THE LAW AND PROCEDURE ON LITIGATION OF HUMAN RIGHTS IN TANZANIA: AN APPRAISAL OF THE NEW RULES OF PROCEDURE

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Abstract

On 26th May 2014, the Tanzania Chief Justice, adopted the Basic Rights and Duties Enforcement (Practice and Procedure) Rules to advance and realize the basic rights and duties contained in the Constitution. The new Rules have brought about a number of important elements in the practice of human litigation in Tanzania, including elaborating the necessary stages in litigating human rights in court (both in the High Court and the subordinate courts), which is missing in the Basic Rights and Duties Enforcement Act. The Rules have also set out timeframes within which litigants they can undertake certain steps in pursuing their rights in courts; and have introduced a mandatory requirement for the parties to submit written submissions before hearing commences as well as the basic contents of such submissions. However, the Rules have also come out with a number of legally challenging aspects, including clothing District Courts and Courts of Resident Magistrates with jurisdiction to entertain human rights cases on referral from Primary Courts, contrary to Article 30(3) of the Constitution that vests exclusive jurisdiction on the High Court. Therefore, this article examines the progressive elements and challenges brought about by the new Rules in the procedure and practice relating to human rights in Tanzanian courts.

Key Words: *Human Rights, Basic Rights and Duties, Bill of Rights, Constitution*

1.0 Introduction

When the British colonialists handed over independence to their colonies in African they made sure that they left back a constitutional order that would provide their remaining citizens[2] with certain constitutional protection. That protection would only be guaranteed where there was a Bill of Rights that would protect the rights of every person (including British citizens) in the former colonies. So, most of the independence constitutions in former British colonies (with the exception of Tanganyika[3]) had Bills of Rights.

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[2] After handing over independence to African national leaders, the British colonialists left back their citizens who were either working in governments as administrators or engaged in "investment" and business activities like running large plantations as was the case in Kenya and Zimbabwe. *See* generally Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials* (Köln: Koppe Rudiger, 1995).

[3] Tanganyika became independent on 9 December 1961 and on 26 April 1964 it united with Zanzibar to form the United Republic of Tanzania.

The Great Britain, among other reasons, allowed Tanganyika to have a Constitution without a Bill of Rights, because it was not it's not a direct colony; rather the latter exercised administrative control on the former in preparing it for internal self-rule.[4] This was due to the fact that, when the former Tanganyikan colonialists, the Germans, were defeated in WWI in 1919, its colonies were placed under the mandate of the League of Nations[5] and later they were placed under the mandate of the United Nations trust preparing them for their internal self-rule.[6] In fact, colonies that were placed under the trusteeship of some other colonial administrators after the defeat of Germany were to be ruled by those colonial masters until they were ripe for self-rule (i.e. independence). So, Tanganyika was placed under the British trust in preparation for internal self-rule.[7]

This means that the British did not invest too much in Tanganyika like they did in countries like Kenya and Zimbabwe, as they were aware that one day Tanganyika would be running its own internal affairs. Therefore, at the time of negotiations for the independence constitution in 1960-61 the British colonialists were lenient to Tanganyikan national leaders who did not want to have a Bill of Rights for the reasons stated below. In other British colonies where white settlers and British citizens who were still in working in the while colour jobs, a Bill of Rights was necessary to provide guarantees to the rights of these whites. That way, Tanganyika got independence without a Bill of Rights. The Bill of Rights in Tanzania was introduced in Constitution in 1984 vide the 5th Constitutional Amendment, vesting the jurisdiction to determine cases on the enforcement of the Bill of Rights in the High Court.[8]

However, a law providing for the procedure to enforce human rights in the High Court was enacted ten years later.[9] Nonetheless, this procedural law did not contain elaborate rules of procedure and practice, which created several challenges in the

[4] For a detailed discussion on the constitutional politics around the history of the Bill of Rights in Tanganyika and later Tanzania Mainland, *see* Peter, C.M., op. cit; and Ruhangisa, J.E., "Human Rights in Tanzania: the Role of the Judiciary", Ph.D. Thesis, University of London, 1998; Mashamba, C.J., "Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights", LL.M. Thesis, Open University of Tanzania, 2007; Peter, C.M., *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (New York – Westport, Connecticut/London: Greenwood Press, 1990); Luoga, F.D.A.M, "The Tanzanian Bill of Rights", in Peter, C.M. and I.H. Juma (eds.), *Fundamentals Rights and Freedoms in Tanzania* (Dar es Salaam: Mkuki na Nyota Publishers, 1998); Mwalusanya, J.L., "The Bill of Rights and the Protection of Human Rights: Tanzania's Court Experience," reproduced in Peter, C.M. and H. Kijo-Bisimba, *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries* (Dar es Salaam: Legal and Human Rights Centre, 2005), pp. 634-635; Peter, C.M. and I.H. Juma (eds.), *Fundamental Rights and Freedoms in Tanzania* (Dar es Salaam: Mkuki na Nyota Publishers, 1998); and Mughwai, A., "Forty Years of Struggles for Human Rights in Tanzania: How far have we Travelled?" in Mchome, S.E. (ed.), *Taking Stock of Human Rights Situation in Africa* (Dar es Salaam: Faculty of Law, University of Dar es Salaam, 2002).

[5] Tanganyika became a League of Nations Mandate Territory under Britain on 10 January 1920 after its former colonial masters, Germans, were defeated in WWI.

[6] Tanganyika became a United Nations Trust Territory under Britain on 13 December 1946 following the establishment of the UN in 1945.

[7] *See* generally Meredith, M., *The State of Africa: A History of Fifty Years of Independence* (London: Free Press/Simon & Schuster UK Ltd., 2006).

[8] Article 30(3) of the Constitution of the United Republic of Tanzania (1977) (herein after the Constitution of Tanzania).

[9] The Basic Rights and Duties Enforcement Act (1994), Cap. 3 R.E. 2002.

enforcement of human rights through courts of law as examined in this article. It took thirty years after the Bill of Rights was incorporated in the Constitution for elaborate rules of procedure to be issued by the Chief Justice in May 2014.[10]

Therefore, this article revisits the law, procedure and practice of litigating human rights in Tanzanian courts before and after the adoption of the new rules of procedure and practice. The article also briefly examines the inherent challenges facing human rights litigation in Tanzania by particularly looking at a number of *lacunae* in the new rules of procedure and practice adopted by the Chief Justice in 2014.

2.0 The Genesis of the Bill of Rights in Tanzania

The history of Bill of Rights in Tanzania traces its roots back to the British colonial rule at the time of handing power over Tanganyika to African indigenous in 1961.[11] The British colonial rulers pressed for incorporation of a bill of rights in the Independence Constitution in order to protect the interests of their remaining subjects.[12] However, the new African leaders through Tanganyika African National Union (TANU) refused the idea.[13] This idea was rejected on accounts that: foremost, the new government put great emphasis on economic development and political stability of the country; and it, thus, wanted a constitution that would not hinder it in these endeavours.[14]

Indeed, the TANU-led Government seemed to be justified, in this regard, because a Bill of Rights once enshrined in a constitution is potentially rebellious of authoritarianism, as it tends to limit the autocratic powers of a state to violate human rights. According to the late Ben Lobulu, a Bill of Rights 'tells the Executive what it cannot do to its people. It strengthens the Judiciary's position in relation to parliament and the presidency.'[15]

Furthermore, the state feared the fact that as the Judiciary at the time being was mainly staffed by white expatriates; it would probably turn out to be that these staff would take advantage of the presence of a Bill of Rights in the Constitution to frustrate the efforts of the new government by declaring many of its actions

[10]The Basic Rights and Duties Enforcement (Practice and Procedure) Rules. These Rules were published in the Gazette of the United Republic of Tanzania No. 35 Vol. 95 (Supplement No. 34) dated 29 August 2014.
[11] Shivji, I.G., *et al* (eds.), *Constitutional and Legal System of Tanzania: A Civics Sourcebook* (Dar es Salaam: Mkuki na Nyota Publishers, 2004), p. 91. *See* also Ruhangisa, J.E., "Human Rights in Tanzania: the Role of the Judiciary", Ph.D. Thesis, University of London,1998; Kabudi, P.J., "The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms" *Verfassung Und Recht*, Vol. 24, 1991; Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials, op. cit*; and Mbunda, L.X., "Limitation Clauses and Bill of Rights in Tanzania" *Lesotho Law Journal*, Vol. 4, No. 2, 1988.
[12] Peter, *ibid*, p. 148.
[13] *Ibid,* pp. 148-149.
[14] Mughwai, A., "Forty Years of Struggles for Human Rights in Tanzania: How far have we Travelled?" in Mchome, S.E. (ed.), *Taking Stock of Human Rights Situation in Africa* (Dar es Salaam: Faculty of Law, University of Dar es Salaam, 2002), 2002, p. 57.
[15] Lobulu, B.R.N., *Citizens' Rights in Tanzania: Selected Essays* (Vol. I) (Arusha: S.J. Printers & Stationery, 1995), p. 42.

unconstitutional.[16] As Prof. Peter argues: 'It is in this context that the then Prime Minister Rashid Kawawa characterised a Bill of Rights as a luxury which merely invites conflicts.'[17] On the other hand, Nyerere thought that 'it would have seemed hypothetical for a colonial power to entrench guarantees of human rights on the eve of decolonisation: colonialism was itself a basic denial of human rights.'[18]

In the end, the British colonial government agreed to grant political independence to Tanganyika with a constitution that had no Bill of Rights, which was, in those days, an exception to the general rule that every British colony had to be given political independence with a Bill of Rights enshrined in its constitution.[19] Indeed,

> Such a *lacunae* left the population at the mercy of the ruling party and its government. For instance, it could have been impossible to declare a one-party political system because that would have been a violation of the right of the people to organise. It is both strange and laughable to talk of democracy in a one-party State […]. Therefore, it is clear that (the) absence of the Bill of Rights in a Constitution is a *conditio sine qua non* for the smooth functioning of a one-party system. In such a situation an undemocratic regime can freely do whatever it likes without the people having opportunity to contribute to the issue concerning their welfare. That is exactly what has been happening in Tanzania for more than (40) years.[20]

Before the Bill of Rights was enshrined in the Constitution in 1984, the Government put in place two strategies for protection of fundamental human rights and freedoms in Tanzania. First, the basic rights, which are normally enshrined in a Bill of Rights, were enumerated in a loose form in the Preamble to the Interim Constitution (1965).[21] The effect of this phenomenon in law was that citizens could not enforce the rights embedded in the Preamble, as it was held not to be part of the Constitution; and, thus, unenforceable. In *A.G. v Lesinoi Ndeinai and 2 Others*,[22] Kisanga, J.A., (as he then was), held that a preamble is:

> A declaration of our belief in these rights. It is no more than just that. The rights themselves do not become enacted thereby such that they

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[16] Peter, C.M., *Human Rights in Africa: A Comparative Study of the African Charter on Human and Peoples' Rights and the New Tanzanian Bill of Rights* (New York – Westport, Connecticut – London: Greenwood Press, 1990), p. 2.
[17] Peter, C. M., "Five Years of Bill of Rights in Tanzania," *op. cit,* p. 149. *See* also *Parliamentary Debates (Hansards)*, National Assembly, 3rd Meeting, 1088, 28th June 1962. This contention is true in view of what the Government later did in 1994 after the High Court of Tanzania, in *Rev. Christopher Mtikila v A.G.* [1993] TLR 31, had declared certain provisions in the Elections Act (1985) unconstitutional in 1993, the Attorney-General hastily tabled a Bill in Parliament amending Articles 21, 39 and 67 of the Constitution. The constitutional amendment, indeed, restored the provisions that were declared unconstitutional by the High Court despite the fact that the A.G. had lodged an appeal to the Court of Appeal of Tanzania, and without due regard to the Bill of Rights enshrined in the Constitution.
[18] Read, J.S., "Human Rights in Tanzania," *op. cit*, p. 129.
[19] Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials*, *op. cit*, p 3.
[20] *Ibid*, pp. 3-4.
[21] The Interim Constitution was enacted by Act No. 43 of 1965. It remained in force until 1976 when the process for a new and permanent Constitution finally resulted into the current Constitution of the United Republic of Tanzania in 1977.
[22] [1980] T.L.R. 214.

> could be enforced under the Constitution. In other words, one cannot bring a complaint under the Constitution in respect of violation of any of these rights as enumerated in the Preamble.[23]

This judicial reasoning was not something new, because Biron, J. (as he then was) held to the same effect in *Hatimali Adamji v East African Posts & Telecommunications Corporation*.[24]

In effect, 'the Preamble did not afford any protection to the citizen in situations of violation of his rights and freedoms.'[25]

However, if one adopts the view of the Indian Supreme Court as well as the recent developments in human rights jurisprudence in Tanzania,[26] preambular provisions are an integral part of the constitution; and, as such, they can be interpreted into the "enforceable" part of the constitution.[27] For instance, in *Rev. Christopher Mtikila v A.G.*,[28] the late Justice Lugakingira observed that:

> […] *fundamental rights are not gifts from the State.* They inhere in a person by reason of his birth and are therefore prior to the State and the law […]. Modern constitutions like our own have enacted fundamental rights in their provisions. This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law.

His Lordship was of the view that what modern constitutions do is to *translate* the fundamental rights into written codes, called Bills of Rights.[29] One of the novel constitutional provisions supporting Justice Lugakingira's view is found in Article 20(1) of the *Ugandan Constitution* (1995), which provides that 'fundamental rights of the individual are inherent and not granted by the state' and 'shall be respected, upheld and promoted by all organs and agencies of government and by all persons.'[30] Article 45 of the Ugandan Constitution is even more progressive as it contains an inclusive clause to cater for *all* human rights, which are not explicitly mentioned in the constitution. It categorically provides to the effect that,

> The rights, duties, declaration and guarantees relating to the fundamental and other human rights and freedoms specifically

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[23] Cited in Peter, C.M., "Five Years of Bill of Rights in Tanzania," *op. cit*, pp. 195-196.
[24] [1973] L.R.T. No. 6.
[25] Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials*, *op. cit,* p. 10.
[26] This matter is comprehensively discussed in particularly Mashamba, C.J., "Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights," LL.M. Thesis, Open University of Tanzania, 2007; and Mashamba, C.J., "Using Directive Principles of State Policy to Interpret Socio-Economic Rights into the Tanzanian Bill of Rights" *Law Reformer Journal* Vol. 2 No. 1, 2009.
[27] *Ibid*.
[28] [1995] TLR 31.
[29] *Ibid*.
[30] *See* Article 20(2) of the Ugandan Constitution (1995). For a detailed account on this subject *see* particularly Twinomugisha, B.K., "Exploring Judicial Strategies to Protect the Rights of Access to Emergency Obstetric Care in Uganda" *African Human Rights Law Journal* Vol. 1 ,No. 2 2007, pp. 283-306, at p. 294.

> mentioned in this Chapter [Four] shall not be regarded as excluding others not specifically mentioned.

In *Julius Ishengoma Francis Ndyanabo*, the Court of Appeal held that the constitutional provisions 'touching fundamental rights have to be interpreted in broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights (and) our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail.'[31] Therefore, the Court was of the opinion that:

> Access to court is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental *or not*. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the "last resort of the oppressed and bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard.[32] [Emphasis added].

In view of the Court of Appeal's observation, in *Ndyanabo,* 'Restrictions on fundamental rights must be strictly construed (by the Court).'[33] This view was also adopted by the High Court in *Rev. Christopher Mtikila v A.G.* (2005), where Justice Massati held that:

> A Constitution must not be construed in isolation, but in its context which includes the history and background to the adoption of the Constitution itself. It must also be construed in a way which secures for individuals the full measures of its provisions.[34]

Therefore, it is our considered view that before the Bill of Rights was incorporated in the Constitution, the courts in Tanzania could use the preambular provisions in interpreting human rights into the Interim Constitution in order to give practical effects the basic rights and fundamental freedoms set out therein.

Secondly, the government of the day established the Permanent Commission of Enquiry (PCE), which was, in actual sense, an ombudsman dealing with complaints from citizens against the government and party bureaucrats and report the same to the President.[35] However, the PCE had several limitations in relation to protection of fundamental rights and freedoms. The first limitation was that the PCE lacked institutional autonomy as it had to report all the completed investigations on complaints brought to it to the President, who would decide whether or not to pursue the matter brought to him.[36] Secondly, the President had powers 'to stop any

[31] *Ibid*, pp. 17-18.
[32] *Ibid*, p. 25.
[33] *Ibid*, p. 18.
[34] At p. 14.
[35] Peter, C.M., "Five Years of Bill of Rights in Tanzania," *op. cit.*
[36] Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials, op. cit.*

investigation which the Commission had undertaken at any point in time.'[37] And lastly, the President could bar the PCE from accessing any information. All these limitations rendered the PCE's performance ineffective, resulting into subjecting the fundamental rights and freedoms of the individual at the mercy of the executive arm of the State.[38]

Historically, the legal framework in Tanzania before 1984 accorded minimal importance to the protection of human rights in the country. It is apparent that the methods adopted by the Government were of no use in that the fundamental rights and freedoms were not enshrined in the Constitution; hence there were a number of instances of violation of human rights in which individuals had no redress. Thus, the Bill of Rights, which was incorporated in the Constitution of the United Republic of Tanzania (1977) in 1984, strives to address some of violations of human rights as will be seen in the next section of this work.

3.0 Constitutionalisation of Human Rights in Tanzania

In principle, human rights are birthrights. They inhere in a human being by virtue of being a human being. Thus, the inclusion of basic rights and fundamental freedoms in a constitution is a mere appreciation of the same. As the late Justice Lugakingira observed in the case of *Rev. Christopher Mtikila v. A.G.*,[39]

> [...] it is appropriate to recall, in the first place, that *fundamental rights are not gifts from the State. They inhere in a person by reason of his birth and are therefore prior to the State and the law*. In our times one method of judging the character of a government is to look at the extent to which it recognises and protects human rights. [...] Modern constitutions like our own have enacted fundamental rights in their provisions. *This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law.* It can therefore be argued that *the very decision to translate fundamental rights into a written code is by itself a restraint upon the powers of Parliament to act arbitrarily*.[40] [Emphasis added].

In this context, the Court was of the view that human rights are inherent in human beings and what constitutions do is to recognize and effectively protect human rights in their jurisdictions. In principle, constitutions catalogue human rights in what is technically called a Bill of Rights. Constitutions also do provide constitutional frameworks and mechanisms for the protection of human rights – that

[37] *Ibid*.
[38] *Ibid*. *See* also McAuslan, J.P.W.B. and Y.P. Ghai, "Constitutional Innovation and Political Stability in Tanzania: A Preliminary Assessment" *Journal of Modern African Studies*, Vol. 4 No. 4, 1966, p. 474; and OLuyede, P.A., "Redress of Grievances in Tanzania" *Public Law,* 1967, p.567.
[39] [1995] TLR 31.
[40] *Ibid*.

is, institutions and procedures through which a person who is of the view that his or her rights are violated, are being violated or are about to be violated can pursue and get effective remedies.

According to Chief Justice Nasim Hassan Shah in *Muhammed Nawaz Sharif v President of Pakistan*,[41]

> Fundamental Rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity that an individual can engage. Although constitutional guarantees are often couched in permissive terminology, in essence they impose limitations on the power of the State to restrict such activities. Moreover, Basic or Fundamental Rights of individuals which presently stand formally incorporated in the modern constitutional documents derive their lineage from and are traceable to the ancient Natural Law.[42]

Historically, the incorporation of the Bill of Rights in the Union Constitution was not due to the willingness of the ruling party, *Chama cha Mapinduzi* (CCM),[43] but rather a result of pressure from various sources, both internal and external.[44] As Prof. Maina argues,

> The National Executive Committee (NEC) of the ruling Party *Chama cha Mapinduzi*, in its usual tradition, had already prepared a package of what was to be amended in the Constitution. The package was tight and specific. Again, people were never consulted. They were being confronted with a *fait accompli* without being given an opportunity to say what changes they felt were necessary in their Constitution.[45] A Bill of Rights was not in contemplation.[46]

Amongst the areas that were specifically proposed by the NEC included the powers of the President; consolidation of the authority of the Parliament; strengthening the representative character of the National Assembly; consolidation of the Union; and consolidation of people's power.[47] However, at the time the proposals of the ruling party were made public, there were already three forces pressurising for inclusion of a Bill of Rights in the Constitution. Firstly, many people aired their views through

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[41] PLD 1993 DC 473.
[42] At p. 557.
[43] Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials, op. cit*, p. 11. *See* also Luoga, GA, F.D.A.M, "The Tanzanian Bill of Rights," in Peter, C.M. and I.H. Juma (eds.), *Fundamentals Rights and Freedoms in Tanzania, op. cit*, p. 39.
[44] Shivji, I.G., *et al* (eds.), *Constitutional and Legal System of Tanzania: A Civics Sourcebook, op. cit*, p. 91; and Ruhangisa, J.E., "Human Rights in Tanzania: the Role of the Judiciary", *op. cit*, p. 129.
[45] The proposals by the CCM's NEC were contained in *Chama cha Mapinduzi, 1983 NEC Proposals for Changes in the Constitution of the United Republic and the Constitution of the Revolutionary Government of Zanzibar* (Dodoma: C.C.M. Department of Propaganda and Mass Mobilization, 1983).
[46] Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials, op. cit*, p. 11.
[47] *Ibid*, footnote 52.

the media – state-censored as it was – pressing for the inclusion of the Bill of Rights in the Constitution.[48]

Secondly, there were pressures from Zanzibar pressing for return of the Bill of Rights in the Zanzibar Constitution, which ceased to be in force together with the Independence Constitution during the Zanzibar Revolution on 12th January 1964.[49] Following years of authoritarianism by the Karume regime after the 1964 Revolution, 'Zanzibaris wanted a Bill of Rights back in their Constitution in order to guard the rights already won against the state and to ensure that there was no return to authoritarianism.'[50] In addition,

> Zanzibaris had a trump card in that if the United Republic refused to have a Bill of Rights in the Union Constitution, then they were going to enact one in the Constitution of Zanzibar. Having fundamental rights and freedoms guaranteed in one part of the United Republic only was going to be embarrassing to the Union Government.[51]

Thirdly, the Union Government agreed to include a Bill of Rights in the Constitution due to the developments that were taking place in the African continent in relation to human rights protection.[52] The African Charter on Human and Peoples' Rights had just been adopted in 1981, with Tanzania having taken a leading role in its promulgation. Given its good record on campaigning for human rights and liberation of the African continent, it would be unbecoming for Tanzania to have no Bill of Rights in her Constitution.[53]

Therefore, the above factors combined to impel the Government of the United Republic of Tanzania to incorporate the Bill of Rights in the Constitution in 1984 vide the Constitution (Fifth Amendment) Act (1984)[54] and came into force in March 1985. This was a significant turn of events, for the ruling party's 1983 proposal did not contain, nor did the CCM stalwarts envisage, anything concerning such a Bill of Rights.[55] As Ruhangisa argues:

> Although Tanzania is one of the countries which adopted the African Charter on Human and Peoples' Rights in 1981, the government had not contemplated seriously the idea of incorporating a Bill of Rights in the Constitution until it was caught unaware by the course the debate

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[48] *Ibid*, p. 11.
[49] The Independence Constitution of Zanzibar (1963) had a Bill of Rights, which was abrogated by the Revolutionary Government after the January 12, 1964, Revolution. *See* Reads, J.S., "Human Rights in Tanzania," *op. cit*, p. 129; and Shivji, I.G., *Pan-Africaninsm or Pragmatism? Lessons of Tanganyika-Zanzibar Union* (Dar es Salaam: Mkuki na Nyota Publishers/Addis Ababa: Organisation for Social Research in Eastern and Southern Africa (OSREA), 2008), Capter Two, pp. 41-68.
[50] Peter, C.M., "Five Years of Bill of Rights in Tanzania," *op. cit*, p. 150.
[51] Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials, op. cit*, p. 11-12.
[52] *Ibid*.
[53] Welch, C.E., Jr., "The OAU and Human Rights: Towards a New Definition" *Journal of Modern African Studies*, Vo. 19 No.3, 1981, p. 401.
[54] Act No. 5 of 1984.
[55] Mughwai, A., "Forty Years of Struggles for Human Rights in Tanzania: How far have we Travelled?" *op. cit*, p. 55.

had taken. Since the government had not prepared itself to hit back with the same vigour against these demands it had to make some sort of a 'concession' and include a Bill of Rights in the Constitution.[56]

Nonetheless, the justiciability of the Bill of Rights was delayed until 1988 vide the Constitution (Consequential, Transitional and Temporary Provisions) Act (1984).[57]

4.0 Constitutional Protection of Human Rights in Tanzania

It is well settled that, generally, human rights 'are best protected at the domestic or national level'[58], which has been described as an 'inner layer, forming the core of protection'.[59] Where the victim of violation is unable to find protection at the national sphere, international mechanisms for the protection of rights exist at the global and regional spheres as bodies of last resort for vindicating an individual's human rights.[60] Therefore, national judicial institutions have a great transformational role to play in national development particularly when it comes to vindicating human rights at the national level.[61] As the European Court of Human Rights held in *Kudla v. Poland*[62], national States have an obligation under international human rights law to entrench in the constitutional legislative frameworks effective remedies for the protection and vindication of human rights. According to the European Court of Human Rights, the provision of effective remedies, therefore, has a crucial function to fulfil in a system that emphasizes subsidiarity, according to which 'the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on national authorities.'[63]

Under international human rights law, what is important in the evaluation of the efficacy of fundamental rights and freedoms at municipal level is not only whether a State has legislated the said rights into its municipal legal system; but the degree of guarantee and enjoyment of these rights and freedoms by its people.[64] This means that in order for human rights to be implemented effectively at the municipal level, there must be put in place an effective protection mechanism of the rights themselves.[65] Indeed, it is true that:

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[56] Ruhangisa, J.E., "Human Rights in Tanzania: The Role of the Judiciary", *op. cit*, p. 131.
[57] Act No. 16 of 1984.
[58] Ebobrah, S.T., "Litigating Human Rights in Sub-regional Courts in Africa: Prospects and Challenges" 17 *RADIC* (2009), p. 86.
[59] Viljoen, F., *International Human Rights in Africa* (Oxford: Oxford University Press, 2007), p. 9.
[60] *See* particularly De Schutter, O., *International Human Rights Law: Cases, Materials and Commentary* (Cambridge: Cambridge University Press,2011), pp.729-740.
[61] *Ibid*, p. 729. *See* also Heyns, C. and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (The Hague: Kluwer Law International, 2002); and Conforti, B., *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997).
[62] Application No. 30210/1996.
[63] De Schutter, *op. cit*, p. 736.
[64] Rudolph, J., "A Right to Work,' in Ramcharan, B.G. (ed.), *Judicial Protection of Economic, Social and Cultural Rights*, Leiden/Boston: Martinus Nijhoff Publishers, 2005), p. 247.
[65] Peter, C.M., "The Human Rights System: An Overview," *op. cit*, pp. 3-4.

> Any right or freedom is useful to the targeted person(s) or community if it can be enforced. It does not serve any purpose to inform a person that he or she has a given right or freedom, if that person cannot enforce that right or freedom. It is, therefore, important that a clear articulation of various rights and freedoms be closely linked with and followed by a clearly and elaborately provided mode of implementation or enforcement. Absence of such an enforcement mechanism reduces the right or freedom to naught.[66]

Therefore, it is conventional that in most contemporary jurisdictions, Bills of Rights in most constitutions contain provisions for enforcement of fundamental rights and freedoms guaranteed in the Bills of Rights. This part, therefore, briefly will discuss the general enforcement mechanism of human rights in Tanzania.

As we have already seen, the Bill of Rights was incorporated in the Tanzanian Constitution in 1984. Although the Bill of Rights contained provisions for the enforcement of human rights,[67] the justiciability of the Bill of Rights itself was suspended for three years.[68] The suspension was made in order for the Government to "clear" out laws that were seen as in direct conflict with the Bill of Rights.[69] But, as Prof. Peter points out,

> There have been differing arguments as to the legal value of this suspension. The majority argue that the effect was not to suspend the duty of the government to respect fundamental rights and freedoms of the individual, but rather to suspend the justiciability part of the rights.[70] That is to say, the government still had the duty to respect the rights and freedoms of the individual but where these (rights) were violated the individual had no remedy in law.[71]

However, during this period there was no significant legislative activity to change or amend the existing laws that seemed to be repugnant to the Bill of Rights.[72] There is an explanation that the delay to make the Bill of Rights justiciable was due to conflicting schools of thoughts amongst the commissioners of the Law Reform Commission of Tanzania (LRCT), which was mandated to see to it that the existing

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[66] Peter, C.M., "The Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice," *op. cit*, p. 47.

[67] *See* Article 30(3) of the *Constitution* of Tanzania.

[68] This suspension was done through section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 (Act No. 16 of 1984).

[69] *See* Peter, C.M., "The Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice," *op. cit*, p. 51; and Mughwai, A., "Forty Years of Struggles for Human Rights in Tanzania: How Far have we Travelled?", *op. cit*, p. 57. *See* also Mashamba, C.J., "Casting the Net Wide: Litigating Socio-Economic Rights beyond the Bill of Rights in Tanzania," *op. cit*; and Mashamba, C.J., "Using Directive Principles of State Policy to Interpret Socio-Economic Rights into the Tanzanian Bill of Rights," *op. cit*.

[70] That is, Article 30(3) of the Constitution of Tanzania.

[71] Peter, C.M., "The Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice," op. cit.

[72] *Ibid*, p. 58.

laws conformed to the Bill of Rights. While some of them, especially those coming from the Government, wanted to retain most of the laws identified as being likely to conflict with the Constitution, some were totally opposed to that.[73] Thus, as the then Attorney-General pointed out, there were two options open to the Government:

> One, the Government could place before the National Assembly a Bill seeking further suspension of the Constitution after March, 1988 in so far as the justiciability of the Basic Rights is concerned if the government felt fully convinced that such a course of action is in the interest of the country. Two, at the expiry of the three year period i.e. 1st March, 1988, to allow the constitutional provisions on the Basic Rights to be fully justiciable.[74]

Nonetheless, the Government took the second option – i.e., to allow the constitutional provisions on the Basic Rights to be fully justiciable, which had 'one consequence, namely, to shift the burden to the judiciary. It was now up to the courts of law, and the High Court to be specific, to determine the constitutionality of various laws.'[75] As Prof. Peter argues,

> This would again depend on whether a particular law was a subject of litigation before the court. It was up to the parties to raise the matter or the court itself in the exercise of its inherent jurisdiction could raise the matter *suo moto*. That also meant that the laws which were not challenged in the courts, unconstitutional as they might be, would remain in the statute books.[76]

Therefore, the Bill of Rights became justiciable in 1988, but without the repeal or amendment of the laws felt to be draconian.[77] At the same time, there was no any enabling provision of the law that was envisaged under Article 30(4) of the Constitution for regulating human rights litigations in the High Court of Tanzania. So, without an enabling procedural law for enforcing human rights, it was apparent that the High Court had to bear this responsibility.[78]

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[73] Peter, C.M., "Five Years of Bill of Rights in Tanzania," *op. cit*, p. 152.
[74] This was stated by the then Minister for Justice and A.G., D.Z. Lubuva, at a public talk on the future of the Bill of Rights in Tanzania at the Faculty of Law of the University of Dar es Salaam on 16th October, 1987; and it is quoted in Peter, *ibid*.
[75] *Ibid*, p. 153.
[76] *Ibid*.
[77] Most of the laws that were repugnant to the Bill of Rights, which were still in force at the time the Bill of Rights became justiciable in 1988, include Area Commissioners Act, 1962 (Cap. 466); Collective Punishment Ordinance, 1921 (Cap. 74); Deportation Ordinance, 1921 (Cap. 38); Human Resources Deployment Act, 1983 (Act No. 6 of 1983); Regions and Regional Commissioners Act, 1962 (Cap. 490); and Preventive Detention Act, 1962 (Cap. 461). Others included Corporal Punishment Ordinance, 1930 (Cap. 17); National Security Act, 1970 (Act No. 3 of 1970); Government Proceedings Act, 1967 (Act No. 16 of 1967); Expulsion of Undesirables Ordinance, 1930 (Cap. 39); Witchcraft Ordinance, 1928 (Cap. 18); and Townships (Removal of Undesirable Persons) Ordinance, 1954 (Cap. 104).
[78] Peter, C.M., "The Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice," *op. cit*, p. 51.

5.0 Judicial Protection of Human Rights in Tanzania

There are two institutions forming the core of the human rights protection mechanism in Tanzania: the Commission for Human Rights and Good Governance (CHRAGG); and the courts of law. However, in this article we only examine the role of the Judiciary in litigating human rights in Tanzania.

5.1 Overview of the Court's Human Rights Protection Function

The Judiciary is a constitutional creature, mandated to interpret laws of the country. In terms of Article 107A of the Constitution: 'The Authority with final decision in the dispensation of justice in the United Republic shall be Judiciary.' In terms of the jurisdiction of litigating human rights cases, Article 30(3) is the founding provision whereby the procedure for the enforcement of human rights in Tanzania is founded in Article 30(4) of the Constitution, which *requires* the "state authority" to enact legislation for the purpose of:

(a) regulating procedure for instituting proceedings pursuant to this Article;
(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this Article;
(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.

Therefore, enabling procedural law on the enforcement of the Bill of Rights in courts is the Basic Rights and Duties Enforcement Act[79] enacted in 1994 accordance with a constitutional provision in the Bill of Rights.[80] On 26th May 2014, the Chief Justice promulgated the Basic Rights and Duties Enforcement (Practice and Procedure) Rules to advance and realize the basic rights and duties contained in the Constitution. The specific procedure and practice concerning this procedural framework for litigating human rights in courts are examined below.

5.2 The Enabling Law on the Enforcement the Bill of Rights

As noted above, the enabling law on the enforcement of the Bill of Rights was passed ten years after the Bill of Rights was incorporated in the Constitution of Tanzania; that is, the Basic Rights and Duties Enforcement Act (1994)[81] (henceforth, the "BRADEA"). Twenty years after the enactment of the BRADEA, on 26 May 2014 the Chief Justice, Mohammed Othman Chande, promulgated the Basic Rights and Duties Enforcement (Practice and Procedure) Rules (the Rules).[82] The Rules apply to

[79] [Cap. 3 R.E. 2002].
[80] Article 30(4) of the 1977 Constitution.
[81] [Cap. 3 R.E. 2002].
[82] These Rules were published in the Gazette of the United Republic of Tanzania No. 35 Vol. 95 (Supplement No. 34) dated 29 August 2014.

all proceedings under the BRADEA[83] 'with a view to advancing and realizing the basic rights and duties contained in the Constitution.'[84] Before we consider the current procedure and practice in the Court relating to vindication of human rights, we shed some light on the procedure and practice before the enactment of the Basic Rights and Duties Enforcement Act.

5.2.1 Procedure and Practice before the Enactment of the Procedural Law

As noted above, the incorporation of the Bill of Rights into the 1977 Constitution in 1984 did not go together with the enactment of a law providing for the rules of procedure and practice in the High Court relating to proceedings in cases of violation of the rights enshrined in the Bill. That came only in 1994 when the Basic Rights and Duties Enforcement Act was enacted. So, in order to fill this *lacunae,* an interim measure was adopted: section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance,[85] was amended to the effect that,

> 17A .-(2) In any proceedings involving the interpretation of the Constitution with regard
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> > to the basic freedoms, rights and duties specified in Part III of Chapter I of the Constitution, *no hearing shall be commenced or continued unless the Attorney-General or his representative designated by him for that purpose is summoned to appear as a party to those proceedings*; save that if the Attorney-General or his designated representative does not appear before the Court on the date specified in the summons, the court may direct that the hearing be commenced or continued, as the case may be, *ex-parte*. [Emphasis supplied].

As it can be gathered from the provisions of this section, there was no detailed procedure on how the Court would proceed to hear and determine cases revolving around the violation of the Bill of Rights. The law only required the AG to be made party to such proceedings.

In fact, there were practical problems associated with the new subsection's requirement to make the Attorney-General party to proceedings involving the interpretation of the Bill of Rights, as was the case in *National Housing Corporation v Tanzania Shoe Company and Others*.[86] This was an appeal arising from the decision of the High Court (Mwalusanya, J. as he then was) granting orders of *certiorari* and prohibition against the appellant, the National Housing Corporation (NHC), for

[83] *Ibid*, Rule 2(1).
[84] *Ibid*, Rule 2(2).
[85] Cap. 360 of the Revised Laws of Tanzania. This amendment was effected vide Act No. 27 of 1991.
[86] [1995] TLR 251 (CA).

having effected rent increases to its tenants to the tune of 800% per annum. Before the matter proceeded to hearing the trial Judge, following representations from the Bar, ruled that in terms of section 17A(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, as amended by Act No. 27 of 1991, the Attorney-General should be served to appear.

On appeal, the Court of Appeal held that: 'In order to comply with that sub-section, it was necessary to show that the Attorney General or his representative designated for that purpose was summoned to appear as a party to the proceedings.' However, in this case, although the Attorney General was duly summoned, in the summons the Attorney General was not cited as a party. He was summoned merely as the Attorney General, while the only parties to the case are shown to be "Tanzania Shoe Company Ltd. and 28 Others (plaintiffs) and National Housing Corporation (defendant)."[87]

At this juncture, the Court of Appeal stated the rationale of section 17A(2) of Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance in the following regards,

> *The clear object of sub-section (2) above quoted is to make sure that the government is afforded the opportunity to be heard upon an application for a prerogative order.* Thus it seems to us not an irregularity which went to the root of the matter. For, one can say that the Government was, in a real sense, a party to the (*Lausa*) case especially as the Senior State Attorney on behalf of the Attorney General and representing the Minister for Lands, Housing and Urban Development, appeared and participated in the proceedings. In other words the government was, in a true sense, afforded the opportunity to be heard. There was compliance with the spirit, though not with the letter, of the sub-section, and had the Attorney General been cited instead of the Minister, it would not have made the slightest difference in the conduct of the proceedings. [Emphasis supplied].

Therefore, *National Housing Corporation v Tanzania Shoe Company and Others* did not lay down the procedure and practice relating to litigating human rights before the High Court. Litigant then resorted to commencing human rights cases as if they were ordinary civil suits, provided that they enjoined the AG as a necessary party under the foregoing law. This procedure, however, left a lot to be desired up until 1994 when the BRADEA was enacted in line with Article 30(4) of the Constitution.

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[87] *Cf*: *Lausa Alfan Salum and Others v Minister for Lands and Housing and Urban Development and National Housing Corporation* [1994] TLR 237 in which the constitutionality of G.N. No. 41 of 1992 was challenged. Although the A.G. was not *expressly* cited as a party, the Court of Appeal proceeded to deal with the appeal on the merits. This case was distinguished in *National Housing Corporation v Tanzania Shoe Company and Others* in the following respects:

'It seems to us, however, that [the *Lausa*] that case is distinguishable. In the first place in that case no objection was raised

5.2.2 Procedure and Practice after the Enactment of Rules of Procedure

The enactment of the Basic Rights and Duties Enforcement Act (1994) strives to make provision for rules of procedure and practice for the enforcement of the justiciable fundamental rights and freedoms in the Constitution of Tanzania. Under Section 1(2), this Act covers all claims and causes of action founded on the provisions of Articles 12 to 29 of the Constitution in relation to the basic rights, duties and fundamental freedoms. It also vests the High Court of Tanzania with original jurisdiction in cases relating to fundamental rights and freedoms.[88]

However, the BRADEA did not bring about clear rules of procedure and practice in the High Court pertaining to cases of violation of the Bill of Rights. Consequently, this omission resulted in a number of challenges (such as lack of clear procedure in conducting proceedings concerning human rights cases in courts, the type of matters before the court[89], and representation), which necessitated the promulgation of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules (the Rules) by the Chief Justice in 2014. In general, the Rules are progressive in the sense that they provide clear rules of procedure and practice on the enforcement of the Bill of Rights, distinct from rules applicable in other civil proceedings.[90] In particular, the Rules provide for essential steps to be undertaken in the proceedings before the High Court as well as they progressively vest powers in a District Court or a Court of Resident Magistrate to receive and determine cases of violation of human rights referred to them by a Primary Court.[91]

Therefore, the discussion herein below highlights the procedure and practice set out in the Rules. In particular, the Rules set out two ways through which a case for the enforcement of human rights under the Bill of Rights can be referred to the Court: i.e. by the petitioner, or by reference from a subordinate court.

(a) Stages in the Proceedings for the Enforcement of Human Rights Instituted by the Petitioner

In human rights proceedings filed by a petitioner there are about seven essential steps to be undertaken one after another in light of the Rules. As considered below, the Rules set out the following mandatory steps in human rights proceedings:

(i) filing a petition by way of originating summons;
(ii) serving the petition on the respondent;

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[88] Section 4 of the Basic Rights and Duties Enforcement Act (1994).

[89] Whereas the generally acceptable practice was to designate human rights cases as "Miscellaneous Civil Cause No…", in one case before the High Court (Tabora Registry): *National Organization for Legal Assistance v A.G.* (2009), the Court dismissed the matter for want of the designation: "Constitutional Petition No…".

[90] It should be noted that, under Rule 19, the Rules give the Court room to apply the procedure and practice applicable in the High Court in civil cases where there is a *lacunae* in the rules concerning a certain matter facing the Court in human rights proceedings before it.

[91] Rule 2(3) of the Rules provides that the Rules do not limit or affect the inherent powers of the Court 'to make necessary orders for the ends of justice or to prevent abuse of the process of the Court.'

(iii) filing a reply to the petition;
(iv) determination of the competence of the petition;
(v) filing written submissions;
(vi) filing an affidavit in proof of service of the petition; and
(vii) hearing of the petition.

(i) Step I: Petition Filed by way of Originating Summons

Human rights proceedings initiated by a petitioner are set in motion by the filing of a petition in accordance with the provision of the Basic Rights and Duties Enforcement Act. The petition must be filed by way of Originating Summons.[92] An "originating summons" is one of the modes of commencing a civil action in court. At common law, civil actions commenced by way an originating summons normally relate to matters where people agree on the facts, but need a judge to decide on the meaning of a law, contract or other document.[93] That is to say, the dispute at the centre of the civil action to be commenced by an originating summons 'is concerned with matters of law where there is unlikely to be any substantial dispute of fact.'[94] In many jurisdictions, an originating summons is heard based on affidavit(s) filed in support and in opposition of the application in chambers or open court.[95]

Although the Rules are silent, the general procedure and practice in Tanzanian courts is that every application (be it a Chamber Summons or Originating Summons) must be accompanied by an Affidavit supporting the same.[96] In *Tanzania Railways Ltd. v The Minister for Labour, Employment and Youth Development & 2 Others*[97] the Labour Court held, *inter alia*, that no application in Court can derogate from this statutory requirement. As such, since Order 43 Rule 2 of the Civil Procedure Code (CPC) requires the filing of an application, i.e. a Chamber Summons accompanied by an affidavit, any party to a civil suit who does anything to the contrary without leave of the court offends the law.

As Justice Msoffe remarked in *Samwel Kimaro v Hidaya Didas*[98], 'an affidavit is nothing more than a statement made by a person under oath.'[99] An affidavit is evidence of facts 'stated on oath or affirmation by a deponent used in Court

[92] *Ibid*, Rule 4.
[93] *See* a definition of an originating summons available at www.lexion.ft.com/Term?term=originating summons (accessed 19 September 2015).
[94] http://www.elitigation.sg/getreadt/os-a.html (accessed 19 September 2015).
[95] *Ibid.*
[96] See, for instance, Rules 48(1) and 49(1) of the Court of Appeal Rules (2009) and O. XLIII r. 2 of the Civil Procedure Code (Cap. 33 R.E. 2002).
[97] High Court of Tanzania (Labour Division) at Dar es Salaam, Application No. 4 of 2008 (unreported).
[98] Court of Appeal of Tanzania at Mwanza, Civil Application No. 20 of 2012 (ruling delivered on 11 October 2013) (unreported).
[99] *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman, Bunju Village Government* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 147 of 2006 (unreported).

proceedings to assist or enable the court to determine a dispute before it.'[100] In *D.B. Shapriya and Co. Ltd. v Bish International BV*[101], the Court of Appeal pointed out that:

> Affidavit has been defined as a written document containing material and relevant facts or statements relating to the matters in question or issue and sworn by the deponent before a person or officer duly authorized to administer any oath or affirmation or take any affidavit. It follows from this definition that an affidavit is governed by certain rules and requirements that have to be followed.

So, the requirement to also attach an Affidavit to the Originating Summons initiating a human rights petition is supported by the fact that Rule 6(1) of the Rules requires the respondent to file its reply to the petition accompanied by a counter-affidavit. Conversely, a counter-affidavit is a sworn statement in reply to an affidavit. As such, Rule 6(1) presupposes the existence of an affidavit (a sworn statement) accompanying the Originating Summons, in line with the provisions of Rule 19 of the Rules, which provides categorically that: 'Where there is any matter not provided for in these Rules, the practice and procedure applicable to the High Court shall apply.'

Another point that seems not to have been contemplated in the Rules is the lack of a requirement for the Originating Summons to bear the enabling provisions of the law under which it is made.[102] The superior courts in this country have held the view that applications must cite the relevant provisions of the law under which they are made[103], because non-citation or improper citation of the enabling provisions of the law renders the application incompetent for failing to properly move the court.[104] In a number of cases, both the Court of Appeal[105] and the High Court[106] have emphasised the need to comply with this mandatory requirement in the context of

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[100] NGALO, C., "Rules of the Court of Appeal of Tanzania", in PETER, C.M. and H. Kijo-Bisimba (Eds.), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* Dar es Salaam: *Mkuki na Nyota*/Legal and Human Rights Centre, 2007, pp. 113-136, p. 127.

[101] Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 53 of 2002 (unreported).

[102] This *lacunae* is also dealt with by Rule 19 of the Rules as cited above.

[103] *See* also *Tanzania Revenue Authority v Merina Mwayole*, op. cit; and *Said Mohamed & 9 Others v M/S Mees Ltd.* High Court of Tanzania (Labour Division) at Morogoro, Labour Revision No. 313 of 2010 (Unreported).

[104] *See* particularly *Tanzania Telecommunications Co. Ltd. v. Augustine Kibandu* High Court of Tanzania (Labour Division) at Dar es Salaam, Application for Revision No. 122 of 2008 (unreported); *Tanzania Revenue Authority v. Merina Mwayole* High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Revision No. 100 of 2009 (unreported); and *Tanzania Railway Ltd. V. The Minister for Labour, Employment and Youth Development & 2 Others* op. cit.

[105] *See* particularly *Edward Bachwa & Three Others v The Attorney General & Another* Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 128 of 2008 (unreported); *Chama cha Walimu Tanzania v. A.G.* Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 151 of 2008 (unreported) (CAT), *op. cit*; *Aloyce Msele v The Consolidated Holding Corporation, op. cit; and Salvatory Syridion and Steven Mbwana v. Williamson Diamond Ltd.*, op. cit.

[106] *See* particularly *Tanzania Telecommunications Co. Ltd. v. Augustine Kibanduo op. cit*; and *National Oil (T) Ltd. v. Bruno Joseph* High Court of Tanzania (Labour Division) at Dar es Salaam, unnumbered Application of 2009 arising from a decision by Rweyemamu, J., in an Application for Review of the decision by Mandia, J. (as he then was) in Revision No. 115 of 2008 (unreported). *See* also *Harish A. Jina* (By his Attorney *Ajar Patel) v. Abdulrazak Jussa Suleiman* Court of Appeal of Tanzania at Zanzibar, Civil Application No. 2 of 2003 (unreported); and *Chama cha Walimu Tanzania v AG* (CAT), *op. cit.*

the Court of Appeal decisions.[107] The Court of Appeal of Tanzania has also held, in a number of cases, that citing a wholly inapplicable provision of the law is a worse situation than citing a correct section but a wrong sub-section.[108]

(ii) Step II: Service of the Petition on the Respondent

The second step to be undertaken in human rights proceedings initiated by the petitioner is effecting service of the petition on the respondent. Under Rule 5(1), the Rules oblige the petitioner to serve the respondent with a copy of the petition within seven (7) days after the petition was filed in court. Although this provision is constructed in a mandatory manner, there is no prescribed sanction in case the petitioner fails to effect service within the prescribed time. However, the Court has discretion to adjourn the hearing in case of failure of service so as to facilitate the process of serving the petition on a person who ought to be so served.[109]

(iii) Step III: Reply to the Petition and Ancillary Preliminary Points of Law

After the petition is duly served on the respondent or on any other person who ought to be served, the respondent is obliged to file a reply to the petition within fourteen (14) days from the date of service. The reply to the petition must be accompanied by a counter-affidavit.[110] Where the respondent fails to reply to the petition within the prescribed period, the court *may* hear and determine the petition *ex-parte*.[111]

Where the respondent desires to raise a point of preliminary objection, he or she should file a notice to that effect at the time when the reply to the petition is filed.[112] Notably, a preliminary objection challenging the jurisdiction of the court shall be heard by a single Judge.[113] A single Judge also has power to consolidate applications; particularly so when the applications involve same parties or respondents, same matters and same grounds.[114]

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[107] *See* particularly *Sea Saigon Shipping Ltd. v Mohammed Enterprises (T) Ltd*. Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 37 of 2005 (unreported); *Chama cha Walimu Tanzania v AG* (CAT), op. cit; *Tanzania Heart Institute v. The Board of Trustees of the National Social Security Fund* Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 109 of 2008 (unreported); Mathias Eusebi Soka v. The Registered Trustees of Mama Clementina Foundation & 2 Others ***Court of Appeal of Tanzania at Dar es Salaam,*** Civil Appeal No.40 of 2001 (unreported); Anthony J. Tesha v Anitha Tesha, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 10 of 2003 (unreported); and *National Bank of Commerce v. Sadrudin Meghji* Court of Appeal of Tanzania at Dar es Salaam, Civil Application No. 20 of 1997 (unreported).

[108] *See* particularly *Chama cha Walimu Tanzania v. AG,* ibid; and ***Harish A. Jina*** **(**By his Attorney ***Ajar Patel) v. Abdulrazak Jussa Suleiman Court of Appeal of Tanzania at Zanzibar***, Civil Application No. 2 of 2003 (unreported).

[109] Rule 5(3) of the Rules.

[110] *Ibid*, Rule 6(1).

[111] *Ibid*, Rule 6(2).

[112] *Ibid*, Rule 7(1).

[113] *Ibid*, Rule 7(2).

[114] *Ibid*, Rule 8.

(iv) Step IV: Determination of the Competence of the Petition

The fourth step undertaken in human rights proceedings is the determination of the competence of the application, which is done by a single Judge within thirty (30) days of completion of pleadings. Together with determining the competence of the application, the single Judge also has powers to determine all preliminary matters of law.[115]

Where the single Judge determines that the matter is competent, it shall be assigned to a panel of three Judges for hearing.[116] If the single Judge considers the matter to be vexatious or frivolous the application will be declared incompetent, subsequent to which an aggrieved party may refer the grievance to a panel of three Judges for re-examination.[117]

(v) Step V: Filing Written Submissions

Now the Rules require that parties should submit written submissions in support of their respective cases or opposition of their opponents' cases. In both civil and criminal proceedings in all categories of courts, submissions are elaborations or explanations on the law, facts and evidence tendered in court; they are not evidence in themselves.[118] Submissions tend to summarize parties' arguments and cannot be used to introduce evidence that was not adduced in the course of hearing of the matter before the court.[119]

In human rights litigation, Rule 13(1) makes it mandatory for the petitioner to file and serve on the respondent written submissions in support of his or her application[120] within seven (7) days after the determination of the competence of the application.[121] Thereafter, the respondent is obliged to its reply to the petitioner's written submissions within seven (7) days of service of the petitioner's written submissions.[122] In particular, the written submissions must contain:

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[115] *Ibid*, Rule 9(1).
[116] *Ibid*, Rule 15.
[117] *Ibid*, Rule 9(2).
[118] *See* particularly *The Registered Trustees of the Arch Diocese of Dar es Salaam v. the Chairman, Bunju Village Government* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 147 of 2006 (unreported). *See* also Mashamba, C.J., *Annotated Civil Procedure and Practice in the Court of Appeal of Tanzania* (Nairobi: LawAfrica Publishers, 2015).
[119] *Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Co. Ltd. v. Mbeya Cement Co. Ltd. & National Insurance Corporation (T) Ltd.* [2005] TLR 41.
[120] Under Rule 3 of the Rules, "application" means 'an application brought by or on behalf of a person for the purpose of enforcing or securing the enforcement of fundamental rights.'
[121] *Ibid*, Rule 13(1).
[122] *Ibid*, Rule 13(2).

(a) a brief summary of facts with reference to exhibits (if any) attached to the petition[123];
(b) issues for determination by the Court[124];
(c) a concise statement of arguments on each issue with supporting authorities[125]; and
(d) a list of authorities and copies of unreported cases.[126]

(vi) Step VI: Filing an Affidavit in Proof of Service of the Petition

The sixth step in proceedings concerning human rights violation is the mandatory requirement imposed on the petitioner to file in court an affidavit in a proof of, *inter alia*, service of the petition. Under Rule 5(2), the petitioner must, within three (3) days before the hearing date, file an affidavit in court stating:

(a) the names, address of place and date of service on all persons who have been served with the originating summons[127]; and
(b) in case of non-service, facts and reasons why service 'has not been effected to a person who ought to be served under the provision of this rule.'[128]

(vii) Step VII: Hearing of the Petition

As noted above, and in terms of Section 10 of the Basic Rights and Duties Enforcement Act (1994) and Rule 15(1) of the Rules, every human rights petition must be heard by a panel of three High Court Judges. The panel must be assigned to hear the petition within seven (7) days after a single Judge finds the petition to be competent in terms of Rule 9(1).[129] The panel is obliged to hear and determine the petition within ninety (90) days after being so assigned.[130] However, the Rules are silent as to the timeframe within which a judgment of the Court should be delivered and the manner through which it would be pronounced.

While presiding over the hearing of a human rights petition, the Court has several sets of discretionary powers:

(a) to receive evidence by affidavit in addition to or in substitution of oral evidence and it 'may limit the time for oral submissions by the parties'[131]; and

[123] *Ibid*, Rule 13(3)(a).
[124] *Ibid*, Rule 13(3)(b).
[125] *Ibid*, Rule 13(3)(c).
[126] *Ibid*, Rule 13(3)(d).
[127] *Ibid*, Rule 5(2)(a).
[128] *Ibid*, Rule 5(2)(b).
[129] *Ibid*, Rule 15(1).
[130] *Ibid*, Rule 15(2).
[131] *Ibid*, Rule 13(3)(a).

(b) to call, examine and allow the cross-examination of any witness where 'it is of the opinion that the evidence is likely to assist the Court to arrive at a just decision'.[132]

It should be noted that cross-examination of a witness may only be done upon leave of the Court.[133]

One thing that is missing in the Rules is a specific provision requiring the proceedings in human rights cases to be conducted either in open court (where members of the public would attend), or in camera (where only the parties and their representatives would participate in the proceedings).[134] This provision is so important in relation to human rights cases because, while some cases have great public interest compelling the court to conduct the proceedings in open court; there are other cases of human rights violations whose proceedings require the court to conduct the hearing in camera in order to protect the litigants and other victims from further harm that may be occasioned by the exposure of their sufferings to the public.

(b) Proceedings for the Enforcement of Human Rights Upon Reference by a Subordinate Court

Apart from the institution of human rights cases by a petition, the Court may also be seized with jurisdiction to determine a human rights case through reference of a case from a subordinate court. This takes place where a question concerning a breach of any basic right or fundamental freedom arises in any proceedings before a subordinate court.[135]

Unlike the provisions of Article 30(3) of the Constitution (vesting exclusive jurisdiction of determination of human rights petitions), there are two levels of reference of human rights cases under the Rules. Firstly, the matter may be referred to a District Court or Court of Resident Magistrate from a Primary Court; and, secondly, a matter may be referred to the High Court from a District Court or Court of Resident Magistrate.[136]

(i) Jurisdiction of a District Court or Court of Resident Magistrate to Hear and Determine Referrals from Primary Courts

In the first place, where it is faced with a question concerning the breach of any basic right or fundamental freedom arising in any proceedings before it, the presiding

[132] *Ibid*, Rule 13(3)(b).
[133] *Ibid*, Rule 13(4).
[134] However, Rule 19 of the Rules can still be invoked to address this anomaly.
[135] *Ibid*, Rule 10(1).
[136] *Ibid*.

Primary Court Magistrate must prepare a statement of facts setting out the question(s) raised and his or her opinion(s) on the question(s). The statement of facts must be referred to a District Court or Court of Resident Magistrate within fourteen (14) days after it was discerned by the Court.[137]

As noted above, the Rules have vested certain amount of jurisdiction on a District Court or Court of Resident Magistrate to determine human rights cases upon reference from a Primary Court.[138] In particular, Rule 10(2) expressly provides that:

> The Court of a Resident Magistrate or a District Court *shall*, within fourteen days from the date of receiving the statement of fact referred to it under paragraph (a) of sub rule (1), *determine the matter* and *may refer the matter to the High Court if it deems appropriate*. [Emphasis added].

The underlined phrases signify that the District Court or Court of Resident Magistrate are seized with the jurisdiction to determine human rights cases referred to them. They may only refer such human rights cases to the High Court where they deem appropriate to do so. Necessarily, this will mitigate the challenge of the requirement to refer all such referrals to the High Court, a challenge that had haunted the human rights discourse in the country for the past twenty years or so. This challenge is considered below.

(ii) Jurisdiction of the High Court to Hear and Determine Referrals from a District Court or Court of Resident Magistrate

The second arm of referrals of human rights cases is in respect of cases so determined by the District Court or Court of Resident Magistrate. In this case, the presiding Magistrate must prepare a statement of facts setting out the question(s) raised and his or her opinion(s) on the question(s). The statement of facts must be referred to the High Court within fourteen (14) days after it was discerned by the concerned Court.[139] The hearing of a referral before the High Court is presided over by a panel of three Judges and must take place within ninety (90) days upon receipt of the referral.[140]

In all situations, where a matter is referred to a superior court for the determination of questions concerning violation of human rights, the proceedings in the subordinate court will be stayed pending the determination of the matter by the

[137] *Ibid*, Rule 10(1)(a).
[138] This vesting of jurisdiction on a District Court or Court of Resident Magistrates to hear referrals from Primary Courts in respect of human rights seems to contradict the provision of Article 30(3), which vests jurisdiction to hear cases of human rights violation in the High Court.
[139] Rule 10(1)(b) of the Rules.
[140] *Ibid*, Rule 12(1).

superior court.[141] A copy of the judgment of superior court should be transmitted to the referring subordinate court upon receipt of which the subordinate court must dispose of the case in conformity with the decision of the superior court.[142]

(c) Incidental Matters to the Proceedings for the Enforcement of Human Rights

There are several incidental matters supplementary to the proceedings that can be taken care of by the Court while determining a human rights petition. Firstly, the Court *may* invite or allow any person with expertise in a particular issue to appear as a friend of the court in proceedings before it.[143] This normally happens upon request of either party or on the court's volition. Secondly, the Court *may* allow any interested party to join the proceedings upon application.[144]

Thirdly, a petition may be withdrawn at any time before it is finally determined. There are two ways through which a petition may be withdrawn from the court: by way of notice filed in court by the petitioner; or by leave of the court orally obtained.[145] However, before granting the withdrawal, the Court is obliged to first determine the effects of the withdrawal on the realization of the impugned rights.[146] Where it refuses to allow the withdrawal, the Court must do two things: state the reasons for the refusal[147]; and order the petitioner to proceed with the petition.[148]

Fourthly, the parties are at liberty to engage in negotiations with a view to amicably settling the matter. This can only take place upon leave of the court. In this sense, amicable settlement of the matter may result in partial or final determination of the case.[149] In case of final determination of the case, the Court would recognise the amicable settlement as part of its order to that effect and mark the matter finally concluded. In case of final settlement, the court would finally conclude the partially settled matter and proceed with matters upon which the parties did not amicably agree.

Fifthly, the Rules vest discretionary powers in the Court to award costs.[150] In determining the award of costs, the Court has to factor in a number of considerations: the *bona fides* of the proceedings; the public interests around the petition; and/or the court's role 'in advancing human rights jurisprudence in the

[141] *Ibid*, Rule 11.
[142] *Ibid*, Rule 12(2).
[143] *Ibid*, Rule 14.
[144] *Ibid*.
[145] *Ibid*, Rule 16(1).
[146] *Ibid*, Rule 16(2).
[147] *Ibid*, Rule 16(3)(a).
[148] *Ibid*, Rule 16(3)(b).
[149] *Ibid*, Rule 17.
[150] *Ibid*, Rule 18(1).

United Republic.'[151] Notably, in exercising its powers to award costs, the Court is enjoined to 'take appropriate approaches to ensure that citizens have access to the Court.'[152] In all fairness, these considerations are very progressive and crucial in enhancing effective judicial protection of human rights in the country.

6.0 Concluding Remarks

The promulgation of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules in 2014 has finally brought about elaborate rules of procedure and practice in human litigation in Tanzania. The Rules have further expanded the scope of procedure and practice in the High Court than those provided for in the BRADEA. The Rules have brought about progressive elements relating to the procedure and practice in the High Court as well as they have extended a certain level of jurisdiction to District Courts and Courts of Resident Magistrates to determine referrals from Primary Courts in respect of human rights violations.

In particular, the Rules have elaborated the necessary stages in litigating human rights in court (both in the High Court and the District Courts/Courts of Resident Magistrates), which is missing in the Basic Rights and Duties Enforcement Act. They have also set out timeframes within which litigants they can undertake certain steps in pursuing their rights in courts. Furthermore, the Rules have introduced a mandatory requirement for the parties to submit written submissions before hearing commences as well as the basic contents of such submissions. Moreover, the Rules have provided a specific segregation of powers between a single Judge and a panel of three Judges in determining matters before the High Court.

Indeed, these progressive elements will provide litigants with clear procedures through which to conduct proceedings in human rights litigation in Tanzania. As such, help to overcome of the challenges hitherto facing litigants in cases of human rights violation.

However, there are some problematic areas in the Rules which need further reform. Firstly, the Rules do not clearly provide for the need for the Originating Summons to be accompanied by an affidavit, but the respondent is obliged to reply to Originating Summons by way of a counter-affidavit. As noted above, a counter-affidavit needs to be made in reply to a sworn statement (i.e. an affidavit). As it is now, the Originating Summons envisaged in the Rules is not a sworn statement. It is proposed that the Rules be amended to rectify this anomaly.

[151] *Ibid*, Rule 18(2).
[152] *Ibid*, Rule 18(3).

Secondly, most of provisions providing for a timeframe within which a litigant is mandatorily required to undertake certain steps do not provide for the sanction to be imposed upon failure to undertake the same.[153] They also do not provide for any remedy to cure the omission to undertake the required step, for instance, application for extension of time where the defaulting party has sufficient cause to be allowed to undertake the missed step out of time. It is proposed that the Rules should be amended for them to provide for clear sanctions and where appropriate for extension of time in the interest of justice.

Thirdly, Rule 15(2), which obliges a panel of three Judges to hear and determine the petition within ninety (90) days after being so assigned, the Rules are silent as to the timeframe within which a judgment of the Court should be delivered and the manner through which it would be pronounced. It is urged that the Rules ought to be amended so that they could clearly prescribe the time frame within which a judgment of the Court will be delivered (particularly, after the hearing is completed) and the manner in which it is going to be pronounced, whether in open court or in camera.

It should be noted that in certain sensitive matters (e.g. in gross violations of the rights of the child or persons with disabilities) it may be more appropriate to pronounce the judgment in camera to avoid occasioning further suffering to the victims of human rights violation. This should also apply to the manner of conducting hearing in human rights proceedings. The Rules should state that, although human rights cases are to be conducted in open court, where circumstances so require the court may conduct hearing in camera.

Fourthly, although Article 30(3) of the Constitution vests exclusive jurisdiction of determination of human rights petitions, Rule 10 of the Rules allows Primary Courts to refer any matter to the District Court or Court of Resident Magistrate where the former is of the view that there is before it a human rights issue to be decided upon by a court superior to it. In particular, Rule 10(2) expressly provides obliges the Court of a Resident Magistrate or a District Court, to '*determine the matter*' within fourteen days from the date of receiving the statement of fact referred to it under Rule 10(1)(a). Conversely, the District Court or Court of Resident Magistrate may only refer such human rights cases to the High Court where they deem appropriate to do so. Although this may mitigate the challenge of the requirement to refer all

[153] For example, although 5(1) of the Rules obliges the petitioner to serve the respondent with a copy of the petition within seven (7) days after the petition was filed in court, there is no prescribed sanction in case the petitioner fails to effect service within the prescribed time. In addition, although Rule 15(2) obliges a panel of three Judges to hear and determine the petition within ninety (90) days after being so assigned, the Rules are silent on whether or not such time frame may extended.

such referrals to the High Court, a challenge that had haunted the human rights discourse in the country for the past twenty or so years, this provision requires to be harmonised with Article 30(3) of the Constitution.

Despite the foregoing problematic areas needing further reform, the Rules are progressive and should be commended. In the interim, the High Court can innovatively invoke the provisions of Rule 19 of the Rules to address the foregoing gaps, pending for further amendments to the Rules to permanently mitigate these challenges. Litigants and courts alike are, therefore, urged to apply the Rule in such a purposive way so to enable the same to achieve their ambitious aim of application: 'advancing and realizing the basic rights and duties contained in the Constitution.'[154]

[154] *Ibid*, Rule 2(2).

PROMOTING SUSTAINABLE ECONOMIC GROWTH THROUGH COMPETITION REFORMS: EXPLORING THE CASE OF TANZANIA

By Deo J. Nangela[1]

Abstract

This article discusses the challenges facing the competition regime in Tanzania with particular focus on policy, institutional, and implementation of the Fair Competition Act. It argues that, successes or failures of competition reform, or any regulatory reform, depend on the political will of the government of the day. Taking Tanzania as the case study, this article analyses the government's role in the competition reform process in the country and the role competition policy has been playing in promoting healthy markets, consumer welfare, employment and innovation in Tanzania.

Additionally, the article examines areas that still call for further reform. It also lays an emphasis on the role which government should continue to play, in terms of providing strong and consistent support to the institutions vested with the mandate to provide competition regulation oversights. The article is in support of the view that while sustainable economic growth is a function of regulatory reforms, such reforms must essentially aim at eliminating or minimizing costs of doing business in order to stimulate investments, industrialization, and ultimately providing new employment opportunities that add to stability and total socio-political and economic welfare.

Keywords: *Competition, Productivity, Efficiency, Competition Reform, Consumer Welfare, Sustainable Growth*

1.0 Introduction

In the past few decades, many developing countries, including Tanzania, were interested in and opted for state controlled and/or managed economy as their preferred economic policy model. Under such an economic environment, market economy policies that promote competition among various players were viewed with a suspicious eye. The State was at the centre of economic regulation thus monopolizing and planning for all major economic operations, including setting prices of various commodities and services. With the coming of an era of regionalization and globalization, however, it dawned in the minds of policy makers in many developing countries that economic prosperity and ability to deliver sustained economic growth, social stability and development is conditioned upon development and adoption of 'coherent set of economic policies linked to … a

[1]Disclaimer: Although *Dr. Nangela* is currently the Director of Restrictive Trade Practices at the Fair Competition Commission, what is expressed in this paper does not reflect the views of the Commission but rather *Dr. Nangela's* personal views, reflections and observations. Any shortcoming should thus be imputed on him.

functional and credible legal system.'[2] Given this realization, from 1980s onwards, developing countries including Tanzania embarked on socio-economic reforms which are essentially hinged on 'the neoliberal philosophy that places faith in markets as the most efficient means of allocating societal resource.'[3]

The shift from economic centralism to liberalism has in turn influenced and increased the preference for competition law and policy among developing countries to a level not seen hitherto. It is on record, for instance, that, 'over 100 countries on all continents' have enacted legislations to regulate competition and others are in the process of joining this band-wagon.[4] This abrupt turn of events is explainable since, in essence, competition, enhances the levels of productivity through efficiency gains and it widens the frontiers of market access through increased entry opportunities that in turn, results into increased investments and continuous innovation to capture new market niches. The end results are improved consumer and social welfare in the form of reduced prices, improved goods or services, increased employment opportunities, and eventually, poverty reduction.

2.0 Competition Reforms Process in Tanzania

After attained her independence, Tanzania followed socialist policies but, currently it is one of the developing countries that adhere to the tenets of liberalised economic policies. The turn of events in this country is historical if one travels from *Arusha* to *Zanzibar*, beginning with the *Arusha Declaration,* in 1967, (which by then ushered in the country the philosophy of '*Socialism and Self-reliance'* (*Ujamaa na Kujitegemea*)) and the later referred to *Zanzibar Declaration* of 1992 which oversaw the demise of the *Arusha Declaration* and ushered in the era of liberalism. Liberalism, as one author puts it, expresses "a view of politics that is required by and legitimates capitalist market [practices]."

While under the socialist era all major means of production were placed under the hegemony of State for the reasons that 'the then private sector lacked both the capacity to generate the needed economic growth and to efficiently allocate resources in a young economy,'[5] under the liberalised system that espoused capitalism the private sector is seen as the engine of the economy. Consequently, as UNCTAD correctly puts it, while under the socialist philosophy, the competition was considered 'a suspicious capitalist tool' and hence, not 'a developmental tool' of

[2] See: Sok S., *Role of Law and Legal Institutions in Cambodia Economic Development*: "*Opportunities to Skip the Learning Curve"* Ph.D. Thesis, submitted to the School of Law, Bond University, 15 Aug.2008, at p. iii, (available online from*http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1081&context=theses* (as accessed on 20th February 2014)).
[3]See: Scott, A., 'The Evolution of Competition Law and Policy in the United Kingdom' (available online from *www.ssrn.com/abstract=1344807*) at 1, (as accessed 23rd June 2015)).
[4]See: Hofer, P.; Williams, M, and Wu, L., 'Principles of competition policy economics' (available from *http://www.nera.com/extImage/03Economicssjc4-7.pdf* (as accessed on 25th March 2014)).
[5] See: Waigama, S.M.S.,*Privatization Process and Asset Valuation: A Case Study of Tanzania* (unpublished *Ph.D. Dissertation*, School of Architecture and the Built Environment, Royal Institute of Technology Stockholm, 2008.p 1.

the country's centralized economy,[6] under the capitalist tempo competition is at the heart of economic sustainability through innovation. In view of the positive effects of competition in the development process, Tanzania chose to embrace economic and political reforms that seek to unlock its economic potentials through private sector's involvement in the economy.

The on-going economic reforms in Tanzania have been well informed by the global economic realities beginning from mid-1980s and early 1990s onwards. Some of these realities include, among others, the fall of the Cold War curtains, globalisation and increased demand for global and regional economic integration. All of them have created tremendous economic reverberations calling for major socio-economic and legal reforms in not only Tanzania but throughout the developing world. In early 1980s, for instance, Tanzania had to undergo a surgical transformation embedded in the so-called National Economic Survival Programme (NESP) (1981), followed by 1982 Structural Adjustments Programmes (SAP) and the Economic Recovery programmes (ERPs) which, in their totality, led to a farewell-bid to the socialist command economy policies in favour of market-led economic principles.

The transforming paces of reforms were taken to a further new height in the 1990s on wards with massive reform programme in the nature of liberalization and privatization. 'Liberalization aimed at inviting private sector participation in economic development activities, coupled with attracting more Foreign Direct Investment (FDI) in the country, hence more competition.'[7]

Generally, embracing such reforms and a new policy orientation was an inevitable event. This is because at the material time the country's economic growth was unsustainable and crumbling. Essentially, so to speak, the monopoly of the public entities, nepotism and corruption had worsened. The country was experiencing declining economic growth rate, high inflation and foreign exchange crisis. Coupled with other inefficiencies, all these had brought the country to a near total market failure.[8] Therefore, it indeed dawned on the part of policy makers that a public sector led economy embodied with restrictive investment and business climate was unhealthy and reforms were a matter of necessity.

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[6] See: UNCTAD, *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe*, United Nations, New York and Geneva, 2012.p.38.

[7] Ministry of Industry and Trade (MIT) "Analysis of the Services Sector with a View to Making Commitments in the Context of Trade Liberalization at Bilateral, Regional and Multilateral Trade Negotiations: The Case of Tanzania" (available from *http://www.tzonline.org/pdf/analysisoftheservicessector.pdf* (as accessed on 24th June 2015)), at p.12.

[8] It is noted, for instance that , in ranking of the world's poorest countries, the position of Tanzania changed dramatically in the 1980s dropping from 14th poorest in 1982, with a GNP per capita of $280, to the 2nd poorest in 1990, with a GNP per capita of $110. In previous years, particularly the 1960s and 1970s, real GDP per capita was growing at an average annual rate of 1.5 - 1.9%. However in the period between 1981 and1986, it registered a negative annual growth rate of 2%. See: Ministry of Industry and Trade (MIT), "Analysis of the Services Sector with a View to Making Commitments in the Context of Trade Liberalization at Bilateral, Regional and Multilateral Trade Negotiations: The Case of Tanzania" (available from *http://www.tzonline.org/pdf/analysisoftheservicessector.pdf* (as accessed on 24th June 2015)) at p.11.

With such a realisation in mind, the desired changes took cognizance of not only the need to bring to the front and recognize the noble role which the private sector has to play in promoting sustainable economic growth, but also the need to create a fertile environment for a policy re-think and regulatory approaches designed to correct market failures. One essential element of that 'fertile and enabling environment' for a thriving private sector was the creation of a fair and transparent regulatory environment in which an effective competition regime becomes an imperative.[9] The adoption of competition law and policy was thus a step further in the reform process since economic liberalization and privatization policies could not alone bring about the desired benefits in the absence of an environment that fosters competition among various economic players.

3.0 Moulding Competition Reforms

Having embraced a policy shift from 1980s onwards, it is clear that one major role which the government has been playing is that of providing the necessary services and frameworks for an effective functioning of a market economy in the country. This economic system, in which the allocation of resources is determined solely by supply and demand, needs its own discipline and proper guidance if it is to bear the much desired fruits. It, for instance, needs regulatory and operational institutional frameworks which, in the context of economic development, can ably gauge not only the parameters within which socio-economic activity takes place but also the provision of public goods; regulation of economic activities; reallocation of resources; and stabilization of the economy.

In view of the above, the post-*Ujamaa* era has been 'stuffed' with pro-competition policies and enactments that seek to provide for checks and balances in the market economy. Most of these enactments, primarily focus on not only establishing the legal status of business enterprises and ensure the rights and protection of private ownerships are envisaged (this being a key factor in encouraging FDI as well as entrepreneurship within the country),[10] but also on taking measures to avoid anti-competitive agreements and abuse of dominance as well as regulating mergers and acquisitions which result in distortion of the market. One such legislation was *the Fair Trade Practices Act, 1994* which sought 'to encourage competition in the economy by prohibiting restrictive trade practices, regulating monopolies, concentrations of economic power and prices, to protect the consumer and to provide for other related matters.'[11] The Act laid down various general competition rules governing anti-competitive activities. Under the Act, anti-competitive practices could not 'be

[9] See: Sengupta, R & Mehta, U.S, 'Competition Reforms – An Essential Element to Evolving a Sound Business Environment in Eastern and Southern Africa 'CUTS International, India (available from *http://www.businessenvironment.org/dyn/be/docs/154/Sengupta.pdf*, (accessed on 19th May 2015) at p. 1.

[10] See: for instance, the enactment of Land Act, 1999 (Cap. 113); the Village Land Act, 1999 (Cap. 114) and the Unit Title Act of 2008;the Business activities registration Act 2005; The Business Names (Registration) Act (Cap. 213); Tanzania Revenue Authority Act 2006 and the Tanzania Investment Act, 1997 .

[11] See: the preamble to the Act.

justified if they significantly "affect competition in a market."'[12] Basically, the Act covered four main areas; namely:

a) restrictive business practices,(including those with horizontal and vertical nature);[13]

b) misuse (abuse) of market power;

c) control of monopolies and concentration of economic power through mergers and acquisitions;[14] and

d) Consumer protection.[15]

While this Act laid a foundation towards promotion of competition in the economy, for the sake of ensuring an effective regulation of the market economy in the country, the Government reviewed the Act in 2001 and opted for a two pronged approach to effective competition regulatory reforms in the country, namely; *economic regulation* and *competition regulation*.

3.1 The Economic Regulation Approach

Economic regulation of specific sectors in the economy was essentially an approach adopted as a response to the fact that certain sectors of the economy needed specific form of regulation through specific sector-based institutions if the government was to attain the requisite efficiencies in such sectors. In this regard, the government created separate institutional and legal frameworks apart from the framework for competition regulation. The respective legislative enactments so far adopted, and which limit the applicability of the Competition Act, are:

a) The Energy and Water Utilities Regulatory Authority Act, 2001;

b) The Surface and Marine Transport Regulatory Act, 2001;

c) Tanzania Civil Aviation Authority Act, 2003; and

d) The Tanzania Communications Regulatory Authority Act, 2003.

These four pieces of legislation regulate certain forms of competition in the respective sectors in which they apply with a view to ensure that efficiency and innovation, which ultimately together lead to consumer welfare, are maintained. It may thus be argued that the regulatory authorities created under these laws enjoy concurrent jurisdiction with the primary competition regulatory authority envisaged

[12]See: CUTS, *Competition Law and Policy: A Tool for Development in Tanzania* CUTS Centre for International Trade, Economics & Environment, 2002. p. 30.
[13] These were dealt with under section 15 to 29 of the Act.
[14] These were dealt with under section 30 to 40 of the Act.
[15] See sections 51-93 of the Act.

under the Fair Competition Act on competition matters as regards dealing with anti-competitive conduct in those sectors.

However, there has been an argument that it is now high time that these pieces of legislation should be reviewed with a view to allow the Fair Competition Commission (FCC) to directly intervene whenever there is an anticompetitive conduct in those sectors. The rationale for this proposal is that, while these regulatory authorities spend more time and expertise on technical/economic regulation of activities in those sectors, the FCC is specifically established to address competition and consumer protection issues. As such, it has more expertise on investigations and enforcement of anti-competitive conduct than the rest of its sister regulatory authorities. It is argued therefore that, vesting the FCC with direct powers to intervene and investigate anti-competitive conduct in any of the regulated sectors will also help to remove any confusion and uncertainty which may occur should a Regulatory Authority, for instance, pursuant to its enabling Act; punish its subjects for violations of the laws and regulations governing the sector, such as cancellation of a license, and at the same time refer an anticompetitive conduct to the FCC for investigation. In such a scenario, the culprit may rely on the *Nibis in idem* (double jeopardy) principle to challenge any decision which the FCC may wish to take, hence unnecessarily prolonging the effective enforcement of the competition principles.

3.2 Competition Regulation

The policy direction as regards regulation of anticompetitive conduct in Tanzania is generally bent towards allowing competition to regulate the market. The prevailing legislation which regulates competition in the market, the Fair Competition Act, 2003, replaced the 1994 enactment. The Act has established two important institutions: a fully functioning and independent Commission as a market support institution responsible for addressing anticompetitive conduct in the market, and a Tribunal which determines appeals arising from the decision of the Commission. The Commission was fully operational since 2005 and has dealt with a number of cases ranging from merger applications, un-notified mergers, abuse of dominance and restrictive agreements. With the Tribunal in place, the two institutions provide for an assurance that anticompetitive conduct in the market will be discouraging. The Act and its enforcement machinery also provide for an environment which not only guarantees for a fair exit from but also free entry into the market.

4.0 Areas calling for further Reforms with the Potential to Spur to Sustainable Growth

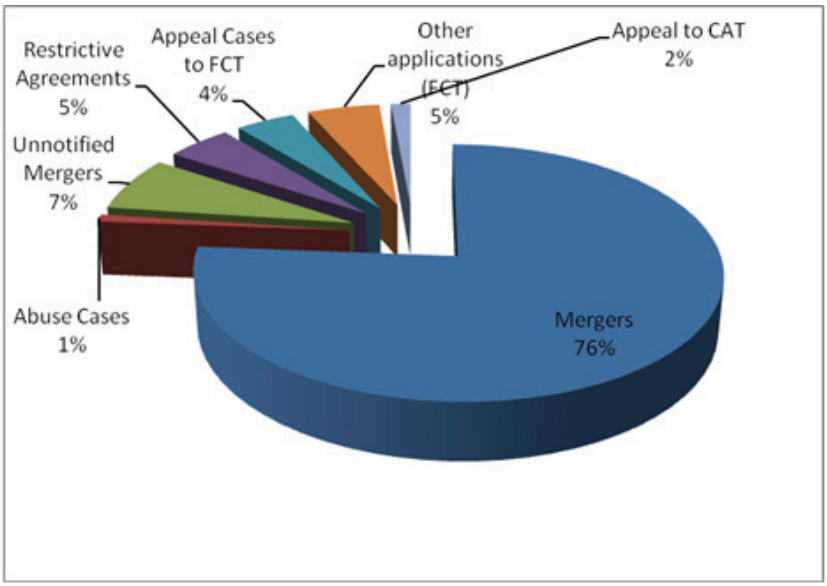
The *Doing Business 2015 Report* has pointed out correctly that '[c]reating an efficient and inclusive ethos for enterprise and business is in the interest of all societies.'[16] This understanding reveals one underlying fact which is to the effect that attaining a sustainable economic growth is a function of many things. It is not only a function of regulatory reforms but also of reforms meant to essentially eliminate or minimize costs of doing business in order to stimulate investments, industrialization, and ultimately providing new employment opportunities that add to stability and total socio-economic and political welfare. As such, it does not involve a single entity like the government alone but a host of other players. The government and those who hold political power, however, have an important facilitative role to play including that of creating the requisite environment in terms of appropriate rules and procedures that allow other actors to play their part effectively and contribute to growth. Worth noting, however, is the fact that 'an economy with an efficient bureaucracy and rules of governance that facilitates entrepreneurship and creativity among individuals, and provides an enabling atmosphere for people to realize their full potential, can enhance living standards and promote growth and shared prosperity.'[17] Several reform portfolios are noted here below.

4.1 Reform Pegged on Enhanced Political Commitment

Ever since the time when Tanzania embarked on competition reforms' process to date, the role which competition law and policy has been playing in the economy in terms of promoting healthy markets, consumer welfare, employment, innovation and industrialization is immense. As it may be seen in the figure below, the Fair Competition Commission has dealt with cases ranging from merger applications (175 applications); un-notified mergers (15 cases); abuse of dominance (2 cases), restrictive agreements (10 cases), and 2 exemption cases, all being part of its mandate under the law. The Commission has also defended appeals and applications arising from its decisions. There has been (9) appeal cases, ((3) of which are still pending at the Court of Appeal of Tanzania) and 11 applications filed at the Fair Competition Tribunal. The chart below shows the number of FCC's competition related cases, in % -wise, received as from 2007 to 2015.

[16] See: World Bank, *Doing Business 2015: Going Beyond Efficiency*, 12th Ed. at v, (available from *http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Chapters/DB15-Report-Overview.pdf* (accessed on 26th June 2015).
[17] *Ibid*.

Fig.1: FCC Cases from 2007-2015 (in %)



Source: Data from FCC's Internal Presentation, 2015

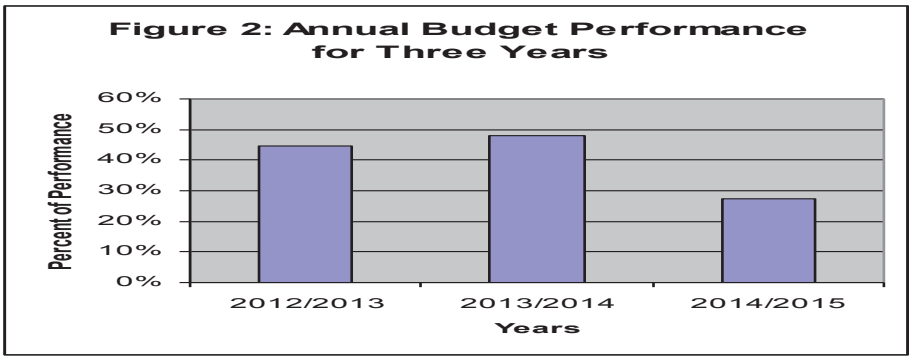
It is a point to acknowledge also, that, the adoption of competition reforms in Tanzania has opened plenty of opportunities for investments and economic growth.[18] However, it is also worth emphasizing that competition policy is not, on its own, a panacea for a sustained economic growth. Strong political commitment on the part of the Government and its various agencies that seek to promote and sustain on-going regulatory reforms is still required if Tanzania is to leap frog from a low to middle income before 2050. This is due to the fact that successes or failures of competition reform, or any regulatory reform, depend on the political will of the government of the day.

The first and foremost commitment may be explained in terms of provision of strong and consistent support to the institutions vested with the mandate to provide competition regulation oversights. Crucial to this is financial support which has been diminishing from time to time while the financial needs of the Fair Competition Commission have been increasing day by day as it seeks to effectively discharge its mandate. While the Commission's operational budget has been growing perpetually, governmental funding support has been diminishing gradually as may be seen in Table 1 and figure 2 below.

[18] See: generally, Wangwe, S.M. 'Economic Reforms and Poverty Alleviation in Tanzania', ESRF- ILO Paper No.7, (1996) (available from *http://ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_125479.pdf* (as accessed on 23th June 2015)).

Table 1. Annual Regulatory Authorities Budget Performance Percentage 2012-2015 – Amount in Million Tanzania Shillings

Year	Request	Disbursed	Percent Deficit	Percent Performance
2012/2013	2,707	1,209	55%	45%
2013/2014	2,585	1,238	52%	48%
2014/2015	3,298	900	73%	27%

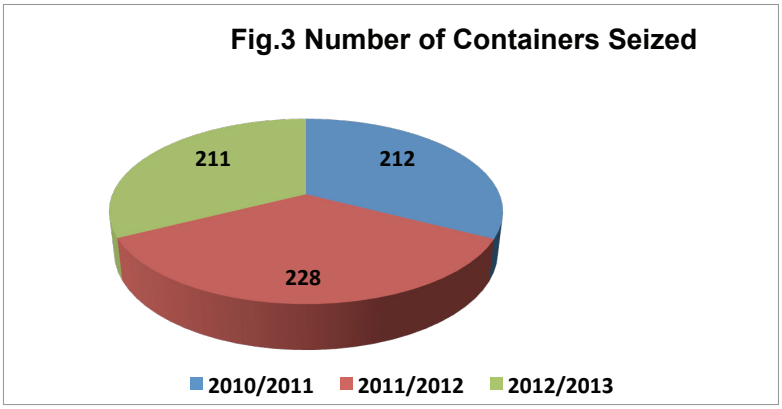


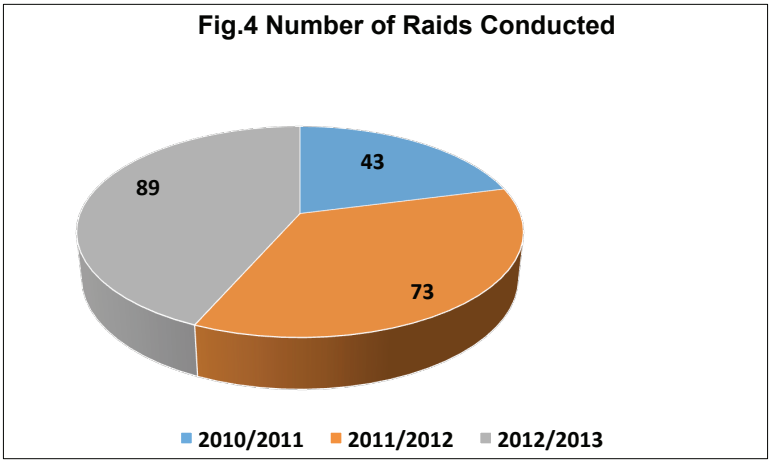
Source: FCC, Internal Presentation, 2015

As it may be seen from the three years analysis shown in Table 1 above from 2012-2015, the Commission budget from Regulatory Authorities has never been achieved by more than 50%. In the year 2012/2013, it was achieved by 45% followed by 48% in the year 2013/2014 and 27% in the current year 2014/2015. These variations have had a negative impact on Commission's achievement of its objectives, goals, targets and activities due to the fact that the Commission had to drop some of its planned activities due to financial difficulties. Poor funding makes the Commission less effective in monitoring competition in the economy and this is to the detriment of not only the entire economy but also consumers.

It is also worth noting that, in terms of protecting consumers, apart from dealing with competition issues, the FCC is also mandated to fight counterfeits from the market and protect consumers. Up to the moment it has been able to confiscate and destroy counterfeit products worth approximately *Tanzanian Shillings 5 billion*. The

figures 3 and 4 below illustrate what was done over the past three financial years, 2010/2011; 2011/2012 and 2012/2013.





Source- F3 &F4: Data from FCC's Ant counterfeit Department, 2015

Despite such successes, the Commission is faced with a critical shortage of manpower, a fact which constrains its performance in dealing with competition as well as consumer protection issues more effectively. This constraint results from the bureaucratic nature of the employment system and poor financial position of the institutions. Given its inability to fund itself meaningfully, and hence depending on the government funding, all new staff recruitments had to be sanctioned by the relevant ministry (Permanent Secretary, President's Office - Public Service Management (UTUMISHI). To get a recruitment permit takes years, and for that reason the Commission has remained understaffed and unable to spread its wings away from its head office in Dar-es-salaam.

4.2 Reforms in the Nature of Enhanced Relations with Stakeholder

It is worth noting that there are still grey areas which need to be further explored for the sole purpose of captivating not only the culture of competition within the various sectors of the economy but also the entire rationale for competition reform agenda. Since it is agreed that competition is among various players in the economy that has the potential to spur sustained economic growth, and there is now a need to ensure that the would-be barriers to competition, be artificial or statutory are completely removed so as to ensure not only free movements of goods and services but also effective enforcement of the competition law by the respective machineries. In this regard, the Fair Competition Commission in Tanzania has, for instance, come up with a strategy to engage with various government departments and agencies and regulatory bodies through entering into memorandums of understanding (MoUs) which aim at not only ensuring that the relevant governmental departments, agencies or regulatory entity lend support to the effective carrying out of the Commission's mandate but also ensuring that the culture of promoting competition permeates into their daily operations. In so doing, it is hoped that the end result will be a strengthened synergy that reduces to the minimal levels or completely eradicate potential barriers to the effective flow of goods or services and, in turn, this will contribute to less regulatory bottlenecks, speedy delivery of goods and services, reduced costs of doing business, increased investments, increased employment opportunities, fair play in the economy, increased consumer welfare, and ultimately sustained economic growth and poverty alleviation.

4.3 Reforms of a Cross-Border Nature

Spearheading the bilateral/multilateral competition reforms from a cross-border perspective is an essential agenda in attaining sustainable economic growth. No country in the world and no competition authority either is an island of its own. With the increasing globalization and regional integrations among various developing countries, the need to craft bilateral/multilateral policy reforms aimed to facilitate and enhance cross-border interactions is indispensable. Regional multilateral cooperation in the form of free trade areas and common markets is a good example. As for Tanzania, its participation in regional cooperation is considered to be vital in not only reducing the trade imbalances with regional partners but also 'achieving harmonization of economic policies, legislation, procedures, facilitating trade through smooth movement of goods and services, as well as promoting diversification of exports and becoming a competitive trading country.'[19]

[19] See Ministry of Industry and Trade (MIT), "Analysis of the Services Sector with a View to Making Commitments in the Context of Trade Liberalization at Bilateral, Regional and Multilateral Trade Negotiations: The Case of Tanzania" (available from *http://www.tzonline.org/pdf/analysisoftheservicessector.pdf* (as accessed on 24th June 2015)).

As a country, Tanzania is strategically and geopolitically positioned to benefit immensely through bilateral and regional groupings given its proximity to the Indian Ocean, its cultural similarity with the East African Community (EAC) and the Southern Africa Development Community (SADC) neighbouring Member States, and its business environment which is currently being set to substantially reduce operational costs. Currently, Tanzania is an active participant in the establishment of a Tripartite Free Trade Area which embraces member states from SADC, EAC and the Common Market for Eastern and Southern Africa (COMESA). With this in place, efforts to remove unwarranted trade barriers including non-tariff barriers and harmonisation of competition and other regulatory laws in the tripartite area become an imperative task meant to easy movement of persons, businesses and goods/services across the relevant borders. These developments envisage more and deepened reforms which include adoption of a harmonised competition and consumer protection policy for the tripartite member states.

5.0 Conclusion

In order to realize the highest returns from competition or any other regulatory reforms, participation of key competition stakeholders in the reform process and those who are beneficiaries of the reforms, is vital. This entails enhancing the role of competition and consumer protection advocacy at national and regional levels including, but not limited to holding regional and national consultative meetings with the business community, investors, consumer groups, governmental departments and ministries with a view to disseminate the competition gospel thus winning their support for any of intended future reforms. Effective involvement of such key players is essential in not only building or strengthening the requisite synergies that exists or that need to be established but also helps to promote the enjoyment of a continued support for the competition reform agenda within the given country or regional economic grouping.

It is further argued that building or strengthening existing synergies between regulatory institutions, relevant government agencies, and stakeholders or players in the business circles, is vital since it enhances the chances of instilling the competition philosophy and culture within and among key players within a given market. All these are vital ingredients for a sustainable economic growth.

6.0 Recommendations

Given the foregone discussion and the kind of reform considerations it has triggered, few lines will suffice to highlight the recommended course of action(s). Four main recommendations are put forth here below. In particular:

Firstly, it is recommended that the Government should reassess its own rationale to embark on market economy and whether it is truly living to its own promises of

creating a favourable enabling regulatory environment necessary for the functioning of this economic model. Periodic reviews of its regulatory performance are thus a necessity.

*Secondly, s*ince competition is at the heart of a well-functioning market economy, providing sufficient funding to the Fair Competition Commission so as to enable this institution to effectively deliver on its tripartite mandate, i.e., competition regulation, consumer protection and protection of the Tanzanian market against influx of ant counterfeit products that also harm competition, investor's interest, consumers and the entire economy, is a crucial point to note. Adequate funding will, for instance, enable the carrying out of advocacy activities which are vital in entrenching the culture of competition within the country, the EAC region and beyond. Similarly, availability of adequate funding will enable the FCC to strengthen its market research and investigation activities thus staying ahead of its regulated subjects.

Thirdly, the Government should also review its own rationale of introducing regulatory institutions with concurrent jurisdiction to regulate competition matters in the same way as the FCC does. The suggestion here is that the Government should now see to it that competition and consumer protection issues are removed from the ambit of such regulatory bodies. Instead these functions should solely be vested on the FCC. The reason for such is to allow regulatory bodies like the Energy and Water Utilities Regulatory Authority, (EWURA); the Surface and Marine Transport Regulatory Authority (SUMATRA) or the Tanzania Communications Regulatory Authority (TCRA) to concentrate on their economic regulation functions leaving aside competition regulation as a function to be carried out by the FCC. This is indeed a fact which, if looked at objectively, should be upheld since, as of now, the FCC has developed sufficient competence to handle competition and consumer related cases.

Finally, the Government should, to the maximum possible, strive to ensure that it exploits its natural and strategic geo-political location to reap economic benefits from its landlocked neighbouring countries by removing all non-tariff barriers and other barriers to trade, a factor which has the potential to give Tanzania a competitive advantage in the EAC region. Doing so will not only bolster investment in the country but will further invigorate competition and sustainable economic growth.