ACHIEVING INDEPENDENCE OF THE BAR: CHARTING A COURSE FOR LAWYERS' INDEPENDENCE IN MAINLAND TANZANIA

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Abstract

This article charts out a course of achieving independence of the private Bar in Mainland Tanzania. While highlighting the role of the independence of the private Bar in enhancing independence of the Judiciary, rule of law and justice; the article premises its analysis along four indicators of independence of the Bar to shed some light on the broader significance of this principle. The article, among others, underscores that the disciplinary framework for members of the private Bar in Mainland Tanzania compromises its independence and consequently renders the assertion on judicial independence questionable. It echoes that; effective independent regulation, freedom from fear of prosecution and professional privilege have not been effectively achieved. Ultimately, the article proposes for reform of the disciplinary framework and urges lawyers to take lead in asserting their independence from external forces. The article reveals the current state and prospects of the independence of the private Bar in Mainland Tanzania.

Keywords: *Independence of the Bar, Judiciary, Tanganyika Law Society, Advocates Committees.*

1.0 Introduction

The question of independence of the legal profession is a longstanding issue, as ancient as the profession itself. [1] This article, therefore, navigates into this question by critically analysing the independence of one particular segment of the legal profession, that is the bar. The analysis is framed along the four indicators of independence of the bar to reveal the current state and legal gaps that need to be addressed more comprehensively to ensure that every facet of lawyer's independence is secured and guaranteed.

The article is, thus, structured into eight prominent sections. While Section One presents the introduction of the article, Section Two sets the context and some issues relating to the independence of the bar. Section Three highlights the role that an independent bar can play in administration of justice especially in upholding rule of law and protection of human rights. Section Four illuminates the legal basis for independence of the bar, highlighting the available domestic and international instruments on the subject.

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1 Z. Gutman, and E. Wald, 'Is the Legal Profession Too Independent?', 105 *Marq. L. Rev* (2021), 341.

On its part, Sections Five and Six discuss, in details, the indicators of independence of bar where Tanzania legal framework and practices are tested to reveal the current state of independence of the bar in Mainland Tanzania. The Tanzania practices are also weighed against best practices and standards in another jurisdiction. While Section Seven discusses the crucial roles that the bar association should play, exposing the existing challenges that have inhabited the national and regional bar associations in asserting the independence of its members, Section Eight sets out the conclusion of the article.

2.0 Setting Out the Context and Issues

Unlike independence of the judiciary, which has received a considerable attention and protection, the independence of the private Bar has been overtly neglected; and, therefore, there is a paucity of scholarly works trying to discuss, or even analyzing, it.[2] However, its conception, in most common law jurisdictions, is generally linked to the freedom of the respective bar association and its members in discharging their professional duties with impartiality, neutrality, and autonomy.[3] It is worth noting albeit briefly to examine the concept of the independence of the Bar in tandem with the growth of the bar association in Mainland Tanzania.

The bar association of Tanzania Mainland – *i.e*., the Tanganyika Law Society (TLS) – is a creature of the Tanganyika Law Society Ordinance of 1954.[4] Since the legal profession is not a union matter, Zanzibar maintains its own bar association.[5] TLS was established as an independent bar association, responding to professional needs during the colonial time in Tanganyika. Apart from serving its members, it is also responsible for regulation of the legal profession in Mainland Tanzania especially the private Bar.[6] The Public Bar and the private Bar in Mainland Tanzania are regulated by, *inter alia*, the Constitution of United Republic of Tanzania (1977),[7] the Tanganyika Law Societies Act,[8] the Notaries Public and Commissioners for Oaths Act,[9] the Office of Attorney General (Discharge of Duties) Act,[10] the Advocates Act[11] as amended by the Legal Sector

2 T. Harrison, "Between principle and practicality: A dynamic realist examination of independence in the Canadian justice system"Unpublished PhD thesis, Queen's University 2016, at 2.
3 *Ibid*, at 7.
4 Repealed and replaced by Tanganyika Law Society Act, [Cap. 307 R.E. 2002].
5 That is the Zanzibar Law Society registered under Societies Act No. 6 of 1995.
6 J. Ruhangisa, "Sustainability of National Bar Association: Reflection on Miscellaneous Amendments Act No. 2 of 2018." Paper presented at the Tanganyika Law Society (TLS) Annual Conference and General Meeting, AICC, Arusha, Tanzania, April 5, 2019.
7 *See* Arts 107A and 107B thereof.
8 [Cap. 307 R.E 2002].
9 [Cap. 12 R.E 2019].
10 [Cap. 268 R.E 2019.]
11 [Cap. 341 R.E 2019].

Laws (Miscellaneous Amendments) Act[12] and several other pieces of subsidiary legislation made there under.[13]

The inbuilt flexibility under these laws were largely meant to ensure the existence of the private Bar, which is autonomous in discharging its statutory functions.[14] For the past decade, the private Bar has exhibited an exponential growth to over 11,615 members,[15] comprising of practicing, non-practicing, notary public, and commissioner for oath, non-citizen advocates and honorary members.[16] The ever-increasing membership of bar indeed presents a strong case for the continuation of the need to protect their professional independence. In that regard, since its establishment, TLS has long been playing a pivotal role in advocating for independence of the private Bar. However, as it will become apparent in this article, throughout history, the independence of the private Bar in Mainland Tanzania has proven to be fragile. This is because there have been several attempts and moves that have tended to question its sustainability. For instance, in its report published in 1977, the Judicial System Review Commission ('the Msekwa Commission's Report')[17] recommended for the abolition of the private legal profession. In spite of the fact that the recommendation could not sail through, it had a serious repercussion on the independence of the private Bar.[18] In similar vein, on 10 September 2018, the Written Laws Miscellaneous Amendments Act[19] was passed, which amended the TLS Act with a view to subjecting members of the private Bar to the control of the Executive.[20]

Indeed, the current surge of regulatory attempts to encroach the independence of the private Bar and several incidences as exemplified throughout history, definitely urge the members of the private Bar, who are benevolent custodians and trustees of such principle, to resist any of those attempts seeking to encroach

12 No. 11 of 2023.

13 The regulations made under the TLS Act includes the Tanganyika Law Society (Chapter and Chapter zone) Regulations, 2020, G.N. No. 524 of 2020; Tanganyika Law Society (Annual Subscription) Regulations, 2022, G.N. 600 of 2022; and Tanganyika Law Society (Ethics) Regulations, 2022, G.N. No. 598 of 2022. The Regulations made under the Cap. 341 includes the Advocates Remuneration Orders, 2015, G.N. No. 264 of 2015; the Advocates (Admission and Practicing Certificate) Regulations, 2015, G.N. No. 62 of 2015; Advocates (Disciplinary and other Proceedings) Rules, 2018, G.N. No. 120 of 2018; and Advocates (Professional Conduct and Etiquette) Regulations, 2018, G.N. 118 of 2018. The Office of the Attorney General (Discharge of Duties) Guidelines for Practicing State Attorneys and Law Officers, 2020, G.N. No. 1008 of 2020 which is made under Cap. 268.

14 Tanganyika Law Society Act, [Cap 307 R.E. 2002], Section 4.

15 https://tls.or.tz (Accessed on 9 October, 2024).

16 *See* Tanganyika Law Society (Annual Subscription) Regulations, 2022, G.N. 600 of 2022, Regulation 3.

17 *See* United Republic of Tanzania, *The Report of the Judicial System Review Commission* (Dar es Salaam: Judicial System Review Commission, 1977).

18 F. Twaib, *op. cit fn* at 3.

19 No. 2 of 2018, Section 108.

20 J. Ruhangisa, *op. cit fn at 5.*

their independence, the principle which they should jealously guard.[21] For these reasons the need to articulate the independence of the private Bar is counseled.

3.0 Independence of the Private Bar and Its Role in the Administration of Justice

Independence of the private Bar constitutes a third pillar in the maintenance of rule of law in addition to independence of the Judiciary and prosecutors as well as lawyers in public service.[22] It has been further articulated that, effective protection of human rights is only possible if people are able to access an independent legal profession.[23] Moreover, lawyers have been regarded as agents of administration of justice and, therefore, have the duty to uphold human rights and fundamental freedoms.[24] Hon Michael Kirby,[25] underscoring the essence of independence of the private Bar, asserts that it is a condition precedent for an independent judiciary, rule of law, justice, democracy and freedom. The society is protected from potential violation of their right of the governing authority by the existence of checks and balance rooted in independence of the Judiciary and the Bar.[26]

It should be noted, however, that the independence of the legal profession does shield neither lawyers nor Judges from professional responsibility or even from the general law but it guarantees due process for the entire public.[27] Without independence of the Bar, principles such as separation of power and judicial independence become obsolete.[28] A true independent Bar safeguards citizen's rights against intrusion and other wider public interests. It enhances the legitimate interests without fear of undue prosecution and improper influence and therefore calls for political accountability. Scholarly works have reiterated a stance that lack of an independent Bar does not only have effects on individuals but also broadly jeopardizes the entire free and democratic constitutional order of the State.[29]

Attacking the private Bar is held to be an attack of independence of the Judiciary and consequently an assault to the rule of law.[30] Moreover, the existence of a

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21 G. Turriff, 'The consumption of lawyer independence', 17 *International Journal of the Legal Profession* 3 (2010),1.

22 United Nations Office of the High Commissioner for Human Rights, and International Bar Association. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*. No 9. New York and Geneva: United Nations, 2003, at 150.

23 See the ninth paragraph of the preamble in Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

24 OHCHR, *Op cit fn 23* at 151.

25 International Bar Association, *IBA Presidential Task Force Report on the Independence of the Legal Profession*, September 2016, 2.

26 *Ibid* at 5.

27 IBA, *op. cit fn* 26 at 5.

28 *Ibid*

29 OHCHR, *op. cit fn* 23 at 158.

30 S.A. Saltzburg, 'The Importance of an Independent Bar', 22 *Crim. Just* (2008), 3.

free society is manifested by, *inter alia,* the presence of an independent Bar in its pervasiveness.[31] In *Andrews v. Law Society of British Columbia*,[32] the court stated that an independent bar plays a vital role in administration of justice, the absence of which renders the whole legal system parlous. In some jurisdictions, independence of the bar has the status of the unwritten constitutional principle; and, therefore, any legislation inconsistent with it, may be declared inoperative.[33] Judges have been criticizing the legal systems that place lawyers as agents of the government thereby surrendering their clients' interests at the expense of the government's interests.[34]

It follows, therefore, that the current jurisprudential discourse, especially in legally advanced jurisdictions, equates independence of the bar to a condition precedence for upholding the rule of law. It has moved from unwritten constitutional principle to being enshrined in statute books. Putting it differently, the independence of the bar underpins other fundamental constitutional principles such as independence of the judiciary, separation of power, human rights and good governance. This article posits that; the independence of the bar is a principle that should be jealously protected should a state aspire to prosper in all spheres of life. Tanzania, not being an island of its own, is bound by the principle of independence of the bar at least by general principles of law which the principle of independence of the bar is generally considered to form part.

4.0 The Legal Basis for the Independence of the Bar

The independence of the Bar largely draws its authority from several domestic, regional, international legal instruments and other global standards and norms which generally underscores the necessity of having an independent bar. These instruments contain provisions which generally recognizes the normative value of independence of the bar. These instruments are examined in the next sections.

4.1 International Legal Instruments

Universally, independence of the Bar stems itself in the broad conception of fair hearing embedded in various international instruments such as Article 10 of the Universal Declaration of Human Rights of 1948 (UDHR) and Article 14 of the International Covenant on Civil and Political Rights of 1966 (ICCPR). Moreover, the United Nations Basic Principles on the Role of Lawyers,[35] in its ninth preambular paragraph, provides that adequate protection of human rights and

31 *Ibid,* at 6.
32 [1989] 1 S.C.R. 143 at pp. 187-88.
33 R. Millen, 'The Independence of the Bar: An Unwritten Constitutional Principle', 84 *the Canadian Bar Review* (2005), 1.
34 *Re Griffiths* 413 U.S. 717 at 733 (1973).
35 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Havana, Cuba, from 27 August to 7 September 1990.

fundamental freedoms requires all persons to be entitled to effective access to legal services provided by an independent legal profession. In doing so, lawyers need to be free while protecting the rights and interests of their clients.[36] It generally obliges governments to set forth a friendly environment for members of the Bar to work free from intimidation, harassment or sanctions.[37] The same instrument prohibits the practice of identifying lawyers by their clients[38] and that, whenever the security of a member of the Bar is at stake, the same should be safeguarded by the appropriate authority.[39]

Despite the fact that some of these instruments do not provide for the principle in more explicit terms – probably because of their historical background which led to their promulgation – they are all at one as they define the principle in rather broad terms to the extent of prohibiting all acts that may result into interference of lawyer's independence in the course of administration of justice. No doubt from the provisions of these instruments, the significance of an independent Bar can be considered to have attained an international normative appeal.[40]

4.2 The Domestic Legal Framework

4.2.1 The Constitution of the United Republic of Tanzania (1977)

The Constitution of the United Republic of Tanzania (1977) ('the Constitution of Tanzania') as amended from time to time, does not specifically guarantee independence of the bar in Tanzania. However, the same may be inferred from its provisions. Indirectly, the independence of the Bar is implied in the right to a fair hearing and independence of the judiciary guaranteed under Articles 13(6)(a) and 107 B of the Constitution of Tanzania, respectively. Further, the Constitution, under Article 20, guarantees the right to freedoms of association and assembly thereby lying the foundation for the formation of an independent and self-governing professional association that represents members' interest and integrity, a thing which is crucial in ensuring lawyers execute their duties without external pressure.

While it is widely accepted that, the independence of the Bar can be guaranteed through legislation, convention and other norms and practices; having an explicit constitutional guarantee of the principle offers numerous advantages. [41]

36 See principle 14.
37 See principle 16.
38 See principle 18.
39 See principle 17.
40 https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=J.+Ouma%2C+%22Judicial+independence+in+Kenya%3A+Constitutional+challenges+and+opportunities+for+reform.%22+&btnG= (Accessed 9 October 2024).
41 P. Mahendra, 'Securing the independence of the judiciary-the Indian experience', 10 *Ind. Int'l & Comp. L. Rev* (1999), 245.

Unlike other Acts of Parliament, is difficult to amend the constitution, requiring rigorous procedures outlined under Article 98 of the Constitution of Tanzania; thus, ensuring continuance and protection of the principles laid therein. Additionally, all other Acts of Parliament must conform with the provision of the constitution; meaning that, any regulatory attempt to undermine the Bar's independence would definitely not survive constitutional review as well as judicial review.

4.2.2 Tanganyika Law Society Act

The Tanganyika Law Societies Act ('the TLS Act'), which basically establishes the framework for private legal practice in Mainland Tanzania and the functioning of law society, contains some important provisions that ensures lawyers operates free from external pressure thereby upholding the rule of law. Under Section 3, the TLS Act establishes the Tangayika Law Society (TLS), which is charged with the functions to, *inter alia,* regulate the legal profession and to represent, protect and assist members of the legal profession in Mainland Tanzania.[42] Section 31 of the TLS Act empowers the council to make regulations binding members of the Society. This provision to some extent, guarantees self-regulation of the legal profession in matters relating to standards in admission, subscription, disciplinary and conducts of the members of legal protection. Self-regulation of the legal profession has been regarded as a crucial element in ensuring the independence of the private Bar.[43]

Further, the TLS Act makes provisions for the appointment of the members of the council. These provisions ensure that the elected members of the council largely represent the interest of its members.[44] Finally, the TLS Act contains some provisions that ensures financial autonomy of the bar association and thereby avoiding external funding that may have serious effect in operational independence of the bar.[45] Generally, the cumulative effects of all these provisions is to guarantee the independence of the private Bar by ensuring self-governance, professional accountability and protection from external forces.

However, a thorough analysis of the TLS Act shows that it is still lacking in number of ways. Firstly, the TLS Act does not contain sufficient provisions that will shield members of the bar from harassment and intimidation when discharging their professional duties thereby undermine their ability to practice independently. Secondly, the TLS Act contains insufficient provisions that limits the government influences over the legal profession thus providing an avenue for the government to compromise the independence of the bar. Lastly,

42 See Section 4 (a)-(i) thereof.
43 M. Judith, 'Bar associations, self-regulation and consumer protection', *J. Prof. Law. Symp. Issues* (2008), 53.
44 See Section 15 of the Act.
45 See Section, 10 and 4 (f) (g) of the Act.

the TLS Act lacks enforcement mechanisms to ensure compliance of its provisions.

To the contrary, in some other jurisdictions, the principle of independence of the Bar has been entrenched in the specific laws regulating the legal profession as a provision which expressly recognizes it. In that regard, the practice found under the South African Legal Practice Act[46] is applauded. This law has managed to restructure the legal profession by aligning it with constitutional imperatives and in the process, it has managed to create an independent legal profession that reflects diversities of the legal profession in South Africa.[47] Consistent with this, the South African Legal Practice Council established under Section 4 of the South African Legal Practice Act, is charged among others with the functions of transforming and restructuring the South African legal profession that is accountable, efficient, and independent.[48] Reading the TLS Act, similar functions have not been extended to the TLS. It thus argued that, addressing all these shortcomings is crucial towards strengthening and achieving the independence of the bar in Mainland Tanzania.

5.0 Indicators of Independence of the Bar

Independence of the Bar is more of a legal obligation than merely an ethical or moral consideration, recognized by both international and domestic laws. Stressing on this ideal, the UN Special Rapporteur on the Independence of Judges and Lawyers has stated that; independence of judges and lawyers constitutes an international law norm as per Article 38(1)(b) of the Statute of the International Court of Justice.[49] However, no single indicator can alone dictate the availability or lack of independence of the Bar. There is, therefore, a set of indicators whose context should be viewed in conjunction with one another. The United Nations on its side, noted that the existence of independence of the bar largely depends on the ability of lawyers to discharge their functions freely, independently without any fear of reprisal.[50] Moreover, it requires member states to take measures to ensure self-governance and independent association of lawyers.

The International Bar Association (IBA) named the following as indicators for existence of independence of the bar; Constitutional guarantees of judicial independence, freedom to associate through independent bar associations and organizations, clear and transparent rules on admission to the bar, disciplinary

46 No. 28 of 2014, part of the Act came into operation on 1 February 2015, and the remainder of the Act came into full force in February 2018.

47 *See* the Long Title and Section 3(c) of the Legal Practice Act (No. 28 of 2014).

48 *Ibid,* Section 5(a).

49 OHCHR, *op. cit fn* 23 at 151.

50 United Nations General Assembly, *Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers*, A/HRC/44/L.7, July 2020, arts. 7, 15.

proceedings and disbarment, protection of legal professional privilege/professional secrecy, the scope of protection, and procedural guarantees, effective independent regulation of the profession, Freedom of choice in representation, including freedom from fear of prosecution in controversial or unpopular cases.[51] This article will, however, not delve into discussing all of the indicators. The following indicators will be under the purview of this study: disciplinary proceedings and disbarment, protection of the legal professional's privilege/professional secrecy, freedom from fear of prosecution in controversial cases, and effective independent regulation of the profession. In the upcoming sections, these indicators will serve as gauging standards for evaluating Mainland Tanzanian law and practices in comparison with international standards and best practices from other jurisdictions.

6.0 Practices Compromising Independence of the Bar in Mainland Tanzania

This part discusses various instances, both in law and practice, that put the road to achieving independence of the Bar in Mainland Tanzania at the crossroads. It sheds some light on the gaps existing in the law and other practical experiences requiring an immediate address by the responsible stakeholders in the administration of justice. It discusses various thresholds ranging from advocates' disciplinary mechanisms, advocates' fear of prosecution and retaliation, effective independent or self-regulation of the Bar and the question of legal profession's privileges. These important tenets of the independence of the Bar are hereunder traversed as follows:

6.1 Advocates' Disciplinary Mechanisms

The disciplinary mechanism for advocates in Mainland Tanzania marks an important challenge that compromises the independence of the Bar. The mechanism is faulted from how the advocates' disciplinary authorities are constituted, functions and the powers conferred upon them against misconducting advocates. A detailed discussion of these critical aspects is canvassed herein below.

6.1.1 Compositional Challenges of the Advocates' Committees

In ascertaining independence of any institution, its composition is paramount. The essence comes from the principle: *nemo judex in causa sua*, which underlines the idea that a fair hearing discourages one to decide a matter in which he/she has substantial interest.[52] Principle 28 of the United Nations Basic Principles on the Role Judges and of Lawyers emphasizes that disciplinary proceedings against lawyers in their capacity as such, needs to be heard by a neutral body. This connotes that; a body entertaining disciplinary action against a member of the Bar should have minimum external control from the Executive arm of the

51 IBA, *op. cit fn* 26 at 9.
52 IBA, *op. cit fn* 26 at 9

State or other private bodies. Concerns have been raised by members of the Bar in Mainland Tanzania to the effect that the composition of disciplinary authorities such as the Advocates' Committees compromises the independence of the Bar, consequently interfering with their professional interests.

Currently, there are two Advocates' Committees: the National Advocates' Committee and the Regional Advocates' Committee. While the National Advocates' Committee ('the NAC') is established under Section 4(1) of the Advocates Act, the Regional Advocates Committee ('the RAC') is established under Section 4A(1) of the Advocates Act. In particular, the NAC is a national disciplinary body for advocates in Mainland Tanzania. The NAC is composed of a tripartite type of members, namely: a Judge of the High Court of Tanzania nominated by the Chief Justice(who is the chairperson of the NAC), the Attorney-General (AG) or the Deputy Attorney-General (DAG) or the Director of Public Prosecutions (DPP), and a practicing advocate nominated by the Council of the TLS.[53] Two of the appointed members of the NAC, one of them being the Attorney-General, form a quorum.[54] This means that, proceedings before the NAC cannot take off in absence of the AG/DAG; but, on the contrary, the absence of either of the other two members cannot affect the proceedings of the case.

There have been concerns that; with this composition, decisions of the NAC cannot be independent as much control has been given to the Executive arm of the State in its composition and quorum. The East Africa Law Society (EALS), the Pan African Lawyers Union (PALU) and the Southern African Lawyers Association (SADC/LA), in their joint statement expressed similar, have expressed their worries over the structure and composition of the NAC, the quorum requirement, and the broad discretion bestowed to the AG in both scheduling and initiation of proceedings against advocates.[55]

These allegations get more serious in the event the complainant against a member of the Bar is the AG him/herself. Under this situation, the AG, who is a complainant against the advocate, becomes the judge in his/her own case. Additionally, Section 4(4) of the Advocates Act provides that; in absence of the High Court Judge acting as the chairperson, the AG or the DAG will act as a chairperson of the NAC. The possibility of conflict gets amplified by the fact that; the AG, as opposed to other members, is a necessary member without whom the hearing cannot proceed.[56] Under such circumstances, the law does not provide on how such conflict of interest can be avoided. Nonetheless, the

53 Advocates Act, [Cap. 341R.E 2019], Section 4 (1)
54 *Ibid*, Section 4 (5).
55 https://www.lawyersofafrica.org/wp-content/uploads/20240705_-JOINT-STATEMENT-OF-THE-PALU-EALS-SADCLA_Independence-of-the-legal-profession.pdf (Accessed on 8 October 2024).
56 *Ibid*, Section 4 (5).

drafters of this legislation were keen enough to avoid conflict of interest arising when the allegations involve an advocate appointed as a member of the NAC, by excluding him/her and allowing re-appointment of another independent member of the Bar.[57]

Similar sentiments arise, when a Judge appointed as a chairman of the NAC is the complainant. Similar standard, which applies when an appointed advocate is the respondent, does not apply when the complainant against an advocate is a Judge of the High Court appointed as a chairperson. According to Section 4(3) of the Advocates Act, the only set of circumstances where a Judge appointed by the Chief Justice as a chairperson of the NAC will not preside over a matter is when he/she is temporarily incapable or absent from the country.[58] Commonly, temporary incapability would cover issues such as sickness and similar situations but not conflict of interest. Again, the law is silent on how such conflict of interest, which is against the interest of the respondent advocate, can be avoided.

It is not clear whether the oversight was intentional or a slip on the part of the drafters. Surprisingly, a similar situation was addressed by drafters where a matter comes to the NAC as an appeal from an order of a High Court Judge, who is also serving as a chairperson of the NAC. Under this situation, the law requires the Chief Justice to appoint another Judge to sit as the chairperson of the Committee.[59] However, this provision is only relevant in a situation where the matter against an advocate comes as an appeal to the NAC; and, therefore, cannot be said to be impliedly applicable under Section 4 of the Advocates Act, where the Committee serves as the first instance body.

On its part, the RAC,[60] which was established in 2021 following the introduction of Section 4A(1) to the Advocates Act vide Act (No. 5 of 2021), is composed of: (*i*) the High Court Registrar of the Zone where the High Court is situated, who sits as Committee's Chairperson;[61] (*ii*) the State Attorney in-charge or a Regional Prosecution Officer working under the National Prosecutions Services (NPS);[62] and (*iii*) a Chapter Convener of the TLS.[63] The RAC may appoint any public officer 'who has requisite knowledge in law to be a Secretary to the Regional

57 *Ibid*, Section 4 (7).
58 *Ibid*, Section 4(3).
59 *Ibid*, Section 22(2)(c)(ii).
60 The powers of the RAC are spelt out in Section 4B(1) of the Advocates Act; that is: (*i*) to determine any application by an advocate to remove the name of an advocate from the Roll of Advocates [Section 4B(1)(a)]; (*ii*) to determine any application by any person to remove the name of an advocate from the Roll of Advocates [Section 4B(1)(b)]; and (*iii*) to determine any allegation of misconduct made against an advocate by any person [Section 4B(1)(c)].
61 Section 4A(1)(a) of the Advocates Act.
62 *Ibid*, Section 4A(1)(b).
63 *Ibid*, Section 4A(1)(c).

Advocates Committee.'[64] The Committee's quorum is where there are two members, one of whom being a State Attorney in-charge or a Regional Prosecutions Officer.[65] As with the NAC, the composition of the RAC is also overwhelmed by members from the Executive and the Judiciary, a situation which compromises its independence and freedom from bias against any given respondent advocate particularly where the complainant is either a member of the Executive or the Judiciary.

It is a well-known principle that; a genuine independence of the Bar requires disciplinary bodies of the bar to be able to discharge their functions independently and with minimum executive interference.[66] Among other things, minimum executive interference is affected by existence of a regulatory body that is predominantly composed of government-appointed members and consequently compromises independence of the bar.[67] The legal requirement for the AG's presence to trigger the proceedings, combined with the fact that a member of the bar absence cannot prevent the hearing from proceedings, raises concerns over the independence of the bar. Additionally, the committees' structure permits conflict of interest to the detriment of the advocate and thereby placing the independence of the bar at a great risk.

The practice has been different in other jurisdictions such as Kenya, where the advocates' disciplinary tribunal is composed of six advocates from the Bar in addition to the AG, the DPP, and the Solicitor-General (SG) who are presidential appointees.[68] Moreover, the tribunal may proceed in absence of the three executive members.[69] To this end, it high time that the legislature should make necessary amendment to the Advocates Act in order to uphold the independence of the private Bar in Mainland Tanzania. This can be done by, *inter alia,* amending the relevant provisions of the law that place overwhelming control of the disciplinary committees onto members of the Executive arm of the State and those allowing conflict of interest at the expense of the advocates in conflict with the law. It is suggested that these disciplinary bodies should be predominated by members from the private Bar to enhance the spirit of self-regulation as encapsulated by international standards. In doing this, Mainland Tanzania may learn best practices from other jurisdictions such as the neighbouring Kenya.

64 *Ibid*, Section 4A(2).
65 *Ibid*, Section 4A(3).
66 IBA, *op. cit fn* 26 at 15.
67 *Ibid* at 22.
68 Advocates Act [Cap 16 of the laws of Kenya, 2012], Section 57.
69 *Ibid*, Section 57.

6.1.2 Uncontrolled power of Judges of the High Court as disciplinary authorities

The Advocates Act vests power in the Chief Justice and High Court Judges to admonish, suspend from practice or order removal from the roll any advocate for misconduct. The decisions therefrom are appealable to the Court of Appeal or the High Court as a case may be.[70] Courts have held that these powers can only be exercised when an alleged misconduct is committed in his/her presence and in the course of hearing.[71] These powers cannot be interfered or superseded by any authority.[72] Emphasizing on this point, the High Court in *Fatma Amani Karume v. The Attorney General and Advocates Committee,*[73] among other things, reiterated that once the High Court Judge has exercised this power, any part privy to the impugned case is barred from initiating a case based on the same allegations.

Reading between the lines, the law conferring these powers to High Court Judges does not provide any for procedure that the Judge exercising these powers should follow before giving any order against the advocate in question, although they are required to observe natural justice while doing so.[74] Due to this, it has been equally interpreted by Judges that this provision meant to be a temporary measure pending other procedures such as reference to advocates committee;[75] and, therefore, procedures such as hearing before an order are not required.

The Advocates (Disciplinary and Other Proceedings) Rules (2018) do not provide for any requirement for the Judge to hear the advocate facing allegations. To the surprise, it details procedures to follow where the alleged advocate has been referred to the committee for misconduct. While the law does not require a Judge to hear the alleged advocate, contrary to rules of natural justice, the order that the Judge may issue, whether temporary or permanent are heavy and some of them tantamount to curtailing the advocate of his right to work.[76] For instance, in *NIC Bank Tanzania Ltd. v. Princess Shabaha Co. Ltd.,*[77] the court reiterated that an advocate who has been suspended from the roll cannot issue any process, neither can he defend any action in his name or in another person's name.

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70 Section 22 of the Advocates Act [Cap 341R.E 2019].

71 *Fatma Amani Karume v. The Attorney General and Advocates Committee*, Civil Appeal No. 02 of 2020, High Court of the United Republic of Tanzania, at Dar es salaam, (Unreported).

72 Section 22(1) of the Advocates Act [Cap 341R.E 2019].

73 *Fatma Amani Karume v. AG & Another, Op. cit fn* 70.

74 *Alex Peter Msalenge & Another v. A.G.,* Advocates Committee (DSM), Appeal No. 01/2022 (unreported); and *Zephrine Galeba v. Honourable Attorney General* [2017] TLS LR 100.

75 *Fatma Amani Karume v. AG & Another, Op. cit fn* 70.

76 The provision of section 22 (2) of Cap. 341, empower the judge to suspend an advocate for a definite duration or may order for his removal from the roll of advocates.

77 [2017] TLR LR 518.

It is incomprehensible, therefore, for a decision that curtails a person's constitutional right to work for unknown period of time be entertained without affording such person a right to be heard. In similar vein, the Court of Appeal in *Zephrine Galeba v. Honourable Attorney General*,[78] stated that the disciplinary powers of Judge or Chief Justice over advocates under Section 22 (2)(a) and (b) of the Advocates Act must comply, among other things, with the cardinal rules such as *aud alteram partem* and presumption of innocence. It is therefore apposite to state that necessary amendment is needed to ensure procedures that afford an advocate a right to be heard even in such deemed temporary order by a Judge. Failure to do so will leave members of the bar at risk of compromising their professional independence.

6.1.3 Powers of Judges of the High Court Who Are Serving Under Other Capacities

As Canvassed above, Section 22 of the Advocates Act empowers the Chief Justice and High Court Judges to admonish, suspend from practice or order removal from the roll, any advocate for misconduct. Moreover, as previously discussed, in *Fatma Amani Karume v. The Attorney General and Advocates Committee (supra)*, these powers have to be exercised when such misconduct is committed by the said advocate before and in course of hearing by the said Judge. The conditions for applicability of these powers are limited to a misconduct committed not only in his presence but also during hearing of a case where he is presiding over. These conditions set territorial/geographical boundaries on the applicability of the powers under Section 22. With this in mind therefore, a Judge cannot exercise the powers under this provision to admonish an advocate who is alleged to have committed a misconduct anywhere within the territorial limits of the Judge's jurisdiction, unless the conditions are met.

However, that stance brings another controversy not addressed by the law, in our opinion. This is whether the powers, under Section 22, apply even where a Judge of the High Court is presiding over a matter under other capacities. For instance, a Judge of the High Court who is also appointed as a chairman of a commission or tribunal with certain adjudicative powers. In the event an advocate is alleged to commit a professional misconduct while appearing before such commission or tribunal, can such chairman apply the powers under Section 22? Putting it differently, are the powers under Section 22 moving with the Judge in all legal forums where adjudicative processes are done? This dilemma cannot be easily resolved as it is not clearly addressed by the law.

78 [2017] TLS LR 100. *See* also *Alex Peter Msalenge & Another v. A.G., op. cit.*

However, failure of the law to address this dilemma has attracted different interpretation of Section 22 over the powers bestowed to the Judges. It has been reported now and then that advocates representing their clients in other bodies other than the High Court, have been suspended by presiders who holds a title of a Judge though acting in other capacities such as chairpersons. A recent example is the suspension of Advocate Mpale Mpoki who appeared on behalf of his client before the advocate committee, where the chairperson suspended him from practicing pending determination by the advocate committee. The chairperson alleged to assert these powers under Section 22 of the Advocates Act. This anomaly however, can be cleared by the legislature amending the provision because leaving it as such makes the Judges disciplinary powers over advocates unnecessary wide at the detriment of the independence of the bar.

6.2 Freedom from Fear of Prosecution and Retaliation

The private Bar is meant to serve as a neutral adviser of the government and represent a strong voice against state institutions threatening proper administration of justice.[79] This can be done through issuing press statements, court representation, court's amicus, pro bono work, public interest cases, civic education, to mention a few. This means, as independent realm, the bar is expected to partner with the government in a wake to uphold rule of law while serving as a watchdog over the state powers. This dual role cannot be effectively played when it acts with fear of retaliation or prosecution from the state. Highlighting on this, the International Bar Association (IBA),[80] noted that, the legal profession is not independent in the event advocates are prone to arbitrary disbarments or targeted disciplinary proceedings as a result of fulfilling their professional obligations. Therefore, for the bar to serve as an effective independent voice against threat to administration of justice and rule of law, there must be no possibilities of disbarment or potential disciplinary charges against its members for merely fulfilling these professional obligations.

The current landscape in the practice of legal profession in Mainland Tanzania, reveals elements of eminent fear of prosecution or retaliation among lawyers. Moreover, the escalation of the problem is more pointing to the state agencies than other private entities. The events precipitating the concerns include actions which were associated with the retaliation against actions by lawyers while fulfilling their professional duties, which actions were interpreted to be against the interest of the State. Among numerous examples worth mentioning includes, the bombing of IMMMA Advocates' offices in Dar es Salaam. The attacks of these offices were linked to the fact that the said law firm was representing ACCACIA, a limited liability company which had a commercial

79 IBA, *Op.cit fn 26* at 16.
80 *Ibid*.

dispute with the Government.[81] Moreover, three weeks after the attacks on law firm's premises – that is, on 12 September 2017 – another law firm's offices by the name of 'Prime Attorneys' were broken into by unknown assailants, whereby some documents and money were alleged to have been taken away by the assailants.[82] This event took place at the time when the firm was representing a renowned businessman by then, Mr. Yusuph Manji, who faced charges related to economic sabotage. Some members of the public and members of the Bar had an opinion that the firm was targeted due to its representation of such client who, according to them, had adverse interest with the Government.[83]

Furthermore, an assassination attempts of the then President of TLS, Mr. Tundu Lissu, was also associated with the victim's profession as member of the private Bar. Mr. Lissu's attack followed his arrest on 6 February 2017 for charges which were not disclosed after his High Court petition against election regulations.[84] Furthermore, on 26 August 2017, his law firm was also bombed. The suspicions that these events are linked to the victims' professional duties as members of the private Bar got support because, to date, there have been no official report showing significant developments in their investigation. This leaves behind divided opinions that the same were motivated by the advocates' duties un-countered and therefore holding water. All these events can be inferred as amounting to a significant infringement of the independence of the private Bar in Mainland Tanzania.[85]

Beside the above-named events, the independence of the private Bar, and the legal profession at large, may also be in jeopardy when members of the Bar are prone to constant threats and verbal attacks from both the executive realm or other organs of the State. Available records show that somehow the private Bar in Mainland Tanzania has been a victim of these attacks in one way or the other. One occasion worth naming concerns utterances made on 20 April 2018 by the then president of Tanzania while swearing in the appointed Judges and senior State lawyers[86] directing the Chief Justice and the Attorney General to deal with members of the private Bar who aired out their opinion on the welfare of Judges

81 "Suspected bandits raid office block hosting Manji's attorneys" in the Citizen, 12 September 2017, available at www.thecitizen.co.tz/News/Tanzania--Suspected-bandits-raid-office-block-hosti/1840340 4092210cyemk4/index.html (Accessed on 11 April 2024).

82 *Ibid.*

83 International Bar Association, "Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers on the Role, Composition and Functions of Bar Associations," A Report of the International Bar Association's Human Rights Institute, October 2018, 21-22.

84 *Ibid.*

85 *Ibid.*

86 The Depute Attorney General, the Solicitor General, the Deputy Solicitor General and the Deputy Director of Public Prosecutions.

in Tanzania.[87] These utterances raised alarm from the public with the feeling that they put both the independence of the judiciary and that of the bar at risk. Nonetheless, in March 2024, the Legal and Human Right Centre issued a press release condemning the threats of their advocate, Mr. Joseph Oleshangay, by officials from the Tanzania Police Force. The threats were related to his involvement in representing Maasai living in the Ngorongoro Conservation Area.[88]

Another practice instilling fear in the minds of advocates is the tendency of connecting the advocates with their clients in certain criminal investigations. There is a growth of investigative machineries in Mainland Tanzania associating advocates with charges their clients face before the court of law. This practice has made some advocates turn into accused persons over the same charges that their clients are facing, contrary to what the principles of independence of the Bar requires. A good example is a series of arrests of advocates attending their clients who happened to be under police investigation. The claims get support because in many occasions, these arrests have been taking place after statements of politicians holding high administrative ranks in the government.[89] These actions tantamount to associating lawyers with their client which undermine their ability to execute their professional obligations freely.

A good example is the arrest of advocate Boniface Mwabukusi which took place on 12 August 2023 where the said advocate was arrested by the police by allegedly uttering seditious statements. These came two days after the High Court pronounced a judgment where the named advocate represented the petitioner against the government. The statements allegedly seditious concerned among other things, Judgement of the validity of the contract between Tanzania and a foreign entity.[90] The matter raised concerns on whether lawyers as members of the public have no right to partake in discussion of matters of public interest, especially regarding rule of law and protection of human rights.[91] According to a joint statement issued by the EALS, SADC/LA and PALU on 5 July 2024, about thirteen (13) reprisal cases against lawyers in Tanzania were instituted between 2019 and July 2024 and nearly half of them

87 International Bar Association, "Stakeholder Submission to the Special Rapporteur on the Independence of Judges and Lawyers on the Role, Composition and Functions of Bar Associations," op. cit.

88 E. Charles, "Mwanasheria adaiwa kutishiwa usalama", in the *Nipashe* newpaper (Dare es Salaam, Tanzania), 29 March 2024.

89 IBA, *Op. cit fn* 82 at 21-22.

90 https://thechanzo.com/2023/08/12/polisitumemkamata-mwabukusi-ni-wakili-aliyesimamia-kesi-ya-mkataba-wa-bandari-na-dp-world/ (Accessed on 11th April 2024).

91 Lawyers for Lawyers, "Individual UPR Submission, Lawyers for Lawyers–United Republic of Tanzania," Thirty-Ninth Session of the Working Group on the UPR, 7. https://lawyersforlawyers.org/en/upr-submission-tanzania/ (Accessed October 7, 2024).

were initiated by the Attorney General to the advocates committee.[92] Moreover, some cases involved threats to life which made them look for temporary exile.[93]

As a consequence, these events put independence of the private Bar at risk by making lawyers retreat from representing clients especially those who are in conflict of interest with the State. It is, therefore, argued that, the ethical rules for lawyers should be looked at to ensure that lawyers as officers of the court are not restricted to take part in public debates.[94] In absence of visible initiatives by the state to put away with this, no words can be said than asserting that members of the bar in Tanzania are in fear of eminent prosecution and retaliation and eventually independence of the bar is at risk. That said, state agencies need to refrain themselves from interfering with the professional duties of advocates. This should be complemented by a deliberate review of all laws that permit such interferes and restrict advocate's professional liberty.

6.3 Effective Independent Regulation of the Legal Profession

As considered above, independence entails freedom of the bar to regulate its practices free from outside regulation. Lawyers are held to be legally accorded with powers to set terms of entry, standards of practice and means to discipline violators of rules of professional etiquette and ethics.[95] In assessing independence of the Bar, the regulatory scheme and its actual impact they have on the ability of lawyers to carry out their duties independently and impartially, is important.[96] The Bar is generally deemed to be independent when it is free from external influence and can withstand pressure from external sources on matters related to regulation of the profession, disbarment proceedings and the right of lawyers to join the association.

With this in mind, independence of the Bar is, therefore, at crossroad in case the Bar association is unable to set its own standards for professional practice. It is a fundamental rule that an independent Bar should have an ability to form its own code of ethics subject to the domestic laws as well as international standards.[97] Lawyers themselves should retain a nearly exclusive territory over admission, licensing, regulation, and disciplinary affairs.[98] Once this principle is not legally honored, it is fair to assert that independence of the Bar is not fully guaranteed.

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92 https://www.lawyersofafrica.org/wp-content/uploads/20240705_-JOINT-STATEMENT-OF-THE-PALU-EALS-SADCLA_Independence-of-the-legal-profession.pdf (Accessed on 8 October 2024).

93 *Ibid*.

94 Southern Africa Litigation Centre, Tanzania's 3rd Universal Periodic Review, 39th Session (October-November 2021). https://www.southernafricalitigationcentre.org/wp-content/uploads/2021/03/Tanzania_UPR-Submsn_-Mar-2021-website.pdf (Accessed on 7 October 2024).

95 R. W. Gordon, "The Independence of Lawyers", 68 *Boston University Law Review* 1 (1988), 6.

96 *Ibid* at 350.

97 See article 26 of the United Nations Basic Principles on the Role of Lawyers, 1990.

98 L. Zer-Gutman *Op. cit fn* 3 at 343.

Equally, it is correct therefore to argue that, independence of the bar is compromised in the event the codes of ethics for practice of its members come from external source and not from the bar through its appropriate organs. Moreover, some practices such as legislative attempts by government to restrict the rights of lawyers to join other independent non-governmental organizations may add up to the list. In similar vein, Section 31 of the Advocates Act[99] empowers the TLS to make regulations prescribing various affairs of the Bar through its Governing Council. This provision is in line with principle 26 of the United Nations Basic Principles on the Role of Lawyers, which is considered above.

However, there have been observed practices violating this principle in Tanzania. A good example could be that of 2018 when some provisions of the submitted draft of the Tanganyika Law Society (Elections) Regulations were modified by the Attorney General, specifically the one restricting civil servants, Members of Parliament (MPs), councilors or leaders of political parties from contesting for positions in the Bar. The practice of controlling the standards of entry into, and exclusion from the profession is far from achieving independence of the bar.

Therefore, there must be comprehensible, clear and transparent rules on admission to and disbarment from the bar, which should be mainly controlled by the bar association itself. The admission and disciplinary bodies of the Bar must be able to discharge their functions independently with minimal executive interference. It is thus suggested that, the making of rules to regulate conducts of members of the bar should be left to the bar through its established organs and the executive part should not temper with it.

6.4 Legal Professional Privilege/Secrecy

Despite having no common definition of what the legal professional privilege entails, the same is presumed to exist where communications and documents offered in confidence by the client is protected from disclosure. However, such privilege can in some special circumstances be waived.[100] In *Re (Morgan Grenfell & Co Ltd.) v. Special Commissioner of Income Tax,*[101] legal professional privilege was considered as a fundamental human right similar to the right to obtain a skilled advice; and, therefore, the right cannot be achieved unless a client is free to disclose all facts to the adviser without fear of later disclosure. The advocate-client privilege is meant to ensure sound, accurate and reasoned legal advice and advocacy. That situation is a possibility in the event there is disclosure of

99 Act No. 42 of 1961.
100 http://fbattorneys.co.tz/news/Aug20_12.html (Accessed on 6th April 2024).
101 [2002] UKHL 21.

all relevant information to the attorney. That can be possible in the event the zone of privacy is created by making sure that a lawyer is neither obliged nor voluntarily expose facts communicated to him in confidence by a client seeking professional advice. Legal professional privilege is a crucial element in maintaining the rule of law.

The private legal practice in Tanzania has recently witnessed elements reflecting an attack to this important element of the independence of the Bar. Such threats come from various actors such as legislators, regulatory bodies, public bodies and law enforcement agencies.[102] The principle of legal professional privilege is under threat where the legislature passes legislation that mandates disclosure of confidential client information. With such legislation, lawyers are, therefore, forced to act as 'agents of the State' by disclosing private and confidential client information, sometimes without the permission of their clients. In the absence of the right of confidentiality and clear circumstances under which client's information can be disclosed, the ability of the advocate to represent the client with independent and honest advice is significantly undermined.

One of the laws in Tanzania that has been condemned on compromising the right to legal profession privilege, is the Anti-Money Laundering Act.[103] The law designates lawyers as reporting persons for the purpose of money laundering and predicate offences. It further obliges them to report to the Financial Intelligence Unit (FIU) any transactions they suspect to be linked to money laundering and predicate offences within 24 hours of their suspicion.[104] The lawyers may be obliged to disclose any further information if required.[105] The obligations arises when an advocate is assisting clients in preparing or executing transactions involving purchase or sale of property or commercial enterprises, management of funds, opening of bank accounts, buying or selling of business entities, amongst others.[106]

However, in *Federation of Law Societies v. Canada (Attorney General)*[107] the court held that money-laundering legislation violates the independence of the Bar by requiring disclosure of information protected by solicitor-client confidentiality. This is because by doing so, it is forcing a lawyer to choose his/her loyalty to his/her client or complying with the terms of the legislation.[108] However, on the

102 The Chamber of Advocates, Legal Professional Privilege–Practice Note for Advocates, 1 October 2021. https://www.avukati.org/wp-content/uploads/2021/09/Legal-Privilege-Practice-Note-2021.pdf (Accessed on 9 April 2024).
103 [Cap 423 R.E 2019].
104 The Anti-Money Laundering Act [Cap 423 R.E 2019], Section 17.
105 *Ibid*
106 FB Attorneys, "New Anti-Money Laundering Regulations", https://fbattorneys.co.tz/qa-10-june-2019/ (Accessed on 7 May 2024).
107 2013 BCCA 147.
108 *Ibid*.

other side, there is an argument to the effect that lawyers should act contrary to the client's interest when the same falls out of what the rule of law protects or when it is necessary to serve its values.[109] There has not been a conclusion on whether legislation obliging lawyers to disclose clients financial information, under such circumstances, conflicts with legal professional privilege and client confidentiality.[110] However, for purpose of balancing the two competing interests, this issue needs to be careful dealt with so that; while serving the purpose of countering money laundering, it should equally not jeopardise the confidential relationship between advocates and their clients, leaving the constitutional rights to privacy and legal defense at risk.[111]

One way of doing this is by exonerating lawyers from this obligation in the event legal professional privilege is established. This means, states should through legislations, determine what amounts to legal professional privilege in that jurisdiction.[112] In other jurisdictions, this obligation has been left to the bar itself to be dealt through self-regulation.[113] This means, the bar itself through its appropriate organs places such obligation as part of its disciplinary processes as opposed to criminalizing it. This makes non-disclosure of such information by an advocate, a professional misconduct attracting disciplinary actions and not an offence.

It is, therefore, argued that Section 17 of the Anti-Money Laundering Act, that designates advocates as reporting persons with obligation to immediately ensure they ascertain the destiny and later prepare and submit the report to that effect and Section 17(4) of the Anti-Money Laundering Act, that makes failure to do this a crime should be looked at. It is contended that this requirement and its ensuing criminal liability on the advocate, has a consequence of compromising the legal professional privilege leading to fear of clients to freely communicate and disclose potential information's to their lawyers. It suffices, if the reporting requirement is self-regulated by the bar association of Mainland Tanzania under the auspice of unethical conduct of advocates.

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109 A. Woolley, 'Lawyers and the Rule of Law: Independence of the bar, the Canadian constitution and the law governing lawyers', *24 National Journal of Constitutional Law* (2014), 23. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435330/ (Accessed on 8 October 2024).

110 K. Pambo 'Designating lawyers as reporting entities under the Kenya's anti-money laundering regime' 23 *Journal of Money Laundering Control* 3 (2020), 643. https://www.emerald.com/insight/content/doi/10.1108/JMLC-07-2019-0063/full/html (Accessed on 8 October 2024).

111 Ibid at 644.

112 *Ibid* at 645.

113 N. Gichuki, 'The conflict between anti-money laundering reporting obligations and the doctrine of confidentiality for legal practitioners in Kenya', 24 *Journal of Money Laundering Control* 3 (2021). https://www.emerald.com/insight/content/doi/10.1108/JMLC-05-2020-0055/full/html (Accessed on 8 October 2024).

7.0 The Role of the Bar Associations in Asserting Independence of its Members

The foregoing demonstrated instances clearly show that, the legal protection is weak and fragile in practice. The ongoing executive encroachment as evidenced through regulatory overreach and intimidation significantly erodes the bar's independence. Moreover, these incidences put the independence of the bar to ultimate test, necessitating a critical interrogation and re-evaluation of the roles of the bar associations at domestic, regional and international level in safeguarding lawyer's independence. In particular, the international, regional and national bar associations such as the IBA, the EALS, PALU, SADCLA and TLS become essential in asserting and affirming the independence of the Bar at the municipal level. It is, thus, crucial to assess their effectiveness in protecting the legal profession in light of the identified challenges.

Of particular importance, principle 18 of the IBA Standards for the Independence of the Legal Profession highlights the crucial role that the bar association could play in asserting the independence of the private Bar in any given jurisdiction. This principle stresses that, the respective bar association has a role to play in promoting justice impartially and upholding the integrity and ethical standards of its members. The bar associations' role should also extend in ensuring public access to justice including provision of legal aid. Furthermore, the bar association is responsible for advocating for prompt hearings and participate in discussion on law reforms to influence legislation.[114]

At the international level, IBA which is founded in 1947 has been instrumental in asserting the independence of the bar globally and to a larger extent have managed to fully embrace the above roles. Describing itself as the "global voice of the legal profession", IBA has conducted numerous fact-finding missions aiming to study the state of independence of the legal profession especially to the countries where the rule of law is in crisis. IBA therefore document reports, highlighting incidences of serious violation of lawyer's independence and provides recommendations to the specific country and the international community on how to eliminate the existing challenges and uphold the rule of law and ultimately the independence of the bar. The notable example is its joint fact-finding mission in 2018 which aimed at assessing the state of independence of legal profession in Tanzania following series of events that occurred in 2017.[115] Additionally, the organized workshops and webinars not only raises awareness on the plight of legal profession but have far-reaching impacts in

114 See Principle 18 (a)-(K).

115 See the International Bar Association. *Warning Shots: Threats to the Independence of the Legal Profession in Tanzania*. (April 2018)

building confidence on the part of the lawyer in discharging their duties without fear of reprisal.[116]

Complementing IBA's efforts, national and regional bar associations have also been vocal in condemning acts that put the independence of the bar at jeopardy. This mostly have involved the issuance of joint statements expressing the association's firm positions. A good example is the joint statement issued by PALU, EALS and SADCLA condemning the developments in the interaction between the legal profession and judicial institutes in Uganda, Tanzania, Kenya and Botswana.[117] Despite this notable success, it is apparent that both regional and national bar associations, to some extent, have failed to replicate the efforts by the IBA in asserting the independence of the bar. This is because the associations are faced with numerous challenges that, to some extent, have undermined their ability to firmly protect lawyer's independence.

Instead of adopting advocacy role in legal reforms that would strengthen the independence of the bar, these associations have been adopting reactive measure such as issuance of statements whose effects have been so far minimal bringing an argument that they have failed to discharge their legal mandates and roles. At the moment, the bar associations are not equipped with any mechanism for protecting its members especially when they are facing persecution and intimidation. Inadequate funding and resources have also been cited as yet another reason that have inhabited the associations' ability to carry meaningful initiatives and effective lobbying necessary in promoting and enhancing the independence of the bar.[118]

Lack of coordinated efforts and collaborations in addressing regional issues among bar associations in East Africa have also diminished their collective strength in responding to various acts threatening the independence of the bar within the region.[119] Inability of these associations in responding to emerging challenges such as digital threats to privacy and security for lawyers also brings home the point that the national and regional bar associations have so far failed to embrace their roles in asserting the independence of their members. Therefore, it's fair to comment that, the challenges facing the independence of the bar in Mainland Tanzania and East Africa at large have been partly contributed by the respective bar associations. There is a dire need for the national and regional bar associations to work together in eliminating these

116 C. Leslie, M. Lynn, & G. Leny, 'The Impact of International Lawyer Organizations on Lawyer Regulation' 42 *Fordham International Law Journal,* 2 (2018), 408. Available at SSRN: https://ssrn.com/abstract=3319400 (Accessed on 8 October 2024).

117 Jointly Issued on 5 July 2024, available at https://www.lawyersofafrica.org/wp-content/uploads/20240705_-JOINT-STATEMENT-OF-THE-PALU-EALS-SADCLA_Independence-of-the-legal-profession.pdf/ (Accessed on 8 October 2024).

118 East Africa Law Society Strategic Plan, (2017-2021) at 10.

119 *Ibid*, at 9.

challenges, a step which will be crucial in strengthening their role in affirming the independence of the legal profession in East Africa.

8.0 Conclusion

It has been stressed that the independence of the Bar, as it find its legal basis from the constitution and other international legal instrument, is an essential component in upholding, justice, rule of law, democracy and human rights. When lawyers are independent to the extent of exerting freely their authority and expertise, the credibility and legitimacy of the Tanzania legal profession is enhanced. To the contrary, public confidence on the legal profession is eroded when lawyers are not independent. For these reasons, throughout this article it has been demonstrated that the need of protecting their independence while adhering to the international best practices and standards is crucial.

In that regard, the analysis of Mainland Tanzania's legal framework and practices in relation to the independence of the bar *vis-à-vis* each of the four indicators of independence of the bar, has revealed that, the independence of the bar in Tanzania is at stake and therefore there is a dire need for the bar association together with its members to assert more firmly their independence from external forces. The current disciplinary mechanisms for advocates especially the composition of disciplinary committee, the regulation of legal profession from external sources, lack of legal professional privilege and secrecy, and the lack of freedom from fear of prosecution of members of the bar further strengthen the proposition.

With the principle now receiving nearly a universal recognition, it is imperative for the country to have robust legislation and regulations with entrenched provisions that to a larger extent guarantees the independence of the bar. The existing regulatory gaps definitely erode lawyer's independence. With such concern in mind, the TLS is urged to continue and strengthen its efforts by developing appropriate standards that will ensure members of the bar are enjoying their independence when discharging their professional duties. Consistent with this, the EALS, being among the apex bodies of East African Community (EAC) with observer status and as an umbrella Regional Bar Association of respective national law societies in East Africa, should also take a leading role in condemning attacks and any regulatory attempts seeking to jeopardise the independence of the bar. This will definitely require the existence of strong leadership and a clear governance structure at TLS and EALS level.

The TLS, in collaboration with other bar associations across jurisdictions and IBA, can be of importance in strengthening the independence of the private Bar in Mainland Tanzania. Moreover, reforming the law on the disciplinary authority and the composition of disciplinary committee will be a great step

towards neutralizing conflict of interest, diminishing powers of the member of the executive from exerting control over the bar, a thing that will also be vital in upholding the principles of natural justice. The article, therefore, emphasises that the independence of the bar largely depends on the existence of a vibrant bar association and robust legal framework tailored towards protecting lawyers' independence.