative or consular officer of the requesting state[18] and registers the application in a register.[19] Depending on the nature of the request, the Minister for Legal Affairs may seek advice from experts including the Attorney General, the government's chief legal advisor.[20]

Since extradition entails a judicial process, once the Minister forms an opinion that the request is tenable, he or she will issue an order[21] to signify to a magistrate that an extradition request has been made and require the magistrate to issue a warrant of arrest and detention of the fugitive criminal.[22] As a matter of practice and since the Director of Public Prosecutions (DPP) is mandated to handle all criminal matters in all courts of law except for court-martial,[23] a copy of such an order is sent to the DPP to handle court proceedings pertinent to the execution of the ministerial order on the requisition for extradition.[24]

On receipt of the order from the Minister, the Magistrate registers the case in the appropriate register and may issue an arrest warrant against the fugitive criminal.[25] After the arrest of the fugitive criminal, the Magistrate would set the date for the hearing of extradition proceedings and notify the DPP and the prison authority where

18 *Ibid.,* section 5(1).
19 The Extradition (Forms) Order as published in GN No. 139 of 2018.
20 Article 59(2), the Constitution of the United Republic of Tanzania.
21 Form No. EA1 of Extradition (Forms) Order.
22 Section 5(1), the Extradition Act.
23 Article 59B (2), the Constitution of United Republic of Tanzania.
24 *Ibid*., Article 59B.
25 Section 6(1), the Extradition Act.

the fugitive criminal is held.[26] Extradition cases are heard in the same manner as the preliminary hearing.

If upon completion of the hearing the Magistrate is satisfied that the evidence presented would justify committal for trial if the offence which the prisoner is charged with was committed in Tanzania, the Magistrate shall commit the fugitive criminal into prison pending the Surrender order from the Minister.[27] Otherwise, the magistrate would discharge the alleged criminal if no *prima* facie case is made. In the case of a criminal fugitive alleged to have been convicted of an extraditable crime, the prosecution needs to present evidence to such effect.[28]Where the fugitive criminal is committed to prison the Magistrate thereafter sends to the Minister a certificate of committal and any report on the case that the magistrate thinks fit and necessary.[29] After receipt of such a report, the Minister assesses the same to determine whether he should surrender the criminal fugitive or not.[30]

In case the Minister is satisfied with the report, he or she would sign the surrender order[31] and hand it over to the Inspector General of Police (IGP), and the Commissioner General of Immigration (CGI) with a copy to the Ministry Responsible for Foreign Affairs for the removal of the fugitive criminal from Tanzania.[32] Where no surrender and conveyance of the fugitive criminal out of Tanzania is carried out within two months from the date he or she was committed to prison then a Judge of the High Court or the High Court of Zanzibar may order the fugitive criminal to be discharged.[33]

5.0 Extradition Practice in Tanzania

According to the Extradition Act,[34] countries that request the surrender of fugitive criminals should comply with the conditions set to facilitate an extradition process. Some of the common documents and information that are required to be availed

26 *Ibid*., section 7(1).
27 *Ibid.,* section 8.
28 *Ibid*., section 8(2).
29 *Ibid*., section 8(3).
30 *Ibid.,* section 8A.
31 *Ibid.,* section 8A.
32 *Ibid.,* section 8A (2).
33 *Ibid.,* section 10.
34 *Ibid.,* sections 18 and 19.

to authorities in Tanzania in the process were expounded in detail in the case of *Matthias Frank Radetzk,*[35] a fugitive criminal sought by German authorities for drug trafficking charges. The required document and information include the following:

Extradition request*:* there should be a formal written request *via* diplomatic channels for extradition from the requesting country's competent authority to the competent authority of the requested state.[36] The request should explicitly state the identity of the fugitive, the offences for which extradition is sought, his citizenship, the whereabouts of the fugitive, the time when the offence was committed, and the relevant legal provisions. The request should be authenticated by the competent authority of the requesting state.

Arrest warrant*:* an extradition request to Tanzania should be accompanied with original copies of documents, including, the arrest warrant issued by a competent court of the requesting state. The arrest warrant should provide details of the charges, the identity of the fugitive and the court that has issued the same.

Evidence of the offence*:* since extradition is a judicial process like preliminary inquiry,[37] the request should be supported by evidence that establishes a *prima facie* case against the fugitive to demonstrate that there is sufficient evidence to justify extradition. This may include witness statements, affidavits, expert reports, authentication statements and warrant of arrest, charge sheet, extracts of the laws, proof of personal identity or any other relevant evidence.[38]

Legal documentation*:* certified copies of extracts of legislation of the applicable laws in the requesting country that define and establish the offences for which extradition is sought. These documents help the Tanzanian authorities to determine whether the offence is also recognized as a crime under Tanzanian laws.

35 *Director of Public Prosecutions v. Matthias Frank Radetzk,* Misc. Criminal Application No.13/2022, Resident Magistrate Court of Dar es Salaam at Kisutu.
36 Section 5(1), Extradition Act.
37 *Ibid.,* section 7(1).
38 *Ibid.,* section 18.

Extradition treaty or legal basis: where the extradition request is based on a bilateral or multilateral extradition treaty between Tanzania and the requesting state, a copy of the treaty or the legal basis for extradition is to be attached for ease of processing the request.[39]

Identity and Supporting Information: the requesting state should make sure that it avails the requested state, and in this case Tanzania, information about the identity, nationality, and physical description of the fugitive, such as their full name, date of birth, place of birth, passport details, photograph and any known aliases, the colour of their skin, eyes, hair or other identifying marks to enable law enforcement agencies to arrest the fugitive criminal.

Statement of Facts: a detailed statement of facts outlining the circumstances of the offence, the involvement of the fugitive, and any other relevant information about the case. These facts of the statement required are to be adduced through an affidavit by the investigator who investigated how the offence was committed and the involvement of the fugitive sought.[40]

Translations: where the documents are in a language other than Swahili or English, the requesting state should provide certified translations to authorities in Tanzania to enable ease of communication and process of the request.

These requirements were further expounded by courts which guided the course of interpreting the provisions of the Extradition Act. For instance, in the case of *Francesco Tramontano v. R.*[41] the court ordered that requests for extradition should be specific and use proper terms according to the law governing extradition matters and treaties between respective countries. The case laid down the following issues to be considered for guidance of the extradition process:

39 *Ibid.,* section 3.
40 *Ibid.,* section 19.
41 [1999] TLR, 275.

Whether the person brought to court is the same person named in the warrant of arrest of the requesting country;

Whether the offence for which extradition is sought is extraditable;

Whether the requesting country is an extradition country;

Whether supporting documents have been properly filed and authenticated;

Whether the relevant documents and evidence adduced in the extradition proceedings supports findings that the person committed an extraditable offence; and

Whether any objection has arisen and if it did arise whether such objection or any other law, compelling circumstances or national interest preclude the surrender of a person requested.

6.0 Grounds for Refusal of Extradition Requests

In Tanzania, as in many other countries, the Extradition Act provides for grounds for which extradition requests may be refused. Some of the grounds include the request being founded on political factors or the absence of dual criminality[42] and the absence of an extradition treaty. Extradition requests could also be refused in cases where the requesting country fails to state the status of the fugitive criminal. In the case of *Francesco Tramontano v. R.*[43] the court ruled out the extradition of the requested fugitive to Belgium because the documents supporting his extradition request referred to him as the suspect and not as the accused, as the law required.

The courts also tend to reject requests which do not comply with the procedures and provisions of the Extradition Act. For example, in the case of *Minister for Constitutional and Legal Affairs vs Max Louarn,* the court held that non-compliance with the provisions of the Act nullifies the entire extradition process. [44] In this case, the arrest was done some days even before the Minister issued an order for the issuance of an arrest warrant to the magistrate. This made the entire process to be illegal.

42 Sections 16 and 17, the Extradition Act.
43 [1999] TLR 275.
44 Criminal Appl. No. 22/2022 at the Resident Magistrate of Dar es Salaam at Kisutu.

In addition, although not stipulated in the Tanzania Extradition Act and other related instruments, Tanzania tends to diplomatically refuse to extradite its nationals.[45] However, being a State Party to a number ofinternational conventions catering for international judicial cooperation, Tanzania has on several occasions applied the principle of *aut dedere aut judicare* (either extradite or prosecute) to prosecute individuals who escaped criminal charges in countries where they committed offences. This clearly shows the political will of the country to cooperate with other nations to fight against and curb transnational crime.

7.0 Challenges of Extradition

Extradition as an international mechanism to surrender fugitive criminals for prosecution to countries where the crime was committed, faces several challenges. Sometimes these challenges make it difficult for some states to surrender the requested fugitives. Challenges experienced include:

7.1 Extradition of Nationals

Many countries find it difficult to extradite their nationals.This is due to constitutional or legal protection provisions that prohibit the extradition of their nationals.[46] The reason behind countries' refusal to extradite their nationals was that the process was equated to deserting their nationals to an unfriendly and probably permanent exile if not death.[47] This necessitated most countries to include the provisions of not extraditing nationals in their constitutions and extradition legislation as a commitment of customary state obligation to protect the liberties of their nationals. The exception to extraditing nationals in some of the countries is in cases where there is an agreement in the region, such as the European Union, compelling member states to extradite nationals amongst themselves.

In Africa, there are specific constitutional and statutory provisions of some countries that restrict the extradition of nationals to foreign countries for prosecution unless

45 Salehe's case, *supra*.

46 Article 696-1, the French Code of Criminal Procedure. Also see Article 16 of the Basic Law for the Federal Republic of Germany; Article 61(1) of the Russian Federation Constitution; Article 5 LI of the Constitution of Brazil; and Article 8 of the Constitution of China.

47 Shearer, I.A., "Non-Extradition of Nationals – A Review and Proposal", ALR 2 1966, at pp. 274-305.

some conditions are met.[48] In Kenya, for instance, a citizen cannot be extradited unless ordered by the court.[49]The refusal to extradite nationals is based on the principle of nationality and on the fact that each state has the primary responsibility for prosecuting its citizens. Tanzania, on the other hand, has no such provision for the protection of its citizens when it comes to their surrender to other jurisdictions. For quite some time Tanzania has been extraditing its nationals to face charges in countries where they are alleged to have committed offences.

7.2 Dual Criminality

Another common challenge in extradition is the requirement of dual criminality, where an offence must be considered as an offence in both the requesting and the requested state.[50] Where the offence does not align with the laws of the requested country there is a likelihood for extradition to be refused unless stated otherwise in the bilateral agreement the states or the respective extradition Acts have reciprocity provisions.

7.3 Political Considerations

In most cases, where extradition requests involve politically affiliated offences, the said requests tend to fail. The simple reasons as to why the requested state hesitates to extradite a person due to diplomatic or political reasons lie in potential domestic or international repercussions. The definition of political offences varies across borders, but it generally refers to acts that are directly related to political dissent, opposition, or acts committed during times of political unrest or conflict.[51] Some states hesitate to extradite on political considerations because of concerns about the adequacy of

48 Section 3, the Extradition Act of Nigeria. Also see section 2(2), the Extradition Act of Ghana and Article 10, the Constitution of Senegal.

49 Article 29(5), the Constitution of Kenya.

50 Section 27, the Extradition Act.

51 History, Organizational Structure and Deeds of a Clandestine Crime Syndicate in the Turkish coup attempt of 2016.

evidence, treatment[52] or the fairness of the legal system[53] in the requesting country and sometimes because of fear of protests, demonstrations, or public pressure against extraditing individuals seen as political activists or opponents by a certain member of the community and groups. Many countries including Tanzania have special provisions relating to refusal to extradite on political grounds.[54] Some countries such as Brazil have placed restrictive provisions in their Constitutions.[55] It is worth noting that in Tanzania terrorism offences and money laundering are excluded from a set of offences of a political character considering the motives, purpose and means employed in the commission of such offences related to its impact on the society.[56]

7.4 Non-cooperative Jurisdiction

In the extradition process, some countries are non-cooperative in surrendering criminal fugitives, either due to legal restrictions, political reasons, or lack of an extradition treaty. Countries as such may as well be restrictive even in exercising the reciprocity principle of international law.[57] This lack of cooperation hampers the smooth execution of extradition requests. This attributed to the act of unreasonable non-cooperation, defies the cardinal principle of reciprocity which is key in matters relating to international judicial cooperation.

52 Extradition of Julian Assange who sought refuge in the Embassy of Ecuador in London, United Kingdom, where he stayed from June 2012 until April 2019. He sought asylum in the embassy to avoid extradition to Sweden, where he was wanted for questioning regarding allegations of sexual assault and rape. Assange feared that if he were extradited to Sweden, he would subsequently be extradited to the United States, where he faced potential charges related to WikiLeaks' publication of classified information. Available at https://www.theguardian.com/media/2023/apr/11/julian-assange-australian-politicians-urge-merrick-garland-united-states-us-attorney-general-to-abandon-extradition.(Accessed on 07 June 2023).

53 Extradition of Edward Snowden who is a former National Security Agency (NSA) contractor who suspected to have leaked classified documents in 2013 that revealed the extent of global surveillance programs operated by the United States and its allies. Snowden ran to Russia and despite the U.S. extradition request, Snowden remains in Russia, where he has been granted asylum and has lived since 2013. Council on Foreign Relations. https://www.cfr.org/interview/extraditing-edward-snowden. (Accessed on 07 June2023).

54 Section 16, the Extradition Act.

55 Article 5 LII, the Constitution of Brazil.

56 Section 17(5) (a) and (b), the Extradition Act.

57 The Palermo Convention, *supra*.

7.5 Absence of Extradition Treaties

Extradition, as stipulated, requires bilateral and multilateral treaties between states. As a principle of international law, without bilateral or multilateral extradition treaties in place, the process becomes more challenging. When this happens, countries, where the need arises, may rely on alternative mechanisms such as reciprocity or negotiations to assist one another in securing fugitives who are required to face charges relating to offences committed.

7.6 Procedural Challenges

It is an undisputed fact that the extradition process involves complex legal and procedural requirements.In this case, challenges may arise due to differences in legal systems, for instance, the common law system and the civil law system. Likewise, the availability of evidentiary standards and the availability of documentation or evidence required to meet the extradition criteria. These challenges can cause delays and difficulties in the process.

7.7 Human Rights Concerns

Challenges may arise to extradition requests when there seems to be concerns about human rights violations, the fair treatment of the accused in the requesting country or where it is believed that the criminal fugitive will be subjected to capital punishment. The requested country may also refuse to extradite the fugitive criminal if there are substantial grounds to believe that the person would be subjected to torture, inhumane treatment, or an unfair trial in the requesting country.

In order to address the pointed challenges properly, international cooperation should be enhanced between states. There should be clear extradition laws and procedures which address explicitly all concerns in extradition including protection of nationals and respect for human rights.

8.0 Challenges of Extradition in Tanzania

Despite compliance with international standards on extradition practice and procedure, the implementation of the Extradition Act of Tanzania and its procedure faces some challenges that need to be addressed. One is the lack of provisions relating to extraditing its nationals. Although Tanzania has extradited a substantial number of its citizens and is the leading country in extraditing its nationals in the Eastern and Southern African region,[58] there are cases where requests to extradite nationals are rejected without a legal provision to back up the refusal. Unless the Act is amended to include provisions that will protect its nationals, there is the likelihood of disrupting diplomatic relations between Tanzania and the requesting country. This would harm Tanzania for being marked internationally as an uncooperative country. Hence, it could receive reciprocal uncooperative responses from other countries including other sanctions affiliated with non-compliance with international obligations under international conventions on international judicial cooperation. However, Tanzania's commitment to extraditing its citizens is a positive sign for international cooperation in the fight against transnational crime.[59] The country's continued compliance with international treaties and conventions related to extradition will help to strengthen the process and ensure that fugitives are brought to justice.

Limited resources and capacity of key actors and practitioners in the extradition process is another challenge. Sometimes, the extradition process may be expensive and become an unbearable burden to the requested State. Law enforcement agencies may lack resources to speed up the processes of arrest. This is due to the vastness of the country in locating fugitive criminals and preparations of documentation to initiate and complete the extradition judicial proceedings. Since extradition is a complex process, it is inevitable for practitioners and all key actors in the chain to be well-trained, equipped and acquainted with the laws and procedures, to move with the pace that is required in handling extradition requests effectively and efficiently.

58 Ali Khatib Haji Hassan@ Shkuba and 4 others, extradited to USA in 2017; Amini Kaganga, extradited to Zambia in 2018; Gilbert Lawuo, extradited to U.K in 2018; Samwel Enock, extradited to Kenya in 2018; Hamad Abdulrahim Kamana, extradited to Kenya in 2018; Samir Ali Hussein, extradited to Kenya in 2018; Daudi Sadick Mgaya, extradited to Zambia in 2019;Furaha Adam Kajiba and Adam Livingstone Kajiba, extradited to Malawi in 2021; Amani Amosi, Philemon Matata, Ezekia Alex Ngole, extradited to Zambia in 2021.

59 *Ibid*.

In addition, in Tanzania, most extradition requests are handled by the Resident Magistrate's Court of Dar es Salaam Region at Kisutu. This requires the fugitive criminal arrested in other parts of the country to be transported to Dar es Salaam for extradition proceedings. This could reasonably be interpreted to mean that there is a limited number of experts, including police officers, prosecutors and magistrates, with requisite knowledge and skills in the field of extradition in some other parts of the country. This contributes to delays in processing the extradition requests and in the end occasions ineffectiveness in the handling of the same.

Tanzania also has no mechanism to follow up on the treatment of extradited persons, especially its citizens, to requesting states. Criticisms may arise where individuals are extradited to countries where they may face ill-treatment, torture or other forms of discrimination. The situation may be worse when the individuals are to be extradited to countries where Tanzania does not have an embassy or a consulate in the vicinity of the region or province where the offender will be tried or imprisoned in the requesting state.

9.0 Alternatives to Extradition

As stated, extradition is the common and formal process for the surrender of fugitive criminals from the requested state to the requesting state. However, since the mechanism is somewhat expensive, lengthy, and time-consuming and to some extent complicated, there are alternative means that can be employed in certain circumstances. In most cases, these mechanisms are used when extradition is not practicable or when one country is unwilling to cooperate in the extradition process. Most notable alternative mechanisms include:

Waiver. This is the least controversial process where the fugitive voluntarily waives the formal extradition process and agrees to be surrendered and transferred to the requesting state.Sometimes a fugitive may waive the right to be surrendered and be dealt with accordingly by the laws of the requested state.

Diplomatic negotiations. In this process, states engage in diplomatic discussions and agreements to facilitate the transfer of the fugitive. This, however, requires the political will and cooperation of the states involved.

Deportation or expulsion. A country may choose to deport or expel a fugitive criminal instead of going through extradition processes.[60] It should be noted that this process is not a substitute for extradition in cases where the fugitive is wanted for criminal prosecution nor is it desirable if the deported individual is not a national or citizen of the state to which he is deported or expelled.

Extraordinary rendition. Under this process, a fugitive is removed by force from a country of refuge and denied access to its judicial process.[61] Rendition normally involves various methods, such as abduction, capture, or extrajudicial transfer.[62] This mechanism has been a topic of controversy and raised human rights concerns.[63]

Foreign prosecution. Another feasible option is to prosecute a criminal fugitive in the jurisdiction of a requested state. In most cases, this happens when a fugitive person is a national of the requested state. This is one of the factors that is considered in the *aut dedere aut judicare* maxim[64] in that if no extradition, then prosecute. For instance, in 2022, Tanzania initiated prosecutions against its nationals suspected and required in Zambia for stealing goods in transit.[65] This process, however, requires countries to assist one another through mutual legal assistance to cooperate in the investigation including exchange of information, gathering of evidence, and assistance in locating and apprehending fugitives.

60 Mr. Thabo Bester and Dr. Nandipha Magudumana were deported by the Government of the United Republic of Tanzania to South Africa in April, 2023. Mr. Thabo was convicted for rape and murder, he then faked his death in prison and fled to Tanzania. While on the other hand Dr. Nandipha was allegedly accused of assisting Mr. Bester to escape from prison in 2022.

61 Maher Arar who was suspected by the US government of being a member of Al Qaeda was in September 2002 detained and deported to Syria. He was held without charges in solitary confinement in the United States for nearly two weeks, questioned, and denied meaningful access to a lawyer. Found at https://ccrjustice.org/files/renditiontotorturereport.pdf. (Accessed on 29 May, 2023).

62 Ahmed Agiza and Muhammad al-Zery, two Egyptian asylum seekers who were rendered from Sweden to Egypt on 18th December 2001. They were both accused by the Egyptian regime of membership in violent Islamic organisations, and were subjected to repeated harassment and arrest by the Egyptian security forces. Both men allege that they were tortured while in detention in Egypt in the 1980s. They were apprehended by Swedish security services and handed over to the U.S. Central Intelligence Agency (CIA), who then transferred them to Egypt, available at https://www.therenditionproject.org.uk/prisoners/agiza_elzery.html. (Accessed on 29 May 2023).

63 https://www.therenditionproject.org.uk/prisoners/agiza_elzery.htm (Accessed on 7 June, 2023)

64 Steven, L.A., *op.cit.*

65 Saleh Ally Mwanyika and Hussein Omary Human who were arraigned with case No. 56/01/2022 in the Nakonde Magistrate Court in Zambia and the said court issued a warrant of arrest of the fugitives. The fugitive criminals were however, charged and prosecuted in Tanzania in Criminal Case No. 173/2021 in the District Court of Momba at Vwawa.

Even though these mechanisms offer prospects of doing away with extradition challenges, they often lack a legal framework and standardization. The process, in most cases, relies on ad hoc agreements and diplomatic negotiations, which can vary in their effectiveness and consistency. In addition, the alternative mechanisms are potential for political consideration and lack of trust between states. Political factors are likely to influence the decision-making process and hinder cooperation in the transfer of fugitives.

Additionally, concerns about human rights, due process and fair trials can arise when alternative mechanisms are employed without proper safeguards.[66] It is therefore crucial for these mechanisms to be employed by international law and with proper safeguards to ensure the protection of the rights of the accused. The voluntary nature of these mechanisms means that the fugitive's consent or agreement is typically sought, and arrangements are made to facilitate their transfer to the requesting country.

10.0 Conclusion

In conclusion, and as noted above, extradition is a tool for international cooperation in the fight against crime. This process involves diplomatic and judicial procedures to return fugitives to countries where they committed criminal acts. It is usually governed by bilateral and multilateral treaties depending on domestic laws of individual countries. In Tanzania, the extradition process is governed by the Extradition Act.[67]

Indeed, there have been challenges such as lack of legal provisions related to the protection of nationals, lack of a mechanism to trace the treatment of extradited individuals to requested counties and lack of resources and capacity to law enforcement agencies. These can be addressed by building capacities of personnel through training and ensuring there is sufficient allocation of financial resources to address this challenge. There is also a need for the government to continue reforming its legal framework to ensure that the extradition process is fair, just and consistent with international standards.

66 Arar's case, *supra*.
67 Cap. 368.

Even though the extradition decision is guided by domestic laws, international agreements, and other specific circumstances, Tanzania, like other countries should consider amending the Extradition Act[68] to include provisions to prevent the extradition of its nationals. Legal provisions like these demonstrate the commitment to the protection of nationals from unjust treatment in foreign jurisdictions.The amendment should correspond to our international human rights obligations which require states to protect their citizens from unfair treatment within and outside their borders.[69]

While considering preventing the extradition of its nationals through the amendment of the Extradition Act, Tanzania should also address issues related to capital punishment either in its laws or when signing bilateral arrangements on extradition. Since most countries are getting rid of capital punishment, there is the likelihood that if the same is not explicitly addressed in the laws or agreements, extradition requests by Tanzania to other states may be refused because of human rights concerns.

However, with continued investment in the judicial system, law enforcement agencies and the entire criminal justice system, the government can further improve its capacity to process extradition requests efficiently and effectively. This will enhance the efforts to combat transnational crime not only in the region but also internationally. The cumulative effect is to make the international community free from crime and a safe place for all humankind.

68 *Ibid*.

69 Articles 3 and 10, the Universal Declaration of Human Rights (UDHR); Articles 6, 7 and14, the International Covenant on Civil and Political Rights (ICCPR); and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT).

Prior Exhaustion of Civil or Administrative Remedies as a Prerequisite for Instituting Criminal Proceedings: A Critique

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Abstract

Thearticle critically examines the rationale and challenges underlying the binding requirement for exhaustion of civil or administrative requirements before invoking criminal process in a criminal matter with an administrative or civil nature. This process has been introduced by the Criminal Procedure Act of Tanzania. The findings reveal that the amendments introduced by the Criminal Procedure Act has brought challenges as they conflict with evidence rules, abandon the requirements for free choice in suing, and challenge the right to prosecution and statutory limitation. The amendments are also in conflict with other laws and principles in the criminal justice system. The article recommends amendment of section 4(3) of Criminal Procedure Act to overcome the challenges.

Keywords: *Criminal and civil procedure, administrative autonomy, exhaustion of remedies in Tanzania.*

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1.0 Introduction

The exhaustion of remedies arises when a litigant, in this case also a complainant in criminal proceedings of a civil or administrative nature, who is aggrieved by a wrongful act and seeks judicial intervention is required to pursue an available remedy in the administrative or civil domain first.[1] The rationale behind the binding requirement for exhaustion of administrative or civil remedies is to protect administrative autonomy, preserve separation of powers, gain judicial economy, avoid administrative inefficiency and permit courts to benefit from an institution's determination of facts and exercise of discretion. Generally, the benefits of exhaustion requirements are lower costs, quicker decisions, more straightforward procedures, a chance of self-representation and a more significant opportunity for an institution to correct its error.[2]

Despite the benefits of the binding exhaustion requirements, these could pose challenges. This is reflected, for example, in section 4(3) of the Criminal Procedure Act which neither defines nor lists the administrative or civil cases with a criminal nature for a complainant or claimant to exhaust administrative or civil remedies in administrative or civil domains before invoking the criminal process.

Further, the section does not provide for a remedy to a claimant who is time-barred to exhaust administrative or civil remedies for cases of a criminal nature. The section also does not provide a remedy for a litigant who cannot exhaust administrative or civil remedies in administrative or civil domains if the doors to attain such remedies are closed. Thus, the article examines the rationale underlying the binding requirement for exhaustion of civil or administrative requirements before invoking a criminal process on a criminal matter with an administrative or civil nature.

1 Gelpe, M., "Exhaustion of Administrative Remedies: Lessons from Environmental Cases," *George Washington Law Review*, Vol. 53, No. 1, 1985, pp.1-66 at p. 3.

2 *Ibid.,* at pp. 10-11. See also Funk W, "Exhaustion of Administrative Remedies-New Dimensions Since Darby," *Pace Environmental Law Review*, Vol. 18, No. 1, 2000, pp.1-18 at p. 2.

2.0 Background to the Requirement of Exhausting Other Remedies

Before 8 February 2022, the position of the law allowed a litigant to file a civil case for compensation after obtaining a judgment of conviction in a criminal case arising from the same wrongful act against the same person. In the same line, a litigant, after obtaining a judgment of conviction in a criminal case, could file a civil suit for compensation against a master under vicarious liability on the same wrongful act if the wrongful act had elements of both a civil and criminal nature. Thus, it was open for a claimant to invoke criminal process as a primary means and thereafter to invoke civil or administrative process for remedies after obtaining a judgment of conviction in a criminal case.

This legal position is well illustrated in the case of *Nimrod Elireheman Mkono v. State Travel Service Ltd & Masoo Saktay,*[3] in which, Masoo Saktay was charged before and convicted by the District Court of Musoma for causing death by dangerous driving.[4] Later, Masoo Saktay and State Travel Service Ltd (his master) were sued by Nimrod Mkono in the High Court of Tanzania for compensation.[5] The litigant (Nimrod Mkono) was able to file a civil case for compensation after obtaining a judgment of conviction in a criminal case arising from the same wrongful act against the same persons (Masoo Saktay and State Travel Service Ltd).

Another example is the case of *Roseleen Kombe, the estate administratrix of the late Lieutenant General Imran Hussein Kombe v. Attorney General.*[6] In this case, the Attorney General was sued by virtue of the doctrine of vicarious liability for compensation for the death of Imran Hussein Kombe, who was killed by two police officers. The police officers were first convicted for murder and sentenced to death by the High Court of Tanzania. Their appeal at the Court of Appeal of Tanzania was dismissed.[7] In this case, the litigant (Roseleen), after obtaining a judgment of conviction in a criminal case, was able to file a civil suit for compensation against a master on the basis of vicarious liability principle on the same wrongful act because the wrongful act had both elements of a civil and criminal nature.

3 [1992] TLR 24.
4 Traffic Case No. 5 of 1984.
5 Civil Case No. 158 of 1986.
6 [2003] T.L.R. 347.
7 *Attorney General v. Roseleen Kombe (as administratix of the late Gen. Imran Hussein Kombe)* [2005] T.L.R. 208.

On 12 November 2021, the Government of the United Republic of Tanzania presented a Bill[8] before the National Assembly of Tanzania for first reading.[9] The Bill was read for the second time in the House on 07 February 2022.[10] The Bill was passed into law by National Assembly of Tanzania in the exercise of its legislative power given under Article 64(1) of the Constitution of the United Republic of Tanzania on 07 February 2022 as the Written Laws (Miscellaneous Amendment) Act No. 1 of 2022.[11] The Act, among others, amended the Criminal Procedure Act. One of the amendments made to the Criminal Procedure Act wasthe addition of section 4(3).

Since 8 March 2022, when Act No. 1 of 2022 came into force, invocation of the criminal process as primary means for remedies in cases with administrative or civil and criminal nature has been blocked in courts of law unless administrative or civil remedies in administrative or civil domains, as the case may be, are resorted to as a primary means and not as a secondary means. A litigant who decides to invoke a criminal process before exhausting administrative or civil remedies as a primary means may be caught up by a preliminary objection for want of jurisdiction. In addition, courts of law may determine matters without having jurisdiction.

On the one hand, the position in Mainland Tanzania is like that of Kenya, specifically on the exhaustion of administrative remedies. In Kenya, administrative actions[12] cannot be prosecuted in the High Court or subordinate courts unless all remedies available under any other written law are first exhausted in administrative domains.[13] On the other hand, the position in Mainland Tanzania and Kenya is different. In Kenya, a party can prosecute an administrative action in the High Court or subordinate courts directly if remedies cannot be exhausted under administrative domains.

8 Written Laws (Miscellaneous Amendment (No. 7) Act, 2021.

9 Available at https://www.parliament.go.tz (Accessed on 22 July 2023).

10 Available at https://www.parliament.go.tz (Accessed on 22 July 2023).

11 The Act was assented to by the President of the United Republic of Tanzania on 8 March 2022.

12 Section 2 of the Fair Administrative Action Act No. 4 of 2015 defines 'administrative action' to mean 'any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.'

13 Section 9(2), Fair Administrative Action Act No. 4 of 2015. *See* also *William Odhiambo Ramogi & 3 others v. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR; *Robert Khamala Situma and 8 others v. Acting Clerk of the Nairobi City County Assembly* [2022] eKLR.

Moreover, there are other special circumstances upon which a party can exhaust administrative remedies directly in the High Court and subordinate courts in Kenya.[14] The special circumstances have not been provided by the Fair Administrative Action Act. However, the Court of Appeal of Kenya has laid down the following special circumstances which allow a party to seek judicial remedies directly before exhausting administrative remedies in administrative domains. The special circumstances are: - the presence of clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the rules of natural justice are manifest.[15]

Section 4(3) of the Criminal Procedure Act has been tested in courts in the case of *R. v. Robert Kadaso Mageni.*[16] Mr. Robert was arraigned before the District Court of Mbinga on 24 March 2022 for abuse of position and occasioning loss to a specified authority.[17] Mr. Robert raised a preliminary objection to the effect that section 4(3) of the Criminal Procedure Act was contravened as no administrative remedies were exhausted. After hearing the learned counsel for both parties, the trial court dismissed the objection on the ground that administrative remedies could not have been exhausted as the accused was no longer a public servant when the case against him was filed in court. The High Court of Tanzania upheld the decision of the District Court at Songea[18] in an appeal lodged by Mr. Robertto the Court of Appeal of Tanzania. The Court of Appeal found that the appeal contravened section 359(3) of the Criminal Procedure Act as it was a preliminary or interlocutory order, which is not appealable. Thus, the appeal was not decided on merit, and the case file was remitted to the trial court to proceed with the hearing.

14 Section 9(4), the Fair Administrative Action Act No. 4 of 2015. *See* also *Republic v. Independent Electoral and Boundaries Commission [IEBC] Ex Parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR; *Fleur Investments Limited v. Commissioner of Domestic Taxes & another* [2018] eKLR; *Robert Khamala Situma and 8 others, supra*.

15 See *Fleur Investments Limited* (n 13); *Robert Khamala Situma and 8 others, supra.*

16 (Criminal Appeal No. 52 of 2022) [2023] TZHC 16456 (31 March 2023) available at https://tanzlii.org (accessed 12 September 2023). *See* also *Robert Kadaso Mageni v. Republic* (Criminal Appeal No. 476 of 2023) [2023] TZCA 17504 (18 August 2023) available at https://tanzlii.org (Accessed on 12 September 2023).

17 Economic Case No. 2 of 2022.

18 See *Robert Kadaso Mageni case, supra.*

Another case is *R. v. Tunu Salum Mtamah and 2 others*,[19] where the accused persons were charged with economic and non-economic offences. The court*suo moto* raised the issue of jurisdiction in respect of section 4(3) of Criminal Procedure Act and invited the counsel for the parties to address it on the competence of the court to hear and decide the case, while administrative remedies were not exhausted as primary means. Having heard the counsel, the court held that it lacked jurisdiction since the Republic had not exhausted administrative remedies as required under section 4(3) of Criminal Procedure Act. The court struck out the charges and discharged the accused persons.

As earlier pointed out, section 4(3) of Criminal Procedure Act brings about negative legal implications. . Despite the problems created by section 4(3) of the Criminal Procedure Act, the section still favours the principle of prosecution of civil cases as a primary means and thereafter invocation of criminal process against the same person on the same wrongful act to cases of both civil and criminal nature. The principle of invocation of civil procedure and thereafter, the criminal process over the same unlawful act to the same person is reinforced by section 14 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act.[20]

3.0 Legal Implications Caused by the Exhaustion Requirement before Invoking Criminal Proceedings

3.1 Conflicting Objectives and Reasons for Exhaustion Requirement

Order 93(2) of the Parliamentary Standing Orders[21] provides that the Bill tabled to amend certain provisions of the lawshould provide objectives and reasons for the same. Unfortunately, Bill No. 7 of 2021 did not provide for the objectives and reasons for amending section 4 by inserting subsection 3 immediately after subsection 2 of Criminal Procedure Act. Interestingly, the same Bill provides reasons for other amendments of sections 47A, 91, 131A, 174, 265 and 285.[22]

19 Economic Crime Case No. 02/2022 and 03/2022 of the District Court of Liwale at Liwale, delivered on 18.08.2022. However, we are informed that the decision has been appealed by the Republic to the High Court of Tanzania at Mtwara Sub-Registry, and the appeal is at the very initial stages as no date for hearing has been set.

20 Cap. 310 of the Laws of Tanzania. See also *Nimrod Elireheman Mkono case supra, at* p. 24 and *Roseleen Kombe case* at p. 353.

21 Parliamentary Standing Orders, Supplement No. 11 of 21 March 2023, available at https://www.parliament.go.tz (Accessed on 22 July 2023).

22 *Taarifa Rasmi za Bunge, Mkutano wa 6, Kikao cha 5, tarehe 07 Februari at pp. 137-140* available at https://bunge.go.tz (Accessed on 22 June 2023).

Moreover, during his speech before the National Assembly of Tanzania, when Bill No. 7 of 2021 was read for the second time, no objects and reasons for amending section 4 of Criminal Procedure Act were provided by the Attorney Generalsave for reasons relating to sections 91, 98, 131A, 174, 265 and 285.[23] The objects and reasons for amending section 4 of Criminal Procedure Act by adding subsection 3 were explained by the Parliamentary Standing Committee for Governance, Constitutional and Legal Affairs (the Parliamentary Committee) while submittingpresenting its opinion as required by regulation 99(5) of the Parliamentary Standing Orders. However, the subject objects and reasons are confusing.

The Parliamentary Committee on one hand, stated that the amendment aimed to compel exhaustion of administrative or civil remedies as a primary means prior to exhausting criminal remedies to criminal cases with administrative or civil nature.[24] The Parliamentary Committee opinion was in line with what the wording of section 23 of Act No. 1 of 2022 as follows:

> Notwithstanding subsection (2), where a matter is of a civil, administrative or criminal nature, as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process in accordance with this Act.

On the other hand, the Parliamentary Committee opined that the objects and reasons for amending section 4 of the Criminal Procedure Act aimed at reducing case backlogs in criminal courts. The other reason provided was to block the invocation of criminal process to cases with an administrative, civil and criminal nature if their remedies can be exhausted in administrative or civil domains.[25] The Parliamentary Committee's objects and reasons were in line with the Attorney General's explanation[26] summing-up speech to the National Assembly of Tanzania after deliberation.

23 *Ibid*.

24 *Taarifa Rasmi za Bunge, Mkutano wa 6, Kikao cha 5, tarehe 07 Februari* at pp. 110-111 available at https://bunge.go.tz (Accessed on 22 June 2023).

25 *Ibid*.

26 The parliamentary Hansard of 07 February 2022.

The Attorney General, in emphasising the need for legal education to stakeholders as advised by the Parliamentary Committee regarding the rationale of section 4 (3) of Criminal Procedure Act, stated:

> Nafikiri Serikali inapochukua dhamana ya kuhakikisha elimu inatolewa hii itasaidia kwa sababu itahusu vile vile mamlaka; Kwa mfano, zile za waajiri ambazo zimekuwa hazichukua hatua za kinidhamu na mashtaka ya kiutumishi na kukimbilia mahakamani. Au makosa madogo madogo ya jinai kupokelewa vituo vya polisi.[27]

The statement by the Attorney General suggests that the rationale for amending section 4 of Criminal Procedure Act was to block the institution of criminal cases with an administrative or civil nature in criminal courts if their remedies can be exhausted in administrative or civil domains, and block minor offences reported at police stations.

Going by the second position opined by the Parliamentary Committee and as captured by the Attorney General, the framing of section 23 of Bill No. 7 of 2021 later on section 23 of Act No. 1 of 2022 and now section 4(3) of the Criminal Procedure Act is problematic. It never blocked the court's criminal process of criminal cases with administrative or civil nature and minor offences reported to the police stations. Nonetheless, the section introduced a new binding requirement for the exhaustion of administrative or civil remedies as a primary means before invoking the criminal process as a secondary means.

Section 23 of Bill No. 7 of 2021 read as follows: -

> *Notwithstanding subsection (2), where a matter is of a civil, administrative or criminal matter, as the case may be, exhaustion of the remedies in civil or administrative domains shall be mandatory prior to the invocation of the criminal process in accordance with this Act."* Though the Bill No. 7 of 2021 inserted the word "matter" instead of the word "nature" appearing in section 23 of Act No. 1 of 2022 as underlined, the error was an oversight if one reads the whole of section 23 of the Bill No. 7 of 2021.

27 *Taarifa Rasmi za Bunge, Mkutano wa 6, Kikao cha 5, tarehe 07 Februari* at p. 138 available at https://bunge.go.tz (Accessed on 22 June 2023).

While the Parliamentary Committee provided conflicting objects and reasons for amending section 4(3) of the Criminal Procedure Act, Honourable Judge M. K. Ismail [28] (as he then was) was of the view that the amendment of section 4(3) of the same Act intended to avoid the parallel pursuit of remedies. Unfortunately, the Honourable Judge reached that conclusion without referring to the conflicting objects and reasons given by the Parliamentary Committee, and the Attorney General as reflected in the Hansard. In the case of *Robert Kadaso Mageni v. R.,*[29] the Court of Appeal of Tanzania reasoned that section 4(3) of Criminal Procedure Act creates a binding requirement to exhaust *available civil and administrative remedies before invoking any criminal process.* While section 4(3) of the Criminal Procedure Act has no such phrase of '*available remedies',* the Court of Appeal opined.

Therefore, the failure of Bill No. 7 of 2021 to provide the objects and reasons for amending section 4 by inserting subsection 3 immediately after subsection 2 of the Criminal Procedure Act brought aboutconfusing interpretations. The Parliamentary Committee gave two conflicting objects and reasons.[30] The Honourable Judge M. K. Ismail also laid a contrary objects and reasons for amending section 4 of the Criminal Procedure Act to those provided for by the Parliamentary Committee.[31] The Court of Appeal of Tanzania also held that section 4(3) of the Criminal Procedure Act creates a binding requirement to exhaust available civil and administrative remedies before invoking any criminal process; *with* due respect, such requirements do not feature under section 4(3) of the same Act.

28 *The Director of Public Prosecutions v. Jitesh Jayantilal Ladwa and another* (Criminal Appeal No. 111 of 2022) TZHC 11577 (11 August 2022), at p. 11 available at https://tanzlii.ord (Accessed on 19 August 2023).

29 (Criminal Appeal No. 52 of 2022).

30 *Taarifa Rasmi za Bunge, Mkutano wa 6, Kikao cha 5, tarehe 07 Februari* at pp. 110-111 available at https://bunge.go.tz (Accessed on 22 June 2023).

31 See *The Director of Public Prosecutions case,* at p. 11.

3.2 Uncertainty in Classification of Unlawful Acts

A wrongful act can be a civil wrong, a crime, or both.[32] Moreover, a wrongful act can be of an administrative nature, a crime, or both.[33] The nature of administrative, civil and criminal wrong arises from the legal consequences that follow the action. A wrongful act regulated by both administrative and criminal laws or by both civil and criminal law is regarded as both administrative and criminal wrong or civil and criminal wrong.

A wrongful act may be considered as both an administrative and criminal offence or civil and criminal offence by focusing separately or cumulatively on three criteria. The first criterion is the classification of the offence. Second, it is the nature of the offence, and the third is the degree of severity of the penalty that the person concerned risks incurring.[34] This is because there are acts that do constitute a civil wrong only (such as failure to pay a loan), a crime only (such as treason) and an administrative wrong only (such as lateness at work) with no overlapping nature. Good examples of crimes and civil wrongs are murder,[35] manslaughter, assault, theft, malicious damage to property and causing grievous bodily harm.

An administrative act of a criminal nature is an offence or a crime consisting of a violation of an administrative rule or regulation that carries with it a criminal

32 Section 14, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R. E. 2019]; sections 348(1) and 348A (1), the Criminal Procedure Act [Cap. 20 R. E. 2022]. *See* also Barker D., *Granville Williams: Textbook of Criminal Law,* 3rd edn., Sweet and Maxwell: London, 2012, atpp. 25-26; Smith A., (ed.), *Granville Williams: Learning the Law*, 14th ed., Thomson Reuters (Legal) Limited: London, 2013, at p. 3; Keenan D., *Smith and Keenan's English Law*, 9th edn., English Language Book Society/Pitman: London, 1990, at p. 500; Collingwood J., *Criminal Law of East and Central Africa*, African University Press: Lagos, 1967, at p. 3.

33 Section 120, Penal Code [Cap. 16 R. E. 2022]; Regulations 50, 52, 53 and First Schedule to the Public Services Regulations 2022, Government Notice No. 444 of 2022; Rule 12(3)(a), (b), (c) and (e) of the Employment and Labour Relations (Code of Good Practice) Rules 2007, Government Notice No. 42 of 2007.

34 *Engel and Other v. The Netherlands*, European Court of Human Rights, 8 June 1976, paragraph 82, at p. 31; *Benham v. The United Kingdom*, European Court of Human Rights, 10 June 1996, paragraphs 55-56, at p. 16; *Gary Fallou Aebe v. Greece*, European Court of Human Rights, 24 September 1997, paragraphs 32-34, at p. 8; *Lauko v. Slovakia*, European Court of Human Rights, 2 September 1998, paragraphs 56-57, at p. 11, available at https://hudoc.echr.coe.int (Accessed on 02 September 2023). See also OSCE's Office for Democratic Institutions and Human Rights, Handbook for Monitoring Administrative Justice, 2013, at pp. 18-19, available at https://www.osce.org (Accessed on 02 September 2023).

35 Section 3, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act. See also *Roseleen Kombe* case supra at p. 353.

sanction.[36] The heart of determining an administrative act to be a crime is the violation of an administrative rule or regulation carrying a criminal sanction, as there are administrative acts not amounting to criminal sanction, like work absenteeism. Examples of administrative acts amounting to criminal sanctions may be drawn from the Public Services Regulations (the Public Regulations).[37]

Under Regulations 50 and 67 of the Public Regulations, a public servant who commits a disciplinary offence amounting to a criminal offence under the Code of Ethics and Conduct for the Public Servant is subject to disciplinary criminal prosecution. Some of the disciplinary offences are listed under the First Schedule, Part A of the Public Regulations.[38]These are an act or omission involving moral turpitude, e.g. theft, corrupt practices, and disclosure of information in contravention of the National Security Act,[39] act or omission which contravenes the e-Government Act,[40] act or omission which contravenes the Economic and Organized Crime Control Act,[41] act or omission which contravenes the Cybercrime Act,[42] an act or omission which contravenes the Prevention and Combating of Corruption Act [43] and an act or omission contravening the Drug Control and Enforcement Act.[44]

Under Regulation 52 of the Public Regulations, a public servant who commits any disciplinary offence amounting to a crime may be dismissed, reduced in rank and salary, reduction of salary equivalent to 15% of the gross salary served for 3 years.[45]

36 Garner, B., (ed.), *Black's Law Dictionary*, 10th edn. Thomson Reuters: St. Paul Minn, 2014, at p. 451.
37 Government Notice No. 444 of 2022.
38 *Ibid*.
39 Sections 3-8 and 10-11, Cap 47.
40 Section 57(1) and (2), Cap. 273.
41 Offences under section 57(1) and paragraphs 3-4, 6-7, 9-15, 18, 20-39 to the First Schedule of the Economic and Organized Crime Control Act have been categorized as administrative and criminal.
42 Sections 4-27 and 29, Cap. 443.
43 Offences under sections 15-34, 36 and 37 of the Prevention and Combating of Corruption Act have been categorized as administrative and criminal.
44 Offences under sections 11, 15, 15A, and 16-25 have been categorised as administrative and criminal, Cap. 95.
45 Regulation 42(1), GN No. 444 of 2022.

The second example may be drawn from the Employment and Labour Relations (Code of Good Practice) Rules (Code of Good Practice).[46] Under Rule 12(3) (a) (b), (c) and (e) of the Code of Good Practice, there is a list of misconducts which have both administrative and criminal elements. Gross dishonesty, wilful damage to property, wilful endangering the life of others, and assault are some of the disciplinary offences amounting to criminal offences. Under Rule 9(4) (a) of the Employment and Labour Relations (Code of Good Practice) Rules, the employer may terminate an employee who commits any of the following misconducts: causing serious damage to property, causing loss of employer's property, theft, fraud or misappropriation of organisational funds, assaults, etc.[47]

To illustrate the above, suppose an employee forges and presents to an employer an academic certificate of a specific qualification by which the employee has no such education qualification for employment promotion. Then, the employer promotes the employee to a higher position based on the presented forged certificate. After two years of employment promotion, the employer discovered the certificate was forged. The act of forgery is an administrative misconduct with elements of a crime, attracting criminal sanction (as forgery is gross dishonest/misconduct) under the Public Regulations,[48] the Code of Good Practice[49] and the Penal Code.[50]

The fourth example of an administrative action or wrong of a criminal nature can be drawn from the Universities' By-Laws. For example, those of Marian University College,[51] the University of Arusha,[52] Sokoine University of Agriculture,[53] University of Dar es Salaam,[54] Mkwawa University College of Education,[55] Ardhi University,[56] Ruaha

46 Government Notice No. 42 of 2007.
47 *Ibid*. See also *Platinum Credit Limited v. Martin Joaqim* (Civil Appeal No. 138 of 2022) [2023] TZCA 17740 (6 October 2023), at pp. 14-18 available at https://tanzlii.org (Accessed on 22 October 2023).
48 Regulation 52 and item 1, First Schedule, Part A of the Government Notice No. 444 of 2022.
49 Rule 12(3), the Government Notice No. 42 of 2007. *See* also *Platinum Credit Limited V Martin Joaqim*, at pp. 14-18.
50 Sections 333 and 335, Cap. 16.
51 Marian University College Students' By-Laws (General Conduct, Disciplinary Offences, Procedures, Penalties and Appeal), 2015-2016.
52 Staff Rules and Regulations, 2012 (Reviewed 2022).
53 Students By-Laws Governing General Conduct, Disciplinary Proceedings and Penalties), 2016.
54 Students By-Laws, 2021.
55 Students By-Laws, 2012.
56 Students By-Laws, 2018.

Catholic University (RUCU),[57] St. Augustine University of Tanzania[58] and Mzumbe University.[59]

These by-laws create offences, domains with authority to hear the offences, procedures of conducting hearings and penalties to be imposed by the authority and the right to appeal to a person aggrieved with the decision. Some offences are forgery and cheating,[60] sexual misconduct (includes rape, attempted rape, oral or anal intercourse) and misconduct (includes sexual harassment and sexual assault),[61] theft, fraud or misappropriation of properties,[62] possessing, using, administering, distributing prohibited drugs, narcotics or any other illicit intoxicating substances.[63]

Furthermore, an advocate who engages in acts contrary to his legal profession may be found to commit administrative wrongs of a criminal nature, for example, fraud.[64] Thus, before invoking criminal prosecution against the advocate for his misconduct, the claimant shall first invoke the administrative procedures provided under a different set of laws concerning the advocate's misconduct.[65]

57 Ruaha University College (RUCO), St. Augustine University of Tanzania Students By-Laws (General Conduct, Disciplinary Offences, Procedures, Penalties and Appeals) Amendments of 2011/13. Under Article 3 (1) and (4) of the Ruaha Catholic University Charter 2022, Government Notice No. 176 of 2022, Ruaha Catholic University has been established as a successor of the Ruaha University College (RUCO).

58 Students By-Laws (General Conduct, Disciplinary Offences, Procedures, Penalties and Appeals), 2015.

59 Mzumbe University Examinations and Students' Assessment Criteria By-Laws 2018, 2018.

60 Paragraph 2, Mzumbe University Examinations and Students' Assessment Criteria By-Laws.

61 See Rules 2, 5 (1) (ii) and (4), 10 (2) (a) and (c) of Marian University College Student By-Laws (General Conduct, Disciplinary Offences, Procedures, Penalties and Appeals); Rule 5.3 (xii), University of Dar es Salaam Students By-Laws; Rule 4.3 (xii), Mkwawa University College of Education Students By-Law.

62 Rule 5.2 (iii), Mkwawa University College of Education Students By-Law.

63 Rule 5.2 (xxx), University of Dar es Salaam Students By-Laws and Rule 4.2 (xxvii), Mkwawa University College of Education Students By-Law.

64 Regulation 21, the Advocates (Professional Conducts and Etiquette) Regulations 2018, Government Notice No. 118 of 2018 and section 307, Penal Code.

65 Section 4A (4), the Advocates Act [Cap. 341 R. E. 2019] as amended by the Written Laws (Miscellaneous Amendments) (No. 3) Act No. 5, 2021; the Advocates (Disciplinary and other Proceedings Rules 2018, Government Notice No. 120 of 2018 and the Tanganyika Law Society (Ethics) Regulations of 2022, Government Notice No. 602 of 2022.

Civil acts with a criminal nature may be illustrated by drawing an example from Smith, who notes that:

> If I entrust my bag to a person working in the left-luggage office at a railway station, and that person runs off with it, they commit the crime of theft and also two civil wrongs-the torts of interference with goods and a breach of contract to keep the bag safe. The result is that two sorts of legal proceedings can be taken: a prosecution for the crime and a civil action for the tort and breach of contract.[66]

The second example of a civil act with a criminal nature may be drawn from Collingwood, who cites an example as follows:

> If Banda hits Tembo without cause, Banda commits both a crime for which he may be prosecuted and a civil wrong (tort) for which he may be sued. Tembo will personally sue Banda, and the prosecution will normally conduct criminal prosecution.[67]

The third example of a civil case with a criminal nature may be: where A obtains property through fraud and or engages in fraudulent acts. Fraud act carries both a civil[68] and criminal[69] nature. Thus, the property owner obtained fraudulently, or the victim may decide to sue as a civil wrong or invoke the criminal process. The fourth example may be drawn from Smith[70] and Keenan,[71] who illustrate as follows: If a railway signaller fails to press the button at the right moment so that a fatal accident occurs, this carelessness may be regarded as sufficiently gross to amount to the crime of manslaughter for those who will die.

It is also a tort of negligence towards the dependants of the deceased persons and a breach of contract with the employer to take due care whilst at work. Therefore, the right of action is vested in many different persons, namely, in criminal proceedings by the prosecution, in tort proceedings by the victims/survivors of the accident or dependants of the deceased and contract proceedings by the employer.

66 Smith,*op.cit.,* at p. 3. See also Keenan, *op.cit.,* at p. 500.
67 Collingwood, *op.cit*., at p. 3.
68 Order VI Rule 10, the Civil Procedure Code [Cap. 33 R. E. 2019] read together with section 26, the Law of Limitation Act [Cap. 89 R. E. 2019].
69 Sections 258, 306 and 307, Penal Code.
70 Smith, *op.ct.*, at p. 4.
71 Keenan, *op.cit.*, at p. 500.

Recklessness and negligence are both civil and criminal wrongs.[72] A person is said to act recklessly with respect to (i) a circumstance when he is aware of a risk that exists or will exist and (ii) a result when he is aware of a risk that will occur and it is, in the circumstances known to him, unreasonable to take the risk.[73] Negligence can mean failure to conform to the standard of care to which it is the defendant's duty to conform or failure to behave like a reasonable, prudent person in the circumstances where the law requires such reasonable behaviour.[74]

Offences of assault and battery are other examples.[75] An assault involves causing someone to apprehend that he will suffer a battery.[76] Assault requires no contact because its essence is conduct, which leads the claimant to apprehend the application of force.[77] Battery means an unlawful act by which reference is made to the claimant's body.[78]It is worth noting that the chief aim of criminal proceedings is to punish the wrongdoer by sending him to prison, forfeiture of properties, fine payment and compensating the victim/claimant. In contrast, civil proceedings aim to compensate the victim, prohibiting the wrongdoer from doing something, vacating from a premise or doing something.

It should be noted that, in essence, administrative proceedings seek to punish the wrongdoer by ordering a fine payment or compensating the victim/claimant, prohibiting the wrongdoer from doing something and suspending from entering the premises. Before the coming into force of section 4(3) of the Criminal Procedure Act, exhaustion of remedies over administrative, civil and criminal cases was not affected in any way, and it was at the claimant's choice against a wrongdoer on the exact nature.[79]

72 Sections 233-239, Penal Code. *See* also Simonds, V.,(ed),*Halsbury's Laws of England,* 3rd ed, Vol. 28, Butterworth and Co. Ltd: London, 1959, at p. 3; Barker, *op.cit.,* at p. 119-123; Prime, T., and Scanlan, G., *The Law of Limitation*, 2nd edn, Oxford University Press: Oxford, 2001, at pp. 132-150; Peel, W., and Goudkamp, J., *Winfield and Jolowicz Tort*, 19 edn, Thomson Reuters: London, 2015, at p. 51.

73 Section 233, Penal Code. See also Barker, *op.cit.,* at p. 120.

74 Section 233 of the Penal Code. See also Barker, *op.cit.*, at p.123; Peel and Goudkamp, *op.cit*., at p. 51 and Prime and Scanlan, *op.cit.,* at p. 132.

75 Sections 240-243, the Penal Code. See also *Roseleen Kombe's case, supra*, at p. 348; Barker, *op.cit*., at p. 235; Peel and Goudkamp., *op.cit*., at pp. 58-65.

76 Section 240, the Penal Code. *See* also Peel and Goudkamp, *op.cit.,* at p. 58; Barker, *op.cit*., at p. 236.

77 Section 240, the Penal Code. See also Peel and Goudkamp, at p. 64; Barker, *op.cit.*, at p. 237.

78 Section 241, the Penal Code.*See* also Peel and Goudkamp, *op.cit*., at p. 58 and Barker, *op.cit.,* at pp. 236-237.

79 Section 14, the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act and sections 348(1) and 348A (1), Criminal Procedure Act.

There is no limited list of administrative or civil cases with a criminal nature, as the list is broader. The three criteria have to be applied separately or cumulatively to detect an act with an administrative, civil or criminal nature or to have both administrative and criminal nature or civil or criminal nature.[80] As far as the list is said to be broader and unlimited, section 4(3) of Criminal Procedure Act was required to precisely define and or list the administrative or civil cases with a criminal nature rather than leaving a gap.

As there is no specific definition and or list of the issues, there is a great possibility for criminal courts to make uncertain decisions whether the matter is both administrative or civil with a criminal nature or the case is purely criminal. If the courts render uncertain decisions, the claimants will be at a crossroads regarding which remedies they should exhaust as primary means, or they may lose complete interest in prosecuting their cases. More so, criminal courts may be at a crossroads to decide the jurisdictional issue as to whether the case before the court has an administrative, civil and criminal nature or is purely a criminal case at a preliminary stage because the decision as to whether the case has both administrative or civil and criminal nature is based on both points of law and fact.

3.3 Conflict with Other Laws

3.3.1 Abandonment of Free Choice to Sue

The Law Reform (Fatal Accidents and Miscellaneous Provisions) Act is both a substantive and procedural law governing civil actions over wrongful acts.[81] The civil actions against the wrongful act may be for damage[82] or personal injury.[83] Although the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [84] provides for civil action rights over a wrongful act. It does not affect the invocation of a criminal process against any person on the same wrongful act falling therefrom. Moreover, a criminal conviction against a person does not affect civil liability against the same

80 *The Director of Public Prosecutions v. JiteshJayantial Ladwa and Another, supra.*

81 Wrongful act has been defined under section 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap. 310, to mean *any negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort.*

82 Damages have been defined under section 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act to include *loss of life or personal injury.*

83 Personal injury has been defined under section 2 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act to *include any disease and any impairment of a person's physical or mental condition.*

84 Section 14, Cap 310.

person arising from the same wrongful act as provided under sections 348(1) and 348A (1) of Criminal Procedure Act.[85]

Under sections 348(1) and 348A (1) of Criminal Procedure Act, a person, after obtaining a conviction order in a criminal case, may file a civil suit for a compensation claim against the same wrongdoer if the wrongful act has both criminal and civil nature. For example, suppose Juma causes bodily grievous harm under section 225 of the Penal Code against Asha. If Juma is convicted in a criminal case under section 225 of the Penal Code, Juma may be sued in a civil suit for a compensation claim under section 348(1) of the Criminal Procedure Act.[86] Prior to the coming into force of section 4(3) of the Criminal Procedure Act, a litigant had a free choice to file a criminal case against the wrongdoer.

After obtaining a copy of the judgment of conviction, the litigant had a free choice to file a civil suit for compensation based on the final decision of conviction as provided for under sections 348(1) and 348A (1) of the Criminal Procedure Act as noted in *Nimrod Elireheman Mkono,*[87] *Roseleen Kombe*[88] *and the Director of Public Prosecutions v. Focus Patric Munishi.*[89]

However, the coming into force of section 4(3) of the Criminal Procedure Act affects the applicability of section 348(1) and 348A (1) of the same Act. A litigant cannot invoke criminal process for remedies as a primary means and, after that, invoke civil process for civil remedies as a secondary means. A litigant cannot prosecute criminal proceedings with an administrative or civil nature as a primary means if administrative or civil remedies are not exhausted. The current state compels a litigant to abide by section 4(3) of Criminal Procedure Act by exhausting administrative or civil remedies, as the case may be, as a primary means; hence, the applicability of sections 348(1) and 348A (1) of the same Act remains with no legal force.

85 See also Mesaros, M., *Civil Action in Criminal Proceedings*, Ph.D. Thesis in Law, Submitted to the University of Bucharest, Bucharest, 2015, at p. 2.

86 Cap. 20. See also section 3, Law Reform (Fatal Accidents and Miscellaneous Provisions) Act.

87 See [1992] TLR 24.

88 [2003] TLR 347.

89 (Criminal Appeal No. 672 of 2020) [2022] TZCA 468 (25 July 2022) available at https://tanzlii.org (accessed 12 September 2023).

3.3.2 Right to Prosecution and Statutory Limitation Challenges

For most actions, periods of limitation are prescribed by statute, with the consequence that an action begun after the period of limitation has expired is not maintainable.[90] In Tanzania, with the exception of certain cases, criminal prosecution, generally, has no time limitation.[91] .[92] Still, all civil cases have time limitations; some administrative cases have time limitations, whereas others have no time limitations. If a litigant intends to exhaust his remedies by filing a lawsuit in civil or administrative domains, as the case may be, he must observe time limitations. If he is out of time to invoke administrative or civil remedies, the litigant will also be blocked from invoking the criminal process.

Among the statutes that provide for limitation of periods are the Law of Limitation Act,[93] the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules,[94] the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act[95] and the Labour Institutions (Mediation and Arbitration) Rules.[96] Recklessness, negligence, assault, battery and fraud all fall within the category of torts.[97] The time limit to file a case for civil remedies over recklessness, negligence, assault, and battery is within 3 years from the date the cause of action accrued.[98]

The time limitation arising from fraud, though a tort, is 3 years starting to run from the date the claimant plaintiff has discovered the fraud or could, with reasonable diligence could have discovered, became into knowledge or discovered fraud.[99] However, in case one sues over a cause of action that exists after the person's death under the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, the

90 Simonds, V., (ed), *Halsbury's Law of England*, 3rd edition, Vol. 24, Butterworth and Co. Ltd: London, 1958 at p. 177.

91 Section 43(a), Law of Limitation Act, Cap. 89.

92 Section 241, Penal Code and section 20, the Primary Courts Criminal Procedure Code, Third Schedule of the Magistrates' Courts Act [Cap. 11 R. E. 2019].

93 [Cap. 89 R. E. 2019].

94 Government Notice No. 311 of 1964.

95 Cap. 310 R. E. 2019.

96 Government Notice No. 64 of 2007; *Barclays Bank Tanzania Limited* v. *Phylisiah Hussein Mcheni* (Civil Appeal No. 19 of 2016) [2021] TZCA 202 (17 May 2021) at p. 9 available at https://tanzlii.org (Accessed on 19 August 2023).

97 [Cap. 89 R. E. 2019].

98 Item 6, Part I to the Schedule of the Law of Limitation Act, [Cap. 89 R. E. 2019].

99 Section 26 (a) and (b) Law of Limitation Act. See also Gupta, S., *Rustomji on Limitation Act*, 9th edn., Kamal Law House, Kolkata, 2006, at pp. 363-364; Prime and Scanlan *op.cit*., at pp. 97-98.

limitation of time is six months from the date when the administrator or executor takes representation.[100] Administrative cases, specifically those falling under labour matters, also have time limitations of 30 and 60 days, as provided for under Rules 10(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules.[101] Therefore, a litigant who is time-barred to exhaust administrative or civil remedies in the respective domain cannot invoke criminal process to exhaust criminal remedies.The criminal procedure also cannot be invoked where the administrative domain for exhaustion of remedies is not possible.

3.3.3 Barrier of Invoking the Criminal Process over Restricted Administrative Domains

Section 4(3)of the Criminal Procedure Code does not provide an exception to the mandatory exhaustion rule with respect to administrative remedies when such remediesare restricted or ineffective. The absence of such an exception exclusionmay result into miscarriage of justice. This is due to the inability to invoke the criminal process when administrative remedies cannot be pursued as the primary recourse.

A good example may be drawn from public service. When a public servant[102] or a private employee[103] commits an administrative offence warranting criminal sanction and terminates his or her service or is terminated from his employment before an administrative tribunal take his or motion. The employer cannot exhaust administrative remedies in the administrative domain against his former employer under employment laws. Hence, the invocation of the criminal process will be restricted against the former employee.

3.3.4 Contradiction with Principles of Evidence

A final judgment obtained in criminal proceedings against a person is taken as conclusive proof that the person so convicted or acquitted is guilty or innocent of the

100 Section 9(3) (b), Cap. 310.
101 Government Notice No. 64 of 2007. See also *Barclays Bank Tanzania Limited case, supra*, p. 9.
102 Regulations 3 and 36, Public Service Regulations, 2022 Government Notice No. 444 of 2022.
103 Rule 11, Employment and Labour Relations (Code of Good Practices) Rules 2007, Government Notice No. 42 of 2007.

offence to which the judgment relates[104] in administrative or civil proceedings. That means, if a person is charged with criminal proceedings, for instance, negligence and at the end of the trial is convicted by the court, the final judgment of conviction in criminal proceedings on negligence is conclusive proof in administrative or civil proceedings on the issue of negligence.

That principle also applies to a person acquitted in criminal proceedings for negligence. In the cases of *Nimrod Elireheman Mkono*[105] and *Roseleen Kombe* as the administratrix of the estate of the late *Lieutenant General Imran Hussein Kombe*,[106] the final decisions of conviction in criminal cases were conclusive proof in civil proceedings filed by the litigants.

In contrast, in *Charles Christopher Humprey Richard Kombe t/a Humprey Building Materials v. Kinondoni Municipal Council*,[107] the final judgment in a criminal case that had acquitted the appellant was also held to be conclusive proof of the related issue in civil proceedings. The coming into force of section 4(3) of Criminal Procedure Act, which prevents invocation of the criminal process over criminal cases with an administrative or civil nature before exhaustion of administrative or civil remedies in their respective domains, as the case may be, affects the applicability of section 43A of the Evidence Act;[108] hence, section 43A of the same Act therefore becomes useless.

In this regard, section 4(3) of Criminal Procedure Act raises serious questions, for example, should a driver who causes bodily injury to a person by carelessly driving a motor vehicle be prosecuted for civil action for a claim of compensation as the primary means before the driver is charged in criminal proceedings to obtain a

104 Section 43A, Evidence Act [Cap. 6 R. E. 2022]. See also *Nimrod Elireheman Mkono* supra, at pp. 27-28; *Robison v. Oluoch* [1971] E. A. 376; *Queens Cleaners and Dyers Ltd v. East African Community and Others* [1972] E. A. 229; *Charles Christopher Humprey Richard Kombe t/a Humprey Building Materials v. Kinondoni Municipal Council* (Civil Appeal No. 19 of 2019) [2022] TZCA 205 (14 April 2022), at pp. 10-11 available at https://tanzlii.org (Accessed on 19 August 2023).

105 See [1992] TLR 24.

106 [2003] TLR347 and [2005] TLR 208.

107 (Civil Appeal No. 19 of 2017) [2022] TZCA 205 (14 April 2022), at pp. 10-12 available at https://tanzlii.org (Accessed on 10 September 2023).

108 Cap. 6 R.E 2022.

criminal conviction for the same wrongful act? Should a victim of a sexual offence invoke a civil process to claim compensation against an alleged person who has not been charged and convicted of the offence of sexual violation?

If civil proceedings must be invoked as primary means, can a litigant succeed in claiming compensation for causing bodily injury by carelessly driving a motor vehicle before the driver is found guilty by a criminal court? Should a litigant file civil action as a primary means to claim compensation against a person for causing grievous bodily harm before the wrongdoer has not been found guilty of the wrongful act by a criminal court? Suppose a litigant succeeds in his civil action for a claim of compensation against the driver for causing bodily injury by carelessly driving a motor vehicle. Later, the driver is prosecuted for the same wrongful act in a traffic case. What will be the fate of the decision in a civil suit if the criminal court finds him not guilty of the offence? Should the deceased's dependant for murder file a suit for compensation against a person who is alleged to murder their dependant, or should the master be sued before the alleged murderer has not been found guilty of the offence of murder?

Furthermore, the current position complicates the prosecution of serious crimes falling under the Wildlife Conservation Act, Prevention and Combating of Corruption Act, Cybercrimes Act, Prevention of Terrorism Act, Tanzania Food and Drugs Control Act, Anti-Money Laundering Act, the National Security Act and Economic and Organised Crimes Control Act which have also been termed to be administrative crimes under the Public Service Regulations. This is because the earlier the action to prosecute criminal cases leads to the easier availability of key witnesses and collection of strong and accurate evidence for production in criminal courts rather than delaying invoking criminal process pending administrative or civil cases to be concluded in their respective domains for remedies.

The delay in invoking the criminal process may lead to the unavailability of key witnesses. Even if key witnesses may be available, the lapse of a long time to prosecute criminal cases may lead to the loss of memory of the key witnesses concerning how the crime was committed. In addition, delay in prosecuting criminal cases may cause witnesses to lose interest in the case, which may cause ineffective cooperation with law enforcement agencies.

3.4 Who Should Invoke Administrative or Civil Remedies Prior to Invoking Criminal Process?

Parties under administrative actions may be between institution versus the wrongdoer, employer versus employee, employer versus a trade union, employee versus employee and vice versa. In civil suits, parties may be a claimant versus defendant, whereas, in criminal proceedings, parties are the Republic versus the accused person or (where leave is sought and granted by a court for private prosecution, parties may be the private person (who is the prosecutor versus the accused person)[109] or a claimant versus accused person for those criminal cases filed in the Primary Courts[110] if an individual prosecutes the case.

Suppose a litigant in an administrative or civil case with a criminal nature is not interested in invoking administrative or civil remedies. Shall the Republic lose interest in invoking criminal process for remedies to criminal cases to be instituted by the Republic? This issue is paused because the Republic cannot invoke criminal process before administrative or civil remedies are exhausted in their respective domains. Further, the Republic cannot invoke an administrative or civil process to exhaust administrative or civil remedies to cases of a criminal nature to pave the way to the invocation of the criminal process.

If that is the case, can it not be a place where criminals may hide if administrative or civil remedies are not exhausted to pave the way for criminal process invocation? If the criminal process must be invoked after exhaustion of administrative or civil remedies, is that a means of reducing case backlogs in criminal courts as was intended by the National Assembly of Tanzania, or has the invocation of the criminal process stayed pending exhaustion of administrative or civil remedies?

109 Section 99, Penal Code.

110 Section 1(2), the Primary Courts Criminal Procedure Code, Third Schedule of the Magistrates' Courts Act [Cap. 11 R. E. 2019] defines the word '*complainant*' to mean '*a person who lays such information.*'

4.0 Conclusion

It is concluded that the binding exhaustion of remedies doctrine's values are sufficiently meaningful. However, the objects and reasons of amendment section 4(3) Criminal Procedure Act are confusing based on the opinion given by the Parliamentary Committee; the Attorney General's views as recorded in the Hansard; what was drafted by the parliamentary draftsman in section 23 of the Bill No. 7 of 2021, section 23 of Act No. 1 of 2022 and now is section 4(3) of Criminal Procedure Act and the way the judiciary has reasoned on the object and reason of amending section 4(3) of the Criminal Procedure Act.

Drawing a lesson from the above positions given by the Parliamentary Committee, the Attorney General, the decision of the High Court of Tanzania in the *Director of Public Prosecutions case*[111] and the Court of Appeal of Tanzania decision's in*Robert Kadaso Mageni case*,[112] there is no doubt that, the amendment of section 4(3) of Criminal Procedure Act is problematic because the National Assembly of Tanzania had its own two conflicting objects and reasons; the Executiveand the Judiciary had theirown position respectively.

Therefore, if criminal courts adopt the requirement stricter on exhaustion of administrative or civil remedies before the criminal process is invoked, litigants may lose their rights by not invoking the criminal process to prevent the commission of crimes; hence, the crimes will go unpunished and without effective remedies to victims, dependants and or the parents.

The article recommends for the amendment of section 4(3) of Criminal Procedure Act to revert to the previous position consideringthe conflicting objects and reasons for amending section 4(3) of the Criminal Procedure Act and the position opined by the Court of Appeal of Tanzania on what the section requires. The old position allowed litigants to freely choose to invoke criminal process for remedies as primary means and later invoke administrative or civil process for remedies as secondary means.

111 (Criminal Appeal No. 111 of 2022) TZHC 11577 (11 August 2022).
112 (Criminal Appeal No. 476 of 2023) [2023] TZCA 17504 (18 August 2023).

The old position allowed litigants to rely upon the final judgment in criminal proceedings as conclusive evidence to related matters as provided for under sections 348(1) and 348A (1) of the Criminal Procedure Act. Thus, the revival of the old position will not negate the applicability of section 43A of the Evidence Act and sections 348(1) and 348A (1) of the Criminal Procedure Act.

Lastly, the revival of the old position will facilitate timely and effective prosecution of criminal cases to deter the commission of the crimes of murder, manslaughter, forgery, theft, uttering false documents, and causing grievous bodily harm, which also have civil nature as above discussed.

In the alternative to the old position, in case rational justification is not suitable for the current need, section 4(3) of the Criminal Procedure Act should be amended to suit the relevant and justifiable need. There are contradicting justifications, as stated above. We recommend that the office of the Attorney General should prepare the Bill for amending section 4(3) of the Criminal Procedure Act to avoid the current confusion, which has consequences for parties, the court and other laws.

Protection of Third Parties' Interest in Real Property During the Division of Matrimonial Property in Mainland Tanzania

Luckness W. Jangu*

Abstract

The article specifically assesses the overlooked phenomenon of protection of third-party interest in real property during the division of matrimonial property after divorce in polygamous marriages under the Law of Marriage Act (LMA). The article is inspired by the Constitution of the United Republic of Tanzania and the Land Act which provides the right to property of every person and the protection of such property by the law and that any interest in land has value which should be considered during any disposition of property. Data for the article was obtained through doctrinal and comparative legal methodologies. It is noted that the laws regulating the division of matrimonial property at the time of divorce fall short in the protection of the third party's interest in real property at the time of the division of real matrimonial property. It is concluded that the LMA should be amended to accord the right to third parties to defend their interest in real property during the division of such property after divorce by enacting relevant provisions to that effect.

Keywords: *Polygamous marriage, third-party interest, real property, division of matrimonial property, Tanzania.*

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1.0 Introduction

Land is a real property whose ownership and possession belong to people.[1] Real property refers to abstract rights over the land and improvements permanently attached to it made by owners or possessors.[2] Real property deals with the rights and liability of landowners. [3] All interests in land are interests in real property[4] in or over a right of occupancy.[5] During marriage, spouses can invest in real properties. Upon divorce, the court must decide the rights of the spouses in respect of the real properties acquired by joint efforts or order the sale of the property and divide the proceeds of the sale thereof.[6] Property division is generally a one-time occasion, and the distribution of property is final.[7]

Usually, the divorce courts consider the issue of equitable ownership at the time of division of matrimonial property. It has the power to divide any asset in which one or both spouses hold a beneficial interest.[8] The Order for division of matrimonial property must be pleaded for the court to divide the matrimonial property.[9] In line with pleading the right to division of matrimonial property jointly acquired, spouse(s) must prove by adducing evidence showing the extent of the contribution made towards acquiring such property.[10]

Generally, matrimonial property includes real and personal property acquired by either or both spouses during the marriage.[11] The Court of Appeal of Tanzania in

1 Leroy, B. A., *International Organizations: Principles and Issues*, 6th edn., New Jersey: Prentice Hall, 1995, at p. 141, cited in Onyango, P. O., "*Balancing of Rights in Land Law: A Key Challenge in Kenya*", 2014, at p. 4, available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/73574/Balancing%20of%20Rights%20in%20Land%20Law.pdf?sequence=2, (Accessed on 04 September 2023).

2 Omboi, B. M., "Factors Influencing Real Estate Property Prices a Survey of Real Estates in Meru Municipality Kenya," *Journal of Economic and Development*, Vol, 2, No. 4, 2011, pp. 34-53, at p. 34. See also Colwell, Peter F. and & Trefzger, Joseph W. (eds.), *The Economics of Real Estate Principles*, Illinois Real Estate Letter, 1994, at p. 5.

3 Harpum, C. B., et al., (eds), *The Law of Real Property*, 8th edn., Thomson and Reuters, Sweet and Maxwell: London, 2012, at p. 2.

4 *Ibid.*

5 Section 2, the Land Act.

6 Section 114(1), the Law of Marriage Act, [Cap 29 R.E. 2019].

7 Stark, B., *International Family Law: An Introduction*, Routledge: London, 2017, at pp. 117-118.

8 Turner, B. R., "Division of Third-Party Property in Divorce Cases," *Journal of the American Academy of Matrimonial Lawyers,* Vol. 18, 2002, pp. 375-427, at p. 385.

9 Sections 108 and 106(f), the Law of Marriage Act.

10 *Ibid.*, section 114(2) (b).

11 Bissett-Johnson, A., *et al.*, "Matrimonial Property Law in Canada," *Carswell Legal Publications: Ontario, Vol.* 1, 1980, at p. 89.

Bi Hawa Mohamed v. Ally Sefu,[12] referring to Lord Hailsham's *Halsbury's Laws of England,*[13] defined matrimonial property as those things that are acquired by one or both of the parties with the intention that there should be a continuing provision for them and their children during their joint lives and used for the benefit of the family as a whole.

Family assets can be divided into two parts; those that are of a capital nature such as the matrimonial home and the furniture in it and those that are of revenue-producing nature such as the earning power of the husband and wife. Thus, an asset to be termed a matrimonial property or otherwise is a question of law and fact to be established by evidence.[14] This article focuses only on the interest in real property such as mortgages, leases, and rental charges over a real matrimonial property subject to division at the time of divorce.

2.0 Methodology

The article applied doctrinal and comparative legal methodology to collect data.Doctrinal legal methodology was adopted because it identifies, analyses and synthesizes the contents of the law, rules, and doctrines of law[15] in order to contribute to the continuity, consistency, and certainty of law.[16] On the other hand, the comparative legal methodology was used to aid law reform and policy development in matters relating to the protection of third party's interest in real matrimonial properties.[17]Under the two methods laws, case laws and policies formed part of primary data.

Doctrinal legal methodology also requires the analysis of existing literature such as books, papers, journal articles, reports and other written sources as part of

12 [1983] T.L.R 32.

13 Hogg, H.Q., *Halsbury's Laws of England*, 4th Ed, Vol. 13, Butterworths: London, 1975, p. 491.

14 *Habiba Ahmadi Nangulukuta, Hawana Hamisi and Hamisi Salumu Malimusi v. Hassani Aussi Mchopa and Issack Issack Mtenda,* Civil Appeal No. 10 of 2022, CAT, Mtwara, (Unreported), at p. 18.

15 Watkins, D., and Barton, M., (eds.), *Research Method in Law,* 11th edn., Routledge, Tylor and Francis Group: London, 2013, at pp. 33 -36.

16 Sherlyn, S., *What is Doctrinal and Non-Doctrinal Legal Research*? https://www.linkedin.com/pulse/what-doctrinal-non-doctrinal-legal-research-sherlyn-sharma, 2021(Accessed on 17 September 2023).

17 Paris, M., "*The Comparative Method in Legal Research: The Art of Justifying Choices in* Cahillane, L., and Schweppe, J.," (eds), *Legal Research Methods: Principles and Practicalities, 2016,* Clarus Press: Dublin, pp.1-20 at pp. 9-11.

secondary data so as to inform the writer of what is known and unknown about the topic.[18]Secondary data in this article were used because documents reflect or report reality, describing an event, a perception, or an understanding of the law.[19]This helped in identification of gaps in the theme regarding the article. Documents were evaluated because they provide evidence of policy directions, legislative intent, and understandings of perceived shortcomings or best practices in the legal system, and agenda for change.[20] Both physical and online sources and literature review were used to collect data.[21]

3.0 Legal Protection on the Protection of Third Part Interest

The Constitution of the United Republic of Tanzania provides for the right to own property under Article 24(1). It provides that provides that no person should be deprived of his/her property without due process of law and adequate, prompt and fair compensation of the value of the land and exhausted improvements thereof.[22] The Constitution also imposes a duty to every person to protect and safeguard all property collectively owned by the people, and also to respect other person's property.[23] In complementing the Constitution, land statutes provide that interest in land has value and such interest should be taken into account on disposition.[24]

Under the Land Act, the application of the Right of Occupancy should be accompanied by a declaration of the interest in land the applicant has at the time of disposition.[25]Even in co-occupancy, surrender of land requires the consent of every co-occupier, any person or body having any interest in that land.[26] This implies that interest in land is valuable in all forms of disposition, including the division or sale and sharing proceeds thereof at the time of divorce. Section 56 of the Law of Marriage Act provides for the liability of spouses in tort and contract.

18 Hutchison, T., "*Doctrinal Research Researching the Jury*" in Watkin, D *et al, Research Methods in Law*, Routledge: London, 2013, at p.13.

19 *Ibid.,* p. 11.

20 Webley, L, "*Qualitative Approaches to Empirical Legal Research" in* Caine, P., *et al., The Oxford Handbook of Empirical Legal Research*, OUP:Oxford, 2010, at p. 11.

21 Wakesa, M., *Research Methods for Lawyers and other Professionals*, Sports Link Limited: Nairobi, 2016, at p.112.

22 Article 24(2), Constitution of the United Republic of Tanzania.

23 *Ibid*., Article 27(1) (2).

24 Section 3(1) g), Village Land Act and section 3(1)(f), the Land Act.

25 Section 25(1) (f), the Land Act.

26 *Ibid.,*section 42(2) (g).

Likewise, section 114(2) of the same Act recognizes the division of spouses' liability of spouses incurred for the joint benefit of the family at the time of the division of matrimonial property. However, the same provision is silent on the rights of those who have an interest in matrimonial property used to secure the debt.

4.0 Third-Party Interest in Matrimonial Property Arises

Third-party interest needs to be determined before a court considers the division of real matrimonial property jointly acquired between a husband and wife. A third party will need to adduce evidence in respect of his/her rightful claim over real property, subject to division before the hearing of substantive claim on the division of matrimonial properties between the spouses is heard by court. Determining third-party interest is important to enable the court to determine the extent of the third party's claim and therefore the extent of the resources available for distribution between parties to reach a fair and just decision between all spouses and a third party. There are various instances where third-party interest in real property may arise in matrimonial proceedings at the time of division of these properties. These circumstances include:

4.1 Debt of Spouses

Third-party interest may arise due to a simple debt of the spouses or one of the spouses secured against property subject to division during divorce. The obligation may give rise to some proprietary interest of that third party against the real property subject to division in the matrimonial proceedings.[27]

Further, in accordance with section 78 of the Law of Contract Act,[28] a spouse might have also guaranteed another third person to perform a promise or discharge a liability by mortgaging the matrimonial property.This would give rise to the beneficial interest of another person who should benefit from the property in the event of non-payment by the surety making the principal liable. The liability of the surety is co-extensive with that of the principal debtor unless discharged or otherwise agreed.[29] This situation gives rise to the beneficial interest of another person in such matrimonial property.

27 McCall, I., "Third Party Interests in Marriage Assets," *The University of Western Australia Law Review,* Vol. 20, 1990, pp. 656- 674 at p. 656.

28 The Law of Contract Act, [Cap 345 R.E. 2019].

29 *Ibid.,* section 80.

In mortgage cases just like in a contract of guarantee, a spouse or all spouses under the Land Act[30] may mortgage any land to obtain money from a bank or financial institution for developing the land, or business or for any other investment. The mortgage of a matrimonial home or real property jointly owned by spouses or owned by one of the spouses would give the bank or financial institution a right over the matrimonial property, joint property or family property so mortgaged. Thus, the division of such property at the time of divorce would not arise before the interest of the mortgage is assessed in the property when the debt is not discharged.

It is important to note that the court enforces contractual obligations legally entered between parties. As such contractual obligations have arisen between a spouse(s) and a third party in relation to a real matrimonial property subject to divorce. The court would not ignore the rights of the third party in such property before the distribution of such property to the spouses after divorce.In the case of *Lulu Victor Kayombo v. Oceanic Bay Limited & Another*[31]the Court of Appeal of Tanzania observed that: -

> It is common knowledge that parties to a contract are bound by the terms of the contract. Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which the parties have agreed between themselves ... it is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute.

4.2 Claims by Family Members on Real Property Subject of Division

In line with the above, family members can have a rightful claim over matrimonial properties subject to division after divorce. This can arise because their names appear on the title deeds, or because they have contributed towards the assets although their name does not appear on the title deeds.This situation was exemplified in the case of *Ivin v. Blake,*[32] where the mother paid the deposit to acquire the property. It was, however, placed in her son's name as he was able to secure a mortgage in his name. The mother then paid the mortgage instalments. The court held that she was the beneficial owner.

30 Section 120A (1), the Land Act.
31 Consolidated Civil Appeals 22 of 2020, 155 of 2020) [2021] TZCA 228.
32 [1995] 1 FLR 70.

Similarly, the third party may have an interest in property registered in the name of the spouse(s).[33] In Kenya, for example, the law allows any person with interest in a property against a spouse to make an application for declaration of such interest in a property against spouses in court.[34] Such an application can be brought as part of the petition[35] in matrimonial causes or as a separate claim when a petition for a matrimonial cause is not filed.[36]

4.3 Spouses Occupying Land Jointly with Third Persons

In some cases, a spouse can hold real estate properly jointly with a third party in an attempt to safeguard the property.[37]This would necessarily require the third party to join or to be joined to show the extent of his share and that of the spouse(s).The case of *Burns v. Burns*[38] amplified grounds in which a third party may prove a claim to an asset interest held in the names of the husband and wife in the division of matrimonial property.The third party will need to show and prove the following: -

> an express declaration or agreement confirming their share in the property even though their name is not on the title deeds; ii) a resulting trust where the third party has directly provided part of the purchase price; or iii) a common intention between the parties.

5.0 Legal Challenges on Protection of Third-Party Interest in Real Property During Divorce

During divorce, a division of community assets takes place considering the extent of the contribution of a husband and wife towards the acquisition of matrimonial property. This is usually smooth in a monogamous marriage but complicated in polygamous marriages, likewise in situations where third-party interests are claimed

33 *Pamela Jane Teasdale v. Rebecca Sarah Carter v Daniel James Teasdale* (Teasdale Case) [2023] EWHC 490.
34 Section 17 (1) (a), the Matrimonial Property of Act of Kenya, Act No. 49 of 2013, R.E 2014.
35 *Ibid.,* section 17(2) (b).
36 *Ibid.,* section 17(2) (c).
37 Underwood Law Firm, P.C., Can a third party be joined in a family law proceeding to sell a property?Available at https://www.underwood.law/blog/can-a-third-party-be-joined-in-a-family-law-proceeding-to-sell-a-property/ (Accessed on 27 July 2023).
38 *[1984] CH 317.*

by persons other than spouses in a real property that is a subject matter of division. This part evaluates the legal challenges associated with third-party interest protection in the whole process of divorce and the subsequent division of real property to be divided in matrimonial proceedings.

5.1 Lack of Cause of Action Protecting Third-Party Rights in the Law

The LMA and the Law of Marriage (Matrimonial Proceedings) Rules (Rules) are silent on the cause of action giving the right of third parties to knock on the doors of the courts to protect their interest in real property at the time of divorce and division of such property.Under these laws, there is no provision allowing third parties to claim the rightful interest/claims over a real property during the division of such property or sale of the property because of divorce. This is contrary to Kenya where matrimonial property rules have a provision[39] and describe procedure[40] regarding the protection of the interest of other parties in matrimonial litigations.

The LMA, the Land Act, Probate and Administration of Estate Act,[41] and the Village Land Act recognized the existence of a third-party interest in real property such as lenders, mortgagees and other persons yet the protection of such interest at the time of divorce and subsequent division of matrimonial property is a conundrum requiring a property regime and matrimonial to handle such issues.

Sections 56 and 114 (2) (b) of the LMA acknowledge the duty of the spouses to pay debts. However, the said provisions of the LMA and the Rules at large do not even give rights to mortgagees and lenders the right to the audience at the time of dealing with the property put as collateral during division of matrimonial property especially where the real property mortgaged is likely to be divided or sold after divorce.

The LMA and the rules do not provide for a cause of action allowing third parties with interest in real property owned by a spouse(s) to bring actions for declaration of rights over that matrimonial property. It is even worse when the property is divided or sold to share the proceeds among spouses. This is because once the real property is disposed

39 Sections 17 (1) and 17(2) (a-c), the Matrimonial Property Act of Kenya.
40 Rule 7(1-8), the Matrimonial Property Rules, 2022, Kenya Gazette Supplement No. 126 of 2022.
41 [Cap 352, R.E. 2019].

of by the courts, the buyer becomes a bona fide purchaser who is protected by the law following the purchase of the real property in the market. The non-recognition of the cause of action in respect of third-party interest means that their constitutional right to own the property or interest of the third parties in a property is derogated and jeopardized.

5.2 Dilemma Regarding Jurisdiction

The lack of recognition of the right of action of third persons to defend their interest in real property at the time of division in the event of divorce implies that courts are precluded from entertaining such cases due to lack of jurisdiction.The LMA and the Land Courts Act are silent on this matter. As such it impedes the right of third parties' claims in the matrimonial property of the spouses subject to division.

Jurisdiction is a creature of statute. However, the provision of section 76 of the LMA and the rules do not make provision for courts to deal with this matter and it is not one of the matrimonial proceedings.

On the other hand, land matters are dealt with by land courts. Section 167 of the Land Act and Section 62 of the Village Land Act establish land courts. However, looking examining at the jurisdiction of these Land Courts, specifically sections 13, 33 and 37 of the Land Disputes Courts Act[42] and Courts under section 76 of LMA, these courts appear to have no jurisdiction to deal with claims of right to ownership or third parties' interest in real property at the time of divorce. This affects the third parties' right over such property.

Furthermore, Sections 81(b) and 114(1) of the LMA and its Rules[43] do not give the right to third parties to claim the right over matrimonial property since the provision only applies to spouses who did not claim division of matrimonial property during or after divorce or where the court did not make an order for division of property.

42 [Cap 216, R.E. 2019].

43 Rule 32, the Law of Marriage Matrimonial Proceeding Rules, G.N. No. 25 of 1971.

5.3 Lack of Procedure for Claimants with Third Party Interest

The courts (through case law, the LMA and Rules) have not been provided with a procedure to be used by a third party to claim an interest in the property subject to division in matrimonial proceedings.The LMA does not provide for the procedure to call or join third parties with interest at the time of division of such matrimonial property. The Rules allow the application of the Civil Procedure Code Act(CPC)[44] in the case of *lacunae*. However, Order 1 Rule 1 of the CPC may not be applicable in the situation where the third party claims the right to or interest property to all spouses. The third party cannot be the petitioner as the third party is not interested in divorce except for a claim over a property subject to division.

Likewise, Order 1 Rule 3 of the CPC would not apply because the third-party claims interest might be towards both spouses and one of them.Likewise, the cause of action would not have fallen in the same transaction for the rules of joinder of parties to apply.This would be more complicated when the nature of the marriage is polygamous and the third party claims an interest in the property while other spouses would not even be in court. This is because they are not parties to divorce and are not interested in the division as they are still married.

The LMA, Rules and the CPC have no provision that allows the court to issue notice to all interested persons in a matrimonial property or home to be heard on their interest or rights towards the property at issue before the division of such property is made. Section 45 of the Family Property Act of Saskatchewan in Canada gives jurisdiction to a court to order notice to be given to a third party who has or may have an interest in a property subject to division upon divorce. The absence of the provision in Tanzania has caused the inability of the third parties with interest in the matrimonial property subject to division to prove their interest or rights in the real property before the division of such matrimonial properties to the parties to suit.

Some common law cases such as *UDA v. UDB and Another*[45] have ruled out that, if the third party wishes to claim an interest in a matrimonial asset, where he/she actively asserts rights his/her right over the property he/she should commence independent proceedings against either or both spouses. This is to enable such party

44 [Cap. 33 R.E. 2019].
45 *[2018] SGCA 20.*

to get his or her right over the said property in court. This would require vesting a court with jurisdiction and stipulating procedures thereof. The third-party should adduce evidence in respect of ownership of the interest before the hearing on the division of matrimonial property between the spouses towards the property.

5.4 Lack of Requirement for Full Disclosure of Interest in Real Property

The LMA and its rules have no provision setting up a mechanism that mandates spouses and other interested parties in the property to make full disclosure of the nature of their interest in the property likely to be present in real property subject to the division in the event of divorce. Likewise, even in the event of division of the property where third-party interests are available the LMA, Civil Procedure Code and the Law of Marriage (Matrimonial Proceedings) Rules do not provide for procedures or relevant documents to be used by a third party to prosecute his/her right to the property even after divorce. Therefore, this , requires a specific provision to protect the third-party interest in matrimonial property in the substantive law (LMA) and the procedure in the rules made under the LMA vesting courts with jurisdiction and stipulating relevant documents to be used.

5.5 Challenge Relating to Appropriate Remedies

The LMA and the rules do not provide for the available remedies that the court would award to third parties with an interest in matrimonial property upon the right being affirmed by the court. Likewise, the Act is silent as to when such cause action can be made whether it can be made before, during or after the division of such property between spouses and the nature of the proceedings. The nature of the remedies should have been specified in line with the law of realty.The remedies should also be in line with the nature of the interest just like it is in Kenya under Rule 30 of the Matrimonial Property Rules.

5.6 Challenges on Execution of Decrees

The LMA allows the court to order the division or sale of assets acquired by joint efforts and divide the proceeds of the sale among the spouses.[46]With regard to property involving third parties' rights and interest, the challenge is that since the third party is

46 Section 114 (1), the Law of Marriage Act.

allowed by the CPC to file objection proceedings.[47] The proceedings allow the court to investigate the claim to determine whether the third party (objector) has viable interest on the ground of he/she being a party to the original proceeding.[48]

In a polygamous marriage, this is challenging, and brings fundamental questions. For example, who will be the parties in objection proceedings taking into consideration that the non- divorcing spouses were not parties to the original proceeding and their interest or contribution toward the property was not decided in the original proceedings?Second, which court will be vested with jurisdiction because the third party and the non-divorcing spouses are not interested in divorce but proprietary interest?

Furthermore, Order XXI rule 62 of the CPC is controversial because an Order issued in the determination of objection proceedings is conclusive. A party who is aggrieved and intends to pursue the matter further has no right to appeal but can file a suit to establish the right he/she claims to the property.[49] The provision brings prolongation of trials against a spouse who is a decree holder. Further, instituting afresh suit in relation to polygamous marriage is quite challenging in terms of who should be joined as parties to such fresh suit;what will be the court with competent jurisdiction to try the matter; should it be a matrimonial court or a land court? This therefore requires third parties' issues to be legislated.

5.7 Challenge of Division of Debts

Section 56 of the LMA recognizes the liability of spouses in contract or tort. This would encourage the interest of another person in the property subject of division. In addition, section 114(2) (c) of the LMA requires that courts to have regard to debts owing by the spouses that were contracted for the joint's benefit. If the debts were contracted for the joint benefit of the family, the presumption is that it will be divided equally among the spouses. In the case of *Rose Harun Sogod v. Dominic Godfrey*

47 Order XXI, Rule 57 (1), the Civil Procedure Code.

48 *Mkuu Aman Fresh Sports Club v. Dodo Ubwa Mamboya Khamis Khamis Machano Keis,* Civil Appeal No. 88 of 2002, CAT, Zanzibar (Unreported).

49 *Amour Habib Salum v. Hussein Bafagi, Civil Application No. 76 of 2010, CAT, Dar es Salaam, (Unreported)*.

Shayo[50], the court held that,

> The trial Court, after being satisfied that there were debts which arose against the appellant in the course of taking care of the family when the respondent was based to the concubine ordered the debts to be paid by the parties jointly. The trial Court categorically stated that; 'debts also be divided into half for each." In this point of debts, I find bound not to detain long because the issue of debts has been well settled by the parties. (Underlined emphasis interpreted literally from Kiswahili)

The law, however, does set criteria on those who should be paid the debts and how they should be joined to assess their rights toward the property that secured the loan. It is more challenging when the rights of third parties' cut across matrimonial property in a polygamous marriage since non-divorcing spouses are not parties to such divorce. The silence on how the debts can be attributed to a real property owned by the spouses and how the property will assist in paying the debts brings challenges to the third parties to assess their right over the property. The provision of section 114(2) (c) of the LMA does not state how debts will be distributed after divorce.

In addition, the provision of 114(2) (c) of the LMA does not include a clause that offers protection to the beneficial interest of third parties. There should be, for example, a clause requiring that nothing affects the rights and remedies of a spouse's creditors, guarantors or assignees in relation to family debts.

5.8 Definitional Challenges Relating to Third Party Interest

The matrimonial legal regimes have not defined the concept of third-party interest in matrimonial property. Likewise, beneficial interest in the property has not been defined to include the beneficial interest of the third party in the property unless a contrary intention appears. The lack of a definition would also affect the whole concept of dealing with the right of the interest of the third parties and its scope.

50 *Matrimonial Appeal 3 of 2021 [2021] TZHC 7419.*

6.0 Conclusion and Recommendations

Matrimonial property laws have a direct nexus with protection of third parties' interest in real property[51] in any kind of disposition.It is noted that the LMA and the rules made thereunder have no provision for protecting third-party interest in real property at the time of division of such property in the event of divorce. Thus, the LMA, Law of Marriage (Matrimonial Proceedings) Rules and other laws as noted do not have provision for a cause of action. They also do not vest courts with jurisdiction and describe the procedure that can be used to assist third parties with interest over matrimonial property to defend their interest at the time of divorce. This is a violation of the constitutional right to own the property or right values of the interest in such property at the invent of divorce.

Thus, it is recommended that the LMA and the rules made there under should be amended to adopt the best practices stipulated in the case of UDA v. UDB and Another (supra). The case reveals the need for enactment of a provision that allows a third party who actively asserts rights his/her right over the real property that is subject to division upon spouses in a polygamous marriage to commence independent proceedings against either or both spouses to claim rights over such property.This will require subsequent amendments of the LMA and Land Statutes to provide for the court with jurisdiction, procedure and time limitation upon which the third party would claim his/her right over the real property.

In polygamous marriages, the amended provision should also stipulate conditions under which the non-divorcing spouses would defend their matrimonial right over the property contested by the third party.The amendment should also stipulate the condition under which the third-party liabilities over the real matrimonial property would be shared between divorcing and non-divorcing spouses if the liability was in the best interest of the family.

In addition, the LMA and its rules should be amended to adopt or have a provision allowing third parties with interest in real matrimonial property which are in matrimonial

51 Rademacher, L., "Changing the Past: Retroactive Choice of Law and the Protection of Third Parties in the European Regulations on Patrimonial Consequences of Marriages and Registered Partnerships," *Cuadernos Derecho Transnacional* , Vol. 10, 2018, pp. 7-18, at p. 8.

causes or not to make an application of declaration of their interest in the real matrimonial property. The provision should allow third parties to join matrimonial causes or institute separate suits where they could defend their rights over real property. This is what is provided for under section 17 of the Matrimonial Property Act of Kenya, 2013 and Rules 7(1-8) and 23 of the Matrimonial Property Rules of Kenya.

It is also recommended that the amendment of the LMA should have a provision that allows the court to order spouses to issue notices to third parties who have an interest in the real property, the subject matter of division at the time of divorce.This can assist the third parties to intervene or to be formally joined to proceedings at the earliest opportunity so that the third party's claim can be dealt with prior to the court-making decision in respect of the matrimonial property between the divorcing couple.

Thus, Tanzania can adopt section 45 of the Family Property Act of 2001 of Saskatchewan in Canada. The adoption, however, should be modified to allow even non divorcing spouses to have a right under the provision to defend the right over real matrimonial property. This will require procedures to intervene or to join the third party to be enacted so that the third-party interveners' nature of documents and proceedings would be known. This is important because the intervener is not interested in divorce but only in a beneficial interest in the property likely to be divided.

In addition, the LMA and the Law of Marriage (Matrimonial Proceedings) Rules should be amended to provide the right, court vested with jurisdiction, procedure and appropriate documents to be used by the third parties to institute their claim of the interest in the real property considering the interest of other spouses over the real matrimonial property.

In the same line, the LMA should be amended by enacting a provision which provides grounds upon which third-party interest in real matrimonial property would arise at the time of divorce in polygamous marriages. Such conditions among others can include conditions listed in the case of *Burns v Burns(s)* for example an express or implied valid contractual arrangements; a resulting trust where the third party has directly provided part of the purchase price; or a common intention between the parties.

Likewise, the LMA and the Law of Marriage (Matrimonial Proceedings) Rules should be amended to mandate the parties /spouses to provide particulars of liability and interested party over the real property subject to division upon divorce.The provision should stipulate in a manner to eliminate the possibilities of conflict between the disclosing party and the party to the detriment of the other spouse(s).

Accordingly, the LMA and the rules should provide appropriate remedies that can be viable in the protection of third-party interest in real property together with the interest of another spouse (s). The remedies should be commensurate with the law of realty interest i.e., mortgage, lease and leaders among others.

Subsequently, the LMA should be amended to allow the adoption of an amicable settlement between the spouses and third parties. This is to provide spouses and third parties with an early opportunity to settle matters thereby limiting the emotional and financial consequences of the dispute. Consequently, section 106 (1) (f) of the LMA should be amended to include provisions for prenuptial agreements. This would provide the opportunity for spouses to agree and exclude some of the property where other persons have beneficial interests at the time of divorce and division of such property.

Finally, to ensure smooth sailing of property rights between spouses and third-party interest rights in such properties, the laws relevant to matrimonial and land ownership regimes should provide a mechanism to ensure that any interest of friends, relatives and or creditors in real property owned by a spouse(s) is accurately recorded and legally registered in line with the Land Registration Act.[52] Where the real property is not registered the holder of a third-party interest must make sure that the interest is embodied in a legal document such as a legally binding contract or agreement, a declaration of trust or a loan agreement.

Likewise, the third party would use a caveat being registered in the land registry so that the party with an interest is notified before the asset is sold. This of course would apply to registered titles only. Accordingly, third parties and spouses should keep evidence of any financial contributions they make to the real property for purposes of proof of the nature of ownership/interest in the real property subject to division in the court.

52 [Cap. 334 R.E. 2019].

The Scourge of Statelessness in Tanzania: Call for Legislative Reform

John E. Ruhangisa[*] and *Nasru Juma*[**]

Abstract

Since the end of World War I, the international community has been desirous of making the world a better place to live in. Among the attempts made to bring this desire to fruition include its anxiety to either reduce or fully eliminate statelessness. Various international legal instruments have been adopted under the auspices of the United Nations. Key among these is the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. Under the Universal Declaration of Human Rights, 1948 the right to a nationality is also recognized as amongst the fundamental human rights. States are under an obligation to ensure that their national legislation are in line with international standards, particularly those instruments embedding fundamental rights and freedoms. The issue of statelessness has been high on the agenda because of the dire consequences that come along with it.Thie article examines the extent to which various legislation regarding citizenship in the United Republic of Tanzania conform to international standards set or otherwise to ensure that statelessness is eliminated. It concludes that there are challenges in this regard and calls for reforms in the law.

Keywords: *Statelessness, nationality, international law, national law, Tanzania.*

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1.0 Introduction

For more than half a century the international community has been fighting against the avenger of statelessness. There were no serious steps taken prior to the World War 1 (WWI) to curb statelessness. The post WWI epoch was a watershed. International jurisprudence calls upon States to ensure that they reduce and or eliminate the state of statelessness through their domestic legal systems.[53] Under international law, the right to grant nationality is reserved for states. There is no single instrument under the international arena that grants nationality.

Nationality is granted in accordance with the domestic legislation of a particular state. This is a piece of legislation that regulates all affairs regarding nationality in that particular state.[54] Thus, under international law, there is no instrument that can confer or deprive nationality of a person.[55] International instruments only regulate the conduct of States regarding this sovereign power even though the conferment or deprivation lies within the competence of the respective State.[56]

Accordingly, the international community's call for States to reduce and or eliminate statelessness depends on the good-will, good governance and the legal system of the respective State. The United Republic of Tanzania is not an island; it has international obligations like any other State in ensuring that its domestic citizenship laws are framed in a way that does not permit loopholes for its national(s) becoming stateless.

53 Preamble to the Convention Relating to the Status of Stateless Persons, 1954, provides that; considering that it is desirable to regulate and improve the status of stateless persons by an international agreement. See also a Preamble to the Convention on the Reduction of Statelessness, 1961 that states that; considering it desirable to reduce statelessness by international agreement. See also the obligations imposed to states under the provisions of Article 8 of the same Convention.

54 In the context of this paper, the terms 'Citizen' and 'national' are used interchangeably and significantly, under this paper, they carry the same meaning.

55 UNHCR, *Handbook on Protection of Stateless Persons: Under the 1954 Convention Relating to the Status of Stateless Persons*, UNHCR: Geneva, 2014 at pp. 13-15.

56 Goodwin-Gill, G.S., *Deprivation of Citizenship Resulting in Statelessness and its Implications in International Law,* 2014, at p.8-9 available at https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/GSGG-DeprivationCitizenshipRevDft.pdf (Accessed on 03 December 2023). See Batchelor, C.A., Statelessness and the Problem of Resolving Nationality Status, *International Journal of Refugee Law*, Vol. 10, No.1/2, 1998, pp. 156-183 at pp.256-257. See also, Cosemans, S., 'Modern Statelessness and the British Imperial Perspective: A Comment on Mira Siegelberg's Statelessness: A Modern History, Routledge: Leuven, 2021, at p.2.

The government of Tanzania has taken crucial steps to incorporate provisions under its laws regarding the protection of the right to nationality. However, fundamental gaps still exist. If left unattended and reformed, these gaps may turn into being the enablers of statelessness in Tanzania.

The article examines the extent to which the government of Tanzania has successfully framed its legislation in a way that eliminates the scourge of statelessness or is still lagging with notorious legislation that might render in one way or the other a person stateless. The scope covered ranges from international, regional, and national jurisprudence on the legal framework that is relative to citizenship.

2.0 The Concepts of 'Citizenship,' 'Nationality,' and 'Statelessness'

Citizenship and nationality are related concepts. Despite being used interchangeably by various international instruments, the two terms have distinct meanings and legal implications. It is important to state the key differences between the two technical terms.

2.1 Citizenship

Black's Law Dictionary defines citizenship to mean the status of being a citizen.[1] Citizen is defined to mean someone who, either by birth or naturalization, is a member of a political community, owing allegiance to the community. Such person is entitled to enjoy all civil rights and protections; a member of the civil state, entitled to all its privileges.[2] Citizenship is a legal status that grants an individual certain rights, privileges, and responsibilities within a specific country.[3] It is a formal relationship between an individual and a sovereign state, typically established through the state's laws and regulations.

A national, unlike a citizen, does not necessarily owe allegiance to his/her nation, whereas allegiance under citizenship often implies a deeper level of allegiance and loyalty to the country.[4] Citizens are usually expected to follow the laws and

1 Garner, B.A., (ed), *Black's Law Dictionary*, 11th ed, Thomson Reuters: St. Paul, Minnesota, 2019, at p. 308.

2 *Ibid.*, p. 307.

3 *Ibid*.

4 Goodman, D., 'Citizenship and Allegiance: Before and After the Fourteenth Amendment' 2010, at p.6. See also; Arcioni, E." Constituting Citizenship: The Evolution of Australian Citizenship Law ", in Sarat, A., *Law and the Citizen (Study in Law, Politics and Society),* Emerald Publishing:West Yorkshire, 2020, pp. 801-808 at 802.

defend the nation if necessary, such as through military service or other civic duties. Citizenship can be acquired through various means, including birth within the country's territory (*jus soli*) or being born to citizens of that country (*jus sanguinis*).[5] It can also be acquired through naturalization, marriage, or other legal processes, depending on the country's laws.[6]

Some countries allow individuals to hold multiple citizenships. Others may require individuals to renounce their previous citizenships when acquiring a new one. Citizens enjoy certain rights, such as the right to vote, work, reside and receive protection from their country. These rights come with responsibilities such as paying taxes, obeying the law and readiness to defend their country.

2.2 Nationality

Nationality refers to a relationship between a citizen of a country and the country itself, customarily involving allegiance by the citizen and protection by the state.[7] Ethno-cultural identity is among the key identifiers of nationality. Nationality is primarily associated with an individual's ethno-cultural or national identity. It refers to a person's affiliation with a particular nation, culture, or ethnic group.[8] Nationality can be a matter of self-identification or affiliation with a particular community.[9] 'Nationality' often relates to cultural, linguistic and social ties that bind individuals to a specific group or community. It may be a matter of personal identity and can be separate from one's legal citizenship status.

Nationality is not necessarily legal; it does not always carry the same legal rights and responsibilities as citizenship.[10] While nationality may be linked to citizenship in many cases, especially in the context of *jus sanguinis* (inheriting nationality from one's parents), it does not necessarily grant the same legal status and privileges.[11]

5 Garner, *op.cit.,* at p. 308.
6 *Ibid*.
7 *Ibid.*, p.1234.
8 Von Rutte, B.," Citizenship and Nationality: Terms, Concepts, and Rights "in Cantor, D.J., (d), *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law,* Brill Nijhoff: Leiden/ Boston, 2022, pp. 11- 55 at p. 12.
9 *Ibid*.
10 Von Rutte, B.," Defining the Right to Nationality: Rights and Obligations" in Cantor, D.J., (ed), *The Human Right to Citizenship: Situating the Right to Citizenship within International and Regional Human Rights Law,* Brill Nijhoff: Leiden/ Boston, 2022, pp. 212- 326 at 229.
11 *Ibid*.

In summary, citizenship is a legal status that grants certain rights and obligations within a specific country, often involving a formal legal process. Nationality, on the other hand, is more about cultural and ethnic identity and may not carry the same legal implications. While these concepts are closely related, technically they are not synonymous and the exact relationship between them can vary from one country to another based on their laws and regulations.

Despite the technical difference between the two terms, almost all international instruments haveappreciated their connectedness, and the terms are used interchangeably. In this article, the two terms have been employed interchangeably unless where the context strictly requires them to be used in specific terms.

2.3 Defining Statelessness

Statelessness refers to a situation whereby a person does not have a nationality of any State under the operation of its law.[12] This is derived from the couching of the term itself 'state' and 'less' in which case the latter negates the former. When this is attributed to an individual it then forms a situation of a person being stateless, thus statelessness. Some international law scholars simply define stateless as a condition whereby a person either does not have nationality or has no effective nationality.[13]

3.0 Evolution of the Concept of Statelessness in International law

3.1 Statelessness as an Aftermath of the First World War (WWI)

Scholars under international law indicate that statelessness as a concept and international phenomenon developed significantly from the 1920s.[14] The emergence of the notion of statelessness under this period is historical and the same can be

12 Article 1(1), the Convention Relating to the Status of Stateless Persons, 1954.

13 Batchelor, C.A., "Stateless Persons: Some Gaps in International Protection" *International Journal of Refugee Law,* Vol.7 (2), 1995, pp. 232- 259 at 232. See also Carey, J.," Some Aspects of Statelessness Since World War I "American *Political Science Review, Vol.* 4 (1), 1946, pp. 113-123 at p.113.

14 Brownlie, I.," The Place of Individual in International Law ", *Virginia Law Review*, Vol. 50, No. 3, 1964, pp.435- 462 at p. 442. See also, Goodwin-Gill, G.S., 'Convention Relating to the Status of Stateless Persons', 2010, at p.1 available at https://legal.un.org/avl/ha/cssp/cssp.html (Accessed on 03 December 2023).

inferred from what happened between 1914-1918 during the First World War (WWI).[15] The WWI is recorded to have claimed more than twenty-million lives. These included 8.5 million soldiers and 13 million civilians.[16]

Following the odious scourge of the WWI, the international community, particularly the western states whose countries really engaged in the war, convened at the historic Paris Peace Conference (1919-1920). The states recalled what happened, and thereafter concluded the Versailles Peace Treaty of 1919. The Treaty contained various clauses that marked a wakeup call for the States to co-exist peacefully.[17] A significant point at this juncture is found in an answer to the question, why does literature indicate that the first point of reference on the evolvement of the concept of statelessness was the WWI era.

History reveals that during and before WWI there was a huge wave of territorial aggrandizement that expanded even to what was referred to as 'overseas territories', all these being the outcome of imperialism.[18] Following expansionism and colonialism during that era there came into being a confusion of nationality particularly to unions and disintegration of sovereign states as well as colonial territories. Thus, transfer of territory was highly regarded as amongst the factors that led to the emergence of statelessness after WWI.[19]

Among other key issues addressed under the Versailles Treaty was the loss of territories by Germany in Europe. For instance, Estonia, Latvia, and Lithuania which were territories of Germany vide the then Brest-Litovsk Treaty were taken away from Germany and declared to be independent States.[20] Likewise, Memel was handed over to Latvia, whereas Alsace-Lorraine was handed over to France.[21]

15 Brownlie, I., *The Relations of Nationality in Public International Law*, *British Yearbook of International Law*, Vol. 39, Oxford University Press: Oxford, 1973, at pp.320-321. See Batchelor, C.A., "Stateless Persons: Some Gaps in International Protection", op.cit. at p. 232.

16 https://www.britannica.com/summary/Causes-and-Effects-of-World-War-I (Accessed on 21 January 2022).

17 Lowe, N., *Mastering: Modern World History*, Palgrave Macmillan: Hampshire, 2013, at p.34. See also; Fry, M.G., *et al* (eds), *Guide to International Relations*, Continuum:New York, 2002, at p.188.

18 See Lowe, *op.cit*., p. 20.

19 Brownlie, *op.cit*., p. 39.

20 Lowe, *op.cit*., p. 20.

21 *Ibid*.

Among other things, the above examples indicate the situation that nations were in during that era, and thus due to the kind of transfer of territories the concept of statelessness emerged. This is because the treaties that used to transfer those territories, did not foresee a state of some people becoming stateless.[22] On the other hand, members at the Paris Peace Conference noted that among other things what led States to enter into WWI was an old international system and thus called for a new international world order. This led to the establishment of the League of Nations.[23]

3.2 The 1930 Hague Codification Conference

Initially, there was no significant legal step taken at the international sphere in the ambit of the League of Nations to curb statelessness. It was until 1933 when three international instruments were adopted. These were the 1930 Convention on Certain Questions relating to the Conflict of Nationality Laws, the 1930 Protocol Relating to a Certain Case of Statelessness and the 1930 Special Protocol Concerning Statelessness. Under these instruments, States were obliged to ensure that every person had a nationality.[24]

Thus, statelessness was addressed by international law even before the documentation of other human rights instruments, such as the Universal Declaration of Human Rights (UDHR) of 1948 which was the first document to address the human rights regime under international law.25

3.3 The Universal Declaration of Human Rights, 1948

Amongst the main objectives that the League of Nations sought to bring about was the maintenance and promotion of peace and security in the world. This was triggered by WW1 which, as noted claimed millions of lives, and the international community could not afford going into such war again. However, due to its weaknesses as the international monitor of peace and security, the League of Nations failed in its mission. As a result, nations were at war again in 1939 giving rise to the Second World War (WWII).[26] The failure of the League of Nations led to the establishment of another

22 Brownlie, *op.cit*., pp. 320-321.
23 Fry *et al* (eds) *op.cit*., p.44.
24 Van Waas, L., "'Are We There Yet?': The Emergence of on the International Human Rights Agenda"*; Netherlands Quarterly of Human Rights*, Vol. 32/4, 2014, pp.342-346 at p.343.
25 *Ibid*.
26 Lowe, *op.cit.,* at p.46.

international order to maintain peace and security in the world, namely the United Nations Organization with its founding document the Charter of the United Nations, 1945.[27]

Among other things, the United Nations adopted the Universal Declaration of Human Rights (UDHR) in 1948. UDHR is the primary document that has been used as reference on matters of human rights in the jurisprudence of the United Nations. Under UDHR, the right to a nationality was recognized.[28] UDHR was a harbinger to the international community particularly under the United Nations jurisprudence regarding the protection, and promotion of human rights. It wasa blueprint from which most international human rights instruments drew inspiration.

Thus, most of the human rights were recognized in the instruments that were adopted after the UDHR.[29] UDHR contained both civil and political rights together with economic, social and cultural rights. Among other rights, the right to nationality was recognized. In fact, nationality as a human right was firstly recognized by this Declaration under Article 15 to the effect that:

> (1) Every person has a right to a nationality.
>
> (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.[30]

UDHR is just a declaration, and under the law of treaties in international law, a declaration is a legally non-binding instrument albeit binding politically.[31] However,

27 *Ibid.,* at p.167.

28 Article 15, the Universal Declaration of Human Rights, 1948.

29 See for instance the Convention Relating to the Status of Refugees, 1951, and its 1967 Protocol; the Convention on the Reduction of Statelessness, 1961; theInternational Covenant on Civil and Political Rights, 1966; International Covenant on Economic, Social and Cultural Rights, 1966; and even the foundational conventions on International Humanitarian Law, thus the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea,1949; the Geneva Convention Relative to the Treatment of Prisoners of War ,1949; theGeneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 and even in the regional human rights systems, their development and recognition of human rights drew inspiration from the Universal Declaration of Human Rights, 1948. For instance, the European Convention on Human Rights of 1950 together with the European Social Charter of 1961; the American Convention on Human Rights of 1969 (the Pact of San Jose); and the African Charter on Human and Peoples' Rights of 1981.

30 Article 15, the Universal Declaration of Human Rights, 1948. See also Article 29, the Arab Charter on Human Rights, 2008.

31 Malanczuk, P., *Akerhust's Modern Introduction to International Law*, Routledge:London and New York, 1997, at p. 213.

the development of international law suggests that an instrument of customary international law nature binds, even if it is a declaration that ordinarily does not bind.[32] Regardless of this development on the normative value of the UDHR, the international community adopted other significant international instruments that are binding to states. These are the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Right (ICESCR) which recognized most of current international human rights.

4.0 The Rights of a Stateless Persons: In a Nutshell

Stateless persons, like any other persons, are human beings and they are protected under international human rights law. Thus, the fact that one is a stateless person does not strip him or her from enjoying basic human rights. Among others, the following are the rights of a stateless person.

The right to life; this right is embedded under the ICCPR.[33] The ICCPR affirms the right to life, and stateless persons like any other individuals, are protected from arbitrary deprivation of life. The right to Recognition as a Person; stateless individuals have the right to be recognized as legal persons under international law, which means they are entitled to certain fundamental human rights and protections. Prohibition of torture and cruel, inhuman, or degrading treatment or punishment; the Convention Against Torture,[34] together with the ICCPR,[35] protects persons from being tortured or ill-treated. Stateless persons are among the people who are covered under these treaties.

The Convention on the Reduction of Statelessness,[36] is a key international instrument aimed at reducing and preventing statelessness. Despite its longevity of more than half a century, Tanzania is yet to accede and domesticate this significant Convention.

32 See Tehran Case (United States of America versus Iran) ICJ Reports 1980 where the International Court of Justice ruled that most of what is contained in the Universal Declaration of Human Rights can no longer be considered as non-binding since the principles contained therein forms part of Customary International Law, General Principles of Law, and Fundamental Principles of Humanity; See also Article 38 of the Vienna Convention on the Law of Treaties, 1969.

33 Article 6, the International Covenant on Civil and Political Rights, 1966.

34 1987.

35 Article 7, ICCPR.

36 1961.

The Convention set out several rights and principles that apply to stateless persons to prevent and reduce statelessness. The Convention presents a set of key rights including the right for stateless persons to be granted citizenship,[37] the right to citizenship for a stateless child, the right to access education and employment, the right to housing and social services, and the right to non-discrimination. Other rights encapsulated under the Convention is the right to administrative assistance whereby states are encouraged to provide administrative assistance to stateless persons, for example, assistance in obtaining nationality and assistance in obtaining travel documents.[38]

Other fundamental rights that are also available to stateless persons like any other individuals are the right to equality before the law, freedom of thought, conscience, religion and expression, freedom of movement, access to justice, the right to privacy, and protection from arbitrary expulsion, among other rights.

5.0 Right to Nationality and Reduction/Elimination of Statelessness in Tanzania

5.1 Tanzania Citizenship Law: Historical Context

5.1.1 Tanganyika Citizenship During the Colonial Era

The 18th and 19th centuries were marked with the horrible scourge of colonialism. Almost every African state was under the colonial domination by a European state, and even within Europe itself expansionism was the order of the day. During this epoch, Tanganyika was under the imperial rule of Germany and later the British. The British colonial era diverted the identity of citizens of the then Tanganyika. Despite having in place, the Legislative Council mandated to legislate within the colony, some of the laws governing the colony were legislated in Britain. Matters of citizenship within Tanganyika were governed by the British Nationality Act, 1948, a legislation having force of law in Britain. The long title to the Act read:

> An Act to make provision for British nationality and for citizenship of the United Kingdom and Colonies and for purposes with matters aforesaid.[39]

Under that Act, citizens of the British colonies were made British subjects.[40] Tanganyika was amongst the British colonies as a mandate under the umbrella of the League of

37 Paragraphs 1-3, the Preamble to the Convention on the Reduction of Statelessness, 1961.
38 *Ibid.*, paragraph 3 of the Preamble.
39 Long Title to the British Nationality Act, 1948.
40 Article 1, the British Nationality Act, 1948.

Nations.[41] It entails that there was no such thing as Tanganyika citizenship. Instead, those who ought to have been citizens of Tanganyika were termed as British subjects under the British Nationality Act. Thus, the colonial state dragged Africans into the abyss of nothingness and poverty. It grabbed their identity by appending their citizenship to that of the British, even though in a real sense they benefited none from that heinous scheme.

5.1.2 Citizenship and the Post-colonial State

In the early1960s, most African states gained their independence which they were deprived of almost for two centuries. Tanganyika gained its independence in 1961 from the British colonial rule. Such independence had various consequences as to the setup that was laid down by the British rule. First and foremost, it signified Tanganyika as an independent state and therefore not a British territory. However, despite having gained independence, Tanganyika remained under the province of the United Kingdom since it was yet to be the republic. It was until 1962 when Tanganyika became the Republic. Secondly, the Republic of Tanganyika was to govern its affairs on its own and was fundamentally free to establish its own government and administer the whole territory.

Thirdly, citizens of the then British colonies were subjects of the United Kingdom under the British Nationality Act, 1948. The gaining of independence and subsequent becoming the republic, made Tanganyika to rethink of its citizenship law by undressing itself of the British 'colonial gown' of citizenship under its colonial master law. Thus, Tanganyika legislated its Citizenship Ordinance, 1961, and later the law titled Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962.

5.1.2.1 The Citizenship Act, 1961

The enactment of the Citizenship Act, 1961 was purposely done because the law as it were, was that the people of Tanganyika were citizens of the United Kingdom and Colonies under the British Nationality Act, 1948. As stated earlier, under the British Nationality Act, 1948 the people of British colonies were made subjects of the United Kingdom and Tanganyika being amongst the British colonies, its people were by virtue of that, subjects of the United Kingdom.

41 Ruhangisa, J.E., *Human Rights in Tanzania: The Role of the Judiciary*, Thesis Submitted to the University of London (SOAS) 1998, at p. 16.

The parliamentary debates during the enactment of the Citizenship Act,1961 were dominated by the argument whether Europeans and Asians domiciled in Tanganyika should be included in the definition of Tanganyika citizens. Most of the Tanganyika African Nation Union (TANU), the then ruling party, were against the inclusion of Europeans and Asians in the definition of Tanganyika citizens.[42] The tension on the definition of citizenship, within TANU was divided between those who believed that the determinant should be race vis-à-vis those who argued that the factor should be residence – for purposes of strengthening unity in the new nation.[43] The debate was so tense to the extent that Mw J.K. Nyerere threatened to resign. Emizande argues that the debates were a result of balance of power within and between political parties, and that national identities became institutionalised through public service, citizenship laws, and electoral laws.[44] Finally, the 1961 Act was enacted.

The Citizenship Act, 1961 stipulated that every person who was born in Tanganyika and became a citizen of the United Kingdom and Colonies or a British protected person, was automatically made a citizen of Tanganyika on the 9th day of December 1961.[45] This provision however, applied only to those persons whom either of their parents were born in Tanganyika.[46]

The Act further indicated that, for a person who was born outside Tanganyika but his or her father was born in Tanganyika, that person was also made to be a citizen of Tanganyika.[47] The challenge with this saving clause is that it intended to protect only those whose fathers were born in Tanganyika, without regard to those whose mothers were born in Tanganyika. The controversy under this provision is that it was pegged on sexuality, and the same was oppressive to the female gender. The Act did not take into account the fact that when the British Nationality Act made every person in the colony to be a subject of the United Kingdom it did not provide for a

42 Leys, C., "Tanganyika: The Realities of Independence", *International Journal* 17, No. 3, 1962, pp. 251-268 at p. 252. See also, Aminzade, R., "From Race to Citizenship: The Indigenization Debate in Post-socialist Tanzania", *Studies in Comparative International Development*, Vol. (1) 38, 2003, pp. 43-63 at 52.

43 Aminzade, R.," The Politics of Race and Nation: Citizenship and Africanization in Tanganyika", in Davis, D.E., ed, *Political Power and Social Theory,* Emerald: Leeds, 2001, pp.53-90 at p. 88.

44 *Ibid.*

45 Section 1(1), the Citizenship Act, 1961.

46 *Ibid*.

47 *Ibid*., section 1(2).

gender-based proviso.[48] By so doing the 1961 legislation left every person who was born outside Tanganyika but his or her mother was born in Tanganyika. Thus, the Citizenship Act, 1961 left a huge *lacuna* through which this category of people fell prey of statelessness.

The Citizenship Act, 1961 continued to be law even after Tanganyika became the Republic in 1962. Under the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962 it was specified that the Citizenship Act, 1961 was to remain a law as if it was enacted by the Parliament.[49] In other words, after Tanganyika became the Republic, the 1962 Act was enacted to save those who were made citizens of Tanganyika by the 1961 Act.

5.2 The Tanzania Citizenship Act, 1995 and Reduction of Statelessness

5.2.1 The Tanzania Citizenship Act, 1995

Citizenship laws of the United Republic of Tanzania were scattered, it was until 1995 when the citizenship laws were consolidated.[50] In the United Republic of Tanzania, the law that regulates matters of citizenship/nationality is the Tanzania Citizenship Act. This Act applies to both Mainland Tanzania and Zanzibar since citizenship is a Union Matter.[51]

The Tanzania legal regime has exhibited the efforts towards the fight against statelessness. Under the Citizenship Act, there are considerable factors that can give credit to the United Republic of Tanzania as regards legal initiatives to reduce and or eliminate statelessness in the territory as required under international law.

5.2.2 Transfer of Sovereign

The 1964 Union of Tanganyika and Zanzibar created the United Republic of Tanzania. Tanzania became the new sovereign state after the 1964 unification. Therefore,

48 See section 1, the British Nationality Act, 1948.
49 Section 26(1), the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962.
50 See a long tittle to the Tanzania Citizenship Act, 1995.
51 See Item 6, the First Schedule to the Constitution of the United Republic of Tanzania, 1977.

the Tanzania citizenship emerged and took over the then Tanganyika and Zanzibar citizenships that existed before. This was sovereignty transfer. Sovereignty transfer is termed as among the major reasons that has led to an increase of stateless persons in the world.[52] This is because, where there is transfer of sovereignty one will lose his or her nationality as the state under which he or she acquired citizenship will no longer be existing after such transfer.

The Tanzania Citizenship Act, stated clearly that a person who was either a citizen of Zanzibar or Tanganyika prior to the Union Day that person is considered to be a citizen of the United Republic.[53] The United Republic of Tanzania being a state born after the Union of two sovereign states, the people of the then states of Tanganyika and Zanzibar were in danger of being stateless unless the legal status of their citizenship is adequately addressed.

The implication of section 4(1) of the Tanzania Citizenship Act is that those who were citizens of the then sovereign states of Tanganyika and Zanzibar were to be deemed citizens of the United Republic of Tanzania following the Union of the two states. In the absence of this kind of protective provision there was a great danger of the then citizens of the Republic of Tanganyika and the People's Republic of Zanzibar to be stateless.

Reading section 4(1) of the Act alone is not satisfactory because the section qualifies that citizenship in accordance with the provisions of section 30 of the same Act. The Act made a distinction to the effect that those whose citizenship were in one way or the other invalidated by the now repealed laws, such invalidation/denunciation was recognized by the new Act.[54] Thus, section 4(1) safeguarded only those who were citizens of either the Tanganyika or Zanzibar who were born in either of the territories.

52 Blackman, J.L.," State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law", *Michigan Journal of international Law,* Vol. 19 (4), pp. 1141-1194 at p. 1163.See also Article V of the Venice Report on Consequences of State Succession for Nationality adopted by the European Commission for Democracy through Law, 1996 available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD (1997)023-e(Accessed on 4 December 2023).

53 Section 4(1), the Tanzania Citizenship Act, Cap. 357.

54 Section 4(1), the Tanzania Citizenship Act, read together with section 30 of the same Act.

The safeguard provided for under the Tanzania Citizenship Act regarding transfer of sovereignty is in line with the requirements of international law. States are under an obligation to ensure that a person does not become stateless because of such transfer. States are thus required to ensure that their laws accommodate situations that might render one stateless following the transfer of sovereignty or territory.[55]

The fact that Tanzania framed its legislation to accommodate those people were possibly to be stateless after transfer of sovereign, Tanzania has fulfilled its international obligation embedded under the Convention on the Reduction of Stateless Persons.[56] The law also provided safeguards of citizenship for those who were born outside the territories of Tanganyika or Zanzibar and who were citizens by either naturalization or registration.[57]

5.2.3 Safeguard for those Born in the United Republic of Tanzania

Tanzania applies both *jus soli* and *jus sanguinis* principles. This is evident under what is provided for in the Citizenship Act, which makes safeguards in respect of those who were born in the United Republic of Tanzania on or after the Union Day to be deemed as citizens of the United Republic of Tanzania.[58] This birth right citizenship does not apply to those whose parents were diplomatic envoys of sovereign states accredited to the United Republic of Tanzania enjoying immunity from legal proceedings and anyone whose any of his parents is an enemy and birth occurred at a place then under occupation by the enemy.[59]

The excluding clause under section 5(2) (a) did not and does not make stateless the children of a diplomat sent by a sovereign state and who is immune from legal proceedings, born in the United Republic of Tanzania, since under international law they are within their territory, under the principle of reciprocity.[60]

55 Article 10, the Convention on the Reduction of Statelessness, 1961.
56 *Ibid*.
57 Section 4(2), the Tanzania Citizenship Act.
58 Section 5, the Tanzania Citizenship Act.
59 *Ibid.,* section 5(2).
60 Crawford, J., *Brownlie's Principles of Public International Law,* 8th edn., Oxford University Press: Oxford, 2012, at p.409.

Unlike many other rights, the right to a nationality of a child is non-derogable and thus the Law of Child Act safeguards this right.[61] Thus, the same must not be deprived save in very exceptional circumstances and in accordance with the law.[62] This also demonstrates that Tanzania has tried to enact a legislation that prevents a child from being stateless. This is in line with the United Nations jurisprudence regarding the protection of the right to a nationality of a child. The United Nations Human Rights Council stated categorically that deprivation of a nationality to child constitutes gross human rights violation.[63] The rationale is that children are vulnerable to lose identity and nationality in general. Further, they are incapable of fighting for their own rights such as seeking redress in courts of law or any other administrative or judicial bodies.

Despite the provisions of the Law of the Child Act and their guarantee on the right to citizenship of a child, the Act falls short of covering the foundling. Neither under the Law of the Child Act nor the Tanzania Citizenship Act has in anyway covered a foundling. A danger is that, if citizenship of a child is ordinarily pegged on the citizenship of his/her parents, what would happen in cases where parents of the child are unknown. That invites a danger of such foundling to become stateless. Even though not many countries have covered the foundlings in their laws governing nationality, Tanzania when enacting the Law of the Child Act ought to have considered this fact, and subsequently guarantee the right of citizenship to foundlings.

The African Union addresses the challenge in Article 6 to the African Charter on the Rights and Welfare of the Child.[64] Accordingly, a child is entitled to a right to acquire a nationality.[65] The Charter further requires:

> State parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

61 *Ibid*.
62 Section 6, the Law of the Child Act.
63 See Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, at p.9.
64 1999.
65 Article 6(3), the African Charter on the Rights and Welfare of the Child.

Significantly what the Charter requires, is that a child shall not become stateless, that is, even in situations where there cannot be nationality conferred upon him/her under the laws of a particular state, the laws of the state in which he/she was born should be able to grant him/her nationality. This covers the foundling. Tanzania signed and subsequently ratified the African Charter on the Rights and Welfare of the Child on 16 March 2003, and therefore it is bound by it. It is submitted here that the Law of the Child Act should be amended to incorporate provisions that seeks to protect the right to a nationality of the foundling.

5.2.4 Safeguard for those Born Outside the United Republic of Tanzania

Under the Tanzania Citizenship Act, it is also made clear that a person who is born outside the United Republic of Tanzania is deemed to be a citizen of the United Republic of Tanzania provided that either of his or her parent is a citizen of Tanzania otherwise than by descent.[66] This invites a conclusion that, the safeguard is in line with what is enshrined under the Convention on the Reduction of Statelessness where contracting states are required to retain the nationality of those who were born outside contracting states.[67]

The Tanzania Citizenship Act recognizes citizenship by naturalization. However, the same has been a thorn to a child who was born outside the United Republic. Under the Act, a father has been elevated and given more significance than a mother. A child who is born outside Tanzania, after attaining the age of majority, whose father is a Tanzania citizen by descent, may make an application to be a citizen of Tanzania by naturalization.[68] The law does not recognize a child born outside the United Republic whose mother is a citizen of Tanzania by descent. A necessary question to pose here is, what would be the fate of that child when he attains the age of majority? Would he not fall prey of statelessness? The law makes no safeguard to that.

5.2.5 Renunciation, Deprivation and Statelessness in Tanzania

5.2.5.1 Renunciation and Statelessness

Among other grounds, a person who is a citizen of the United Republic may cease to be a citizen by either renouncing or being deprived of his citizenship by the Minister

66 Section 6, the Tanzania Citizenship Act.
67 Article 7(5), the Convention on the Reduction of Statelessness, 1961.
68 Section 9(2), the Tanzania Citizenship Act.

for Home Affairs.[69] The difference between the two is that in renouncing it is the citizen himself or herself who renounces that citizenship while deprivation is where the State takes away that status of citizenship of the United Republic of Tanzania from that particular person.[70] The law prescribes that a person who desires to renounce the Tanzanian citizenship needs to do it in accordance with the law and such renunciation cannot be valid until registered by the Minister for Home Affairs.[71]

Pursuant to section 17 of the Tanzania Citizenship Act, the effect of renouncing citizenship in accordance with the laid down procedures by the law, is that such person ceases to be a citizen of the United Republic of Tanzania. The Act makes safeguard for married women who renounce Tanzanian citizenship by birth on grounds of marriage, to the effect that their citizenship by birth can be reverted to where such marriage breaks down.[72] This is in line with the requirement and international standard set out under international law.[73]

However, in general renunciation law does not safeguard the right to citizenship, because the law does not compel the Minister not to allow denunciation unless the renouncing person is guaranteed citizenship by another country.[74] Thus, the Citizenship Act does not prescribe the safeguard of one's citizenship upon renunciation. This is contrary to the express provision of the UDHR that guarantees the right to nationality and prohibiting arbitrary deprivation of the same.[75] By Tanzania enacting its citizenship legislation with no protection of one's right to nationality upon his renunciation, is in violation of the international standard set out under the UDHR.

Tanzania ought to have borrowed a leaf from its counterpart the Republic of Kenya. Under the Kenya setup, renunciation is permitted,[76] and like in Tanzania, for such a declaration to become effective in law it must be registered by the Cabinet Secretary

69 *Ibid*. See sections 13-17 of the Tanzania Citizenship Act.
70 *Ibid*.
71 Section 13(1) and (2), the Tanzania Citizenship Act.
72 *Ibid.,* section 13(4).
73 See Article 6, the Convention on the Reduction of Statelessness 1961. See also Article 1 of the Convention on Nationality of Married Women, 1957.
74 See section 13(2), the Tanzania Citizenship Act; the Minister can only refuse to register a renouncing declaration if it is in time of war and where in his opinion he sees to be contrary to the public policy.
75 Article 15(2), the Universal Declaration of Human Rights, 1948.
76 Section 19, the Kenyan Citizenship and Immigration Act [Cap 172 REV 2012].

responsible for citizenship and management of foreign national;[77] an equivalent of the Minister for home affairs of Tanzania. Under section 19 of the Kenyan Citizenship and Immigration Act, the Cabinet Secretary is restricted from registering the renunciation if such renunciation is likely to render the applicant stateless.[78]

The jurisprudence under international law is that states have an obligation to ensure that one's citizenship is not renounced or deprived when such person is not a citizen of another country or not guaranteed to be given citizenship by another State.[79] Under the Citizenship Act, a person renouncing Tanzanian citizenship ceases to be a citizen of the United Republic of Tanzania upon such declaration.[80]

The provisions of the 1961 Convention on the Reduction of Statelessness provides that where a municipal law permits renunciation, then such renunciation shall not result to loss of citizenship. Further, that the validity of such renunciation shall be conditional to a fact that a person renouncing possesses or acquires another nationality.[81] As noted earlier, renunciation of Tanzanian citizenship is not conditional for possession or acquisition of another nationality. The danger here is that a person making such renunciation might find himself or herself being stateless due to the requirements set out under section 13(2) of the Tanzania Citizenship Act.

5.2.5.2 Deprivation of Nationality and the Unfettered Powers of the Minister

Under the Tanzania Citizenship Act a person may be deprived of his citizenship, by the Minister for Home Affairs.[82] The law makes an exception and expressly bars a person who is a citizen by birth to be deprived of his nationality.[83] This is regarded as the common law rule on nationality that prescribes that citizens by birth cannot be deprived their citizenship against their will.[84]

Deprivation of citizenship is recognized under international law but there are

77 *Ibid*., section 19(1).
78 *Ibid.,* section 19(4).
79 Article 7, the Convention on Reduction of Statelessness, 1961.
80 Section 13(2), the Tanzania Citizenship Act read together with section 7 of the same Act.
81 Article 7(1), the Convention on the Reduction of Statelessness, 1961.
82 Section 14, the Tanzania Citizenship Act.
83 *Ibid.*
84 African Commission on Human and Peoples' Rights, *The Right to Nationality in Africa,* ACHPR: Banjul, 2014 at p.33.

procedures and requirements set. The Convention on the Reduction of Statelessness and the UDHR restrict arbitrary deprivation of nationality. Under the 1961 Convention on the Reduction of Statelessness it is prescribed that a person shall not be deprived of his nationality if such deprivation will result to him being stateless.[85] Nationality being amongst the human rights, its deprivation requires international standards of human rights to be taken into account.[86] The UDHRprohibits arbitrary deprivation of the right to a nationality.[87]

The powers given to the Minister under the Tanzania Citizenship Act are so vague to the extent that they can easily be abused. Powers to deprive nationality, including other decisions made by the Minister for Home Affairs under the Tanzania Citizenship Act are final, not subject to appeal or judicial review by any court of law.[88] Further, the lawstipulates that the Minister does not have to assign reasons for the decisions regarding all the applications made under the Act.[89]

One might argue that there is a requirement to inquire about one's citizenship is deprived and therefore that is a fair procedure. However, it is worth noting that the inquiry is not a fair procedure. Under the Tanzania Citizenship Regulations where issuance of a notice is explained as indicated under the Act, there is still a requirement for a person to whom a notice is given by the Minister to make an application for inquiry.[90]

Once that is termed as an application, therefore it falls squarely under the provisions of section 23 of the Tanzania Citizenship Act,[91] where it is unequivocally stated that decisions of a Minister on any application under the Act are final and are not subject to appeal or review in any court, and that the Minister is not duty bound to give reasons for any of his decisions under the Act.[92]This is contrary to the rules of natural justice. A duty to give reason has been agreed as one of the cardinal requirements for a body determining the rights and duties of individuals, that once one's rights are being determined and a decision made in respect of his or her rights, one has a right to be given reasons for the decision.[93]

85 Article 8(1), Convention on the Reduction of Statelessness, 1961. See Batchelor, *op.cit*., at p. 3.
86 Article 15, the Universal Declaration of Human Rights, 1948.
87 *Ibid*.
88 Section 23, the Tanzania Citizenship Act.
89 *Ibid*.
90 Regulation 11, the Tanzania Citizenship Regulations, GN.No. 411 of 1998.
91 Cap. 357.
92 Section 23, the Tanzania Citizenship Act.
93 *James F. Gwagilo versus The Attorney General*, High Court of Tanzania at Dodoma, Civil Case No. 23 of 1993.

It is submitted that the duty to give reasons for the decision is a rule that was advanced by court of law and that under the common law jurisprudence it is a well settled rule now that the duty to give reasons form part of the rules of natural justice.[94] The fact that the Tanzania Citizenship Act does not require the Minister to give reasons of his decision offends a fundamental rule of natural justice, of one knowing reasons for the decision made for or against him.

The Act prescribes a detailed procedures for depriving one his citizenship. The Act also does not permit one to appeal against the decision of the Minister, and that no court is allowed to review the decision of the Minister of Home Affairs made under the Tanzania Citizenship Act.[95] Suppose a person is deprived of his nationality, and that there is no safeguard to ensure protection of that person's nationalityso thathe does not become stateless,[96]consideringthefact that the decision by the Minister is non-appealable and is not subject to judicial review. Therefore, what happens when a person is deprived of his nationality and he does not possess and has not acquired nationality of any other State?

The right to appeal and review is a very significant right and the same forms part and parcel of the right to be heard.[97] The same is the jurisprudence under the African Human Rights System, where the African Charter on Human and Peoples' Rights stipulate that every person has the right to appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and custom in force.[98]

In the same line, the Inter-American Court of Human Rights knowing the effect of a legislation that deprives citizenship, had these to say:

> States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of nationality that, in actual fact is not effective.[99]

94 Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe: Verlag-Koln, at pp.431.

95 Section 23, the Tanzania Citizenship Act.

96 See Sections 7 and 14, the Tanzania Citizenship Act.

97 Office of the High Commissioner for Human Rights and International Bar Association, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations: New York, 2003 at p. 305.

98 Article 7(1), African Charter on Human and Peoples' Rights, 1981.

99 Case of the Yean and Bosico Children versus The Dominican Republic, Inter-American Court of Human Rights, 2005.

States are thus required to make sure their legislation do not foster in increasing number of stateless persons. The fact that the Tanzania Citizenship Act does not allow a decision by the Minister to be challenged or reviewed by any court of law, invites nothing but anarchy, arbitrary deprivation of human rights and potential for stateless persons.

6.0 Anudo's Case and Statelessness Legislation in Tanzania

Anudo's case presents an occasion where Tanzania's Citizenship Act was scrutinized by the African Court on Human and Peoples' Rights in relation to the right to nationality and the reduction statelessness.[100] In the year 2012 the applicant namely Anudo Ochieng Anudo, a Tanzanian citizen, approached a Police Station at Babati District in Manyara Region in northern Tanzania, for matters concerning his marriage formalities. While at the police his Tanzanian national passport was seized on the ground that Anudo's citizenship was suspicious. He was later deprived of his Tanzanian citizenship and deported to Kenya where he was also expelled and sent back to Tanzania. Because his national passport was confiscated and Tanzania already deprived him of his nationality, he could not have been allowed to enter the country and therefore he remained in no-man's land at Sirari border between Tanzania and Kenya for two years.

In the year 2013, he wrote a letter to the Minister for Home Affairs asking for the reasons for confiscation of his travel documents. In May 2014 an investigation was conducted by the Tanzania Immigration Department on the nationality of Anudo. In August 2014 the Minister of Home Affairs decided against the applicant to the effect that the Immigration Department's conclusion is that Anudo is not a Tanzanian citizen and that the passport that he held was obtained by fraud and misrepresentation. The applicant was then directed to visit the nearest Immigration Office for the processes to follow for applying for Tanzania nationality. He was aggrieved by that decision, and his father on his behalf sought for remedy to the Prime Minister of theUnited Republic of Tanzania. He was referred to the Minister for Home Affairs who confirmed his decision. Thus, Anudo was a stateless person, since both Tanzania and Kenya denounced him.

Aggrieved by the decision Anudo approached the African Court on Human and Peoples' Rights alleging among other things, being denied his right to citizenship that was arbitrary deprived contrary to Article 15(1) and 17 of the Constitution of

100 In the Matter of Anudo Ochieng Anudo versus The United Republic of Tanzania, Application No. 012 of 2015, African Court of Human and Peoples' Rights.

the United Republic of Tanzania, and Article 15(2) of the UDHR. Tanzania on the other hand argued that the applicant was supposed to exhaust local remedies as required by the Rules of the African Court on Human and Peoples' Rights, 2010 and the Protocol to the African Charter on Human and People's Rights.

The African Court on Human and Peoples' Rights ruled that even though the right to confer nationality lies with States, deprivation of nationality needs to conform with international standards.[101] The Court stated further that international law does not permit loss of nationality unless under very exceptional situations; the Court set out four limbs for deprivation: -

They must be founded on clear legal basis.

It must serve a legitimate purpose that conforms with international law.

Must be proportionate to the interest protected, and that,

It must install procedural guarantees which must be respected allowing the concerned to defend himself before an independent body.

The Court ruled that the deprivation of Anudo's citizenship by Tanzania was unjustified, and that a citizen cannot be expelled from his own country and denied entry. It noted that the position taken by the government of Tanzania was contrary to the African Charter on Human and Peoples' Rights.[102] Tanzania was held to have violated a host of provisions under international law and even its own domestic laws.[103]

The Court directed Tanzania to amend its legislation to allow judicial remedies in the event of disputes over their right to nationality. It also ordered the government of Tanzania to allow Anudo to return in the territory and submit the report within 45 days as regards to the implementation of the decision.

101 Paragraphs 77-78 of the authentic copy of the judgment. See also Massey, H., 'UNHCR and De Facto Statelessness, Legal and Protection Policy Research Series' 2010, at p.51 available at https://www.refworld.org/pdfid/4bbf387d2.pdf (Accessed on 4 December 2023)

102 Article 12, the African Charter on Human and Peoples' Rights, 1981.

103 The right to be heard under article 7 the African Charter on Human and Peoples' Rights, 1981 and article 14 of the International Covenant on Civil and Political Rights, 1966; the right not to be arbitrary deprived of one's nationality under article 15(2) of the Universal Declaration of Human Rights, 1948.

7.0 Conclusion and Recommendations

The Tanzania Citizenship Act address some matters regarding citizenship in one way or another safeguards reduction of statelessness. However, this article reveals that there are still very serious irregularities in the Tanzania Citizenship Act that if left unaddressed citizens of the United Republic of Tanzania will be vulnerable as regards the protection of their right to nationality. Consequently, Tanzania will contribute to an increase of stateless persons. For instance, the fact that the provision regarding deprivation of citizenship to citizens by naturalization,[104] and the procedure encapsulated under the preceding sections,[105] do not impose a mandatory duty on the Minister to satisfy himself whether the person to be deprived of Tanzania citizenship has acquired or is guaranteed to acquire citizenship of another country. Such person therefore becomes vulnerable to becoming stateless.

In other jurisdictions, like Kenya, the law clearly prescribes that deprivation or renunciation of citizenship will have effect when the Minister is satisfied that the person so renounced or deprived of citizenship is guaranteed or is given citizenship of another country.[106] Considering the Tanzanian setup of lack of dual citizenship for adults, the law ought to set at least some limits of deprivation or renunciation to become effective until the Minister is satisfied and guaranteed that the person so denouncing or deprived of Tanzania citizenship will not become stateless.

It is therefore concluded that the legal position regarding citizenship in Tanzania does not satisfactorily protect the right to a nationality and it is framed in a way that fosters an increase of stateless persons. It is further revealed that the right to a nationality is so fundamental, and it is amongst the rights recognized under the UDHR and other international human rights instruments. It is recommended that Tanzania makes a constitutional move on recognizing the right to a nationality in the Bill of Rights in its Constitution.

104 Section 15, the Tanzania Citizenship Act.
105 Ibid., sections 16 and 17.
106 Section 19, the Kenyan Citizenship and Immigration Act [Cap 172 REV 2012].

Tanzania attempted to safeguard the right of nationality to a child under the Law of the Child Act. However, the challenge remains on the foundling – whose issues of citizenship are not covered at all under the Act or any other law governing children or citizenship. It is recommended that Tanzania should amend the Law of the Child Act and the Tanzania Citizenship Act to cover the right to nationality of the foundlings in their provisions respectively. This will not only be among the legislative initiatives to reduce statelessness, but also Tanzania will be honouring her international commitment under article 6 of the African Charter on the Rights and Welfare of the Child.

This article reveals that human rights need to be highly protected and their derogation needs to be within properly laid down procedures that considers the provisions of international instruments and international constitutional standards. International human rights jurisprudence strictly condemns the arbitral deprivation of human rights. The Tanzania Citizenship Act, needs to be amended and lay down proper procedures for determination of the right of a person from being arbitrarily deprived of his nationality, including allowing the right to appeal and judicial review. It is further recommended that the Tanzania Citizenship Act be amended to ensure that deprivation and renouncing of nationality is conditioned upon possession or acquisition of another nationality/citizenship.

This article has revealedthat the reduction of stateless persons and in particular, looking at the right of States to grant nationality, lies within the competence of States. Similarly, the primary duty of reducing statelessness vests with states. In this regard, it is recommended that Tanzania accedes, ratifies, and domesticates international instruments, particularly the Convention on the Reduction of Statelessness, which seeks to reduce stateless persons.

Table of Content