

# **Legal and Human Rights Centre**

## **Tanzania Human Rights Report 2008:**

### **Progress through Human Rights**

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# **Tanzania Human Rights Report 2008**

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## Acronyms and Abbreviations

### Part One – Mainland Tanzania

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immunodeficiency Syndrome
APNAC	African Parliamentarians' Network against Corruption
APRM	African Peer Review Mechanism
ASP	Afro-Shirazi Party
BoT	Bank of Tanzania
CA	Court of Appeal of Tanzania
CCM	Chama cha Mapinduzi
CHADEMA	Chama cha Demokrasia na Maendeleo
CHRGG	Commission of Human Rights and Good Governance
CUF	Civic United Front
DNA	Deoxyribonucleic Acid
DP	Democratic Party
DRD	Declaration on the Right to Development
ELRA	Employment and Labour Relations Act, 2004
EMA	Environmental Management Act
EPA	External Debt Account
FGM	Female Genital Mutilation
GBS	General Budget Support initiative
GBV	Gender-based Violence
GN	Government Notice (of Tanzania)
HC	High Court of Tanzania
HIV	Human Immunodeficiency Virus
KTM	Karibu Textile Mill
LEAT	Legal Environmental Action Team
LHRC	Legal and Human Rights Commission
LRCT	Law Reform Commission of Tanzania
LSRP	Legal Sector Reform Programme
MDGs	Millennium Development Goals
MKUKUTA	<i>Mkakati wa Kukuza Uchumi na Kuondoa Umaskini</i> (in English, the National Economic Growth and Reduction of Poverty)
MKURABITA	Property and Business Formalization in Tanzania
MP	Member of the Parliament
NACSAP II	National Anti-Corruption Strategy and Action Plan of 2006 – 2010
NCCR	National Convention for Construction and Reform
NEC	National Electoral Commission
NEGRP	National Economic Growth and Reduction of Poverty (in Kiswahili, <i>Mkakati wa Kukuza Uchumi na Kuondoa Umaskini</i> )
NEMC	National Environment Management Council
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental organisation

NMB	National Microfinance Bank
NOLA	National Organisation of Legal Assistance
OAU	Organisation of African Unity
PCCB	Prevention and Combating of Corruption Bureau
PEDP	Primary Education Development Plan
PNVR	Permanent National Voters' Register
RE	Revised Edition (of the Laws of Tanzania of 2002)
SADC	Southern African Development Community
Second NMSF	Second National Multi-Sectoral Framework on HIV/AIDS
SEDP	Secondary Education Development Plan
TACAIDS	Tanzania Commission for AIDS
TANU	Tanganyika African National Union
TAWLA	Tanzanian Women Lawyers Association
TB	Tuberculosis
TLR	Tanzania Law Report
TPS	Tanzania Prisons Service
Tshs	Tanzanian Shillings (Money)
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commission of Refugees
USD	United States Dollars
ZLSC	Zanzibar Legal Services Centre

## Case Law

*Attorney General v N.I.M. Munuo Ng'uni*, Civil Appeal No. 45 of 1998 (Court of Appeal of Tanzania) (unreported).

*Attorney General v. W.K. Butambala* (1993) TLR 46 (Court of Appeal of Tanzania)

*Bernardo Ephraim v. Holario Pastory and Another*, Civil Appeal No. 70 of 1989; [1990] LRC (Const) 757 (High Court at Mwanza)

*Ibrahimu Koroso & 34 Others and LHRC v District Commissioner and Officer Commanding District for Serengeti District*, Case No. HBUB/S/1032/2001/2002/MARA (unreported)

*Joseph Kivuyo and Others v Regional Police Commander, Arusha and Another*, Misc. Civil Application No. 22 of 1978 (High Court of Tanzania at Arusha) (unreported)

*LHRC v Ole Sabaya and 4 Others*, Civil Appeal No. 88 of 2006 (Court of Appeal of Tanzania) (unreported)

*LHRC v Thomas Ole Sabaya and 4 Others*, Misc. Land Application No. 22 of 2005 (High Court) (unreported)

*LHRC, Mkombozi Centre for Street Children and the East African Law Society v Attorney General*, Misc. Civil Application No. 26 of 2007 (High Court of Tanzania at Arusha)

*Mbushuu alias Mnyaroje and Kalai Sangula v Republic* (1995) TLR 97 (Court of Appeal)

*National Organization for Legal Assistance, Tanzania Media Women Association, Southern African Human Rights NGO Network, Tanzanian Chapter, Media Institute of Southern Africa, Tanzania Chapter, and Kivulini Women's Rights Organisation v Attorney General*, Misc. Civil Cause No. 28 of 2008 (High Court of Tanzania at Dar es Salaam)

*Republic v Mbushuu alias Mnyaroje and Kalai Sangula* (1994) TLR 146 (High Court)

*Republic v Mbushuu alias Mnyaroje and Kalai Sangula* (1994) TLR 146 (High Court)

*Rev. Christopher Mtikila v Attorney General* (1995) TLR 31 (High Court)

*Rev. Christopher Mtikila v Attorney General*, Civil Case No. 5 of 1993 (High Court at Dodoma) (unreported)

*Rev. Christopher Mtikila v. Attorney General*, Misc. Civil Case No. 10 of 2005 (High Court) (unreported)

*Tanganyika Law Society, Legal and Human Rights Centre and SAHRiNGON – Tanzania Chapter v AG*, Misc. Civil Application No. 67 of 2008 (High Court at Dar es Salaam)

*W.K. Butambala v The Attorney General*, Misc. Criminal Cause No. 50 of 1990 (High Court at Mwanza) (unreported)

### **Legislation**

**Note:** The phrase “of the Revised Edition 2002 of the Laws of Tanzania” has been abbreviated to “R.E. 2002”.

*Affiliation Act, 1949*, Cap. 278, R.E. 2002

*Anti-Money Laundering Act, 2006*, Act No. 12 of 2006

*Anti-Trafficking in Persons Act, 2008*, No. 6 of 2008

*Basic Rights and Duties Enforcement Act, 1994*, Cap. 3, R.E. 2002

*Commission for Human Rights and Good Governance Act, 2001*, Cap. 391, R.E. 2002

*Community Service Act, 2002*, Act No. 6 of 2002

*Companies Act, 1931*, Cap. 212 R.E. 2002

*Constitution of the United Republic of Tanzania, 1977*, Cap. 2, R.E. 2002

*Corporal Punishment Act*, Cap. 17, R.E. 2002

*Criminal Procedure Act, 1987*, Cap. 20, R.E. 2002

*Disabled Persons (Care and Maintenance) Act, 1982*, Cap. 183, R.E. 2002

*Disabled Persons (Employment) Act, 1982*, Cap. 184, R.E. 2002

*Economic and Organised Crime Control Act, 1984*, Cap. 200, R.E. 2002

*Education (Corporal Punishment) Regulations, 2002*, G.N. No. 294 of 2002

*Education (Expulsion and Exclusion of Pupils from Schools) Regulation, 2002*, G.N. No. 295 of 2002

*Emergency Powers Act, 1986*, Cap. 221 R.E. 2002

*Employment and Labour Relations Act, 2004*, Act No. 6 of 2004

*Environmental Management Act, 2004*, Act No. 20 of 2004

*Forestry Act, 2002*, No. 10 of 2002

*HIV and AIDS (Prevention and Control) Act, 2008*, Act No. 28 of 2008

*Islamic Law (Restatement) Act, 1964*, Cap. 375, R.E. 2002

*Judicature and Application of Laws Act, 1920*, Cap. 358, R.E. 2002

*Labour Institutions Act, 2004*, Act No. 7 of 2004

*Land (Amendment) Act, 2004*, Act No. 2 of 2004

*Land Act, 1999*, Cap. 113, R.E. 2002

*Law of Marriage Act, 1971*, Cap. 29, R.E. 2002

*Law Reform Commission of Tanzania Act, 1980*, Cap. 171, R.E. 2002

*Law School of Tanzania Act, 2007*, Act No. 5 of 2007

*Legal Aid (Criminal Proceedings) Act, 1969*, Cap. 21, R.E. 2002

*Local Authorities Pensions Fund, 2006*, Act No. 9 of 2006

*Local Customary Law (Declaration) Order, 1963*, G.N. No. 36 of 1963

*Local Government (District Authorities) Act, 1982*, Cap. 287, R.E. 2002

*Local Government (Elections) Act, 1982*, Cap. 292 R.E. 2002

*Local Government (Urban Authorities) Act, 1982, Cap. 288 R.E. 2002*  
*Local Government Laws (Miscellaneous Amendments) Act, 1999, Act No. 6 of 1999*  
*Local Government Laws (Miscellaneous Amendments) Act, 2006, Act No. 13 of 2006*  
*Magistrates Court Act, 1984, Cap. 11, R.E. 2002.*  
*Minimum Sentences Act, 1972, Cap. 90, R.E. 2002*  
*Mortgage Financing (Special Provisions) Act 2008, Act No. 17 of 2008*  
*National Defence Act, 1965, Cap. 192, R.E. 2002*  
*National Elections Act, 1985, Cap. 343, R.E. 2002*  
*National Health Insurance Fund Act, 1999, Cap. 395, R.E. 2002*  
*National Microfinance Bank Limited Incorporation Act, 1997, Act No. 22 of 1997*  
*(repealed 30 January 2004)*  
*National Security Act, 1970, Cap. 47, R.E. 2002*  
*National Social Security Fund Act, 1973, Cap. 50, R.E. 2002*  
*Newspaper Act, 1976, Cap. 229, R.E. 2002*  
*Non-Governmental Organisation Act, 2002, Act No. 24 of 2002*  
*Parastatal Organisations Pensions Scheme Act, 1978, Cap. 372, R.E. 2002*  
*Parastatal Pensions (Amendment) Act, 2001, No. 25 of 2001*  
*Parole Board Act, 1994, Cap. 400, R.E. 2002*  
*Penal Code, 1930, Cap. 16, R.E. 2002*  
*Police Force and Auxiliary Services Act, 1939, Cap. 322, R.E. 2002*  
*Political Parties Act, 1992, Cap. 258, R.E. 2002*  
*Preventative Detention Act, 1962, Cap. 361 R.E. 2002*  
*Prevention and Combating of Corruption Act, 2007, Act No. 11 of 2007*  
*Prevention of Corruption Act, 1971, Cap. 329, R.E. 2002 (repealed in 2007 and replaced*  
*by the Prevention and Combating of Corruption Act, 2007)*  
*Prisons Act, 1967, Cap. 58, R.E. 2002*  
*Provident Fund (Government Employees) Act, 1942, Cap. 51, R.E. 2002*  
*Public Leadership Code of Ethics Act, 1995, Cap. 398, R.E. 2002*  
*Public Procurement Act, 2004, Act No. 21 of 2004*  
*Public Service Retirement Benefits Act, 1999, Cap. 371, R.E. 2002*  
*Refugee Act, 1998, Cap. 37, R.E. 2002*  
*Sexual Offences Special Provisions Act, 1998, Cap. 101, R.E. 2002*  
*Societies Act, 1954, Cap. 337 R.E. 2002*  
*Statements of Islamic Law, 1967, G.N. No. 222 of 1967*  
*Succession (Non-Christians Asiatics) Act, 1923, Cap. 28, R.E. 2002*  
*Tanzanian Communication Regulatory Authority Act, 2003, Act No. 12 of 2003*  
*Transfer of Prisoners Act, 2004, Act No. 10 of 2004*  
*Village Land Act, 1999, Cap. 114, R.E. 2002*  
*Wildlife Conservation Act, 1974, Cap. 283, R.E. 2002*  
*Witchcraft Act, 1928, Cap. 18, R.E. 2002*

## Preface

The Legal and Human Rights Centre (LHRC) is a Tanzanian, non-governmental organisation that is private, voluntary, non-partisan and not for profit. It is registered and incorporated under the *Companies Ordinance (Act)*, Cap. 212, R.E. 2002, as a company without shares limited by guarantee. It has been in operation since September 1995.

The overarching aim of the LHRC is to create a “just and equitable society”. This aim is reflected in the LHRC’s mission statement, which states:

[the] LHRC is a not for profit, non-partisan, non-governmental organisation striving to empower the public, promote, reinforce and safeguard human rights and good governance in Tanzania.

In an effort to achieve its aim of creating a just and equitable society, the LHRC works to create legal and human rights awareness among the public and, in particular, the underprivileged sections of society through legal and civic education, training, advocacy, research, the monitoring of human rights abuses, and the provision of legal aid. To this end, the LHRC has three main areas under which its programmes of operation fall:

1. Contributing to policy and legislative frameworks and improving the community capacity for social justice;
2. Strengthening partnerships for human rights, good governance, and public engagement; and,
3. Improving the performance and sustainability of the LHRC.

The Human Rights Report is an advocacy tool designed for matters relating to human rights and good governance. It serves as a resource and a barometer of adherence to human rights in Tanzania. It is also a platform on which violations of human rights are exposed and areas that require improvement are highlighted.

The Human Rights Report is now in its eighth year. The 2008 Human Rights Report was authored by the LHRC and the Zanzibar Legal Services Centre (ZLSC). The collaboration between the LHRC and the ZLSC ensures that this report provides a comprehensive statement about the state of human rights throughout the United Republic of Tanzania. This collaboration is reflected in the structure of this report, which is divided into two parts: Part One discusses the human rights situation in Mainland Tanzania, while Part Two considers the state of human rights in Zanzibar.

The 2008 Human Rights Report contains information obtained through primary and secondary research. Our primary research took three forms. The first form was a random, opinion survey of 523 people who live in various regions of Tanzania. In addition to this survey, we relied on the reports provided to us by the LHRC’s human rights monitors who collect data in the field on an ongoing basis and other employees of the LHRC who did field work in 2008. Finally, the LHRC distributed a number of questionnaires to employees of non-governmental organisations and government

departments. The data obtained from these questionnaires was invaluable in preparing this report. However, the usefulness of this research technique was undermined by the poor response rate of both non-governmental and government departments, many of whom did not respond to our repeated requests to complete our questionnaire.

The secondary research consisted of gathering data from various resources, such as reports of other non-governmental organisations, government publications; newspapers; and, various Internet sources. The authors also referred extensively to national, regional and international legal instruments that have bearing on the matters discussed in this report.

***Bishop Elinaza Sendoro***  
***Chairperson, LHRC Board of Directors***

## Introduction

In 2008, Tanzania, along with the rest of the world, celebrated the 60<sup>th</sup> anniversary of the *Universal Declaration of Human Rights, 1948*. During this celebration, Tanzania had the opportunity to consider the improvements and failures in its efforts to achieve the goal of realizing justice, liberty and human rights for all. While Tanzania is committed to upholding the rights contained in the *Universal Declaration of Human Rights, 1948*, this commitment does not always seem to translate into reality.<sup>1</sup> In 2008, many Tanzanians were still denied certain basic human rights, such as the right to life, the right to be equal protection of the law, freedom of expression and freedom of assembly.

There is a disjunct between Tanzania's commitment and the reality in Tanzania, which is contrary to the spirit of the *Universal Declaration of Human Rights, 1948*. The *Universal Declaration of Human Rights, 1948* calls upon member states to ensure that the rights contained in the *Universal Declaration of Human Rights, 1948* are a living reality and that these rights are known, understood and enjoyed by everyone, everywhere.<sup>2</sup> The LHRC advocates for Tanzania to work towards creating an environment where Tanzanians can enjoy all the rights contained in the *Universal Declaration of Human Rights, 1948*.

This report contains information about the state of human rights in Tanzania in 2008. It is the seventh report of this nature and it is now jointly produced by LHRC and ZLSC. This report examines the positive trends that were apparent in 2008 in the promotion and protection of human rights in Tanzania. For instance, the government has devised a number of strategies to address unemployment; it is tackling the issue of over-congestion in prisons; and, the government continues to provide free anti-retroviral drugs to people who are HIV-positive. On the issue of HIV/AIDS, the government also passed the *HIV/AIDS (Prevention and Control) Act, 2008*, which prohibits discrimination against people living with HIV/AIDS and addresses a host of other HIV/AIDS-related issues. From an education perspective, there was an improvement in the enrolment rate of primary school pupils. In 2008, the government also started reconsidering its stance on the death penalty. It commissioned the Law Reform Commission of Tanzania to assess the continued use of the death penalty. In the draft paper issued by the Law Reform Commission in March 2008, it recommended the abolishment of the death penalty.

Although there were a number of positive trends in the realization of human rights in Tanzania in 2008, there were also some negative trends. These negative trends prevented Tanzania from fulfilling its obligations under the *Universal Declaration of Human Rights, 1948*. Two particularly noteworthy trends in the violation of human rights in 2008 were the continued use of mob violence and violence associated with witchcraft beliefs. Both of these human rights violations deny people the right to life.

---

<sup>1</sup> The Government of Tanzania is obligated to fulfill the rights contained in the *Universal Declaration of Human Rights, 1948*, as it was referentially incorporated into Art. 9(f) of the *Constitution of the United Republic of Tanzania, 1977*. In an effort to realise these rights, the government incorporated the Bill of Rights and Duties into the *Constitution of Tanzania, 1977* in 1984.

<sup>2</sup> Statement of the UN Secretary General, Mr. Ban Ki-moon in United Nations, *60 Years of the Universal Declaration of Human Rights: Justice and Dignity for All of Us* (special ed. UN, New York 2008), at p. iii.

Mob violence continued to be used as a means to deal with people who are suspected to have committed criminal acts, while the murder of albinos was linked to witchcraft beliefs. In 2008, more than 35 albinos were killed because of the belief that their body parts could be used by witches to improve a person's fortune. Although a number of people were arrested in relation to the murder of albinos, no cases have gone to court as of yet. Also noteworthy was the three month suspension of a Tanzanian, weekly newspaper, Mwanahalisi, for publishing a seditious article raised serious concerns about the freedom of the press in Tanzania.

On a more general level, the situation of women, children and people with disabilities did not experience a marked improvement in 2008. Women, children and people with disabilities continue to face challenges with discrimination, sexual violence, and an inability to realise their human rights. These groups, along with others, are vulnerable to the spread of HIV/AIDS. HIV/AIDS continues to be a major issue in Tanzania. Poverty and the lack of sufficient information hinder the government's efforts to control this epidemic.

Poverty and corruption continue to be major obstacles to the realization of human rights in Tanzania. These factors undermine Tanzania's ability to reach its targets in its *Development Vision 2025*, the Millennium Development Goals and MKUKUTA. An inability to reach these targets means that Tanzania continues to have issues with the provision of health care services, education to all, under-five and maternal mortality rates, and unemployment.

Tanzania is a signatory state to a number of regional and international human rights instruments. However, Tanzania's ability to perform its obligations under these instruments is hindered by a failure to domesticate some of the instruments that protect human rights. In addition, Tanzania has also failed to ratify some core international human rights instruments, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment, 1984* and the *Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989*, which calls for the abolishment of the death penalty.

This report highlights the major trends in human rights in Tanzania. These trends are considered in light of Tanzania's obligations under international and regional human rights instruments, and its domestic legislation, policies and strategies.

As always, we envisage a better Tanzania through the rectification of the challenges highlighted in this report.

***Mr. Francis Kiwanga (Advocate)***  
***Executive Director***

# Chapter One

## General Overview of Tanzania

### 1.0 Introduction

This chapter provides a brief overview of the social, economic and political situation in the United Republic of Tanzania. This background information provides the context for our evaluation of the state of human rights in Tanzania.

### 1.1 Geography

Tanzania is located in east Africa and is comprised of Mainland Tanzania and Zanzibar. The islands of Zanzibar are located approximately 30 kilometers from mainland Tanzania.<sup>3</sup> Tanzania has a total land area of 886,039 square kilometers. Tanzania is bordered on the north by Kenya and Uganda, on the west by the Democratic Republic of the Congo, Burundi and Rwanda, on the south by Malawi, Mozambique and Zambia, and on the east by the Indian Ocean.

Tanzania's terrain includes plains, which are located along the country's coast; a central plateau region, which exists in the majority of the country; and, highlands, which are found in both northern and southern Tanzania. The northern highlands of Tanzania include two of the highest peaks in Africa, Mt. Kilimanjaro and Mt. Meru. There are 32 large, medium and small mountain summits including Mount Kilimanjaro, Meru, Lool Malasin, Oldeani, Lemagruti, Monduli, Mtorwi, Rungwe, Tembolin, Salala, Longido, Olosha, Shengena, Mbogo, Kisiba, Mbizi, Malonje, Mahari, and Usambara.<sup>4</sup>

Tanzania borders three of the largest lakes in Africa: Lake Victoria, the world's second largest, freshwater lake; Lake Tanganyika, the world's second deepest lake; and, Lake Nyasa. Tanzania has tremendous wildlife resources and has established 15 national parks<sup>5</sup> and 17 game reserves<sup>6</sup> on mainland Tanzania in an effort to preserve and protect

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<sup>3</sup> Tanzania National Bureau of Statistics and Ministry of Planning, Economy and Empowerment, United Republic of Tanzania 'Tanzania in Figures 2006' (Report of June 2007), at p. 7.

<sup>4</sup> Mt. Kilimanjaro is referred to as the "roof of Africa" as it is 5,895 meters above sea level. Mt. Meru is slightly smaller than Mt. Kilimanjaro with an altitude of 4,566 meters above sea level. The smallest mountain among the list of 32 large mountains in Tanzania is Usambara, which is 2,300 meters above sea level.

<sup>5</sup> Large national parks include the Serengeti in the Serengeti District (14,750 sq. km), Ruaha in the Mbarali District (13,000 sq. km), Ngorongoro in the Ngorongoro District (8,320 sq. km), Mikumi in the Morogoro Region (3,230 sq. km); others are Tarangire in the Manyara Region, Katavi in the Mpanda District, Saadani in the Tanga Region, Udungwa in the Morogoro Region, Kilimanjaro in Kilimanjaro Region, Rubondo, Kitulo, Mahale Mountains in Kigoma Region, Manyara in the Arusha Region, Arusha in the Arusha Region, and Gombe Stream in Kigoma District.

<sup>6</sup> These are Selous in the Lindi region (50,000 sq. km), Ruangwa in the Ruangwa district (9,000 sq. km), Kigosi in Shinyanga district (8,000 sq. km), Moyowosi in Kibondo district (6,000 sq. km); others are Uwanda in Sumbawanga district, Burigi in the Biharamulo and Karagwe districts, Maswa in Maswa district, Kizigo in the Manyoni district, Uмба in the Lushoto district, Biharamulo in the Biharamulo

these resources. Tanzania has one of the largest forested regions in Africa. It is also blessed with numerous natural resources, such as tin, phosphates, iron ore, coal, diamonds, gold, natural gas and nickel.

The largest city in Tanzania is Dar es Salaam, which is located on the east coast of Tanzania. Up until 1974, Dar es Salaam was the capital city of Tanzania. In 1974, it was decided to move the capital city to Dodoma, which is located in the interior of Tanzania. Although Parliament is situated in Dodoma, many government offices continue to have their headquarters in Dar es Salaam. There are a number of other important towns and cities in Mainland Tanzania including Arusha, Iringa, Kigoma, Morogoro, Mbeya, Moshi, Mtwara, Mwanza, Tabora and Tanga. In Zanzibar, the most important towns are Stone Town in Unguja and Mkoani and Chake Chake in Pemba Island.<sup>7</sup>

## 1.2 People

Tanzania has not conducted an official population census since 2002. However, it is estimated that Tanzania currently has a population of 38.7 million, which is an increase from the 2002 population estimate of 34.4 million. The annual population growth of Tanzania is approximately 2.9 percent per annum.<sup>8</sup> It is estimated that there are 37.5 million people living on Mainland Tanzania and 1.1 million people living in Zanzibar. Despite the steady growth of Tanzania's population, Tanzania continues to be sparsely populated. As of 2002, the average population density in Tanzania was 39 persons per square kilometer.<sup>9</sup>

In terms of the composition of Tanzania's population, approximately 51 percent of the population is female. The population is also skewed towards a younger age group as 44 percent of the population is below the age of 15 years. In fact, the median age of Tanzanians is 18 years and only two to three percent of Tanzanians are older than 65 years. The low median age is partially attributable the fact that Tanzanians have a life expectancy at birth of about 45 years.<sup>10</sup>

Tanzania has a multi-ethnic population. There are approximately 120 different ethnic groups living in Tanzania. The largest of these ethnic groups is the Bantu-speaking group, which is comprised of peoples such as the Sukuma, Haya, Nyakuyusa, Nyamwezi and Chagga.

Tanzania's official language is Swahili. However, English is the primary language of commerce, administration and higher education. In addition, there are over 100 local languages, which are the first language of most of the people in the country.

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district, Mkomazi in the Lushoto district, Mount Meru in the Arumeru district, Ibanda in the Karagwe district and Saa Nane Island in the Mwanza district.

<sup>7</sup> Tanzania Human Rights Report 2006, at p. 2.

<sup>8</sup> Tanzania Human Rights Report 2007, at p. 2.

<sup>9</sup> For more information on the history of population growth, see: Tanzania Human Rights Report 2006, *supra* at p. 2.

<sup>10</sup> Tanzania Human Rights Report of 2007, *supra* at p. 2.

### 1.3 Economy

The government's approach to the economy is encompassed by the *Tanzania Development Vision 2025* and the Millennium Development Goals (MDGs). The focus of the *Tanzania Development Vision 2025* is the creation of a society that has certain attributes, such as a high standard of living and a dynamic economy, by 2025.<sup>11</sup> The MDGs focus on the achievement of socio-economic goals, such as poverty reduction and the availability of universal education. In an effort to realise the aims of these instruments, the government initiated the *National Strategy for Growth and Reduction of Poverty* (NSGRP) or, in Swahili, *Mkakati wa Kukuza Uchumi na Kuondoa Umaskini* (MKUKUTA) four years ago. MKUKUTA's focus is outcome orientated and organised around three clusters, namely: growth and reduction of income poverty; improved quality of life and social well being; and governance and accountability.

In terms of the performance of Tanzania's economy, it was reported that in 2006/2007, there was a growth in the real domestic product of Tanzania of 6 percent to 8 percent.<sup>12</sup> Note that economic growth is vital for the reduction of poverty. The average of 6 percent to 8 percent growth does not reflect the reality of micro-economy. That is, the improvement of macro-economy (major economy) does not correspond with the levels of poverty in practical terms especially in the rural areas.<sup>13</sup>

Major challenges continue to persist in Tanzania such as the existence of inadequate social services, a relatively high unemployment rate and low per capita income. In addition, 2008 was marked by fluctuations in the price of food and fuel, which made it difficult for people to afford basic necessities. The increase in the price of food led to Tanzania's rate of inflation hitting double digits in September 2008 for the first time in a decade.<sup>14</sup> In October 2008, it was reported there was a depreciation of 17 percent in the value of the Tanzanian shilling against the American dollar in comparison to the same period in 2007.<sup>15</sup>

The *General Budget Support Annual Review 2007 – Information Pack* of the United Republic of Tanzania indicates that 42 percent of funding for Tanzania's national budget comes from donors, while 80 percent of funding for Tanzania's development budget comes from donors.<sup>16</sup> Tanzania's high level of donor dependency is concerning, as it

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<sup>11</sup> Planning Commission, United Republic of Tanzania 'The Tanzania Development Vision 2025'

<sup>12</sup> Research and Analysis Group, United Republic of Tanzania 'Poverty and Human Development Report 2007' (Report Tanzania December 2007) (Poverty and Human Development Report 2007) at p. 4.

<sup>13</sup> In May 2008, Professor Juma Kapuya, the Minister for Labour, Employment and Youth Development was quoted in the media as saying that Tanzania has achieved macro-economic stabilization, but still has challenges with unemployment and poverty. See: M. Jumbe 'Government admits failure in tacking unemployment' *The Citizen* (Tanzania) 13 May 2008.

<sup>14</sup> 'Inflation rises to 12.3 percent in Nov.' *Daily News* (Tanzania) 18 December 2008.

<sup>15</sup> 'EA banks in bid to tackle global financial crisis' *Sunday Observer* (Tanzania) 26 October 2008. In October 2008, the exchange rate between the Tanzanian shilling and the American dollar was approximately 1,300 to 1.

<sup>16</sup> Tanzania receives funding from donors in three ways: general budget support, basket funds and project funds. Funds from the general budget support are the only funds that go directly into the national budget.

may influence the way in which Tanzania implements its domestic policies and development programs. It also raises the possibility that Tanzania's development will be guided by the wishes of donors, rather than according to the priorities of the Tanzanian government. In addition, the high level of donor dependency sometimes negatively affects the government's plans because donors' support is unpredictable.<sup>17</sup>

In the 2008/2009 budget, the Tanzanian government allocated 64 percent of the entire budget to six priority sectors: education, infrastructure, health, agriculture, water and energy. In the 2008/2009 budget, there was only a 0.1 percent increase in the funds allocated to agriculture to take the total budgetary allocation to agriculture to 6.4 percent. It is argued that agriculture is an important sector of the economy that will remain underdeveloped, unless further funds are allocated to this sector. As for other important non-economic sectors, such as health, there was no any significant increase of the budget.<sup>18</sup>

Despite the fact that the agricultural sector is the main driving force of Tanzania's economy, 2008 did not witness any notable improvements in terms of availability of agricultural inputs, markets, control of market price, processing factories, extension services, modernization of technology and the like. More than 70 percent of farmers still use a hand hoe for tilling the land, while 20 percent use animal drawn ploughs and only 10 percent use tractors.<sup>19</sup> As a result, the majority of people continue to shift away from agriculture towards private non-agricultural activities and there is a migration of people from rural to urban areas. In 2008, employment in agriculture declined by approximately 7.7 percent.<sup>20</sup>

As for revenue collection, the government plans to collect Tsh. 7,216,130 billion from its domestic sources, foreign grants, concession loans and the sale of its 21 percent interest in National Microfinance Bank Limited. The government's estimated expenditure for 2008/2009 is Tsh. 7,216,130 billion (the same amount as its revenue). Tanzania's recurrent expenditures<sup>21</sup> account for Tsh. 4,726,650 billion of Tanzania's budget or, differently stated, for about 34.4 percent of the government's total expenditures. Tanzania's high recurrent expenditures reduce the amount of funding that can be channeled into development-orientated programs, which could ultimately hinder Tanzania's economic development.

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<sup>17</sup> Speech of the Honourable Mustafa Haidi Mkulo, Minister for Finance and Economic Affairs, introducing to the National Assembly of Tanzania the estimates of the Government's Revenue and Expenditure for the Financial Year 2008/ 09 (Dodoma 12 June 2008) at p. 22, para 33(ii).

<sup>18</sup> In the 2008/2009 budget, the health sector was allocated 11 percent of the budget, which is one percent more than in the 2007/2008 budget. See: Speech of the Honourable Mustafa Haidi Mkulo, *ibid.* at p. 31, para 44(iii).

<sup>19</sup> Charles R. Tulahi and Perpetua M. Hingi 'Agrarian Reform and Rural Development in Tanzania' International Conference on Agrarian and Rural Development (Porto Alegre, Brazil 7 March -10 March 2006) at p. 1.

<sup>20</sup> Poverty and Human Development Report 2007, *supra* at p. 10.

<sup>21</sup> Recurrent expenditures normally include public debt; and payments to ministries and local governments, such as wages and salaries, and vehicle, allowances.

#### 1.4. Historical Overview: Colonialism to Present

In 1890, Tanganyika (now Tanzania) was split into different areas of influence by treaties made between Germany, Britain and the Sultan of Zanzibar. According to these treaties, Tanganyika and Ruanda-Urundi (now Rwanda and Burundi) became German East Africa, while Pemba and Unguja, the main islands of Zanzibar, became a British protectorate.

The agreements between Germany, Britain and the Sultan of Zanzibar were opposed by some of the local inhabitants of Tanganyika. In northern Tanzania, opposition to this colonial arrangement was led by Mirambo of the Nyamwezi, while the opposition in the southern highlands was led by Mkwawa of the Hehe and, in the Kilimanjaro region, by Meli of the Chagga. This local opposition culminated in the *Maji Maji* resistance of 1905 to 1907. The *Maji Maji* resistance was inspired by Kinjekitile, a spiritual leader in Southern Tanzania whose medicine could allegedly prevent the “white man’s bullets” from harming his followers.

With the end of World War I in 1919, Germany’s colonial domination over Mainland Tanzania ended. Control of most of the territory passed to the British through a League of Nations mandate. After World War II, Tanganyika became a United Nations Trust Territory, subject to British control. However, Tanganyika began to move towards self-government and independence.

On 9 December 1961, the area now known as Mainland Tanzania became an independent nation under the Tanganyika African National Union (TANU). One year later, it became a Republic headed by the then President Julius Kambarage Nyerere. Zanzibar gained independence from the British on 10 December 1963. The ruling Sultanate of Zanzibar was overthrown on 12 January 1964 and the Afro-Shirazi Party (ASP) came into power. On 26 April 1964, the two independent states merged to form the United Republic of Tanzania.

From 1961 to 1965, Tanzania was a multi-party state. In 1965, Tanzania moved to a one-party political system. Despite Tanzania having a one party political system, there were two political parties operating in Tanzania in the period 1965 to 1977, namely the TANU on Mainland Tanzania and the ASP on Zanzibar. On 5 February 1977, TANU and ASP merged to form the Chama Cha Mapinduzi (CCM). From 1977 to 1992, the CCM was the only party allowed to operate in Tanzania. In 1992, opposition parties were legalized and Tanzania became a democratic state with a multi-party system.<sup>22</sup> The CCM has been the ruling party of Tanzania from 1977 onwards.

President Nyerere headed Tanzania from 1962 until 1985 when he retired. In 1985, Mr. Ali Hassan Mwinyi was elected as the new President of the United Republic of Tanzania. President Mwinyi served two five year terms for a total of ten years. In 1995, Tanzania

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<sup>22</sup> The information in this paragraph is drawn from Mohammed Omar Maundi, ‘Tanzania’ in Gavin Cathra et al (eds), *Security and Democracy in Southern Africa* (Wits University Press, Johannesburg 2007).

held its first multi-party election, which the CCM won. On 23 November 1995, Mr. Benjamin William Mkapa of the CCM was sworn in as the third President of the United Republic of Tanzania. Ten years later, on 21 December 2005, Mr. Jakaya Mrisho Kikwete of the CCM was elected to be the fourth President of Tanzania.

Considering Tanzania's history from a human rights perspective, there is no doubt that colonialism negated and suppressed human rights. When one state colonizes another, it violates the right to self-determination of the colonized peoples. There is no law that justifies colonialism. The colonial powers rarely allowed colonized peoples to enjoy any human rights.<sup>23</sup>

The human rights situation in post-colonial Tanzania, like many other African states, has been overshadowed by a need for development. The nationalist leaders conceived the process of economic development to be one that may not necessarily promote or respect human rights.<sup>24</sup> The adoption of a Bill of Rights designed to protect human rights was denied apparently due to nationalistic reasons.

In 1984, a Bill of Rights and Duties was incorporated in the *Constitution of Tanzania, 1977* through the fifth constitutional amendment after a long struggle by human rights activists. The provisions of the Bill of Rights and Duties are discussed in this report.

## **1.5 Governance system**

In Tanzania, the governing structure is comprised of the executive, the legislature and the judiciary. These three bodies are established by Article 4 of the *Constitution of Tanzania, 1977*.

### *The Executive*

The executive arm of the state is made up of the President, who is the head of the state and of the government, and the Cabinet of ministers. The Cabinet includes the Vice-President, the Prime Minister, the President of Zanzibar and all Ministers. The Vice-President assists the President in all matters that relate to the union. Zanzibar has a semi-autonomous government that looks into non-union matters affecting the Isles.

### *The Legislature*

The President of the United Republic of Tanzania and the members of the National Assembly are elected for a five year term by direct popular vote. The President appoints a Prime Minister who is approved by the Parliament. The Prime Minister serves as the leader of government business in the National Assembly. The President appoints his cabinet from National Assembly members. The President also nominates 10 individuals from non-elected members to be part of the Parliament.

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<sup>23</sup> LHRC (2006) *Through a Crucible of Human Rights Struggles in Tanzania: A Decade of Legal and Human Rights*, pp. 5 to 6.

<sup>24</sup> *Ibid.* at pp. 5 to 6.

As of 2008, there were 314 seats in Parliament. Currently, 95 of these seats are held by women, while the remaining 220 seats are held by men.<sup>25</sup> Differently stated, approximately 30 percent of the Members of Parliament (MPs) are women.<sup>26</sup> At the moment, 83.59 percent of the parliamentary seats are held by the ruling party, the CCM.<sup>27</sup>

Apart from MPs who are elected by a constituency and those who are nominated by the President, there are also a number of special seats for women who are nominated by their respective political parties, 5 Members from the House of Representatives (Zanzibar) and an Attorney General who becomes the Member by virtue of his or her office. Laws passed by the National Assembly are only valid in Zanzibar if they address specifically designated union matters and after being presented to Zanzibar's House of Representatives by the responsible minister.<sup>28</sup>

Zanzibar's House of Representatives has jurisdiction over all non-union matters, that is, matters that do not pertain to foreign affairs, citizenship, higher education and so on.<sup>29</sup> There are currently 81 members in the House of Representatives in Zanzibar. The House of Representatives can make laws for Zanzibar on non-union matters without the approval of the union government. The term of office for Zanzibar's President and its House of Representatives is also 5 years. The semi-autonomous relationship between Zanzibar and mainland Tanzania is a relatively unique system of government. More information about Zanzibar can be found in Part Two of this report.

There are also central and local governments, which operate pursuant to Article 145 of the *Constitution of Tanzania, 1977* and the local government laws that apply to the regional and district levels of government.<sup>30</sup> Currently, there are 26 regions and more than 120 districts. Each region has an average of four to five districts. In each district, there are divisions which are formed by wards and villages.

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<sup>25</sup> Written statement by Hon. Margareth Simwanza Sitta, Minister for Community Development, Gender and Children, United Republic of Tanzania to the Committee on Elimination of Discrimination against Women (New York 11 July 2008) <<http://www2.ohchr.org>> accessed 6 November 2008.

<sup>26</sup> M. Mukunza 'TAMWA marks 20th anniversary with pomp, ecstasy' *The African* (Tanzania) 29 March 2008.

<sup>27</sup> The remainder of the parliamentary seats are held by the Civic United Front (9.91 percent); the Chama cha Demokrasia na Maendeleo (3.41 percent); and the United Democratic Party (0.31 percent).

<sup>28</sup> Arts. 132 (1) and (2) of the *Constitution of the Revolutionary Government of Zanzibar of 1984*.

<sup>29</sup> The House of Representatives is established under Arts. 63 and 64 of the *Constitution of Zanzibar of 1984*. It consists of: elected members from the Constituents; nominated members by the President of Zanzibar, female members (special seats 30% of all elected members) appointed by political parties and represented in the House of Representatives, Regional Commissioners; and the Attorney General of Zanzibar. The matters that are considered to be union matters are set out in the *Constitution of Tanzania, 1977* at First Sch.

<sup>30</sup> The local government laws include the *Local Government (District Authorities) Act, 1982*, Cap. 287, R.E. 2002; the *Local Government (Urban Authorities) Act, 1982*, Cap. 288 R.E. 2002; the *Local Government (Elections) Act, 1982*, Cap. 292 R.E. 2002; the *Regional Administration Act, 1997*, Cap. 97, R.E. 2002. These laws have been amended by the *Local Government Laws (Miscellaneous Amendments) Act, 1999*, Act No. 6 of 1999 and the *Local Government Laws (Miscellaneous Amendments) Act, 2006*, Act No. 13 of 2006.

## *The Judicial System*

Tanzania's legal system is based on the English common law. Judicial functions are administered by various courts established in accordance with the law.<sup>31</sup> The judicial hierarchy in mainland Tanzania (in descending order) is as follows: Court of Appeal, High Court of Tanzania, Resident Magistrates Courts, District Courts and Primary Courts. In the Court of Appeal and High Court adjudicators are called Judges. In all other courts, adjudicators are called magistrates.

Judges are appointed by the President after consultation with the Judicial Service Commission of Tanzania.<sup>32</sup> Magistrates are appointed by the Judicial Service Commission.<sup>33</sup>

There is also a Court Martial<sup>34</sup> and a Special Constitutional Court, which is an *ad hoc* court for resolving disputes relating to interpretation of the *Constitution of Tanzania, 1977*.<sup>35</sup> The sole function of the Special Constitutional Court is to make decisions over matters concerning the interpretation of the *Constitution of Tanzania, 1977* where the interpretation or its application is in dispute between the Government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar.<sup>36</sup> One half of the members of the Special Constitutional Court are appointed by the Government of the United Republic of Tanzania and the other half is appointed by the Revolutionary Government of Zanzibar.

Tribunals have been established under various laws to adjudicate on various matters such as cases involving labour, taxes and land issues.

Zanzibar, as discussed in Part Two of this Report, has its own judicial system consisting of (in descending order): The Court of Appeal of Tanzania, the High Court of Zanzibar, regional and district magistrate courts, primary courts, Kadhi Appeal courts and Kadhi courts. These courts have jurisdiction on matters arising in Zanzibar that involve non-union matters.<sup>37</sup> The High Court of Zanzibar is the highest Court of Appeal for matters originating from Kadhi Courts and the interpretation of the Constitution of Zanzibar. However, the appeal process for a case originating from a Magistrate Court is slightly different, as the case can be appealed to the High Court of Zanzibar and then to the Court of Appeal of Tanzania.

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<sup>31</sup> See: Arts. 108, 114 and 117 of the *Constitution of Tanzania* also provisions of the *Magistrates Court Act, 1984*, Cap. 11, R.E. 2002.

<sup>32</sup> Arts. 109 and 118 of the *Constitution of Tanzania*.

<sup>33</sup> Art. 113(1) of the *Constitution of Tanzania*

<sup>34</sup> Court Martials, including general court martials, disciplinary court martials and standing court martials, are governed by the provisions of the *National Defence Act, 1965*, Cap. 192, R.E. 2002.

<sup>35</sup> The Constitutional Court is established by Art. 125 of the *Constitution of Tanzania*.

<sup>36</sup> Art. 126 of the *Constitution of Tanzania*.

<sup>37</sup> There are 22 union matters. The Court of Appeal is one of the union matters listed in the First Schedule of the *Constitution of Tanzania*. Other union matters include: foreign affairs, security, police, citizenship, immigration, foreign trade, high education, aviation and statistics.

The delivery of justice is wholly and exclusively vested in the judiciary.<sup>38</sup> Therefore rights can be respectively secured or lost by the strength or weakness of the judicial system. Members of the judiciary are expected to protect human rights. As Justice Edward Mwesiumo said in the case of *Joseph Kivuyo and Others v Regional Police Commander, Arusha and Another*, “[t]his [court] is a temple of justice and nobody should fear to enter to battle his redress as provided by the law of the land”.<sup>39</sup>

There has been an emergence of judicial activism in Tanzania, which is directly connected with the developments of politics in the country. During Tanzania’s single-party era, the judiciary struggled to act independently. However, over time, bold spirits within the judiciary, such as Justice Mwalusanya, Justice Mwesiumo, and the late Justice Lugakingira, have emerged. These Judges, and others, are largely responsible for the development of human rights jurisprudence in Tanzania.<sup>40</sup>

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<sup>38</sup> Art. 107A of the *Constitution of Tanzania*.

<sup>39</sup> The High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 22 of 1978 (unreported), quoted from Helen Kijo-Bisimba and Chris Maina Peter, (2005) *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries*: Dar es Salaam 2005, at p. 12.

<sup>40</sup> *Ibid* at p. 12. .

## Chapter Two

### Civil Rights and Liberties

#### 2.0 Introduction

The term civil rights and liberties encompasses a diverse range of rights, such as the right to life, the right to equality before the law and the right to freedom of expression. Civil rights and liberties govern the relationship between a government and its citizens.

Tanzania is a signatory to several international and regional human rights instruments that address civil rights and liberties, including the *International Covenant on Civil and Political Rights, 1966*, the *African Charter on Human and Peoples' Rights of 1981* and the *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006*.<sup>41</sup> Although Tanzania has not explicitly incorporated all of these instruments into its domestic legislation, it accepts these instruments as legally binding.<sup>42</sup>

At the domestic level, some civil liberties and rights are guaranteed by the Bill of Rights and Duties, which was incorporated into the *Constitution of Tanzania* in 1984.<sup>43</sup> When the Bill of Rights and Duties became justiciable in 1988, the courts started enforcing it and declaring various laws unconstitutional.<sup>44</sup> This judicial activism was not received well by the government, which responded by enacting the *Basic Rights and Duties Enforcement Act, 1994*.<sup>45</sup>

Under the *Basic Rights and Duties Enforcement Act*,<sup>46</sup> any infringement of the rights contained in the Bill of Rights and Duties can be addressed by the High Court of Tanzania.<sup>47</sup> Proceedings commenced under this Act have to be heard by a three-judge panel.<sup>48</sup> The lack of sufficient judges to meet the requirement of a panel of three judges

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<sup>41</sup> *International Covenant on Civil and Political Rights, 1966* (adopted 16 December 1966, entered into force 23 March 1976, ratified by Tanzania 11 June 1976) 999 U.N.T.S. 171; *African Charter on Human and Peoples' Rights, 1981* (adopted 27 June 1981, entered into force 21 October 1986, ratified by Tanzania 18 February 1984), (1982) 21 ILM 58; *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006* (adopted 13 December 2006, entered into force 3 May 2008, ratified by Tanzania 30 March 2007) UNGA Res A/61/611.

<sup>42</sup> Government of Tanzania, 'Fourth periodic report of the United Republic of Tanzania to the United Nations Human Rights Committee' (17 December 2007) CCPR/C/TZA/4 (Fourth report to the UNHRC). at pp. 7 - 8.

<sup>43</sup> Following the 5<sup>th</sup> Constitutional Amendment of 1984. The Bill of Rights and Duties is comprised of Arts. 12 to 28 of the *Constitution of Tanzania*. The rights contained in the Bill of Rights are not absolute, as the government can derogate from these rights in the circumstances set out in Art. 30(2) of the *Constitution of Tanzania*.

<sup>44</sup> Kijo-Bisimba and Peter, *supra* at p. 33.

<sup>45</sup> Kijo-Bisimba and Peter, *supra* at p. 34.

<sup>46</sup> Cap. 3 of the R.E 2002.

<sup>47</sup> S. 4 of the *Basic Rights and Duties Enforcement Act, 1994*, Cap. 3, R.E. 2002.

<sup>48</sup> S. 10 of the *Basic Rights and Duties Enforcement Act, 1994*.

can result in significant delays in the hearing of the case.<sup>49</sup> In addition, the cumbersome process set out in the Act has resulted in some cases involving constitutional rights being dealt with as cases involving disputes between private individuals, rather than constitutional rights.<sup>50</sup> By making it harder for individuals to pursue cases involving their constitutional rights, the government has also limited the judiciary's ability to address unconstitutional laws.

## 2.1 Right to Life and Freedom from Torture

At the core of civil rights and liberties is the right to life. The right to life is the supreme right from which no derogation is permitted.<sup>51</sup> The right to life is clearly set out in Article 6 of the *International Covenant on Civil and Political Rights, 1966*, which states "every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".<sup>52</sup> In order to prevent the arbitrary deprivation of life, it is incumbent on states to ensure that the death penalty is only applied to the "most serious crimes", prevent extrajudicial killings by their security forces, and prevent the deprivation of life by criminal acts.<sup>53</sup>

In Tanzania, the right to life is a non-derogable right, as set out in Article 14 of the *Constitution of Tanzania, 1977*. However, the *Constitution of Tanzania, 1977* allows the state to derogate from the right to life, if it is in accordance with the law.<sup>54</sup> For instance, in Tanzania, the *Penal Code*<sup>55</sup> provides for the use of the death sentence in specific circumstances. As such, it can be said that the right to life is not absolute in Tanzania.

### 2.1.1 The Death Penalty

Tanzania is one of 25 countries in the world that continues to retain the death penalty in its legislation.<sup>56</sup> However, *de facto*, Tanzania is an abolitionist country, as there have been no executions in Tanzania since 1994.<sup>57</sup>

In October 2008, it was noted that there were 286 people on death row in Tanzania.<sup>58</sup> Of the people on death row, 14 have been on death row for 10 years or more, while another 31 have been on death row for 5 years or more.<sup>59</sup> In *Republic v. Mbushuu alias Mnyaroje*

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<sup>49</sup> P. Rugonzibwa 'CJ wants review of human rights law' *Daily News* (Tanzania) 29 October 2008; S. 10 of the *Basic Rights and Duties Enforcement Act, 1994*, sets out the requirement for a three judge panel.

<sup>50</sup> Written response of unnamed employee to LHRC questionnaire, employee of the LHRC Buguruni Legal Aid Clinic (Dar es Salaam, Tanzania November 2008).

<sup>51</sup> Office of the High Commissioner for Human Rights 'General Comment No. 6: The Right to Life (Article 6) (30 April 1982) <<http://www.unhchr.ch>> accessed 9 October 2008.

<sup>52</sup> Art. 6 of the *International Covenant on Civil and Political Rights, 1966*.

<sup>53</sup> Office of the High Commissioner for Human Rights, *supra*.

<sup>54</sup> Arts. 14 and 31 of the *Constitution of Tanzania*. .

<sup>55</sup> Cap. 16

<sup>56</sup> B. James 'Yes to death penalty!' *Sunday Citizen* (Tanzania) 18 May 2008.

<sup>57</sup> L. Kato 'Scrap death penalty now, say activists' *The Citizen* (Tanzania) 7 February 2008.

<sup>58</sup> Discussion with Mr. Chikawe, Minister for Justice on 15<sup>th</sup> October, 2008.

<sup>59</sup> LRCT 'Discussion Paper on the Review of Capital Punishment, Corporal Punishment and Long Term Sentences in Tanzania' (Draft paper provided to a stakeholders' workshop held in Dar es Salaam on March

and *Kalai Sangula*, the High Court found lengthy delays in the execution of people on death row to be inhumane and contrary to the prohibition against torture.<sup>60</sup> Despite the decision in *Mbushuu et al*, people continue to spend lengthy periods of time on death row. This is a violation of their constitutional right to be free from torture, as well as, a violation of the international prohibition against torture.

In Tanzania, the death penalty is a mandatory sentence for people who are convicted of murder.<sup>61</sup> The Human Rights Committee of the United Nations has noted that legislation dictating the mandatory imposition of the death penalty is prohibited under international human rights law, as it violates the right to life.<sup>62</sup> It has been held that in order to guarantee that the imposition of the death penalty is not cruel or arbitrary, it is essential that a judge be permitted to determine whether the death sentence is just in each particular case by taking into account any mitigating or extenuating circumstances.<sup>63</sup> In Tanzania, the mandatory sentencing provision prevents judges from exercising this discretion.

There has been international pressure on Tanzania to ratify the *Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty, 1989*.<sup>64</sup> The international community has become increasingly vocal in its support for the abolition of the death penalty. Most recently, the United National General Assembly adopted a resolution calling for a moratorium on the use of the death penalty.<sup>65</sup> Tanzania abstained from voting on this resolution.

The Tanzanian government's position is that the death penalty is a means of dealing with incorrigible individuals; it is viewed as a general deterrent measure; and it is the only form of retribution for particularly serious crimes.<sup>66</sup> The Tanzanian government's position is mirrored in the opinions expressed by some Tanzanians. For instance, a survey respondent from Maswa district, Sinyanga region stated:

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27, 2008), p. 66. At the date of printing, these figures accurately reflected the information in the draft LRCT's Discussion Paper. However, as the LRCT's Discussion Paper is still in draft form, these figures may be different in the final version of the LRCT's Discussion Paper.

<sup>60</sup> *Republic v. Mbushuu alias Mnyaroje and Kalai Sangula*, 1994 (TLR) 146 (H.C.). This decision was overturned by the Court of Appeal in *Mbushuu alias Mnyaroje and Kalai Sangula v. Republic* (1995) TLR 97 (C.A.) on a different point of law. It was held to be in the public interest to retain the death penalty.

<sup>61</sup> Ss. 26, 196 and 197 *Penal Code, 1930*, Cap. 16. However, Judges have the discretion to impose the death penalty when a person commits treason, a treasonable offence or when a soldier acts traitorously. See: Ss. 39 and 40 of the *Penal Code; National Defence Act, 1965*, Clauses 11 to 14.

<sup>62</sup> UN Commission on Human Rights 'Report by Special Rapporteur Philip Alston 2006/03' UN Doc E/CN.4/2006/53/Add.1, at pp. 15 and 16.

<sup>63</sup> *Ibid.* at pp. 233 to 234.

<sup>64</sup> Art. 1 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989* (adopted 15 December 1989, entered into force July 11, 1991, not ratified by Tanzania) UNGA Res 44/128. In September 2008, the UN renewed its call for Tanzania to ratify the Second Optional Protocol. See: P. Kisembo 'Call on Tanzania to ratify protocol on death penalty' *IPP Media* (Tanzania) 12 September 2008.

<sup>65</sup> UNGA Res 62/149 'Moratorium on the use of the death penalty' (18 December 2007) UN Doc A/RES/62/149.

<sup>66</sup> Fourth report to the UNHRC, *supra*, at p. 12.

*“Adhabu ya kifo inafaa; kama hakutakuwa na adhabu hii, watu wataendelea kuua”* [“Death penalty is effective; if this punishment will be abolished, people will continue to kill others.”]<sup>67</sup>

However, the Tanzanian government has started reconsidering its position.<sup>68</sup> In September 2006, the Attorney General of Tanzania requested that the Law Reform Commission of Tanzania (LRCT) conduct a public consultation on the abolition of the death penalty.<sup>69</sup> The LRCT started a consultative process with the public on the issue of the abolition of the death penalty in January 2007<sup>70</sup> and, in March 2008, the LRCT issued a draft discussion paper on this issue. It has yet to release a final discussion paper. In the draft discussion paper, the LRCT recommended the abolition of the death penalty, despite its finding that the majority of Tanzanians favoured the retention of the death penalty.<sup>71</sup>

It has been difficult to pin down the actual public sentiment about retaining the death penalty. An opinion survey conducted by the LHRC in 2008 indicated that 81.7 percent of respondents were in favour of abolishing the death penalty.<sup>72</sup> One survey respondent from Moipo village, Manyara region indicated that he favoured abolition of the death penalty because:

*“Adhabu ya kifo haifai, pengine muuaji apelekwe gerezani na hapo atabadilika kuwa mtu mzuri na kubadili tabia. Ukimuhukumu kifo hiyo siyo adhabu tena. Atabadilikaje tabia wakati atakuwa amekufa? Haiwezekani kutenda kosa na kuhukumiwa kosa lilelile”* [ “[the d]eath penalty is not effective. Maybe the convict should be imprisoned and s/he will reform to be a good person and change the [bad] behaviour. If you convict a person in death that is not a punishment. How can s/he reform while died? It does not bring sense to give a punishment resembling the offence s/he has committed.”]<sup>73</sup>

It was in this international and national climate that the LHRC, Tanganyika Law Society (TLS), and SAHRiNGON filed a joint petition in the High Court of Tanzania, Dar es Salaam on 10 October 2008 challenging the constitutionality and mandatory of the death sentence/ death penalty.<sup>74</sup> In the petition filed by the TLS and others, the constitutionality of the death penalty was challenged on two grounds: (1) the availability

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<sup>67</sup> Response to LHRC opinion survey by interviewee in Maswa district, Sinyanga region (Tanzania January to November 2008).

<sup>68</sup> Fourth report to the UNHRC, *supra* at p. 12.

<sup>69</sup> LRCT’s Discussion Paper, *supra* at p. 2.

<sup>70</sup> Tanzania Human Rights Report of 2007, *supra* at p. 10.

<sup>71</sup> LRCT’s Discussion Paper, *supra*, at p. 40.

<sup>72</sup> Responses to LHRC opinion survey by interviewees (Tanzania January to November 2008). Of the 470 people interviewed for the LHRC’s opinion survey, 384 interviewees indicated that they were in favour of the abolishment of the death penalty.

<sup>73</sup> Response to LHRC opinion survey by interviewee in Moipo Village, Manyara region (Tanzania January to November 2008).

<sup>74</sup> *Legal and Human Rights Centre, Tanganyika Law Societ, and SAHRiNGON – Tanzania Chapter v AG*, Misc. Civil Application No. 67 of 2008 (High Court at Dar es Salaam).

of the death penalty breaches various constitutional provisions;<sup>75</sup> and (2) the mandatory imposition of the death penalty is unconstitutional. The High Court will hear the petition on the constitutionality of the death penalty on 26 March 2009.

The constitutionality of the death penalty was previously challenged in *Republic v. Mbushuu alias Mnyaroje and Kalai Sangula (supra)*. In this case, the High Court of Tanzania held the death penalty to be unconstitutional, as it was an inherently cruel, inhuman and degrading punishment.<sup>76</sup> However, the Court of Appeal of Tanzania overturned the High Court's decision. The Court of Appeal agreed with the High Court's characterization of the death penalty, but it held that the death penalty was saved by Article 30(2) of the Constitution.<sup>77</sup> Article 30(2) of the Constitution allows the state to derogate from the basic rights of the individual, if it is in the public interest to do so. It was held to be in the public interest to retain the death penalty.

### 2.1.2 Extra-Judicial Killings

An extra-judicial killing is a killing by a police officer or another state official that occurs outside of the ambit of the law, that is, it is illegal use of lethal force. In Tanzania, a number of extra-judicial killings occurred in 2008.

There were a number of reports in 2008 of the police using lethal force against individuals. For example, it was reported in May 2008 that there was tension between the police and Ngorongoro residents due to the police's failure to investigate the death of a traditional Maasai leader, Shangai Ole Puta, who was shot by the police during a police raid.<sup>78</sup> In July 2008, police killed six suspected robbers in the Kilombero district. The police fired a warning shot before engaging the suspects in a "full battle", which resulted in the suspects' deaths.<sup>79</sup>

In the words of Philip Alston, the UN Special Rapporteur on Extrajudicial killings:

The police are the face of the government. If they serve and protect the people, the government will have legitimacy. If they extort, intimidate and kill, the government will have no legitimacy.<sup>80</sup>

The Tanzanian Police Force's use of lethal force undermines the rule of law in Tanzania and public confidence in the government, as people cannot rely on the apparatus of the

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<sup>75</sup> It is argued that the death penalty is unconstitutional because it offends the following Articles of the *Constitution of Tanzania, 1977*, at Arts. 12(2) and 13(6)(d), which pertain to human dignity; Art. 13(6)(e), which addresses inhumane and degrading punishment; and, Art. 14 regarding the right to life.

<sup>76</sup> *Republic v. Mbushuu alias Mnyaroje and Kalai Sangula* (1994) TLR 146 (H.C.).

<sup>77</sup> *Mbushuu alias Mnyaroje and Kalai Sangula v. Republi* (1995) TLR 97 (C.A.).

<sup>78</sup> R. Luhwago 'Police chief to meet villagers' *The Citizen* (Tanzania) 8 May 2008.

<sup>79</sup> A. Msuya 'Police gun down six suspected robbers' *Sunday News* (Tanzania) 28 July 2008.

<sup>80</sup> United Nations Press Release 'Special Rapporteur calls on the government and the international community to make renewed efforts to prevent unlawful killings' (New York 15 May 2008)

<<http://www.unhchr.ch>>accessed 9 October 2008.

state to protect them. Instead, the apparatus of the state increases peoples' insecurity and promotes disrespect for the law.

At the international level, the UN's *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* states the following regarding the use of force by law enforcement officials:

[l]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.<sup>81</sup>

Similarly, at the domestic level, the *Police Force and Auxiliary Services Act*<sup>82</sup> makes it clear that the use of arms by a police officer is the last resort to be employed by a police officer when a person is attempting to escape from custody or is assisting another person to do the same.<sup>83</sup> This Act does not explicitly provide for the non-lethal use of arms. However, the *Criminal Procedure Act* states that a police officer can only use force that is proportionate in the circumstances. Specifically, it states that a police officer may use all means necessary to affect an arrest if a person forcibly resists or attempts to evade arrest; however, the arrested individual shall not be subjected to more restraint than necessary to prevent escape.<sup>84</sup> The *Criminal Procedure Act* further provides that in the course of making an arrest, a police officer should not use more force than is necessary and, more specifically, a police officer shall not, in the course of arresting a person, do an act likely to cause the death of that person.<sup>85</sup>

If a police officer uses lethal force, he or she can be prosecuted under the *Penal Code*. If a police officer is prosecuted under the *Penal Code*, he or she has the traditional defences against a criminal charge that are set out in the *Penal Code*, as well as the defence that his or her actions were in accordance with the provisions of the *Police Force and Auxiliary Services Act* and the *Criminal Procedure Act*. However, it is not a defence that the police officer's actions were done on the orders of a superior officer. This limitation on the defences available to a police officer accords with principle 19 of the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, which states:

...an order from a superior officer or public official may not be invoked as a justification for extralegal, arbitrary or summary executions...<sup>86</sup>

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<sup>81</sup> 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (Havana 27 August - 7 September 1990) U.N. Doc A/CONF.144/28/Rev.1, at principle 4.

<sup>82</sup> Cap. 322.

<sup>83</sup> S. 29 of *Police Force and Auxiliary Services Act, 1939*, Cap. 322, R.E. 2002.

<sup>84</sup> Tanzania Human Rights Report of 2007, *supra* at p. 14, which cites the Ss. 11 and 12. *Criminal Procedure Act, 1985*, Cap. 20, R.E. 2002.

<sup>85</sup> S. 21. of the *Criminal Procedure Act, Cap. 20*.

<sup>86</sup> UN Economic and Social Council 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' (1989) UN Doc. E/1989/89 Principles 3 and 19.

The trial of Assistant Commissioner of Police, Abdallah Zombe, and 11 others is an example of extrajudicial killings that were committed on the orders of a superior. In 2006, the former Assistant Commissioner of Police, Abdallah Zombe, and 11 other police officers were charged with murdering three mineral dealers and a taxi driver. The offence occurred on 14 January 2006 in Pande Forest, Dar es Salaam. It is alleged that the victims were arrested by some of the accused and later killed on the orders of Abdallah Zombe, who was then Assistant Commissioner of Police. Initially, the accused claimed that the victims were bandits who had been killed in a police shootout.<sup>87</sup> However, doubts were raised about the veracity of the police officers' statements when it became apparent that the bandits had all been shot in the back of the head. In July 2008, the trial of the accused police officers began.<sup>88</sup> At the end of 2008, the prosecution had rested its case and the defence was scheduled to commence its arguments in February 2009. The fact that the government charged and tried the 12 police officers is a positive move towards holding police officers accountable for extrajudicial killings.

### 2.1.3 Mob Violence

Deaths as a result of mob violence continue to occur in Tanzania. These killings contravene an individual's right to life, as guaranteed by various international, regional and national legal instruments. Furthermore, mob violence usurps the judiciary's role and deprives an individual of the procedural safeguards, such as the right to be heard and the presumption of innocence, that are inherent in the criminal justice system.<sup>89</sup>

Mob violence generally occurs in Tanzania when a group of people believe another person has committed a crime of some sort. Ironically, mob violence turns law-abiding citizens into criminals.<sup>90</sup> The continued occurrence of mob violence in Tanzania has been attributed to a lack of confidence in the judicial system, which is perceived to be corrupt and to perpetuate social inequalities.<sup>91</sup> In particular, people evinced concern about corruption in the police force and lengthy delays in the investigation and prosecution of cases.<sup>92</sup> In the LHRC's 2008 opinion survey, 9.11 percent of the respondents identified a lack of confidence in the police as a reason for mob violence, while a further 4.025 percent of respondents linked it to the remoteness of police stations.<sup>93</sup> However, concerns about the police were trumped by ignorance of the law as the primary reason for mob violence. The LHRC's 2008 opinion survey revealed that 78.17 percent of respondents identified ignorance of the law as the reason for mob

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<sup>87</sup> 'Zombe murder trial continues at High Court' *ThisDay* (Tanzania) 9 September 2008.

<sup>88</sup> F Kapma 'Zombe: It's fair trial so far' *DailyNews* (Tanzania) 27 September 2008.

<sup>89</sup> Art. 13(6)(b) *Constitution of Tanzania, 1977*.

<sup>90</sup> UN Press Release 'Liberia: Deputy UN Envoy says mob violence has no place in civilized society' (29 March 2008) UNMIL PR 28 <<http://www.reliefweb.int>> accessed 16 October 2008. Comment made by the Deputy Special Representative of the Secretary General for the Rule of Law, Henrietta Mensa-Bonsu, in relation to mob violence in Liberia.

<sup>91</sup> P. M. Ng'walali and J N. Kitinya, 'Mob Justice in Tanzania: A Medico-Social Problem' [2006] *Afri. Health Sci.* 36.

<sup>92</sup> LHRC 'Mob Violence irritates LHRC, Police' (Newsletter Tanzania July 2008). Delays in the investigation of cases can be partially attributed to the inadequate number of police officers.

<sup>93</sup> Responses to LHRC opinion survey by interviewees (Tanzania January to November 2008).

violence.<sup>94</sup> As a result of this generally negative perception of the judicial system and a lack of knowledge as to how the judicial system operates, people take the law into their own hands to deal with individuals who are thought to be criminals.<sup>95</sup>

In 2008, there were a number of incidents of mob violence reported in the media, including:

- in Mabungo village in the Moshi district, four people were beaten to death by an angry mob. It is believed that the individuals killed were “hard core” criminals who had committed various robberies;<sup>96</sup>
- in Tabora, two people who were suspected of stealing money and 16 cellular phones were beaten to death by a crowd;<sup>97</sup>
- in Dar es Salaam, a man was beaten to death by a local resident on the suspicion that he had stolen a cellular phone;<sup>98</sup> and,
- in Tarime Township, residents killed three people who were suspected bandits. After the three people were killed, the villagers set their bodies on fire.<sup>99</sup>

Mob violence undermines the operation of the judicial system, as it side steps the judicial system completely, and it erodes the rule of law. The lack of prosecution of individuals involved in incidents of mob violence creates a culture of impunity for these acts. The LHRC is concerned about the arbitrary nature of mob violence and, in particular, the presumption of guilt that is inherent to mob violence.

The LHRC recognizes that the government has taken some steps to educate people about the impropriety of mob violence.<sup>100</sup> The LHRC encourages the government to continue with its campaign to educate the public about mob violence. In addition, the LHRC encourages the government to engage in systematic reforms of the judicial system and increase the resources available to the judicial system so that it could operate more efficiently. Improving the judicial system may increase confidence in it and lead to a decrease in mob violence.

#### **2.1.4 Killings due Belief in Witchcraft**

Belief in witchcraft is pervasive throughout Tanzania.<sup>101</sup> Witchcraft can be used to explain events that seem irrational and as a medium through which those who believe in it try to achieve their personal goals.<sup>102</sup>

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<sup>94</sup> Responses to LHRC opinion survey by interviewees (Tanzania January to November 2008).

<sup>95</sup> Ng'walali and Kitinya, *supra* note 89, at p. 36.

<sup>96</sup> O. Andondile 'Mob kills four 'hardcore criminals' *The Citizen* (Tanzania) 7 February 2008.

<sup>97</sup> D. Mushi 'Mob lynches man in Arusha' *DailyNews* (Tanzania) 8 May 2008.

<sup>98</sup> Photograph without title, *ThisDay* (Tanzania) 17 June 2008.

<sup>99</sup> E. Marwa 'Police clash with angry residents in Tarime township' *ThisDay* (Tanzania) 1 January 2008.

<sup>100</sup> Fourth report to the UNHRC, *supra*, at p. 12.

<sup>101</sup> Maia Green, 'Discourses on inequality' (2005) 5 *Anthropological Theory* 247, at p. 249.

<sup>102</sup> C. Bubani 'Witchcraft and the law in Tanzania' *The Guardian* (London 26 September 2008).

In Tanzania, the *Witchcraft Act*<sup>103</sup> makes it clear that it is an offence to practice witchcraft, possess or supply instruments of witchcraft, or to threaten to resort to witchcraft.<sup>104</sup> A person can be imprisoned for at least seven years, if they commit an offence under the *Witchcraft Act* that causes harm to either a person or an animal.<sup>105</sup> This Act also makes it an offence for a person to accuse another of witchcraft.<sup>106</sup> Belief in witchcraft is reinforced and legitimized by the existence of the *Witchcraft Act*.

The Act reflects the societal perception that witchcraft is undesirable and it is necessary to punish those who practice witchcraft. Ironically, most actions commenced under this Act have been initiated against a person who has accused another person of practicing witchcraft, rather than a person being charged with the practice of witchcraft.<sup>107</sup> For instance, in 2008, a woman was sentenced to six months imprisonment for accusing another person of being a witch.<sup>108</sup>

In 2008, two trends emerged in incidents that were linked to witchcraft. The first trend was the continued persecution of people labeled as witches, while the second trend related to the killing of albinos for the purposes of witchcraft. Former Prime Minister Edward Lowassa addressed both these trends in January 2008 when he “urged local residents to desist from the habit of killing albinos and old people in relation to acts of sorcery”.<sup>109</sup>

#### *Persecution due to allegations of witchcraft*

People who are labeled as witches are often subject to violence and persecution.<sup>110</sup> By and large, it is older women who are accused of witchcraft and are at risk of violent attack and even murder.<sup>111</sup> In particular, older women with red eyes are targeted.<sup>112</sup> It is more likely that a poor person will be labeled as a witch, as that person’s

Visible failure to thrive ...cannot be explained through bad luck or inadequacies alone. On the contrary, such people must actively seek out this way of living because they despise success in themselves and in others...The poorest are thus the most likely to be suspected of witchcraft and the slightly better off are the most likely to suspect them.<sup>113</sup>

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<sup>103</sup> Cap. 18.

<sup>104</sup> S. 3 of the *Witchcraft Act, 1928*, Cap. 18, R.E. 2002.

<sup>105</sup> S. 5 *Witchcraft Act*.

<sup>106</sup> S. 4 *Witchcraft Act*.

<sup>107</sup> Green, *supra*, at 263.

<sup>108</sup> B. Msongo ‘unknown headline’ *Habari Leo* (Tanzania) 13 May 2008.

<sup>109</sup> B. Nyakeke ‘Fight graft first, Church tells govt’ *The Citizen* (Tanzania) 21 January 2008.

<sup>110</sup> C Bubani ‘Witchcraft and the law in Tanzania’ *The Guardian* (London) 26 September 2008.

<sup>111</sup> Green, *supra*, at 249; Response to LHRC opinion survey by interviewees (Tanzania January to November 2008).

<sup>112</sup> Response to LHRC opinion survey by interviewees in Bariadi and Msawa districts, Shinyanga region (Tanzania) January to November 2008. It is thought that red eyes are a physical indication that a person is a witch.

<sup>113</sup> Green, *supra*, at 252.

In 2007, there was a 17 percent increase in the number of incidents of violence against elderly people due to allegations of witchcraft.<sup>114</sup> The tendency to persecute people due to allegations of witchcraft continued in 2008. For example, in May of 2008, a man was killed by a mob in Uchira Village in the Moshi District because it was alleged that he belonged to a group that killed people and used their body parts for sorcery.<sup>115</sup> Similarly, in Kombo Mji, Mpya Ward, Morogoro District, a 68-year old woman was attacked by a mob for allegedly killing a three-year old child for the purposes of witchcraft. While the woman's life was saved due to the intervention of the police, the mob demolished her residence.<sup>116</sup>

The *Witchcraft Act* is an outdated act that should be repealed. The continued existence of the *Witchcraft Act* serves to reinforce beliefs in witchcraft. The LHRC recommends that the government educate people about the fallacy of believing in witchcraft and persecuting people on suspicions of witchcraft. Furthermore, people who commit violence due to a belief in witchcraft should be prosecuted to the full extent of the law.

#### *Killing of albinos for the purposes of witchcraft*

In the past three years, there has been a steady increase in the number of albinos killed. In 2006, 25 albinos died in suspicious circumstances.<sup>117</sup> Whereas it was reported that in the period October to December of 2007, 20 albinos were murdered, and more than 35 albinos were murdered in the period January to December of 2008.<sup>118</sup> While albinos were murdered in all regions of Tanzania, there was a greater concentration of these incidents in rural areas and, in particular, in the regions of Arusha, Mwanza, Shinyanga, Mara and Karega.<sup>119</sup>

The killing of albinos in Tanzania has been linked to witchcraft. It is believed that an organ or body part of an albino can be used by a witchdoctor to manufacture a charm that will make a person wealthy.<sup>120</sup> These charms are believed to increase a person's success in activities, such as fishing and mining.<sup>121</sup> Hon. Mr. Justice (rtd) Amir Manento, the Chairperson of the Commission for Human Rights and Good Governance, attributed the killings of albinos for witchcraft purposes to poverty and illiteracy.<sup>122</sup>

In 2008, a number of murders of albinos occurred. For instance;

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<sup>114</sup> J. Ng'oko 'Witch killing on the rise' *The Guardian* (Tanzania) 27 January 2008.

<sup>115</sup> A. Juma 'Mob kills man over sorcery allegations' *Daily News* (Tanzania) 19 May 2008.

<sup>116</sup> LHRC, Interview with Aulelia Thomas, victim of persecution due to witchcraft allegations (Tanzania) 10 January 2008.

<sup>117</sup> E. Agola 'British NGO decries rampant albino killings' *The Guardian* (Tanzania) 10 March 2008.

<sup>118</sup> Interview with Advocate Abdallah Possi, Advocate for the Tanzania Albino Society (Tanzania) 8 January 2009; F Seleman 'Human rights watchdog castigates albino killings' *The Guardian* (Tanzania) 12 February 2008; '16 albinos killed in the country, says Kagasheki' *ThisDay* (Tanzania) 21 June 2008.

<sup>119</sup> F. Seleman 'Human rights watchdog castigates albino killings' *The Guardian* (Tanzania) 12 February 2008; B Kinyori 'Tanzania: Child Abuse 'Is Most Rampant'' *The Citizen* (Tanzania) 10 September 2008.

<sup>120</sup> 'Attackers kill albino girl 5, in night raid' *The Citizen* (Tanzania) 25 January 2008.

<sup>121</sup> *Ibid.*

<sup>122</sup> L. Shekighenda 'Pinda challenges Human Rights Commission staff to be exemplary' *The Guardian* (Tanzania) 4 June 2008.

- In January 2008, a five-year old albino was murdered in Mwanza and her organs removed. Her murder was associated with witchcraft;<sup>123</sup>
- In February 2008, a two-year old albino boy was killed in the lake zone. His blood was drained and some of his body parts were removed for use in witchcraft;<sup>124</sup>
- In May 2008, Vumilia Doto Makoye, a 17 year-old albino girl, died after a group of people hacked off her right leg so that it could be used for witchcraft;<sup>125</sup>
- In July 2008, Jovin Majaliwa was killed in his home in a remote Lake Victoria village. His attackers reportedly severed his right foot and genitalia. His wife, also an albino, was also injured;<sup>126</sup> and,
- In October 2008, an albino residing in Dar es Salaam was attacked when she was on her way home from a demonstration raising awareness about the plight of albinos in Tanzania. Her assailants hacked off one of her arms and, unsuccessfully, tried to hack off her other arm. This arm was later amputated.<sup>127</sup>

The government, political parties and some human rights organisations have been criticised for their delay in responding to the murder of albinos.<sup>128</sup> In response to the murders, the government launched a campaign in mid-2008 to train traditional healers in other occupations, as a way of encouraging them to abandon their present occupations, and, presumably, reduce the practice of witchcraft and attendant violence.<sup>129</sup> President Kikwete also ordered the police to locate albinos and to offer them protection.<sup>130</sup> However, in general, the government's response to the murder of albinos has been slow and inadequate. It is doubtful as to whether the steps taken by the government to address the murders of albinos have had any effect.

The police have also been criticised for the tardy manner in which they have addressed the murder of albinos.<sup>131</sup> In the media, it was suggested that police had been bribed to not investigate these murders. The police made no arrests in this regard in the period January to March 2008, although their performance improved in the period April to October 2008 when 47 people were arrested in connection to the violence against albinos.<sup>132</sup> In October 2008, it was reported that the police had taken to court all the people suspected of being involved in the killing of albinos and the subsequent sale of their body parts.<sup>133</sup> The Tanzanian Police Force has stated that their investigation of

<sup>123</sup> 'Attackers kill albino girl 5, in night raid' *The Citizen* (Tanzania) 25 January 2008.

<sup>124</sup> 'Govt blasted over albinos' killings' *The African* (Tanzania) 4 March 2008.

<sup>125</sup> 'Albino girl killed in Magu' *ThisDay* (Tanzania) 6 May 2008.

<sup>126</sup> 'Tanzania albinos targeted again' *BBC News* (United Kingdom) 27 July 2008.

<sup>127</sup> A Smith 'Albino Africans live in fear after witch-doctor butchery' *The Observer* (United Kingdom) 16 November 2008.

<sup>128</sup> E. Agola 'British NGO decries rampant albino killings' *The Guardian* (Tanzania) 10 March 2008.

<sup>129</sup> '16 albinos killed in the country, says Kagasheki' *ThisDay* (Tanzania) 21 June 2008.

<sup>130</sup> 'Living in fear: Tanzanian's albinos targeted in wave of witchcraft killings' *ThisDay* (Tanzania) 23 July 2008.

<sup>131</sup> Kangero 'Rights groups blamed over silence on the killing of albinos' *ThisDay* (Tanzania) 22 March 2008.

<sup>132</sup> L. Shekighenda 'JK: Plight of albinos critical challenge' *The Guardian* (Tanzania) 20 October 2008.

<sup>133</sup> P. Kisembo and F Peter 'All suspected albino killers taken to court' *The Guardian* (Tanzania) 22 October 2008.

these murders has been hindered by a lack of cooperation from residents, particularly in rural areas.<sup>134</sup>

The killing of albinos is a violation of the right to life. It is the LHRC's position that the steps taken by the government to address the murders of albinos have been inadequate and ineffective. It is our recommendation that the government take concrete steps to protect albinos. We suggest the government take the following steps: review the licenses issued to traditional doctors; sensitize and educate the public about albinism as a medical condition; and, educate the public about the myth of witchcraft. In addition, the government should ensure that there is a thorough and timely investigation and prosecution of all incidents of violence against albinos.

## 2.2 Freedom from Torture and Police Brutality

Tanzania is a signatory to various instruments, such as the *African Charter on Human and Peoples' Rights, 1981*, the *International Covenant on Civil and Political Rights, 1966* and the *Universal Declaration of Human Rights, 1948*, which contain a general prohibition against torture.<sup>135</sup> In addition, the Constitution contains a general prohibition against torture.<sup>136</sup> However, Tanzania is not a signatory to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* which provides a clear definition of torture, places a duty on the state to take proactive measures to prevent torture, and requires the criminalization of the act of torture.<sup>137</sup> Contrary to this convention, there is no clear definition of torture in Tanzania's legislation and the act of torture is not criminalized. These two gaps in Tanzania's legislation make it difficult for the judiciary to address alleged acts of torture in a meaningful fashion. In 2008, torture accounted for 7% of human rights violations in Tanzania.<sup>138</sup>

In terms of police brutality, the *Basic Principles on the use of Force and Firearms by Law Enforcement Officials* provide that force should only be used where it is unavoidable and, when force is used, it should be proportionate to the seriousness of the offence and police officers should minimize the damage and injury caused.<sup>139</sup> A similar provision can be found in the *Criminal Procedure Act*, as discussed in Chapter 2.1.2. of this report.

In 2008, there were occasions when the use of force by the police was inappropriate. For instance, Silaha Marwa was arrested by the police on the suspicion of committing an armed robbery. On the way to the police station, the arresting officers covered Mr.

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<sup>134</sup> P. Magubiro 'MPs' team sent to investigate albino killings' *The Citizen* (Tanzania) 14 March 2008.

<sup>135</sup> Art. 5 of the *African Charter on Human and Peoples' Rights, 1981*; Art. 7 of the *International Covenant on Civil and Political Rights, 1966*; Art. 5 of the *Universal Declaration of Human Rights, 1948* (adopted 10 December 1948, incorporated into the *Constitution of Tanzania, 1977*) UNGA Res 217 A(III).

<sup>136</sup> Art. 13(6)(e) of the *Constitution of Tanzania, 1977*.

<sup>137</sup> Arts. 1, 2 and 4 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* (adopted 10 December 1984, entered into force 26 June 1987, not ratified by Tanzania) UN Doc. A/39/51.

<sup>138</sup> B. Kinyori 'Tanzania: Child Abuse 'Is Most Rampant'' *The Citizen* (Tanzania) 10 September 2008.

<sup>139</sup> 'Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' (Havana 27 August - 7 September 1990) U.N. Doc A/CONF.144/28/Rev.1, at principles 4 and 5.

Marwa's face with a piece of clothing, took him to Vikundu Forest and discharged a firearm into the air before forcing Mr. Marwa to sign a blank confession. The police threatened to kill Mr. Marwa, if he did not sign the confession.<sup>140</sup> In Kigoma, two police officers beat and threatened several citizens.<sup>141</sup>

One of the reasons for police brutality is the bribery of some of the police officers.<sup>142</sup> In some instances, a complainant will pay a police officer to arrest a person due to personal animosity between the parties and request that the police officer use violence against the arrested person.<sup>143</sup> Another reason for police brutality is discontent within the police force (some of them not all) with their welfare.<sup>144</sup> In 2008, it was reported that there was only one police officer for every 1,339 people,<sup>145</sup> which results in police officers being overworked. In addition, police officers are poorly remunerated and have poor living conditions.

LHRC, however, recognizes the current positive reforms within the police force. The police force is now undertaking the community policing and continue converting the work of the police officer into patterns of professional ethics relating to policing work. In some places like in the City of Dar es Salaam, impact of the said reforms is seen. It is recommended that, this should be done countrywide. Monitoring and evaluation should be implemented periodically in all police posts in order to ascertain individual police officers who still act unscrupulously and unprofessional.

### **2.3 Equality before the Law – Access to Justice and Fair Trials**

The entitlement to equality before the courts, equality before the law and the equal protection of the law is contained in the *International Covenant on Civil and Political Rights, 1966*.<sup>146</sup> At a national level, equality before the law is guaranteed by Sub-sections 13(1) and 13(2) of the *Constitution of Tanzania, 1977*, which state:

13(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

13(2) No law enacted by any authority in the United Republic [of Tanzania] shall make any provision that is discriminatory either of itself or in its effect.

At its heart, equality before the law ensures the law is applied to each person in the same way, irrespective of any qualities that are unique to that person, such as their status, their

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<sup>140</sup> P Musa 'unknown headline' *Mwananchi* (Tanzania) 26 June 2008.

<sup>141</sup> A report of LHRC human rights monitors (Report to the LHRC Tanzania 29 April 2008).

<sup>142</sup> Written response to LHRC questionnaire by unnamed employee of the National Organisation for Legal Assistance (NOLA) (Tanzania November 2008).

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> C. Barasa 'Ten Regions top crime list' *Daily News* (Tanzania) 31 July 2008.

<sup>146</sup> Arts. 14 and 26 of the *International Covenant on Civil and Political Rights, 1966*.

political power, or income level. It also ensures that laws do not contain provisions that discriminate on the basis of inherent, personal characteristics, such as gender or colour.

Access to justice is a facet of equality before the law, as it enables people to use the law to protect their rights. In order to have access to justice, it is necessary for people to be aware of their legal rights and to be able to pursue those rights through the judicial system in a meaningful way. At present, one of the factors limiting people's access to justice is their ignorance of the law. Ignorance of the law can be attributed to a number of factors, including: a lack of education; the government's failure to disseminate popularized versions of the law; and, the government's failure to translate laws from English to Swahili, even though 75 percent of Tanzanians cannot understand English. Only 1 percent of Tanzania's laws are in Swahili. In addition, many laws contain Latin terms that are difficult to understand.

The government is attempting to address access to justice issues through the *Legal Sector Reform Programme (LSRP)*, which was established in 2005.<sup>147</sup> Among other things, this programme aims to strengthen the management and coordination of the legal sector and enhance access to legal services for the poor and disadvantaged. However, little progress has been made in the implementation of the activities of this programme, notwithstanding the LSRP's motto of "timely justice for all".<sup>148</sup> As a result, access to justice continues to be a widespread problem in Tanzania.

### **2.3.1 Legal Representation**

Access to justice is problematic in Tanzania. One of the factors that impact a person's ability to access justice is that person's ability to afford legal representation and the quality of that representation.

At present, there are 1071 lawyers on Tanzania's roll of advocates.<sup>149</sup> It is unlikely that there will be a rapid increase in the number of advocates practicing in Tanzania as, on average, only 50 people qualify as advocates per year.<sup>150</sup> It is hoped that the number of advocates will increase in the next few years due to the establishment of the Law School of Tanzania, which became operational in 2008.<sup>151</sup> The pool of advocates who can represent people in the Court of Appeal is even smaller, as only advocates with five years

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<sup>147</sup> Ministry of Justice and Constitutional Affairs, 'Unlocking the Road to Timely Justice for All: First Annual Review of the Legal Sector Reform Programme of the United Republic of Tanzania' (18 June 2008) <<http://www.ambdaressalaam.um.dk>> accessed 21 October 21, 2008, at p. 3.

<sup>148</sup> *Ibid.* at p. 10.

<sup>149</sup> TLS, Membership Directory, 2008.

<sup>150</sup> M Tambwe 'CJ says Judiciary in dire need of resources' *Daily News* (Tanzania) (22 May 2008).

<sup>151</sup> B James 'Tanzania: Milestone as Fifty Six Admitted to the Bar' *The Citizen* (Tanzania) 14 June 2008. The purpose of the law school is to provide practical legal training to students who have obtained a Bachelor of Laws. A student must attend the Law School in order to become an advocate. In Tanzania, advocates can appear in court, while lawyers can give legal advice but are not permitted to appear in court. The Law School has enrolled two cohorts of 274 and 208 students. The Law School was established by the *Law School of Tanzania Act, 2007*, Act No. 5 of 2007. One of the challenges which the Law School programmes would face, especially on the part of students is insufficient funds to give them loans/ grants. The government has to foresee this issue and find out ways of resolving it.

or more of experience in the High Court can appear in the Court of Appeal.<sup>152</sup> The low number of advocates in Tanzania has the effect of denying justice to many.

In addition, the majority of advocates are located in urban areas, such as Dar es Salaam, Arusha and Mwanza, while there are a low number of or no advocates in other regions.<sup>153</sup> For instance, according to the Hon. Chief Justice Augustino Ramadhan, there are no advocates practicing in the Lindi and Mtwara regions, there is only one advocate practicing in each of the Mara and Rukwa regions, and there are only three advocates practicing in each of the Singida and Tabora regions.<sup>154</sup> As a result, it is difficult for people living in remote or rural areas to obtain legal representation.

Another barrier to access to justice is the cost of litigation. In terms of ameliorating the cost of litigation, the government may provide legal aid to a person who has been charged with murder or treason, if it is ordered by a court.<sup>155</sup> There was little incentive for advocates to volunteer to take legal aid cases, as the legislated level of remuneration for advocates was extremely low.<sup>156</sup> The High Court considered the level of remuneration for legal aid cases in *W.K. Butambala v. The Attorney General*.<sup>157</sup> In this case, the Hon. Mr. Justice Mwalusanya stated that the legislated remuneration for advocates in legal aid cases was inadequate. Rather, an advocate was entitled to be remunerated according to the quantity and quality of the work done as assessed by the certifying authority. This judgment was overturned on appeal.<sup>158</sup> However, the Court of Appeal revisited this issue in *Attorney General v N.I.I. Munuo Ng'uni* and decided to increase the remuneration for legal aid cases to Tsh. 100,000 per brief.<sup>159</sup> In March 2008, the Law Reform Commission of Tanzania recommended that this amount be treated as the minimum amount and that remuneration should depend on the circumstances of each case.<sup>160</sup>

The government does not provide any legal aid for civil matters. Certain non-governmental organisations, such as the LHRC and NOLA, provide legal aid in this area of law.<sup>161</sup> The issues most frequently addressed in the LHRC and NOLA legal aid clinics

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<sup>152</sup> Dr. Angelo M. Mapunda, Law Reform Commission of Tanzania 'Comprehensive Review of the Appellate Jurisdiction Act 1979 and the Court of Appeal rules' (Position Paper Tanzania March 2008), at p. 99.

<sup>153</sup> Tanzania Human Rights Report of 2007, *supra*, at p. 24. Of the 761 practicing advocates in Tanzania, 602 are based in Dar es Salaam as per D. Mukiza 'Lindi, Rukwa in need of legal aid' *Sunday News* (Tanzania) 14 December 2008.

<sup>154</sup> D. Mukiza 'Lindi, Rukwa in need of legal aid' *Sunday News* (Tanzania) 14 December 2008.

<sup>155</sup> S. 3 of the *The Legal Aid (Criminal Proceedings) Act, 1969*, Cap. 21, R.E. 2002.

<sup>156</sup> The legislated amount of remuneration for each proceeding is Tsh120 to Tsh300 as per the s. 4 of the *Legal Aid (Criminal Proceedings) Act, 1969*.

<sup>157</sup> *W.K. Butambala v. The Attorney General*, Misc. Criminal Cause No. 50 of 1990 (High Court at Mwanza) (unreported).

<sup>158</sup> The Court of Appeal overturned the High Court judgment in *Attorney General v W.K. Butambala* (1993) TLR 46 on the basis that Hon. Mr. Justice Mwalusanya had improperly raised a constitutional issue.

<sup>159</sup> *Attorney General v N.I.M. Munuo Ng'uni*, Civil Appeal No. 45 of 1998 (Court of Appeal of Tanzania) (unreported).

<sup>160</sup> Mapunda, *supra*.

<sup>161</sup> Other legal aid providers in Tanzania include the Tanzania Women Lawyers Association; the Faculty of Law, University of Dar es Salaam; the Comprehensive Community Based Rehabilitation in Tanzania; the Disabled Organisation for Legal Affairs and Social Economic Development; the Lawyers Environmental

are those relating to land, matrimonial issues, labour and succession.<sup>162</sup> In 2008, the LHRC and NOLA tracked the people using their legal aid services. On average, 69 percent of new clients were men, while 31 percent were women.<sup>163</sup> From these statistics, it can be extrapolated there is a strong gender bias to the issue of access to justice.

The right to legal representation does not necessarily mean that a person should be represented by an advocate or a lawyer.<sup>164</sup> What is important is that the person receives some assistance in a legal matter from a person they trust and who has a certain amount of knowledge of the law. Paralegals can fulfill this role, as they have an elementary knowledge about the law and legal procedures. They can assist people with simple legal matters and with navigating legal procedure. At present, paralegals are not allowed to represent people in court, conduct examinations or prepare court documents.

It is the LHRC's position that paralegals and lawyers who have not become advocates should be allowed to represent people at the Primary Court level and below.<sup>165</sup> Increasing the role of paralegals will increase accessibility to justice for those groups that form the most marginalized parts of society and who have the least access to justice, such as women and the rural poor. To promote the efficacy of paralegals, a legal framework should be put in place that clearly delineates the tasks that can be performed by paralegals, the courts in which they can provide representation and the qualification process to become a paralegal.

Under the MUKUKUTA, one of the government's goals is the protection and promotion of the rights of the poor and vulnerable groups in the justice system.<sup>166</sup> One of the strategies to achieve this target was the provision of legal aid services to vulnerable groups.<sup>167</sup> In addition, the government made a commitment in the *Legal Sector Reform Programme (Medium Term Strategy) 2005/6-2007/8* to establish legal aid groups and centres at regional and district levels.<sup>168</sup> These commitments at the policy level have not translated to the practical level, as the government has yet to establish any legal aid groups or centres.

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Association of Tanzania; Women in Law and Development in Africa; Women's Legal Aid Centre; ENVIROCARE; and, the Service Health and Development for People living with HIV/AIDS.

<sup>162</sup> Written responses to LHRC questionnaires by unnamed employees of NOLA and LHRC Buguruni Legal Aid Clinic (Tanzania November 2008).

<sup>163</sup> *Ibid.* In October 2008, 76 percent of the LHRC's Buguruni Legal Aid clinic's clients were men and 24 percent were women. In 2008, 62 percent of NOLA's new clients were men and 38 percent were women.

<sup>164</sup> Kijo-Bisimba and Peter, *supra* note 40, at p. 507.

<sup>165</sup> 2007 Human Rights Report, *supra* at p. 24.

<sup>166</sup> Government of Tanzania, 'United Republic of Tanzania: Poverty Reduction Strategy Paper' (IMF Country Report No. 06/12, April 2006) <<http://www.imf.org>> accessed 21 October 2008) at p. 60.

<sup>167</sup> *Ibid.* at p. 60.

<sup>168</sup> 2007 Human Rights Report, *supra*, at p. 25. Under the LSRP Medium Strategy, the parties have been taking steps to establish a Legal Aid and Literacy Network. See: LSRP '2008 GBS LSRP Progress Report' (Report Tanzania 11 November 2008).

### 2.3.2 Institutional Capacity of the Judicial System

Human rights cannot be protected or equality secured when the judiciary is incapacitated. In Tanzania, the ability of the judiciary to dispense justice is seriously undermined by the lack of infrastructure, the insufficient number of qualified personnel, the allegations of corruption and the lack of judicial independence.

#### *Delay in Cases*

In 2008, the Chief Justice of Tanzania, the Hon. Mr. Justice Augustino Ramadhani, noted that “the judicial process in this country was going at a snail’s pace as the number of cases kept piling at the courts – some for over a decade – before judgment is passed”.<sup>169</sup> These delays can be partially attributed to a lack of resources and a lack of capacity in the judicial system.

In cases where a person is remanded into police custody, undue delays in the judicial process infringe on a person’s right to freedom and their right to a fair hearing. In addition, a lengthy delay in the judicial process denies justice to both the victim and the accused, as evidence deteriorates and the accused may be deprived of their freedom.

An example of an undue delay in the judicial process is the case of Baraka Elias who was charged with rape in 2004 and held in remand until 2008 when the case against him was dismissed because of a lack of evidence.<sup>170</sup> Similarly, Miraji Nassoro Samvu has been in remand since 2003 while waiting for a trial on a murder charge.<sup>171</sup> The delay in the trial of Mr. Samvu is contrary to the *International Covenant on Civil and Political Rights, 1966*, which states that a person arrested or detained on a criminal charge is entitled to a trial within a reasonable time or should be released.<sup>172</sup> According to Mr. Samvu’s advocate, it is also a breach of an individual’s right to fair hearing as set out Section 13(6) of the *Constitution of Tanzania, 1977*. It is still to be seen whether the High Court of Tanzania agrees with the position of Mr. Samvu’s advocate. Mr. Samvu’s situation is not unique. In October 2008, five remandees charged with murder went on a hunger strike to protest the more than year long delay in hearing their cases.<sup>173</sup>

In an effort to increase the capacity of the judiciary and to reduce delays, President Kikwete appointed 11 new judges to the High Court of Tanzania and two new judges to the Tanzania Court of Appeal in May 2008.<sup>174</sup> These appointments bring the total number of judges appointed to the High Court to approximately 58 and the total number

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<sup>169</sup> P. Machira ‘JK appoints seven women judges’ *The Citizen* (Tanzania) 29 May 2008.

<sup>170</sup> R. Mirondo ‘Suspected rapist acquitted in court for lack of evidence’ *The Guardian* (Tanzania) 12 February 2008.

<sup>171</sup> R. Mirondo ‘Murder suspect sues govt for 50m/. damages for undue detention’ *The Guardian* (Tanzania) 10 March 2008.

<sup>172</sup> Art. 9 of the *International Covenant on Civil and Political Rights, 1966*.

<sup>173</sup> R. Mwalongo ‘Govt says monitoring inmates now on hunger strike’ *The Guardian* (Tanzania) 8 October 2008. All the inmates had been held in remand in the Keko Remandee Prison, Dar es Salaam on charges of murder since 2007.

<sup>174</sup> P. Machira ‘JK appoints seven women judges’ *The Citizen* (Tanzania) (29 May 2008).

of judges on the Court of Appeal to 17.<sup>175</sup> While these appointments are welcome, there are still an inadequate number of judges in both these courts. It is suggested that further appointments be made to these courts, as well as to the primary courts, district courts and courts of resident magistrates, subject to the availability of appointees who have the right qualifications. We agree with LRCT's recommendation that research assistants should be assigned to judges to assist with research on legal issues.<sup>176</sup> Research assistants will increase judicial capacity, as judges will have more time to focus on hearing cases and writing judgments.

In the 2008/2009 financial year, the government evinced the intention to establish the Judiciary Fund, which will be used for judicial operations and to strengthen judicial infrastructure. The creation of this fund would be a milestone for Tanzania's judiciary, as the judiciary has consistently been allocated funds that are insufficient to maintain its operations.<sup>177</sup> At this point, it is unclear what the quantum of the Judiciary Fund will be, how the funds will be used or when the fund will be established.

### *Judicial Independence*

In Tanzania, the independence of the judiciary is guaranteed by the *Constitution of Tanzania, 1977*.<sup>178</sup> However, the independence of the judiciary has been undermined by the government's lack of respect for judicial decisions and, more particularly, the government's efforts to sidestep judicial decisions.<sup>179</sup>

The issue of private candidates running for elected offices is a prime example of the legislature undermining the independence of the judiciary. Private candidates are individuals that are unaffiliated with a political party who want to run for elected office. In 1994, the High Court of Tanzania ruled that a prohibition against private candidates running for elected positions was unconstitutional.<sup>180</sup> Rather than appealing the decision, the Government of Tanzania amended the Constitution to expressly prohibit private candidates. The constitutionality of this amendment was challenged and, in 2006, the High Court of Tanzania nullified the constitutional amendment.<sup>181</sup> The Government of Tanzania appealed this decision to the Court of Appeal of Tanzania, which dismissed the Government of Tanzania's appeal in May 2008. The Court of Appeal ordered the Government of Tanzania to draft and table a Bill permitting private candidates to run for elected office within three months of the court's decision.<sup>182</sup> The Attorney General

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<sup>175</sup> Mapunda, *supra*, at p. 11.

<sup>176</sup> Mapunda, *supra*, at p. 101.

<sup>177</sup> B. James 'Judicial Operations to have Special Fund' *The Citizen* (Tanzania) 14 August 2008.

<sup>178</sup> See: *Constitution, 1977*, *supra* note 1, at Art. 107B, which states: "In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land".

<sup>179</sup> Freedom House, 'Country Report – Tanzania' (2006 Report) <<http://www.freedomhouse.org>> accessed 21 October 2008.

<sup>180</sup> *Rev. Christopher Mtikila v Attorney General*, Civil Case No. 5 of 1993 (High Court at Dodoma) (unreported).

<sup>181</sup> *Rev. Christopher Mtikila v Attorney General*, Misc. Civil Case No. 10 of 2005 (High Court) (unreported).

<sup>182</sup> E. Kagaruki 'The court's ruling on independent candidates must be respected' *Sunday Citizen*

indicated that it will file an appeal of the Court of Appeal's decision. The Government has yet to table a Bill in response to the Court of Appeal's decision.

The judiciary's independence is also negatively affected by legislation that prevents the judiciary from exercising its discretion. For instance, Section 197 of the *Penal Code* makes it mandatory for a person who is convicted of murder to be sentenced to death, while under Section 131 of the *Penal Code*, it is mandatory to sentence a person to at least 30 years imprisonment for the offence of rape. Similarly, the *Minimum Sentences Act*,<sup>183</sup> prescribes a 30 year minimum sentence for an offence relating to stock theft.<sup>184</sup> Minimum sentences can serve as a useful guideline for the judiciary and can ensure consistency in decisions. However, minimum sentences can be problematic when they provide for significant periods of imprisonment or death. In these instances, it is difficult to achieve justice, as the judiciary is unable to exercise its discretion to ensure that the sentence is proportionate to the offence and that the sentence takes into account the offender's circumstances.

The LHRC recommends that the government respect the decisions of the judiciary by complying with its decisions. In doing so, the government would promote and strengthen the rule of law in Tanzania. In relation to minimum sentences, the LHRC suggests the government review the minimum sentences contained in the *Penal Code* and other legislation, and revise these provisions to promote the exercise of judicial discretion.

### *Judicial Infrastructure*

A lack of appropriate judicial infrastructure, such as courthouse and libraries, can negatively impact access to justice because courts may not be able to function properly and may be geographically inaccessible. The judiciary faces a critical shortage of court buildings. At present, 40 million people are served by 1105 Primary Courts, 88 District Courts, 22 Resident Magistrate Courts, 13 High Courts, one Court of Appeal and one juvenile court.<sup>185</sup> In some areas, the lack of appropriate court facilities has made it difficult for courts to function. For instance, in the Ngorongoro District, the magistrate of the Endulen Primary Court shared an office with the police and a cell for suspects. The Endulen Primary Court has been closed until a court house is built.<sup>186</sup> Minister for Justice and Constitutional Affairs, Mr. Mathias Chikawe, told the National Assembly that

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(Tanzania) 1 June 2008; P. Rugonzibwa 'Registrar happy with court ruling' *The Citizen* (Tanzania) 17 May 2008.

<sup>183</sup> Cap. 90.

<sup>184</sup> S. 4 of the *Minimum Sentences Act, 1972*, Cap. 90, R.E. 2002. For instance, the minimum sentence for possession of stolen stock is 30 years.

<sup>185</sup> Tanzania Human Rights Report of 2007, *supra*, at p. 25. In 2008, there were no new statistics on the number of court buildings published. Tanzania's physical, judicial infrastructure is being improved. Using LSRP basket funds, three new courts were constructed and four primary courts rehabilitated. In addition, the government used non-basket funds to construct 34 new primary courts, equip one primary court, rehabilitate six primary courts and construct a house for one primary court magistrate. See: LSRP '2008 GBS LSRP Progress Report' (Report Tanzania 11 November 2008).

<sup>186</sup> C. Mwilolezi 'Jaji Kiongozi closes down primary court for insecurity' *The Guardian* (Tanzania) 10 July 2008.

1,056 court buildings need to be rehabilitated, while other buildings have been rebuilt.<sup>187</sup> The Chief Justice of Tanzania, Hon. Mr. Justice Augustino Ramadhani, has asked regional and district leaders to assist with the face lift of court buildings in their areas.<sup>188</sup>

In order to increase the efficiency of courts and access to justice, the internal infrastructure of the courts is also in need of improvement. In this regard, the Court of Appeal has started to use laptop computers in court in an effort to speed up the dispensation of justice.<sup>189</sup> In addition, in 2008, it was announced that courthouses and magistrates' offices would be provided with computers in an effort to expedite court proceedings.<sup>190</sup>

In order to speed up the dispensation of justice, the LHRC suggests that the government embark on a program to improve the judicial infrastructure. These improvements should include the continued rehabilitation of court buildings; the creation of well-stocked legal libraries in various court houses; and the release of a Tanzania Law Report for the period 1998 to 2008.

### *Corruption in the Judiciary*

Corruption in the judiciary threatens the independence and impartiality of the judiciary, as the court is influenced by factors outside of the judicial process. Furthermore, corruption undermines the public's confidence in the judiciary, as decisions are unfair and unpredictable. It also prevents access to justice, as the judicial system does not operate to protect the individual's rights as these rights are set out in law.

A recent study indicated that 70 percent of Tanzanians believe the police and the judiciary to be among the most corrupt public institutions in the country.<sup>191</sup> For instance, people residing in the Kilosa district made the following comments about the magistrates in their district:

“If you do not couch something, the case will turn against you and you end up losing it.”

“The clerk won't allow you to see the magistrate, unless you have given in some money”

“The magistrates keep adjourning cases until they are bribed.”<sup>192</sup>

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<sup>187</sup> 'Chikawe: 1,056 court houses for repair' *Daily News* (Tanzania) 2 February 2009.

<sup>188</sup> M. Tambwe 'CJ says Judiciary in dire need of resources' *Daily News* (Tanzania) 22 May 2008.

<sup>189</sup> T. Kahoho 'Country highest court demonstrates IT use in speedy justice administering' *The Guardian* (Tanzania) 7 February 2008.

<sup>190</sup> F. Peter 'CJ: Corruption thrives on immorality by magistrates' *The Guardian* (Tanzania) 12 August 2008.

<sup>191</sup> F. Peter 'CJ: Corruption thrives on immorality by magistrates' *The Guardian* (Tanzania) 12 August 2008.

<sup>192</sup> These quotes are drawn from LHRC et al, 'A fact-finding report on the dispute between pastoralists and peasants in the Kilosa district' (Report Tanzania 2 November to 7 November 2008).

While a survey respondent from Kiteto district stated:

*“Rushwa ni adui wa haki, aliyetunga msemu huo aliona sasa hivi rushwa imekuwa kigezo kikubwa sana watu wananyimwa haki kutokana na umaskini”* [“Corruption is an enemy of justice, he who devised this proverb saw the current situation. Corruption is a major impediment to justice. People are denied of their rights because of their paucity/poverty”.]<sup>193</sup>

Examples of allegation of corruption in the judicial system are said to include court clerks who take bribes to decide whether or not to open cases and to hide or misdirect files; and, magistrates or judges who occasionally accepted bribes to determine guilt or innocence, or to give a certain sentence.<sup>194</sup> The Hon. Chief Justice Ramadhani admitted that corruption was a problem in the judiciary, particularly at the primary and district court levels.<sup>195</sup> In an effort to address this problem, the judiciary is reintroducing supervisor magistrates to strengthen the judicial ethics system and to restore public confidence in the judiciary.<sup>196</sup>

The LHRC recommends that the government reassess the salaries of judicial officers and magistrates at all levels, improve the working conditions of judicial employees and train all employees on the negative impact of corruption. It is the LHRC’s position that it is imperative that corruption in the judiciary be stopped, as it undermines the rule of law in Tanzania in general and, more specifically, it makes it difficult for people to realise their legal rights.

### **2.3.3. Repressive legislation**

There are a number of laws in Tanzania that are bad laws because they contain discriminatory provisions or are unconstitutional. In the words of a volunteer working at one of the LHRC’s legal aid clinics:

They [the laws of Tanzania] do not encourage respect for human rights because many of them are unconstitutional, cumbersome and discriminative. Very few of them encourage respect for human rights....<sup>197</sup>

In 1991, the then President Benjamin Mkapa appointed the then Chief Justice Francis Nyalali to head up a commission charged with the mandate “to enquire whether the

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<sup>193</sup> Response to LHRC opinion survey by interviewee in various Kiteto district (Tanzania January to November 2008).

<sup>194</sup> Response to LHRC opinion survey by interviewee in various places (Tanzania January to November 2008).

<sup>195</sup> ‘Judiciary ought to be above reproach’ *The Guardian* (Tanzania) 8 August 2008.

<sup>196</sup> P. Machira ‘Judiciary takes steps to win back public confidence’ *The Citizen* (Tanzania) 11 August 2008.

<sup>197</sup> Written response to LHRC questionnaire by unnamed employee of LHRC Buguruni Legal Aid Clinic (Dar es Salaam, Tanzania November 2008).

majority of Tanzanians preferred the continuation of a single-party system of the establishment of a multi-party system'.<sup>198</sup> This commission was known as the Nyalali Commission. One of the recommendations of the Nyalali Commission was that '40 pieces' of repressive legislation be amended or repealed to assist the transition to a multi-party system.<sup>199</sup> Many of the '40 pieces' of repressive legislation, such as the *Emergency Powers Act*,<sup>200</sup> remain in force but have not been amended.<sup>201</sup> These laws should be amended or repealed in accordance with the recommendations of the Nyalali Commission. The failure to do so has resulted in the continued application of laws that are discriminatory and unconstitutional.

## 2.4 Freedom of Opinion and Expression

Freedom of opinion and expression are linked to democratic accountability and participatory development.<sup>202</sup> Additionally, freedom of opinion and expression are important for exposing violations of human rights and challenging these violations.<sup>203</sup> The guarantee of freedom of expression is particularly important for the media and for civil society organisations.

The right to hold opinions without interference and to have the right to freedom of expression, including the ability to access information, is contained in the *International Covenant on Civil and Political Rights, 1966*, the *African Charter on Human and Peoples' Rights, 1981* and the *Universal Declaration of Human Rights, 1948*.<sup>204</sup> In Tanzania, it is also guaranteed by Article 18 of the Constitution, which states:

18. Every person –
  - (a) has a freedom of opinion and expression of his ideas;
  - (b) has a right to seek, receive and impart or disseminate information regardless of national frontiers;
  - (c) has a right to freedom to communicate and a right of freedom from interference with his right of communication;

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<sup>198</sup> M. Rupiya 'The Nyalali Commission and Security Sector Reform: 1992 -2005' in M Rupiya, J Lwehabura and L le Roux (eds), *Civil Security Relations in Tanzania: Investigating the Relationship between the State, Security Services and Civil Society* (Monograph 128 Institute for Security Studies, Pretoria December 2006).

<sup>199</sup> *Ibid.*

<sup>200</sup> Cap. 221.

<sup>201</sup> *Emergency Powers Act, 1986*, Cap. 221 R.E. 2002. This Act was amended in 1998 by Act No. 12 of 1998, but this amendment only applied to Section 5 of this Act. The Nyalali Commission recommended that a number of this Act's provisions be amended, including Sections 14, 18, 26 and 27. Other laws mentioned by the Nyalali Commission that are still in force, but that have not been amended, include the *Witchcraft Act, 1928*, Cap. 18, R.E. 2002; the *Societies Act, 1954*, Cap. 337 R.E. 2002; the *Preventative Detention Act, 1962*, Cap. 361 R.E. 2002.

<sup>202</sup> HakiElimu and LHRC 'The Legal and Policy Status of Access to Information in Tanzania' (Report Tanzania September 2006) at p. 1.

<sup>203</sup> Article 19 'Memorandum on the Tanzania Media Services Bill 2007' (Memorandum 29 March 2007) <<http://www.unhcr.org/>> accessed 23 October 2008, at p. 6.

<sup>204</sup> Art. 9 of the *International Covenant on Civil and Political Rights, 1966*; Art. 9 of the *African Charter on Human and Peoples' Rights, 1981*; Art. 19 of the *Universal Declaration of Human Rights, 1948*.

- (d) has a right to be informed at all times of various important events of lives and activities of the people and also of issues to the society.

Freedom of opinion and expression, particularly of the media, is limited in Tanzania by the *Newspaper Act, 1976*, the *Broadcasting Act, 1993*, the *National Security Act, 1970*, and the *Tanzanian Communication Regulatory Authority Act, 2003*.<sup>205</sup> In 2006, the government started drafting an omnibus bill, the *Freedom of Information Bill*, to replace the aforementioned Acts.<sup>206</sup> After much discussion, the *Freedom of Information Bill* was split into two parts, the *Right to Information Bill* and the *Media Services Bill*. To date, neither of these Bills has been enacted.

There was some progress on freedom of opinion and expression in 2008, as the government and civil society continued to work on both the *Right to Information Bill* and the *Media Services Bill*. However, this progress was marred by the government's suspension of the newspaper, *Mwanahalisi*,<sup>207</sup> and incidents in which the right to freedom of opinion was violated. For instance, in May of 2008, there were reports that some young men had been arrested after they publicly ridiculed former President Benjamin Mkapa as his entourage passed through Dar es Salaam.<sup>208</sup>

#### 2.4.1 Freedom of Expression

Freedom of expression is the key to the operation of a democratic society. One facet of this right is the right to demonstrate. The right to demonstrate is a means by which an individual or group can publicly express their opinion on a matter and it can take the form of a protest. The right to demonstrate was exercised in Tanzania in 2008 by various groups, including albinos and their supporters who staged a demonstration in Dar es Salaam on 19 October 2008 to raise awareness of the situation of albinos in Tanzania;<sup>209</sup> and, editors from different media houses who staged a demonstration in Dar es Salaam on 28 October 2008 in opposition of the government ban of *Mwanahalisi*, a weekly newspaper.<sup>210</sup>

In Tanzania, the right to demonstrate, as a group, is subject to many of the same legislative limitations that apply to the right to freedom of assembly. These limitations are discussed in Chapter 3.2 of this report. An example of this is the demonstration staged by the former workers of the East African Community in Dar es Salaam in

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<sup>205</sup> *Newspaper Act, 1976*, Cap. 229, R.E. 2002; *National Security Act, 1970*, Cap. 47, R.E. 2002; *Tanzanian Communication Regulatory Authority Act, 2003*, Act No. 12 of 2003.

<sup>206</sup> Tanzania Human Rights Report of 2007, *supra*, at p. 30.

<sup>207</sup> MISA, 'Newspaper suspended for seditious article; security forces summon editor for questioning' (personal email correspondence 14 October 2008); L. Philemon 'MwanaHALISI banned' *The Guardian* (Tanzania) 14 October 2008; P Rugonzibwa 'Govt bans "Mwanahalisi" tabloid' *DailyNews* (Tanzania) 14 October 2008.

<sup>208</sup> Unnamed reporter 'Don't ridicule retired leaders – Pinda' *Daily News* (Tanzania) 13 May 2008.

<sup>209</sup> A Smith 'Albino Africans live in fear after witch-doctor butchery' *The Observer* (United Kingdom) 16 November 2008.

<sup>210</sup> F. Peter 'Dumb' editors stage demo' *The Guardian* (Tanzania) 29 October 2008.

October 2008. These workers congregated on the Selandar Bridge, which is one of the main routes into the Dar es Salaam city centre, and stopped traffic for several hours while they protested the government's failure to pay them terminal benefits. It is alleged that the demonstration was illegal, as the demonstrators had not notified the police of their intention to demonstrate. The police tried to get the demonstrators to disperse voluntarily. When the demonstrators refused to disperse, it is reported by the media that the police used water cannons on the demonstrators and arrested 25 suspected ring leaders of the demonstration. Eight of the arrested demonstrators were arraigned before the Kisutu Resident Magistrate's Court in Dar es Salaam in early November on charges of unlawful assembly.<sup>211</sup> As is evident from this example, the limitations on the freedom of assembly can negatively affect a person's freedom of expression.

It is important for private citizens to have freedom of expression. Similarly, it is vital that the media can exercise its right to freedom of expression, as:

the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.<sup>212</sup>

In 2008, President Kikwete praised the role of the media in society and encouraged the media to report on problems facing society without fear, bias or interference from outside forces.<sup>213</sup> Despite this presidential praise, in 2008, journalists were attacked, harassed by the police and arrested. For instance,

- in January 2008, the editor and a professional advisor of the Tanzanian newspaper, *Mwanahalisi*, were attacked by a group of assailants while in the offices of Hali Halisi Publishers Ltd. The attackers wielded machetes and poured acid onto the victims;<sup>214</sup>
- in March 2008, Maxence Mello and Mike Mushi, the editors of an online public discussion site, *Jambo Forum*, were arrested;<sup>215</sup>
- in July 2008, the police searched the office of *Mwanahalisi*, a Tanzanian newspaper, and the home of one of its editors. During the search, the editor was subjected to questioning;<sup>216</sup> and,

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<sup>211</sup> R. Lamtey and R Mirondo 'Riot police descend on ex-EAC workers' *The Guardian* (Tanzania) 30 October 2008; 'Furious ex-EAC workers paralyse transport in Dar' *ThisDay* (Tanzania) 3 November 2008; R John 'Ex-EAC Workers Arraigned' *The Citizen* (Tanzania) 29 October 2008.

<sup>212</sup> Article 19 'Memorandum on the Tanzania Media Services Bill 2007' (Memorandum 29 March 2007) <<http://www.unhcr.org>> accessed 23 October 2008, 7.

<sup>213</sup> 'JK tells media to write without fear' *Daily News* (Tanzania) 8 January 2008; P. Machira, 'Kikwete endorses media fight against social evils' *The Citizen* (Tanzania) 25 March 2008.

<sup>214</sup> Media Council of Tanzania 'Editors assaulted' *Media Watch Newsletter* (Tanzania) (January 2008) at p. 1; P Kisembo 'JET comforts Mwanahalisi editors following attacks' *The Guardian* (Tanzania) 18 January 2008.

<sup>215</sup> 'Rights body hits at Jambo editors' arrest' *The Citizen* (Tanzania) 2 March 2008.

<sup>216</sup> 'JK tells media to write without fear' *Daily News* (Tanzania) 8 January 2008

- in November 2008, the editors of *Habari Leo*, a government-run newspaper, were summoned by the Information, Culture and Sports ministry to verify the correctness of an article they had published. The article stated that there was dissent between members of the CCM and the President over his handling of the External Payment Arrears (EPA) scandal.<sup>217</sup>

In addition, the media's freedom of expression continues to be limited by the *Newspaper Act*, the *National Security Act* and the *Penal Code*. Pursuant to Section 25(1) of the *Newspaper Act*, the Minister of Information and Culture is allowed to prohibit the publication of a newspaper, if the Minister is of the opinion that it is in the public interest or in the interest of good order to do so. On 13 October 2008, the Minister of Information and Culture, Hon. George Mkuchika, used his discretion under this Act to suspend the publication of *Mwanahalisi* for a period of three months for its alleged practice of running stories with the intention of inciting public hatred against the President and contributing to misunderstandings within the President's family.<sup>218</sup> The Minister stated that the suspension was "designed to send strong signals to other newspapers with similar intentions of violating ethical reporting under the name of practicing constitutional rights to freedom of expression".<sup>219</sup> The Minister's comment, and the provision of the *Newspaper Act*, is out of line with the *Constitution of Tanzania, 1977*, which does not permit any derogation from the freedom of expression. In December 2008, the publisher of *Mwanahalisi*, Hali Halisi Publishers Limited, sent notice to the Permanent Secretary of the Ministry of Information, Culture and Sports stating that a civil suit would be instituted against the government in 90 days, if the government failed to pay Tsh108 million in damages that resulted from the three month suspension of *Mwanahalisi*.<sup>220</sup>

There have also been instances where the government has tried to censor the freedom of expression of non-governmental organisations. For example, former Prime Minister Edward Lowassa censured *ThisDay*, a Tanzanian newspaper, for reviving the issue of the Richmond scandal.<sup>221</sup> Similarly, in October 2008, the deputy minister for Social Development, Gender and Children, Dr. Lucy Nkya, asked the Tanzania Education Network to warn HakiElimu, a local non-governmental organisation (NGO), about airing a television spot addressing the External Payment Arrears scandal.<sup>222</sup>

The *Media Services Bill*, which is aimed at the promotion and regulation of media services, is still in the process of being drafted. The initial draft of the *Media Services Bill, 2007* was criticised by civil society for containing unduly restrictive provisions, such as the requirement that journalists hold an academic degree and that all print media

<sup>217</sup> R. Mwalongo and P Kisembo 'Habari Leo in hot soup over MPs story; *The Guardian* (Tanzania) 8 November 2008. The External Payment Arrears scandal is discussed in Chapter 9 of this report.

<sup>218</sup> 'JK tells media to write without fear' *Daily News* (Tanzania) 8 January 2008.

<sup>219</sup> *Ibid.*

<sup>220</sup> F. Kapama 'Govt risks paying 108m/- for banning Mwanahalisi' *Daily News* (Tanzania) 26 December 2008.

<sup>221</sup> 'In retrospect: PM Lowassa's response to Richmond scandal' *ThisDay* (Tanzania) 7 February 2008.

<sup>222</sup> M. Jumbe and V. Mnyanyika 'Caution HakiElimu Govt Tells Body' *The Citizen* (Tanzania) 23 October 2008.

should be registered.<sup>223</sup> On 8 October 2008, Tanzania's Freedom of Information Bill Coalition campaign submitted a draft *Media Services Bill* to the Minister of Information and Culture for consideration.<sup>224</sup> The LHRC urges the government to consider the recommendations of the Freedom of Information Bill Coalition and to enact the *Media Services Bill* as soon as possible.

The LHRC is opposed to the intimidation and censorship of journalists and non-governmental organisations, as it violates the right to freedom of expression. It is the LHRC's position that these groups help to foster a dialogue between the government and its citizens. They play a key role in ensuring that the government is accountable to the citizens and that there is a meaningful participation by the citizens in the affairs of Tanzania. It is the LHRC's position that the government should encourage freedom of expression in the public sphere by the media, NGOs and individuals.

#### 2.4.2 Right to Information

The *Declaration of Principles on Freedom of Expression in Africa* of 2002 states the basic principle that governs the right to information, namely:

[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.<sup>225</sup>

There is currently no law in Tanzania guaranteeing access to public information. It can be difficult to access information in Tanzania. A 2005 study on access to information found that the overall rates of response by governmental and non-governmental institutions to requests for information were generally low.<sup>226</sup> Surprisingly, the report indicated that non-governmental organisations had some of the lowest levels of response.<sup>227</sup> When conducting primary research for this report, the LHRC experienced similar issues with access to information as were identified in the 2005 study.

At the governmental level, the Ministry of Infrastructure Development, formerly the Ministry of Communication and Transportation, deals with access to information requests on a somewhat *ad hoc* basis. In 2008, the Ministry of Infrastructure attempted to improve public access to information by appointing a person as the Head of the

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<sup>223</sup> International Press Institute 'World Press Freedom Review 2007 – Tanzania' (Annual review 2007) <[www.freemedia.at](http://www.freemedia.at)> accessed on 23 October 2008; Article 19 'Memorandum on the Tanzania Media Services Bill 2007' (Memorandum 29 March 2007) <<http://www.unhcr.org>> accessed 23 October 2008.

<sup>224</sup> Media Institute of Southern Africa, Tanzania chapter 'Push for Reform Gathers Momentum as Coalition submits Media Services Bill' (Tanzania) (14 October 2008) <<http://allafrica.com>> accessed 23 October 2008.

<sup>225</sup> Organisation for African Unity (African Commission on Human and Peoples' Rights) 'Declaration of Principles on Freedom of Expression in Africa' (OAU Banjul, The Gambia 17 – 23 October 2002) 32<sup>nd</sup> Session.

<sup>226</sup> HakiElimu, LHRC and REPOA 'Access to Information in Tanzania: Still a Challenge' Research report Dar es Salaam, Tanzania 2005, at p. 4.

<sup>227</sup> *Ibid.* at p. 4.

Information, Education and Communication Unit.<sup>228</sup> In addition, the Ministry encouraged government agencies, institutions and authorities to be accessible to the public on matters of interest to the public.<sup>229</sup>

Although the government has taken steps to improve access to public information at the decision-making level, actual access to public information is hindered by a lack of training of information officers. Information officers are the link between the government and the public when it comes to access of information requests. Currently, the training of information is done on an individual basis and is based on a general training curriculum administered by the Department of Administration and Personnel.<sup>230</sup> This training may not be sufficient to prepare information officers to make appropriate and consistent decisions in respect to access to information requests.

The proposed *Right to Information Bill* would promote access to public information. This Act would entitle the public to information held by the government and create a Commission of Information to ensure accessibility to information. It is hoped that the Act would streamline and increase access to information in Tanzania. It was expected that the *Right to Information Bill* would be tabled in Parliament in October 2008. However, the bill was not tabled in 2008, as the government continues to revise the draft bill.

The enactment of the *Right to Information Bill* would increase the right to information. However, in order for the right to information to be fully exercised, it is necessary to amend various other laws as well, such as the *Public Leadership Code of Ethics Act*.<sup>231</sup> In April 2008, a coalition of human rights organisations filed a petition challenging the constitutionality of certain provisions of the *Public Leadership Code of Ethics Act, 1995*.<sup>232</sup> The coalition requested that the court order that the declaration of assets and liabilities made by public leaders in accordance with the *Public Leadership Code of Ethics Act, 1995* be allowed to be published.<sup>233</sup> At the moment, the publication of these declarations is a criminal offence.<sup>234</sup>

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<sup>228</sup> Written response to LHRC questionnaire by unnamed employee of the Ministry of Infrastructure (Dar es Salaam, Tanzania November 2008).

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> Cap. 398 (of 1995).

<sup>232</sup> *National Organization for Legal Assistance, Tanzania Media Women Association, Southern African Human Rights NGO Network, Tanzanian Chapter, Media Institute of Southern Africa, Tanzania Chapter, and Kivulini Women's Rights Organisation v Attorney General*, Misc. Civil Cause No. 28 of 2008 (High Court of Tanzania at Dar es Salaam).

<sup>233</sup> A. Beyadi 'Law on public leaders' ethics up for review' *The Guardian* (Tanzania) 10 May 2008.

<sup>234</sup> *Ibid.*

## Chapter Three

### Political Rights

#### 3.0 Introduction

Political rights govern the manner and the extent to which citizens' participate in the political process and governance of their nation. In a democratic country, such as Tanzania, the most obvious political right is the right to participate in political affairs. However, there are other important political rights such as freedom of association and freedom of assembly. This chapter examines the state of political rights in Tanzania in the context of the right to freedom of association, the right to freedom of assembly and the right to participate in public affairs.

#### 3.1 Freedom of Association

Freedom of association allows people who share similar interests to come together to form an association that represents their interests and views. The exercise of the right to freedom of association is particularly important for entities such as political parties, non-governmental organisations and trade unions. These entities ensure that the state is accountable for its actions and they facilitate participation in public affairs.

At the international level, the importance of the freedom of association is recognised by the *International Covenant on Civil and Political Rights, 1966*.<sup>235</sup> At the national level, the right to freedom of association is guaranteed by the *Constitution of Tanzania, 1977*, which states:

[e]very person has a freedom, to freely and peaceably assemble, associate and cooperate with other persons, and for that purpose, express views publicly and to form and join with associations or organisations formed for the purposes of preserving or furthering his beliefs or interests or any other interests.<sup>236</sup>

The only limitation on this constitutionally guaranteed right to freedom of association is that political parties are prohibited from forming to promote the interests of a particular religious, ethnic or tribal group.<sup>237</sup>

#### *Association of Political Parties*

There are currently 17 political parties registered in Tanzania.<sup>238</sup> Of these political parties, the most influential parties are the ruling party, the CCM; the main opposition

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<sup>235</sup> Art. 22 of the *International Covenant on Civil and Political Rights, 1966*.

<sup>236</sup> Art. 20(1) of the *Constitution of Tanzania, 1977*.

<sup>237</sup> Art. 20(2) of the *Constitution of Tanzania, 1977*.

<sup>238</sup> Written response to LHRC questionnaire by unnamed employee of the Office of the Registrar of Political Parties (Tanzania October 2008).

party on Mainland Tanzania, the Chama cha Demokrasia na Maendeleo (CHADEMA); and, the main opposition party in Zanzibar, the Civic United Front (CUF).

In order for a political party to legally participate in Tanzanian politics, it must be registered with the Registrar of Political Parties.<sup>239</sup> The registration of political parties is a two-stage process that is lengthy and demanding. At the first stage, a political party applies for provisional registration under the *Political Parties Act*.<sup>240</sup> Within 180 days of the provisional registration of a political party, it must apply to the Registrar for full registration.<sup>241</sup> In order to be fully registered as a political party, the party must have 200 or more members that are drawn from at least ten regions of Tanzania, including some regions of Zanzibar and Pemba; and it must submit the names of the national leadership of the party and the address of its head office of the party to the Registrar.<sup>242</sup> This unduly onerous registration process acts as a barrier to freedom of association, as budding political parties may be unable to fulfill the registration requirements. We recommend that the government reconsider the registration requirements for political parties.

A coalition of political parties is not exempt from the registration requirements of the *Political Parties Act, 1992*.<sup>243</sup> In order to become registered as a coalition party, each party that is a member of the coalition must dissolve and the parties must submit to the Political Parties' Registrar a written document evidencing their agreement to form a coalition.<sup>244</sup> Forming a coalition party can be time-consuming and difficult. The Political Parties' Registrar, Mr. John Tendwa, has publicly stated that the *Political Parties Act* needs to be amended to allow parties to form coalitions without having to follow the registration process to become political parties.<sup>245</sup> A draft Bill amending various provisions of the *Political Parties Act*, including the registration requirements for coalition parties, was presented to parliament in October 2008. However, parliament did not consider this Bill, as it was flawed. The Bill was returned to the government for revision. It is likely that this Bill will be resubmitted to parliament in 2009.

In an effort to sidestep the onerous registration rights for forming a coalition party, political parties have formed informal coalitions that allow them to reap the benefits of being a coalition party without going through the registration process. In this respect, in

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<sup>239</sup> S. 7(1) of the *Political Parties Act, 1992*, Cap. 258, R.E. 2002. The CCM did not have to comply with the registration requirements of the *Political Parties Act, 1992* as it was deemed by the Act to be a fully registered political party when the Act came into effect. See: S. 7(2) of the *Political Parties Act, 1992*.

<sup>240</sup> S. 9 of the *Political Parties Act*. A political party will qualify for registration if the founding members have applied for registration in the prescribed manner; the application is accompanied with a copy of the constitution of the proposed party; and, membership in the party is voluntary and non-discriminatory.

<sup>241</sup> S. 8(3) of the *Political Parties Act*.

<sup>242</sup> S. 10 of the *Political Parties Act*. The national leadership of the party has to have members drawn from both Zanzibar and Mainland Tanzania.

<sup>243</sup> Written response to LHRC questionnaire by unnamed employee of the Office of the Registrar of Political Parties (Dar es Salaam, Tanzania October 2008). The only exemption granted to a coalition party is that it does not have to show that it has 200 or more members.

<sup>244</sup> *Ibid.*

<sup>245</sup> J. Tarimo 'Registrar sees flaws in law on political parties' *The Guardian* (Tanzania) 14 March 2008.

May 2007, four opposition parties signed an informal cooperation agreement to work together and field a single presidential candidate for the 2010 general elections.<sup>246</sup>

In its current form, the *Political Parties Act* impedes the freedom of association due to its complex and opaque registration requirements. The LHRC supports the amendment of this Act to streamline the registration process for political parties and coalition parties. The LHRC encourages the government to facilitate the freedom of association by encouraging the emergence of new political parties, either as stand alone political parties or as coalition parties.

### *Association of Non-Governmental Organisations*

There are approximately 12,000 NGOs registered in Tanzania, of which 1,500 are assumed to be active.<sup>247</sup> The perception of NGOs is that they are a means of raising important issues and ensuring government accountability.<sup>248</sup> However, the rapid proliferation of NGOs in Tanzania also raises concerns that some NGOs are being established with the purpose of obtaining funding, rather than working towards a perceptible goal.<sup>249</sup> The operation of these NGOs undermines the credibility of the work done by NGOs as a whole and diverts much needed resources away from legitimate NGOs.

In order for a NGO to operate legally in Tanzania, it must register itself in accordance with the provisions of the *Non-Governmental Organisation Act*.<sup>250</sup> The registration of a NGO is subject to the approval of the Non-Governmental Organisations Coordination Board, which can refuse to register a NGO if its activities are not in the public interest. The Act does not contain a definition of the term “public interest”. The Act’s vague wording creates the potential that the Board could abuse its discretionary power to register NGOs, such that NGOs with mandates that are contrary to the government’s interests are not registered and not allowed to operate in Tanzania. The LHRC recommends that the circumstances in which the Non-Governmental Organisations Coordination Board can refuse to register a NGO be more clearly set out to ensure that it does not act as a barrier to the freedom of association.

There are a number of other provisions in the *Non-Governmental Organisation Act* that may serve to stifle the freedom of association. There seems to be an inconsistency in the

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<sup>246</sup> The opposition parties that entered into the cooperation agreement are CUF, CHADEMA, the Tanzania Labour Party, and the National Convention for Construction and Reform.

<sup>247</sup> R. Kondo ‘Why is credibility of NGOs questioned?’ *The Citizen* (Tanzania) 30 June 2008.

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> S. 11(1) of the *Non-Governmental Organisation Act, 2002*, Act No. 24 of 2002. The Act applies to Non-Governmental Organisations, which are defined in Section 2 of the Act as “a voluntary grouping of individuals or organisation which is autonomous, non-partisan, no profit making, which is organised locally at the grassroot, national or international levels for the purpose of enhancing or promoting economic, environmental, lobbying or advocating on issues of public interest...and includes a Non-Governmental Organisation established under the auspices of any religious organisation or faith propagating organisation, trade union, sports club, political party or community based organisation, but does not include a trade union, a social club or a sports club, a political party, a religious organisation or a community based organisation”.

Act as it treats a NGO as a corporate body, but the officers of an NGO is personally liable for an offences committed by the NGO.<sup>251</sup> These offences include conducting fund raising activities contrary to the Act and the violation of the code of conduct, or contravention of any regulation or rule made under the Act.<sup>252</sup> The penalty associated with these offences a fine not exceeding Tsh. 500,000 or imprisonment not exceeding one year, or both.<sup>253</sup> The use of criminal penalties against individuals connected with NGOs can serve as a powerful deterrent against NGO activities and freedom of association.<sup>254</sup> In addition, the *Non-Governmental Organisation Act* bars all individuals convicted under the Act from office in an NGO for up to five years,<sup>255</sup> which violates an individual's right to freedom of association.

The *Non-Governmental Organisation Act* also limits the issues that can be addressed by NGOs. The *Non-Governmental Organisation Act* stipulates that a NGO has the duty to respect the culture and traditions of the people and communities in which it operates unless such culture and traditions are contrary to any other written law.<sup>256</sup> It is possible that the culture and traditions of the people in which a NGO operate are outdated, discriminatory or have harmful affects on certain members of the community. It may be beneficial to some, if not all, members of the community, if NGOs are permitted to address certain manifestations of culture or certain traditional practices, even if these practices are addressed by law.

For instance, one cultural practice that NGOs should be allowed to address more fully is the practice of early marriage. For example, in the Bagamoyo District, after 12-year old girls go through certain traditional initiation rituals, then tradition allows them to be taken as wives.<sup>257</sup> This traditional practice is contrary to the *Law of Marriage Act*, which stipulates a minimum marriageable age for girls of 15 years.<sup>258</sup> However, once a girl has reached 15 years of age, then both tradition and the law allow for her marriage. A NGO may want to address the issue of marriage of girls who are between the ages of 15 and 18 years due to the potentially negative effects of early marriage on a girl's education, her long-term prospects and her health. A strict interpretation of the *Non-Governmental Organisation Act* would prevent a NGO from addressing the issue of early marriage of the girls in this age group.

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<sup>251</sup> S. 36(1) of the *Non-Governmental Organisation Act, 2002*, Act No. 24 of 2002 reads: For the purposes of Section 35, where an offence has been committed under this Act by a Non-Governmental Organisation, any of the office bearers of such Non-Governmental Organisation shall be liable to be proceeded against and punished accordingly, unless any of such office bearer proves to the satisfaction of the Court that he had no knowledge, and could not, by the exercise of reasonable diligence, have had knowledge, of the commission of the offence.

<sup>252</sup> *Ibid.* at s. 35

<sup>253</sup> *Ibid.* at s. 35.

<sup>254</sup> World Movement for Democracy, 'Defending Civil Society: A report of the World Movement for Democracy' (Report February 2008) <<http://www.icnl.org>> accessed 30 October 2008, 14.

<sup>255</sup> S. 35(2) of the *Non-Governmental Organisation Act, 2002*.

<sup>256</sup> S. 31 of the *Non-Governmental Organisation Act, 2002*.

<sup>257</sup> D. Mwita 'Early pregnancies fuel school dropouts in ancient Bagamoyo town' *ThisDay* (Tanzania) 23 July 2008.

<sup>258</sup> S. 13 of the *Law of Marriage Act, 1971*, Cap. 29, R.E. 2002.

It is our recommendation that the registration process under the *NGO Act* be simplified to encourage the registration of NGOs. Furthermore, the penalties contained in the *NGO Act* should be removed or, at the very least, the burden of proof should be changed so as to allow NGOs to exercise the right to association without fear of prosecution. NGOs should be permitted to engage in activities that promote the realisation of human rights, even if these human rights conflict with customs and traditions.

### *Associations of Trade Unions*

The right to unionize is recognized in the International Labour Organisation's *Right to Organise and Collective Bargaining Convention* and the *Freedom of Association and Protection of the Right to Organise Convention*.<sup>259</sup> These conventions provide that employees are entitled to join a union of their choice, employees should be protected from anti-union discrimination from their employers and trade unions should operate as independent entities.<sup>260</sup>

At a national level, the right to form and join a trade union is contained in the *Employment and Labour Relations Act, 2004* and in Article 20 of the *Constitution of Tanzania, 1977*.<sup>261</sup> This Act sets out the requirements for the formation and registration of a trade union; and it empowers the Registrar of Trade Unions to apply to the Labour Court to cancel the registration of a trade union under certain circumstances.<sup>262</sup> Since the *Employment and Labour Relations Act, 2004* came into force in 2006, there has been an increase in the number of Trade Unions operating in Tanzania.<sup>263</sup>

The proliferation in trade unions is generally seen as a positive move towards the exercise of the right to association. However, it can occasionally have an adverse affect on the right to association. For instance, in 2008, two trade unions, the Tanzania Plantation Workers Union and Tanzania Social Industrial Workers Union commenced litigation to determine which trade union was entitled to represent the 2,300 employees of TPC Limited.<sup>264</sup> Until the litigation is concluded, the employees of TPC Limited (formerly known as Tanganyika Planting Company) do not have trade union representation and the employees cannot choose which trade union will represent them.<sup>265</sup> As a result, the employees have the right to associate by forming a trade union, but they cannot exercise this right until the court makes a decision on which trade union will represent the employees.

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<sup>259</sup> *Right to Organise and Collective Bargaining Convention* (ILO No. 98) (entered into force 18 July 1951, ratified by Tanzania February 2000) 96 U.N.T.S. 257; *Freedom of Association and Protection of the Right to Organise Convention* (ILO No. 87) (entered into force 4 July 1950, ratified by Tanzania 18 April 2000) 68 U.N.T.S. 17.

<sup>260</sup> Arts. 1, 2 to 4.

<sup>261</sup> S. 9 of the *Employment and Labour Relations Act, 2004*, Act No. 6 of 2004.

<sup>262</sup> Ss. 45 and 55 of the *Employment and Labour Relations Act, 2004*, Act No. 6 of 2004.

<sup>263</sup> Interview with Jurgen Schwettmann, East Africa Regional Director of the International Labour Organisation in Dar es Salaam, Tanzania 18 September 2008.

<sup>264</sup> P. Temba 'TPC workers told to choose one trade union' *Daily News* (Tanzania) 28 September 2008.

<sup>265</sup> *Ibid.*

### 3.2 Freedom of Assembly

Freedom of assembly refers to the right of people to congregate physically in one place. The location and manner of the congregation may be restricted by criminal and civil laws designed to keep public order, to protect public and private property, and to promote public safety.<sup>266</sup>

The right to freedom of assembly is recognized internationally in instruments, such as the *International Covenant on Economic, Social and Cultural Rights, 1966* and the *International Covenant on Civil and Political Rights, 1966*, and it is also guaranteed at the national level by the *Constitution of Tanzania, 1977*.<sup>267</sup> However, the freedom of assembly is also limited at the national level by the *Penal Code, 1930* and the *Police Force and Auxiliary Services Act, 1939*.

Pursuant to the *Penal Code*, an assembly of three or more persons is unlawful if:

[the assembled persons] conduct themselves in such a manner as to cause persons in the neighborhood reasonably to fear that the persons so assembled will commit a breach of the peace or will, by that assembly needlessly and without any reasonable occasion, provoke other persons to commit a breach of the peace ...<sup>268</sup>

It is interesting to note that an assembly may become unlawful due to the reaction of people who are not part of the assembly. There are various other provisions in the *Penal Code* that may limit the right to assembly, such as the provisions regarding common nuisance and trespass.<sup>269</sup>

Freedom of assembly is also circumscribed by the *Police Force and Auxiliary Services Act*. This Act provides that any person who wants to have an assembly in a public place has to notify the police of the impending assembly.<sup>270</sup> It is within the discretion of the police to prohibit an assembly, if the assembly “is likely to cause a breach of the peace or to prejudice public safety or the maintenance of public order or to be used for any unlawful purpose”.<sup>271</sup> There have been allegations that the police have improperly exercised their discretion to prohibit public assemblies. More specifically, it is alleged that the police favour certain political parties when deciding whether to permit a public assembly.<sup>272</sup> If the police exercise their discretion to prohibit assemblies improperly,

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<sup>266</sup> John Swaigen and others, *How to Fight for What's Right* (James Lorimer & Company, Halifax 1981) 92.

<sup>267</sup> Art. 8 of the *International Covenant on Economic, Social and Cultural Rights, 1966* (adopted 16 December 1966, entered into force 3 January 1976, acceded to by Tanzania 11 June 1976) 993 U.N.T.S.; Arts. 21 and 22 of the *International Covenant on Civil and Political Rights, 1966*; Art. 20 of the *Constitution of Tanzania of 1977*.

<sup>268</sup> S. 74 of the *Penal Code, Cap. 16*.

<sup>269</sup> Ss. 170 and 299 *Penal Code, Cap. 16*.

<sup>270</sup> S. 43 of the *Police Force and Auxiliary Services Act, Cap. 322*.

<sup>271</sup> S. 43(3) of the *Police Force and Auxiliary Services Act, Cap. 322*.

<sup>272</sup> N. Kigwangallah ‘Opposition leaders bemoan election laws’ *The Guardian* (Tanzania) 21 June 2008.

then they infringe the right to assembly and, in the case of political assemblies, they effectively hinder the democratic process in Tanzania.

The LHRC suggests amending the *Police Force and Auxiliary Services Act* so that it explicitly prohibits the police from discriminating between persons on grounds such as political affiliation when deciding whether to permit a public assembly. Alternatively, the police force's role in relation to assemblies should be limited to the maintenance of security at an assembly, rather than having the power to decide whether an assembly should occur.

### **3.3 Right to Participate in Public Affairs**

From 1961 to 1965, Tanzania was a multi-party state. In 1965, Tanzania moved to a one-party political system. Despite Tanzania having a one party political system, there were two political parties operating in Tanzania in the period 1965 to 1977, namely the TANU on Mainland Tanzania and the ASP on Zanzibar. On 5 February 1977, TANU and ASP merged to form the CCM. From 1977 to 1992, the CCM was the only party allowed to operate in Tanzania. In 1992, opposition parties were legalized and Tanzania became a democratic state with a multi-party system.<sup>273</sup> However, the CCM, as the ruling party, continues to dominate Tanzania's political system because, firstly, the CCM holds the majority of the seats in Parliament; secondly, from 1992 onwards, Tanzania's Presidents have all been from the CCM; and, thirdly, the CCM-dominated government is responsible for appointing all government officials and the cabinet.

The right to participate in public affairs is of fundamental importance to a democratic system of government. The extent to which a state is democratic can be assessed by examining the degree to which people can participate in public affairs and whether this participation is meaningful. Participation in public affairs is meaningful when an individual can exercise their right to participate in public affairs freely and has a genuine choice when choosing elected representatives. The right to freely participate in public affairs is recognized by Article 13 of the *African Charter on Human and Peoples' Rights, 1981*; Article 25 of the *International Covenant on Civil and Political Rights, 1966*; and Article 21 of the *Universal Declaration of Human Rights, 1948*.

In Tanzania, there are three major issues that have undermined meaningful participation in public affairs, namely election violence, loss of franchise, and the government's continued refusal to permit private candidates. Another key issue in Tanzania with regard to participation in public affairs is the participation of women in the governing of the country.

#### **3.3.1. Election Violence**

Election violence undermines peoples' ability to participate freely in a democratic process. Fear of bodily harm may cause people to refrain from participating in political

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<sup>273</sup> The information in this paragraph is drawn from Mohammed Omar Maundi, 'Tanzania' in Gavin Cathra et al (eds), *Security and Democracy in Southern Africa*. Wits University Press, Johannesburg 2007.

activities, such as running for office or voting. As a result, it prevents fair and free elections from taking place. In 2008, there were a number of incidents of election violence in Tanzania.

For instance, in the Kiteto district, Manyara Region, a by-election was held on 24 February 2008 to fill a parliamentary seat that was left vacant following the death of the incumbent Member of Parliament, Mr. Benedict Losurutia. In the lead up to the by-election, six officials of CHADEMA who were campaigning in Kiteto were attacked and beaten by members of the CCM and, possibly, by members of the police force. Two people were arrested in connection to the violence.<sup>274</sup> It is uncertain as to whether these two people were prosecuted. The CCM candidate, Mr. Benedict Nangoro, won the by-election with 21,506 of 35,262 votes.<sup>275</sup>

Pre-election violence also occurred in Tarime District, Mara Region where a by-election was held in October 2008 for a parliamentary seat that had become vacant due to the death of the incumbent MP, Mr. Chacha Wangwe. Five political parties participated in the by-election and, ultimately, an MP was elected from CHADEMA. A number of violent incidents occurred in the pre-election period in Tarime, such as:

- four CHADEMA supporters were wounded during a political rally. It is suspected that they were wounded by CCM supporters;<sup>276</sup>
- Rev. Christopher Mtikila of the Democratic Party (DP) was stoned by a mob while addressing a political rally;<sup>277</sup>
- on 7 October 2008, the police used rubber bullets and tear gas to disperse supporters of CHADEMA after they stoned the police. The CHADEMA party leaders were among the 29 people arrested on the grounds of holding an illegal assembly;<sup>278</sup> and,
- the National Convention for Construction and Reform (NCCR-Mageuzi) Director for Justice and Human Rights, Dr. Sengondo Mvungi, was stoned by youths after addressing a political rally. It was reported that the youths were supporters of CHADEMA.<sup>279</sup>

Some of the actions taken by the political parties during the Tarime by-elections were questionable. For instance, the political leaders of the CCM and the DP advised people not to vote for CHADEMA, as CHADEMA was allegedly responsible for the death of the incumbent MP.<sup>280</sup> In addition, on the day before the election, the CCM disrupted a

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<sup>274</sup> R. Athumani and M Juma 'Six injured in Kiteto campaign violence' *The Citizen* (Tanzania) 19 February 2008; A Mavuri 'Makamba blames CHADEMA for chaos in Kiteto campaign rally' *The Guardian* (Tanzania) 20 February 2008; B Missoke 'CUF slams campaign violence ahead of by-election in Kiteto' *The Citizen* (Tanzania) 28 February 2008.

<sup>275</sup> LHRC 'By-election in Kiteto' (Report Tanzania 2008).

<sup>276</sup> LHRC 'Tarime By-election Report' (Report Tanzania 2008) LHRC/ELM/Vol.III/ii.

<sup>277</sup> M. Juma 'Top envoys visit violence-ridden Tarime' *The Citizen* (Tanzania) 6 October 2008.

<sup>278</sup> M. Juma 'Police – CHADEMA has declared war on us' *The Citizen* (Tanzania) 8 October 2008.

<sup>279</sup> F. Mwera 'NCCR's Mvungi injured as youths disrupt public rally' *The Citizen* (Tanzania) 1 September 2008.

<sup>280</sup> LHRC 'Tarime By-election Report' (Report Tanzania 2008) LHRC/ELM/Vol.III/ii.

campaign rally of the NCCR-Mageuzi.<sup>281</sup> Actions of this nature disrupt the process that ensures a free and fair election, as voters may change their voting behaviour due to unsubstantiated allegations about one political party and political parties may not have an equal opportunity to present their platform to voters.

The LHRC condemns the occurrence of election violence. It recommends that political parties educate their supporters and party officials about appropriate behaviour in pre-election periods and on the principles of democracy. Furthermore, the LHRC suggests that political parties abide by their codes of conduct and do not incite their supporters to violence or use state apparatus, such as the police, to stifle the democratic process.

### 3.3.2. Disenfranchisement

The right to vote and to participate in public affairs is enshrined at the international and regional levels in the *International Covenant on Civil and Political Rights, 1966*, the *Universal Declaration of Human Rights, 1948* and the *African Charter on Human and Peoples' Rights, 1981*.<sup>282</sup> Similarly, the *Constitution of Tanzania, 1977* declares that every Tanzanian who has attained the age of 18 years is entitled to vote or be voted for in any public election.<sup>283</sup> The constitutional right to vote is subject to certain restrictions. A person is disqualified from voting, if he or she has been sentenced to imprisonment for more than six months, if she or he is under a death sentence, or if he or she is not registered on the Permanent National Voters' Register (PNVR).<sup>284</sup> In 2008, no progress was made in terms of the enfranchisement of prisoners, whereas some progress was made in relation to the PNVR.

The PNVR is a relatively recent development in Tanzanian politics. In 2000, the *Constitution of Tanzania, 1977* was amended to confer the responsibility for creating and maintaining the PNVR on the National Electoral Commission (NEC).<sup>285</sup> Pursuant to this mandate, the NEC created the PNVR in 2004.<sup>286</sup> The PNVR was created to provide a record of Tanzanian voters that would be updated on a regular basis and that could track voter information.<sup>287</sup>

In 2008, some progress was made in terms of the PNVR. The government is in the process of updating the PNVR in preparation for the 2010 general election.<sup>288</sup> As a part of this process, people who have passed away since the 2005 general elections are being

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<sup>281</sup> *Ibid.* There was a disagreement between the CCM and NCCR-Mageuzi over the use of a parade ground. Both parties claimed they had the right to use the same parade ground at the same time. Ultimately, the NCCR-Mageuzi leader, Mr. James Mbatia, was allowed to salute his supporters and then they proceeded to a different venue. After the salute, the CCM held their rally at the parade ground.

<sup>282</sup> Art. 25 of the *International Covenant on Civil and Political Rights, 1966*; Art. 21 of the *Universal Declaration of Human Rights, 1948*; Art. 13 of the *African Charter on Human and Peoples' Rights, 1981*.

<sup>283</sup> Art. 5 of the *Constitution of Tanzania of 1977*.

<sup>284</sup> Art. 5(2) of the *Constitution of Tanzania of 1977*; S. 14 of the *National Elections Act, 1985*, Cap. 343, R.E. 2002.

<sup>285</sup> Art. 74 of the *Constitution of Tanzania of 1977*; Tanzania Human Rights Report of 2007, at p. 39.

<sup>286</sup> Tanzania Human Rights Report of 2007, at p. 40.

<sup>287</sup> *Ibid.* at p. 40.

<sup>288</sup> 'Reflections on the Kiteto by-election' *Daily News* (Tanzania) 29 February 2008.

deleted from the PNVR; voters' addresses are being updated; and, people who were not registered for the 2005 general elections or who have turned 18 years of age since those elections are being added to the PNVR.<sup>289</sup>

When a person is registered on the PNVR, he or she is issued with a voter's registration card. The voter's registration card is presented at the polling station and it allows a person to cast a vote. In most cases, voter's registration cards were issued prior to the 2005 general election. In the interim, some people have lost their voters' registration cards and, as a result, are unable to vote.<sup>290</sup> While updating the PNVR, the government intends to issue new voters' registration cards to those voters who have misplaced them.<sup>291</sup> It is hoped that this process of re-issuing voters' registration cards will be completed prior to the 2010 general elections.

During the Kiteto by-elections, an issue arose about the intentional destruction of voters' registration cards. There were reports that people were purposively destroying their voters' registration cards, or people were being bribed to sell their cards to supporters of the CCM.<sup>292</sup> The LHRC suggests that the government embark on a public education campaign about the importance of the participation of citizens in the electoral process and how selling voter registration cards undermines the legitimacy of the democratic process.

Aside from the issues arising in connection to the PNVR and voters' registration cards, there is also the issue of disenfranchisement due to peoples' inability to access polling stations. The *National Elections Act* stipulates that a person can only vote by presenting themselves at a polling station.<sup>293</sup> As a result, Tanzanians residing or traveling outside of Tanzania during an election period, or Tanzanians who are unable to present themselves at polling stations due to a disability or an illness are unable to vote.<sup>294</sup> The LHRC recommends that the government considers amending the *National Elections Act* so that it provides for special ballots that allow people who are unable to physically attend a polling station to submit their votes prior to the Election Day.

Even if a person is able to vote, a poor understanding of democratic principles and the multiparty system can hinder the meaningful exercise of that person's right to vote. A multiparty, democratic political system is relatively new in Tanzania and there is a need to educate people about this system and what it means in terms of a person's political participation. The NEC and the Registrar of Political Parties are responsible for funding and undertaking voters' education activities.<sup>295</sup> These activities are ongoing, but insufficient voters' education activities have been conducted. The NEC in particular has been criticised for not providing enough voters' education in the lead up to the 2010

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<sup>289</sup> V. George 'Pray for Kikwete's anti-graft war – call' *Citizen* (Tanzania) 28 January 2008; F. Mgwabati 'Lowassa urges electoral harmony' *Daily News* (Tanzania) 15 January 2008.

<sup>290</sup> Mgwabati, *ibid.*

<sup>291</sup> Mgwabati, *ibid.*

<sup>292</sup> M Malima 'CHADEMA now proposes withdraw of voter cards' *Sunday Citizen* (Tanzania) 2 March 2008.

<sup>293</sup> S. 74 of the *National Elections Act, 1985*.

<sup>294</sup> Tanzania Human Rights Report 2007, at p. 39.

<sup>295</sup> Mgwabati, *supra*.

general elections.<sup>296</sup> The LHRC recommends that NEC organises voters' education activities on an ongoing and continuous basis. It further recommends that NEC commences large-scale, voter education activities as soon as possible to facilitate preparations for the 2010 general elections.

A reduction in the quality of a person's franchise right can also be linked to the funding structure for political parties. The *Political Parties Act, 1992* provides for the payment of an annual subsidy from the government to all political parties that have candidates in parliament or local government.<sup>297</sup> This funding can be used for political campaigning, among other things. Political campaigning increases voter awareness about the existence of and platforms of various political parties. This financial aid to political parties that already have representation in parliament serves to strengthen their ability to campaign and to maintain power, while putting political parties without representation at a further disadvantage. As a result, the current funding structure serves to undermine the multiparty political structure in Tanzania and the ability of voters to obtain information about all the political parties that are active in Tanzania. The Registrar of Political Parties has suggested that government funding should be made available to all political parties, irrespective of their representation in Parliament, or that the government should provide some level of funding to all political parties prior to general elections.<sup>298</sup> The LHRC agrees with the Registrar of Political Parties' suggestion that all political parties, irrespective of their representation in Parliament, should receive funding.

### 3.3.3. Private Candidates

In Tanzania, every citizen is entitled to be elected as a MP or President, except those individuals who are not affiliated with a political party.<sup>299</sup> Individuals who wish to run for elected office, but are not affiliated with a political party, are called private candidates.

In 1994, the High Court of Tanzania found the prohibition against private candidates to be unconstitutional.<sup>300</sup> In response to this decision, the *Constitution of Tanzania, 1977* was amended in 1994 to include a prohibition against the election of a person who is not a member of a political party to the position of president or as an MP.<sup>301</sup> In 2005, Reverend Christopher Mtikila filed a petition in the High Court of Tanzania challenging the constitutionality of this provision.<sup>302</sup> The basis of this challenge was that the

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<sup>296</sup> P. Rugonzibwa 'Electoral body faulted on public education' *Daily News* (Tanzania) 22 July 2008.

<sup>297</sup> Ss. 16 and 17 of the *Political Parties Act, 1992*.

<sup>298</sup> Written response to LHRC questionnaire by unnamed employee of the Office of the Registrar of Political Parties (Dar es Salaam, Tanzania October 2008).

<sup>299</sup> Arts. 21, 39 and 67 of the *Constitution of Tanzania, 1977*.

<sup>300</sup> *Rev. Christopher Mtikila v Attorney General*, Civil Case No. 5 of 1993 (High Court at Dodoma) (unreported), decision delivered by Lugakingira J.; E Kagaruki 'The court's ruling on independent candidates must be respected' *Sunday Citizen* (Tanzania) 1 June 2008.

<sup>301</sup> Arts. 39 and 67 of the *Constitution of Tanzania, 1977*; L. Kato 'Private candidacy haunts ruling party' *The Citizen* (Tanzania) 28 May 2008.

<sup>302</sup> *Rev. Christopher Mtikila v. Attorney General*, Misc. Civil Case No. 10 of 2005 (High Court) (unreported).

provision violated Article 21 of the *Constitution of Tanzania, 1977*, which provides for the participation of citizens in the governance of Tanzania.<sup>303</sup> The High Court found the provision to be unconstitutional. The government appealed this decision to the Tanzanian Court of Appeal. The Court of Appeal struck down the appeal on the basis of an incurable defect, thereby upholding the decision of the High Court of Tanzania to allow private candidates.<sup>304</sup> The Attorney General has announced its intention to appeal the decision of the Court of Appeal of Tanzania.<sup>305</sup> The Attorney General filed an appeal in 2008 and this appeal is still pending in the Court of Appeal. The Registrar of Political Parties has also come out in support of private candidates as “everyone has the right of electing and being elected”.<sup>306</sup>

The LHRC supports the High Court’s decision to allow private candidates, as it believes private candidates will add diversity to the political playing field. In addition, a prohibition against private candidates prevents a person from exercising their right to participate in the political process and their right to choose not to associate with a certain group. In this case, a person can only exercise their right to participate in politics by joining a certain association, namely a political party. The introduction of private candidates may also increase the accountability of MPs to their constituents, if MPs are elected as a private candidate. The LHRC recommends that the government comply with the Court of Appeal’s decision and draft a bill that allows private candidates.

### 3.3.4. Women’s Participation in Government

In 2005, the 14<sup>th</sup> amendment of the *Constitution of Tanzania, 1977* increased the number of seats reserved for female MPs from 15 percent to 30 percent.<sup>307</sup> These reserved seats are called special seats. In order to fill the special seats, each political party nominates and ranks female candidates from their party for the special seats.<sup>308</sup> The number of female candidates drawn from each political party is proportionate to their political party’s representation in parliament.<sup>309</sup> These constitutional provisions are in accordance with the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2000*, which mandates that states should take positive action to promote women’s participation in governance.<sup>310</sup>

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<sup>303</sup> Kato, *supra*; Art. 21 of the *Constitution of Tanzania, 1977*.

<sup>304</sup> Kato, *supra*.

<sup>305</sup> P. Mbossa ‘AG seeks more time to appeal against private candidacy’ *ThisDay* (Tanzania) 22 May 2008.

<sup>306</sup> Written response to LHRC questionnaire by unnamed employee of the Office of the Registrar of Political Parties (Dar es Salaam, Tanzania October 2008).

<sup>307</sup> Art. 66(1) of the ; *Constitution of Tanzania, 1977*. Also see Written statement by Hon. Margareth Simwanza Sitta, Minister for Community Development, Gender and Children, United Republic of Tanzania to the Committee on Elimination of Discrimination against Women (New York 11 July 2008) <<http://www2.ohchr.org>> accessed 6 November 2008.

<sup>308</sup> Art. 78 of the *Constitution of Tanzania, 1977*.

<sup>309</sup> Art. 78 of the *Constitution of Tanzania, 1977*.

<sup>310</sup> Art. 9 of the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, 2000* (adopted 13 September 2000, entered into force 25 November 2005, signed by Tanzania 5 November 2003) OAU CAB/LEG/66.6.

After the 2005 general elections, of the 321 Parliamentarians, 98 were women (17 were elected by their constituencies, 75 hold special seats, four were nominated by the President and two were from Zanzibar).<sup>311</sup> Differently stated, approximately 30 percent of MPs were women.<sup>312</sup> The Tanzanian government's aim is to increase the number of female MPs to 50 percent by 2010.<sup>313</sup> The 50 percent target is in line with the Southern African Development Community's (SADC's) Protocol on Gender and Development, which states that:

[m]ember states shall ensure that by 2015, 50 percent of decision-making positions in the public and private sectors, the cabinet, the parliament, judiciary, all tribunals and commissions, including human rights bodies, civil society, traditional structures, trade unions, political parties and the media are held by women, and shall monitor their quotas to ensure that representation.<sup>314</sup>

While Tanzania has made positive progress in its number of female MPs, it continues to experience difficulties in increasing the number of women in cabinet and in senior decision making positions in government. As of July 2008, six of the 27 ministers were women; eight of the 30 deputy ministers were women; eight of the 27 permanent secretaries were women; three of the 15 deputy permanent secretaries were women; and 22 of the 77 judges in Tanzania were women.<sup>315</sup> The majority of female government employees hold positions like receptionists and personal assistants, which typically have low salaries and give women few opportunities of advancement.

Despite the relatively high percentage of women the parliament, there is concern about whether women are effectively participating in governance. It is noted that the majority of women hold these positions due to affirmative action policies, rather than through direct competition in various constituencies.<sup>316</sup> The affirmative action appointment of women into these positions may undermine the legitimacy and credibility of their input into governmental decisions. Whether these women feel empowered as MPs and contribute to parliamentary proceedings is unknown. It is important to study the role of female MPs, as there is a need not only for women to be appointed to these positions, but also for these women to actively and meaningfully participate in parliamentary proceedings.

One of the reasons that women in parliament primarily hold special seats, rather than being elected by a constituency, is because few women are nominated as candidates by

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<sup>311</sup> Written statement by Hon. Margareth Simwanza Sitta, *supra*.

<sup>312</sup> Mukunza, *supra*.

<sup>313</sup> Mukunza, *supra*.

<sup>314</sup> Art. 5 of the Protocol on Gender and Development of SADC (Johannesburg 17 August 2008) SADC/M/2007/GAD/2.

<sup>315</sup> Committee on Elimination of Discrimination against Women 'Impeding Tanzanian efforts to implement Women's Convention were male domination, physical violence, emotional abuse, women's anti-discrimination committee told' (Press Release New York 11 July 2008) General Assembly WOM?1695 <<http://www.un.org/News/Press/docs/2008/wom1695.doc.htm>> accessed 6 November 2008.

<sup>316</sup> L. Rashid 'Towards equal representation in parliament' *The Guardian* (Tanzania) 3 June 2008.

their political parties.<sup>317</sup> The LHRC encourages political parties to support and nominate female candidates. Furthermore, the LHRC encourages political parties to support women in attaining leadership roles within their political parties. At the moment, all the leaders of Tanzania's political parties are men.<sup>318</sup> In addition, there are social and cultural barriers that hinder women from participating in governance. The LHRC recommends that the government engage in a sensitization campaign to help break down these barriers.

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<sup>317</sup> *Ibid.*

<sup>318</sup> *Ibid.*

## Chapter Four

### Economic and Social Rights

#### 4.0 Introduction

At the international level, the *International Covenant on Economic, Social and Cultural Rights, 1966* was specifically adopted in 1966 to address economic and social rights, such as the right to work, the right to receive social security, the right to health and the right to education.<sup>319</sup> However, until this year, individuals were not able to submit complaints to the Committee on Economic, Social and Cultural rights, as the *International Covenant on Economic, Social and Cultural Rights, 1966* did not contain a petition mechanism that could be used by individuals. The *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 1966*, which contains an individual complaint mechanism, was approved by the UN Human Rights Council on 18 June 2008, it was presented to the UN General Assembly for its consideration in October 2008, and it was unanimously adopted by the UN General Assembly on 10 December 2008.<sup>320</sup>

The degree to which the aims of the *International Covenant on Economic, Social and Cultural Rights, 1966* can be achieved at the state level depends on a state's commitment and ability to provide social services to its citizens, and the legislative safeguards that the state has put in place to protect the economic and social rights of its citizens. In Tanzania, many of the rights guaranteed by the *International Covenant on Economic, Social and Cultural Rights, 1966* are safeguarded by the *Constitution, 1977*.<sup>321</sup> However, Tanzania's ability to give practical effect to the rights set out in the *Constitution of Tanzania, 1977* and the *International Covenant on Economic, Social and Cultural Rights, 1966* is hampered by a lack of resources and a lack of political will.

This part of the report will evaluate the Tanzanian government's progress in realizing the rights contained in the *International Covenant on Economic, Social and Cultural Rights, 1966*. In particular, this part will consider labour rights, the right to own property, the right to health services and the right to education in Tanzania.

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<sup>319</sup> Arts. 6 to 9, 12 and 13 of the *International Covenant on Economic, Social and Cultural Rights, 1966*.

<sup>320</sup> UNGA Res. 117 (10 December 2008) UN Doc A/RES/63/117; Press release by the International Federation for Human Rights, 'International NGO Coalition for an Optional Protocol to the ICESCR NGO Coalition welcomes historic Decision' (personal email correspondence 19 June 2008); UN High Commission for Human Rights, Committee on Economic, Social and Cultural Rights 'Monitoring the economic, social and cultural rights' <<http://www2.ohchr.org/english/bodies/cescr/>> accessed 12 February 2009.

<sup>321</sup> Arts. 11, 22, 23, and 24 of the *Constitution of Tanzania, 1977*. However, the right to education and social services are contained outside the Bill of Rights of the Constitution and therefore, they can not be enforced under the Basic Rights and Duties Enforcement Act, Cap. 3 once violated because this law (Cap. 3) enforces violations of rights and duties contained under Arts. 12 to 29 of the Constitution.

## 4.1 Labour Rights

### *Right to Work*

Pursuant to the *Constitution of Tanzania, 1977* “every person has the right to work”.<sup>322</sup> A person’s ability to exercise the right to work is dependent on the existence of a stable economy that creates an environment in which employment opportunities and opportunities for self-employment can exist.

In 2005/2006, Tanzania had a labour force of 20.6 million people.<sup>323</sup> The term “labour force” means the number of people who are working or who are actively seeking work. It is estimated that Tanzania’s labour force is increasing at a rate of 3.2 percent, or 520,000 people, per year.<sup>324</sup> Tanzania’s labour force is engaged in the following sectors of employment:

<b>Sector of Employment</b>	<b>Male %</b>	<b>Female %</b>	<b>Urban Areas %</b>	<b>Rural Areas %</b>	<b>Total %</b>
Agriculture, livestock, fishing	68	49	51	87	58
Self-employed (no employees)	15	22	23	6	19
Homemaker/unpaid farm worker/family business	2	17	11	2	19
Employee	7	4	6	5	6
Dependent: Retired/Student	2	4	2	0	3
Self-employed (with employees)	3	1	4	0	3
Unemployed	0	1	1	0	1
Other	2	0	0	1	1

**Source:** Research and Analysis Working Group, United Republic of Tanzania ‘Views of the People 2007’ (Dar es Salaam December 2007) 12.

As is evident from the table set out above, a significant percentage of Tanzania’s labour force is engaged in agriculture and fishing. Pursuant to the *National Employment Policy of 2000*, the Tanzanian government has focused its efforts on increasing employment in the agricultural sector.<sup>325</sup> The government’s efforts to increase employment in this area have been met with limited success. In fact, in the period 2000/2001 to 2005/2006, there was a 7.7 percent reduction in the share of agricultural employment.<sup>326</sup> The reduction in

<sup>322</sup> Art. 22(1) of the *Constitution of Tanzania, 1977*.

<sup>323</sup> M. Jumbe ‘Govt admits failure in tackling unemployment’ *The Citizen* (Tanzania) 13 May 2008.

<sup>324</sup> *Ibid.*

<sup>325</sup> Economic Research Bureau, ‘Review of the Minimum Wage-Setting for the Private Sector in Tanzania and Impact on the Labour Market, Economy and Welfare’ (Report September 2008) (Minimum Wage Report) at p. 10.

<sup>326</sup> Poverty and Human Development Report 2007, p. 10.

the number of people employed in the agricultural sector has had a relatively large impact on the employment rate in Tanzania due to the proportion of the labour force engaged in this sector. It has also negatively affected the Government of Tanzania's overall plan to reduce poverty in Tanzania.

In the period 2005/2006, approximately 11.7 percent of Tanzania's labour force or, 2.3 million people, were unemployed.<sup>327</sup> In 2008, the Tanzanian government launched various initiatives to address the issue of unemployment. For instance, as a part of MKUKUTA, the government launched the Thematic Working Group on Employment on 5 September 2008.<sup>328</sup> The aim of this Working Group is to address employment issues and employment creation. The Tanzanian Government is also addressing the issue of unemployment by supporting the development of small and medium enterprises on the understanding that these enterprises are instrumental in creating employment.<sup>329</sup> To this end, the government has developed a policy on small and medium enterprises and established the Mwananchi Economic Empowerment Fund to provide financial resources to the local population.<sup>330</sup> It is unclear whether these government initiatives have resulted in job creation and, more specifically, job creation for women and youth. These two groups have the highest rates of unemployment.

The group with the highest rate of unemployment is youth between the ages of 15 and 24. This group has an unemployment rate of 14.9 percent.<sup>331</sup> The high rate of youth unemployment is partially attributable to the market's inability to absorb the 650,000 youth entering the labour force each year and the low level of education of some of the youth who entering the labour force.<sup>332</sup> The government of Tanzania has targeted the issue of youth unemployment with its *National Youth Development Policy*, which focuses on engaging youth in Tanzania's social and economic development. This policy entered its second phase in early 2008.<sup>333</sup> In addition, the government has taken steps to prepare the implementation strategies for the *National Youth Development Policy*; it created a budget for the National Youth Development Fund; it implemented an out of school program for youths in 19 districts; conducted a national youth week; and, implemented its youth economic groups program.<sup>334</sup> Despite these steps, the level of youth unemployment remains high.

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<sup>327</sup> *Ibid.*, p. 10.

<sup>328</sup> International Labour Organisation, 'Launching of the Sector Working Group on Employment in Tanzania' (SWG meeting Dar es Salaam 5 September 2008) <<http://www.ilo.org>> accessed 10 November 2008.

<sup>329</sup> Edine Mangesho, Deputy Permanent Secretary, Ministry of Labour, Employment and Youth Development, Government of Tanzania, Statement to the 46<sup>th</sup> Session of Commission on Social Development on Agenda Item 3a: Promoting Full Employment and Decent Work for all (New York 7 February 2008) <<http://www.un.org>> accessed 10 November 2008, at p. 2.

<sup>330</sup> *Ibid.* at p. 2.

<sup>331</sup> Poverty and Human Development Report 2007, *supra* p. 11.

<sup>332</sup> Statement of Dr. Ali Mohamed, Shein Vice President of the United Republic of Tanzania at the first meeting of the African Commission (Copenhagen 16 April 2008) <<http://www.africacommission.um.dk>> accessed 10 November 2008.

<sup>333</sup> T. Mushi 'Youth Development policy is unveiled' *The Guardian* (Tanzania) 23 April 2008.

<sup>334</sup> Written response to LHRC questionnaire by unnamed employee of the Ministry of Labour, Youth and Sports (Dar es Salaam, Tanzania October 2008).

In 2006, 51.9 percent of Tanzania's labour force was comprised of women.<sup>335</sup> The rate of unemployment for women is 14.2 percent, while for men it is 11.6 percent.<sup>336</sup> The gender disparity also affects the areas in which women are employed. Women tend to be employed in the informal sector, mainly in agricultural activities, as well as in activities such as running small businesses, food processing and handicrafts, where they have limited access to land, lack job security and do not have access to social security benefits.<sup>337</sup> The gender disparity in the unemployment rate in Tanzania and the sectors of employment makes it difficult for women to empower themselves economically and marginalizes women.

The sectors in which women work also influences the degree of legal protection they have in the workplace. As mentioned above, the majority of women work in the informal sector. Indeed, approximately 96 percent of Tanzania's labour force works in the informal sector, where the informal sector includes agricultural enterprises.<sup>338</sup> The *Employment and Labour Relations Act* is a labour law that protects the rights of employees by limiting the hours of work of employees, ensuring a certain level of remuneration and requiring that employees be granted a certain amount of leave.<sup>339</sup> People working in the informal sector are not covered by this Act.<sup>340</sup> People working in the informal sector are also not covered by the *Workers Compensation Act, 2008*, which provides for compensation to be paid to workers who suffer disability or death in the course of employment.<sup>341</sup> As a result, the majority of Tanzania's labour force has no legal protection in the workplace.

The LHRC recommends that the government determine how to address the rights of people working in the informal sectors and how to improve the working conditions and rights of people in this sector. In addition, the LHRC recommends that the government improve its enforcement of the *Employment and Labour Relations Act*. Currently, the Ministry of Labour lacks the capacity to enforce Tanzania's labour laws, as the Ministry of Labour employs few labour inspectors and it only has one office, which is located in Dar es Salaam.<sup>342</sup> This lack of capacity undermines the relevance and the efficacy of the *Employment and Labour Relations Act*.

In addition, accessibility to the redress procedures of the *Employment and Labour Relations Act* needs to be addressed. The Commission for Mediation and Arbitration can

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<sup>335</sup> *Ibid.* A statistical analysis of the composition of Tanzania's labour force is unavailable for 2007 or 2008.

<sup>336</sup> Mushi, *supra*.

<sup>337</sup> Committee on the Elimination of Discrimination against Women, 'Concluding observations: United Republic of Tanzania' (18 July 2008) UN Doc CEDAW/C/TZA/CO/6 <<http://www2.ohchr.org/english>> accessed 10 November 2008, 10.

<sup>338</sup> Interview with Jurgen Schwettmann, *supra*.

<sup>339</sup> Ss. 17 to 34 of the *Employment and Labour Relations Act, 2004*.

<sup>340</sup> In addition, the Act does not apply to members of the armed services, the police, the prison services and the national service as per S. 2 of the *Employment and Labour Relations Act, 2004*.

<sup>341</sup> Rose Mwalongo, "House endorses amendments to Workers Compensation Act" *The Guardian* (Tanzania) 5 November, 2008. This Act will become effective after presidential assent has been given.

<sup>342</sup> Interview with Jurgen Schwettmann, *supra*.

address disputes between employees and employers, or trade unions and employers.<sup>343</sup> Currently, the prescribed forms to file a dispute with the Commission for Mediation and Arbitration are difficult to complete and are only in English. The LHRC recommends that these forms be simplified and translated into Kiswahili to increase accessibility to this redress mechanism.

### *Fair Remuneration*

The right to fair remuneration is enshrined in Article 23 of the *Constitution of Tanzania, 1977*, which provides that the level of remuneration should be commensurate with a person's work. In order to determine what constitutes a fair wage, it is useful to refer to the minimum wage requirements.

Tanzania is one of the few countries to ratify the *Minimum Wage Fixing Convention, 1970*, which provides for the creation of a minimum wage system.<sup>344</sup> From the 1960s onwards, Tanzania had a minimum wage system that provided for two minimum wage rates, one for urban employees and another for rural employees.<sup>345</sup> In November 2007, the government replaced this system with a sectoral minimum wage system pursuant to which a person's minimum wage is determined by their sector of employment.<sup>346</sup>

Pursuant to the *Labour Institutions Act, 2004*, the government issued a new minimum wage order on 16 November 2007 that reflected the sectoral system.<sup>347</sup> This minimum wage order came into effect on 1 January 2008. The new, average minimum wage rates of 2008 were 16 to 66 percent higher than the minimum wage rates that existed in 2007. For instance, in the trade, industry and commerce sector, the average, minimum wage increased by 31 percent, while in the domestic and hospitality sector, it increased by 27 percent.<sup>348</sup> Due to the minimum wage order, the average minimum wage rates were substantially higher than they had been in the previous year.

When the minimum wage order came into effect in January of 2008, it caused labour unrest in Tanzania as there was limited compliance with new minimum wage rates. In

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<sup>343</sup> Ss. 64, 65, 67, 70, 74 of the *Employment and Labour Relations Act, 2004*. The Commission for Mediation and Arbitration is established under S. 12 of the *Labour Institutions Act, 2004*, Act No. 7 of 2004.

<sup>344</sup> *Minimum Wage Fixing Convention, 1970* (ILO No. 131) (entered into force 29 April 1972, ratified by Tanzania 30 May 1983) <<http://www.ilo.org>> accessed 10 November 2008; Interview with Jurgen Schwettmann, *supra*.

<sup>345</sup> Minimum Wage Report, *supra*, at p. 2.

<sup>346</sup> Minimum Wage Report, *supra*, at p. 2. For the purpose of determining the minimum wage rate, there are eight sectors: health services; agricultural services; commercial, industry and trading services; transportation and communication; mining services; marine and fishing; domestic services, including hotels; and, private security.

<sup>347</sup> Minimum Wage Report, *supra*, at p. 2.

<sup>348</sup> Minimum Wage Report, *supra*, at p. 27. In the trade, commerce and industry sector, the average effective minimum wage increased from Tsh. 79,064 in 2007 to Tsh. 115,000 in 2008, whereas in the domestic and hospitality sector the average effective minimum wage went from Tsh. 67,734 in 2007 to Tsh94,000 in 2008. The exchange rate of Tanzanian shillings to United States of American dollars was approximately 1,300:1 on 30<sup>th</sup> December 2008.

January and February of 2008, employees organised a number of strikes demanding that their employers increase their wages to reflect the provisions of the new minimum wage order.<sup>349</sup> The government denounced these strikes as illegal, but it also reminded private employers that it was mandatory to comply with the minimum wage order.<sup>350</sup> By September 2008, the general compliance by employers with the minimum wage order was only 56.7 percent.<sup>351</sup>

The minimum wage order is valid and binding, unless it is suspended or cancelled by the Ministry of Labour, or amended or superseded by a new wage order.<sup>352</sup> After receiving complaints from various employers about the 2008 minimum wage order, the Ministry of Labour exempted certain types of employers from the provisions of this order. In particular, the Ministry of Labour granted exemptions to employers who had manufacturing facilities that employed 300 or more people and/or exported more than 25 percent of its finished product.<sup>353</sup> These employers were allowed to pay a minimum wage of Tsh. 80,000, rather than the minimum wage of Tsh. 150,000 that was set out in the minimum wage order.<sup>354</sup>

The new system of basing a person's minimum wage on their sector of employment has been criticised for a number of reasons, including the following:

- The sub-categories of the various sectors are vaguely defined and it is difficult to determine what activities are covered by a wage sector. As a result, people who perform comparable activities may be eligible for different minimum wages. Furthermore, there is no method to differentiate between the different sectors or different companies within a sector for the purposes of determining the appropriate minimum wage;<sup>355</sup>
- Instead of the new minimum wage being determined on the basis of objective criteria, it was determined on the basis of the amount that an industry could pay;<sup>356</sup>
- The exemptions granted to the November 2007 minimum wage order are illogical, as these exemptions were granted to large employers that are more financially able to pay the new minimum wages than small to mid-size employers who were not granted any exemptions.<sup>357</sup> Exemptions to a minimum wage order should be exercised cautiously; and,

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<sup>349</sup> P. Machira 'Protests to Tsh. 80,000 wages rise' *The Citizen* (Tanzania) 26 January 2008; P. Magubira 'Fillet firms hit as workers strike' *The Citizen* (Tanzania) 25 January 2008; N. Kigwangallah 'Over 300 ALAF workers down tools demanding newly announced wages' *The Guardian* (Tanzania) 31 January 2008.

<sup>350</sup> L. Philemon 'Govt sticks to its gun on new wage increase' *The Guardian* (Tanzania) 2 January 2008; T. Mosoba 'Strikes illegal, workers told' *The Citizen* (Tanzania) 1 February 2008.

<sup>351</sup> Minimum Wage Report, *supra*, at p. xviii.

<sup>352</sup> Minimum Wage Report, *supra*, at p. 14.

<sup>353</sup> T. Mosoba 'Strikes illegal, workers told' *The Citizen* (Tanzania) 1 February 2008.

<sup>354</sup> *Ibid.*

<sup>355</sup> Interview with Jurgen Schwettmann, *supra*.

<sup>356</sup> Interview with Jurgen Schwettmann, *supra*.

<sup>357</sup> Interview with Jurgen Schwettmann, *supra*.

- Prior to setting the new minimum wages, the government did very little research to determine the appropriate minimum wage for each sector. As a result, the new minimum wages do not take into account factors that are specific to each sector.<sup>358</sup>

Before imposing future minimum wage orders, the LHRC recommends that the government address the criticisms leveled against the November 2007 minimum wage order. Addressing these criticisms will help maintain the balance between fair remuneration, job creation and economic growth in Tanzania. The LHRC recommends that the government take steps to ensure that businesses comply with the minimum wage order. The LHRC is concerned that if the government does not enforce the minimum wage order, it will appear that the government is favouring the interests of employers over the interests of employees.

### *Impact of the Privatization of Parastatal Corporations on Employee's Rights*

In the last few years, there has been a trend in Tanzania to privatize parastatal corporations, such as the CRDB Bank Limited and the National Bank of Commerce. The privatization of these corporations has negatively impacted on the rights of employees. This section will briefly consider the interaction between the rights of employees and the changing status of parastatal corporations using the example of the National Bank of Commerce, a parastatal corporation, and one of its successor, the National Microfinance Bank (NMB).

In preparation for its privatization, the National Bank of Commerce was split in 1997 into three entities, the NMB, NBC Holding Corporation and NBC (1997).<sup>359</sup> This section will only consider the privatization of the NMB. The NMB was established by the *National Microfinance Bank Limited Incorporation Act, 1997* and then incorporated into private limited liability company under the *Companies Act, 1931*.<sup>360</sup> The NMB was partially privatized in 2004 when the government sold 49 percent of its shares in NMB to Rabobank of the Netherlands.<sup>361</sup> However, the government retained a 51 percent interest in NMB. In November 2007, by shareholder resolution, it was decided to convert NMB to a public limited liability company.<sup>362</sup> The conversion of the NMB to a public limited liability company allowed its shareholders to publicly sell their shares. In 2008, the government decided to make an offer of sale of a further 21 percent of its shares in NMB.<sup>363</sup> This offer of sale effectively removed the Government of Tanzania's control over the NMB. It also resulted in labour unrest.

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<sup>358</sup> G. Lwayu 'Govt to study minimum wage' *Daily News* (Tanzania) 11 January 200).

<sup>359</sup> Government of the United Republic of Tanzania 'National Microfinance Bank Prospectus: An offer for Sale by the Government of Tanzania' (Prospectus Tanzania 18 August 2008) (NMB Prospectus) at p. 28.

<sup>360</sup> *National Microfinance Bank Limited Incorporation Act, 1997*, Act No. 22 of 1997 (repealed 30 January 2004); *Companies Act, 1931*, Cap. 212 R.E. 2002.

<sup>361</sup> NMB Prospectus, *supra*, at p. 28.

<sup>362</sup> NMB Prospectus, *supra*, at p. 12.

<sup>363</sup> NMB Prospectus, *supra*, at p. 28.

NMB employees threatened to go on strike in January 2008 in an attempt to force the government to pay employees Tsh. 23 billion in terminal benefits, which was allegedly owed to them from the 2004 round of privatization.<sup>364</sup> Employees of NMB also sought a raise in their wages, new contracts with the NMB, equal treatment between staff and increased transparency in job grading and staff salaries.<sup>365</sup> The High Court of Tanzania issued an injunction that prohibited the NMB employees from going on strike until the dispute had been addressed by the Commission for Mediation and Arbitration.<sup>366</sup> In September 2008, roughly 2,000 employees went on an illegal strike for two days before being ordered back to work by the Labour Court of Tanzania.<sup>367</sup> NMB and the Tanzania Union of Industrial and Commercial Workers signed a memorandum of understanding on 26 September 2008, after two years of negotiation, industrial action and a contempt case that the company brought against union officials.<sup>368</sup> Under the memorandum, five percent ownership of the bank was given to workers; and, workers were guaranteed lump sum benefits for services rendered and a payment of 50 percent of an employee's current salary for each completed year of service up to 18 August 2008.<sup>369</sup>

The privatization of parastatal corporations has negatively affected labour rights, as there have been inconsistencies in the provision of terminal benefits and the setting of the rate of remuneration. Employees of privatized parastatal corporations can be vulnerable to human rights abuses, as the effective change in their employer may have a negative impact on their labour rights.

## 4.2 Right to Own Property

The right to own property is guaranteed by Article 24 of the *Constitution of Tanzania, 1977*. The rights and obligations of land ownership and the process for obtaining land are prescribed in the *Land Act, 1999* and the *Village Land Act, 1999*.<sup>370</sup> The *Land Act, 1999* provides that all land in Tanzania is public land that is vested in the President as trustee.<sup>371</sup> As all land is public land, the right to land obtained by an individual is the right to use and occupy land.

An individual can obtain a right to occupancy by obtaining a formal grant of occupancy under the *Land Act*. Before an individual can obtain this grant, the individual must have

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<sup>364</sup> F Kapama 'High Court blocks NMB strike' *Daily News* (Tanzania) 29 January 2008.

<sup>365</sup> P Rugonzibwa 'NMB workers threaten to call national strike' *Sunday Citizen* (Tanzania) 20 January 2008.

<sup>366</sup> Kapama, *supra*.

<sup>367</sup> 'Striking bank employees ordered back to work' *Afrol News* (News article 24 September 2008)

<<http://www.afrol.com>> accessed 11 November 2008.

<sup>368</sup> UNI Global Union 'Tanzania: Workers win dispute in National Microfinance Bank' (Switzerland) (26 September 2008) <<http://www.union-network.org/uniafrican.nsf>> accessed 11 November 2008.

<sup>369</sup> *Ibid*.

<sup>370</sup> *Land Act, 1999*, Cap. 113, R.E. 2002 (*Land Act, 1999*) (amended by the *Land (Amendment) Act, 2004*, Act No. 2 of 2004, which addresses the rights of non-citizens to land and mortgages; amended in 2008 by the *Mortgage Financing (Special Provisions) Act 2008*, Act No. 17 of 2008, which addresses mortgage requirements and disposition of title); *Village Land Act, 1999*, Cap. 114, R.E. 2002 (*Village Land Act, 1999*).

<sup>371</sup> Ss. 4 and 22 of the *Land Act, 1999*.

the land surveyed and registered under the *Land Registration Act, 1953*.<sup>372</sup> Alternatively, an individual may have a deemed right of occupancy to a piece of land due to their customary use of the land.<sup>373</sup> It is also possible for a grant of occupancy to be to an individual using the provisions of the *Village Land Act*. Where there is a conflict between a right of occupancy and deemed right of occupancy, the person with the right of occupancy may require the person with a deemed right of occupancy to relocate from the land in issue.<sup>374</sup>

### *Land Conflicts*

The bias in the *Land Act* towards formalized rights of occupancy has caused conflict between certain groups, particularly foreign investors and people with deemed rights of occupancy. Below are a number of examples of land conflicts that arose in 2008. The first two examples relate to conflicts between the government, investors and citizens, while the other three examples relate to conflicts over land use.

#### Hadzabe People

The Hadzabe community, numbering no more than 3,000 people, is a hunter-gather indigenous people who depend on their traditional lands and surrounding natural resources for their survival.<sup>375</sup> Part of the Hadzabe community resides in the Yaeda Chini Valley in the Mbulu district and their rights to the Yaeda Chini Valley derive from their customary occupation of the land. The Hadzabe people also have formally recognized authority over the Mongo wa Mono village in the Mbulu District under the provisions of the *Village Land Act*.<sup>376</sup>

In 2007, the Tanzanian government granted a hunting license over the Yaeda Chini Valley to a private company, UAE Safaris Limited.<sup>377</sup> The Hadzabe community was not consulted about the grant of the hunting license and, by all accounts, did not consent to its grant.<sup>378</sup> There was concern that the infringement of the Hadzabe community's traditional land by UAE Safari Limited would threaten the Hadzabe's traditional lifestyle and their existence.

In June 2008, UAE Safaris Limited abandoned its project to develop the Yaeda Chini Valley due to pressure from civil society organisations.<sup>379</sup> The company contends that if it had been allowed to invest in the area, its activities would have benefited the Hadzabe

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<sup>372</sup> S. 22 of the *Land Act, 1999*.

<sup>373</sup> Ss. 5 to 7 of the *Land Act, 1999* and Ss. 14 and 15 of the *Village Land Act, 1999*.

<sup>374</sup> s. 34(3) of the *Land Act, 1999*.

<sup>375</sup> LHRC 'Public Engagement – Governance Watch' (Annual Report Tanzania May 2007) at p. 26.

<sup>376</sup> UN Human Rights Council 'Report by Special Rapporteur Jean Ziegler 2008/02' (2008) UN Doc A/HRC/7/5/Add. 1 <<http://www2.ohchr.org/english>> accessed 11 November 2008, 83.

<sup>377</sup> Tanzania Human Rights Report 2007 *supra*, at p. 29. A detailed background to the conflict between the Hadzabe people and UAE Safaris Ltd. is given at pages 24 to 32.

<sup>378</sup> Tanzania Human Rights Report 2007 *supra*, at p. 30.

<sup>379</sup> Z. Ubwani 'Arab firm gives in to activism' *The Citizen* (Tanzania) 18 June 2008.

people.<sup>380</sup> Shortly after UAE Safaris Limited pulled out of the area, it was reported that a mining company, Green Hills Mining Limited, was conducting unauthorised geological surveys in the Yaeda Chini Valley. Apparently, the company is interested in potentially mining red garnets in this area.<sup>381</sup>

The LHRC calls on the government to change its policies regarding land and indigenous people. Currently, the Tanzanian government's policies seem to favour the use of land for tourism and development over preserving the rights of indigenous people who rely on the land to sustain their way of life. The LHRC recommends that the government draft a national policy or legislation specifically recognizing the special relationship between indigenous people and the land.

### Nyamuma Village residents

In 2001, Nyamuma residents were evicted from their properties and their houses were destroyed by the government so that the government could extend a game reserve into the area formally occupied by the Nyamuma Village. The villagers did not receive compensation for their expropriated land. As a result, 135 of the evicted villagers took their case to the Commission of Human Rights and Good Governance (CHRGG). In 2004, the CHRGG recommended that the government compensate the villages for the loss of their homes and their properties; and, resettle the villagers. However, the government rejected the CHRGG's recommendations.<sup>382</sup>

The government's refusal to comply with the CHRGG's recommendation prompted the LHRC to file a petition against the government in the High Court (Land Division) in 2006 in an effort to have the court enforce the CHRGG's recommendations.<sup>383</sup> The High Court (Land Division) found that it did not have the authority to enforce the CHRGG's recommendations. This finding was appealed by the LHRC to the Court of Appeal of Tanzania. The Court of Appeal of Tanzania heard the appeal on 22 April 2008 and released its decision on 11 October 2008. The Court of Appeal held that the CHRGG could enforce its recommendations by bringing an action before a court of competent jurisdiction.<sup>384</sup>

Civil society has been highly critical of the government's actions regarding the residents of Nyamuma village. It is noted that the government's initial actions in dispossessing the people of Nyamuma village and its failure to abide by the CHRGG's order undermines the rule of law in Tanzania, as the government's actions violate the provisions of the *Constitution, 1977*, the *Land Act, 1999* and the *Village Land Act, 1999* and the present

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<sup>380</sup> *Ibid.*

<sup>381</sup> 'Strange Miners invading Yaeda Valley' *ThisDay* (Tanzania) 4 July 2008.

<sup>382</sup> Tanzania Human Rights Report 2007 *supra*, at p. 49.

<sup>383</sup> *LHRC v Thomas Ole Sabaya and 4 Others*, Misc. Land Application No. 22 of 2005 (High Court, Land Division at Dar es Salaam) (5 October 2005) (unreported), judgment by Lugazia J.

<sup>384</sup> *LHRC v Thomas Ole Sabaya and 4 Others*, Civil Appeal No. 88 of 2006 (Court of Appeal at Dar es Salaam) 11 October 2008 (unreported).

government's actions create a bad precedent for future governments.<sup>385</sup> The Government of Tanzania has defended its actions on the basis that the eviction of the Nyamuma residents was in accordance with the *Land Act, 1999*, as its actions were for the advancement of the economic and social welfare of its citizens.<sup>386</sup>

The LHRC recommends that the government engage in a consultative process with people before it expropriates land. In addition, the government should provide fair compensation to people when it expropriates land. Furthermore, it is important for the government to create a fair and legal system to address land conflicts between investors, the government and Tanzanian citizens, as conflict between these three groups continue to occur throughout Tanzania due to the fluid nature of land rights in Tanzania.

### Kurasini – Demolition of Houses

Kurasini is an informal settlement located in the Temeke Municipality, Dar es Salaam. It is situated next to the port and runs parallel to the Indian Ocean. Plans for the redevelopment of Kurasini have been circulated since at least 2001, when the Ministry of Lands and Human Settlements Development and the Dar es Salaam City Council published the Kurasini Area Redevelopment Plan.<sup>387</sup> The government plans to sell the land for redevelopment by big businesses.

On 14 August 2008, on the order of the Ministry of Land, Housing and Settlement Development, government agents commenced demolishing various houses in Kurasini. Prior to the demolition, the government had given the Kurasini residents one month's and then one week's notice to vacate their plots. 269 residents of Kurasini objected to the demolition of their houses because they were dissatisfied with the compensation that had been given to them by the government. This concern stemmed from their lack of involvement in the evaluation process in 2006 and from irregularities in the payment of compensation.<sup>388</sup> In the government's defence, the Minister of Land, Housing and Human Settlements, Mr. John Chiligati, stated that the government had compensated all Kurasini residents. In addition, the government had evaluated the houses twice after residents complained that the first evaluation was done poorly.<sup>389</sup>

In an effort to stop the demolition, various residents applied to the High Court (Land Division) in August 2008 for a temporary injunction to stop the demolition of the their

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<sup>385</sup> Interview with Elias Mwashuiga, Executive Director of the Lawyers' Environmental Action Team (LEAT) (Dar es Salaam, Tanzania 6 October 2008).

<sup>386</sup> Interview with Elias Mwashuiga, *ibid.*; S. 4 of the *Land Act, 1999* provides that the President shall exercise his powers and duties under the Act as trustee of the land in a manner that advances the economic and social welfare of the citizens of Tanzania.

<sup>387</sup> The information in this paragraph is drawn from M Hooper 'Motivating Urban Social Movement participation: Lessons from Slum Dweller Mobilization in Kurasini, Dar es Salaam (Development Studies Association Conference London 8 November 2008) <[www.odi.org.uk](http://www.odi.org.uk)> accessed February 19, 2009.

<sup>388</sup> The information in this section is drawn from LHRC, 'A Brief Report of the Fact Finding over demolition of houses at Kurasini by the Ministry of Land, Housing and Settlement Development' (Field research Tanzania 20 August 2008).

<sup>389</sup> P. Kisembo 'Victims of Kurasini house demolition' *The Guardian* (Tanzania) 15 August 2008.

houses. Due to procedural irregularities, the court did not grant this injunction. Subsequently, the 269 residents who were dissatisfied with their compensation united and filed a representative action in the High Court (Land Division). The residents requested that the High Court address the issue of whether the compensation given to them had been just and adequate. This action was dismissed due to a procedural irregularity. It is expected these residents will file individual petitions on the same issue in the High Court (Land Division) in early 2009. Despite these legal actions, the government continued to demolish houses in Kurasini.

### Pastoralists and Agriculturists in Kilosa District

Conflicts between pastoralists and agriculturists have been reported from time to time since a major confrontation occurred in 2000. These conflicts revolve around the issue of land use. That is, whether land should be cultivated or used for grazing. The primary factors behind the disputes between the agriculturists and pastoralists are:

1. The migration of pastoralists and agriculturists into the area, which has reduced the amount of available land and led to cases where cattle is grazed on land that is used for farming;
2. The perception that the police and judiciary are corrupt, which has resulted in unjust decisions. In particular, it is alleged that these institutions favour the rights of the pastoralists; and,
3. Few villages in the Kilosa district have land use plans. Land use plans would help regulate the number of cattle in the district and allocate certain areas to pastoralists and agriculturists.

The conflict between these two groups flared up again on 27 October 2008. On 27 October 2008, Mr. Yohana Lipurukwa, a pastoralist, tried to arrest Mr. Hassan Kilunge, an agriculturist, on the basis that Mr. Kilunge was degrading the environment by using fire to clear a field for the farming season. The two men got involved in an argument and it is alleged that Mr. Kilunge killed Mr. Lipurukwa. This incident led to a broader conflict between pastoralists and agriculturists in Mabwegere Village, Kilosa district and resulted in the deaths of eight people in total.

This incident stems from a disagreement between the pastoralists and the agriculturists about the status of the Kikenge hamlet. It is unclear whether this hamlet falls within the village boundaries of Mabwegere village, a pastoralist village, or Mambegwa village, an agriculturist village. A case was filed in this regard in the High Court (Land Division) in 2006. The hearing of this case has been concluded and the parties are waiting for the release of the judgment.<sup>390</sup>

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<sup>390</sup> The information in this section is drawn from LHRC *et al*, 'A fact-finding report on the dispute between pastoralists and peasants in the Kilosa district' (Field research Tanzania 2 November to 7 November 2008).

## Tabata Dampo – Demolition of Houses

In Tabata Dampo, an area in the City of Dar es Salaam, there has been a conflict between a corporation, Allied Cargo Freighters (Allied), and people residing in Tabata Dampo, as to who has the right to occupy a certain area of land.

In 2002, a representative of Allied advised some Tabata Dampo residents that in 1996 Allied was granted legal title to the land occupied by the residents and the residents were trespassing on that land. The residents disputed this statement, as they had occupied the land since the 1950s. Shortly after this interaction, 16 residents of Tabata Dampo were arrested and tried on the charge of trespassing. Magistrate Fatuma Kiwanga of the Magistrates' Court found the residents guilty of trespassing, ordered a one year conditional sentence, and ordered the residents to vacate the land in contention. The residents appealed the decision of the Magistrates' Court to the High Court. The Hon. Justice Massati of the High Court overturned the decision of the Magistrates' Court on the basis of procedural irregularities. He ruled that the residents could continue to occupy the land in question until the rightful owner of the land had been determined.

Subsequent to the criminal proceedings in the Magistrates' Court and High Court, Allied Cargo Freighters went to the Ilala District Land and Housing Tribunal and sued the City of Dar es Salaam for granting a plot of land to the residents to which Allied held title. It is believed that the City of Dar es Salaam lost this case and that an order was made for the demolition of various houses in the Tabata Dampo area. On 26 February 2008, a bulldozer demolished at least 96 houses in the Tabata Dampo area on a directive given by the Ilala Municipal Council. The demolition of these houses left 500 people homeless. The residents did not receive prior notice of the demolition. After the demolition, the affected residents were homeless.<sup>391</sup>

The public outcry that resulted from the demolition promoted the government to form a six-person committee to investigate the incident. The committee found that municipal officials had grossly violated rules in ordering the demolition of the houses.<sup>392</sup> Various officials who had participated in the demolition resigned from their positions. In April of 2008, the government said it would pay Tsh20 million in compensation for each of the 88 houses that the government had confirmed had been demolished. The government also offered to relocate the affected residents to Mbuyuni, where 96 plots of land had been allocated to the residents.

### *Ensuring land rights*

There are a number of issues that hinder the efforts of Tanzanians to secure their land rights. The issues range from a lack of awareness about land rights to provisions in the *Land Act, 1999* that need to be updated.

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<sup>391</sup> The information in this section is drawn from LHRC 'Submission of short fact finding report on the demolition of houses at Tabata Dampo' (Field research Tanzania 17 June 2008).

<sup>392</sup> G. Lamtey 'Committee on Tabata Dampo begins work on compensation' *The Guardian* (Tanzania) 26 April 2008.

In Tanzania, few people are aware that a process exists through which they can secure their land rights, or how to access this process. The government has taken few steps to educate the public about the *Land Act* and the *Village Land Act*.<sup>393</sup> The education of the public about their land rights has been primarily fallen into the hands of NGOs like the LHRC and the Lawyers Environmental Action Team (LEAT). These NGOs, and others, have undertaken programs to educate people about their land rights and have distributed popularized, Swahili versions of the *Land Act* and the *Village Land Act*. However, further efforts need to be taken to educate people about their land rights and the effect that the 2004 amendments of the *Land Act* have on their land rights so that people are able to access and enforce these rights.

As noted above, in order for a person's title to land to be formalized, the land needs to be surveyed and registered in the land registry. Nearly ten years after the passage of the *Land Act* and the *Village Land Act*, only 11 percent of the land properties in Tanzania have been legally registered.<sup>394</sup> One of the barriers to registration of land title is the requirement of surveying the land. The Tanzanian government does not have a comprehensive plan to survey the land in Tanzania, it is unclear what resources, if any, will be allocated to the survey of land, and there is a lack of technical expertise to survey land.<sup>395</sup> These factors hinder the ability of individuals to secure a formal right of occupancy, as individuals are bear the responsibility of retaining and paying a surveyor to assess their land.<sup>396</sup> The cost of hiring a surveyor can be prohibitive. As a result, people do not have their land surveyed and their land rights remain unclear and open to infringement.

A failure to survey land to which a person has a right of occupancy can result in land conflicts. For instance, in Msola Station Village in Kilosa District, 1,239 residents of the village were asked to relocate after a ranch declared them squatters on its land. In this case, the Msola Station Village had been granted a right of occupancy under the *Village Land Act*. However, the village had failed to obtain a survey demarcating the boundaries of its land. As a result, there seems to be an overlap of the land occupied by the village and by the ranch.<sup>397</sup>

In addressing land rights, the LHRC advocates for the government to provide compensation to people whose land has been expropriated. The level of compensation should be set in accordance with the principle that compensation be prompt, fair and adequate, as provided in the *Land Act*. Furthermore, people who have been displaced from their land should be provided with alternative places to settle. In addressing the conflict between pastoralists and agriculturists, the LHRC calls for an improved monitoring of district councils to ensure that they operate within their jurisdiction and

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<sup>393</sup> Interview with Elias Mwashiuga, *supra*.

<sup>394</sup> Martin Huber et al 'Universal Land Registry to Support Independent Economic Development in Tanzania' *International Journal of Spatial Data Infrastructure Research* Vol. 4 (2009) 52, at p. 53.

<sup>395</sup> Interview with Elias Mwashiuga, *supra*.

<sup>396</sup> Interview with Elias Mwashiuga, *supra*.

<sup>397</sup> V. George 'Investor asks villagers to leave' *The Citizen* (Tanzania) 7 July 2008.

that corruption does not influence the way in which they operate. An effort must be made to ensure that the appropriate authorities, namely village councils, land councils and ministries, address land disputes.

### 4.3 Right to Health Services

The right to health is recognized by Article 12 of the *International Covenant on Economic, Social and Cultural Rights, 1966*. It is also contained in the *African Charter on Human and Peoples' Rights, 1981* and the *African Charter on the Rights and Welfare of the Child, 1990*.<sup>398</sup> However, the right to health is not recognized in the domestic law of Tanzania.

For the financial year 2008/2009, the Tanzanian government allocated ten percent of the budget to health care.<sup>399</sup> This budget allocation is markedly lower than the target set out in the *Abuja Declaration on HIV/AIDS, Tuberculosis and other Related Infectious Diseases, 2001* of 15 percent.<sup>400</sup> It is necessary to increase the budget allocated to health care to address the systemic problems that are rife in the Tanzanian health care system.

The degree to which people enjoy the right to health can impact the state of a country's economy and overall development. In this regard, it has been noted that improving women's and children's health helps reduce the poverty level in a country.<sup>401</sup> In light of the importance of the right to health, both from an individual and state perspective, we recommend that the Tanzanian government address the right to health in a more comprehensive manner and allocate appropriate resources to this area.

In Tanzania, the geographical distribution of health care facilities, the quality of services provided by health personnel and budgetary constraints impinge on the right to health. In terms of geographical distribution of health care facilities, the national average indicates that most households live within 5 kilometers of a primary health care facility.<sup>402</sup> However, there are large variations in physical access between rural and urban households, between poor and poorer households, and between the accessibility of primary health care facilities and hospitals.<sup>403</sup> These barriers to access disproportionately affect poorer households and women.<sup>404</sup> Inaccessibility of health care services can negatively affect a person's life expectancy.

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<sup>398</sup> Art. 16 of the *African Charter on Human and Peoples' Rights, 1981* and Art. 14 of the *African Charter on the Rights and Welfare of the Child, 1990* (adopted July 1990, entered into force 29 November 1999, ratified by Tanzania 16 March 2003) OAU Doc. CAB/LEG/24.9/49 (1990).

<sup>399</sup> P. Machira 'Child deaths rate still high: UNICEF' *The Citizen* (Tanzania) 16 June 2008.

<sup>400</sup> In 2001, all the members of the Organisation of African Unity agreed to the *Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, 2001* (Abuja, Niger adopted 24 to 27 April 2001) OAU/SPS/ABUJA/3.

<sup>401</sup> P. Ndovie 'Rapid population growth threat to poverty reduction in Africa' *ThisDay* (Tanzania) 5 July 2008.

<sup>402</sup> Paul Smithson 'Fair's Fair: Health Inequalities and Equity in Tanzania' (Report November 2006) <<http://womensdignity.org>> accessed 13 November 2008, at p. 25.

<sup>403</sup> *Ibid.* at p. 25. It is necessary to attend hospitals for more complex procedures, such as cesarean sections.

<sup>404</sup> *Ibid.* at p. 25.

Related to the physical accessibility of health care facilities is the quality of care provided by personnel at health care facilities. Overall, there is a shortage of trained personnel who are able to provide high quality or specialized care. In 2008, it was estimated that there were two Tanzanian doctors per 100,000 people.<sup>405</sup> In 2008, the Minister of Health and Social Welfare announced the government's intention to train more nurses and doctors to address the problem of personnel shortages.<sup>406</sup> The shortage of trained personnel is compounded in certain areas by the fact that trained personnel do not want to be posted to districts with poor communication, poor schooling and inadequate infrastructure.<sup>407</sup> As a result, people who are already disadvantaged due to their economic status or the area in which they reside receive poorer health care services, as there are a lack of facilities and personnel present in these areas.<sup>408</sup>

Health care may become inaccessible for economic reasons, especially for vulnerable groups like older persons, children and disabled people. Social security and health insurance coverage is low in Tanzania. In Mainland Tanzania, less than 1 percent of the population is covered by contributory social security schemes.<sup>409</sup> There are some non-contributory social security schemes, such as the schemes operated by the Department of Social Welfare in the Ministry of Health and NGOs that provide services and benefits.<sup>410</sup> However, these programmes provide a limited amount of assistance due to funding constraints. Social assistance funding from the government is 0.5 percent of the Gross Domestic Product and NGOs provide a further 0.5 percent of the Gross Domestic Product in funding.<sup>411</sup> Health care insurance coverage is also low. There are two health insurance schemes in Tanzania: the National Health Insurance Fund and the National Social Security Fund. Together, these funds have a membership of approximately 1.1 million.<sup>412</sup> In a country where 57.8 percent of the population lives on less than \$1 USD per day,<sup>413</sup> the lack of an effective health insurance and social security net may prevent people from obtaining health care because they simply cannot afford it.

### *Children and Health*

One of the goals of MKUKUTA, Tanzania's national strategy for growth and reduction of poverty, is to improve the survival, health and well-being of children and women.<sup>414</sup> This goal is particularly important in Tanzania, as Tanzania is one of the ten countries

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<sup>405</sup> Unnamed reporter 'Tanzanian doctors overworked –study' *ThisDay* (Tanzania) 22 July 2008.

<sup>406</sup> *Ibid.*

<sup>407</sup> Smithson, *supra*, at p. 29.

<sup>408</sup> Smithson, *supra*, at p. 32.

<sup>409</sup> Social Security Department, ILO 'Tanzania Mainland: Social Protection Expenditure and Performance Review and Social Budget' (Executive Summary Geneva 2008), at p. 8. These schemes are set out in Chapter 5.5. of this report.

<sup>410</sup> *Ibid.* at p. 10.

<sup>411</sup> *Ibid.* at p. 11.

<sup>412</sup> *Ibid.* at p. 12. In 2005, the National Social Security Fund had 9,000 members. The National Social Security Fund had 242,580 active members and, including dependents, one million people were covered.

<sup>413</sup> UNDP '2007/2008 Human Development Report: 03 Human and income poverty: developing countries' < <http://hdrstats.undp.org> > accessed 3 February 2009.

<sup>414</sup> Poverty and Human Development Report of 2007, *supra* at p. 31.

that accounts for more than two-thirds of newborns and three-fifths of maternal deaths that occur worldwide.<sup>415</sup>

In the period 1999 to 2005, there was a reduction in infant and child mortality in Tanzania. Infant mortality dropped from 99 to 68 per 1,000 live births, and under-five mortality dropped from 147 to 112 per 1,000 live births.<sup>416</sup> It is MKUKUTA's target that by 2010 the under-five mortality rate will be 79 out of 1,000 live births.<sup>417</sup> If Tanzania can achieve the goal set in MKUKUTA, it is possible that it will meet the 2015 MDGs of 48 deaths per 1,000 live births.

### *Women and Health*

In Tanzania, the lifetime risk of maternal mortality is one in ten.<sup>418</sup> The primary causes of maternal mortality in Tanzania are hemorrhaging (34 percent), sepsis (16 percent), hypertensive disorders (9 percent), and, obstructed labour, abortion and anemia (4 percent each).<sup>419</sup> One of the factors contributing to the high rate of maternal mortality is a lack of experience of emergency treatment for women in labour. In 2007, it was reported that four-fifths of health centres had never administered drugs to control hemorrhaging or pregnancy-induced tension.<sup>420</sup>

In 2007, it was noted that basic equipment for emergency obstetric procedures was rarely available in health centres and hospitals.<sup>421</sup> The lack of equipment can result in an increase in maternal mortality. For instance, in 2008, it was reported that there were frequent deaths of expectant mothers at Mwanayamala Hospital in Kinondoni District in Dar es Salaam due to insufficient medical equipment at the hospital.<sup>422</sup>

Another factor contributing to the high rate of maternal mortality is the lack of medical assistance for women who are giving birth. Currently, only about 46 percent of women have skilled assistance when giving birth and 56 percent of women give birth at home.<sup>423</sup> In an effort to address this problem, the government announced its intention to place a midwife in each dispensary in Tanzania.<sup>424</sup>

The government also announced that services in government hospitals to expectant mothers and infants or children below five years of age would be provided free of charge.<sup>425</sup> The plan to provide free health care services to these groups would partially

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<sup>415</sup> P. Machira 'New report paints gloomy picture on child mortality' *The Citizen* (Tanzania) 25 February 2008.

<sup>416</sup> Poverty and Human Development Report of 2007, at p. 32.

<sup>417</sup> *Ibid.*

<sup>418</sup> Save the Children, 'State of the World's Mothers 2007' (May 2007). <<http://www.savethechildren.org>> accessed 24 September 2008, at p. 56.

<sup>419</sup> P. Machira 'Child deaths rate still high: UNICEF' *The Citizen* (Tanzania) 16 June 2008.

<sup>420</sup> Poverty and Human Development Report 2007, at p. 36.

<sup>421</sup> *Ibid.*

<sup>422</sup> C. John 'Probe mothers' deaths at hospital, NGO urges' *The Citizen* (Tanzania) 5 June 2008.

<sup>423</sup> D. Mbega 'MDGs and cases of child and maternal mortality' *ThisDay* (Tanzania) 3 June 2008.

<sup>424</sup> L. Kato 'JK for new laws to check violence against women' *The Citizen* (Tanzania) 25 May 2008.

<sup>425</sup> C. John 'Probe mothers' deaths at hospital, NGO urges' *The Citizen* (Tanzania) 5 June 2008.

address the intersection between poverty, accessibility of health care and the mortality rates of mothers and children under the age of 5. As noted by one survey respondent from the Morogoro district:

*“Kila kitu ni pesa mpaka kadi ya shilingi 1,500. Bila hiyo hupati kadi na huduma ya kliniki”* [“Everything goes for money. The clinic card is available at Tsh. 1,500 [\$1.2 USD]. A pregnant woman has to pay such amount of money for normal clinical check-ups”.]<sup>426</sup>

The cost for health care can be prohibitive and it is a factor that prevents pregnant women from accessing health care. The LHRC supports the government’s plan to provide free health care to pregnant women, as this would increase the accessibility of health care for women and, potentially, reduce Tanzania’s maternal mortality rate.

#### **4.5 Right to Education**

The importance of education is recognized by the *African Charter on Human and Peoples’ Rights, 1981*, which guarantees the right to education.<sup>427</sup> This right is also contained in the *Constitution of Tanzania, 1977*, but it is an unenforceable right as it is not contained in the Bill of Rights.<sup>428</sup>

##### *Quantity of Education*

In an effort to enable people to realise their right to education, the Tanzanian government created the Primary Education Development Plan (PEDP) and the Secondary Education Development Plan (SEDP). The government started implementing the PEDP and the SEDP in 2002 and 2004 respectively.<sup>429</sup> The goals of the PEDP and the SEDP are to improve the quality and quantity of education available in Tanzania. The government has also incorporated education into MKUKUTA. In the 2008/2009 financial year, the government recognized education as a key sector and it increased the budgetary allocation to education by 32 percent.<sup>430</sup>

In 2008, the Tanzanian government made progress in the quantity of education available by abolishing enrollment fees, constructing and expanding schools, and increasing student enrollment. The increase in the number of schools and the enrollment rate for the period 2000 to 2007 are indicated below:

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<sup>426</sup> Response to LHRC opinion survey by interviewee in Morogoro district (Tanzania January to November 2008).

<sup>427</sup> Art. 17 of the *African Charter on Human and Peoples’ Rights, 1981*.

<sup>428</sup> Art. 11(2) of the *Constitution of Tanzania, 1977*.

<sup>429</sup> Human Rights Report of 2007, *supra*, at p. 52.

<sup>430</sup> G. Obulutsa ‘Tanzania budget up 19 pct in ‘08/09, leans less on aid’ *Reuters* (News article 12 June 2008) <<http://africa.reuters.com>> accessed 14 November 2008.

	<b>Pre-Primary Schools</b>	<b>Primary Schools</b>	<b>Secondary Schools</b>
<b>Number of Schools (2005)</b>	638,591	14,257	1,745
<b>Number of Schools (2007)</b>	795,011	15,624	3,485
<b>Enrollment (2000)</b>	554,835 (2004)	4,370,000	261,951
<b>Enrollment (2007)</b>	873,981	8,410,094	1,222,403

**Source:** Written response to LHRC questionnaire by unnamed employee of HakiElimu (Dar es Salaam, Tanzania October 2008; S Mrindoko 'Kikwete government makes strides in education' *ThisDay* (Tanzania) (28 May 2008).

While the government has made strides in increasing the enrollment rate, there is worrying difference between the number of pupils enrolled at the primary school level and the number of pupils enrolled at the secondary school level. The difference between these two figures suggests that pupils are not transitioning between primary and secondary school. The failure to transition between these two levels of school can partially be attributed to the lack of facilities at the secondary school level. The lack of secondary school facilities limits the size of the cohort that can move onto secondary school. For instance, in the 2008 cohort of Standard Seven pupils, only 52.7 percent of pupils passed their Standard Seven examinations and, of these pupils, only 80.7 percent were selected to attend secondary school.<sup>431</sup> The remaining 19.3 percent of students who were eligible to attend secondary school were unable to do so due to a lack of secondary school facilities.

The quantity of education provided to children of a school going age in Tanzania is also affected by characteristics that are specific to a particular group of students, such as gender and disability. In the period 2002 to 2006, 14,036 female primary school pupils and 4,113 female secondary school pupils were withdrawn from school after becoming pregnant.<sup>432</sup> School authorities continue to expel pregnant schoolgirls.<sup>433</sup> The continuation of this practice can be partially attributed to the government's reluctance to introduce sex education and contraception into schools; and, concern that readmission of child mothers would be contrary to societal values and would encourage girls to engage in sexual activities.<sup>434</sup>

The expulsion of pregnant schoolgirls and the prevention of young mothers from resuming their education after giving birth contradict their right to education. Furthermore, this practice creates a category of girls who have limited life prospects, as

<sup>431</sup> J. Alipo '500,000 to join sec schools' *Daily News* (Tanzania) 23 December 200).

<sup>432</sup> 'TAMWA urges new PM to spearhead anti-graft drive' *The African* (Tanzania) 11 February 2008.

<sup>433</sup> There is no legislation that specifically provides for the expulsion of pregnant school girls. However, under the *Education (Expulsion and Exclusion of Pupils from Schools) Regulation, 2002*, G.N. No. 295 of 2002, S. 4, a pupil can be expelled for misbehaviour. This regulation could be used to justify the expulsion of pregnant schoolgirls on the grounds that getting pregnant is a type of misbehaviour.

<sup>434</sup> Written response to LHRC questionnaire by unnamed employee of HakiElimu (Dar es Salaam, Tanzania October 2008); 'Re-admission of pregnant girls opposed' *Daily News* (Tanzania) 13 September 200).

they are condemned by the government and their communities, they have low levels of education, they have limited employment prospects, and they may be more susceptible to certain health problems.<sup>435</sup>

The LHRC recommends that the government take pro-active steps to address the factors that lead to the pregnancy of school girls, such as poverty, the lack of dormitories at schools, and the long distances that children need to travel to get to school. All of these factors put school girls in a position in which they are vulnerable to sexual abuse. The LHRC also recommends that the government discourage the practice of expelling pregnant schoolgirls and encourage these children to return to school after giving birth. There is a need to recognize that the sexual abuse and impregnation of school girls is a result of poverty and sexual predation by men, it is not because of the moral weakness of school girls. The government should make it clear that the sexual abuse of school girls is a criminal offence, the fault of which lies with the abuser, rather than the school girl. In line with this reasoning, the LHRC supports the government's move to use DNA testing to speed up the investigation of cases involving the impregnation of school girls and the prosecution of men who impregnate school girls.<sup>436</sup>

Similarly, disabled children face various challenges in realizing their right to education.

It is estimated that only 0.3 percent of children enrolled in primary school are disabled, a much lower percentage than the expected population of school-age children with disabilities.<sup>437</sup> Overall, it is estimated there are 8,583 children with special needs who are enrolled in school, of which 4,125 are girls while 4,458 are boys.<sup>438</sup> In addition to the low enrollment rate of children with disabilities, it appears that a high number of disabled children who are enrolled in school drop out of school. A survey of ten schools located in the Dodoma and Morogoro regions indicated that over a period of three years, the number of disabled children who were enrolled in school dropped from 608 to 317. One of the primary reasons for disabled children dropping out of school was poverty.<sup>439</sup>

In order to encourage the increased enrollment of disabled children into school, it is suggested that the government embark on a program encouraging parents and communities to send disabled children to school.<sup>440</sup> Furthermore, the government should promote a policy of inclusive education for disabled children and provide training to teachers on inclusive education.<sup>441</sup> Inclusive education encourages the integration of disabled children with the general school population and is aimed at the development and

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<sup>435</sup> Written response to LHRC questionnaire by unnamed employee of HakiElimu (Dar es Salaam, Tanzania October 2008); Unnamed reporter 'Girl students speak out on pregnancies' *The African* (Tanzania) 12 February 2008.

<sup>436</sup> L. Shekigenda 'Kikwete instructs DNA tests to apprehend men impregnating school girls' *The Guardian* (Tanzania) 21 July 2008.

<sup>437</sup> Poverty and Human Development Report 2007, *supra*, at p. 25.

<sup>438</sup> Statement of Mr. Leonard Musaroche, Education Ministry Acting Chief Educational Officer quoted in G Sembony 'Address Teacher Shortage, says Education Stakeholders' *The Citizen* (Tanzania) 1 September 2008.

<sup>439</sup> Y. Chiwambo and E Natuhwera 'Disabled Kids Leave School' *The Citizen* (Tanzania) 9 August 2008.

<sup>440</sup> Written response to LHRC questionnaire by unnamed employee of HakiElimu (Dar es Salaam, Tanzania October 2008).

<sup>441</sup> *Ibid.*

education of children to the best of their respective abilities. As a part of developing an inclusive education program, the government should educate teachers about the value of providing education to all children, including those with disabilities. This educational program would help to reduce biases, such as the one expressed by a teacher in Geita to a disabled child that “*nimechoka kukufundisha toto lenye viungo na mtu nusu ...*” [“I am tired of teaching this imperfect child”].<sup>442</sup> Furthermore, the government should address the root cause of poverty and examine the disproportional effect that poverty has on families with disabled children.

### *Quality of Education*

Implementation of the PEDP and the SEDP has also improved the quality of education. For instance, through the PEDP and the SEDP, teachers have been able to upgrade their qualifications, schools have been provided with capital grants for the purchase of teaching materials, and teachers’ resource centres have been established.<sup>443</sup> From a quantitative perspective, there has been an increase in the number of students passing their Standard Seven examinations.<sup>444</sup> However, the recently released results for the 2008 Standard Seven examinations indicates there has been a drop in the number of students passing these examinations, as pupils are failing Mathematics and English.<sup>445</sup> This raises concern about the quality of education that is being provided.

There are a number of factors that continue to undermine the quality of education. For instance, there is a general lack of resources in schools and, in particular:

- a lack of textbooks. At one school, it was reported that up to 20 children share one textbook that has missing and torn pages;<sup>446</sup>
- an inadequate number of classrooms. It was reported that there were 120 children to a classroom at a primary school in Lindi,<sup>447</sup> and,
- a lack of computers.<sup>448</sup>

An example of the impact of the lack of resources on the quality of education is the Mkokozi Primary school located in Mkuranga District. This school has a deficit of eight classrooms, 22 teachers’ houses, 16 latrines and over 250 school desks. In July 2008, it was reported that the classrooms were dilapidated, some children were being taught

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<sup>442</sup> Response to LHRC opinion survey by interviewee in Geita district (Tanzania January to November 2008).

<sup>443</sup> Written response to LHRC questionnaire by unnamed employee of HakiElimu (Dar es Salaam, Tanzania October 2008).

<sup>444</sup> *Ibid.*

<sup>445</sup> J. Alipo ‘500,000 to join sec schools’ *Daily News* (Tanzania) 23 December 2008.

<sup>446</sup> Research and Analysis Working Group, United Republic of Tanzania ‘Tanzanian Children’s Perceptions of Education and Their Role in Society: Views of the Children 2007’ (Report Tanzania 2008) (Views of the Children 2007). <<http://www.repoa.or.tz>> accessed 14 November 2008 (Views of the Children 2007), at p.12.

<sup>447</sup> *Ibid.* at p. 11.

<sup>448</sup> Research and Analysis Working Group, United Republic of Tanzania ‘Views of the People 2007’ (Report Dar es Salaam, Tanzania December 2007) (Views of the People 2007), at pp. 30 and 31.

under a cashew nut tree, there were more than 100 children per class and up to five children were sharing a desk. The Director of Primary Education, Euphrazia Ntukamazina, indicated that the government would take action to improve the situation. She also stated that there are “many schools in this country that are in the same situation”.<sup>449</sup>

The lack of resources may also affect the quality of teaching, as teachers may become demotivated when they are not compensated in a timely manner for their work they have done. In addition, the actions taken by teachers to enforce their rights may affect the quality of education. For instance, in 2008, teachers planned various strikes and engaged in a go-slow. These actions were taken due to a dispute between the government and teachers about the promotion of teachers, payment arrears, the re-registration of teachers who were removed from the payroll, the establishment of the Teachers Joint Staff Council and the involvement of the union in assessing teachers' claims.<sup>450</sup> In October 2008, the Tanzania Teachers Union organised a strike to compel the government to pay the outstanding amounts.<sup>451</sup> However, on 13 October 2008, the High Court's Labour Division issued an injunction prohibiting the strike on the basis that it would cause irreparable harm. Instead of the planned strike, teachers engaged in a one-day go-slow. The go-slow negatively impacted on children's right to education, as there was a marked decline in the quality of teaching on that day. The government started paying the teachers claims in November 2008.<sup>452</sup>

Another factor impacting on the quality of teaching is the training of teachers. In Tanzania, there is a shortage of qualified teachers at both the primary and secondary school levels.<sup>453</sup> The government responded to this shortage by introducing a programme in late 2007 under which Form Six leavers could become licensed secondary school teachers after participating in a one month crash course at a teachers' college.<sup>454</sup> However, the Tanzania Teachers Union expressed the concern that this programme would result in under-qualified teachers being employed in schools and lead to a decline in the quality of education in Tanzania.<sup>455</sup> Their concern is well founded, as poorly trained teachers may lack the knowledge and the skills necessary to teach effectively.

Another concern about the quality of teachers being produced in Tanzania is the report from the National Examination Council of Tanzania that six percent of the candidates who sat for the Grade A Certificate in 2008 had used fake or forged academic certificates to enroll in teachers' college.<sup>456</sup> The use of forged certificates could result in teachers

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<sup>449</sup> D. Mwita 'Govt to come to the aid of Mkokozi Primary school' *ThisDay* (Tanzania) 30 July 2008.

<sup>450</sup> Z. Ubwani and D Kishombo 'Teachers vow to press ahead with walkout' *The Citizen* (Tanzania) 13 October 2008.

<sup>451</sup> 'Teachers' go-slow paralyses learning countrywide' *The Citizen* (Tanzania) 16 October 2008.

<sup>452</sup> A. Saiboko '7bn- worth teachers' claims rejected' *Daily News* (Tanzania) 21 December 2008.

<sup>453</sup> V. Mnyanyika 'Govt turns to cell phones to tackle teacher shortage' *The Citizen* (Tanzania) 28 July 2008. In secondary schools, there is a shortage of 40,000 teachers.

<sup>454</sup> F. Peter 'Teachers' crash course plan harmful, govt told' *The Guardian* (Tanzania) 5 October 2007.

<sup>455</sup> *Ibid.*

<sup>456</sup> P. Machira 'Massive forgery in Teachers Colleges' *The Citizen* (Tanzania) 2 August 2008. According to the National Examination Council of Tanzania, 529 of the 8,421 candidates who sat for the national

who are under-qualified entering the education system. It also brings into question the ethics of these future teachers and how a lack of ethics may influence their performance of their professional obligations.

The quality of education is also affected by the atmosphere in which education occurs. In this regard, the quality of education can be enhanced by creating an environment in which students feel like they are able to participate in their education without fear of corporal punishment or other measures that demean or humiliate them.<sup>457</sup> Corporal punishment continues to be used in Tanzanian schools. In a survey conducted in 2007, 80 percent of students indicated that their teachers used corporal punishment.<sup>458</sup> Furthermore, children indicated that they have difficulty learning from a teacher when they feared that the teacher would use corporal punishment.<sup>459</sup>

The use of corporal punishment in schools is governed by the *Education (Corporal Punishment) Regulations, 2002*, which provide that only a head teacher or an agent of the head teacher can strike a pupil on the hands or buttocks for serious breaches of school discipline.<sup>460</sup> However, serious breaches of this regulation occur. For instance, in 2008, Edith Bamwenda, a teacher at Chalambe Primary School in Dar es Salaam, was charged with causing seriously bodily harm to an 11-year old student who was beaten after being late for school.<sup>461</sup> Corporal punishment can also create conflict between students and teachers. For example, a riot occurred at Kantalamba Boys School in Sumbawanga town in the Rukwa region in protest against the public caning of a fellow student. School authorities requested assistance from the police to control the riot, which led to the students being tear-gassed and the death of three students.<sup>462</sup> The LHRC advocates for a ban on the use of corporal punishment and all other forms of physical punishment in schools. It is the LHRC's position that corporal punishment is demeaning and infringes a child's right to dignity.

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Grade 'A' teacher's certificate in 2008 had used fake or forged certificates to register in a teacher's college. See: Ministry of Education and Vocational Training 'Education Directorate – Teacher Education' <<http://www.moe.go.tz>> accessed 18 February 2009. A Grade A certificate is obtained on successful completion of a two-year course for students who passed their O levels at a division III level and entitles the holder to teach all seven grades of primary education. During the two-year course, students spend one year at teachers' college and the second year in a primary school where the student teacher will obtain practice in teaching.

<sup>457</sup> HakiElimu 'Redefining Quality Education in Tanzania: From Inputs to Capabilities' (HakiElimu, Dar es Salaam October 2007) at pp. 7 and 8.

<sup>458</sup> Views of the People 2007, *supra*, at p. 32.

<sup>459</sup> Views of the Children 2007, *supra*, at p. 13.

<sup>460</sup> Ss. 2 of the *Education (Corporal Punishment) Regulations, 2002*, G.N. No. 294 of 2002.

<sup>461</sup> S. Mwishehe 'unknown headline' *Majira* (Tanzania) 13 June 2008.

<sup>462</sup> P. Siyame 'Body of 3<sup>rd</sup> student retrieved from Lwiche River' *Sunday News* (Tanzania) 4 May 2008.

## Chapter Five

### Rights of Vulnerable Groups

#### 5.0 Introduction

There are certain groups that tend to be marginalized, disenfranchised or disempowered by society because of characteristics that are unique to that group. These groups tend to be more vulnerable to human rights violations and less able to enforce their human rights. In Tanzania, there are six groups of people that can be classified as vulnerable groups: women, children, disabled persons, refugees, elderly persons; and minorities.

At the national level, there is some legislation that specifically addresses the rights of these groups. The most important provision regarding these vulnerable groups is the prohibition against discrimination that is contained in the *Constitution of Tanzania, 1977*.<sup>463</sup> In the *Constitution of Tanzania, 1977*, the term “discriminate”

means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantages outside the specified conditions or the prescribed necessary qualifications...<sup>464</sup>

It is important to note that the term “discriminate” does not include a prohibition against discrimination on the basis of age, or mental or physical disability. The LHRC recommends that the *Constitution of Tanzania, 1977* be amended to prohibit discrimination on these grounds. Furthermore, the LHRC recommends that the *Constitution’s* definition of “discriminate” be broadened to include direct, as well as, indirect discrimination. Indirect discrimination is when a person’s act is not discriminatory on its face, but it is discriminatory in its effect.

#### 5.1 Women’s Rights

The core international instrument on women’s rights is the *Convention on the Elimination of all Forms of Discrimination against Women, 1979*.<sup>465</sup> The *Convention on the Elimination of all Forms of Discrimination against Women, 1979* requires governments to ensure that women are not discriminated against in any sphere of life, whether public

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<sup>463</sup> Art. 13 of the *Constitution of Tanzania, 1977*.

<sup>464</sup> Art. 13(5) of the *Constitution of Tanzania, 1977*.

<sup>465</sup> Adopted December 18, 1979, entered into force September 3, 1981, ratified by Tanzania 20 August 1985) 1249 UNTS 13.

or private.<sup>466</sup> The prohibition against discrimination on the basis of gender is contained in a number of other international and regional instruments to which Tanzania is a signatory, such as the *International Covenant on Civil and Political Rights, 1966*, the *African Charter on Human and Peoples' Rights, 1981* and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2000*.<sup>467</sup> In 2008, SADC also adopted the *Gender and Development Protocol*.<sup>468</sup> The *Constitution, 1977* explicitly prohibits discrimination on the basis of gender.<sup>469</sup>

Despite the various international, regional and national legal instruments guaranteeing women's right, when a survey respondent from the Songea district was asked about the situation of women in Tanzania, she said:

*“Unyanyasaji wa wanawake unafanywa kwa njia nyingi. Kwa mfano, kuzalishwa watoto wengi; kufanyishwa kazi kuliko wanaume; kubakwa; kupigwa; kudharauliwa; na kutopewa elimu sawia na wanaume”* [“There are various ways in which women are mistreated. For instance, they are forced to have many children; do harder work than men; raped; assaulted; ignored; and denied an equal opportunity to be educated”.]<sup>470</sup>

As evident from the quote set out above, women still experience discrimination in Tanzania and they are vulnerable to human rights violations. Some of this discrimination stems from cultural practices and societal attitudes that are gender-biased, while some discrimination is as a result of laws that are discriminatory either in themselves or in their effect. This section will examine some of the key areas in which women's human rights are violated, or in which there is discrimination against women.

### **5.1.1. Laws discriminating against Women**

Contrary to Article 13 of the *Constitution of Tanzania, 1977*, there are a number of Tanzanian laws that are discriminatory either in themselves or in their effect. There is the need to amend these laws in order to protect women's rights and to remove provisions that are discriminatory. This section considers some of the laws that need to be revised.

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<sup>466</sup> For instance, in the *Convention on the Elimination of all Forms of Discrimination against Women, 1979*, *ibid.*, discrimination is prohibited in areas such as: in political or public life as per Art. 7; in the workplace as per Art. 11; and, in matters relating to marriage and family relations as per Art. 16.

<sup>467</sup> Art. 4 of the *International Covenant on Civil and Political Rights, 1966*; Art. 18 of the *African Charter on Human and Peoples' Rights, 1981*; Art. 2 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2000*.

<sup>468</sup> K. Madibana 'SADC leaders will not criminalize marital rape' *Sunday Standard* (Gaborone 31 August 2008) <<http://www.sundaystandard.info>> accessed 10 December 2008.

<sup>469</sup> Art. 12 of the *Constitution of Tanzania, 1977*.

<sup>470</sup> Response to LHRC opinion survey by interviewee in Songea district (Tanzania January to November 2008).

In mainland Tanzania, there are two acts that govern marriage and family matters, the *Law of Marriage Act, 1971* and the *Affiliation Act, 1949*.<sup>471</sup> Certain provisions of these Acts are discriminatory either in themselves or in their effect.

Marriage in Tanzania is governed by the *Law of Marriage Act* and religious customary law. The *Law of Marriage Act* provides that a marriage can be monogamous or polygamous where in a polygamous union, a man may be married to more than one woman.<sup>472</sup> However, a woman is prohibited from being married to more than one man at a time.<sup>473</sup> While polygamy is a part of the culture of Tanzania, it is a practice that supports the societal perception that women are subservient and that a man entitled to the benefit of more than one wife. The LHRC is in agreement with the recommendation of the Convention on the Elimination of all Forms of Discrimination against Women Committee that polygamy should be eliminated in Tanzania.<sup>474</sup>

The other issue arising in relation to marriage is the difference in the legal age of marriage for men and women. The *Law of Marriage Act* provides that a man cannot be married before attaining the age of 18, while a woman cannot be married before the age of 15 years.<sup>475</sup> A reading of the *Penal Code* suggests that a woman can actually be married before they reach the age of 15 years. The *Penal Code* states:

...shall not render it an offence for any person of African or Asiatic descent to marry or to permit the marriage of a woman under the age fifteen years in accordance with the custom of the tribe or the religion where it is not intended that the marriage be consummated before the woman attains the age of fifteen years...<sup>476</sup>

The provisions in the *Law of Marriage Act* and the *Penal Code* are discriminatory, as they make a clear distinction between men and women in terms of their age of marriage. Furthermore, they are contrary to the *African Charter on the Rights and Welfare of the Child, 1990*, which provides that:

[c]hild marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years...<sup>477</sup>

This distinction between men and women allows for the early marriage of girls. For instance, in Ilkereiyen Village in the Kisongo area in the Dodoma region, Logoilek Shiwawa allegedly planned to marry his 11-year old daughter, Felister Logoilek, to a 50-

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<sup>471</sup> Cap. 278, R.E. 2002.

<sup>472</sup> Ss. 9 and 10 of the *Law of Marriage Act, 1971*. .

<sup>473</sup> S. 15 of the *Law of Marriage Act, 1971*.

<sup>474</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, at p. 14.

<sup>475</sup> S. 13 of the *Law of Marriage Act, 1971*.

<sup>476</sup> S. 138 of the *Penal Code, Cap. 16*. This provision of the *Penal Code* pertains to the defilement of a woman by her husband.

<sup>477</sup> Art. 21(2) of the *African Charter on the Rights and Welfare of the Child, 1990*.

year old suitor who had paid a dowry for her.<sup>478</sup> Early marriages can have a negative impact on the long term prospects of girls, as they often do not complete their education, it is likely that these girls will become mothers at a young age, and it supports the perpetuation of gender power imbalances that already exist in society.

The *Law of Marriage Act* also addresses the rights and obligations of parties upon the dissolution of a marriage. One of the areas that it addresses is spousal support. A woman is entitled to spousal support when there are special circumstances.<sup>479</sup> What constitutes “special circumstances” is not addressed by the *Law of Marriage Act* or the case law. In the event that a court does order spousal support, the quantum of this support is determined on a needs and means basis that takes into account the degree of responsibility of each party for the breakdown of the marriage, and the customs of the community to which the parties belong.<sup>480</sup> The manner in which the quantum of spousal support is determined does not take into account the often greater negative impact of a marriage on a woman. For instance, a woman may be prevented from pursuing her education or certain economic opportunities because of her obligations to her family or traditional conceptions about a woman’s role in society. In addition, it is inappropriate for the court to take into account the customs of a community when ordering spousal support, particularly as these customs are often patriarchal and do not favour women’s rights.

Child support for a child born in wedlock is addressed by the *Law of Marriage Act*. Under the *Law of Marriage Act*, a man has the duty to maintain his children who are under the age of 18 years.<sup>481</sup> The quantum of the maintenance is the amount that is reasonable given the man’s means and station in life to provide accommodation, clothing, food and education to the child.<sup>482</sup> In contrast, child support for a child born out of wedlock is considered by the *Affiliation Act, 1949*.<sup>483</sup>

The *Affiliation Act* provides for the payment of Tsh100 per month for the maintenance and education of the child.<sup>484</sup> The amount set out in the *Affiliation Act* is wholly inadequate to support a child. As a result, the economic burden of raising the child is borne almost entirely by the mother of the child, effectively punishing her for having a child out of wedlock. A man may apply to court to have a child support order made under the *Affiliation Act* vacated, if a woman remarries.<sup>485</sup> This provision allows a man to completely abdicate any responsibility to the child. The differences in the child support provisions of the *Law of Marriage Act* and the *Affiliation Act* indicates a clear discrimination against children born out of wedlock and it is inappropriate, as the child’s opportunities in life may be handicapped due to insufficient monetary resources. The provisions regarding child support that are contained in these two acts should be

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<sup>478</sup> V. Marc ‘School girl flees home to beat forced marriage’ *The African* (Tanzania) 25 January 2008.

<sup>479</sup> S. 115 of the *Law of Marriage Act, 1971*.

<sup>480</sup> S. 115 of the *Law of Marriage Act, 1971*.

<sup>481</sup> S. 129 of the *Law of Marriage Act, 1971*.

<sup>482</sup> S. 129 of the *Law of Marriage Act, 1971*.

<sup>483</sup> S. 5 of the *Affiliation Act, 1949*.

<sup>484</sup> S. 5 of the *Affiliation Act, 1949*.

<sup>485</sup> S. 6 of the *Affiliation Act, 1949*.

harmonised. In the alternative, if the amount of child support continues to be set in the *Affiliation Act*, then this amount should be reviewed and the Act amended on a regular basis. This process would ensure that the amount of child support would keep pace with changes in the cost of living and inflation.

In 2008, the Minister for Community Development, Gender and Children, Margaret Sitta made it clear that laws that undermine the rights of women and children should be wiped out as a matter of priority.<sup>486</sup> MPs were also called upon to play a role in amending outdated laws that do not reflect the needs and demands of contemporary society, such as the *Law of Marriage Act* and the *Affiliation Act*.<sup>487</sup> However, there have been plans to amend various discriminatory laws, such as the two laws discussed above, for approximately the past 15 years with no result.<sup>488</sup> The LHRC implores the government to amend these laws so that they do not discriminate against women and to make these amendments in a timely fashion.

### 5.1.2. Female Genital Mutilation

Female genital mutilation (FGM) is defined as all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural or other non-therapeutic reasons.<sup>489</sup> FGM is practiced in Tanzania and, in particular, it is practiced in the regions of Arusha, Dodoma, Kilimanjaro, Kigoma, Manyara, Mara and Morogoro.<sup>490</sup> Between 1995 and 2005, the percentage of women and girls who underwent FGM in Tanzania declined from 18 percent to 15 percent.<sup>491</sup> However, as communities are reluctant to discuss FGM, it is difficult to provide accurate statistics on the number of women and girls who currently undergo FGM.<sup>492</sup> What is certain is that FGM continues to be practiced in Tanzania.

From a legislative perspective, the practice of FGM is prohibited at the regional level by the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2000*, which calls for the elimination of practices that are harmful to women, including FGM.<sup>493</sup> FGM was also considered by the UN General Assembly in the *Declaration on the Elimination of Violence against Women*, which exhorts states to eliminate gender-based violence (GBV), including FGM.<sup>494</sup> This Declaration also

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<sup>486</sup> A. Robi and M. Gwera 'Govt ready to revise laws oppressive to women – JK' *Sunday News* (Tanzania) 25 May 2008.

<sup>487</sup> D. Stephen 'Amend bad laws, MP told' *Daily News* (Tanzania) 23 January 2008.

<sup>488</sup> Human Rights Report of 2007, *supra*, at p. 60.

<sup>489</sup> LHRC, 'Female Genital Mutilation: A Human Rights Abuse veiled in customs and traditions, A Report on the research into the Practice of FGM in Tanzania' (Report Tanzania August 1999), at p. 11.

<sup>490</sup> Human Rights Report of 2007, *supra*, at p. 63.

<sup>491</sup> N. Samwel 'Gender minister says FGM cases on the decline' *Daily News* (Tanzania) 17 June 2008.

<sup>492</sup> Human Rights Report of 2007, *supra*, at p. 4.

<sup>493</sup> Art. 5 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2000*.

<sup>494</sup> Arts. 1, 2 and 4 of the Declaration on the Elimination of Violence against Women of 1993. UNGA Res 48/104, UN Doc A/48/49.

affirms the principles that although a practice that results in GBV may be customary, traditional or based on religion, this does not justify the occurrence of this practice.<sup>495</sup>

In an attempt to address FGM in Tanzania, the government adopted a *National Plan of Action to Combat FGM (2001- 2015)* and it enacted the *Sexual Offences Special Provisions Act (SOSPA)* in 1998.<sup>496</sup> It criminalizes the practice of FGM by amending the *Penal Code, 1930* by include the following provision:

Any person who, having the custody, charge or care of any person under eighteen years of age...causes female genital mutilation or carries or causes to be carried out female genital mutilation...commits the offence of cruelty to children.<sup>497</sup>

This above-noted *Penal Code, 1930* provision has been criticised because it does not apply to persons over the age of 18 years, who may undergo FGM unwillingly or due to family or societal pressure. Furthermore, this provision does not contain a minimum sentence, which has resulted in courts exercising their discretion to impose marginal sentences on offenders.<sup>498</sup> We recommend that this provision of the *Penal Code* be amended to address these two criticisms.

The enforcement of this provision has been difficult due to insufficient knowledge of the law, inadequate police resources, the victim's reluctance to testify against family and community members, fear of reprisals from FGM practitioners, corruption and poor police investigation.<sup>499</sup> For instance, it has been reported that the police, ward executive officers and village executive officers accept bribes to not pursue FGM cases.<sup>500</sup> In addition, authorities may choose not to pursue an FGM case. For instance, it was reported that police in the Babati District, Manyara Region did not follow-up on a report that a 12 year-old girl had been circumcised, or take any actions against the local circumcisor.<sup>501</sup> In order to reduce FGM, it is important for police to be proactive in enforcing the *Penal Code* and to react to information regarding instances of FGM. The police's failure to enforce the law will encourage people to continue with this practice and create a culture of impunity.

However, fear of being prosecuted under the *Penal Code* has caused a shift in the manner in which FGM is practiced. In some areas, such as the Singida and Dodoma regions,

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<sup>495</sup> *Ibid.* at Art. 4.

<sup>496</sup> It has now been incorporated under Part XV and XVI of the Penal Code, Cap. 16 (1930).

<sup>497</sup> S. 169A of the *Penal Code, Ca. 16*.

<sup>498</sup> A. Kaniki 'Children protection against FGM' *Sunday Citizen* (Tanzania) 25 May 2008.

<sup>499</sup> Immigration and Refugee Board of Canada 'Tanzania: The practice of female genital mutilation (FGM); state protection available to victims' (Report Ottawa 14 August 2008) <<http://www.unhcr.org>> accessed 18 November 2008.

<sup>500</sup> AFNET 'Minutes of meeting of Anti-FGM Coalition' (Meeting minutes Dodoma, Tanzania 6 February 2008).

<sup>501</sup> E. Masanja 'Activists accuse govt of apathy in FGM fight' *The Citizen* (Tanzania) 18 May 2008.

people have started circumcising infants in an effort to avoid detection.<sup>502</sup> Infants are being circumcised at birth by midwives who “poke their fingers, nails and incisive objects into infants’ clitoris as soon as they are born”.<sup>503</sup> The circumcision of infants can lead to psychological and health problems, including damage to the bladder, infections and even death, if there is excessive bleeding. In response to this trend, health workers in the Singida Region have embarked on a campaign to check whether infants have been circumcised when infants are presented at clinics for routine check-ups.<sup>504</sup> Parents of circumcised infants are subject to prosecution.<sup>505</sup>

The other trend that emerged in 2008 in the context of FGM was the voluntary circumcision of elderly women. Elderly women are willingly undergoing circumcision so that they can sell the part of their genitalia that was circumcised off to miners.<sup>506</sup> The miners believe that when these parts of the genitalia are used in witchcraft, it will increase their success in obtaining minerals.<sup>507</sup> While the FGM of elderly women is voluntary, it may still negatively affect the health of these women. It also points to disturbing beliefs in witchcraft.

In the past six years, a number of women who are *ngaribas* or circumcisors have voluntarily stopped the practice of FGM. In the period 2002 to 2007, 380 circumcisors voluntarily gave up their practice of circumcising girls and women. Most of these practitioners originated from the regions of Arusha, Dodoma, Manyara and Mara.<sup>508</sup> This trend continued in 2008. For instance, in the Monduli district, Arusha region, a group of 20 circumcisors agreed to stop practicing FGM.<sup>509</sup> These circumcisors appealed to the government to assist them to find an alternative source of income, as these women were practicing FGM as a means of supporting themselves. The LHRC encourages the government to fund a program aimed at creating jobs for elderly women so that these women have a means of generating income that is unrelated to FGM.

There is a need for the government to educate people about the laws regarding FGM and, in particular, the criminalization of the practice of FGM and the negative effects that FGM has on a person’s health. Furthermore, the government needs to sensitize law enforcement officers and judicial authorities about FGM and the importance of enforcing the applicable laws. It is imperative that law enforcement officers and judicial authorities strictly enforce the FGM provisions of the *Penal Code*.

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<sup>502</sup> R. Mwalongo ‘Coalition says infant genital mutilation worst human rights violation’ *The Guardian* (Tanzania) 7 February 2008.

<sup>503</sup> Z. Shame ‘New form of female genital mutilation creeping in – NGO’ *The Guardian* (Tanzania) 27 November 2008. This statement was made by Severa Massawa, a member of the executive committee of the Network Against Female Genital Mutilation.

<sup>504</sup> ‘Health workers now diagnose genitally mutilated infants’ *The Guardian* (Tanzania) 15 December 2008.

<sup>505</sup> *Ibid.*

<sup>506</sup> R. Mwalongo ‘Women undergoing FGM to sell parts to miners- study’ *The Guardian* (Tanzania) 8 February 2008.

<sup>507</sup> *Ibid.*

<sup>508</sup> ‘Over 300 FGM practitioners down tools, says AFNET’ *The African* (Tanzania) 27 January 2008.

<sup>509</sup> B. Mwankina ‘20 female circumcisors down tools’ *ThisDay* (Tanzania) 26 March 2008.

### 5.1.3. Gender-based Violence

The UN Declaration on the Elimination of Violence against Women, 1993 offered the first official definition of GBV stating that it was any violence that would result or likely result in physical, sexual or psychological harm or suffering to women, whether in public or in private.<sup>510</sup> GBV includes acts such as spousal battery; sexual abuse; rape, including marital rape; FGM; sexual harassment at work; and, trafficking in women.<sup>511</sup> In Tanzania, GBV continues to be a widespread problem, as shown by the statistic that 6,531 cases of violence against women were reported in Tanzania in 2007.<sup>512</sup>

Chapter 5.1.2. of this report addresses the issue of FGM. This part of the report will focus on the issues of spousal and non-spousal battery, sexual violence and trafficking in women.

#### *Spousal and non-spousal battery*

Spousal and non-spousal battery is widespread in Tanzania. In November 2007, it was reported that 50 percent of women in Tanzania were beaten on a daily basis by their partners.<sup>513</sup> For instance, Scholastica Ramadhani reported being beaten by her husband on a regular basis before he threw her out of the house.<sup>514</sup> In addition, 25 percent of Tanzanian women interviewed in a 2006 study reported being subject to non-spousal battery.<sup>515</sup> A number of incidents of non-spousal battery were also reported in the media. For instance, a 35-year old woman died at the Bunda District Hospital from injuries she sustained after being beaten by a male relative;<sup>516</sup> and a 15-year old girl had her ears cut off by her father-in-law after there was a dispute between her family and her in-laws.<sup>517</sup>

Spousal and non-spousal battery can result in injuries that range from mild to severe. A 2006 WHO study found that 30 percent of victims of spousal battery ended up with serious injuries due to severe beatings.<sup>518</sup> Battery is not limited to beatings, rather it refers to contact between two persons that causes one person bodily harm. Kulwa Samwel is a good example of spousal battery that results in bodily harm. Ms. Samwel's partner seriously injured her by pouring acid over her face and body.<sup>519</sup>

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<sup>510</sup> UN Population Fund 'State of the World Population 2005' (Report New York 2005) <<http://www.unfpa.org>> accessed 1 December 2008.

<sup>511</sup> *Ibid.*

<sup>512</sup> H. Lazaro 'Violence against Women on the rise' *Arusha Times* (Tanzania) 29 November 2008.

<sup>513</sup> Immigration and Refugee Board of Canada 'Tanzania: Situation of women victims of domestic violence, including legislation and the availability of protection and support services' (Report Ottawa 15 July 2008) <<http://www.unhcr.org>> accessed 21 October 2008.

<sup>514</sup> M. Mwanatongoni 'Women silent on domestic violence' *The Guardian on Sunday* (Tanzania) 8 June 2008.

<sup>515</sup> 'Tanzania: Domestic Violence a serious concern' *IRIN* (20 April 2006), online: <<http://www.irinnews.org>> accessed 1 December 2008.

<sup>516</sup> M. Jacob 'Woman dies in land row' *Daily News* (Tanzania) 14 February 2008.

<sup>517</sup> A. Robi 'Discrimination against women persists despite efforts against it' *Daily News* (Tanzania) 11 June 2008.

<sup>518</sup> WHO 2006 *Supra*.

<sup>519</sup> LHRC, Report about Kulwa Samwel (Report Tanzania 8 May 2008).

One of the reasons for the high incidence of spousal battery is the existence of customs and traditional practices that condone the harassment and abuse of women.<sup>520</sup> Furthermore, spousal and non-spousal battery has become normalized in Tanzania. Research conducted in 2006 indicated that 60 percent of women believed that wife beating was acceptable.<sup>521</sup> This normalization and acceptance of spousal battery is a barrier to effectively dealing with spousal battery. Other barriers include the reluctance of women to report spousal battery due to cultural, social and family pressures. For instance, women are silent about spousal battery because they want to protect their children and their marriage, and they are threatened with further violence if they report the spousal battery.<sup>522</sup> Furthermore, women are concerned that their spouses will be jailed if they report spousal battery.<sup>523</sup>

In 2001, the Tanzanian government adopted a *National Plan of Action to Combat Violence Against Women and Children (2001 – 2015)*. However, the effective implementation of this plan has been hindered by inadequate funding and the lack of a comprehensive legal aid system that can be accessed by women.<sup>524</sup> In May 2008, the government took further steps to address spousal and non-spousal battery by endorsing the United Nation’s Development Fund for Women’s “Say No to Violence” campaign.<sup>525</sup> The government also encouraged women to speak out about spousal battery and to be proactive in protecting their rights.<sup>526</sup> In addressing GBV, the government announced its intention to amend laws that perpetuate GBV.<sup>527</sup> The LHRC would welcome such amendments and encourages the government to make these amendments as quickly as possible as they are long overdue. The LHRC is concerned that any potential amendments of laws that perpetuate GBV will be treated in the same manner as the amendments to the *Law of Marriage Act*. The government has been working on amendments to the *Law of Marriage Act* for the past 15 years.<sup>528</sup>

In an effort to address GBV, the LHRC recommends that the *Penal Code* be amended to include a specific provision regarding spousal battery. Alternatively, the *Law of Marriage Act* may be amended to address spousal battery. At present, the *Law of Marriage Act* provides that “no person has any right to inflict corporal punishment on his or her spouse”.<sup>529</sup> However, the Act does not provide a definition of what constitutes “corporal punishment”. This creates uncertainty about what actions are prohibited by the *Law of Marriage Act*. It is the LHRC’s position that the Act should be amended to

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<sup>520</sup> A. Robi ‘Discrimination against women persists despite efforts against it’ *Daily News* (Tanzania) 11 June 2008.

<sup>521</sup> Immigration and Refugee Board of Canada, *supra*. In contrast, 42 percent of men indicated that wife beating was acceptable.

<sup>522</sup> P. Mwangu ‘TAWLA says women must speak out’ *The Guardian on Sunday* (Tanzania) 8 June 2008.

<sup>523</sup> *Ibid*.

<sup>524</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, *supra*, at p. 6.

<sup>525</sup> ‘Violence against women is primitive and illegal’ *Sunday Citizen* (Tanzania) 25 May 2008.

<sup>526</sup> A. Robi and M. Gwera ‘Govt ready to revise laws oppressive to women – JK’ *Sunday News* (Tanzania) 25 May 2008.

<sup>527</sup> L. Kato ‘JK for new laws to check violence against women’ *The Citizen* (Tanzania) 25 May 2008.

<sup>528</sup> Human Rights Report of 2007, *supra*, at p. 60.

<sup>529</sup> S. 66 of the *Law of Marriage Act, 1971*.

clearly state that any verbal or physical abuse by one spouse of another spouse is prohibited.

### *Sexual violence*

Sexual violence in the forms of sexual abuse and rape are frequently reported in Tanzania. For instance, in the period January to October 2008, 196 cases of rape were reported to the police in the Arusha Region alone.<sup>530</sup> This number does not accurately reflect the incidence of rape in the region, as most rape cases go unreported and this is only one of 26 regions in Tanzania. The high incidence of sexual violence coupled with the inadequate sexual offence provisions of the *Penal Code* make girls and women vulnerable to sexual violence against which they have limited judicial recourse.

There are a number of sexual offence provisions in the *Penal Code* that do not adequately protect women from sexual violence. One such provision is the provision relating to rape. The rape provision only applies to non-consensual sexual intercourse between a man and a girl or woman, where the girl or woman is not the man's spouse or the man's separated spouse.<sup>531</sup> This provision does not apply to marital rape. The occurrence of marital rape was alluded to by a survey respondent from Bariadi district, Shinyanga region, who said:

“... wanawake pia tunalazimishwa tendo la ndoa na wanaume zetu, hata kama hatujisikii vizuri.” [“...women, we are also forced to have sexual intercourse with our husbands, even if we do not feel well”.]<sup>532</sup>

The explicit exclusion of marital rape from the rape provision of the *Penal Code* is unacceptable. The failure to include marital rape as offence in the *Penal Code* means that women are denied the protection of the law for sexual violence that occurs within a marriage. Furthermore, the lack of such an offence disempowers married women and enhances the power imbalance that exists between men and women, as a married man can fulfill his sexual needs with or without his wife's consent. The LHRC recommends that the government engages in a sensitisation campaign on the issue of marital rape and the government should start considering what, if any, legislative response it should have to the issue of marital rape.

### *Human Trafficking*

In May 2006, Tanzania ratified the *UN Convention against Transnational Organised Crime and, in particular, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*.<sup>533</sup> The Tanzanian government incorporated

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<sup>530</sup> H. Lazaro 'Violence against Women on the rise' *Arusha Times* (Tanzania) 29 November 2008.

<sup>531</sup> s. 130 of the *Penal Code, Cap. 16*.

<sup>532</sup> Response to LHRC opinion survey by interviewee in Bariadi district, Shinyanga region (Tanzania January to November 2008).

<sup>533</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, *supra*, at p. 7; *UN Convention against Transnational Organised Crime and, in particular, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, G.A. Res. 55/25 (adopted 15

this international instrument into its domestic legislation by enacting the *Anti-Trafficking in Persons Act, 2008*.<sup>534</sup> In an effort to increase the impact of this Act, legislators have called for increased public education about trafficking and the new law, and for the new law to be translated from English into Kiswahili.<sup>535</sup> In addition, 332 law enforcement officers were provided with specialized training on human trafficking and the government created an anti-human trafficking police unit.<sup>536</sup>

The *Anti-Trafficking in Persons Act* prohibits the trafficking of persons both domestically and internationally, and sets out various penalties for offences based on the trafficking of persons. The definitions of the offences contained in the Act have been criticised as trafficking appears to be equated with sexual exploitation, pornography and prostitution.<sup>537</sup> Furthermore, the offences contained in the Act do not include trafficking for labour. In addition, while the trafficking of children has been criminalized in this Act, the sale of children has not been criminalized.<sup>538</sup> The broadening of the offences set out in *Anti-Trafficking in Persons Act* would allow the government to address the problem of trafficking in a more comprehensive manner.

Currently, there is no official data on the trafficking of women in Tanzania.<sup>539</sup> However, anecdotal evidence suggests that the trafficking of women is occurring. For instance, in March 2008, Mwajita Simba reported to the LHRC that she had been kidnapped from her home in Arusha and brought to Dar es Salaam to work as a prostitute.<sup>540</sup> This anecdotal evidence also suggests that children are being trafficked within Tanzania. Occurrences of child trafficking were noted by a survey respondent from Songea district who stated:

*“Unakuta mtu anamchukua matoto kwa wazazi wake kwa kusema kuwa anampeleka shule kumbe anamtumia kama chombo cha kujiingizia kipato mf. Kuuza watoto wa kike kwa wanaume”* [You will find the situation that someone takes a child from his/her parents, saying that s/he takes the child for schooling but to the contrary, s/he uses the child as a means of income. For example, by selling girls to men”].<sup>541</sup>

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November 2000, entered into force 9 September 2003, ratified by Tanzania 24 May 2006) U.N. Doc. A/45/49 (Vol. I) (2001).

<sup>534</sup> *Anti-Trafficking in Persons Act, 2008*, No. 6 of 2008.

<sup>535</sup> T. Abdallah ‘Law to combat human trafficking in offing’ *Daily News* (Tanzania) 7 May 2008.

<sup>536</sup> L. Mukabana-Inzira ‘Human trafficking: A crime that should be tackled right from our homesteads’ *The Guardian* (Tanzania) 23 October 2008.

<sup>537</sup> NGO group for the Convention on the Rights of the Child ‘State Party Examination of Tanzania’s First Periodic Reports on the OPSC’ (15 September – 3 October 2008) 49<sup>th</sup> Session of the Committee on the Rights of the Child <<http://www.crin.org>> accessed 3 December 2008, at p. 3.

<sup>538</sup> *Ibid.* at p. 3.

<sup>539</sup> Statement by Margareth Sitta, Minister for Community Development, Gender and Children of the United Republic of Tanzania to the Committee on Elimination of Discrimination against Women (New York 11 July 2008).

<sup>540</sup> LHRC ‘Short Report on Fact Finding of Brothels’ (Report Tanzania 6 March 2008).

<sup>541</sup> Response to LHRC opinion survey by interviewee in Songea district (Tanzania January to November 2008).

The LHRC recommends that the government do research on trafficking in Tanzania in order to quantify the problem. This research should yield data that is segregated by age, sex and source, which would allow the Tanzanian government to develop a targeted strategy that addresses the issue of trafficking of women and children. After the research has been completed, the government should formulate and implement a policy that addresses trafficking.

#### 5.1.4. Women's Property Rights

Under the *Constitution of Tanzania, 1977*, every person in Tanzania is entitled to own property.<sup>542</sup> As mentioned in Chapter 4.2 of this report, a person's right to own property is governed by the provisions of the *Land Act (Supra)* and the *Village Land Act (Supra)*. Both of these Acts reversed discriminatory customary practices that negatively affected the rights of women to land and these Acts recognized the equal entitlement of men and women to own property.<sup>543</sup> Despite these Acts, there is concern that women are unable to realise the right to own land and other property due to a lack of awareness of these Act or how to enforce their rights.<sup>544</sup> Further sensitisation of women about their land rights is still necessary.

Discriminatory inheritance practices are a major barrier to female land ownership. In Tanzania, there are three systems of law that apply to inheritance:<sup>545</sup>

- Statutory law (the *Indian Succession Act 1865*), which applies to Christians and those of European origin. This law provides that where a deceased has children, one-third of the estate will pass to his widow and two-thirds will pass to the children. If there are no children, then the widow is entitled to half of the estate with the other half passes to the deceased's parents or blood relatives;
- Islamic law, which applies to Muslims. Islamic law provides for widows to receive a base amount of inheritance. Specifically a widow will receive one-eighth of the deceased's property if there is issue of the marriage and one-fourth of the deceased's property if there is no issue; and,
- Customary laws, which are recognized by the *Customary Law (Declaration) Order*. Under most customary law, a widow cannot inherit the house or real property of the deceased. If a widow wants to rely on statutory law, rather than customary law, she has to show that she has not lived according to customs and tradition.<sup>546</sup>

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<sup>542</sup> Art. 24 of the *Constitution of Tanzania, 1977*.

<sup>543</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, *supra*, at p. 12; S.3 of the *Land Act, 1999*.

<sup>544</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, *supra*, at p. 12.

<sup>545</sup> These three systems of law can co-exist by virtue of the *Judicature and Application of Laws Act, 1920*, Cap. 358, R.E. 2002.

<sup>546</sup> Human Rights Report of 2007, *supra*, at pp. 59 and 60; LHRC 'Monitors Capacity Building Training Report' (Report Tanzania 18 June 2008) 19; HelpAge International Tanzania 'NGO Thematic Shadow Report on Older Women's Rights in Tanzania submitted to the Committee on the Elimination of All Forms of Discrimination Against Women' (April 2008) <<http://www2.ohchr.org>> accessed 2 December 2008 (NGO Thematic Shadow Report), at p. 10.

The government has stated that it is currently reviewing discriminatory laws that prevent women from inheriting land and other types of property.<sup>547</sup> In the interim, discriminatory laws, such as the *Local Customary Law (Declaration) Order, No. 4*, remain in effect.<sup>548</sup> This Order denies widows the right to inherit property on the death of their husband. Furthermore, this Order only allows a widow to inherit clan land and enjoy the right to use and profit from the property, but not own the property, until she remarries, but only if there are no male relatives in the clan.<sup>549</sup> Overall, the *Local Customary Law (Declaration) Orders* give legal effect to customary inheritance laws that are gender-insensitive.

The effect of the gender bias in the *Local Customary Law (Declaration) Orders* has been partially ameliorated by the decision in *Bernardo Ephrahim v. Holario Pastory and Another*.<sup>550</sup> In this case, the Hon. Justice Mwalusanya found the inheritance provision in the *Haya Customary Law (Declaration) (No. 4) Order, 1963* to be inconsistent with Article 13(4) of the Constitution, which bars discrimination on account of sex. The Hon. Justice Mwalusanya modified the rules of inheritance contained in this Order to accord with the principle of equality, such that men and women have equal rights to inherit and sell clan land.<sup>551</sup>

The absence of a uniform inheritance law that applies equally to all individuals, irrespective of religion, tribe and colour has resulted in women being deprived of their right to property when their partner's die. In an effort to empower women in this regard, the Tanzania Women Lawyers Association (TAWLA) has advocated the creation of family courts to address cases involving probate and inheritance issues in an attempt to secure the rights of women and children.<sup>552</sup> It is unclear whether the government would consider establishing courts of this nature.

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<sup>547</sup> NGO Thematic Shadow Report, *ibid.* at p. 10.

<sup>548</sup> NGO Thematic Shadow Report, *ibid.* at p. 10.

<sup>549</sup> NGO Thematic Shadow Report, *ibid.* at p. 10; F. Kessy *et al* 'Vulnerability and Property Rights of Widows and Orphans in the Era of the HIV and AIDS Pandemic: A case study of Muleba and Makete Districts, Tanzania' (UNFAO Working Paper No. 5, 2008) <<ftp://ftp.fao.org>> accessed 2 December 2008, at pp. 26 and 27.

<sup>550</sup> *Bernardo Ephrahim v. Holario Pastory and Another*, Civil Appeal No. 70 of 1989.

<sup>551</sup> In this case, Holario Pastory inherited clan land from her father. She sold this land to someone who was not a member of her clan. A member of her clan, Bernardo Ephrahim, filed a suit against Ms. Pastory on the basis that she had violated the *Haya Customary Law (Declaration) (No. 4) Order, 1963*, which states that women can inherit and use land, but not sell it. This provision was found to be inconsistent with Article 13(4) of the *Constitution, 1977*, which prohibits discrimination on the basis of sex and the provision was amended accordingly by the court. The court's actions were consistent with *Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984*, Act No. 16 of 1984, which allows courts to modify or amend laws that existed before the enactment of the Bill of Rights in 1984 so that they conform to the provisions contained in the Bill of Rights. This Act came into effect in March 1988.

<sup>552</sup> M. Mwanatongoni 'Human rights activists seeking family courts' *The Guardian on Sunday* (Tanzania) 9 March 2008.

Children are also often negatively affected by the inconsistencies between the inheritance laws and the inability to enforce succession rights. The LHRC received a number of reports in 2008 from a child or their guardian about issues of inheritance rights, such as:

- A 13 year-old girl wanted to receive the title to a piece of real property that she had inherited from her parents. Her uncle, who was the administrator of the estate, had assumed title to the real property;
- The administrators of the estate of a child's mother refused to distribute money to the 13 year-old boy to pay for his school fees; and,
- Two girls who had attained the age of majority were attempting to obtain the property from their father's estate from the administrator of the estate, their uncle.<sup>553</sup>

In Tanzania, there is a need for the government to review the system of having three distinct types of law that govern inheritance. It is suggested that the government draft a Bill regarding inheritance that is applicable to all Tanzanians, irrespective of religion, race or ethnic group. In addition, it is necessary to educate people about inheritance rights, the probate process and the value of drafting Wills. Education on these matters will empower people such that they are able to choose how to dispose of their assets prior to death and that their wishes are respected by their families.

## 5.2 Children's Rights

As children constitute approximately 50 percent of Tanzania's population, it is important to consider the state of children's rights in Tanzania.<sup>554</sup> It is also important to consider children's rights in Tanzania in light of the African Child Policy Forum's 2008 report, that found Tanzania to be the least child-friendly country in the East African region and ranked it 23<sup>rd</sup> on the continent.<sup>555</sup>

At the international and regional level, Tanzania is a signatory to a number of international and regional human rights instruments that are directed at protecting the interests of the child. For instance, Tanzania is a signatory to the *Convention on the Rights of the Child, 1989*, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000*, the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000* and the *African Charter on the Rights and Welfare of the Child, 1990*.<sup>556</sup>

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<sup>553</sup> LHRC 'Reports of various Human Rights Monitors' (Report Tanzania February 2008).

<sup>554</sup> Caucus for Children's Rights '50% Campaign to Protect Children –About' <<http://www.50campaign.org>> accessed February 19, 2009.

<sup>555</sup> P. Machira 'Tanzania least child friendly in East African region' *The Guardian on Sunday* (Tanzania) 30 November 2008. The African Child Policy Forum ranks how child-friendly a country is based on the degree to which the country's legal regime protects children and the degree to which its budgetary programme or policy favours children.

<sup>556</sup> *Convention on the Rights of the Child, 1989* (adopted 20 November 1989, entered into force 2 September 1990, ratified by Tanzania 10 June 1991) UNGA Res 44/25, UN Doc A/44/49; *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child*

Protection of children's rights in national legislation is somewhat fragmented as provisions dealing with children's rights are scattered throughout various pieces of legislation, such as the *Penal Code, 1930*, the *Law of Marriage Act* and the *Children and Young Persons Ordinance*. In the past, the government raised the possibility of enacting an omnibus piece of legislation, the *Children Act*, to address children's rights. However, the government has yet to draft in this respect. The government has also stated that it will create an independent Commission on the Rights of the Child to protect the rights of children.<sup>557</sup> This body was not established in 2008.<sup>558</sup>

### *Child Labour*

In Tanzania, there are 1.2 million working children.<sup>559</sup> Differently stated, 21 percent of Tanzanian children are engaged in work. In MUKUKUTA, the government stated its objective to reduce the percentage of working children to ten percent by 2010.<sup>560</sup> However, given the current figure of 21 percent, it is unlikely that the government will be able to reach its MKUKUTA target in the next two years.<sup>561</sup>

In MKUKUTA, the government distinguishes between "child work", which it defines as activities such as helping out around the house or casual employment during the holidays, and "child labour", which it defines as work performed by children less than 18 years of age which is exploitative, hazardous or inappropriate for their age.<sup>562</sup> It is likely that "child work" will continue to occur in Tanzania, particularly in rural areas.<sup>563</sup> However, the government has taken steps to address "child labour", such as:

- becoming a signatory to the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999*, which specifically prohibits child labour that involves slavery, prostitution, the

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*pornography, 2000* (adopted 25 May 2000, entered into force 18 January 2002, acceded to by Tanzania 24 April 2003) UNGA Res 54, UN Doc A/54/49; *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2002* (adopted 12 February 2002, entered into force 12 February 2002, acceded to by Tanzania 11 November 2004) UNGA 54, UN Doc A/54/49; *African Charter on the Rights and Welfare of the Child, 1990*.

<sup>557</sup> NGO group for the Convention on the Rights of the Child, *supra*.

<sup>558</sup> National Network of Organisations Working with Children 'Non-governmental organisation's report on the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, United Republic of Tanzania' (Report May 2008) <<http://www.crin.org>> accessed 25 September 2008.

<sup>559</sup> Interview with Jurgen Schwettmann, *supra*; "Let's cooperate to fight child labour" *The Citizen* (Tanzania) 16 June 16, 2008.

<sup>560</sup> Poverty and Human Development Report 2007, *supra*, at p. 55.

<sup>561</sup> Interview with Jurgen Schwettmann, *supra* note 264; "Let's cooperate to fight child labour" *The Citizen* (Tanzania) 16 June 2008.

<sup>562</sup> Poverty and Human Development Report 2007, *supra*, at 48.

<sup>563</sup> Interview with Jurgen Schwettmann, *supra*.

- use of children in illicit activities, and work that is likely to harm the health, safety or morals of a child;<sup>564</sup>
- the *Employment and Labour Relations Act, 2004* prohibits the employment of children under the age of 14 years, except for light work;<sup>565</sup>
  - the government held orientation and training workshops for labour officers on the law relating to child labour and enforcement mechanisms;<sup>566</sup> and,
  - one of the goals of MKUKUTA is a reduction in the percentage of child labour.

Despite these measures, there continue to be reports of child labour occurring in Tanzania and, more specifically, the worst forms of child labour. For instance, there are reports of children as young as 12 years of age being employed in the Mererani Tanzanite mines in the Manyara region and children between the ages of five and 16 years being used as porters in the Tengeru Women Market in Arusha.<sup>567</sup> Children are also engaged in scavenging, fishing, quarrying, and acting as barmaids, prostitutes, street vendors, cart pushers and auto mechanics.<sup>568</sup>

In Tanzania, there are several reasons for the continued existence of child labour. One factor driving child labour is the way in which certain sectors of the Tanzanian economy are structured. For instance, in the Tabora region, farmers receive approximately one percent of the price of their end product. Due to this low profit margin, farmers cannot afford to hire seasonal workers so they use child labourers, which is a cheaper option.<sup>569</sup>

Two other important reasons for child labour in Tanzania is the inability of the Ministry of Labour to enforce the provisions of the *Employment and Labour Relations Act, 2004* that prohibit child labour and the lack of accessible education.<sup>570</sup> Increased access to free and compulsory education would reduce child labour because if a child is attending school on a regular basis, then the child has a minimal opportunity to be involved in child labour.<sup>571</sup> The government needs to take a holistic approach to child labour by considering and addressing the various reasons for child labour that are identified in this report

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<sup>564</sup> Art. 3 of the *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999* (ILO No. 182) (adopted June 17, 1999, entered into force 19 November 2000, ratified by Tanzania 12 September 2001) 2133 U.N.T.S. 161.

<sup>565</sup> S. 5 of the *Employment and Labour Relations Act, 2004*.

<sup>566</sup> Questionnaire response from the Ministry of Labour, Youth and Sports Development, Government of Tanzania (Dar es Salaam, Tanzania October 2008).

<sup>567</sup> A. Ihucha 'Child labour on rise in Arusha' *The Guardian* (Tanzania) 7 July 2008; 'Let's cooperate to fight child labour' *The Citizen* (Tanzania) 16 June 2008.

<sup>568</sup> Department of Labour, United States of America '2007 Findings on the Worst Forms of Child Labour – Tanzania' (Report United States of America 27 August 2008) <<http://www.unhcr.org>> accessed 25 September 2008.

<sup>569</sup> Interview with Jurgan Schwettmann, *supra*.

<sup>570</sup> M. Millinga 'Education vital in combating child labour' *The Guardian* (Tanzania) 27 January 2008.

<sup>571</sup> M Haonga 'Political commitment a must in reducing child labour' *The Guardian* (Tanzania) 4 July 2008.

## *Street Children*

In Africa, street children are among the most physically visible of all children, living on the roads and public squares of cities.<sup>572</sup> A full time street child is defined as a child who lives, sleeps, works and eats on the streets without adult supervision and care, while a part-time street child is a child who comes to the street environment for part of the day and then returns home at night.<sup>573</sup> Street children are visibly present in larger, Tanzanian cities such as Arusha, Dar es Salaam, Morogoro, Moshi, Mbeya, Mwanza and Tanga. However, there is no current data on the number of children who live on the streets in Tanzania.<sup>574</sup> A study conducted in the Arusha region suggests there has been an increase in the past two years in the number of children either living alone or working alone on urban streets.<sup>575</sup> The government intends to carry out a study to determine the magnitude of this problem.<sup>576</sup>

Children migrate to the streets for various reasons, including poverty, abuse and neglect; domestic violence; substance abuse; and family breakdown.<sup>577</sup> Street children are often stigmatized and marginalized by society. Living and working on the street makes these children vulnerable to physical and sexual abuse. A study done in Mwanza indicated that street children living in Mwanza had their first sexual experience, forced or voluntary, between the ages of nine and 12 years.<sup>578</sup> The high incidence of sexual abuse and higher number of sexual encounters engaged in by street children exposes these children to a higher risk of being infected with HIV/AIDS and other sexually transmitted diseases.

The government's attitude towards street children is often negative. These children are often harassed by law enforcement organisations, beaten by the police, put into jail and, sometimes, repatriated to their rural homes.<sup>579</sup> The police have defended the round up of street children on the basis that their acts are in accordance with the provisions of the *Destitute Persons Act, 1923*, the *Criminal Procedure Act* and the *Penal Code*.<sup>580</sup> The LHRC, the Mkombozi Centre for Street Children and the East African Law Society filed a petition in the High Court of Tanzania challenging the constitutionality of the above-mentioned Acts on the basis that these Acts infringed the children's right to equality,

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<sup>572</sup> R. Carabain 'Revealed: The dark side of Mwanza street children' *The Sunday Observer* (Tanzania) 21 September 2008.

<sup>573</sup> Mkombozi Centre for Street Children 'Learn more' <<http://www.mkombozi.org>> accessed 19 February 2009.

<sup>574</sup> NGO group for the Convention on the Rights of the Child, *supra*, at p.5.

<sup>575</sup> Carabain, *supra*.

<sup>576</sup> 'Dogodogo Centre: Street children Tell their Story' *The Guardian* (Tanzania) 13 January 2008.

<sup>577</sup> Mkombozi Centre for Street Children 'Reponses to Child Vulnerability' (Report Tanzania September 2005), at p. 6.

<sup>578</sup> Carabain, *supra*.

<sup>579</sup> Carabain, *supra*.

<sup>580</sup> 'High Court hears petition to remove oppressive laws' *Arusha Times* (Tanzania) (31 May 2008). See: *Destitute Persons Act*, Cap. 389, R.E. 2002; *Criminal Procedure Act*, Ca. 20, Cap. 20, R.E. 2002; *Penal Code*, Cap. 16, R.E. 2002.

equality before the law, the right to freedom and the right to free movement.<sup>581</sup> This case will be heard on 11 March 2009.

### *Child Abuse*

It is estimated that, worldwide, 150 million girls and 73 million boys under the age of 18 have been raped or suffered other forms of sexual abuse.<sup>582</sup> Tanzania children are subject to sexual abuse. A four month review of 14 newspapers indicated that 221 cases of sexual abuse were reported.<sup>583</sup> These numbers only reflect the cases that were reported and it is likely that the number of incidents of sexual abuse is much higher. Reports of sexual abuse continued into 2008. For instance,

- in January 2008, a 87-year-old man, who was a retired teacher, was charged with raping a seven year old girl at Mabibo Luhanga area, Kinondoni district;<sup>584</sup>
- in January 2008, two men, ages 20 and 25, were charged with raping and sodomising a 16-year-old girl in the Gongo la Mboto area, Ilala District;<sup>585</sup>
- in February 2008, a 20-year-old man was arraigned in the Kinondoni Resident Magistrates Court on the allegation that he raped a 10-year-old girl in the Magomeni Mapipa area, Kinondoni district;<sup>586</sup> and
- in March 2008, three employees of Barrick Exploration Africa Limited in Sengereme District, Mwanza forced a 13-year-old girl to be intimate with a dog.<sup>587</sup>

Sexual abuse of girls and women seems to be widespread in Tanzania. Research indicates that the proportion of women ages 15 to 49 who reported that their first act of sexual intercourse was forced, by age group, was:<sup>588</sup>

<b>Location</b>	<b>Under age 15</b>	<b>15-17 years</b>	<b>18 years and over</b>
Tanzania (Urban)	40%	17%	10%
Tanzania (Rural)	43%	18%	12%

<sup>581</sup> *LHRC, Mkombozi Centre for Street Children and the East African Law Society v Attorney General*, Misc. Civil Application No. 26 of 2007 (High Court of Tanzania at Arusha).

<sup>582</sup> L. Philemon 'Mahiza identifies culprits of sexual violence in schools' *The Guardian* (Tanzania) 20 November 2008.

<sup>583</sup> R. Mwalongo '221 children abused sexually in three months' *The Guardian* (Tanzania) 19 February 2008.

<sup>584</sup> G. John 'Dar man (87) charged with rape of a seven-year old girl' *The Guardian* (Tanzania) 9 January 2008.

<sup>585</sup> K. Kenyunko 'Two Dar businessmen face rape and sodomy charges' *The Guardian* (Tanzania) 15 January 2008.

<sup>586</sup> H. Nachilongo 'Dar resident dragged in court over defiling of under age' *The Guardian* (Tanzania) 11 February 2008.

<sup>587</sup> 'Activists urge support for stigmatised victim' *The Citizen* (Tanzania) 8 July 2008; P. Magubira 'Activists and pupils march against abuse of schoolgirl' *The Citizen* (Tanzania) 23 April 2008; P. David 'Doctor: Schoolgirl was raped by dog' *Sunday Citizen* (Tanzania) 6 October 2008.

<sup>588</sup> International Women's Health Coalition 'Triple Jeopardy: Female Adolescence, Sexual Violence, and HIV/AIDS' (Report June 2008) <<http://www.iwhc.org>> accessed 3 December 2008.

Sexual violence against children occurs in a multitude of contexts, one of which is in the educational setting. A report published by Plan International, an international NGO, indicates that girls as young as ten years old are being forced to have sex with their teachers to pass exams and are threatened with poor grades if they refuse.<sup>589</sup> The report contains the story of Rosemary, a head girl at a school in Tanzania, who was repeatedly sexually abused by her teacher and had a child as a result.<sup>590</sup> In November 2008, Plan International, a NGO, launched its “Learn without Fear” campaign in Tanzania to address sexual violence in schools.<sup>591</sup> Given the high incidence of pregnant school girls, sexual violence in schools is obviously a key issue to be addressed. In addition to this campaign, the LHRC suggests that education providers be sensitized on their role as educators and the importance of maintaining appropriate relationships with their students, particularly in the context of the power imbalance that exists between teachers and students.

Violence against children is not limited to sexual violence, it also includes physical violence. Physical violence can take a multitude of forms, such as beating, slapping and pinching. Physical violence against children is often perpetrated by the person who is responsible for caring for them, such as a parent or a caretaker. For instance, in 2008, it was reported that Praxeda Patrick was charged with assault after pouring hot tea over her stepson’s genital area.<sup>592</sup> While violence against children in the home in all social and economic spheres, studies show that low parental education levels, lack of income, and household overcrowding increases the risk of physical and psychological violence against children.<sup>593</sup> Given the high levels of poverty in Tanzania and the low levels of education, it seems likely that Tanzanian children are at a relatively high risk level of physical abuse, particularly as beating children is a socially acceptable means of disciplining a child.

In an effort to address child abuse, more than 50 members of the National Network of Organisations Working with Children have urged the government to enact the *Children’s Bill*, which is an omnibus Bill that addresses children’s rights. A consultative process on this Bill started in 1999 and a final draft was sent by the NGOs to the government five years ago, but the Bill has not been enacted.<sup>594</sup> If the *Children’s Bill* was enacted, it [would] enforce child support systems that protect them [children] against drug abuse, prostitution, child labour, child marriage, human trafficking and violence. The *Children’s Bill* is needed to protect the rights of children. Furthermore, the draft *Children’s Bill* should be amended to provide specific protection for the rights of children

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<sup>589</sup> E Batha ‘Girls being “raped for grades”, says aid agency’ *Reuters* (News article 10 October 2008) <<http://www.alertnet.org>> accessed 3 December 2008.

<sup>590</sup> *Ibid.*

<sup>591</sup> L. Philemon ‘Mahiza identifies culprits of sexual violence in schools’ *The Guardian* (Tanzania) 20 November 2008.

<sup>592</sup> Gasirigwa Sengiyumva, “Mothers more aggressive than fathers” *Daily News* (Tanzania) 5 May 2008.

<sup>593</sup> Mkombozi Organisation ‘People take personal problems out on children’ *Arusha Times* (Tanzania) 20 September 2008.

<sup>594</sup> P. Ndovie ‘Over 50 organisations call for children’s act’ *ThisDay* (Tanzania) 4 February 2008.

with disabilities. The government's delay in passing the *Children's Bill* has and continues to negatively affect the rights of children in Tanzania.

### 5.3 Rights of Persons with Disabilities

In 2004, it was estimated there were approximately 3.5 million people with disabilities in Tanzania.<sup>595</sup> There is no hard data on the number of people with disabilities in Tanzania. The figure of 3.5 million people is based on a formula created by the World Health Organisation that estimates that one in ten people in any given community will have a disability.<sup>596</sup> The Tanzanian government is in the process of completing its 2007 Disability Survey.<sup>597</sup> The 2007 Disability Survey aims to quantify the number of people with disabilities in Tanzania and highlight the issues affecting people with disabilities in Tanzania.<sup>598</sup>

Tanzania is a signatory to the *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006*, which came into effect in May 2008. The Convention sets out the rights of persons with disabilities in spheres such as civil and political, education, health, employment and social protection.<sup>599</sup> However, the Tanzanian government is not a signatory to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2006*, which creates a complaint mechanism for individuals and groups.<sup>600</sup> As Tanzania has failed to ratify the optional protocol, the Committee on the Rights of Persons with Disabilities' jurisdiction is limited to considering the periodic reports submitted by Tanzania to the Committee.

At the domestic level, the government formulated the *National Policy on Disability in 2004*, which provides guidelines and sets parameters for services delivery to persons with disabilities.<sup>601</sup> In addition, the *Disabled Persons (Employment) Act, 1982* and the *Disabled Persons (Care and Maintenance) Act, 1982* address the rights of persons with disabilities.<sup>602</sup> These acts are outdated and fail to address the rights of persons with disabilities in a comprehensive manner. In December 2008, the Prime Minister of Tanzania, Mizengo Pinda, announced that the government intended to replace the

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<sup>595</sup> Ministry of Labour, Youth Development and Sports 'National Policy on Disability' (Governmental Policy July 2004) (National Policy on Disability), at p. 3.

<sup>596</sup> *Ibid.* at p. 3.

<sup>597</sup> National Bureau of Statistics 'Preparation of Disability Survey in Tanzania 2006' <<http://www.nbs.go.tz>> accessed 5 December 2008.

<sup>598</sup> *Ibid.*

<sup>599</sup> *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, 2006* (adopted 13 December 2006, entered into force 3 May 2008, ratified by Tanzania 30 March 2007) UNGA Res A/61/611.

<sup>600</sup> *Optional Protocol to the Convention on the Rights of Persons with Disabilities, 2008* (adopted 13 December 2006, entered into force May 3, 2008, not ratified by Tanzania) UNGA Res 61/106.

<sup>601</sup> National Policy on Disability, *supra*.

<sup>602</sup> *Disabled Persons (Employment) Act, 1982*, Cap. 184, R.E. 2002; *Disabled Persons (Care and Maintenance) Act, 1982*, Cap. 183, R.E. 2002.

aforementioned acts with a comprehensive act that incorporated Tanzania's obligations under international treaties.<sup>603</sup>

Despite national legislation guaranteeing the rights of persons with disabilities and Tanzania's international obligations in this regard, persons with disabilities often experience a low quality of life and discrimination in Tanzania. For instance,

- There is a lack of health care facilities that provide preventative and rehabilitative services for people with disabilities. In Tanzania, there are only three hospitals that have departments capable of taking care of people with disabilities.<sup>604</sup> As a result, people with disabilities are often unable to access health care services that can improve or ameliorate their condition;
- People with disabilities are three times more likely to contract HIV/AIDS, as they are often excluded from receiving information about HIV/AIDS and they are less likely to receive HIV/AIDS-related services.<sup>605</sup> We suggest that the government develop HIV/AIDS educational and service delivery programs that are specifically targeted at people with disabilities;
- Globally, people with disabilities are more likely to be victims of sexual abuse, as they may not receive sexual education and may be less able to defend themselves against sexual abuse and rape;<sup>606</sup> and,
- The *National Disability Policy* recognises that people with disabilities have the capacity to work. However, negative societal (and self) perceptions about a disabled person's ability to work can create barriers to a person exercising their right to work.<sup>607</sup> The inaccessibility of education and skills training facilities to people with disabilities also negatively impacts on their ability to exercise their right to work.

Given the vulnerability of people with disabilities to discrimination and human rights abuses, it necessary for the government to do research on the issues facing people with disabilities and formulate an appropriate policy response to these issues. Included in this policy response should be the recognition that certain issues, such as HIV/AIDS or access to education, have an impact on the general population in Tanzania. However, a policy response to these issues on a general basis may not address the specific needs of people with disabilities. The government's policies on these broader issues need to be nuanced to specifically address the rights of people with disabilities. Aside from a policy response, the government should encourage measures that enable people with disabilities to participate in everyday life. Such measures would include making buildings accessible to people with disabilities, initiating sensitization programs to reduce discrimination

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<sup>603</sup> E. Kemuma 'Pinda: Bill to amend laws on persons with disabilities coming' *The Guardian* (Tanzania) 5 December 2008.

<sup>604</sup> CCBRT 'Vision 2008-2012' (Guiding document Tanzania 2008) <<http://www.ccbtr.or.tz>> accessed 5 December 2008.

<sup>605</sup> *Ibid.* at p. 12.

<sup>606</sup> *Ibid.*

<sup>607</sup> See: G. Mandesi, Disabled Organisation for Legal Affairs and Social Economic Development 'Paper concerning National Disability Policy' (Presented in the staff meeting organised by the Foundation for Civil Society in Dar es Salaam, Tanzania, 26 August 2008).

against people with disabilities, and to economically empower people with disabilities by providing appropriate job training to them.

#### 5.4 Rights of Refugees

In the *Convention relating to the Status of Refugees, 1951*, a refugee is defined as a person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country...<sup>608</sup>

Tanzania is a signatory to the *Convention relating to the Status of Refugees, 1951*. At the national level, Tanzania's approach to refugees is legislated in the *Refugee Act, 1998* and the *National Refugee Policy, 2003*.<sup>609</sup> The *Refugee Act, 1998* represented a step forward from its predecessor, the *Refugees Control Act, 1966*, as it incorporated the internationally accepted definition of a refugee and expanded protection of refugee in some areas.<sup>610</sup> In contrast, it can be argued that the *National Refugee Policy, 2003* represents a step back, as it emphasises repatriation and it casts local settlement of refugees as a temporary solution, rather than a permanent one.<sup>611</sup> The emphasis on repatriation is also echoed by a statement made by President Jakaya Mrisho Kikwete (2005 – onwards) in 2007 that:

Tanzania believes that the return of refugees to their country of origin is a sovereign right which should not be denied. It is also the ultimate testimony and guarantor of the peace so attained. It is not fair, it is not right for people to continue to live in refugee camps after peace has been restored in their country of origin.<sup>612</sup>

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<sup>608</sup> *Convention relating to the Status of Refugees, 1951* (adopted 28 July 1951, entered into force 22 April 1954, acceded to by Tanzania 12 May 1964) 189 U.N.T.S. 150. This definition is complemented by the *Protocol relating to the Status of Refugees, 1966* (adopted in 16 December 1966, entered into force 4 October 1967, acceded to by Tanzania 4 September 1968) 606 U.N.T.S. 267, which removed the temporal and geographical limitations in the *Convention relating to the Status of Refugees, 1951* so that this Convention applies to events occurring anywhere in the world after 1951. In addition, the OAU, *Convention Governing Specific Aspects of Refugee Problems in Africa, 1968* (adopted 1968, entered into force 20 June 1975, ratified by Tanzania 10 January 1975) 1001 U.N.T.S. 45 expanded the definition of the grounds for seeking refuge to include grounds such as “external aggression, occupation, foreign domination and events seriously disturbing public order.”

<sup>609</sup> *Refugee Act, 1998*, Cap. 37, R.E. 2002.

<sup>610</sup> Centre for the Study of Forced Migration et al ‘Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania’ (Working Paper No. 1 Tanzania November 2008), at p. 12. It is argued that this Act also represented a step backward in terms of the integration of refugees, as it reinforced restrictions on freedom of movement, emphasised the negative effects of housing refugees and disallows refugees from working without a permit.

<sup>611</sup> *Ibid.* at p. 12.

<sup>612</sup> Statement by President Jakaya Mrisho Kikwete of the United Republic of Tanzania (2005 onwards) to the 62<sup>nd</sup> Session of the United Nations General Assembly (New York 27 September 2007).

As of December 2008, Tanzania was host to 321,909 refugees, of which 240,480 are from Burundi, 79,706 are from the Democratic Republic of the Congo, 1,522 are from Somalia and there are 201 refugees from other countries.<sup>613</sup> There were relatively few refugees who entered Tanzania in 2008. In 2008, only 262 new refugees were registered in Tanzania, of which 220 of the refugees were from the Democratic Republic of the Congo and the remainder of the refugees originated from Burundi and Rwanda.

There are three long term groups of refugees in Tanzania. These long term refugees are drawn from Burundi, the Democratic Republic of the Congo and Rwanda. In 2008, the Tanzanian government took proactive steps to address the issue of long term refugees and, in particular, long term Burundian refugees in Tanzania.

In 1972, ethnic-based violence in Burundi resulted in the movement of 218,000 refugees from Burundi to Tanzania (1972 Refugees). A second major wave of Burundi refugees occurred in 1993 after the death of their elected president, Melchior Ndadaye, in 1992. The 1972 Refugees and other Burundian refugees were settled by the Tanzanian government in three refugee camps located in the Tabora region and the Mpanda District; some of these refugees were allowed to live in self-sufficient settlements in the Tabora and Rukwa regions.<sup>614</sup>

In September 2007, the Tanzanian government started a registration process for the 1972 Refugees. During this registration process, these refugees were given the choice to be repatriated to Burundi, or to be naturalized and stay in Tanzania.<sup>615</sup> The option of naturalization has only been offered to the 1972 Refugees. During the registration process, 80 percent of the 1972 Refugees indicated that they wanted to be naturalized.<sup>616</sup> In 2008, the UN High Commissioner for Refugees started a two year program to assist the Tanzanian government in the repatriation of the 1972 Refugees.<sup>617</sup>

The naturalization process of the 1972 Refugees hit a snag in March 2008 when the Tanzanian government indicated it would not grant citizenship status to Burundi refugees until the international donor community fulfilled its obligations to the naturalization process.<sup>618</sup> Funding for the registration and naturalization processes was provided by the European Commission Development Fund and the Swedish government.<sup>619</sup> By August

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<sup>613</sup> Interview with Charles Nzuki, Assistant Director, Ministry of Home Affairs - Refugee services (Dar es Salaam 26 February 2009). Between January and December of 2008, the number of refugees hosted by Tanzania dropped by 145, 391. This large decrease in the number of refugees in Tanzania is largely attributable to the repatriation of Burundian refugees who entered Tanzania in 1972.

<sup>614</sup> R. Mwalongo 'Burundi refugees fear going home' *The Guardian* (Tanzania) 27 February 2008; S. McGregor 'Refugees: Promise and peril in going and staying' *The African* (Tanzania) 12 March 2008; Unnamed reporter 'UNHCR closes oldest Burundi refugee camps in Tanzania' *Daily News* (Tanzania) 10 March 2008.

<sup>615</sup> Centre for the Study of Forced Migration et al, *supra*, at p. 18.

<sup>616</sup> D. Mwita 'Solution found to refugee problem in Tanzania' *ThisDay* (Tanzania) 29 January 2008.

<sup>617</sup> 'UNHCR chief's visit to Tanzania a great boost for country' *ThisDay* (Tanzania) 6 March 2008.

<sup>618</sup> M. Tambwe 'No citizenship for Burundi refugees – Govt' *Daily News* (Tanzania) 8 March 2008.

<sup>619</sup> L Anjelo 'Sweden offers \$1.5 million to settle Burundi Refugees' *The East African* (Kenya) 2 November 2008.

2008, 2,570 of the 1972 Refugees had been repatriated.<sup>620</sup> The naturalization process for the 1972 Refugees is ongoing. As of December 2008, all the 1972 Refugees who wanted to be naturalized had completed the requisite application forms and these forms had been reviewed by their respective District Defence and Security Commissions.<sup>621</sup> Before the 1972 Refugees can be naturalized, their applications still need to be reviewed by the Regional Defence and Security Commissions, the Ministry of Home Affairs and the Minister of Home Affairs.<sup>622</sup>

The manner in which the government has dealt with the 1972 Refugees has been criticised for a various reasons, including:

- the 1972 Refugees have not been provided with sufficient information, or independent legal advice about the consequences of repatriation or naturalization. In addition, the 1972 Refugees have been given limited information about the current situation in Burundi. In this context, it is very difficult for the 1972 Refugees to make an informed choice about their futures;
- the government has put pressure on refugees to repatriate, rather than to exercise their option to become naturalized;
- women and people with disabilities, even minor disabilities, are being dissuaded from applying for naturalization;
- once a refugee has opted for repatriation, the refugee is not allowed to change their decision at a later date. However, if a refugee opts for naturalization, they can change their decision at any time;
- if a refugee's naturalization application is denied, there is no appeal process; and
- the government intends to relocate the naturalized 1972 Refugees from the areas in which they have lived in for the past thirty years to other areas in Tanzania. The proposed relocation has caused uncertainty among the refugees about their futures and concern about the fixed assets they have created while residing in Tanzania.<sup>623</sup> The Tanzanian government has promised to find land for the refugees that it intends to resettle.<sup>624</sup>

Since 2003, a number of refugee camps in Tanzania have been closed. In 2008, the government closed one refugee camp, the Nduta Refugee Camp in the Kibondo District.

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<sup>620</sup> Centre for the Study of Forced Migration et al, *supra* note 621, at pp. 19 and 20. In November 2008, it was indicated that 24,000 1972 Refugees had opted for repatriation, while 172,000 had opted for naturalization as per P Rugonzibwa '24,000 refugees opt for repatriation' *Daily News* (Tanzania) ( 11 November 2008). The repatriation of the 1972 Refugees was temporarily halted in late 2008/early 2009 due to the rainy season. The repatriation process will likely recommence in late April 2009.

<sup>621</sup> Interview with Charles Nzuki, Assistant Director, Ministry of Home Affairs - Refugee services (Dar es Salaam, Tanzania 26 February 2009).

<sup>622</sup> *Ibid.* Currently, most of the applications of the 1972 Refugees are being reviewed by the Regional Defence and Security Commission.

<sup>623</sup> All of these criticisms are drawn from the Centre for the Study of Forced Migration et al, *supra* note 621, which provides a comprehensive overview of the manner in which the Tanzanian government is dealing with the 1972 Refugees.

<sup>624</sup> R. Mwalongo 'UNHCR: Diligence needed in naturalizing Burundi refugees' *The Guardian* (Tanzania) 13 October 2008.

As of December 2008, there were three refugee camps in Tanzania. These camps are Lugufu I in Kigoma District, which hosts Congolese refugees; Mtabila in Kasulu District, which hosts Burundian refugees; and, Nyarugusu in Kasulu District, which hosts Congolese refugees.<sup>625</sup>

The planned closure of the refugee camps puts pressure on the Tanzanian government to address the situation of the long term refugee and it may create human rights issues for refugees as the government attempts to meet the deadline that it has set. Hasty closures of refugee camps may result in the 1972 Refugees experiencing greater levels of instability, as they are forced to choose between naturalization and repatriation in a relatively short period of time. It may also put pressure on other refugee groups to return to their country of origin before it is appropriate for them to return.

We recognize that the Tanzanian government is in the unenviable position of balancing the rights and interests of Tanzanian citizens and long term refugees. This balancing act occurs in a context where the presence of refugees has six broad, negative impacts on Tanzania as a host country:

- it may create a threat to Tanzania's external security, as it may cause strain relations between Tanzania and the refugees' country of origin;
- it may cause environmental degradation due to an increase in the number of people relying on natural resources;
- it may result in a destruction of physical and social infrastructure; and,
- it can create an additional burden on local governance and infrastructure.<sup>626</sup>

As recognized above, there are possible negative side effects from hosting refugees and there are few benefits to a host country. Despite this, host countries and, more specifically, the Tanzanian government have an obligation to ensure that the manner in which it deals with refugees is consistent with the provisions of the *Convention relating to the Status of Refugees, 1951*. In addition, in Tanzania, the government must comply with the provisions of the *Constitution of Tanzania, 1977*. Special attention needs to be paid to the rights of refugees in the context of naturalization and property rights.

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<sup>625</sup> The information in this paragraph is drawn from an interview with Charles Nzuki, Assistant Director, Ministry of Home Affairs - Refugee services (Dar es Salaam, Tanzania 26 February 2009). The following refugee camps have been closed in Tanzania from 2003 onwards: Kitali in Biharamulo district in February 2003; Karago in Kibondo district in April 2005; Mbuba, a reception centre, in Ngara District on 2 March 2006; Lukole B in the Ngara district on 7 August 2006; Mwisu, a detention centre, in Karagwe district on 3 April 2007; Muyovosi in Kasulu on 12 May 2007; Mtendeli and Mkugwa in Kibondo district on 18 May 2007; Lugufu II in Kigoma district on 31 September 2007; Kanembwa, a transit centre, in Kibondo district on 26 November 2007; and, Nduta in Kibondo district in December 2008.

<sup>626</sup> G. Jambiya *et al*, TRAFFIC 'Night Time Spinach': Conservation and livelihood implications of wild meat use in refugee situations in North-Western Tanzania' (Report Tanzania 2007), at p. 6.

## 5.5 Rights of Older Persons

Data from 2002 indicates that there were 1.9 million older persons in Tanzania.<sup>627</sup> In Tanzania, the population of older persons is disproportionately female. For instance, in 2006 in the over-60 age group, there were 79 men for every 100 women.<sup>628</sup> This difference is even greater in the over-80 age group where there were only 63 men for every 100 women over the age of 80.<sup>629</sup> It is estimated that by 2025, older persons will form 20 percent of the population in developing countries, including Tanzania.<sup>630</sup> As there are a steadily increasing number of people over the age of 60 years in Tanzania, there is a corresponding need to address the needs and rights of this segment of the population.

At the international level, the rights of older persons were first considered in the *Vienna International Plan of Action on Ageing, 1982* and, subsequently, in the *Madrid International Plan of Action on Ageing, 2002* (Madrid Plan). The Madrid Plan provides detailed recommendations to member states of the UN on how to realise the rights of older people through three main areas, namely development, improving health and well-being, and by creating an enabling and supportive environment for older people.<sup>631</sup>

In response to the Madrid Plan, the Tanzanian government formulated its *National Ageing Policy of 2003*.<sup>632</sup> The *National Ageing Policy* highlights specific issues facing older persons in Tanzania, such as poverty, inadequate access to health care, the position of older women and the absence of legal protection for older person. The *National Ageing Policy* also contained a number of recommendations as to how to deal with these issues. MKUKUTA also indirectly addresses the rights of older persons and, in particular, the right of older persons and others to live above the poverty line. In Tanzania, 40 percent of older people are eligible for social protection under the MKUKUTA mandate and they should be covered by effective social protection measures by 2010.<sup>633</sup> The mandate in MKUKUTA accords with Article 11(1) of the *Constitution, 1977*, which provides that the government should make appropriate provisions for a person's social welfare at times of old age. However, this Article occurs outside of the Bill of Rights and Duties in the *Constitution of Tanzania, 1977*, hence it does not confer a right that can be realised by older persons.

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<sup>627</sup> Social Security Department, ILO 'Tanzania Mainland: Social Protection Expenditure and Performance Review and Social Budget' (Executive Summary 2008) <<http://www.ilo.org>> accessed on 10 December 2008.

<sup>628</sup> NGO Thematic Shadow Report, *supra*, at p. 5.

<sup>629</sup> NGO Thematic Shadow Report, *supra*, at p. 5.

<sup>630</sup> *Vienna International Plan of Action on Ageing* (adopted by the World Assembly on Ageing held in Vienna, Austria from 26 July – 6 August 1982), endorsed by UNGA 37/51.

<sup>631</sup> See: *Madrid International Plan of Action on Ageing, 2002*, (adopted at the 10<sup>th</sup> plenary meeting of the 2<sup>nd</sup> World Assembly on Ageing 12 April 2002, Res 1) Report of the Second World Assembly on Ageing (Madrid 8 April – 12 April 2002).

<sup>632</sup> Ministry of Labour, Youth Development and Sport 'National Policy on Ageing' (Governmental policy September 2003) <<http://www.tanzania.go.tz>> accessed 10 December 2008 (National Policy on Ageing).

<sup>633</sup> HelpAge International et al 'Salt, soap and shoes for school evaluation report: The impact of pensions on the lives of older people and grandchildren in the *KwaWazee* project in Tanzania's Kagera region' (Report, Dar es Salaam August 2008), at p. xiv.

There are a number of issues arising from the implementation of the *National Ageing Policy*. For instance, local governments are still lacking clear information and understanding of the *National Ageing Policy* and, as a result, local governments continue to exclude older people from their plans and budgets.<sup>634</sup> In addition, the Tanzanian government has not implemented some of the recommendations of the *National Ageing Policy*, such as the recommendation that the government enact a law that specifically protects older persons' rights.<sup>635</sup> In 2007, the Tanzanian government indicated that it was in the process of developing legislation to protect the rights of older persons, to facilitate their participation in society, and to promote positive and balanced images of older persons.<sup>636</sup> However, legislation addressing the rights of older persons was not tabled in 2007, or in 2008.

Two major areas of concern for the rights of older people are access to health care and social welfare. Access to health care is particularly important to older persons. In 2007, a survey conducted in Tanzania of 855 older persons indicated that 65 percent of the older persons surveyed had health problems that required regular attention.<sup>637</sup> It is likely that the older persons who participated in this survey are indicative of the health status of the general population of older persons in Tanzania. The Tanzanian government has a policy of providing free health care to older people.<sup>638</sup> However, the majority of elderly people are unable to access the free health care because they are unable to prove that they are above 60 years of age.<sup>639</sup> In 2008, Chama Cha Wazee na Wastaafu Mkoani Arusha and the Monduli district council launched a pilot project that issued 2,200 identification cards to older persons that verified their age.<sup>640</sup> With the identity cards, older persons were able to access health care services for free. Given the success of the pilot project of issuing identification, the LHRC advocates that the government initiate a similar project at the national level, as this project would allow older persons to access much needed health care services.

The social security scheme in Tanzania is somewhat limited, as it only applies to those individuals who were employed in the formal sector.<sup>641</sup> As 96 percent of Tanzania's

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<sup>634</sup> The Foundation for Civil Society 'District Councils influenced to integrate older people's priorities in their plans and budgets' (News item 9 September 2008) <<http://www.thefoundation-tz.org>> accessed 10 December 2008.

<sup>635</sup> National Policy on Ageing, *supra*, at p. 15.

<sup>636</sup> Statement by Mr. Mwazo Paul Kaducha, Representative of the United Republic of Tanzania to the Forty Fifth session of the Commission for Social Development on Agenda Item 3b: Review of relevant United Nations Plans and Programmes pertaining to the situation of social groups (New York 12 February 2007).

<sup>637</sup> Poverty and Human Development Report 2007, *supra*, at p. 44.

<sup>638</sup> National Policy on Ageing, *supra*, at p. 10.

<sup>639</sup> National Policy on Ageing, *supra*, at p. 10.

<sup>640</sup> E. Selasini 'Are you over 60? Here is your ID' *Arusha Times* (Tanzania) 22 November 2008.

<sup>641</sup> National Policy on Ageing, *supra*, at p. 12. The social security schemes in Tanzania are the National Social Security Fund, created by the *National Social Security Fund Act, 1973*, Cap. 50, R.E. 2002, which provides coverage to employees of private sector and non-pensionable parastatal and government employees; the Parastatal Pension Fund, established by the *Parastatal Organisations Pensions Scheme Act, 1978*, Cap. 372, R.E. 2002 (amended by the *Parastatal Pensions (Amendment) Act, 2001*, No. 25 of 2001), which provides coverage to employees of both private and parastatal corporations; the Public Service

population works in the informal sector, the social security scheme benefits less than one percent of the entire population and only about six percent of the formal working population.<sup>642</sup> The effect of the lack of economic insecurity in old age is reflected in the high employment rates of older people - 73 percent of older people are employed.<sup>643</sup> It also reflected in the high poverty rate of older people. As previously noted, 40 percent of older people are eligible for social security under MKUKUTA. Currently, the average poverty gap of older people is five percent from the food poverty line and 12.4 percent from the basic needs poverty line.<sup>644</sup>

A factor compounding the poverty of older people is the prevalence of HIV/AIDS in Tanzania. HIV/AIDS reduces the family support network upon which many elderly people rely for economic, as well as, day-to-day support.<sup>645</sup> The other effect of HIV/AIDS is that older people become caregivers and breadwinners for sick adult children, orphans and vulnerable children.<sup>646</sup> In Tanzania, approximately 40 percent of all orphans are cared for by their grandparents and, in particular, their grandmothers.<sup>647</sup> As a result, older people have less of a family network on which to rely and, potentially, there is an increase in the draw on the economic resources of older people. These two trends have a negative impact on the overall quality of life of both older people and on children who are in their care due to the limited resources available to these two groups.

The challenges facing older persons in Tanzania were summarized by a survey respondent from Dar es Salaam as:

*“Hakuna sheria ya kutetea haki za wazee, serikali haina habari. Ni familia inachukua jukumu. Kama hakuna watoto basi wazee hudhulimiwa, kuteswa na kusingiziwa uchawi na hatimaye wanauawa”* [“There is no law which governs the rights and welfare of the old people in Tanzania. The government does not pay attention. It is the families which bear the

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Pension Fund, established by the *Public Service Retirement Benefits Act, 1999*, Act No. 2 of 1999, which provides coverage to employees of the central government; the Local Authorities Pensions Fund, established by the *Local Authorities Pensions Fund, 2006*, Act No. 9 of 2006, which offers coverage to employees of the local government; the National Health Insurance Fund, established by the *National Health Insurance Fund Act, 1999*, Cap. 395, R.E. 2002, offering health insurance coverage to pensionable employees of the central government; the Government Employees Provident Fund, established by the *Provident Fund (Government Employees) Act, 1942*, Cap. 51, R.E. 2002, which covers non-pensionable civil services and was amended by Act No. 9 of 2000 to cover members of the police force, prison staff, and fire and rescue service below the rank of assistant inspector and those who have served less than 12 years; and, the Public Service Pensions Scheme, established by the *Public Service Retirement Benefits Act, 1999*, Cap. 298, R.E. 2002, which provides coverage to government employees employed in Tanzania and employees employed by executive agencies established by an act of parliament.

<sup>642</sup> Interview with Jurgen Schwettmann, *supra* note 264; Social Security Department, ILO ‘Tanzania Mainland: Social Protection Expenditure and Performance Review and Social Budget’ (2008) <<http://www.ilo.org>> accessed 10 December 2008.

<sup>643</sup> Social Security Department, ILO, *ibid*.

<sup>644</sup> HelpAge International et al, *supra*, at p. 72.

<sup>645</sup> HelpAge International et al, *supra*, at p. xv.

<sup>646</sup> HelpAge International et al, *supra*, at p. xv.

<sup>647</sup> N. Kigwangallha ‘NGO asks for Government Assistance to Elderly HIV/AIDS Caretakers’ *The Guardian* (Tanzania) 30 August 2008.

burden. If these old people do not have children, they tend to be denied of their rights, tortured and labeled as witch. Then, they are killed”].<sup>648</sup>

As noted in Chapter 2.1.4., older women with red eyes are often labeled as witches and are targets of persecution. HelpAge International, an international NGO, estimates that annually there are as many as 1,000 witchcraft related killings in Tanzania.<sup>649</sup> Most of these killings are of older women. The government needs to educate the public about the fallacy of their belief that an older woman with red eyes is a witch.

The Tanzanian government should be more proactive in addressing the rights of older persons by fully implementing the provisions of the *National Ageing Policy*. It should also move to drafting and enacting legislation that specifically addresses the rights of older persons in Tanzania. Furthermore, given the role and importance of older people in our society, further resources should be devoted to lifting older people out of poverty. In order to improve the economic situation of older people, it may be necessary for the government to create a universal old age security system. In addition, the role of older people as caregivers of those affected by HIV/AIDS needs to be recognized and those individuals need to be provided with greater economic support.

## 5.6 Rights of Minorities and Indigenous People

The interests and needs of minorities and indigenous people are often marginalized by or subjugated to the interests of the dominant members of society. Minorities and indigenous people are often the victims of discrimination and human rights abuses. This section explores the situation of minorities and indigenous people in Tanzania.

The international community has found it difficult to create a comprehensive definition of what people constitute a minority.<sup>650</sup> However, reference to the *International Covenant on Civil and Political Rights, 1966* and the *Declaration of the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, 1993* suggests that minorities are those groups that have a unique ethnic, religious or linguistic identity. The right of a minority to enjoy its own culture, practice its own religion and use its own language was first considered in the *International Covenant on Civil and Political Rights, 1966*.<sup>651</sup> These rights were reiterated in the *Declaration of the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities, 1993* and expanded to include an obligation on a state to take a proactive role in protecting and promoting the identity of minorities.<sup>652</sup>

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<sup>648</sup> Response to LHRC opinion survey by interviewee in Dar es Salaam (Tanzania January to November 2008).

<sup>649</sup> Jemma Nelville ‘No country for old women’ *The Guardian* (United Kingdom) 24 November 2008.

<sup>650</sup> ‘Indigenous people and minorities: A global and historic assault’ *IRIN* (News article March 2006) <<http://www.irinnews.org>> accessed 11 December 2008).

<sup>651</sup> Art. 27 of the *International Covenant on Civil and Political Rights, 1966*.

<sup>652</sup> See: UNGA ‘Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities’ (18 December 1992) UN Doc A/Res/47/135.

In contrast, the international community has developed a comprehensive list of characteristics that helps to identify a people as indigenous. People are identified as indigenous when some or all of the following four elements are present:

- they occupy and use specific territory;
- they voluntarily perpetuate their cultural distinctiveness, which may include the aspects of language, social organisation, religion, spiritual values, modes of production, laws and institutions;
- they self-identify, as well as, are recognized by other groups, as a distinct collectivity; and
- they experience of subjugation, marginalization, dispossession, exclusion or discrimination.<sup>653</sup>

While indigenous people often form a minority, minorities are not necessarily indigenous people. At the international level, the rights of indigenous people are protected by the recently adopted *United Nations Declaration on the Rights of Indigenous People, 2007*.<sup>654</sup> Like all declarations, this declaration is not binding on Tanzania. However, it provides a road map for the best practices that Tanzania could adopt to protect and promote the rights of its indigenous people.

At the national level, there is no specific legislation that contemplates the rights of minorities or indigenous people. However, the *Constitution of Tanzania, 1977* prohibits discrimination on the basis of tribe, place of origin, and religion.<sup>655</sup> It is recommended that the Tanzanian government draft a specific policy or law addressing the rights of minorities and indigenous groups.

### *Minorities*

In Tanzania, there is little conflict with or discrimination against religious or linguistic minorities. The situation of ethnic minorities is considered in the section of the report that addresses the rights of indigenous people.

As discussed above, the definition of what groups constitute minorities remains unclear. At the international level, minorities seem to be limited to those groups that possess unique religious, ethnic or linguistic characteristics. However, some literature has suggested that a minority includes groups that are numerically inferior, have certain objective characteristics and self-identify as a minority.<sup>656</sup>

### *Indigenous People*

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<sup>653</sup> These guiding principles were developed by the UN Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities, as quoted in Chris Maina Peter 'Human Rights of Indigenous Minorities in Tanzania and the Courts of Law'(2007) 14 IntlJ on Minority and Group Rights 4, 455.

<sup>654</sup> See: UNGA 'Declaration on the Rights of Indigenous People' (September 2007) U.N. Doc. A/RES/47/1.

<sup>655</sup> Art. 13(5) of the *Constitution of Tanzania, 1977*.

<sup>656</sup> For a discussion on the definition of minorities, see: Chris Maina Peter, *supra*.

Tanzania has several indigenous people, including the Maasai, Barbaig, Hadzabe, Ndorobo, Sandawe, Iraqw, Gorowa and Bugurni. Some of these indigenous peoples are nomads, gathers, hunters, collectors and fishers.

There have been a number of conflicts between the Tanzanian government and indigenous people. These conflicts have primarily revolved around two issues:

- conflict over land use, where the government has appropriated customary land for the purposes of foreign investment or tourism; and
- the integration of “backward” communities into the mainstream way of life so that these communities can benefit from development.<sup>657</sup>

Both of the issues identified above threaten the ability of an indigenous people to survive as a distinct cultural group that has unique cultural practices, unique social organisation and unique modes of production.

In 2008, two land conflicts between the Tanzanian government and indigenous people were reported in the media. The first was the conflict between the Tanzanian government, a foreign investor and the Hadzabe people over the use of land that has been customarily occupied by the Hadzabe people in the Yaedi Chini Valley. This conflict is discussed in detail in Chapter 4.3 of this report. This conflict was resolved in mid-2008 when the foreign investor withdrew their investment from the Yaedi Chini Valley due to pressure from civil society organisations.

The second conflict occurred between the Barbaig, a nomadic, pastoral people, and a French firm, UN En-Lodge Afrique. The French firm planned to set up a tourist lodge in a wild animal corridor linking the Lake Manyara eco-system to the Tarangire National Park. This area has been inhabited by the Barbaig since the 1970s.<sup>658</sup> It was reported that the French firm had made an initial payment of Tsh8 million to the officials of the Vilima-Vitatu village to lease 4084 hectares in the area.<sup>659</sup> When the Barbaig initially protested against this investment in April 2008, 14 members of the Barbaig community were arrested.<sup>660</sup> The Barbaig community subsequently met with the Manyara Regional Commissioner in May 2008 to discuss the investment and their potential relocation. The Barbaig were concerned about the investment, as they had not been consulted about the investment and were unsure about where they were meant to relocate. At that meeting, the Manyara Regional Commissioner told the Barbaig to move their homesteads out of the investment area, as the investor had followed all the procedures required for the investment. The resolution of this conflict was not reported in the media.

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<sup>657</sup> Chris Maina Peter, *supra*, at p. 455.

<sup>658</sup> ‘Barbaig told to value education more than cattle’ *The Arusha Times* (Tanzania) 3 May 2008.

<sup>659</sup> V. Nkwame ‘Animals Corridor allocated to French Entrepreneurs’ *The Arusha Times* (Tanzania) 19 April 2008.

<sup>660</sup> *Ibid.*

The two land conflicts that occurred between the government and indigenous people in 2008 highlight the tension in Tanzania over appropriate land use. It also highlights the tenuous nature of the title to land held by most indigenous communities, as they generally hold customary title. Without formalizing their land rights, indigenous communities are vulnerable to having “their” land reallocated to a party that has obtained a formal right of occupancy to land. While it is commendable that the *Land Act, 1999* recognizes a customary right to land, it does not specifically address the customary rights of indigenous groups, many of whom have a special relationship with the land they occupy. It is vital to the indigenous people of Tanzania that the government develops a policy or a law that addresses the rights of indigenous people and, more specifically, sets out a mechanism for the resolution of land conflicts between the government and indigenous people that takes into account the cultural importance of certain areas of land to indigenous people.

For the purpose of development, the Tanzanian government has been encouraging indigenous people to send their children to school in order to catch up with the rest of the world. The education of the indigenous people of Tanzania is important and it can be empowering, as it can give indigenous people a greater awareness of their rights and how to protect their rights. However, the education of indigenous people should not be used as a tool to undermine the cultural identity and heritage of indigenous people. Rather, their education should be tailored to recognize and promote their unique background, while still maintaining a standard of education that is comparable to the national standard.

## Chapter Six

### HIV/AIDS and Human Rights

#### 6.0 Introduction

Tanzania, like many other sub-Saharan countries, has been negatively affected by the HIV/AIDS epidemic. In 2007, the HIV prevalence in Mainland Tanzania was estimated to be 6.2 percent, or 1.4 million people.<sup>661</sup> The prevalence rate of HIV is particularly high in the regions of Mbeya, Dar es Salaam and Iringa, where more than 10 percent of the population is HIV positive.<sup>662</sup> The high HIV prevalence rate in these three areas follows the trend of higher HIV prevalence rates in urban areas versus rural areas.<sup>663</sup>

The primary mechanisms for HIV transmission in Tanzania are unprotected heterosexual sex, which constitutes 80 percent of all new infections, and mother to child transmission, which constitutes 18 percent of all new infections.<sup>664</sup> However, recent studies indicate that, in some parts of the country, transmission is also occurring through anal sexual intercourse and drug abuse.<sup>665</sup> To date, the government's programs to prevent the transmission of HIV have understandably focused on the primary mechanisms of transmission described above.

HIV/AIDS is a human rights issue, as human rights violations are both the result and the cause of HIV/AIDS.<sup>666</sup> For instance, discrimination against people living with HIV/AIDS may serve as a disincentive for people to get tested and certain cultural practices, such as widow inheritance, may make women more vulnerable to the transmission of HIV/AIDS.<sup>667</sup> In addressing the HIV/AIDS epidemic in Tanzania, it is necessary to address it as both a medical and social phenomenon. Addressing the human rights issues stemming from HIV/AIDS will likely have a positive impact on efforts to reduce the prevalence of HIV/AIDS and it will enable HIV-positive individuals to be productive members of society for a longer period of time. The latter effect is related to reducing the stigma experienced by people who are HIV-positive in all spheres of life, including employment.

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<sup>661</sup> UNAIDS 'Regional and Country Profiles: Tanzania' (Report 2008) <<http://www.unAIDSrstesa.org>> accessed 12 December 2008.

<sup>662</sup> Poverty and Human Development Report 2007, *supra*, at p. 37.

<sup>663</sup> Prime Minister's Office, United Republic of Tanzania 'The Second National Multi-Sectoral Strategic Framework on HIV and AIDS (2008 -2012)' 2<sup>nd</sup> ed. (Government plan Tanzania October 2007) <<http://www.entersoftsystems.com>> accessed 12 December 2008) (The Second National Multi-Sectoral Strategic Framework on HIV and AIDS), at p. 8.

<sup>664</sup> UNAIDS, *supra* note 676; TACAIDS 'UNGASS Country Progress Report: Tanzania Mainland' (Government report Tanzania 30 January 2008), at p. 5.

<sup>665</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra*, at p. 9.

<sup>666</sup> D. Makangale and N Manko 'HIV/AIDS is human rights issue, says CJ' *Daily News* (Tanzania) 16 May 2008.

<sup>667</sup> *Ibid.*

This section addresses the government's response to the HIV/AIDS epidemic, how this epidemic interacts with human rights, such as the right to health care, and the effect of social inequalities on the prevalence of HIV/AIDS.

## 6.1 Governmental Response

In Tanzania, a number of bodies have been created to address the HIV epidemic. For instance, the Tanzania Commission for AIDS (TACAIDS) was created in 2001 to coordinate a national, multi-sectoral response to HIV, while the National AIDS Control Programme was created to coordinate the health sector's response to HIV.<sup>668</sup>

TACAIDS plays an important role in addressing HIV in Tanzania, as it is the primary agency through which the government addresses HIV. In this context, it is important that TACAIDS ensure the integrity of its programmes and the way in which funds allocated to these programmes are used. More specifically, TACAIDS should guard against the misuse of funds that are allocated to it. A 2008 audit of TACAIDS indicated that TACAIDS misused Tsh262.8 million of its funds in its 2006 HIV/AIDS campaign.<sup>669</sup> The misuse of funds by TACAIDS has a negative effect on Tanzania's ability to address the HIV/AIDS epidemic. TACAIDS should reevaluate its accounting system (or internal checks and balances) to prevent any future misuse of funds.

From a policy perspective, the Tanzanian government launched the *Second National Multi-Sectoral Strategic Framework on HIV and AIDS (2008 -2012)* (Second NSMSF) in July 2007.<sup>670</sup> The Second NMSF will be the guiding framework for the government's response to the HIV/AIDS epidemic for the period 2008 – 2010.<sup>671</sup> The focus of the Second NMSF is on creating an enabling environment; prevention; care, treatment and support; impact mitigation; and addressing groups that are most at risk, such as women.<sup>672</sup>

Tanzania has also formulated a legislative response to the HIV/AIDS epidemic. In 2001, it developed a *National Policy on HIV and AIDS*, which served as a guide to the government's response to the HIV/AIDS epidemic.<sup>673</sup> In this policy, the government evinced a need to create a legal framework to address legal and ethical issues arising from HIV/AIDS.<sup>674</sup> In April of 2008, the government created this legal framework by enacting the *HIV and AIDS (Prevention and Control) Act, 2008*. This Act addresses issues of prevention, care and control of HIV and AIDS in Mainland Tanzania.<sup>675</sup>

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<sup>668</sup> UNAIDS 'Regional and Country Profiles: Tanzania', *supra*.

<sup>669</sup> M Jumbe 'AIDS funds embezzled' *The Citizen* (Tanzania) 7 January 2008.

<sup>670</sup> TACAIDS, *supra*, at p. 14.

<sup>671</sup> *Ibid.*

<sup>672</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra*.

<sup>673</sup> Prime Minister's Office 'National Policy on HIV/AIDS' (Government policy Tanzania November 2001) <<http://www.tzonline.org>> accessed 12 December 2008 (National Policy on AIDS).

<sup>674</sup> *Ibid.* at p. 12.

<sup>675</sup> *The HIV and AIDS (Prevention and Control) Act*, No. 28 of 2008.

Prior to the enactment of the *HIV and AIDS (Prevention and Control) Act, 2008*, the government provided the draft Bill of the *HIV and AIDS (Prevention and Control) Act, 2007* to civil society for its review. The Feminist Activist Coalition, a Tanzanian NGO, was critical of this Bill because the Bill did not commit the government to provide resources for the prevention, care and treatment of HIV/AIDS; the power to implement the Bill was centralized in TACAIDS, rather than adopting a multi-sectoral strategy; and there was a failure to mainstream gender issues in the Bill.<sup>676</sup> In evaluating the *HIV and AIDS (Prevention and Control) Act, 2008*, it appears that the government did not address the criticisms of the Feminist Activist Coalition.

The *HIV and AIDS (Prevention and Control) Act, 2008* is fairly comprehensive in the manner in which it addresses the HIV/AIDS epidemic in Tanzania, as it deals with issues such as: the need for public education;<sup>677</sup> HIV testing and counseling;<sup>678</sup> discrimination and stigmatization against people living with HIV;<sup>679</sup> and, the rights and obligations of people living with HIV.<sup>680</sup> However, there are some provisions of the Act that may hinder the government's efforts to control and prevent the transmission of HIV/AIDS in Tanzania.

The *HIV and AIDS (Prevention and Control) Act, 2008* criminalizes the physical or verbal abuse of an HIV-positive person by a spouse or sexual partner due to that person's compliance with the provisions of the Act.<sup>681</sup> For instance, the Act puts a positive obligation on a person who tests positive for HIV to inform their spouse or sexual partner.<sup>682</sup> The imprisonment penalty associated with this provision should be strengthened. At present, a person convicted of an offence under Section 21(3) of the *HIV and AIDS (Prevention and Control) Act, 2008* may be imprisoned for a period of three to six months.<sup>683</sup> To put this penalty in context, the minimum penalty in the *Penal Code, Cap. 16* for the least serious form of assault is one year.<sup>684</sup> As a result, the penalty contained in the *HIV and AIDS (Prevention and Control) Act, 2008* is unlikely to serve as an effective deterrent to the physical abuse of a HIV-positive individual. Given the low reporting level of domestic violence in general and the stigma associated with a HIV-positive status, it is questionable as to whether individuals who are HIV-positive would report incidents of abuse that are associated with their HIV status.

The LHRC is also concerned that the *HIV and AIDS (Prevention and Control) Act, 2008* does not provide adequate protection for a HIV-positive individual's right to health and, by association, their right to life. The Act states that person living with HIV/AIDS has the right to highest attainable standard of physical and mental health.<sup>685</sup> However, the

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<sup>676</sup> 'Femact rejects HIV/AIDS Bill' *The Guardian* (Tanzania) (4 February 2008).

<sup>677</sup> Ss. 7 to 9 of the law.

<sup>678</sup> Ss. 13 to 16 of the law.

<sup>679</sup> Ss. 28 to 32 of the law.

<sup>680</sup> S. 33 of the law.

<sup>681</sup> S. 21(3) of the *HIV and AIDS (Prevention and Control) Act, 2008*.

<sup>682</sup> S. 21 of the *HIV and AIDS (Prevention and Control) Act, 2008*.

<sup>683</sup> S. 21(3) of the *HIV and AIDS (Prevention and Control) Act, 2008*.

<sup>684</sup> S. 240 *Penal Code, Ca. 16*.

<sup>685</sup> S. 33(1) of the *HIV and AIDS (Prevention and Control) Act, 2008*.

provision of basic health care services to HIV-positive individuals is subject to resource availability.<sup>686</sup> The resources that are available are determined by the government which could sidestep its obligations to individuals who are HIV-positive because of a lack of resources. Furthermore, the Act does not specifically address the entitlement of HIV-positive individuals to anti-retroviral prophylaxes. These prophylaxes are key to ensuring a higher quality and longer life of HIV-positive individuals.

The *National Policy on HIV/AIDS* recommended that the *Penal Code, 1930* should be amended to include a criminal penalty against those who deliberately infect others.<sup>687</sup> This recommendation was included in the *HIV and AIDS (Prevention and Control) Act, 2008*, which criminalizes the willful and intentional transmission of HIV.<sup>688</sup> The penalty associated with this offence is five to ten years of imprisonment.<sup>689</sup> The way in which this provision is worded accords with the UNAIDS recommendation that criminalization of HIV transmission be limited to cases “where a person knows his or her HIV-positive status, acts with the intention to transmit to HIV and does in fact transmit HIV”.<sup>690</sup>

The LHRC recommends that the government review the *HIV and AIDS (Prevention and Control) Act, 2008* and amend the provisions of this Act that address a person’s right to health. Furthermore, the LHRC suggests that greater resources be devoted to providing health care services and education about living with HIV/AIDS to those individuals who are HIV-positive.

## 6.2 Right to Accessible Health Care Services

As mentioned in Chapter 4 of this report, the right to health care is not guaranteed in Tanzanian legislation. However, there is an assumption that individuals will have access to health care of a reasonable quality. It is particularly important that HIV-positive individuals receive adequate and appropriate health care services.

People who are HIV-positive can be heavy users of the health care system, as people living with HIV typically experience more than a dozen episodes of illness before dying, with an average of 12 months of deteriorating health in the year before death.<sup>691</sup> In Tanzania, this creates a heavy burden on an already overwhelmed health care system. Simply put, the health care system is unable to cope with the additional demand for treatment from HIV-positive individuals and the provision of anti-retroviral services.<sup>692</sup> The provision of anti-retroviral services is key to the health of HIV-positive individuals.

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<sup>686</sup> S. 19 of the *HIV and AIDS (Prevention and Control) Act, 2008*.

<sup>687</sup> National Policy on HIV/AIDS, *supra*, at p. 24.

<sup>688</sup> S. 47 of the *HIV and AIDS (Prevention and Control) Act, 2008*.

<sup>689</sup> S. 47 of the *HIV and AIDS (Prevention and Control) Act, 2008*, which states: Any person who intentionally transmits HIV to another person commits an offence, and on conviction shall be liable to imprisonment to a term of not less than five years and not exceeding ten years.

<sup>690</sup> ‘Will criminalizing HIV transmission work?’ *IRIN* (News report 1 December 2008) <<http://www.plusnews.org>> accessed 15 December 2008.

<sup>691</sup> UNAIDS ‘Report on the global AIDS epidemic 2008’ (Report New York August 2008) <<http://www.unaids.org>> accessed 15 December 2008, at p. 162.

<sup>692</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra*, at p. 24.

As of November 2008, 300,000 patients were on anti-retroviral prophylaxes.<sup>693</sup> However, in the broader context, the number of patients receiving anti-retroviral prophylaxes is marginal, as there are 1.4 million people who are HIV-positive in Tanzania.

The limited capacity of the health care system may be a factor in the transmission of HIV. For instance, in rural areas, there are few health facilities. For pregnant women living in rural areas, one of the difficulties in attending clinics is the long distances to these clinics<sup>694</sup> As a result, pregnant women who live in rural areas, whether they are HIV-negative or positive, may not attend clinics. For women who are HIV-positive, this means that there is a higher risk of transmitting HIV to their babies during pregnancy, labour and breastfeeding.<sup>695</sup> Without medical intervention, there is a 40 percent transmission rate from mother to child.<sup>696</sup>

In the second half of 2007, President Kikwete launched a year long campaign to encourage voluntary testing for HIV. During this campaign, approximately four million Tanzanians were tested.<sup>697</sup> The campaign was time-limited. The LHRC suggests that a campaign for voluntary counseling and testing be implemented on an ongoing basis. It is also suggested that individuals who get tested be provided with counseling and educational materials regarding the transmission of HIV and living with HIV, if they test positive. The LHRC also advocates for greater confidentiality measures to be taken when releasing test results, as a lack of confidentiality serves as a strong disincentive for individuals to be tested.

### 6.3 Social Inequalities

Social inequalities in Tanzania translate into higher infection rates of more vulnerable groups, such as women, individuals who live in rural areas, low income individuals, and individuals who travel frequently or who are away from home on temporary assignment.

#### *Women and HIV/AIDS*

In Africa as a whole, women are disproportionately affected by HIV in comparison to men; this trend is particularly noticeable in the HIV prevalence rates among young people.<sup>698</sup> Tanzania is no exception. In Tanzania, approximately 6.8 percent of women are infected with HIV, in comparison to the 4.7 percent of men.<sup>699</sup> While HIV prevalence

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<sup>693</sup> P. Rugonzibwa 'Govt demands accountability of all HIV/AIDS donor funds' *Daily News* (Tanzania) 11 November 2008.

<sup>694</sup> L. Philemon 'Mother to child HIV transmission a serious challenge in rural areas' *The Guardian* (Tanzania) 19 August 2008.

<sup>695</sup> *Ibid.*

<sup>696</sup> D. Makangale 'BA, UNICEF out to curb mother-to-child HIV infection' *Daily News* (Tanzania) 4 September 2008.

<sup>697</sup> 'Tanzania controls HIV/AIDS' *AfrolNews* (News report 9 June 2008) <<http://www.aegis.com>> accessed 15 December 2008.

<sup>698</sup> UNAIDS, *supra*, at p. 39.

<sup>699</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra* note 678, at p. 7.

among young women aged 15 to 24 years is 0.4 percent higher than among the young men of the same age.<sup>700</sup> The HIV prevalence rate in this age group is particularly important as 60 percent of new infections occur in this group.<sup>701</sup>

There are a multitude of factors that contribute to a higher prevalence rate of HIV in women in comparison to men in Tanzania. It is beyond the scope of this report to provide a comprehensive list of these factors, or to explore any one of these factors in-depth. However, this report does highlight those factors that are linked to gender inequalities and human rights issues in Tanzania, such as:

- GBV. Between 40 to 60 percent of women surveyed in Tanzania said they had been physically and/or sexually abused by their intimate partners.<sup>702</sup> Fear of violence may result in women engaging in risky behaviour, such as not attending voluntary testing,<sup>703</sup> or “agreeing” to have unsafe sex with her partner;
- It is also argued that FGM increases the risk of women being infected with HIV;<sup>704</sup> and,
- The practice of having multiple concurrent partners.<sup>705</sup> There are various reasons why Tanzanians have multiple partners, including discriminatory cultural practices, such as polygamy, and the economic disempowerment of women, which may lead to women engaging in transactional sex.<sup>706</sup> It is necessary to address these discriminatory cultural practices and to promote gender equality in an attempt to lower the prevalence rate of HIV in women and, particularly, in younger women.

One of the indirect affects of a higher prevalence rate among women, particularly young women, may be an increase in the rate of mother to child transmission. According to EngenderHealth, an American health organisation, there has been an increase in the number of mother-to-child HIV transmissions in Tanzania and, particularly, in the Arusha and Arumeru districts.<sup>707</sup>

In Tanzania, pregnant women are encouraged to be tested for HIV. There is some reluctance on the part of pregnant women to be tested. Interestingly, pregnant women with higher education are less likely than women with lower levels of education to agree to an HIV test.<sup>708</sup> Of the pregnant women who are tested by antenatal clinics, it is

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<sup>700</sup> UNAIDS ‘Regional and Country Profiles: Tanzania’, *supra* note 675. Young men aged 15 to 24 years have an infection rate of 0.5 percent compared to 0.9 percent among young women of the same age group.

<sup>701</sup> F. Peter ‘TAYOA launches helpline for HIV counseling among youths’ *The Guardian* (Tanzania) 16 September 2008.

<sup>702</sup> UNAIDS, *supra*, at p. 72.

<sup>703</sup> E. Clorah ‘HIV/AIDS as a gender issue’ *The Guardian* (Tanzania) 6 September 2008.

<sup>704</sup> TACAIDS, *supra*, at p. 72.

<sup>705</sup> L. Philemon ‘Multiple concurrent partnerships make HIV/AIDS fight a quagmire’ *The Guardian* (Tanzania) 24 October 2008.

<sup>706</sup> *Ibid.*

<sup>707</sup> ‘Mother-to-Child HIV Transmission shocking’ *Arusha Times* (Tanzania) 22 November 2008.

<sup>708</sup> V Mnyanyika ‘Most educated women ‘avoid HIV testing’’ *The Citizen* (Tanzania) 24 May 2008.

estimated that 8.7 percent are HIV-positive.<sup>709</sup> However, the testing of pregnant women is not enough. After testing, HIV-positive women need to receive appropriate health care. The provision of this health care is problematic. Only 28 percent of health care facilities in Tanzania provide preventative treatment to pregnant women who are HIV-positive.<sup>710</sup> Furthermore, research done in 2006 indicates that only 53 percent of pregnant women who tested HIV-positive received anti-retroviral prophylaxes.<sup>711</sup> The limited provision of anti-retroviral prophylaxes to pregnant women who are HIV-positive can be attributed to a limited availability of anti-retroviral prophylaxes, the policy of only dispensing anti-retroviral prophylaxes from 28 weeks onwards and an inadequate follow-up system of HIV-infected women.<sup>712</sup> The gaps in the testing and treatment of HIV-positive women lead to the very real possibility that a generation of HIV-positive children will be created.

Another issue arising from the HIV-infection rate of pregnant women is the creation of generation of children raised in families where one or both parents are HIV-positive and the potential that these children will become orphans. The creation of a generation of AIDS orphans is borne out by statistics, which estimate that the number of AIDS orphans in Malawi, South Africa and Tanzania rose from 2.1 million in 2001 to 2.9 million in 2007.<sup>713</sup> One way of addressing this problem of AIDS orphans is to provide adequate and appropriate health care services, including anti-retroviral prophylaxes, to HIV-positive parents so that they remain healthier for longer and live longer. If HIV-positive parents live longer, then they can care for their children for longer. The Tanzanian government is still coming to grips with the issue of AIDS orphans. It has taken its first step to addressing this issue by launching its *National Plan of Action for Orphans and Vulnerable Children, 2008*.<sup>714</sup> The purpose of this plan is to identify and provide services to children who are AIDS orphans, or who are vulnerable due to HIV/AIDS.<sup>715</sup>

### *Older People and HIV/AIDS*

In Tanzania, the focus in HIV/AIDS prevention is to keep the younger generation between the ages of 10 and 24 years “HIV-free”.<sup>716</sup> However, this focus on the younger generation may result in a marginalization of other groups who require services related to HIV/AIDS, such as older people.

The marginalization of older people is contrary to the *African Union Policy Framework and Plan of Action on Ageing, 2002*, which commits African Union member states to “protect the rights and needs of older people affected by HIV/AIDS and other epidemics,

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<sup>709</sup> Makangale, *supra*.

<sup>710</sup> Makangale, *supra*.

<sup>711</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra*, at p. 63.

<sup>712</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra*, at p. 63.

<sup>713</sup> UNAIDS, *supra*, at p. 47.

<sup>714</sup> ‘First Ladies launch orphan care plan’ *IRIN* (News report 17 February 2008) <<http://allafrica.com>> accessed 15 December 2008).

<sup>715</sup> *Ibid.*

<sup>716</sup> The Second National Multi-Sectoral Strategic Framework on HIV and AIDS, *supra*, at p. 37.

including the recognition that older people are sexually active and this is a risk group”.<sup>717</sup> There is little data on the HIV/AIDS prevalence within the age group of 49 years and above. In order to determine how to respond to the needs of older people who have HIV/AIDS, the government should obtain data that is desegregated by age and by sex about the HIV/AIDS prevalence in the this group.

In 2008, it was reported that older people face discrimination when accessing HIV/AIDS services because of assumption that HIV only affects younger people.<sup>718</sup> The discrimination against older people can take several forms. For instance, most prevention campaigns are targeted at young people and “high risk groups”, and the information needs of older persons are ignored.<sup>719</sup> As a result, many older people are unaware or have incomplete information about the transmission of HIV. Discrimination in the provision of HIV/AIDS services is inappropriate. Older people have the same right, as every other Tanzanian, to access information about HIV prevention and transmission, and to access care and treatment that is age appropriate for them.

There are number of cultural practices that, when coupled with unprotected sex, contribute to the spread of HIV among older people. These practices include polygamous marriages and wife inheritance. Polygamous marriages between older men and younger women put all the parties to the marriage at risk of HIV infection.<sup>720</sup> The custom of wife inheritance, which is intended to protect a widow and her children and to keep property within a clan, can increase the risk of contracting and spreading HIV if the deceased husband was HIV-positive.<sup>721</sup> It is necessary to educate older people about the transmission of HIV and how cultural practices can interact with the spread of HIV. It may be advisable to discourage those cultural practices that contribute to the spread of HIV.

Another key issue arising from the nexus of HIV/AIDS and older people is the burden placed on older people to care for their children who are HIV-positive and their grandchildren who are orphaned by HIV/AIDS. In 2008, UNAIDS reported that 40 percent of all orphans in Tanzania were cared for by their grandparents and, particularly, by their grandmother.<sup>722</sup> HelpAge International, an international NGO, called on the Tanzanian government in 2008 to allocate funds to provide to older people who care for their children and grandchildren that are affected by HIV/AIDS.<sup>723</sup> In addition, the Tanzanian Government should revise the *National HIV/AIDS Care and Treatment Plan (2003 – 2008)* to ensure it responds to the needs of older women who care for people living with HIV/AIDS and most vulnerable children.<sup>724</sup>

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<sup>717</sup> HelpAge International Tanzania ‘The cost of love: Older people in the fight against AIDS in Tanzania’ (Research report Dar es Salaam 2004), at p. 7.

<sup>718</sup> M Gwera ‘Call for protection of elderly against abuse’ *Daily News* (Tanzania) 13 May 2008.

<sup>719</sup> HelpAge International Tanzania, *supra*, at p. 8.

<sup>720</sup> HelpAge International Tanzania, *supra*, at p. 11.

<sup>721</sup> HelpAge International Tanzania, *supra*, at p. 11.

<sup>722</sup> N. Kigwangallah ‘NGO asks for government assistance to elderly HIV/AIDS caretakers’ *The Guardian* (Tanzania) 30 August 2008.

<sup>723</sup> *Ibid.*

<sup>724</sup> NGO Thematic Shadow Report, *supra* at p. 3.

## Chapter Seven

### Collective Rights

#### 7.0 Introduction

The collective rights are those rights, which the individual equally enjoys as part of a group such as the right to access to natural resources, clean and health environment and the right to development. That is, they those rights which are exercised by individually collectively. They are provided for under various international human rights instruments. For instance, Article 22 of the *African Charter on Human and Peoples Rights, 1981*<sup>725</sup> provides that all people have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. This chapter discusses some of the collective rights, namely the right to development; the right to a clean and healthy environment; and, the right to natural resources.

#### 7.1 Right to Development

The right to development is not enshrined in the Constitution. However, it is provided for under the provisions of various international and regional human rights instruments.<sup>726</sup> For instance, Article 1 of the *Declaration on the Right to Development, 1986*<sup>727</sup> states that, the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development,<sup>728</sup> in which all human rights and fundamental freedoms can be fully realized.<sup>729</sup> The right to development, as an

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<sup>725</sup> Adopted by the 18<sup>th</sup> Ordinary Session of the Assembly of Heads of States and Government of the OAU on 27<sup>th</sup> June 1981, Nairobi Kenya and came into force on 21<sup>st</sup> October 1986.

<sup>726</sup> See: Arts. 1, 6, 7, 9, 11, 12, 13 and 15 of the *International Covenant on Economic, Social and Cultural Rights, 1966*, which state that all people have the right of self-determination, to freely determine their economic development, right to work, social security, adequate standard of living, improved methods of production and the like. Other different international instruments are directly or indirectly provide for the same. For instance, see: Arts. 11, 13 and 14 of the *Convention on the Elimination of all Forms of Discrimination against Women, 1979*; Art. 5 of the *Convention for the Elimination of Racial Discrimination* (adopted 21 December 1965, entered into force 4 January 1969, acceded to by Tanzania 27 October 1972) 660 UNTS 195; Arts. 24, 26, 27, 28 and 32 of the *Convention on the Rights of the Child*; Art. 16 of the *African Charter on Human and Peoples' Rights, 1981*.

<sup>727</sup> *Declaration on the Right to Development, 1986*, UNGA Res 41/128 (4 December 1986) UN Doc A/41/53. The *Declaration on the Right to Development, 1986* unequivocally states that the right to development is a human right.

<sup>728</sup> According to LHRC, “development” is a comprehensive process involving sustainable improvement of economic, social and political well-being of all individuals and people. See: Human Rights Report of 2007, *supra*, at p. 83. According to Walter Rodney, *How Europe Underdeveloped Africa Development* (Tanzania Publishing House, Tanzania 1973) at p. 9, “development” in human society is a many-sided process. At the level of the individual, it implies increased skill and capacity, greater freedom, creativity, self-discipline, responsibility and material well-being.

<sup>729</sup> “Full realization” according to the wording of Article 2 of the *Declaration on the Right to Development, 1986*, implies or includes full realization of the right of peoples to self-determination.

unalienable right, also includes the sovereignty over all natural wealth and resources<sup>730</sup> as discussed in this chapter.

The primary responsibility to ensure progressive realization of the right to development rests with the government<sup>731</sup>. The DRD provides that states have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation<sup>732</sup> in development and in the fair distribution of the benefits resulting therefrom.<sup>733</sup> One of the important prerequisites for development is the involvement of people in all stages of development. Therefore, the government, in executing its duties as said above, has to make sure that people are facilitated to work on productive works.<sup>734</sup> Having in place socio-economic policies, strategies and laws could be one of the mechanisms to ensure progressive realization of this right<sup>735</sup>.

The realization of the right to development is, in most cases, measured by looking at socio-economic indicators such as food; housing; unemployment rates; provision of social services such as access to health services; industrial and agricultural development and the like. The wording of various international human rights instruments such as the *Universal Declaration of Human Rights, 1948* and the *International Convention on Economic, Social and Cultural Rights, 1966* illustrates this point.<sup>736</sup>

Despite the fact that this right is not directly provided for under the Constitution, there have been number of national policies, strategies and legislation formulated for the purposes of realizing this right. Some of the said initiatives, as they are fully discussed

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<sup>730</sup> Art. 2 of the *Declaration on the Right to Development, 1986*.

<sup>731</sup> Responsibility for ensuring realization of the right to development lies with the individual, and states operating at both the national and international levels, as set out by Prof. Arjun Sengupta, 'The Right to Development as a Human Right' (2000) < <http://www.hsph.harvard.edu> > accessed 16 December 2008, at p. 3.

<sup>732</sup> *The Rio Declaration on the Environment and Development, 1992* (adopted 12 August 1992) UN Doc. A/CONF.151/26 (vol. I) states at Principle 5 that; "[A]ll states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world."

<sup>733</sup> Arts 2(3) and 4 of the *Declaration on the Right to Development, 1986*. Article 4(1) of the said *Declaration* directs that countries have the duty to take steps, individually and collectively, to formulate international development

<sup>734</sup> Art 3(1) of the *Declaration on the Right to Development, 1986*.

<sup>735</sup> Progressive realization of the right to development means continuous improvement of the living conditions as it is provided for under the provisions the *International Covenant on Economic, Social and Cultural Rights 1966* (Example see Art. 11(1)) and the *Universal Declaration of Human Rights, 1948* (See Art. 25(1)).

<sup>736</sup> Pursuant to Art. 25(1) of the *Universal Declaration of Human Rights*, everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. Similarly, Art. 2 of the *International Covenant on Economic, Social and Cultural Rights 1966*, stipulates that each state party undertakes to take steps to the maximum of its available resources to achieve progressive realization of the rights recognized in the covenant.

below, are the *MKUKUTA*,<sup>737</sup> the *Rural Development Strategy of Tanzania of 2001*; the *Property and Business Formalization in Tanzania (MKURABITA)*;<sup>738</sup> and the *Tanzania Development Vision 2025*.<sup>739</sup> At the international level, the right to development is contained in the *United Nations Millennium Development Goals (MDGs)*.<sup>740</sup> This sub-chapter assesses level or improvement of the indicators embodied in the strategies and policies.

#### *National Strategy for Growth and Reduction of Poverty (MKUKUTA)*

MKUKUTA was initiated four years ago as a driving force for strengthening the government commitment to the realization of the *Tanzania Development Vision 2025* and the MDGs by the government of Tanzania. This strategy is the development framework for the current five year phase (2005-2010).<sup>741</sup> The focus is outcome orientated and organized around three clusters, namely: growth and reduction of income poverty; improved quality of life and social well-being; and governance and accountability.

The recently published report<sup>742</sup> says there is a slight growth performance of between 6 and 8 percent of the Gross Domestic Product. Economic growth is vital for the reduction of poverty. The average of 6 to 8 percent, however, does not reflect the reality of micro-economy. That is, the improvement of macro-economy (major economy) does not correspond with the levels of poverty in practical terms especially in the rural areas.<sup>743</sup> Major challenges still persist, such as inadequate social services, unemployment and low per capita income.

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<sup>737</sup> An acronym for “*Mkakati wa Kukuza Uchumi na Kuondoa Umaskini*” (National Strategy for Growth and Reduction of Poverty).

<sup>738</sup> A Swahili acronym for “*Mpango wa Kurasimisha Rasilimali na Biashara za Wanyonge Tanzania*” (Property and Business Formalization in Tanzania).

<sup>739</sup> This is a government long term plan which formulates a new economic and social development vision for Tanzania for 25 years to come. It sets priorities which Tanzania envisages to achieve within 25 years from the year 2000. Some of the priorities set are education;

<sup>740</sup> The MDGs are eight goals set out by the United Nations which every country is to assess itself with and move towards targets set for 2015. The said goals are (1) eradicate extreme poverty and hunger; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV/AIDS, malaria and other diseases; (7) ensure environmental sustainability; and, (8) develop a global partnership for development.

<sup>741</sup> It runs from 2005/06 to 2009/10. The MKUKUTA is sometimes referred to as the second generation of Poverty Reduction Strategy (PRS). Tanzania’s first PRS was implemented from 2001/01 until 2002/03 and has been replaced by MKUKUTA in 2005. The same strategy is implemented in Tanzania- Zanzibar by the Revolutionary Government of Zanzibar. In Zanzibar, it is called *Zanzibar Strategy for Growth and Reduction of Poverty*, which is the successor of the Zanzibar Poverty Reduction Plan (ZPRP), Zanzibar’s first poverty reduction strategy. This Kiswahili acronym for the current strategy for Zanzibar is *MKUZA*.

<sup>742</sup> Poverty and Human Development Report of 2007, *supra*, at p. 4.

<sup>743</sup> In May 2008, Professor Juma Kapuya, the Minister for Labour, Employment and Youth Development said that Tanzania has achieved macro-economy stabilization, but still has challenges with unemployment and poverty. Quoted in the media, see: M Jumbe ‘Government admits failure in tacking unemployment’ *The Citizen* (Tanzania) 13 May 2008.

The *Household Budget Survey 2007 – Analytical Report 2008*<sup>744</sup>, which assesses the poverty level for the period 1991 to 2007, concluded that the fall in poverty over the assessment period is large. Nationally, there has been a decline of approximately five percent in the proportion of the population living below the poverty line. However, despite that fact, poverty remains high in rural areas where 38 percent of the population falls below the basic needs poverty line. This report does not account for how much the MKUKUTA has contributed to the said growth.

Moreover, according to the poverty profile of Tanzania, the distribution of poverty by main source of income is very low for the Tanzanians who engage in farming, livestock, fishery, and forestry activities. For these groups of economic activities, more than 74.2 percent of them are poor. The said profile concludes that households that depend on agricultural sources of income are more likely to be poor, as are households that depend on a natural product, particularly the sale of firewood.

#### *Food Security, Agricultural Development and Bio-Fuel*

Food security is one of the indicators of poverty. Food security is defined as meaning the availability at all times of adequate food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices<sup>745</sup> in order to ensure that all people at all times have both physical and economic access to the basic food that they need.<sup>746</sup> Article 25(1) of the UDHR provides for adequate standard of living (as the main component for the right to development), which includes the right to adequate food.<sup>747</sup> The *Household Budget Survey 2007 – Analytical Report 2008* assesses whether a household can meet its food needs and its vulnerability to food shortages.

According to that report, most households report that they consume either two to three meals per day on a regular basis. In urban areas, three meals is the norm but in rural areas, the normal situation is the consumption of one to two meals per day. *The Government (Tanzania) Development Vision 2025* says that a high livelihood for Tanzanians is expected to be attained through strategies, which ensure the realization of food self-sufficiency and food security.<sup>748</sup>

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<sup>744</sup> National Bureau of Statistics, United Republic of Tanzania ‘Household Budget Survey 2007 – Analytical Report 2008’ (Report Tanzania 2008) <<http://www.nbs.go.tz>> accessed on 16 December 2008 (Household Budget Survey 2007).

<sup>745</sup> UN ‘Report of the World Food Conference’ (Report Rome 5 November to 16 November, 1974).

<sup>746</sup> UN Food and Agriculture Organisation ‘World Food Security: a Reappraisal of the Concepts and Approaches’ (Director General’s Report Rome, Italy 1983).

<sup>747</sup> The *International Covenant on Economic, Social and Cultural Rights 1966*, *supra* note 268, at Art. 11 (1) provides for the right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions. The *African Charter on Human and Peoples’ Rights, 1981*, *supra* note 42, at Art.16 also provides for the same; that is, everyone has the right to the minimum essential food which is nutritionally adequate and safe to ensure freedom from hunger to everyone and to prevent malnutrition.

<sup>748</sup> Planning Commission, United Republic of Tanzania ‘The Tanzania Development Vision 2025’ (Government policy 1999) <<http://www.tanzania.go.tz/vision.htm>> accessed December 2008, at para. 3.1.

No strategies have been implemented in Tanzania to ensure or achieve food security. *The Agricultural Sector Development Strategy of 2001*, which relies upon the intervention of modern technology in the agricultural sector, is still a theoretical initiative. In 2008, there were not any notable improvements in terms of availability of agricultural inputs, reliable local and international markets, extension services for farmers in rural areas, modernization of technology and the like. More than 70 percent of farmers still use a hand hoe to till the land; 20 percent use animal draught ploughs and only 10 percent use tractors.<sup>749</sup>

As a result, the majority of people have continued to shift away from agriculture towards private, non-agricultural activities, including working in the informal sectors in urban areas. As of 2008, employment in agriculture declined by about 7.7 percent.<sup>750</sup> The availability of adequate food in Tanzania depends on adequate rainfall.<sup>751</sup> It is very unfortunate that only 8 percent of Tanzania's peasants use irrigation farming.<sup>752</sup> Despite the fact that about 31 percent (29.4 million hectares) of Tanzania's arable land is suitable for irrigation development.<sup>753</sup> In this respect, in poor seasons, the country as a whole is vulnerable to serious food shortage due to low production and inadequate storage capacity. In 2008, for instance, in Kilolo District, Iringa Region, there was a serious food shortage.<sup>754</sup> Effective food security arrangement and agricultural development are needed for a more meaningful realization of this component of the right to development. The focus should not only be on crop production, but also on livestock keeping. It should be noted that, the right of adequate food is a source of other fundamental human rights, including the right to life.

Another challenge in respect of the right to adequate food security in 2008 was the issue of biofuel.<sup>755</sup> As Dr. Khoti Kamanga said:

The Government of Tanzania explicitly recognizes the importance and need to develop alternative fuels such as biofuels. In his programme of visiting Government Ministries, the newly elected State President, Jakaya Mrisho Kikwete, called on Ministry of Energy and Minerals (where he once served as Minister), and stressed the importance of developing a strategy to promote biofuels with emphasis on bio-ethanol. He returned to this theme in a subsequent monthly televised address to the nation. He is also known to have made familiarization visits to bioethanol plants in Sweden and US.

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<sup>749</sup> Charles R. Tulahi and Perpetua M. Hingi 'Agrarian Reform and Rural Development in Tanzania' International Conference on Agrarian and Rural Development (Porto Alegre, Brazil 7 March -10 March 2006), at p. 1.

<sup>750</sup> See: Poverty and Human Development Report 2007, *supra*, at p. 10.

<sup>751</sup> See: Poverty and Human Development Report 2007, *supra*, at p. 13.

<sup>752</sup> Human Rights Report of 2007, *supra*, at p. 90.

<sup>753</sup> Ministry of Agriculture, Food and Cooperatives, United Republic of Tanzania 'National Irrigation Master Plan of 2004' (Government plan Tanzania 2002).

<sup>754</sup> Human rights monitor, LHRC (field visit Kilolo District April 2008). Also see: T Msowoya 'Watu 4000 Wakabiliwa na Njaa Kilolo' *Mwananchi* (Tanzania) 19 December 2008, p. 3, which reported that about 4,000 people in Kilolo were in acute food shortage. They were in need of 344.3 tons of food stuff.

<sup>755</sup> Biofuel means fuel produced from renewable resources, especially plant biomass, vegetable oils, treated municipal and industrial wastes. It is made by processing vegetable oils and other fats.

Finally, he is on record as visiting the Rufiji delta area exhorting villagers to embrace Swedish investors with an interest in bioenergy development.<sup>756</sup>

Furthermore, during 2008, the government said that it is developing a policy to address the potential local production and consumption of biofuel and how much, if any, land should be allocated to biofuels. The Deputy Minister for Ministry of Agriculture, Food Security and Cooperatives, Mr. David Mathayo, stated:

Investors have been coming and asking for land for biofuel production. It is a good idea and the investment will create job opportunities and improve the economy through the sale of the fuel.<sup>757</sup>

Steps were taken in 2008 to prepare Tanzania to be a source of biofuel. In 2008, Tsh. 800 million was allocated for compensating 2,840 house holds in Kisarawe District, Coast region whose land (9,000 hectares) has been leased to a company called Sun Biofuels Tanzania Limited for the growth of jatropha.<sup>758</sup> The villagers are concerned about what they will do without the land to work on.<sup>759</sup>

Dr. Kamanga further states that the following threats deserve particular attention; dispossession of village land in questionable circumstances; access and affordability of food; livelihoods of rural communities within biofuel crop growing areas; protection of smallholder farmers from exploitation; environmental impact assessment of projects; preservation of biodiversity and natural resources and plantation workers' rights.<sup>760</sup> The LHRC agrees with the assertion that biofuel production is one of the factors associated with food insecurity<sup>761</sup> because it drains strategic, national resources such as land, water, forests and labour, and crops for generations to come. Tanzanians, especially in rural areas, depend wholly and exclusively on agriculture and crop production for food and business purposes. Allowing biofuel production means scrambling for land resources between biofuel producers and agriculturists.

### *Progressive Realization of Right to Development and Donor Dependency*

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<sup>756</sup> See: Dr. Khoti Chilomba Kamanga, 'The Agrofuel Industry in Tanzania: A Critical Enquiry into Challenges and Opportunities' (Final Report Tanzania 28 May 2008).

<sup>757</sup> G Lamtey 'Government yet to decide on production of biofuel' *The Guardian* (Tanzania) (13 May 2008).

<sup>758</sup> Jatropha Curcas is a non-edible oil crop predominately used to produce bio-diesel. Jatropha Curcas Plantations 'About Jatropha Curcas' <[www.jatrophacurcasplantations.com](http://www.jatrophacurcasplantations.com)> accessed 29 January 2009.

<sup>759</sup> L Philemon and F Peter 'Jatropha farming Scheme: Kisarawe villagers to be paid 800m/- compensation' *The Guardian* (Tanzania) 27 May 2008.

<sup>760</sup> See: Kamanga, *supra*.

<sup>761</sup> Envirocare, a Tanzanian NGO working mainly on environmental justice, is of the view that as the demand of biofuel increases, it is likely that there will be more incentive to grow crops to satisfy the biofuel industry instead of the food market. Without proper regulations, a country like Tanzania, which already experiences food insecurity, could see itself in a situation whereby there is less food being produced resulting in increased food prices and even facing famine. See: Haika Mcharo, Envirocare Tanzania 'Tanzania keen on large-scale biofuel production' (Newsletter Tanzania May – June 2008).

As it has been stated above, achievement of the right to development should be progressively realized by the government. It is not an overnight event. The government of Tanzania currently subscribes to the General Budget Support (the GBS) initiative. GBS refers to channeling of donor funds to a partner government annual budget using the government's own allocation, procurement and accounting systems. It helps to finance implementation of MKUKUTA through the government's budget. The aid financing is provided to Tanzania by 14 donors.<sup>762</sup> The idea is that the government can allocate aid financing according to its national priorities, rather than according to donors wishes.

The MKUKUTA's implementation is largely dependent on aid financing. It is the development partners who support the government to fulfill its role in the development of Tanzania.<sup>763</sup> This is the first challenge as far the implementation and notion of a "home-grown" MKUKUTA are concerned. The realization of MKUKUTA's outputs is therefore on the hands of development partners. That is, the pace towards realization of the MKUKUTA goals depends on the inflow of the donors' money to the development programmes. The trend of Tanzania's dependence on donor funding is as follows:

<b>Year</b>	<b>2002/03</b>	<b>2003/04</b>	<b>2004/05</b>	<b>2005/06</b>	<b>2006/07</b>	<b>2007/08</b>
<b>GBS</b>	30%	38%	34%	48%	42%	38%
<b>Basket Funds</b>	16%	18%	21%	26%	16%	12%
<b>Project Funds</b>	54%	44%	45%	26%	41%	51%
<b>Total</b>	100%	100%	100%	100%	100%	100%

**Source:** Government Budget Books, various years, Ministry of Finance (extracted from the GBS Annual Review 2007 – Information Pack, page 2).

The *General Budget Support Annual Review 2007 – Information Pack* of the United Republic of Tanzania indicates that the government of Tanzania depends on around 42 percent of the donors' funds<sup>764</sup> for its national budget and around 80 percent of the development budget from the donors. With this donor dependency syndrome, the government could not confidently say that the implementation of MKUKUTA is a home-managed process. It will not, moreover, realize its needs according to the priorities. The dependence of the budget on the donor external financing, sometimes negatively affects government's plans because donors' support is unpredictable.<sup>765</sup>

Secondly, despite donor support, the resources needed for the fulfillment of MKUKUTA's targets are still much greater than what the government can afford.<sup>766</sup> It is estimated that MKUKUTA needs more than Tsh. 12 trillion per annum to implements its

<sup>762</sup> United Republic of Tanzania 'General Budget Support Annual Review 2007 – Information Pack' (Information pack Tanzania 2007) at p. 5.

<sup>763</sup> *Ibid.* at p. 3.

<sup>764</sup> Note that, Tanzania receives aid from its donors in three ways; GBS, basket funds and project funds. Unlike other ways, the GBS funds go directly to the national budget.

<sup>765</sup> Speech of the Honourable Mustafa Haidi Mkulo, *supra* note 18, at p. 22, para. 33(ii).

<sup>766</sup> The Minister for Finance and Economic Affairs said "resources required for financing the implementation of MKUKUTA, particularly building economic and social infrastructure, by far exceed our national capacity despite an increasing domestic revenue effort". Speech of the Honourable Mustafa Haidi Mkulo, *supra*, at p. 21, para 33.

goals while the government collects an average of Tsh. 2.4 trillion per annum.<sup>767</sup> One of the proposed solutions is to control the budget allocation. At the moment, recurrent expenditures take a larger share of the budget than development programmes.

### *Unemployment Rates*

Another challenge in relation to the realization of the right to development is the high rate of unemployment. As it is discussed in Chapter 4.1 of this report, many individuals in Tanzania are unable to find paid employment. This affects their ability to enjoy their right to an adequate standard of living.<sup>768</sup> The Constitution does not go to guarantee the right to an adequate standard of living apart from stating that everyone has the right to work.<sup>769</sup>

Recently released statistical information by the government<sup>770</sup> indicates that, there is a steady increase of labour force in Tanzania. For instance, for the period 1991 to 2006/7, there was an increase in the labour force of approximately 9.6 million people. According to the LHRC (2007) that implies about 20.6 million people of mainland Tanzania have the ability to work but the majority of them (of who can actually work) are unemployed. *The Labour Force Survey 2006* says that the rate of unemployment of youth aged 15 to 35 years has gone down from 16 percent of the youth labour force to in 2001 to 13 percent in 2006<sup>771</sup>.

The finding is doubtful because between in the said age groups, the majority of the individuals are primary, secondary and university graduates. According to the information available, it is estimated that for each year a total of 700,000 youth enter job market but only 40,000 get employment in the formal sector.<sup>772</sup> With this pace, the government will create only 200,000 jobs for youth by 2010. That means, an average of 660,000 youths is left out of the job market every year.

In respect of unemployment, the MKUKUTA operational target is to reduce unemployment from the 2000/01 rate of 12.9 percent to 6.9 percent by 2010<sup>773</sup>. The unemployment rate in 2007 was 11 percent, which is 2 percent less than in 2001. That means that employment has increased by 2 percent (of 0.33 percent per annum) for the

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<sup>767</sup> Human Rights Report of 2007, *supra*, at p. 4.

<sup>768</sup> See Arts. 11(1) and 25(1) of the *International Covenant on Economic, Social and Cultural Rights 1966* and provisions of the *Universal Declaration of Human Rights, 1948*, respectively, which as said above, provide for the right to development. Good narration on this is also found in the Tanzania Human Rights Report of 2007, at pp. 44 to 45.

<sup>769</sup> Art 22 of the *Constitution of Tanzania, 1977*.

<sup>770</sup> National Bureau of Statistics, United Republic of Tanzania ‘The Labour Force Survey 2006 – Survey Results’ (Report Dar es Salaam June 2007). Also see: page 44 of the Tanzania Human Rights Report of 2007.

<sup>771</sup> The overall unemployment rate stands at 11.0% according to the National Bureau of Statistics, United Republic of Tanzania and others ‘Analytical Report for Integrated Labour Force Survey 2006’ (Report Tanzania November 2007).

<sup>772</sup> Tanzania Human Rights Report of 2006, at p. 41 and the Tanzania Human Rights Report of 2007, at pp. 44 and 45.

<sup>773</sup> National Bureau of Statistics, United Republic of Tanzania and others ‘Analytical Report for Integrated Labour Force Survey 2006’ (Report Dar es Salaam November 2007) at p. xiii.

period of six years. With that pace of 0.33 percent increase of employment opportunity it is logically estimated that 2010, the unemployment rate will still stand at 9.8 percent and not 6.9 percent as set out in MKUKUTA. Until then, the realization of the right to development to all will remain partially enjoyed by few members of the community.

A number of pro-active steps can be taken to address the rate of unemployment. For instance, for the youth, to make sure that the *National Youth Development Policy of Tanzania* is actually working. The experience has continued to reveal the fact that, youths can actually organize themselves for development projects, but they lack capacity and support from the government. A good example is the Tanga Youth Development Association. This group has established two self-employment projects for youth. It established a dairy goat scheme in Kilindi and a carpentry project in Handeni. The projects are aimed at increasing the participation of young people in the implementation of the *National Youth Development Policy*. One of the problems which have been noted is that although the *National Youth Development Policy* was created in 1996, most youths do not implement what is outlined in the policy because they do not need or, rather understand, the policy.<sup>774</sup>

The relentless attack by municipal militia in urban areas on petty traders should be replaced by viable measures such as access to microfinance loans; designation of specific places for them to trade and giving them entrepreneurship skills. In 2008, city authorities, especially in Mwanza and Dar es Salaam, continued to evict petty traders who conducted business around formal market premises. In the process, the municipal militia has been blamed of destroying merchandise belonging to the petty traders or confiscating the same for personal use. Some petty traders have stated that in retribution they will make impossible for people to go through Kariakoo market at night.<sup>775</sup> Unless youths and other people are guarantee the right to work, the chunk of them will never enjoy the reality of the right to development.

#### *Implementation of the MDGs by Tanzania*

Last year's MDGs' Report<sup>776</sup> indicated that, at the global level, the struggle towards the achievement of the eight MDGs is at midway point.<sup>777</sup> This year, again, the assessment of the MDGs is said to be at the same midpoint and in fact presents a mixed picture, one of both significant progress and formidable challenges.<sup>778</sup> *The Delivering of Results for Children in Tanzania 2008 of UNICEF*<sup>779</sup>, points out that, six of the eight MDGs goals

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<sup>774</sup> G. Sembony 'NGO Starts Projects for Tanga Youth' *The Citizen* (Tanzania) 16 January 2008.

<sup>775</sup> J. Mkonya 'Evicted small traders vow to turn Kariakoo into "Hell"' *The Guardian* (Tanzania) 19 January 2008.

<sup>776</sup> See: UN, *The Millennium Development Goals Report 2007* (UN Dept. of Economic and Social Affairs, New York 2007).

<sup>777</sup> See: The Tanzania Human Rights Report of 2007, at p. 87.

<sup>778</sup> See: International Bank for Reconstruction and Development, the World Bank 'The Global Monitoring Report of 2008: MDGs and the Environment' (Report Washington 2008).

<<http://siteresources.worldbank.org>> accessed 17 December 2008.

<sup>779</sup> UNICEF Tanzania Section, the report is undated but was received by LHRC in July 2008 from UNICEF.

could be met. However, the eradication of extreme poverty and hunger<sup>780</sup> remain elusive and there are particular challenges confronting the health-related goals of reducing child mortality,<sup>781</sup> improving maternal health,<sup>782</sup> and combating HIV/AIDS and other diseases.

On the other hand, the *Millennium Development Goal Report 2008* records some (slight) improvement at the global level. The five major areas of improvement, as it indicated in this report, are<sup>783</sup>:

- in all but two global regions, primary school enrolment is at least 90 percent;
- the gender parity index in primary education is 95 percent or higher in six of the 10 global regions, including the most populous ones;
- the number of deaths from AIDS fell from 2.2 million in 2005 to 2.0 million in 2007, and the number of people newly infected declined from 3.0 million in 2001 to 2.7 million in 2007;
- malaria prevention is expanding, with widespread increases in insecticide-treated net use among children under five in sub-Saharan Africa: in 16 out of 20 countries, use has at least tripled since around 2000;
- the incidence of tuberculosis (TB) is expected to be halted and begin to decline before the target date of 2015.

As for Tanzania in particular, there has no recently released MDGs indicators by the government apart from the *Millennium Development Goals Indicators 2006*, which was released on June 2007<sup>784</sup> and the results by UNICEF Tanzania of July 2008. Therefore, this report relies on the same status as it was published by the LHRC in the year 2007 and the UNICEF's results of 2008.

This portion of the report assesses Tanzania's progress in relation to four of the MDGs, namely: the eradication of poverty; the provision of universal primary education; child mortality and maternal health.<sup>785</sup>

### Eradicate Extreme Poverty and Hunger

As it has been stated in this chapter, the availability of adequate food in Tanzania depends on adequate rainfall. In drought seasons, the majority of Tanzanians face hunger. The poverty level is also high because of the insufficient flow of income caused by high levels of unemployment and the failure to develop the agricultural sector. Tanzania is still

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<sup>780</sup> MDG Goal 1 is to eradicate extreme poverty and hunger.

<sup>781</sup> MDG Goal 4 is to reduce child mortality.

<sup>782</sup> MDG Goal 5 is to improve maternal health.

<sup>783</sup> UN, *The Millennium Development Goals Report 2007* (UN Dept of Economic and Social Affairs, New York 2007) at p. 4.

<sup>784</sup> The Tanzania Human Rights Report of 2007, at pp. 87 and 88.

<sup>785</sup> The remaining four MDGs are addressed elsewhere in the report, in particular: gender equality is addressed in Chapters 3 and 5; the reduction in HIV/AIDS is addressed in Chapter 6; environmental sustainability is addressed is covered later in this chapter; and, the creation of a global partnership is addressed throughout this report.

one of the poorest countries in the world, with 58 percent of the population living below the USD 1 per day threshold of extreme poverty.<sup>786</sup>

### Achieve Universal Primary Education

There has been a positive trend in Tanzania towards the provision of universal primary education. The recently published *Poverty and Human Development Report of 2007 of Tanzania* states that the net primary school enrolment rate continues to show a steady improvement from 96.1 percent in 2006 to 97.3 percent in 2007. The report further states that the government has managed to increase the regular attendance and completion of primary school by students from 67.4 percent in 2003 to 78 percent in 2006/7. Currently, the pupil to teacher ratio in primary schools stands at 53:1,<sup>787</sup> which is unlikely that MKUKUTA's target of 45:1 will be reached. The percentage of teachers with relevant qualifications has also increased from 69.2 percent in 2006 to 73.1 percent in 2007. The student to textbook ratio was 3:1 in 2007 in comparison to the ratio of 4:1 of 2000. However, the MKUKUTA's target of 1:1 is yet to be achieved.<sup>788</sup>

However, student enrolment rates are uneven in terms of geographical coverage. While regions like Dar es Salaam, Arusha and Kilimanjaro record more than a 90 percent enrolment rate, more marginalized regions like Lindi, Mtwara, some parts of Manyara (such as Yaeda Chini and Mono-wa-Mongo in Mbulu District) and Shinyanga record a less than 50% enrolment rate. The pupil to teacher ratio also fluctuates by region. In some regions, like Shinyanga, the ratio is 69:1.<sup>789</sup> There is also a need of improving the working and living standards of teachers. Delay in the payment of salaries and increments occurred in 2008. These issues and others depicted a bad picture on the struggle towards meaningful primary education.

### Reduce Child Mortality Rates

The last year's assessment published by LHRC recorded mortality rate as 112 deaths per 1,000 lives for the under five and 68 deaths per 1,000 live for the infants.<sup>790</sup> The report by REPOA published March 2008 references the same mortality rates.<sup>791</sup> As such, there has been no improvement in 2008 in the child mortality rate. REPOA also says that children in Tanzania face a high risk of death at an early age, with more than 1 in 10 Tanzanian children dying before they reach their fifth birthday.<sup>792</sup> This implies that there are

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<sup>786</sup> OneWorld 'Millennium Development Goals Progress Review: Tanzania' (Country review September 2008) <<http://uk.oneworld.net>> accessed on 17 December 2008.

<sup>787</sup> However, in other regions like Shinyanga, the ratio stands at 69:1, which is even far from the MKUKUTA's 45:1 target. See: Poverty and Human Development Report 2007, *supra* note 13, at p. 27.

<sup>788</sup> Poverty and Human Development Report 2007, at pp. 27 and 28.

<sup>789</sup> Poverty and Human Development Report 2007, at p. 27.

<sup>790</sup> The Tanzania Human Rights Report of 2007, at p. 88.

<sup>791</sup> REPOA 'Children and Vulnerability in Tanzania: A Brief Synthesis' (Special paper 07.25 Tanzania March 2008) 1; Afrobarometer 'Delivery of Social Services on Mainland Tanzania: Are People Satisfied?' (Briefing paper No 34 April 2006) <<http://www.afrobarometer.org>>; Poverty Eradication Division, United Republic of Tanzania 'Progress Towards a Better Quality of Life and Improved Social Well-Being in Tanzania', Brief 2 of 2007 maintains the same position as well.

<sup>792</sup> In Tanzania, 30 percent of newborns die within one month of birth as per REPOA, *ibid.* at p. 1.

160,000 children who die every year before reaching the age of five years. The majority of under-five deaths occur in rural areas where there are 162 deaths per 1,000 live births. This is comparison to the rate in urban areas of 123 deaths per 1,000 live births.<sup>793</sup>

Child mortality rates are highest in the regions of Lindi and Mtwara where one in every four or five children dies before they reach their fifth birthday. In those regions, there are 220 to 250 deaths per 1,000 live births. In contrast, other regions such as Arusha and Kilimanjaro, record 40 to 50 deaths per 1,000 live births. Some of the reasons for this situation are the level of education, poverty<sup>794</sup> and availability of health services<sup>795</sup> in the marginalized areas of Tanzania. Another major contributor to the child mortality rate is malnutrition, which is said to be indirectly responsible for under-five deaths.<sup>796</sup> *The Delivering Results for Children in Tanzania of UNICEF* indicated above says that 56 percent of the under-five mortality is associated with malnutrition.<sup>797</sup> Therefore, any efforts to reduce child mortality should contain a component addressing malnutrition.

### Improve Maternal Health

In 2007,<sup>798</sup> it was recorded that the maternal mortality was 578 deaths per 100,000 live births.<sup>799</sup> The recently published *Poverty and Human Development Report of 2007*,<sup>800</sup> which is published after every two years by the government to account for the

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<sup>793</sup> REPOA, *ibid.* at p. 2.

<sup>794</sup> A comparison of women from richer households with women from the poorest households indicates that women from richer households are (1) 3.4 times more likely to use modern contraception; (2) 2.8 times more likely to receive skilled assistance at delivery; and, (3) 8.7 times more likely to give birth by caesarean section. In contrast, women from the poorest households are 7 times more likely to give birth at home and receive no post-natal check-up for their infants. The disparity between women from richer households and women from the poorest households also translates into the health care provided to their children. Infants and children of women from richer households are (1) 40 percent more likely to receive a measles vaccination; (2) 40 percent more likely to receive treatment for a fever at a health facility; (3) 20 percent more likely to receive an ORS for diarrhea; and, (4) in the under-five years of age category, 14 times more likely to have slept under an ITN the previous night. This information is drawn from Paul Smithson, Ifakara Centre for Health Research and Development; Women's Dignity Project 'Fair's Fair: Health Inequalities and Equality in Tanzania' (Report Tanzania November 2006) at p. 14.

<sup>795</sup> The OneWorld organization is of the view that in a country, which offers only one doctor per 20,000 people, child mortality is not improving fast enough to meet the MDG targets and in common with many African countries. See: OneWorld 'Millennium Development Goals Progress Review: Tanzania', *supra* note 800.

<sup>796</sup> See: Poverty and Human Development Report 2007, *supra* note 13, at p. 35. Also see the International Food Policy Research Institutes (see full report through [www.ifpri.org](http://www.ifpri.org) or [www.repoa.or.tz](http://www.repoa.or.tz) both accessed on December 20 2008) says that child malnutrition is almost twice as high in rural areas as compared to urban areas. It varies by region, being highest in Mtwara; Lindi; Morogoro and Dodoma regions of Tanzania. The institution further states that, the risk of multination is lower when the mother and/or the head of household is educated, when the household has a clean water source and when the household uses an improved form of toilets.

<sup>797</sup> Other causes and their percentages in brackets are HIV/AIDS (9%); diarrhea diseases (17%); pneumonia (21%); malaria (23%); neonatal (27%); measles (1%) and other causes (2%).

<sup>798</sup> The Tanzania Human Rights Report of 2007, at p. 88.

<sup>799</sup> This implies that roughly one woman can be expected to die every hour from maternal causes in Tanzania.

<sup>800</sup> Poverty and Human Development Report 2007, at p. 35.

development of MKUKUTA’s goals, indicates the same number, which is on record as to 2008 because this report is published after every two years. Other research supports this point. *The Millennium Development Goals Review Report*<sup>801</sup> comments that maternal mortality in Tanzania appears to be worsening. Data indicates that maternal mortality in Tanzania was higher in 2005, than it was in 1996.<sup>802</sup>

One of the contributing factors to a high level of maternal mortality is the lack of accessible health services and facilities, including medical practitioners. The statistics published in 2007<sup>803</sup> indicate that the proportion of births attended by skilled health personnel was only 46.6 percent.<sup>804</sup> The weakness in the health system has a direct impact on the delivery of maternal and newborn services. *The Socio-Economic Development Report of APRM Tanzania of November 2008* concludes that majority of the maternal deaths are due to direct causes such as obstetric; hemorrhages; obstructed labour; pregnancy induced hypertension; sepsis and abortion complications.<sup>805</sup> It is said that majority of these deaths can be prevented if pregnant women can be assured of access to skilled attendance at childbirth, which is not the case in most of the health centres in Tanzania.

#### Combat HIV/AIDS, Malaria and Other Diseases

HIV/AIDS is discussed in Chapter 6 of this report. Therefore, this subsection deals with malaria and TB and the impact that these diseases have on the realization of the sixth MDG of halting and reversing the spread of HIV/AIDS, malaria and other diseases. Research conducted by the LHRC in 2008 indicates that, on average, pregnant women are treated for malaria two or three times during pregnancy in order to reduce the risk of malaria.<sup>806</sup> However, malaria still causes a large number of deaths of babies and young children. It causes 1,000,000 deaths per year world wide, of which 90% occur in Africa and are often children because of poor health care system.<sup>807</sup>

TB is prevalent in Tanzania. The following table sets out the number of deaths per 1,000 people that are attributable to TB in Tanzania for the period 1990 to 2005:<sup>808</sup>

Year	Number of deaths per 1,000
1990	37.4
1995	60.4
1996	64.2

<sup>801</sup> OneWorld ‘Millennium Development Goals Progress Review: Tanzania’, *supra*.

<sup>802</sup> *Ibid.*

<sup>803</sup> The Tanzania Human Rights Report of 2007, *supra*, at p. 88.

<sup>804</sup> Poverty and Human Development Report 2007, *supra*, at p. 36 indicates the number to be 43.3 percent. This report failed to reach at conclusion of whether this was an improvement or typical error.

<sup>805</sup> African Peer Review Mechanism Tanzania ‘Socio-Economic Development Report’ (Draft report Tanzania November 2008) (Socio-Economic Development Report) at pp. 65 to 67.

<sup>806</sup> Written and oral responses by individuals to LHRC survey (Tanzania January to October 2008)

<sup>807</sup> D. Mbega ‘MDGs and Causes of child and maternal mortality’ *ThisDay* (Tanzania) 3 June 2008.

<sup>808</sup> The Tanzania Human Rights Report of 2007, *supra*, at p. 89.

1997	69.7
1998	72.5
1999	76.1
2000	75,6
2001	78.9
2002	77.1
2003	75.4
2004	75.1

Between 1983 and 2004, the number of TB cases increased by almost six-fold from approximately 12,000 to 65,665.<sup>809</sup> TB is now the leading cause of death among HIV-positive people.<sup>810</sup> Many people with TB symptoms go undiagnosed due to a lack of public awareness and the inaccessibility of diagnostic services in some areas of Tanzania.<sup>811</sup>

The LHRC maintains its position that sufficient budget allocation for health and other socio-economic sectors is an important solution to these problems. An assessment should be done to determine the most pertinent sectors in which the government is not improving.

## 7.2 Right to Clean Environment

The right to clean environment is provided for under various regional and international human rights instruments. For instance, the ACHPR provides that all people shall have the right to a general satisfactory environment favourable to their development.<sup>812</sup> That means there is a direct link between access to a clean environment and human development.

Principles 3 and 4 of the *Rio Declaration on Environment and Development, 1992*<sup>813</sup> show this link in a more direct way. Principle 3 states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Principle 4 provides to the effect that the environmental protection constitutes an integral part of the development process and cannot be considered in isolation from it.<sup>814</sup>

Principle 5 of the *Rio Declaration on Environment and Development, 1992* vests the duty of environmental protection to all state parties to ensure poverty eradication and sustainable development through environment protection. Some of the measures

<sup>809</sup> Socio-Economic Development Report, *supra*, at p. 70.

<sup>810</sup> *Ibid*, p. 70.

<sup>811</sup> *Ibid*, p. 70.

<sup>812</sup> Art 24 of the *African Charter on Human and Peoples' Rights, 1981*.

<sup>813</sup> Principles 3 and 4 of the *Rio Declaration on the Environment and Development, 1992*.

<sup>814</sup> Said *Rio Declaration* seems to contain a reason for that. It generally provides that the essence of environmental protection should go along with the fair and equitable sharing of benefits arising from the use of genetic resources.

suggested by this Declaration are those which have been stipulated under Principles 10 and 11 of the *Rio Declaration on Environment and Development, 1992*. Principle 10 stresses on the importance of three things, namely:

- participation of all concerned citizens, at the relevant level;
- access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities; and,
- access to judicial and administrative proceedings, including redress and remedy.

Principle 11 of the *Rio Declaration on Environment and Development, 1992* calls for enactment of a specific legislation on environment.<sup>815</sup> Tanzania enacted the *Environmental Management Act, 2004* in 2004.<sup>816</sup> It came into force in February 2005. The *Environmental Management Act, 2004* provides that “[e]very person in Tanzania shall have a right to clean, safe and healthy environment.”<sup>817</sup>

Sections 17 and 18 of the *Environmental Management Act, 2004* establish and give power to the National Environment Management Council (NEMC) to undertake enforcement compliance, review and monitoring of environment in Tanzania including issues of environmental impact assessments. As has been argued by LHRC,<sup>818</sup> the NEMC lacks sufficient powers and institutional capacity to enforce the provisions of the EMA and to educate individuals about pollution, environmental degradation and its consequences. As a result, environmental degradation and pollution, which endangers the survival of people and other living organisms, steadily continued in 2008 despite the sanctions set out in the *Environmental Management Act, 2004*.

Most of the major reported incidences of environmental degradation are associated with the activities of mines and factories. From our observations, it seems the government has assumed a limited role in terms of supervising the activities of these industries and ensuring their compliance with environmental standards.

Professor Okechukwe Ibeanu, the Special Rapporteur for the UN Human Rights Council,<sup>819</sup> stated in 2008 that there was little or no government supervision on the amount of toxic waste released in many parts of the world, Tanzania inclusive; or the manner in which this waste was being treated. He further stated that, the mining companies did not have proper mechanisms to address the waste. The Special Rapporteur comments that the government should be monitoring these companies and the public

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<sup>815</sup> Article 112(2) of the *Treaty establishing the East African Community* calls for the partner states (Tanzania, Kenya, Uganda, Rwanda and Burundi) to adopt environmentally sound management techniques to ensure the control of land degradation issues such as soil erosion, desertification and forest encroachment.

<sup>816</sup> *Environmental Management Act, 2004*, Act No. 20 of 2004.

<sup>817</sup> S. 4 of the *Environmental Management Act, 2004*.

<sup>818</sup> Tanzania Human Rights Report of 2006, at p. 114 also see the Tanzania Human Rights Report of 2007, *supra*, at p. 93.

<sup>819</sup> The UN Human Rights Council was created by the UN General Assembly on March 15, 2006 with the main purpose of addressing situations of human rights violations and making recommendations on these violations.

should be informed of different chemical substances and dangerous products that they are exposed to in the workplace.<sup>820</sup> Professor Ibeanu was also concerned about the unregulated operations of artisanal miners. Artisanal miners use mercury-based substances to obtain minerals. These mercury-based substances pose a danger to the health of individuals, as well as the state of the environment.<sup>821</sup>

In 2008, concerns were raised about the effect of mining operations on the environment. In particular, concern was raised about the pollution emanating from the Geita Gold Mine, run by AngloGold Ashanti, in the Mwanza region. In research conducted by the LHRC, interviewees<sup>822</sup> complained that the activities which are carried out by the said company and other companies expose the surrounding villagers to serious health hazards, such as respiratory and skin problems.<sup>823</sup> The problems are caused by the air and water pollution allegedly emanating from the mining plants to their crops, land and water sources.

Another area of concern in terms of the environments is ensuring that the integrity of wildlife protected areas is maintained. The integrity of these areas is under threat due to water pollution and the disposal of waste materials in these areas.<sup>824</sup> In addition, in some areas, such as the Loliondo Forest Reserve in the Ngorongoro National Park, trees are being harvested by local inhabitants and illegal immigrants.

The accumulation of and incorrect disposal of garbage is a major problem that is endemic in large cities, such as Dar es Salaam and Mwanza. There are anecdotal reports of large piles of garbage accumulating on public streets and in residential areas. In May 2008, ENVIROCARE, a Tanzanian NGO, reported that:

Garbage is piled in the open, posing health threats to children who play and live in the area. While walking across the site (areas) it is not unusual to see items such as hypothermic needles. Glass, scrap metal, plastics and other garbage's among the waste. What is not collected is dumped usually on the near street. These polluting wastes are breeding sites for insect-vectors, pests, snakes and vermin that augment the likelihood of diseases transmission.<sup>825</sup>

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<sup>820</sup> This is also what Principle 10 of the *Rio Declaration on the Environment and Development, 1992* stresses. It has to do with environmental impact assessment, whereby the involvement of the people is crucial.

<sup>821</sup> S. Mrindoko 'Expert worried by activities of mining firms' *ThisDay* (Tanzania) 31 January, 2008.

<sup>822</sup> LHRC 'Human Rights Violations in the Mining Industry: The Case of Buzwagi and Geita Gold Mines' (Report Tanzania October 2008). Also see: 'The Human Cost of Gold' *ThisDay* (Tanzania) (3 May 2008).

<sup>823</sup> Mr. Joseph Wangubo, a man of about 30 years, who is now assisted by LHRC in legal issues concerning the injuries he has sustained during when he was working with the Afrika Mashariki Gold Mines, a company of Tarime district, was seriously injured by chemical substances three years ago. By then, he was working with the mining company as a casual labourer. After the medical diagnosis, it was discovered that his blood was contaminated by chemicals. He is still pursuing a case for compensation and LHRC is representing him.

<sup>824</sup> A. Mvungi 'Illegal Immigrants degrading Environment in Ngorongoro' *The Guardian* (Tanzania) 25 March 2008.

<sup>825</sup> H. Mcharo, Envirocare 'Waste Management is a Serious Problem in Big Cities in Tanzania' (Envirocare newsletter Tanzania May – June 2008).

ENVIROCARE also concluded that the improper disposal of and accumulation of garbage in major cities was a source of diseases, such as dysentery, diarrhea, scabies, skin diseases, eye problems, typhoid and intestinal parasites, which affect mostly poor communities. In accordance with principle 10 of the Declaration, it is important that communities are advised of environmental issues in their community and the impact of these environmental issues on their standard of living. Furthermore, the government should work towards the effective and comprehensive implementation of the *Environmental Management Act, 2004*. One measure that can be taken to improve the implementation of the *Environmental Management Act, 2004* is the decentralization of power from the NEMC to the various district levels, as is provided in the *Environmental Management Act, 2004*.

On a larger scale, there is a strong likelihood that Tanzania will be negatively affected by climate change. In 2008, scientists stated that there was the possibility that in 100 years the islands of Zanzibar and Mafia will be engulfed by the Indian Ocean due to the melting of polar ice cap. In the interim, the rising sea level poses a threat to the economy of the coastal regions of Mainland Tanzania and Tanzania Zanzibar. It is likely to have a negative affect on tourism, fishing and manufacturing.<sup>826</sup>

In 2008, there were some positive trends. The long cry of LHRC and other stakeholders about the closure of factories, which threatened the livelihood of the surrounding areas, was finally acceded to by NEMC by closing one of the environmental unfriendly textile industries. In 2006 and 2007, the LHRC noted in its Human Rights Reports that most textile industries operating in Tanzania lacked proper monitoring mechanisms for the disposal of their waste.<sup>827</sup> As result, their operations wrecked havoc on the surrounding residential areas by releasing untreated effluents into those areas.

In 2008, NEMC temporarily closed down Karibu Textiles Mill (KTM), a textile manufacturing plant, for releasing waste and untreated water into the Kizinga River in Dar es Salaam. The NEMC ordered KTM to build at least five water treatment systems before it would be allowed to resume its operations.<sup>828</sup> In January of 2008, KTM embarked on fulfilling the NEMC's order by building the water treatment systems, providing their workers with safety garments and renovating their on-site washroom facilities.<sup>829</sup>

There is a need to strengthen the NEMC. In addition, the NEMC needs to take on a more pro-active role in enforcing the *Environmental Management Act, 2004*, rather than

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<sup>826</sup> Z Ubwani 'Zanzibar and Mafia to disappear in 100 years?' *The Citizen* (Tanzania) 12 May 2008.

<sup>827</sup> Tanzania Human Rights Report of 2006, at p. 114; the Human Rights Report of 2007, at p. 93. The Tanzania Human Rights Report of 2007 quoted the findings of the research done by ENVIROCARE 'Industrial Toxic Chemicals Dangerous to Human Health and Environment' (Report Tanzania 14 December 2007) 1.

<sup>828</sup> S. Joseph 'KTM mulls sending 1200 workers on compulsory unpaid leave' *The African* (Tanzania) 24 January 2008.

<sup>829</sup> *Ibid.*

operating on the principle of “*zima moto*” (crisis management).<sup>830</sup> In addition, the NEMC should enforce the principle that the polluter pays for any environmental degradation that result from their actions, rather than the community bearing the cost of environmental degradation. In an effort to address the environmental impact of mining activities, the LHRC suggests that environmental impact assessments be conducted prior to the commencement of mining activities as the provisions of the *Environmental Management Act, 2004* require.<sup>831</sup> At the individual level, the LHRC recommends that the government take steps to inform the public about and involve the public in environmental protection and management.

### 7.3 Right to Natural Resources

Tanzania is endowed with significant natural resources, such as timber, minerals, wildlife, and rivers.<sup>832</sup> Both present and future generations of Tanzanians depend on natural resources, as a source of livelihood and a means through which to develop Tanzania’s economy. These resources play a large role in the Tanzanian economy in terms of supporting various manufacturing and mining industries, and the tourism industry.

Natural resources are those materials, such as timber, fresh water and minerals that occur in a natural state and have economic value. Natural resources tend to be materials that are extracted or purified from their natural state, as opposed to materials that are created by human production. Thus, industries such as mining, fishing and forestry are considered to be natural-resource industries, as they focus on extracting or purifying natural resources. In contrast, agriculture is not considered to be a natural-resource industry, as agricultural products are created by human effort.

The *Rio Declaration on the Environment and Development, 1992* provides that all human beings are entitled to a healthy and productive life in harmony with nature.<sup>833</sup> The *African Charter on Human and Peoples’ Rights, 1981* also provides for the right of individuals to own and dispose of the natural resources at their will. More specifically, Article 21(1) of the *African Charter on Human and Peoples’ Rights, 1981* states:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

In order for individuals to realize the above-noted right, Article 21(5) of the *African Charter on Human and Peoples’ Rights, 1981* provides that states have the obligation to eliminate all forms of foreign economic exploitation so that individuals are able to fully

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<sup>830</sup> For instance, the crack-down to resist usage of plastic bags was very effective in 2007 when it was initiated. But it was steadily and naturally dying with the elapsing of time. Today, the garbage caused by plastic bags still outnumbered others in the streets.

<sup>831</sup> Ss. 81 to 103 of the *Environmental Management Act, 2004*.

<sup>832</sup> United Republic of Tanzania ‘Natural Resources’ <<http://www.tanzania.go.tz/naturalresources.html>> accessed 20 December 2008.

<sup>833</sup> Principle 1 of the *Rio Declaration on the Environment and Development, 1992*.

benefit from the advantages derived from their state's natural resources.<sup>834</sup> Article 3 of the *Convention on Biological Diversity, 1992*<sup>835</sup> provides that states have the right to exploit their natural resources and the obligation to ensure that activities within their jurisdiction do not cause damage to the environment outside their jurisdiction.

Four guiding principles for the exploitation and development of natural resources are: (1) individual and state sovereignty over resources; (2) exploitation of resources to the benefit of local people; (3) the necessity to reach consensual agreements to exploit natural resources<sup>836</sup> and, finally, (4) the utilization of natural resources for the purposes of human development.<sup>837</sup> These principles are in accordance with the constitutional provision that:

...the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring –

...

9(i) that the use of natural resources places emphasis on the development of people and in particular is geared towards the eradication of poverty, ignorance and disease...<sup>838</sup>

As Article 9 of the *Constitution of Tanzania, 1977* falls outside of the constitutional section on Basic Rights and Duties, from which there can be no derogation, it is possible to derogate from this right.

This portion of the report considers the use and development of the following types of natural resources: forestry, minerals, water and wildlife.

### *Forestry*

Forestry sector is governed by the *Forestry Act, 2002*<sup>839</sup> of Tanzania. One of the objectives of this law is “to promote, to enhance the contribution of the forest sector to the sustainable development of Tanzania and the conservation and management of natural resources for the benefit of present and future generations.”<sup>840</sup> This means that forestry is one of the important ingredients for sustainable development.

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<sup>834</sup> UNGA ‘Permanent Sovereignty over Natural Resources’ (1962) UN Doc A/5217 reiterates the principle that people and nations have sovereignty over their natural resources and wealth.

<sup>835</sup> *Convention on Biological Diversity, 1992* (adopted at the Earth Summit, Rio de Janeiro, Brazil, June 1992, entered into force December 29, 1993) 1760 UNTS 79.

<sup>836</sup> Permanent Sovereignty over Natural Resources, *supra* note 848, Arts. 1 to 8; also see Tanzania Human Rights Report of 2007, *supra*, at p. 95.

<sup>837</sup> Principle 4 of the *Rio Declaration on the Environment and Development, 1992*.

<sup>838</sup> It is possible to derogate from the rights contained in Art. 9 of the *Constitution of Tanzania, 1977* because these rights are not guaranteed by the Basic Rights and Duties chapter of the said Constitution of Tanzania.

<sup>839</sup> No. 10 of 2002.

<sup>840</sup> S. 3(a) of the *Forestry Act 2002*, No. 10 of 2002.

Tanzania has approximately 33.5 million hectares of forests and woodlands.<sup>841</sup> As such, Tanzania has the largest forested area in Africa.<sup>842</sup> Governmental records indicate that revenue collection from the forestry sector has increased over the period 2004 to 2007. The following table shows the increase in revenue collected from the forestry sector:

Year	Approved Estimates	Actual Collection	Amount Under Collected	Amount Over Collected
2004/05	4,800,002,000	5,818,153,225.30	20,470,709.50	1,038,621,934.80
2005/06	10,106,150,000	10,961,257,440.25	321,171,931.80	1,176,279,372.02
2006/07	11,898,002,000	15,558,990,053.81	249,236,346.00	3,910,224,399.81

**Source:** Dr. A Majule, 'Identifying Constraints in Forestry Resources Utilization and Revenue Collection in Tanzania' (Paper presented at Karimjee Hall, Dar es Salaam 25 November 2008).

However, despite the increase in revenue collection from the forestry sector, the forestry sector only contributes about 2.3 percent of the country's registered exports.<sup>843</sup> This contribution is lower compared to value of the country's forestry riches as it has been explained before.

In recent years, there has been uncontrolled deforestation in Tanzania. The 2007 Tanzania Human Rights Report reported that the amount of forested land shrank in Tanzania from 42 percent in 1990 to 41 percent in 2000. This one per cent decline represents an area over 883,000 hectares.<sup>844</sup> In 2008, there were no notable changes in the government's efforts to address deforestation. The effects of deforestation on water catchments, soil erosion, mountain areas, fire outbreaks such as along Mount Kilimanjaro, were evident in many parts of the country during the year 2008.

The third concern is the export of timber. The countries, which Tanzania's logs are exported to are benefiting more than Tanzania itself where the logs are coming from. For instance, the TRAFFIC Report of 2007 finds that, trade statistics show that China imported/ imports ten times more timber products from Tanzania than appear on Tanzania's own export records. According to that report, this suggests that, Tanzania collects only 10% of the revenue due from these exports.<sup>845</sup>

Fourthly, the official sales prices for forestry products are extremely low compared to world market prices. For instance, woods such as African Blackwood and African Teak are sold for \$2,000 to \$10,000 (USD) per cubic meter on the world market, whereas they

<sup>841</sup> United Republic of Tanzania 'Natural Resources' <<http://www.tanzania.go.tz/naturalresources.html>> accessed 20 December 2008.

<sup>842</sup> The Tanzania Human Rights Report of 2007, *supra*, at p. 97.

<sup>843</sup> *Ibid*, p. 97.

<sup>844</sup> *Ibid*, p. 97.

<sup>845</sup> S. Milledge, I Gelvas and A Ahrends 'Forestry, Governance and National Development: Lessons learned from a logging boom in Southern Tanzania' (Report by TRAFFIC et al, Dar es Salaam, Tanzania 2007).

are sold for \$50 to \$70 (USD) per cubic meter in Tanzania.<sup>846</sup> Moreover, the unlawful logging transaction is enormous in Tanzania.<sup>847</sup> The TRAFFIC Report of 2007<sup>848</sup> published in 2008 indicated that the revenue lost by central and district governments due to the under-collection of royalties reached up to 96 percent of the total amount of potential revenue due. At central government level, it was estimated that losses of revenue amounted up to USD 58 million annually<sup>849</sup> due to the under-collection of the natural forest product royalties.<sup>850</sup>

Some of the issues that beset the forestry sector, such as issues with revenue collection and sales prices, can be attributed to a lack of capacity to monitor the forestry and corruption. Corruption in the forestry sector can take the form of the illicit transport of timber using “*panya*” (unauthorized) routes, the deceitful alteration of the value of timber products or using a forged hammer to mark the logs, or the failure to collect revenue using the proper channels.

Last year, this report found that more than half of the 28 logging companies had close links to the senior forest or government officials. In some rural areas, the involvement of the village leaders in the timber trade has led to unfair distribution of profits and at the higher levels, self-dealing, nepotism and cronyism. The ongoing rampant logging, which is caused by corrupt practices, has continued to plunder the country’s forestry sector.<sup>851</sup>

### *Minerals*

In Tanzania, the mining sector is a core part of the country’s economic development. In 2008, the Tanzanian government prioritised the development of this sector, as it recognised that the development of this sector could lead to rapid economic growth in Tanzania.<sup>852</sup> Despite the mining sector’s potential, it only contributes 2.3 percent to the gross domestic product of Tanzania<sup>853</sup> and only 3.6 percent to the government’s total tax revenues.<sup>854</sup> The mining sector’s contribution to Tanzania’s gross domestic product does

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<sup>846</sup> Dr. A Majule, ‘Identifying Constraints in Forestry Resources Utilization and Revenue Collection in Tanzania’ (Paper presented at Karimjee Hall, Dar es Salaam 25 November 2008).

<sup>847</sup> *Ibid.*

<sup>848</sup> Milledge, *supra*.

<sup>849</sup> The Tanzania Human Rights Report of 2007, *supra*, at p. 97 quoted the report of the African Parliamentarians’ Network Against Corruption (APNAC) indicating the same figure. That report of APNAC said that, Tanzania loses timber revenue equivalent to the cost of building more than 10,000 secondary school classrooms.

<sup>850</sup> Milledge, *supra*, at p. 3.

<sup>851</sup> The Tanzania Human Rights Report of 2007, *supra*, at p. 97.

<sup>852</sup> Policy Forum ‘The Demystification of Mining Contracts in Tanzania’ (Report Dar es Salaam, Tanzania 2008) at p. 1.

<sup>853</sup> United Republic of Tanzania ‘Mining’ <<http://www.tanzania.go.tz/mining.html>> accessed 23 December 2008.

<sup>854</sup> Policy Forum, *supra*, at pp. 1 and 2. The general tax received by the government of Tanzania differs from contract to contract, even when the government negotiates with the same company. Local governments can receive income from the mining companies by levying taxes and other charges but the aggregate in any calendar year should not exceed \$200,000 (USD) irrespective of the company’s profits. The method of calculating taxes must not be based on the profit, turnover, sales, output from the mining operation or the value of the land used for the mine, etc. See: Policy Forum, *supra*, at p. 6.

not reflect the abundance of Tanzania's mineral resources because of the factors detailed herein under.

In 2007, it was found that only one percent of new employment was generated by the mining sector.<sup>855</sup> The mining industry is not a significant source of employment for Tanzanians. Mining companies are exempt from the general requirement that a corporation can employ a maximum of five non-Tanzanians; they can employ an unlimited number of non-Tanzanians. Of the 7,135 people employed in the six major mines in Tanzania, 565 (or 8 percent) are non-Tanzanians.<sup>856</sup>

The third issue of concern is the dominance or monopoly of the mining sector by a few, foreign-owned companies. These corporations operate subsidiaries in Tanzania. For instance, Barrick Gold Corporation operates the following subsidiaries in Tanzania: Pangea Minerals Limited, Sutton Resources Limited, Kagera Mining Company Limited, Kahama Mining Corporation Limited, Afrika Mashariki Gold Mines Limited/ Placer Dome Incorporation. Barrick Gold Corporation, directly or indirectly, owns and operates three mines in Tanzania.<sup>857</sup> The LHRC is concerned about the dominance of the mining sector by foreign-owned and operated corporations and, in particular, the dominance of this sector by Barrick Gold Corporation.

Mining corporations are given significant tax exemptions. For instance, mining corporations pay no duty on the import of mining-related equipment during the prospecting stage and the first year of the development of a mine. After this period, mining corporations pay a five percent duty on these imports.<sup>858</sup> In an effort to reduce their tax liability, mining corporations also tend to overstate their losses.<sup>859</sup> The cumulative effect of the tax exemptions that have been granted to mining corporations and their tax avoidance techniques such as by creating subsidiary companies in order to reduce the tax base is that the Tanzanian government receives little revenue from the mining corporations operating in Tanzania.

Another factor contributing to the low revenue received by the Tanzanian government from the mining sector is the low royalty rate that is imposed on minerals. Tanzania has lost \$58 million (USD) because of its failure to increase the royalty rate to five percent, as was recommended by the Bomani Commission.<sup>860</sup> The general finding of the Bomani

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<sup>855</sup> The Tanzania Human Rights Report of 2007, *supra*, at p. 99.

<sup>856</sup> Ministry of Energy and Minerals, United Republic of Tanzania 'The Mineral Policy of Tanzania 1997' (Government policy Tanzania October 1997) at pp. 5 and 6; 2007 Human Rights Report, *supra* note 8, at p. 97. Mining companies are able to employ an unlimited number of foreigners, compared to a maximum of five in other sectors. The Tanzanian Mines and Construction Workers Union (TAMICO) claims that Tanzanian and foreign mine workers who are employed in the same capacities receive different monthly salaries. For instance, a Tanzanian mine employee can earn \$200 to \$4,000 (USD) per month, whereas a non-Tanzanian employee can earn between \$6,000 and \$20,000 (USD) per month, even though the two employees hold the same job. See: M. Curtis and T. Lissu 'A Golden Opportunity?: How Tanzania is Failing to Benefit From Gold Mining' (Report 2<sup>nd</sup> ed. Tanzania October 2008), at pp. 38 and 39.

<sup>857</sup> Policy Forum, *supra*, at p. 3.

<sup>858</sup> Curtis, *supra*, at p. 15.

<sup>859</sup> Curtis, *supra*, at p. 23.

<sup>860</sup> Curtis, *supra*, at p. 25.

Commission<sup>861</sup> was that the government of Tanzania needed to reconsider the incentives it had granted to the mining sector in order to balance the development of the mining sector with the Tanzanian government's desire to receive benefits from this sector.

On 30 December 2005, President Jakaya Kikwete promised in the Parliament's Inaugural Session that the government is going to review the mining contracts, laws and policies in order to identify gaps for improvement so that the government can benefit more from the mining sector. In the opinion of Tundu Lissu and Mark Curtis, the only positive changes made by the government to the mining sector to fulfil this promise are:

- Companies now pay up to \$200,000 (USD) to the district council of the district in which they operate, irrespective of whether the company declares a profit or a loss; and,
- The removal of the 15 percent capital allowance, or unredeemed capital expenditure, from the Buzwagi mining contract. This allowance helped companies delay paying corporate tax by declaring high losses.<sup>862</sup>

Otherwise, during the year 2008, Mtakuja Street's residents issue against the Geita Gold Mines of Geita district continued. Note that, 86 families (including more than 250 people) were ordered by the government to vacate their domicile in 2007, claiming that, the land on which they were residing is the property of the mining company. As of November 2008, they were still living under a very pathetic situation. It is recommended that, the government should make sure that this people are assisted; currently, they receive humanitarian assistance from the Norwegian Church Aid and other few organisations. These and others are internally displaced persons for the love of investment money which do not benefit the country anyway.

### *Wildlife*

Tanzania has a rich and diverse spectrum of fauna and flora including a wide variety of endemic species and sub-species. The biological diversity and degree of endemism consist of primates (20 species and 4 endemic), antelopes (34 species and 2 endemic), fish (with many endemic in Lake Victoria, Tanganyika and Nyasa and other small lakes and rivers), reptiles (290 species and 75 endemic), amphibians (40 endemic), invertebrates, and plants (around 11,000 species, including many that are endemic).<sup>863</sup> In addition, Tanzania has large populations of lions, buffalos and elephants.<sup>864</sup>

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<sup>861</sup> On the 16<sup>th</sup> November 2007, President Jakaya Kikwete of Tanzania appointed Mr. Mark Bomani chairman of the Committee/ Commission to review all mining contracts between the government of Tanzania and mining companies after the public pressure that the nation is getting very little from this sector comparing to the benefits which the investors are getting.

<sup>862</sup> Curtis, *supra*, at pp. 27 and 28.

<sup>863</sup> United Republic of Tanzania 'Natural Resources' <<http://www.tanzania.go.tz/naturalresources.html>> accessed 21 December 2008. Also see: Ministry of Natural Resources and Tourism, United Republic of Tanzania 'The Wildlife Policy of Tanzania' (Government policy Tanzania March 1998) at pp. 2 and 3.

<sup>864</sup> Tanzania Natural Resources Forum Secretariat 'Wildlife for all Tanzanians: Stopping the loss, nurturing the resource and widening the benefit' (Report Tanzania October 2008) (TNRFR Report).

One of the major issues facing the conservation of Tanzania's wildlife resources is the *Wildlife Conservation Act, 1974*.<sup>865</sup> The current form of the *Wildlife Conservation Act, 1974* does not provide for community involvement in wildlife management, it does not incorporate the principles of corporate responsibility for wildlife tourism operators, and it does not require investors to conduct an environmental impact assessment prior to engaging in wildlife tourism. The government has responded to criticisms of the *Wildlife Conservation Act, 1974* by proposing a new Bill to govern this sector, which will be discussed in greater detail further on in this section.

The lack of community involvement in wildlife areas has created a situation in which communities feel disengaged from and a lack of ownership of wildlife areas. As a result, communities engage in practices that negatively affect wildlife areas, such as poaching, rather than working towards the preservation of wildlife areas. These practices have contributed to a decline in wildlife stocks.<sup>866</sup> The decline in wildlife stocks has been ongoing since the mid-1980s.<sup>867</sup> There is little incentive for communities to work towards the preservation of wildlife areas, as they receive few benefits from these areas such as construction of few classrooms or digging of village wells in their vicinities.

The second problem is the under-collection of revenue from operations that are dependent on wildlife. According to available figures, Tanzania collects \$862 million (USD) per year from tourism, which is associated with wildlife.<sup>868</sup> Despite these high revenues, it is possible that Tanzania may be able to collect further revenue from operations connected to wildlife. Tanzania is the only country in East and Southern Africa that does not manage its wildlife resources and opportunities on the principle of economic competition,<sup>869</sup> which calls upon the updating of trading practices to match with the pace of the regional and global markets.

The third problem with the management of Tanzania's wildlife resources is the undervaluing of wildlife products. In Tanzania, trophy hunting is allowed where each hunter is permitted to hunt an animal and retain a part of the animal as a trophy for a certain fee. These trophy fees have not increased since 1984, although trophy fees in other countries have increased due open market competition.<sup>870</sup> In addition, the cost of operating hunting blocks has not kept pace with their market value, rather this cost has remained static at \$7,500 (USD) for several years.<sup>871</sup>

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<sup>865</sup> Cap. 283, R.E. 2002. The government has announced its intention to repeal this law in 2009 and replace it with a new Act covering the same subject matter.

<sup>866</sup> There are too few incentives for communities to conserve and protect wildlife outside national parks and game reserves. Communities do not have a sense of responsibility for the protection of wildlife because they do not benefit from protecting the wildlife.

<sup>867</sup> TNRF Report, *supra*, at p. 3.

<sup>868</sup> Tanzania generates approximately \$13 million (USD) in revenue from wildlife utilization, such as hunting, live animal capture and other activities as per TNRF Report, *supra*, at p. 24.

<sup>869</sup> TNRF Report, *supra*, at p. 5.

<sup>870</sup> TNRF Report, *supra*.

<sup>871</sup> TNRF Report, *supra*.

With all these problems, the wildlife sector contributes little to the development of communities and to the country overall. Under the current Act, benefits from the wildlife sector are primarily enjoyed by select members of the government and foreign investors. The LHRC advocates for greater community involvement in the management and development of Tanzania's wildlife resources. Partnerships between the community, the government and investors could result in fruitful developments in the future in the wildlife sector and the continued abundance of wildlife in Tanzania.

## Chapter Eight

### Domestic Initiatives in Human Rights Protection

#### 8.0 Introduction

The protection of human rights is closely linked to the incorporation of these rights into legislation and the existence of an enforcement mechanism that allows people to address human rights violations.

In Tanzania, various human rights have been incorporated into the domestic legislation, either directly or by referentially incorporating an international human rights instrument. The adoption of legislative measures that protect human rights is a common way of ensuring human rights protection and of ensuring that states fulfill their obligations under international human rights instruments.<sup>872</sup> Many international human rights instruments encourage member states to adopt such legislative measures. For instance, Article 1 of the *African Charter on Human and Peoples Rights, 1981* states:

[t]he Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

In addition, there is an implied obligation on states that have ratified an international human rights instrument to ensure that its citizens are able to enjoy the human rights contained in that treaty or in any other source of law that is applicable in that state.<sup>873</sup>

Tanzania is committed to complying with its obligations under various international and regional human rights instruments. This commitment is evident from Tanzania's inclusion of the Bills of Rights and Duties in its *Constitution of Tanzania, 1977*.<sup>874</sup> Furthermore, Article 9(a) of the *Constitution of Tanzania, 1977* explicitly states that the Tanzanian government and its agents are obliged to direct their programmes and policies towards ensuring that human dignity and other human rights are respected in Tanzania. Unfortunately, Article 9(a) of the *Constitution of Tanzania, 1977* is an aspirational statement, rather than a statement creating a right at law.<sup>875</sup>

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<sup>872</sup> For instance, Article 2(1) of the *International Covenant on Economic, Social and Cultural Rights, 1966*, stipulates that each state party shall undertake to take steps individually or through international assistance to maximize its available resources with a view to achieving progressively realization of the rights recognize in the covenant. Article 2(1) of the *Convention of the Rights of the Child* provides for the same duty. It provides that, state parties shall undertake to respect and ensure the rights set under it are protected – to take appropriate measures to ensure that the child is protected against all forms of discrimination.

<sup>873</sup> UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (OHCHR and the International Bar Association, New York and Geneva 2003) 17.

<sup>874</sup> Arts. 12 to 29 of the *Constitution of Tanzania, 1977*.

<sup>875</sup> The right contained in Art. 9(a) of the *Constitution of Tanzania, 1977*., is unenforceable as Art 7(2) of the *Constitution*; “[t]he provisions of this Part of this Chapter are not enforceable by any court. No court

At the national level, individuals are able to ensure the protection of their human rights by applying to certain remedial bodies that address human rights violations. In Tanzania, these remedial bodies include the judiciary, the Commission for Human Rights and Good Governance (CHRGG); the Law Reform Commission of Tanzania (LRCT); and, the Tanzania Prisons Service (TPS). This portion of the report will examine the role and the efficacy of the latter three remedial bodies in protecting and promoting human rights in Tanzania in 2008. The role of the judiciary was considered in Chapter 2 of this report.

## 8.1 Commission for Human Rights and Good Governance

The CHRGG is established by Article 129 of the *Constitution of Tanzania, 1977* and it is regulated in accordance with the provisions of the *Commission for Human Rights and Good Governance Act, 2001*<sup>876</sup>, which came into effect in 2001.

The functions of the CHRGG are set forth under the provisions of Article 130 (1) of the *Constitution, 1977* and Section 6 (1) of the *Commission for Human Rights and Good Governance Act, 2001*. The functions of the CHRGG include; to promote within the country the protection and the preservation of human rights and of duties to the society in accordance with the Constitution and the laws of the land;<sup>877</sup> to receive allegations and complaints in the violation of human rights generally;<sup>878</sup> to conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice;<sup>879</sup> and to make recommendations relating to any existing or proposed legislation, regulations, or administrative provisions to ensure compliance with human rights norms and standards and with the principles of good governance.<sup>880</sup>

The idea of forming this national human rights institution traces its history from 1993 when the UN General Assembly adopted a resolution affirming the importance of establishing effective national institutions for the promotion and protection of human rights.<sup>881</sup> This resolution also set out the guiding principles (Paris Principles) for the mandate, composition and powers of national human rights institutions. The Paris Principles are designed to ensure that these institutions are able to operate independently and address the state of human rights in their country in a comprehensive manner

One of the Paris Principles is that “a national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text”.<sup>882</sup>

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shall be competent to determine the question whether or not any action or omission by any person or any court or any law or judgment complies with the provisions of this Part of this Chapter”.

<sup>876</sup> Cap. 391, R.E. 2002 (*CHRGG Act, 2001*).

<sup>877</sup> S. 6(1) of the *CHRGG Act, 2001*; Art. 130(1)(a) of the *Constitution of Tanzania, 1977*.

<sup>878</sup> S. 6(1)(b) of the *CHRGG Act, 2001*; Art. 130(1)(b) of the *Constitution of Tanzania, 1977*.

<sup>879</sup> S. 6(1)(c) of the *CHRGG Act, 2001*; Art. 130(1)(c) of the *Constitution of Tanzania, 1977*.

<sup>880</sup> S. 6(1)(k) of the *CHRGG Act, 2001*; Art. 130(1)(g) of the *Constitution of Tanzania, 1977*.

<sup>881</sup> UNGA Res 48/134 ‘National Institutions for the promotion and protection of human rights’ (20 December 1993) UN Doc A/48/49 <<http://www.unhchr.ch>> accessed 19 January 2009 (Paris Principles).

<sup>882</sup> Paris Principles, *supra* note 895, at “Competence and Responsibilities” Principle 2.

The CHRGG's mandate as it is explained above is set out in Article 130 of the *Constitution, 1977* and Section 6 of the *CHRGG Act, 2001* and, broadly speaking, its mandate is to promote and protect human rights in Tanzania. On closer examination, the CHRGG's mandates is in line with the role of a national institution as conceived in the Paris Principles, as the CHRGG can receive complaints about human rights violations and inquire into these violations; it can provide advice to the government about human rights; and, it can sensitise the public about human rights.<sup>883</sup>

However, it is not sufficient that a national institution's mandate accords with a portion of the Paris Principles, the national institution also has to adhere to the following tenants in order to promote and protect human rights: -

- be independent from the influence of the government or any other institution(s). Independence means operational, legal and financial autonomy;
- be accessible. People have to be aware of the existence of the institution and have physical access to it;
- have operational efficacy. It must take care to ensure that its methods of work are as efficient and effective as possible. Working methods and adequate resources are some of the components that have an impact on efficacy.
- be accountable. Normally, national institutions are generally required to submit detailed reports of their activities or performance to Parliament or a similar body for consideration. National institutions are also accountable to the public. As such, public opinion surveys evaluating the performance of a national institution should be conducted. Accountability to the public is particularly important in this context, as the primary clients of these institutions are the public.<sup>884</sup>

The following section will evaluate the performance of the CHRGG in light of the tenants set out above.

#### *The Independence of the CHRGG*

The independence of the CHRGG is clearly provided for in the *CHRGG Act, 2001*, which states:

14(1) Except as provided by the Constitution, the Commission shall be an independent department and the Commissioners shall not, in the performance of their functions, be subject to the direction or control of any person or authority [emphasis added]

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<sup>883</sup> Art. 130(1) of the *Constitution of Tanzania, 1977*; Paris Principles 3 "Competence and responsibilities." Also see S. 6 of the the *CHRGG Act, 2001*, which sets out the functions of the CHRGG.

<sup>884</sup> UN 'National Human Rights Institutions – A handbook on the establishment and strengthening of National Institutions for the Promotion and Protection of Human Rights' (Professional Training Series No. 4 New York 1995) 11 to 13 and 17; the Paris Principles provides exactly the same. Also see the Tanzania Human Rights Report of 2007, *supra*, at pp. 101 and 102.

The *Constitution, 1977* guarantees the operation of the CHRGG as an autonomous department.<sup>885</sup> However, there are two constitutional provisions that have the potential to impinge on the independent operation of the CHRGG. The CHRGG is comprised of commissioners and assistant commissioners.<sup>886</sup> These commissioners are appointed by the President.<sup>887</sup> The presidential prerogative to appoint commissioners effectively allows the President to control the composition of the CHRGG, which could result in the CHRGG being composed solely of people who have favourable views of the government and create a bias in the CHRGG's decisions. Any such bias would undermine the efficacy and relevancy of the CHRGG, as a watchdog for human rights in Tanzania. It is hereby suggested that, the Commissioners should be approved by the Parliament after being appointed by any authority.

The second concerning provision is a claw back clause in the *Constitution of Tanzania, 1977* that allows the President to give directions or orders to the CHRGG regarding any matter, if the President is satisfied that it is in the public interest to do so.<sup>888</sup> Effectively, the President has the ability to order the CHRGG to restrict or cease its activities with respect to a certain matter. The only factor restraining this presidential power is the nebulous (and broadly worded) phrase “in the public interest.”

The third factor, which is a non-legislative factor, which affects the independence of the CHRGG, is the political environment in which it operates. In 2005, it was noted by the former Chairman of the CHRGG, Justice Robert Kisanga, that “the lack of institutional cooperation and good faith by the Government impeded investigations as public servants either delayed in answering the Commission's letters of inquiry or outright refused to do so”.<sup>889</sup> There is little evidence to suggest that governmental cooperation with the CHRGG has improved.

The lack of governmental cooperation has extended to the government's response to some of the decisions issued by the CHRGG. As an administrative body, the CHRGG is only empowered to make non-binding recommendations that it may enforce by commencing a court action.<sup>890</sup> The government's lack of respect or compliance with the recommendations of the CHRGG has undermined the ability of the CHRGG to protect and promote human rights. In addition, it brings into question whether the government intended the CHRGG to be an effective national institution or if its creation was merely window dressing to satisfy international demand for this type of national institution.

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<sup>885</sup> Art. 130(2) of the *Constitution of Tanzania, 1977*.

<sup>886</sup> Art. 129(2) of the *Constitution of Tanzania, 1977*.

<sup>887</sup> Art. 129(3) of the *Constitution of Tanzania, 1977*. The President's appointment of Commissioners and Assistant Commissioners is done after consultation with the Nomination Committee, the membership of which is set out under Art. 129(4) of the *Constitution of Tanzania, 1977*.

<sup>888</sup> Art. 130(3) of the *Constitution of Tanzania, 1977*.

<sup>889</sup> As quoted in the African Peer Review Mechanism and University of Dar es Salaam 'Democracy and Political Governance in Tanzania' (Draft report Dar es Salaam, Tanzania 8 January 2009), at p. 40.

<sup>890</sup> It is possible for the CHRGG to bring an action to court in order to obtain a judicial remedy as per S. 15 of the *CHRGG Act, 2001*.

A notable instance when the government decided not to follow the recommendations of the CHRGG was the Nyamuma Village case. The facts of this case are set out in full detail in chapter 4.2 of this report. Broadly speaking, the government expropriated land occupied by the Nyamuma Village without compensating the villagers. The CHRGG investigated the complaints of the Nyamuma Village residents in this regard and, in 2004, recommended that the government compensate these residents for their properties and land; and, resettle them.<sup>891</sup> The government explicitly refused to comply with CHRGG's recommendations.

The government's refusal to comply with the CHRGG's recommendations resulted in the LHRC filing a petition in the High Court (Land Division) for the enforcement of the CHRGG's recommendations.<sup>892</sup> This petition was filed in accordance with Section 28(3) of the *CHRGG Act, 2001*, which states:

If within the prescribed time after the report is made no action is taken which seems to the Commission to be adequate and appropriate, the Commission, may after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made either, bring an action before any court or recommend to any competent authority to bring an action and seek such remedy as may be appropriate for the enforcement of the recommendations of the Commission. [Emphasis added]

The High Court (Land Division) dismissed the LHRC's petition on the basis that recommendations by the CHRGG were not judicial decisions to be enforced by a court of law. Therefore, the High Court (Land Division) lacked the jurisdiction to enforce the CHRGG's recommendations. The LHRC appealed against the decision of the High Court (Land Division) to the Court of Appeal.<sup>893</sup> The appeal was heard in April 2008 and a decision released in October 2008.

The Court of Appeal held that Section 28(3) of the *CHRGG Act, 2001* can be used to enforce the CHRGG's recommendations. The Court of Appeal has sent the case back to the High Court for a consideration on its merits. Furthermore, the court noted that the *CHRGG Act, 2001* does not contain adequate procedures or powers for the enforcement of the CHRGG's recommendations. The court recommended that the Minister use his

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<sup>891</sup> *The Case of Ibrahim Korosso and 134 Others & Legal and Human Rights Centre v The District Commissioner and Officer Commanding District*, Shauri Namba (Case Number) HBUB/S/1032/2001/2002/MARA lodged at the Commission for Human Rights and Good Governance. Also see chapter 8 of the LHRC, Tanzania Human Rights Reports of 2004 to 2007 (Report Dar es Salaam, Tanzania 2004 to 2007).

<sup>892</sup> *LHRC v Thomas Ole Sabaya and 4 Others* (High Court (Land Division)) Misc. Land Application No. 22 of 2005 (unreported decision). Lugazia, J handled the case.

<sup>893</sup> *LHRC v Thomas Ole Sabaya and 4 Others* (Court of Appeal) Civil Appeal No. 88 of 2006 (October 2008) (unreported). Some of the grounds of appeal from the decision of the High Court – Land Division were: (1) the judge erred at law by interpreting the request for the enforcement of the CHRGG's recommendation to mean that a new trial with fresh evidence was required; and, (2) the judge erred at law in holding that the CHRGG's recommendation were not enforceable according to S. 28(3) of the *CHRGG Act, 2001*.

power under Section 38 of the *CHRGG Act, 2001* to make regulations that would set out the enforcement procedures of the CHRGG.<sup>894</sup>

The LHRC recommends that, those who have been disrespecting the decision of this Commission be taken into task. It is surprising to note that as to 2008, government officials who have ignored the CHRGG's recommendations in 2004/5 have not been sanctioned.<sup>895</sup> We urge the government to remove these people from public service and other legal sanctions against them be implemented.

#### *Accessibility, Efficacy and Capacity of CHRGG*

The ability of individuals to physically access the CHRGG remains an issue. Currently, the CHRGG only has five offices in Tanzania, one in Dar es Salaam; two in Zanzibar (for Pemba and Unguja) and others in Lindi and Mwanza regions. The limited geographical distribution of the CHRGG offices makes it difficult for individuals to access the CHRGG's services and for the CHRGG to investigate complaints originating from areas in which it does not have an office. It is the LHRC's recommendation that the CHRGG establish a regional or zonal branch in at least five regions in Tanzania. The establishment of these branches would accord with Section 13(2) of the *CHRGG Act, 2001*.<sup>896</sup> It is further recommended that the government provide the CHRGG with sufficient funding to establish these offices and hire the necessary personnel.

Aside from a lack of accessibility, the efficacy of the CHRGG in addressing complaints is hindered by a lack of capacity. Since its inception in 2001 to 31 July 2008, the CHRGG has received 22,812 complaints relating to human rights and the issue of good governance. Of these complaints, 22,322 (or 98 percent) relate to the abuse of the principle of good governance, while the remaining 490 complaints (or two percent) relate to human rights violations. To date, the CHRGG has addressed 14,954 (or 14 percent) of the complaints it has received. However, there are still 7,755 complaints that are still under investigation by the CHRGG.<sup>897</sup> It is debatable as to whether the outstanding complaints will be dealt with in an efficient and timely manner.

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<sup>894</sup> *LHRC v Thomas Ole Sabaya and 4 Others* (Court of Appeal) Civil Appeal No. 88 of 2006 (unreported) at p. 16, para. 4.

<sup>895</sup> The attitude of government officials to the recommendations of the CHRGG is exemplified in a statement made by the former Attorney General Andrew Chenge on December 13, 2004 about the CHRGG's recommendations for the Nyamuma villagers. He said: "the government has investigated the issue and discovered that most of the recommendations made by the commission were based on fabricated evidence", as originally quoted in LHRC 'The Human Rights Calamity of Evictions at Nyamuma-Serengeti' (Report Dar es Salaam, Tanzania 2006), at p. 65.

<sup>896</sup> Section 13 (2) of the *CHRGG Act, 2001*, states: "For the purposes of the better performance of its functions, the Commission may, where it considers it necessary or appropriate, establish branch offices away from its headquarters in such geographical areas as it may deem necessary and may establish divisions or departments and assign to them particular responsibilities in respect of the functions of the Commission."

<sup>897</sup> The statistical information in this paragraph was compiled in the African Peer Review Mechanism and University of Dar es Salaam 'Democracy and Political Governance in Tanzania' (Draft report Dar es Salaam, Tanzania 8 January 2009), at p. 40.

## *Accountability of CHRGG*

As noted above, it is important that national human rights institutions are accountable for their activities to the government, as well as, to the public at large.

The accountability of the CHRGG to the government is mandated by the *Constitution, 1977* and the *CHRGG Act, 2001*. The *Constitution of Tanzania, 1977* requires the CHRGG to submit an annual report to the Minister responsible for human rights detailing its activities and its protection of human rights,<sup>898</sup> while the more pragmatic *CHRGG Act, 2001* requires the CHRGG to be accountable to the National Assembly for its revenue and expenditures.<sup>899</sup> Given the CHRGG's lack of financial independence from the government, it is not surprising that the government requires the CHRGG to provide a record of its financial affairs.<sup>900</sup> However, there are no legislative provisions requiring the CHRGG to be accountable to the public.

## **8.2 Law Reform Commission of Tanzania**

The LRCT is a statutory body that was created by the *Law Reform Commission of Tanzania Act, 1980*.<sup>901</sup> The primary purpose of the LRCT is to facilitate the development and the reform of the laws of Tanzania by reviewing and revising these laws.<sup>902</sup> More particularly, according to Section 4 (2)(a), the LRCT can:

- Review any law or branch of the law and propose measures necessary for:-
- (i) bringing that law or branch of law into accord with current circumstances in Tanzania;
  - (ii) eliminating anomalies or other defects in the law, repealing obsolete or unnecessary laws and reducing the number of separate enactments; and
  - (iii) the proper codification and simplification of that law or branch of law.<sup>903</sup>

This section of the report will evaluate the LRCT's performance in light of the above mandate and powers of the LRCT.

### *Amendment of Out-dated Laws*

There are a number of Tanzanian laws that do not accord with current perceptions of human rights or that contain provisions that are obsolete or anomalous. These laws include the *Law of Marriage Act, 1971*,<sup>904</sup> the *Customary Laws Declaration Order*,

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<sup>898</sup> Art. 131(3) of the *Constitution of Tanzania, 1977*

<sup>899</sup> S. 30 of the *CHRGG Act, 2001*.

<sup>900</sup> S. 29 of the *CHRGG Act, 2001* provides that one (and arguably the largest) source of funding for the CHRGG is monies appropriated by Parliament.

<sup>901</sup> Cap. 171, R.E. 2002 [S. 3 of the *Law Reform Commission of Tanzania Act, 1980*].

<sup>902</sup> S. 4.

<sup>903</sup> S. 4(2).

<sup>904</sup> Cap. 29 of the R.E 2002.

1963,<sup>905</sup> the *Affiliation Act, 1949*,<sup>906</sup> the *Newspapers Act, 1976*,<sup>907</sup> and the *National Elections Act, 1985*.<sup>908</sup> There are several other laws that are in need of amendment. In fact, in 1992, the Nyalali Commission<sup>909</sup> identified 40 laws in Tanzania that needed to be amended or repealed. Many of the laws identified by the Nyalali Commission have not been amended or repealed.

Despite the continued existence of out-dated laws, the LRCT has been actively working in the area of law reform. Since the early 1990s, the LRCT has prepared and submitted a number of reports to the Minister of Justice or the Attorney General on issues such as the death penalty, the *Law of Marriage Act*, and laws relating to DNA evidence.<sup>910</sup> However, there have been significant delays in the implementation of the recommendations of the LRCT. It is the LHRC's position that the delay stems from the inaction of either the Minister or the Attorney General. These parties are responsible for tabling the LRCT's reports in the National Assembly and making a statement as to the actions the government intends to take in response to the LRCT's recommendations.<sup>911</sup> While the legislation provides that the Minister has no more than 12 months to table a report from the LRCT,<sup>912</sup> there is no legislated time frame for the government to act on the report.

The LHRC proposes that the a provision be inserted in the *Law Reform Commission of Tanzania Act, 1980*, or another appropriate act, setting out a time limit in which the government must commence and conclude the actions it takes in response to the LRCT's recommendations.<sup>913</sup> It would not be unusual for such a provision to be inserted in the *Law Reform Commission of Tanzania Act*, as a similar provision exists in the *CHRGG Act, 2001*.<sup>914</sup> Without such a provision, there is the danger that the LRCT's recommendations will become redundant due to the passage of time and people will be unable to attain justice due to the continued existence of laws that have been identified as "bad laws."

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<sup>905</sup> G.N. 279 of 1963, which is discussed in greater detail in Chapter 5.1.4. of this report.

<sup>906</sup> Cap. 278, R.E. 2002, which is discussed in greater detail in Chapter 5.1.1. of this report.

<sup>907</sup> Cap. 229, R.E. 2002, which is discussed in greater detail in Chapter 2.4.1. of this report.

<sup>908</sup> Cap. 343, R.E. 2002, which is discussed in greater detail in Chapter 3.3.2. of this report.

<sup>909</sup> The Nyalali Commission is the Presidential Commission appointed by the President of the United Republic of Tanzania in 1991 to scrutinize and identify bad laws in Tanzania which require amendment in conformity with the Bill of Rights and Duties introduced in the Constitution of Tanzania in 1984. The Commission was chaired by the then Chief Justice of Tanzania, the Late Mr. Francis Nyalali.

<sup>910</sup> For example, see the Tanzania Human Rights Report of 2007, at p. 105. S. 14 of the *Law Reform Commission of Tanzania Act, 1980* provides that the LRCT is to submit its reports to the Minister responsible for legal affairs or the Attorney General.

<sup>911</sup> S. 15 of the *Law Reform Commission of Tanzania Act, 1980*.

<sup>912</sup> S. 15 of the *Law Reform Commission of Tanzania Act, 1980*.

<sup>913</sup> The time limit must be reasonable and take into account the lengthy process that surrounds the amendment or repeal of a law. However, the time limit must also ensure that this process occurs in a timely manner.

<sup>914</sup> S.28(2) of the *CHRGG Act, 2001*, provides that the appropriate authority has three months from the date that the CHRGG's recommendations were issued to take action to redress the impugned fundamental rights or acts of maladministration.

Moreover, the requirement in the *Law Reform Commission of Tanzania Act* that laws that are enacted or amended have to accord with the policies of *Ujamaa* and self-reliance<sup>915</sup> should be removed. These policies are outdated and no longer operational. In 1996, the Legal Task Force recommended that this legislative provision be removed, as these policies no longer exist in Tanzania.<sup>916</sup>

### *Codification and Simplification of the Laws*

The LRCT is empowered to codify the laws of Tanzania.<sup>917</sup> Codification can be broadly defined as the process of collecting, compiling and restating unwritten laws to form a systematic written legal code. In Tanzania, most laws are codified. However, there are a few exceptions, such as some instances of customary law, Islamic law and certain practices that rely on unwritten common law.

Customary law was largely codified in the *Declaration of Customary Law, 1963*.<sup>918</sup> However, this declaration only codified the customary law of Tanzania's patrilineal ethnic communities, which constitute 80 percent of Tanzania's population.<sup>919</sup> Thus for Tanzania's matrilineal communities, the unmodified customary laws remain in force and are subject to proof by the party relying on them. In addition, certain customary laws that were codified are inconsistent with current human rights standards. For instance, under customary law, a widow cannot inherit the house or real property of her deceased husband.<sup>920</sup> It is necessary to codify the customary law of matrilineal tribes and to amend the customary law that has already been codified so that it accords with modern human rights standards.

Islamic law as it applies to matters of marriage and succession have been codified in Tanzania in the *Islamic Law (Restatement Act), 1964*, the *Statements of Islamic Law, 1967* and the *Succession (Non-Christian Asiatics) Act, 1923*.<sup>921</sup> While the matters relating to marriage are clearly set out in the *Islamic Law (Restatement Act), 1964* and the *Statements of Islamic Law, 1967*, the *Succession (Non-Christian Asiatics) Act, 1923* merely states that matters of inheritance shall be determined in accordance with the

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<sup>915</sup> S. 13(1). *Law Reform Commission of Tanzania Act, 1980*. *Ujamaa* is a type of African socialism that was introduced by the then President of Tanzania, the late Julius Nyerere, in the Arusha Declaration of 1967. The *ujamaa* policy called for the nationalization of all major means of production. It restricted liberalization of the market and, as a result, production, processing, services and distribution of goods were done by governmental agencies and parastatal bodies. However, globalization has pushed Tanzania to make economic reforms and the policy of *ujamaa* has fallen by the wayside. Almost all major means of production, which were once nationalized, have been privatized.

<sup>916</sup> Financial and Legal Management Upgrading Project, United Republic of Tanzania 'Legal Sector Report' (Report prepared by the committee chaired by M.D. Bomani, Dar es Salaam, presented to the Minister for Justice and Constitutional Affairs on 25 January 1996), at p. 113.

<sup>917</sup> S. 4(2) of the *Law Reform Commission of Tanzania Act, 1980*.

<sup>918</sup> *The Local Customary Law (Declaration) Order, 1963*, G.N. No. 36 of 1963.

<sup>919</sup> M. Rwebangira, Nordiska Afrkainstitutet, *The Legal Status of Women and Poverty in Tanzania* (Motala, Sweden: Motala Graiska 1996) 25.

<sup>920</sup> See: Chapter 5.1.4. of this report.

<sup>921</sup> *Islamic Law (Restatement) Act, 1964*, Cap. 375, R.E. 2002; the *Statements of Islamic Law, 1967*, G.N. No. 222 of 1967; and, the *Succession (Non-Christians Asiatics) Act, 1923*, Cap. 28, R.E. 2002.

deceased's religion. The reliance on religious law to dictate matters of inheritance may result in discrimination against women in matters of inheritance. The laws of inheritance should be codified and apply uniformly to all Tanzanians, irrespective of their ethnic or religious background.

The other area of law that may benefit from codification is the inclusion of certain international human rights instruments, such as the *International Covenant on Civil and Political Rights, 1966* and the *International Covenant on Economic, Social and Cultural Rights, 1966*, into domestic law. The codification of these instruments would ensure that Tanzania meets its obligations under these instruments and would enable Tanzanians to fully realise their rights under these instruments.

### 8.3 Tanzania Prisons Services

The TPS is a department of the Ministry of Home Affairs and its operations are regulated by the *Prisons Act, 1967*.<sup>922</sup> When the TPS was initially formed in 1931 by the British, the prison was operated on the then generally accepted principles of retribution and incapacitation.<sup>923</sup> After independence, the Tanzanian government adopted a new policy that emphasised rehabilitation of offenders, rather than retribution and incapacitation. The *Prisons Act* embodies this policy shift. A further move in this direction was the introduction of the Probation and Community Services Division of the TPS in September 2008.<sup>924</sup> The Probation and Community Services Division will implement the Community Service Programme, which is aimed at the rehabilitation of offenders.<sup>925</sup>

The treatment of prisoners remains a major challenge in Tanzania, as the conditions in prisons often impinge on prisoner rights, such as the right to sufficient bedding and food. The rights of prisoners and the government's corresponding obligation to prisoners are contained in multiple international instruments to which Tanzania subscribes, such as:

- *Basic Principles for the Treatment of Prisoners, 1990*,<sup>926</sup>
- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988*;<sup>927</sup>
- *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985*;<sup>928</sup>
- *Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, 1990*;<sup>929</sup>

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<sup>922</sup> *Prisons Act, 1967*, Cap. 58, R.E. 2002.

<sup>923</sup> Ministry of Home Affairs, United Republic of Tanzania 'The Tanzania Prisons Service' <<http://www.moha.go.tz>> accessed December 19 2008.

<sup>924</sup> Unnamed reporter 'Prisons' probation and community service welcome' *Daily News* (Tanzania) 8 September 2008.

<sup>925</sup> C Kizigha 'Off-jail terms to ease congestion in the offing' *Daily News* (Tanzania) (4 January 2009).

<sup>926</sup> UNGA Res 45/111 (14 December 1990) UN Doc A/45/49.

<sup>927</sup> UNGA Res 43/173 (9 December 1988) UN Doc A/43/49.

<sup>928</sup> UNGA Res 40/34 (29 November 1985) UN Doc A/40/53.

<sup>929</sup> UNGA Res 45/119 (14 December 1990).

- *Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982;*<sup>930</sup>
- *Standard Minimum Rules for Treatment of Prisoners, 1957 and 1977;*<sup>931</sup>
- *Universal Declaration of Human Rights, 1948;*
- *United Nations Rules for the Protection of Juveniles Deprived of Liberty, 1990;*<sup>932</sup> and,
- *United Nations Standard Minimum Rules for Non-Custodial Measures, 1990.*<sup>933</sup>

This section considers whether Tanzania has met its obligations under the above-noted instruments and general human rights instruments. Tanzania's performance with respect to prison conditions is evaluated in the context of the number of people incarcerated in prisons; violence perpetuated by prison officials and other prisoners; access to information regarding prison conditions; and, life for prisoners in the post-incarceration period.

### *Overcrowding*

In terms of the institutional capacity of the TPS, there are currently 122 institutions, 21 regional offices, two staff training centres, four vocational training facilities and a head office in Dar es Salaam.<sup>934</sup> The 122 institutions have the capacity to accommodate 22,669 prisoners.<sup>935</sup> In December 2007, the government stated that the carrying capacity of these institutions had been increased to 27,653.<sup>936</sup> In addition, in 2007, overcrowding in prisons was slightly reduced, as there was a reduction in the number of prisoners from 46,416 to 43,262.<sup>937</sup>

The increase in the carrying capacity of the prisons was explained in June 2008 by the Minister for Home Affairs, the Hon. Mr. Laurence Masha:

*Uwezo wa sasa wa magereza kisheria ni kuhifadhi wafungwa na mahabusu 27,653 ukilinganisha na uwezo uliokuwepo awali wa kuhifadhi wafungwa 22,669 tu. Ongezeko hili ni kutokana na jitihada za serikali za kukarabati, kukamilisha, kupanua na kujenga mabweni ya wafungwa katika vituo mbalimbali. Tarehe 1 Juni, 2008 kulikuwepo Wafungwa na Mahabusu 39,951. Kiwango hiki ni kikubwa zaidi kwa kuwa na idadi ya*

<sup>930</sup> UNGA Res 37/194 (18 December 1982) UN Doc A/37/51.

<sup>931</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 1976 (LXII) of 13 May 1977.

<sup>932</sup> UNGA 45/113 (14 December 1990) UN Doc A/45/49.

<sup>933</sup> UNGA Res 45/110 (14 December 1990) UN Doc A/45/49.

<sup>934</sup> The Tanzania Human Rights Report of 2007 *supra*, at p. 105.

<sup>935</sup> Ministry of Home Affairs, Government of Tanzania 'The Tanzania Prisons Service' <<http://www.moha.go.tz>> accessed 23 January 2009.

<sup>936</sup> The Tanzania Human Rights Report of 2007 *supra*, at p. 107.

<sup>937</sup> *Ibid*, p. 107.

*Mahabusu na Wafungwa 12,298 ambao ni sawa na asilimia 44 ukilinganisha na uwezo wa kuhifahi Wafungwa na Mahabusu magerezani uliopo nchini kote.*<sup>938</sup> [“Currently, the official capacity of the prisons has increased from 22,669 to 27,653. The increase is due to the government efforts to renovate, expand and construct dormitories for the prisoners in various places. As of 1 June 2008, there were a total of 39,951 inmates. This is a number that is bigger than the official carrying capacity because the difference of 12,298 as increased number above the normal capacity is equal to 44 percent about the capacity of all the prisons in the country.”]

As evident from the statement by the Minister of Home Affairs, there was also a reduction in the number of prisoners in 2008 to 39,951.<sup>939</sup> Arguably, the reduction in the number of prisoners in 2008 may be attributed to the presidential pardon granted by President Kikwete to 7,674 prisoners.<sup>940</sup> Despite the reduction in the number of people incarcerated in mainland Tanzania, there is still a stark difference of 12,228 between the accommodation capacity of prisons and the number of prisoners who are currently incarcerated. On an institution by institution basis, this difference can result in severe overcrowding in a prison. For instance, in October 2008, it was reported that 1,702 prisoners were housed in Isanga Prison, Dodoma, which is approximately 118.2 percent over the prison’s carrying capacity.<sup>941</sup>

One of the major factors that contribute to the overcrowding of prisons is the high number of remand prisoners. Almost half of the prison population is made up of remand prisoners.<sup>942</sup> The high number of remand prisoners can be partially attributed to the underutilization of alternative sentences. It is estimated that one third of prisoners are serving jail terms of at least three years for committing minor offences.<sup>943</sup> From a rehabilitation perspective and to reduce the congestion in prisons, it may be appropriate to consider alternative sentencing for persons convicted of minor offences. The LHRC calls upon the use of the Community Service Programme countrywide.

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<sup>938</sup> *Hotuba ya Waziri wa Mambo ya Ndani ya Nchi, Mheshimiwa Lawrence Kego Masha (MB); Akiwasilisha Bungeni Makadirio ya Mapato na Matumizi ya Fedha kwa Mwaka 2008/2009* [Speech of the Hon. Lawrence Kego Masha, Minister for Home Affairs, to the National Assembly on the estimates of the Government’s Revenue and Expenditure for the year 2008/2009] (Dodoma Tanzania June – July 2008) p. 14 (Swahili version).

<sup>939</sup> In December 2008, it was reported that there were 41,613 prisoners, of which 19,008 were remand prisoners. See: P. Kisembo ‘Kikwete pardons 4,306 prisoners’ *The Guardian* (Tanzania) 10 December 2008. However, based on the figure quoted by the Minister of Home Affairs, there was approximately a 3,000 reduction in the number of prisoners between 2007 and 2008.

<sup>940</sup> P. Kisembo ‘Kikwete pardons 4,306 prisoners’ *The Guardian* (Tanzania) 10 December 2008.

<sup>941</sup> R. Chizosa “Gereza Isanga lakabiliwa na msongamano” [“Isanga Prison faces overcongestion”] *TanzaniaDaima* (Tanzania) 5 October 2008. The head of this Prison, ACP Kibwana Kamtanda, said the overcrowding in the prison is due to delays in addressing criminal cases.

<sup>942</sup> P. Kisembo ‘Kikwete pardons 4,306 prisoners’ *The Guardian* (Tanzania) 10 December 2008.

<sup>943</sup> C. Kisigha ‘Off-jail terms to ease congestion in the offing’ *Daily News* (Tanzania) 4 January 2009.

There has been a steady, albeit minor, yearly reduction in the number of prisoners since 2000.<sup>944</sup> The LHRC commends the government for reducing the number of inmates in the prisons. However, it is concerned that the reduction in the number of prisoners is marginal and it is occurring extremely slowly.

The government of Tanzania has taken some positive measures towards addressing prison congestion, such as:<sup>945</sup>

- Extending the application of the *Community Services Act, 2002*<sup>946</sup> from five to 12 regions. This Act is now applicable in: Dar es Salaam, Arusha, Tanga, Kilimanjaro, Mwanza, Dodoma, Shinyanga. Others are, Iringa, Mbeya, Kagera, Mara and Mtwara. The *Community Services Act, 2002* allows persons convicted of minor offences to be sentenced to community service instead of jail time. As of May 2008, there were 732 people who had been sentenced to community service.
- In the period 1 July 2007 to 1 May 2008, 736 prisoners were allowed to complete their prison sentences by doing community service.<sup>947</sup> However, one of the factors limiting the use of community service is a lack of resources at the district and township council levels to coordinate community service.
- In the 2007/2008 financial year, 233 prisoners were released on parole pursuant to the provisions of the *Parole Board Act, 1994*.<sup>948</sup> As the conditions for parole are very restrictive, few prisoners qualify for parole. The Ministry of Home Affairs has submitted a circular to the Cabinet proposing that the conditions for parole in the *Parole Board Act, 1994* be broadened so that more prisoners would be eligible for parole.

The issue of overcrowding of prisons is multi-dimensional, as it involves the TPS, the judiciary, and the Tanzanian police force. However, there is a lack of coordination between these different governmental departments, which hampers the government's ability to respond to overcrowding in any meaningful way. The government needs to develop a comprehensive plan involving all three key players to deal with factors that cause overcrowding.<sup>949</sup>

### *Violence and Cruelty by Prison Officials and Prisoners*

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<sup>944</sup> In the period 2000 to 2008, the number of prisoners decreased by approximately 5,562. See: Various Sources including Tanzania Human Rights Report of 2006; Tanzania Human Rights Report; Budget Speeches – Home Affairs (2000 to 2008) as indicated above.

<sup>945</sup> Speech of the Hon. Lawrence Kego Masha, *supra*, at pp. 10 to 20 (Swahili version).

<sup>946</sup> Cap. 291, R.E. 2002.

<sup>947</sup> The performance of community service is in accordance with S. 52 of the *Prisons Act, 1967*.

<sup>948</sup> Cap. 400, R.E. 2002.

<sup>949</sup> Tanzania Human Rights Report of 2007, *supra*, at pp. 107 to 109. Factors that contribute to congestion in prisons are also discussed in the 2007 Human Rights Report. These factors include: delays in judicial proceedings, particularly at the appeal level; unnecessarily harsh bail conditions; delay in criminal investigations; and, a failure to effectively use alternative sentencing.

While incarcerated, Tanzanian prisoners face the threat of violence from fellow prisoners and prison officials. Violence against prisoners violates their human rights. Prison officials are obliged to ensure that their actions accord with law and human rights standards, as well as ensuring that prisoners are safe while they are in custody.

In 2008, there were various reports in the media of violence and other unlawful treatment of prisoners who had been convicted, or who were in remand. For instance, Ms. Faith Muthoni Simba, a woman held in remand in Maweni Prison, Tanga Municipality described her experience as follows:

*Niliteseka sana, nilikuwa nikipigwa kila kukicha kwa kipindi chote cha mwaka mmoja na miezi miwili nilipokuwa nikisota jela ... nilipigwa sana hadi kupata ulemavu wa mkono wa kushoto na kuvunjwa meno yangu matatu ... maisha ya jela yasikie tu, ni mateso makubwa, ukiugua dawa unazopewa haziendani na ugonjwa ... ningeiomba serikali itupie macho sua hili la matibabu.*<sup>950</sup> [“While in jail as a remandee, I was beaten up daily for the period of one year and two months that I was incarcerated. I was severely assaulted in such a way that I sustained injuries to my arm and teeth. Jail life is very harsh. When inmates get ill, the medicine given to them is inappropriate for their specific illness. I beg the government to follow-up on these issues.”]

Ms. Simba’s recount of her time in remand indicates a number of violations of prisoner rights, such as the right to be free from cruel or inhumane treatment and the right to receive appropriate medical services while incarcerated.<sup>951</sup> We urge the government to investigate the use of force in prisons and to educate prison officials about human rights standards.

The unfavorable treatment of non-Tanzanian prisoners was an issue that also came to the fore in 2008. In February 2008, 32 Ethiopians who had been charged with illegally staying in Tanzania requested that they be repatriated as soon as possible, as they were targets of physical assault by other inmates.<sup>952</sup> Another request for repatriation was publicly made in August 2008 by some Congolese prisoners. These prisoners, who were incarcerated at Ukongo prison in Dar es Salaam, sent the following open letter to the Minister of Home Affairs, the Hon. Mr. Lawrence Masha:

[w]e, foreign prisoners, citizens of the Democratic Republic of Congo (DRC), while in legal internment under Prison Service Department of Tanzania, are grossly humiliated and tortured because of the perception that we kill each other in our country.

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<sup>950</sup> B. Yakub “Faith alaani kuteswa jela bila makosa” [“Faith condemns being tortured in jail without reasons”] *Mwananchi* (Tanzania) 31 July 2008.

<sup>951</sup> See: Principle 22 of the *Standard Minimum Rules for Treatment of Prisoners*, UNGA Res 37/194 (18 December 1982) UN Doc A/37/51; Principles 3 and 6 of the *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment*, UNGA Res 43/173 (9 December 1988) UN Doc A/43/49.

<sup>952</sup> R. John ‘Ethiopians allege torture’ *The Citizen* (Tanzania) 20 February 2008.

When we demand for any fundamental right, instead of being accorded with, they punish us and also take us to the famous torturing room called *Punishment Cell* (PC). Because of those maltreatments, we have already requested the Ministry of Home Affairs to repatriate us to our country for the remaining imprisonment term. However, the Ministry has not yet replied to our request despite the fact that the United Nations is ready to facilitate us back to our country.

However, we are not alone; even those prisoners who are citizens of Tanzania find their own ways of living in the prison – they are not taken care by the government as the law directs. For instance, they purchase soap, razor blade and even prison garments (convicts' uniform) themselves.

To say the truth, here in the prison, there are lots of [HIV/Aids] infected inmates and we lack razor blade for shaving but despite that situation, we are forced (by the prison warders) to shave our mustache (beards); therefore, we use razor blades of those who have done with their blades.

We request this letter to reach the Minister for Home Affairs, also we beg of you to communicate our concerns to all Tanzanians.<sup>953</sup>

The letter of the Congolese prisoners raises a number of legal and human rights issues, including: the torture of prisoners; discriminatory treatment of non-Tanzanian prisoners; the issue of HIV/Aids in prisons; and, the responsibility of the government to ensure that prisoners live in reasonable conditions.

It is important for the TPS to address allegations of torture. Given the power differential that exists in prisons between prisoners and prison officials and the serious nature of an allegation of torture, it is essential that any allegations of torture are investigated thoroughly and in a timely manner. Furthermore, the government should provide effective remedies to alleged victims of torture, cruel or inhumane treatment.<sup>954</sup> Prisoners and prison officials should be educated about human rights and the way in which human rights can be enforced if they are violated. Education of prisoners and prison officials would enable both groups to work towards creating or maintaining an environment in which human rights are respected.

Both the Ethiopian and Congolese prisoners requested that they be repatriated to their country of origin by Tanzania. The repatriation of non-Tanzanian prisoners to their country of origin is governed by the *Transfer of Prisoners Act of 2004*.<sup>955</sup> This Act

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<sup>953</sup> Barua ya Wasomaji [“Letter to Readers”] ‘Mateso tunayoyapata Gereza la Ukonga’ [“Torments we sustain in Ukonga prison”] *Mtanzania* (Tanzania) 7 August 2008.

<sup>954</sup> Under international law, states have a legal duty to take effective legislative, administrative, judicial and other steps to prevent acts of torture and other forms of ill-treatment. See: UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (OHCHR and the International Bar Association, New York and Geneva 2003), at p. 333. This is why the LHRC proposes a multi-dimensional approach to end the problems in prisons in Tanzania.

<sup>955</sup> Act No. 10 of 2004.

allows the governments of certain partner countries to request the transfer of their citizens who are incarcerated in Tanzania to their home country.<sup>956</sup> Non-Tanzanians incarcerated in Tanzanian prisons may lobby their governments to make use of this act, but the prisoners have little control over this process.

#### *HIV/AIDS Prevalence and Control in Prisons*

It is estimated that approximately 9.2 percent of Tanzania's prison population are infected with HIV/Aids.<sup>957</sup> In an effort to address HIV/Aids in prisons, in 2008, the government embarked on an educational campaign of both inmates and prison staff on HIV/Aids and its transmission.<sup>958</sup> However, other than this educational campaign and the testing of a small sample of prisoners in 2006, the government seems to have taken few steps to address the issue of HIV/AIDS in prisons. The newly enacted *HIV and Aids (Prevention and Control) Act, 2008* does not specifically provide for the testing, counseling or treatment of prisoners (or any persons who are confined to state institutions) who are HIV-positive.

The LHRC is concerned that prisoners do not have the opportunity to determine their status and, even if they are aware of their status, they may be unable to access appropriate health care, including anti-retroviral drugs. It is the LHRC's position that the government should offer voluntary HIV testing to prisoners and provide appropriate health care to HIV-positive prisoners. Furthermore, the government needs to improve living conditions in prisons to, firstly, prevent the transmission of HIV/AIDS in prisons and, secondly, ensure that HIV-positive prisoners are able to maintain their health.

#### *Public Access to Prisons Information*

Access to information about prisons and prison conditions, as well as the publication of this information continues to be restricted. The *Prisons Act* contains an explicit prohibition against prison officers providing information to the media and other persons about a prison or a prisoner.<sup>959</sup> The publication of investigative stories regarding prisons is also prohibited, as is the publication of photographs of prisons or prisoners. The LHRC continues to advocate for greater access to information about prisons and prisoners.

#### *Post-Incarceration Period*

In 2008, there were no changes in the administrative and legal mechanisms available to prisoners in the post-incarceration period. There are no mechanisms that are designed to facilitate a convicted person's transition back into society when they are released. Prisoners' limited access to information or individuals outside of prison makes this

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<sup>956</sup> Ss. 4 and 5 of the *Transfer of Prisoners Act, 2004*, Act No. 10 of 2004.

<sup>957</sup> 'HIV/Aids prevalence in prisons on the high side' *The Guardian* (Tanzania) 22 July 2008.

<sup>958</sup> *Ibid*

<sup>959</sup> S. 93 of the *Prisons Act, 1967*.

transition even more difficult.<sup>960</sup> It is possible that the lack of post-incarceration support results in higher rate of re-offence and greater number of people who are incarcerated.

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<sup>960</sup> Tanzania Human Rights Report of 2007, *supra*, at p. 111.

## Chapter Nine

### Corruption and Abuse of Power

#### 9.0 Introduction

Corruption is defined as an abuse of public office or any entrusted power for private profit or gain. The terms “profit” and “gain” include any financial or material gain, such as money or a gift, and non-material gain, such as the furtherance of political or professional ambitions.<sup>961</sup> Corruption is more bluntly defined in the African Union’s *Convention on Prevention and Combating Corruption of 2003*, as acts and practices relating to bribery.<sup>962</sup> Corrupt acts or behaviour generally involve officials in the public sector who improperly and unlawfully enrich themselves, or those close to them, by misusing the public power entrusted to them.<sup>963</sup> However, corruption can extend beyond the public sector into the private domain.<sup>964</sup> As noted by one of the LHRC’s 2008 survey respondents “*kila mtu anaweza kuwa fisadi katika ngazi yake*” [“everyone can be a corrupt at his or her own position”].<sup>965</sup> When addressing corruption, a holistic approach that considers both the private and public spheres should be taken.

There are a number of factors that lead to corruption in Tanzania, such as:

1. Lack of political will to prevent or reduce corruption;
2. Inefficiencies in the delivery of public services;
3. The existence of a legal and political framework that creates an atmosphere that is conducive to corruption. For instance, the existence of lengthy and difficult procedures that hamper an individual’s ability to access private or public services;
4. Negative economic environment in which there is job insecurity, low wages, and an increase in the cost of living;
5. Lack of transparency and accountability at the decision-making level;
6. Erosion of the integrity of the country’s political leadership; and,

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<sup>961</sup> Transparency International ‘Global Corruption Report 2007 – Corruption in Judicial System’ (Report Cambridge 2007), at p. xxi; Tanzania Human Rights Report of 2007, *supra*, at p. 112; APRM Tanzania and University of Dar es Salaam ‘Economic Governance’ (Revised final report Dar es Salaam December 2008) (Economic Governance) at p. 48.

<sup>962</sup> Adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union, Maputo, 11<sup>th</sup> July, 2003, at Art. 1.

<sup>963</sup> The Tanzania Human Rights Report, *supra*, at p. 112.

<sup>964</sup> Corrupt practices include the solicitation or acceptance by public official or any other person of any goods of monetary value or other benefit for himself or herself as provided for under Art. 4(1)(a) of the *AU Convention on Prevention and Combating Corruption*, adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union, Maputo, 11<sup>th</sup> July, 2003, As such, efforts to prevent corruption should focus on public officials, as well as private individuals.

<sup>965</sup> Response to LHRC opinion survey by interviewee (Tanzania January to November 2008).

## 7. The emergence of conspicuous consumption.<sup>966</sup>

This chapter of the report examines some of the factors that support corruption in Tanzania. It assesses the perception of corruption in Tanzania and the institutional, administrative and legal measures taken in 2008 to address corruption. Last, but not least, this chapter highlights some of the corruption scandals that plagued Tanzania in 2008.

### 9.1 General Perception of Corruption in Tanzania

According to a 2008 Transparency International report, the level of corruption in Tanzania is perceived to be high.<sup>967</sup> The annual Corruption Perceptions Index issued by Transparency International ranks countries according to their perceived levels of corruption. In 2008, Tanzania was ranked as 108<sup>th</sup> out of 180 countries; this ranking was shared by countries such as Rwanda, Mongolia and Bolivia.<sup>968</sup>

Corruption does not exist in a vacuum. The prevalence of corruption has been linked to poverty and good governance.<sup>969</sup> The UNDP Human Development Index assesses the state of a country on the basis of life expectancy; various education indicators; and various indicators about the standard of living. In 2008, Tanzania was ranked on this index as a 152<sup>nd</sup> out of 179 countries.<sup>970</sup> This index indicates that Tanzania has a high level of human poverty. This level of poverty has a negative impact on the other indicators used to assess Tanzania's human development. Tanzania's economy is characterized by a low level of development that stems from its weak economic framework. These weaknesses include a weak and inefficient bureaucracy, an underdeveloped judiciary and cumbersome business regulations. From a governance perspective, Tanzania is rated as "only partly free, indicating that is not an electoral democracy and the ruling party dominates political life."<sup>971</sup> The perception that a high level of corruption exists in Tanzania, Tanzania's weak economy and the abuse of power by public officials all serve to undermine the principles of good governance. Tanzania needs to effectively address corruption in order to stimulate development and good governance.

In Tanzania, the Prevention and Combating of Corruption Bureau (PCCB), a semi-autonomous governmental institution, is empowered to address and combat corruption.

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<sup>966</sup> The Tanzania Human Rights Report, *supra*, at p. 112, which quotes the information from the Prevention and Combating of Corruption 'Causes of Corruption in Tanzania'.

<sup>967</sup> E-Standard Forum 'Best Practice Report for Tanzania' (Report February 2008). See Item # 1 on Performance in Global Best Indices.

<sup>968</sup> Transparency International 'Corruption Perceptions Index 2008' <<http://www.transparency.org/>> accessed 3 February 2009.

<sup>969</sup> Corruption is an obstacle to principles of democracy, good governance and human rights and poses a threat to peace, tranquility and security in the society as per the preamble of the *Prevention and Combating of Corruption Act, 2007*, Act No. 11 of 2007.

<sup>970</sup> UNDP 'The Human Development Index – going beyond income: Tanzania' (Statistic update New York 2008) <<http://hdrstats.undp.org>> accessed 3 February 2009.

<sup>971</sup> E-Standard Forum, *supra* note 982, at Item # 1 on Performance in Global Best Indices.

However, there continue to be concerns about the PCCB's efficacy and ability to perform its functions. For instance, in 2008, the Prime Minister, Edward Lowassa, and two Ministers, Ibrahimu Msabaha and Nazir Karamagi, were forced to resign from public service due to allegations of corruption and abuse of power. However, the PCCB has not taken any steps to investigate the allegations against these parties. The PCCB's inaction on these allegations increases the perception of corruption in Tanzania.

## 9.2 Institutional Anti-Corruption Measures

### *International Aspects and Perception*

There are various international and regional instruments that address corruption. Tanzania is a signatory state to a number of these instruments, such as:

- *African Union Convention on the Prevention and Combating Corruption and Related Offences of 2003*;<sup>972</sup>
- *SADC Protocol Against Corruption of 2001*;
- *UN Convention against Corruption of 2003*;<sup>973</sup> and,
- *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985*.<sup>974</sup>

These instruments contain two major themes. The first is that member states develop effective policy and legal measures to prevent and combat corruption.<sup>975</sup> The measures developed by the member states should cover government departments, government officials and the private sector. Furthermore, the legislative measures should:

- ensure the maintenance and strengthening of independent national anti-corruption authorities or agencies;
- ensure the maintenance and strengthening of internal accounting, auditing and follow-up systems, in particular, in the public income, custom and tax receipts, expenditures and procedures for hiring, procuring and management of the public goods and services;
- protect informants and witnesses in corruption and related offences;
- ensure that citizens report instances of corruption without fear of consequent reprisals;

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<sup>972</sup> Adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003, ratified by Tanzania in 2005.

<sup>973</sup> *UN Convention against Corruption* (adopted 31 October 2003, entry into force 14 December 2005, ratified by Tanzania 25 May 2005) UN Doc A/58/422.

<sup>974</sup> Adopted by General Assembly resolution 40/34 of 29 November 1985.

<sup>975</sup> Art. 5 of the *UN Convention against Corruption*; Art. 5 of the *AU Convention on the Prevention and Combating Corruption and Related Offences*, *supra* note 987.

- punish those who make false and malicious reports against innocent persons in corruption and related offences;
- promote the education of the populations to respect the public good and public interest and awareness in the fight against corruption and related offences.<sup>976</sup>

The second theme is that member states implement these measures effectively. Without effective implementation, these measures are toothless tigers that are unlikely to have an impact on the level of corruption in a member state. In an effort to increase the relevancy of anti-corruption measures, the various international and regional instruments direct member states to widen the category of corruption offences to address contemporary issues, such as money laundering, trading in influence, abuse of functions, illicit enrichment and embezzlement of public properties.

### *National Measures*

As required by the international and regional anti-corruption instruments, Tanzania has developed both policy and legislative measures to address corruption. In 2001, Tanzania developed a *National Anti-Corruption Strategy and Action Plan (NACSAP)*. In 2006, the *NACSAP* was reformulated and developed into the *NACSAP of 2006 – 2010 (NACSAP II)*. The *NACSAP II* expanded the scope of *NACSAP*'s coverage from Ministerial Department Agencies to include the private sector, civil society and local government authorities. The *NACSAP II* envisages improvement in the quality of public service delivery by:

- Enacting new legislation to improve the combating and prevention of corruption.
- Enhancing the organizational capacity to deliver high quality standards of service;
- Creating an effective and transparent system of procedures and regulations; and,
- Increasing public awareness about procedures, standards of services, codes of conduct and the public's rights in general.

From a legislative perspective, Tanzania has enacted a number of laws to address corruption and the various manifestations of corruption, including:

- *Anti-Money Laundering Act, 2006*, Act No. 12 of 2006;
- *Economic and Organised Crime Control Act, 1984*, Cap. 200, R.E. 2002;
- *Penal Code, 1945*, Cap. 16, R.E. 2002;
- *Prevention and Combating of Corruption Act, 2007*, Act No. 11 of 2007;
- *Public Leadership Code of Ethics Act of 1995*, Cap. 398, R.E. 2002; and,
- *Public Procurement Act, 2004*, Act No. 21 of 2004.

Of these laws, the law most focused on addressing corruption is the *Prevention and Combating of Corruption Act, 2007*, which came into effect on 1 July 2007. This law

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<sup>976</sup> Art. 5 of the *AU Convention on the Prevention and Combating Corruption and Related Offences*.

repeals the *Prevention of Corruption Act, 1971*.<sup>977</sup> The *Prevention of Corruption Act, 1971* had been criticized for being ineffective in curbing corruption. It was ineffective for a number of reasons, including the limited scope of its corruption offences; the lack of protection mechanisms for informants and witnesses; the lack of an independent anti-corruption body; the focus of the anti-corruption body on the public sector; delays in the prosecution and determination of corruption cases; and, the overriding discretion of the Director of Public Prosecution.<sup>978</sup> The Director of Public Prosecution had the discretionary power to grant or refuse to grant consent to the anti-corruption body to prosecute a case.

In contrast to its predecessor, the *Prevention and Combating of Corruption Act, 1971* has taken a broader approach to defining corruption offences. It contains 15 corruption offences, whereas the *Prevention of Corruption Act, 1971* only contained three. The 15 corruption offences are contained in Part IV of the *Prevention and Combating of Corruption Act, 2007* and pertain to procurement, auctions, employment, foreign public officials, forged documents, lawful consideration and sexual favours.<sup>979</sup> The new act also addresses the issue of protection of witnesses and informants.<sup>980</sup>

However, the *Prevention and Combating of Corruption Act, 2007* has not brought about any changes to the relationship between the Director of Public Prosecutions and the PCCB, or improved the independence of the PCCB. The PCCB still has to seek the consent of the Director of Public Prosecutions before starting a corruption case.<sup>981</sup> In terms of independence, the director of the PCCB is still appointed by the President and its operations continue to be monitored by the Ministry of State, Good Governance (President's Office). Furthermore, the provision of the *Prevention and Combating of Corruption Act, 2007* that prohibits the media, civil society organizations and individuals from reporting about alleged offences being investigated by the PCCB concerns the LHRC. This prohibition stifles the freedom of expression in Tanzania, as well as negatively affecting a person's right to information.

### 9.3 Post-Warioba Commission

In 1996, the former Prime Minister of Tanzania, Mr. Joseph Warioba was commissioned to chair the presidential inquiry on corruption. This inquiry sought to ascertain root causes of corruption in Tanzania. Ultimately, the inquiry issued the *Warioba Commission Report of 1996*.

The report found that corruption on a petty and a grand-scale was present in almost all public sectors. In this report, petty corruption was held to include the corrupt activities engaged in by junior public servants, such as police officers and judicial officials, to

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<sup>977</sup> Cap. 329, R.E. 2002. See the historical background of this law and the PCCB in the Tanzania Human Rights Report of 2007, *supra*, at pp. 115 to 116.

<sup>978</sup> According to the LHRC's analysis and Economic Governance, *supra*, at p. 48.

<sup>979</sup> ss. 17, 18, 21 to 25 of the *Prevention and Combating of Corruption Act, 2007*, Act No. 11 of 2007.

<sup>980</sup> Ss. 54 and 55 of the *Prevention and Combating of Corruption Act, 2007*.

<sup>981</sup> S. 60 of the *Prevention and Combating of Corruption Act, 2007*.

supplement their incomes. In contrast, grand corruption was held to include the corruption engaged in by senior public officials who, typically, were wealthy and powerful. Although 12 years have passed since the *Warioba Commission Report of 1996* was issued, many of the causes of corruption remain the same, as does the prevalence of corruption.

However, the government did implement some of the recommendations of the *Warioba Commission Report of 1996* by enacting the *Prevention and Combating of Corruption Act, 2007*. As the Act is only a year and half old, it is difficult to assess its efficacy. In addition, any progress that has been made due to the enactment of this Act has been largely obscured by the corruption scandals that plagued Tanzania in 2008.

### *The Competence of the PCCB*

In 2007, the LHRC raised concerns about the capacity of the restructured PCCB. In particular, the LHRC was concerned about the PCCB's ability to investigate and prosecute corruption cases that involved senior government officials. While the *Prevention and Combating of Corruption Act, 2007* empowers the PCCB to investigate matters, the PCCB has made little headway in prosecuting those individuals allegedly involved in corruption. In this regard, the LHRC is concerned about the PCCB's lack of investigation and prosecution of various public officials, such as Prime Minister Edward Lowassa, who resigned from his position under suspicion of corruption.

The PCCB's function is to investigate allegations of corruption, collect evidence of corruption and institute proceedings on corruption. The PCCB cannot adjudicate proceedings or make determinations of guilt. It has left this duty to the Executive to form the "*Kamati za Uchunguzi*" (Inquiry Committees) and as it is, the findings of those committees influences the decision of PCCB of whether or not to take cases in court.<sup>982</sup> This is unfounded new procedures, which need to be discouraged. PCCB has to take alleged cases directly to the Court because it is the only authority vested with final powers to dispense justice in Tanzania.<sup>983</sup>

The LHRC's reservations about the PCCB were mirrored in some of the comments made by the respondents surveyed by the LHRC. For instance, a survey respondent from Kibaha district in the Coastal region noted that:

*"[n]aona sasa wakubwa matumbo joto, nadhani kuna juhudi inafanyika, ila zaidi ni kazi ya akina Dokta Slaa kule bungeni na siyo sijui wale wa taasisi ya rushwa, sijui akina nani hata"* ["As I can see, grand corrupts are worrying, I think there is some progress but mostly is a good work done by Dr. Slaa and others in the parliament and not those of anti-corruption bureau, whom I even don't know them"].

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<sup>982</sup> It has been said that it lacks sufficient information to prosecute right away. More information on this is available in the Tanzania Human Rights Report, *supra*, at p. 117.

<sup>983</sup> Art. 107A of the *Constitution of Tanzania, 1977*.

In 2008, Parliament did take a lead in investigating and publicly naming public officials who were involved in corruption and it addressed incidents of abuse of public power. These incidents are discussed later on in this chapter.

*The Capacity of the PCCB to Handle Corruption Cases*

PCCB's has received total number of 22,284 corruption cases between 2003 and 2007. Statistical information on the number of reports received by the PCCB in 2008 was not secured. The status of the cases handled by the PCCB in the period 2003 to 2007 is as follows:

<b>Year</b>	<b>Information Received</b>	<b>Investigation completed</b>	<b>Cases filed in court</b>	<b>Convictions from court cases</b>
2003	2,285	540	51	9
2004	2,223	458	60	6
2005	3,121	540	50	6
2006	6,320	1,688	71	18
2007	8,235	2,014	195	35
<b>Total:</b>	22,184	5,240	427	74

**Source:** APRM and Dept of Political Science and Public Administration, University of Dar es Salaam 'Democracy and Political Governance in Tanzania (Consultancy report, Dar es Salaam 2008), at p. 113.

The PCCB operates on a national basis and it has 26 regional officers and 130 district offices. However, there is no publicly available data on how many reports of corruption are received from the different regional and district offices. Considering that the PCCB's operations are national, the number of reports about corruption seems relatively low. The LHRC is pleased to note the rise in the number of incidents reported and investigated in 2006 and 2007. The LHRC hopes that this positive trend continues and encourages the government to sensitize the public about the existence of the PCCB and its functions. It also encourages the government to increase the capacity of the PCCB to address corruption reports about high-level public officials.

However, it is disappointing to note that of the cases filed in court by the PCCB, only 17 percent have resulted in convictions. The reasons for this low conviction rate are unknown. It is necessary to do further research on the reasons behind the low conviction rate, as this low rate may be indicative of structural problems with the PCCB's operations and its investigatory methods.

*Peoples' Perception of Corruption and the Capacity of the PCCB*

A survey conducted by the African Peer Review Mechanism (APRM) in 2008 indicates that the following changes have occurred in people’s perceptions of corruption:

Institution	The State of Corruption			Total
	Increased	Decreased	Same	
Police	41.1%	28.0%	30.0%	100%
Judiciary	41.5%	28.2%	30.3%	100%
Health	30.0%	39.7%	30.3%	100%
Immigration	24.3%	30.5%	42.1%	100%
TRA	29.0%	28.1%	42.9%	100%
Land Authority	25.5%	32.5%	42.0%	100%

**Source:** APRM and Dept of Political Science and Public Administration, University of Dar es Salaam ‘Democracy and Political Governance in Tanzania (Consultancy report Dar es Salaam, Tanzania 2008), at p. 115.

As evident from the table, the general sentiment was that there was an increase in the perception of the police and the judiciary is corrupt, while there was a decrease in the perception of corruption in the other institutions. It is concerning that the institutions tasked with keeping the rule of law and ensuring the people’s human rights are protected are the institutions with the highest perceived levels of corruption. The perception of a high level of corruption may serve as a disincentive for people to use the services of the police or the judiciary, thereby creating a barrier to justice.

The perceptions of corruption are not limited to national governmental institutions. There is also a high perception of corruption in government offices that operate at the village and ward level. This perception of corruption and its pervasive nature was pointed out by a respondent to the LHRC’s opinion survey who lived in Loiboshire village, Manyara region. This person stated:

“we have to be very humble or corrupt the leaders in order to get a normal service (such as a reference letter) the way we request.”

“the PCCB should not focus only on the police force and judiciary; there are lot of corruption practices in our wards and villages. They should come and investigate. In our places, we give small cents but for us it means a lot.”<sup>984</sup>

<sup>984</sup> Response to LHRC opinion survey by interviewee (Tanzania January to November 2008).

Perceptions of the way in which the PCCB is dealing with corruption and its overall performance are fairly negative. The LHRC's opinion survey indicates that 70 percent of respondents believed that the number of incidents of corruption is still high because of the PCCB's low capacity to prosecute cases.<sup>985</sup> A 2007 opinion conducted by the Research and Education for Democracy in Tanzania found that 33.4 percent of the respondents were not satisfied with the general performance of the PCCB.<sup>986</sup> Similarly, an opinion poll of experts conducted by the APRM indicated that 63 percent of experts viewed the government's ability to deal with corruption as low.<sup>987</sup> The government's primary means of dealing with corruption is through the activities of the PCCB.

#### **9.4 Major Corruption Scandals**

In 2008, a number of major corruption scandals hit the headlines, while some of the corruption scandals of 2007 remained unresolved. These scandals included:

##### The BAE Radar Deal

The Tanzanian government started negotiating in 1992 with BAE, a British company, for the purchase of an air traffic control system. In 1999, the Tanzanian government purchased this system, which could be used for both civilian and military purposes, and would be installed at the airport in Dar es Salaam. The purchase price for the system was \$40 million (USD). This purchase price had been negotiated down from \$88 million (USD). Despite the reduction in the purchase price, the purchase of this air traffic control system was opposed by the World Bank, the International Monetary Fund, the British Department for International Development, the British Foreign office and the people of Tanzania. Despite this opposition, BAE was granted an export license and the contract was approved by the Tanzanian government.<sup>988</sup>

Mr. Andrew Chenge was the Attorney General of Tanzania in the period 1995 to 2006. By virtue of his position, Mr. Chenge became directly involved in a number of aspects of the contract negotiations with BAE, most notably the financing of the purchase. In 2008, it came to light that between 19 June 1997 and 17 April 1998, a company controlled by Mr. Chenge, Franton Investments Limited, had over \$1.5 million (USD) deposited into a Barclay's Bank account held in the company's name. On 20 September 1999, Mr. Chenge authorized the transfer of £600,000 from this account to the Royal Bank of Scotland International. It is Mr. Chenge's assertion that the original sources of these funds were "professional earnings" and "family savings/ inheritance."<sup>989</sup> There is suspicion that Mr. Chenge received these funds as a pay off from BAE.

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<sup>985</sup> Responses to LHRC opinion survey by interviewees (Tanzania January to November 2008).

<sup>986</sup> D. Mwita 'Poll: Kikwete approval rating dips to 44 percent' *ThisDay* (Tanzania) 11 December 2007.

<sup>987</sup> APRM and Dept of Political Science and Public Administration, University of Dar es Salaam 'Democracy and Political Governance in Tanzania (Consultancy report Dar es Salaam, Tanzania 2008), at p. 114.

<sup>988</sup> Statement by Matthew Cowie, Case Controller, Serious Fraud Office, United Kingdom (Letter to the Attorney General of the United Republic of Tanzania 21 March 2008) Ref. No. SPC01/D/MC, at pp 4 and 5.

<sup>989</sup> Statement by Matthew Cowie, *supra*, at p. 7.

The British Serious Fraud Office (SFO) has investigated Mr. Chenge. They have found that his statements on financial status are incomplete and, potentially, contradictory. The SFO suspects that the statements relating to the sources of his money are false and that these “funds represent bribes taken by Chenge for his own benefit and to be distributed to others.” The SFO has requested that the Tanzania government provide it with relevant information about Mr. Chenge and others that are held under the *Public Leadership Code of Ethics Act, 1995*.<sup>990</sup> The SFO said that Mr. Chenge has not disclosed assets held in Jersey on the appropriate register as that law requires.<sup>991</sup> The investigation was ongoing as of December 2008.

### The Bank of Tanzania (the BoT) Scandal

On 7 January 2008, President Kikwete dismissed the Governor of the BoT, the late Mr. Daudi Balali, due to allegations of fraud. More specifically, a 2007 audit done by Ernest & Young indicated that BoT had paid Tsh99 billion to 13 companies based on fake and forged documents. A further Tsh46 billion had been paid out of the BoT’s commercial external debt account without the requisite supporting documents.

In January 2008, President Kikwete appointed a taskforce comprised of Robert Manumba, Director of Criminal Investigations, Saidi Mwema, the Inspector General of the Police, Edward Hosea, the Director of the PCCB, and Johanson Mwanyika, the Attorney General to investigate the BoT scandal. This taskforce provided a report to the government setting out the names of the individuals and companies involved in the scandal. In 2008, a number of people who were associated with the named companies were charged with corruption and arraigned. These cases are still at the preliminary stages. None of the senior officials employed by the BoT or the Ministry of Finance have been charged. The overriding public sentiment is that these senior officials should be held accountable for their actions.

### Kiwira Coal Mines Company

There are still corruption allegations against the former President Benjamin Mkapa and the former Minister of Energy and Minerals, Mr. Daniel Yona, in regard to their purchase of the Kiwira Coal Mines Company. It is alleged that the purchase price for this company was below market value. It is believed that it cost the Chinese approximately \$4 billion (USD) to construct the mine, which was purchased by Mr. Mkapa and Mr. Yona for Tsh700 million under the government’s indigenization policy.

The Director of the PCCB maintains that the PCCB has no legal authority to investigate the actions of a former head of state that is facing corruption or other charges. To support this statement, the Director of the PCCB relied on Article 46(3) of the *Constitution of Tanzania, 1977*, which states:

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<sup>990</sup> Statement by Matthew Cowie, *supra*, at p. 10.

<sup>991</sup> Statement by Matthew Cowie, *supra*, at p. p 8, paragraph 4.

...[i]t shall be prohibited to institute in court criminal or civil proceeding against a person who was holding the office of President after he ceases to hold such office **for anything he did in his capacity as President while he held the office of President** in accordance with this Constitution. [emphasis added].

Article 46 of the *Constitution of Tanzania, 1977* potentially gives immunity for matters connected to presidential office and not personal issues. That is, the PCCB's interpretation of this Article may be overly broad. Firstly, this Article does not prevent investigation of the acts of a President or former President, rather it prevents a party from commencing a legal proceeding against that individual. Secondly, the Article limits its protection to acts that were done by the individual in their capacity as President. Arguably, if it could be shown that Mr. Mkapa's acts were primarily for personal reasons and for personal gain, then perhaps his acts in respect to the Kiwira Coal Mine were not acts done in a presidential capacity, but in a personal capacity. Furthermore, Article 46 of the *Constitution, 1977* does not prohibit the PCCB from investigating Mr. Yona.

The LHRC recommends that since all people are equal before the law, any person suspected to have committed offences should, as well be taken into task. The interpretation of the said Article of the Constitution, as given by PCCB, is incorrect for the reasons stated above.

#### The Richmond Electricity Deal

In 2006, the Tanzania Electric Supply Company (TANESCO) entered into a contract with Richmond Development Corporation (Richmond) for Richmond to produce and supply emergency power to TANESCO. More specifically, Richmond was meant to increase the capacity of the national electricity grid by 100 MW by June 2006. This task was completed by February 2007. Richmond's delay in fulfilling the terms of the contract due to its lack of experience and funds led to questions being raised about why Richmond was awarded the tender.

The PCCB commenced an investigation into this matter and issued a report in May 2007 indicating that the PCCB had not discovered any elements of corruption during its investigation. Parliament was skeptical of the PCCB's result and created a special commission chaired by Dr. Harrison Mwakyembe to investigate the issue.

In December 2007, the Speaker of the National Assembly, Samuel Sitta, announced he had received the report from the special commission (Mwakyembe Report). The Mwakyembe Report was presented to Parliament in February 2008. The Mwakyembe Report revealed a number of irregularities in the procurement process and it implicated a number of senior government officials, including the former Prime Minister, Edward Lowassa, the former Ministers for Energy, Ibrahimu Msabaha and Nazir Karamagi, and the Attorney General, Johnson Mwanyika. In addition, the Mwakyembe Report called for the resignation of the Director of the PCCB, Dr. Edward Hosea, because the PCCB's earlier, inaccurate report had "considerably eroded the integrity of this important

institution [the PCCB] which has the mandate of fighting corruption, not whitewashing it”.<sup>992</sup>

The findings of the Mwakyembe Report led to the resignation of the former Prime Minister, Edward Lowassa, and the former Ministers for Energy, Ibrahim Msabaha and Nazir Karamagi. However, the Attorney General, Johnson Mwanyika, and the Director of the PCCB, Dr. Edward Hosea, remain in their positions. The government did not take any action against these two individuals in 2008. The LHRC takes the position that all government officials who engage in corrupt activities should be sanctioned accordingly. This type of behaviour is unacceptable and if it is not addressed it creates a culture of impunity in which corruption can flourish.

It is uncertain what, if any, of the 23 recommendations of the Mwakyembe Report have been implemented by the government. Prime Minister, Mizengo Pinda, formed a Probe Committee to report on the steps taken by the government in response to the Mwakyembe Report.<sup>993</sup> However, this Committee has not given any clear answers as to what steps the government has actually taken.

It is important that the recommendations in the Mwakyembe Report be thoroughly considered by the government and steps taken to implement these recommendations. A failure to implement these recommendations makes a mockery of the investigation of the Richmond scandal and turns a blind eye to procurement practices that allow corruption to occur. It also brings into question how serious the government is about addressing corruption in a substantive and meaningful way.

In 2008, the government did take some proactive steps to deal with some of the corruption scandals that plagued Tanzania. For instance,

- in 2007, a Parliamentary Select Committee chaired by Dr. Mwakyembe was formed to investigate the Richmond scandal. This Committee released its findings in 2008 and recommended that the senior government officials who were involved in the contract should resign. This recommendation led to the resignation of the former Prime Minister, Edward Lowassa, and two Cabinet ministers who were also implicated, Nazir Karamagi and Dr. Ibrahim Msabaha;<sup>994</sup> and,

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<sup>992</sup> Quote from the Mwakyembe Report, as quoted in ‘PCCB boss Hosea faces dismissal’ *ThisDay* (Tanzania) 7 February 2008. The Mwakyembe Report recommended that legal and ethical/ administrative steps be taken against the institutions that facilitated the unprofessional procurement procedures, which resulted in the contract being awarded to Richmond. The institutions named were the PCCB; the Business Registrations and Licensing Agency; the Ministry of Energy and Minerals; TANESCO; and the Prime Minister’s Office.

<sup>993</sup> Mizengo Pinda is the current Prime Minister of Tanzania. He replaced Mr. Edward Lowassa, who resigned as Prime Minister after the Richmond saga. According to Art. 52(2) of the *Constitution of Tanzania, 1977*, the Prime Minister is the leader of the government business in the National Assembly. This is why he was required to make sure that the 23 recommendations by the Parliamentary Committee are actually adhered to by the government.

<sup>994</sup> Read the full story on this Committee in the Tanzania Human Rights Report 2007, *supra*, at p. 118 to 120.

- on 26 November 2008, court proceedings were commenced against former Cabinet ministers, Mr. Basil Mramba and Mr. Daniel Yona, on charges of abuse of office. These proceedings were commenced after a three year investigation by the police and the PCCB into a suspect contract concluded between the government and Alex Stewart (Assayers) Government Business Corporation for the latter to audit gold production in Tanzania.

Despite taking these steps, it is the LHRC's position that the government needs to be more proactive in addressing the corruption of public officials and improve the procurement process, in particular, to reduce incidents of corruption. It is also necessary to educate people about what corruption is and the negative impact it has on Tanzania's economic development and growth as a whole.

## Chapter Ten

### Tanzania and International Human Rights Law

#### 10.0 Introduction

Tanzania is a signatory to a number of regional and international human rights treaties, as discussed in this report. By ratifying these treaties, Tanzania committed to fulfilling its obligations under these treaties. These obligations range from promoting and protecting human rights to submitting periodic reports to treaty monitoring bodies on the state of human rights in Tanzania.

In Tanzania, the legal framework has a dual system in regard to international conventions and treaties. International conventions do not operate in Tanzania until they are incorporated into the domestic legislation. Effectively, once a treaty has been ratified by Tanzania, it must be incorporated into domestic legislation in order to put it on the same footing as other domestic legislation.<sup>995</sup> Once a treaty is incorporated into domestic legislation, it should be used by individuals, the legislature and the judiciary to protect and promote human rights.

Due to Tanzania's dual system, it is important to monitor the ratification and domestication of human rights treaties in Tanzania. This chapter examines the status of Tanzania's ratification and domestication of treaties, and its fulfillment of its reporting requirements under various treaties. This chapter also touches upon the APRM process and the progress made in this process in 2008.

#### 10.1 Ratification of Human Rights Treaties

In 2008, Tanzania failed once again to ratify the following fundamental regional and international human right treaties:

- the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984* and its Optional Protocol, which commits states to preventing and prohibiting torture;
- the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990*;
- the *Optional Protocol to the International Covenant on Civil and Political Rights, 1966*, which allows individuals to submit complaints directly to the UN Human Rights Committee; and,
- the *Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989*, which calls for the abolishment of the death penalty;

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<sup>995</sup> United Republic of Tanzania 'Reports submitted by States Parties under Article 9 of this Convention, sixteenth periodic reports of State parties due in 200convent3, Addendum' Committee on the Elimination of Racial Discrimination (19 November 2004) UN Doc. CERD/C/452/Add. 7 <<http://www.unhchr.ch>> accessed 9 February 2009, at para. 52.

It is bizarre to note that, Tanzania is one of the very few countries around the world which have not yet ratified the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*, while it claims from the international eyes that it is a peaceful country which upholds principles of human rights.

## 10.2 Reports to Treaty Monitoring Bodies

Many of the international treaties to which Tanzania is a signatory contain reporting requirements. Tanzania's fulfillment of these reporting requirements has sometimes been inconsistent. In 2008, the status of Tanzania's periodic reports under various human rights treaties was as follows:

- under *Convention on the Elimination of all Forms of Discrimination against Women, 1979*, a member state has to submit a report every four years. Tanzania submitted its fourth, fifth and sixth periodic reports to the CEDAW Committee on 16 April 2007. These reports were submitted approximately five years after their due dates. These reports were considered by the CEDAW Committee in July 2008 at its 845<sup>th</sup> and 846<sup>th</sup> session. Tanzania's seventh and eighth periodic reports are due on 30 September 2014.
- the *International Convention on the Elimination of All Forms of Racial Discrimination, 1966*, which Tanzania ratified in 1972, requires member states to submit a report every two years. Tanzania submitted its eighth to sixteenth reports to the Committee on 2 August 2005. However, it has yet to submit its seventeenth and eighteenth reports, which were due on 26 November 2007.
- the *International Covenant on Civil and Political Rights, 1966*, requires a member state to submit a report every five years. On 8 October 2007, Tanzania submitted its periodic report. The report was approximately five years late. Tanzania's report will be reviewed by the UN Human Rights Committee in July 2009.
- the *International Covenant on Economic, Social and Cultural Rights, 1966* requires member states to submit periodic reports every five years. While Tanzania ratified this instrument in 1976, it has only submitted one, partial report to the overseeing Committee. This report was submitted on 10 September 1979.
- under the *Convention on the Rights of the Child, 1989*, Tanzania is required to submit a report every five years. Tanzania last submitted a report to this Committee on October 20, 2004. The report was approximately six years late. Tanzania's next report is due on 9 January 2012.
- in 2007, Tanzania submitted periodic reports to the Committees for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000* and the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000*. Both reports were more than a year late.<sup>996</sup>

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<sup>996</sup> UN Office for the High Commissioner for Human Rights 'Report Status by Country: Tanzania' <<http://www.unhchr.ch>> accessed 6 February 2009.

In recent years, Tanzania has fulfilled its reporting obligations under most of the human rights treaties to which it is a party. Its failure to file any substantive reports pursuant to the provisions of the *International Covenant on Economic, Social and Cultural Rights, 1966* is a notable exception. However, Tanzania's lack of timeliness in submitting these reports is concerning.

The LHRC recommends that the government should abide to its obligation to the international human rights instruments by reporting to the treaty monitoring bodies in a timely manner. It should also make sure that concluding observations of the committees are implemented through designated programmes of action. Moreover, to achieve these recommendations, the government of Tanzania is advised to establish a specific Inter-Agency Committee or Committees that will, among other things, advise the government on its obligations under various human rights treaties.

### **10.3 African Peer Review Mechanism**

The APRM is an African initiative to for countries to self-monitor aspects of good governance at an individual country level.<sup>997</sup> The monitoring focuses on the four thematic areas of democracy and good political governance; economic governance and management; corporate governance; and socio-economic development.<sup>998</sup> The monitoring process relies on the participating countries doing periodic reviews of their policies and practices. As of September 2008, 28 African countries, including Tanzania, were participating in this self-assessment process.<sup>999</sup>

The APRM forms a part of the New Partnership for Africa's Development's (NEPAD) strategy for the socioeconomic development of Africa. NEPAD was adopted by the Organization of African Unity in 2001. It is an integrated strategic framework for the socio-economic development of Africa. NEPAD focuses on the linkages between economic growth, socio-economic development and political rule, while emphasizing the need for good governance and democracy as a precondition for Africa's development.

In 2008, the APRM Secretariat conducted sensitization seminars about the APRM throughout mainland Tanzania and Zanzibar. It also conducted a field survey to collect peoples' opinions on the four APRM thematic areas. The Technical Assistants Team was also assigned to work on draft reports, which will be compiled to create a country assessment report for Tanzania.

However, the APRM process still faces a number of challenges. One of these challenges is the slow pace of progress. Up until this point, the completion of the APRM's activities, including the finalization of Tanzania's assessment report, has been very slow. At the beginning of 2008, the Executive Secretary of the APRM Secretariat in Tanzania, Prof. Daud Mkangara, stated that the Secretariat planned to complete the external assessment by independent experts by Tanzania by August or September of this year and,

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<sup>997</sup> Tanzania Human Rights Report of 2007, *supra*, at p. 129.

<sup>998</sup> APRM 'Welcome to APRM' <<http://www.aprm-international.org>> accessed on 22 January 2009.

<sup>999</sup> APRM 'The Update' (Newsletter Vol. 8 September 2008), at pp. 2 to 7.

after that, the country assessment report could have forwarded to the higher levels of the process.<sup>1000</sup> However, as of December 2008, the process was lagging behind at the level of compilation of the survey's report done by the members of the Technical Assessment Team.<sup>1001</sup>

This has also been a concern by other monitors of the APRM process. In September 2008, the NEPAD secretariat, which governs this process all over Africa, stated:

Tanzania received its support mission to launch the APRM process in 2006. The country has been undertaking its self-assessment since then although progress has been fairly slow. The country was scheduled for a (external) country review mission but has not yet submitted its Country Self-Assessment Report and National Programme of Action (as to September 2008).<sup>1002</sup>

Although the APRM process does not have a fixed duration, it is important that the APRM Secretariat complete the Country Self-Assessment Report and the National Programme of Action as soon as possible in order to have this process done. It is also suggested that civil society organizations should be more involved in the validation sessions of the Country Self-Assessment Report and during the design of the National Programme of Action.

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<sup>1000</sup> J. Tarimo 'Tanzania to Undergo External APRM Assessment in June' *The Guardian* (Tanzania) 14 February 2008.

<sup>1001</sup> Note that LHRC is one of the members of civil society that participated in the sensitization sessions of February to May 2008 as organized by the APRM Secretariat of Tanzania. Therefore, it has practical information on the process.

<sup>1002</sup> APRM 'The Update' (Newsletter Vol. 8 September 2008) at pp. 2 to 7.

## Conclusion

In 2008, there were some improvements in Tanzania's realization, promotion and protection of human rights. These improvements ranged from Tanzania becoming a signatory to the *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* to the increase in the primary school enrollment rate to the plan to provide free health care to pregnant women and children under the age of 5 years.

However, there were also a number of human rights violations that occurred in 2008. Some of the human rights violations that occurred in 2008 involved core human rights, such as the right to life and the right to a fair trial, while other violations involved socio-economic human rights, such as the right to work and the right to health services.

In our opinion, the survey of the state of human rights in Tanzania reveals that there are pervasive human rights violations in Tanzania. This situation exists despite Tanzania's commitments under various international and regional human rights instruments. While Tanzania has incorporated some of these international obligations into its domestic legislation, there is a gap between these legislative provisions and reality.

This gap is partially attributable to a lack of capacity and resources at the governmental level, which hinders the government's ability to ensure that individuals, companies and governmental departments comply with Tanzania's legislation. It may also be as a result of a lack of political will to protect and promote certain human rights. An example of this is the government's failure to comply with the Court of Appeal's order to draft legislation permitting private candidates.

On the demand side of human rights, individuals are poorly informed about their human rights and how to protect these rights. If an individual does attempt to address a human rights violation using the judicial system, they may experience problems with access to justice. Access to justice in Tanzania is limited due to corruption in the police force and the judiciary, poor judicial infrastructure and the low capacity of the courts. The inability to access justice is a source of human rights violations itself, as people take the law into their own hands in the form of mob violence, or individuals are denied the right to a fair trial because of lengthy pre-trial delays. From a practical standpoint, access to justice issues means that human rights become unenforceable at the individual level. This in turn creates an environment where a person, organisation or government department can violate human rights without being held accountable for its actions. In our opinion, this lack of accountability is a major factor that contributes to the continued existence of widespread human rights violations in Tanzania.

In order to address human rights violations in Tanzania, it is necessary to address the structural weaknesses in the government's ability to enforce its own laws and to strengthen institutions that support human rights, such as the CHRGG, the LRCT and the PCCB. It is our position that the government should give the recommendations of the CHRGG and the LRCT due consideration and implement the relevant recommendations

in a timely and appropriate manner. Furthermore, the PCCB should be strengthened and be given wider powers to institute judicial proceedings against officials who are alleged to be involved in corruption.

Tanzania continues to experience extensive human rights violations that affect all spheres of its citizens' lives, such as their standard of living, their ability to access health care, and their ability to benefit from Tanzania's natural resources. Tanzania needs to address these human rights violations in a systematic and meaningful manner that involves the Tanzanian government, Tanzanian civil society and Tanzanian citizens.

**PART II**

**ZANZIBAR HUMAN RIGHTS REPORT 2008**

**ZANZIBAR LEGAL SERVICES CENTRE**

**TRANSFORM**



**JUSTICE INTO  
PASSION**

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## Acknowledgements

This is the third Report on the Human Rights Situation in Zanzibar. We are grateful that the two previous Reports were generally well received by the public. Some people differed with us on the interpretation of some of the events, but no one disputed as to the facts stated therein. Everybody felt the need for this exercise to be conducted annually.

As with the previous Reports, this one too benefited from the intellectual contributions, experiences and observations of a number of people. We want to thank particularly Safia Masoud Khamis, Ali Ali Hassan, Said Hassan and Mohamed Makame for their inputs. A number of others asked for their names not to be mentioned for fear that what befell on a senior state attorney last time might happen to them too. We understand their fears. It is precisely that kind of fear that we want it eradicated in our society. We want to thank all those, mentioned and unmentioned, who kindly accepted to share with us some of their precious time and making valuable contributions in shaping this Report.

The Editors want to record their deep appreciation to Prof Chris Peter of the Law Faculty at the University of Dar es Salaam and a Trustee of ZLSC for going thoroughly through the manuscript and making very necessary corrections and useful suggestions.

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## **About ZLSC**

### **Vision**

The Centre seeks to ensure that every person in Zanzibar, especially the poor, women, children, the disadvantaged sections of society, has a basic understanding of legal and human rights principles and can act on them in order to build a society based on rule of law, good governance and observance of human rights norms.

### **Mission**

Among others, the Centre is dedicated to raising people's awareness on their rights and responsibilities through the provisions of legal and human rights educations, research on legal issues, conducting seminars, workshop, conferences, counselling and legal aid.

### **Ethical Standards**

All persons participating in the operations of the Centre must show the utmost good faith to others in all matters relating to the Centre and must not use the Centre's facilities or influence to further private gain or any partisan, religious, ethnic, similar interests contrary to the Objectives of the Centre.

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1. Legal Counselling
2. Paralegal Training
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4. Administration of Justice
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## **Chapter One**

### **General Overview of Zanzibar**

#### **1.1 Introduction**

To the outsiders Zanzibar looks to be a place where things have really not settled down, and the class/racial struggle has not been played out yet despite the fact that the Busaidy dynasty was overthrown more than forty years ago. The outsiders get more perplexed when they find out that Zanzibar is a place where there is an intermingling of cultures and inter-racial and inter-ethnic marriages. It is also a place where the overwhelming number of its population is of the Muslim faith and most of them are of the Sunni sect.

#### **1.2 Zanzibar Historical Background**

Zanzibar got its independence from the British on 10<sup>th</sup> December 1963 with the Sultan as a Head of State. A month later, on 12<sup>th</sup> January 1964, a popular revolution took place that overthrew the Busaidy dynasty and established a People's Republic of Zanzibar. On 26<sup>th</sup> April 1964, Zanzibar and the Republic of Tanganyika united together into a single sovereign republic known as the United Republic of Tanzania.

#### **1.3 Geography**

Situated roughly 20 miles from the shores of the African continent Zanzibar is one of the largest islands in the Indian Ocean. It consists of the two main islands of Unguja, with an area of 640 sq. miles, and Pemba with one of 380. There are other islets, Uzi, Kojani, Shamiani, Kisiwa Panzi, Fundo and Tumbatu; the latter area, with 3600 acres, is the only one inhabited and of any significance, lying not far from the north-west coast of Unguja. The country's population density is very high, with an average of 258 people per square mile in Unguja and 352 in the case of Pemba.

#### **1.4 People**

According to the 2002 National Census, Zanzibar has a population of 979, 637. Given the islands' geographical proximity to Mainland Tanzania, and Kenya in the case of Pemba, it is not difficult to assume the early inhabitants must have come from these areas. It is not easy to rule out that people might have also come from places such as the coasts of Mozambique and Somalia, and the islands of Malagasy and the Comoros. It is generally believed that the Ngalawa-type canoe may have come to Zanzibar from Indonesia via Malagasy and the Comoros. The monsoons and the dhows have also brought people from Arabia, India, Iran, the Mediterranean and other places. In fact, in the country's history which dates back to pre-Christian era, there is much that indicates Zanzibar's active links with the outside world. It is such links that gave Zanzibar its language, Kiswahili.

## **1.5 Economy**

While state statistics show that the economy is growing by an average of 6% the people do not feel it in their pockets. Unemployment is rising, especially amongst the youth, and the state capacity to meet the people's basic needs is dwindling.

In the last few years, Zanzibar's economy has shifted from depending on cloves, copra and spices to depending on tourism. The country has a great potential to develop into a really tourist attraction but it needs heavy investments in this area. It needs also to involve the local population in the development of this industry.

## **1.6 Zanzibar in the Union**

On 26<sup>th</sup> April 1964, the People's Republic of Zanzibar and the Republic of Tanzania announced that they had merged to form a United Republic of Tanzania. The circumstances in which the Union was formed raised a lot of questions, many of which are still unanswered, and some have been at the centre of continuous debates and controversies in Tanzania in the last thirty years. Is Tanzania a federal entity or not? Did the founding fathers of the Union had in mind the present two-government structure as a permanent one or did they see a possibility of a complete Union with one government?

## **1.7 Political System**

Zanzibar enjoys a multi-party system with periodic elections after every five years. The President who is elected on a popular vote is the Executive Head of Government and appoints the Chief Minister and other Ministers. There is a legislature known as the House of Representatives majority of whose members are directly elected. There is also the Judiciary whose Chief Justice is appointed by the President.

## **1.8 Judicial System**

The Judiciary in Zanzibar is headed by the Chief Justice. There are two court systems running parallel each with a specific responsibilities but all ending up to the High Court. While the court system from the District court to the High Court deal with all matters, civil and criminal, the Kadhi's courts only deal with matters of matrimony, divorce, child maintenance and inheritance concerning Muslim families and in accordance to Islamic Law and only when the parties agree to go to those courts.

## Chapter Two

### Civil Rights and Liberties

#### 2.1 Introduction

Civil rights and liberties, political and social concepts, refer to guarantees and rights that a state is supposed to provide to its citizens and other persons within its jurisdiction. Although the terms have no precise meaning in law and are sometimes used interchangeably, distinctions may be made. *Civil rights* is used to imply that the state has a positive role in ensuring all citizens equal protection under the law and equal opportunity to exercise the privileges of citizenship and to participate fully in national life, regardless of race, religion, gender, or other characteristics unrelated to the worth of the individual. *Civil liberties* are used to refer to guarantees of freedom of speech, press, or religion; to due process of law; and to other limitations on the power of the state to restrain or dictate the actions of individuals. The two concepts of equality and liberty are overlapping and interacting; equality implies the ordering of liberty within society so that the freedom of one person does not infringe on the rights of others, just as liberty implies the right to act in ways permitted to others.<sup>1003</sup>

Global, regional and municipal legal instruments guarantee the rights and freedoms to the individual. These include Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966, the African Charter on Human and Peoples' Rights, 1981; the Constitution of the United Republic of Tanzania, 1977 as well as in the Zanzibar Constitution, 1984.

#### 2.2 Right to Life

The right to life is unavoidable in this contemporary world. Without this right, all others are meaningless and without life no one can talk of fundamental rights. It is not possible to claim your right while you do not have knowledge on your basic right to life<sup>1004</sup>

Article 3 of Universal Declaration of Human Rights, 1948 proclaims that every human being has the right to life, liberty and the security of person. The meaning and scope of the right to life is clearly spelt out in the International Covenant on Civil and Political Rights, 1966. Article 6 of the Covenant stipulates that every human being has the inherent right to life which shall be protected by law, and that no one shall be arbitrarily deprived of his life. Countries which still retain death penalty in their statute books are required to ensure that sentence of death is imposed only for the most serious crimes and

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<sup>1003</sup> [http://encarta.msn.com/encyclopedia\\_761555666/civil\\_rights\\_and\\_civil\\_liberties.html](http://encarta.msn.com/encyclopedia_761555666/civil_rights_and_civil_liberties.html)

<sup>1004</sup> The statement of the priest from the Anglican Church on the Right to Life at a seminar in Zanzibar on 10<sup>th</sup> October, 2008 at EACROTANAL Hall where ZLSC had organised the occasion as part of the campaign against the death penalty world-wide.

in accordance with the law, and that can only be carried out pursuant to a final judgment rendered by a competent court. Furthermore, sentence of death shall not be imposed for crimes committed by minors and shall not be carried out on pregnant women<sup>1005</sup>.

Apart from the International and regional instruments on human rights, the Constitution of the United Republic of Tanzania, 1977 and the Constitution of Zanzibar of 1984 also guarantee the right to life as an inherent right<sup>1006</sup>. It provides that every person has the right to the preservation of his life, right to live and to the protection of his life by the society in accordance with the law and right not to be tortured, inhumanly punished or to be given punishments which are degrading and humiliating.

It is clearly shown that a person cannot have a right to life without having highest attainable standard of physical and mental health and this can only be obtained after having a healthy environment in comfortable surroundings. The case is different with the 'trainees' (prisoners) who are in prison in Zanzibar. They claim on living in dangerous situation in prisons and consider it to be an indirect infringement on their right to life<sup>1007</sup>.

Cases of infringement of the right to life are reported to increase in 2008 compared to 2007. About 6 people were reported to have been killed within one week soon after the month of Ramadhan and the Police failed to find the offenders. On 2 October, 2008 at Kikwajuni Shehia within Urban District of Unguja a male person was found dead and the postmortem report showed that he was injured before his death.<sup>1008</sup> On 7<sup>th</sup> October, 2008 it was reported in the Mwanakwerekwe Police station that Mohamed Abdalla Mwalimu of Kidongo - Chekundu Zanzibar was killed by someone on suspicion of adultery. Abeid Ali Mmanga was suspected. On 24<sup>th</sup> June, 2008 Juma Mshenga Issa (28) was seriously beaten by his uncles for threatening to kill his grandfather on allegations that the grandfather was a witching him. Juma was admitted at Mnazi Mmoja Hospital for 11 days and died on 6<sup>th</sup> November 2008.

On 9 October, 2008 Nassor Abdallah Khalfan (50), a businessman, was found dead in his room with injuries on his stomach caused by stabbing with sharp object. It was alleged that the murderer did not take anything from the house. In the same week, one Mohamed Abdallah (30) was found dead after being injured by an unrecognized person<sup>1009</sup>. In total, about 22 people were reported to have been murdered in Zanzibar in the year 2008 with different reasons. Some murder suspects have been already charged in the Courts of law and others were expected to be charged after completion of investigations.<sup>1010</sup>

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<sup>1005</sup> Article 6(5) of the International Covenant on Civil and Political Rights, 1966.

<sup>1006</sup> See Article 14 of the Constitution of the United Republic of Tanzania, 1977 and Article 13 of the Constitution of Zanzibar, 1984.

<sup>1007</sup> In an interview conducted on 12<sup>th</sup> November, 2008 in the Office of ZLSC, one of released persons from Kiinua Miguu Education Centre (prison) revealed that the situation in the prison is bad in such a way that every released prisoner is suffering from various diseases and becomes weak due to the cruel treatment from the officers of the centre.

<sup>1008</sup> Interview with Police Officer done by a researcher on 5<sup>th</sup> December, 2008 at Police Head quarters.

<sup>1009</sup> *Tanzania Daima*, [www.freemedia.co.tz/daima/2008/10/9.habari4php-39k](http://www.freemedia.co.tz/daima/2008/10/9.habari4php-39k), [www.freemedia.co.tz](http://www.freemedia.co.tz)

<sup>1010</sup> Interview with Police Officer done by a researcher at Zanzibar Police Headquarters on 5<sup>th</sup> December, 2008.

### 2.3 Death Penalty

Various United Nations protocols provide safeguards to those facing the death penalty by restricting its execution in certain circumstances in countries which have not yet abolished it. Among other protective measures, they prohibit the execution of juvenile offenders, pregnant women, new mothers or the insane. In Resolution 1984/50 of 25 May, 1984 the UN Economic and Social Council under Article 3 of the International Covenant on Economic, Social and Cultural Rights recommended that states eliminate the death penalty for people suffering from mental retardation or extremely limited mental competence:

Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.<sup>1011</sup>

The Council went on to provide that capital punishment may only be carried out after a legal process which gives all possible safeguards to ensure a fair trial, including adequate legal assistance. This means that the convicted person must have the right to appeal to the highest court, in the case of Zanzibar it is Court of Appeal Tanzania; and steps should be taken to ensure that such appeals shall become mandatory.

Section 26 of the Zanzibar Penal Act, 2004<sup>1012</sup> provides for types of penalties to which the courts may inflict the death penalty. The only court allowed to impose death penalty is the High Court. The list of offences punishable by death is as follows:

- (a) Treason c/s 28 of the Penal Act, 2004.<sup>1013</sup>
- (b) Entering Zanzibar with intent to organize a counter – revolution, c/s 29 of the Penal Act, 2004.
- (c) Instigating invasion c/s 30 of the Penal Act, 2004.
- (d) Murder contrary to Sections 196 and 197 of the Penal Act, 2004.
- (e) Child destruction contrary to Section 217.

The law also provides for mode of execution of capital punishment. According to Section 305(1) of the Criminal Procedure Act, 2004 a person sentenced to death shall be hanged by the neck until he/she is dead. The law clearly exempts pregnant women and a minor (below the age of 18) from death penalty.<sup>1014</sup>

According to records, in the year 2008 only three persons were convicted and sentenced to death.<sup>1015</sup> However, no sentence of death has been executed in 2008. Execution of

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<sup>1011</sup> Article 3 of UN ECONOMIC AND Social Council of 25<sup>th</sup> May1994

<sup>1012</sup> Act No. 6 of 2004.

<sup>1013</sup> It is important to note that the Court of Appeal of Tanzania has held that treason cannot be committed in Zanzibar since Zanzibar is not a sovereign state. This was in the case of *S.MZ. v. Machano Khamis Ali & 17 Others*, Court of Appeal of Tanzania at Zanzibar, Criminal Application No. 8 of 2000.

<sup>1014</sup> Section 305 (2) and 132 the Criminal Procedure Act, 2004.

<sup>1015</sup> On 4<sup>th</sup> September Hon. Judge Mshibe Ali Bakari convicted Kheri Kombo Hamad who was charged with murder contrary with Section 108 and 181 of Penal Code of Zanzibar .It has been alleged that on

death penalty requires approval of the Zanzibar President, and no such approval was given in the year 2008.

## 2.4 Mob Violence

In simple meaning, mob violence means arbitrary action by a group of people punishing a person because of his or her alleged mischief. It is sometimes called “mob justice.” It entails people taking the law into their own hands without following the due process. The victim of mob violence normally experiences injuries, pains, lost of properties and even life. A number of cases reported concerning mob violence shows an increase in 2008 compared with that of 2007. An increase of reported cases of this nature is an indication of failure of the law enforcement agencies to perform their duties efficiently. There are however other reasons mentioned to contribute in the increasing cases of mob justice. These include ignorance of law and procedures, inhumanity and corruption. One of the interviewee was quoted as saying that there was no need of taking a suspect to a Police station as after few days he will be seen in streets committing crimes again.<sup>1016</sup>

## 2.5 Freedom from Torture

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 was a sequel to the Declaration on Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1975. The term “Torture” is defined as any act by which severe pain or suffering, whether physical, or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity<sup>1017</sup>.

State Parties are under obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture in their jurisdiction. State of war or a threat of war, internal political instability or any other public emergency shall not be invoked as a justification of torture. Furthermore, an order from a superior officer or a public authority may not be invoked as a justification of torture. Acts of torture are to be incriminated in domestic law.<sup>1018</sup>

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20<sup>th</sup> November, 2000 at or about 5.00 pm at Jang'mbe, Zanzibar Kheri did unlawfully and with malice aforethought killed Hassan Ahmad Hassan by stabbing him with a knife several times. On 4<sup>th</sup> January the accused Bashiru Rashid Omar was sentenced to death after being convicted for the murder of a baby boy at Bububu.

<sup>1016</sup> Research/Interview conducted by the ZLSC on mob violence cases in year 2008.

<sup>1017</sup> Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

<sup>1018</sup> Ibid. Article 4.

Incidentally, Tanzania has not ratified the Torture Convention. However, both the Constitutions of the United Republic of 1977 and that of Zanzibar of 1984 prohibit torture, inhuman and degrading treatment or punishment.<sup>1019</sup>

In case of Zanzibar, its Constitution prohibits all acts or punishments which result in torture to any person.<sup>1020</sup> It prohibits a person to be tortured, inhumanly punished or to be given punishments which are degrading and humiliating. In 2008, there are no reported cases of torture committed by State agencies. The only form of torture reported is that of domestic and sexual violence.<sup>1021</sup>

## **2.6 Equality before the Law – Access to Justice**

The right of equality before the law and access to justice is provided under Article 14 of the International Covenant on Civil and Political Rights, 1966. The Article provides that all persons shall be equal before the courts and tribunals, and that in determination of any criminal charge against him, or of his right and obligation in a suit of law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The article further provides for a right of a person charged with criminal offence be presumed innocent and be entitled with minimum guarantees in full equality. Such minimum guarantees include to be informed promptly of the charge against him, adequate time and facilities for preparation of his defence and communicating with counsel of his choosing; being tried without delay, opportunity to be heard, and not to be compelled to testify against himself or to confess guilty.<sup>1022</sup>

Section 12 of the Zanzibar Constitution declares for equality of all persons before the law and the entitlement, without discrimination, to equal opportunity before and protection of the law.

Access to justice can be described as active participation in the justice system coupled with effective utilization of affordable and available resources in the course of approaching and obtaining justice for all. The concept of access to justice can only be meaningful when individuals have knowledge and understanding of their rights and avenues of resources. It also means being entitled to take, and have access to legal advice and representation. It also goes along with fair and accelerated trials. Unfortunately, this is not the case for many Zanzibaris whose rights are being violated.<sup>1023</sup>

There are no material changes in the year 2008 on the issue of access to justice compared with 2007. Various reasons including economic conditions, lack of awareness of the individuals on legal advice and corruption are mentioned. Corruption in Zanzibar courts

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<sup>1019</sup> See Articles 13(3) and 13(6) (e) respectively.

<sup>1020</sup> Section 13 (3) of The Zanzibar constitution of 1984 guarantee the freedom from torture.

<sup>1021</sup> See A Report on Gender- Based Violence in Zanzibar, 2008, A research conducted by the Ministry of Labour, Youth, Women and Children Development.

<sup>1022</sup> Article 14(3) of the International Covenant on Civil and Political Rights, 1966.

<sup>1023</sup> Tanzania Human Right Report (2007) at p. 23.

hampers access to justice to majority of Zanzibar residents who are poor. Corrupt practice is complained against judges, magistrates, court clerks, typists and even court messengers.

## 2.7 Legal Representation

Ignorance of the legal process, delay of cases in courts and high costs of legal services particularly in drafting of pleadings and representation in court, as well restricting advocates not to appear in Primary and Kadhi's Courts hindered access to justice in the year 2008. According to terms attached to a certificate of practicing as an advocate, Advocates are not allowed to Primary and Kadhi's Courts. This has resulted in failure to obtain justice to a majority of litigants who appear before such Courts to defend themselves since they do not enjoy the services of advocates to defend them. Justice may not be achieved where the parties to the suit are ignorant of law and procedures, and advocates are not allowed to defend them. Section 12(6) of the Constitution of Zanzibar 1984 states that:

“When rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

One may comment that Vakils are allowed to safeguard interests of parties, but such Vakils are not qualified lawyers and thus may not be well acquainted with Islamic and many other laws. With their limited knowledge they may therefore not be very useful for the purpose of legal representation.

The situation is however worst in Kadhi's Courts. Kadhi's Court was re-established in 1985 under the Kadhi's Court Act, 1985 without having particular procedures and practice to be followed by Kadhis. The Chief Justice, in consultation with the Chief Kadhi, is empowered to make Rules of the Court providing for the procedure and practice to be followed in Kadhi's Court.<sup>1024</sup> Until such Rules are made, procedures and practice in Kadhis' Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Decree<sup>1025</sup>. To date no such Rules have been made and procedures and practice applied by most Kadhis are neither that of the Civil Procedures Decree nor of Islamic Courts. The bad thing with Kadhis is that majority of them are ignorant of procedures under the Civil Procedures Decree which are not only cumbersome to understand them but also too technical. This also hinders access to justice in Kadhi's Court.

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<sup>1024</sup> Kadhis Court Act, 1985, Section 9.

<sup>1025</sup> Ibid.

There is therefore an urgent need for the Chief Justice to exercise his discretionary powers provided under Section 9 of the Act, by laying down simple procedures to be followed by Kadhi's Courts. Alternatively, qualifications of Kadhis be improved to be holders of a Degree in Islamic Laws who are acquainted with procedural rules and advocates who are acquainted with Islamic law to appear before Kadhi's Courts.

Although in 2008, there were 13 practicing registered advocates in Zanzibar,<sup>1026</sup> there was only one advocate residing in Pemba<sup>1027</sup> This is because most of the advocates prefer to work in Zanzibar Town where most business is to be found. One advocate was quoted to say as follows:

It is difficult to take cases from Pemba because clients could not afford to pay fee, air transport and accommodation.<sup>1028</sup>

Access to justice is always accompanied by the provision of legal aid to those who are incapable of engaging advocates. Three legal institutions in Zanzibar, that is Zanzibar Law Society (ZLS), Zanzibar Female Lawyers (ZAFELA) and Zanzibar Legal Services Centre (ZLSC), have an objective of providing legal assistance to the poor.

#### Number of People who sought legal assistance in 2008

Institution	Land Disputes	Labour Disputes	Inheritance	Custody/maintenance of Children	Domestic violence	Divorce and matrimonial assets	Mob violence	Injury/Compensation disputes	Grievous Bodily Harm	SUB-TOTAL
ZAFELA	7	6	8	130	120	79	-	2	-	352
ZLSC	251	155	134	130	49	35	23	20	2	799
ZLS	-	-	-	-	-	-	-	-	-	-
<b>TOTAL</b>	<b>158</b>	<b>161</b>	<b>142</b>	<b>260</b>	<b>169</b>	<b>104</b>	<b>23</b>	<b>22</b>	<b>2</b>	<b>1151</b>

Apart from having offices in Zanzibar Town and Chake Chake in Pemba, the Zanzibar Legal Services Centre has been using its paralegals all over Zanzibar.<sup>1029</sup> The system of using Paralegals in Zanzibar was established by ZLSC in October 2007 whereby there are 53 paralegals in all constituencies of Zanzibar and four from Zanzibar Special Departments. The main idea of introducing paralegals in Zanzibar is to address justice –

<sup>1026</sup> Statement by Secretary of the Zanzibar Law Society at the ZLS annual meeting held at Mazson's Hotel in 2008. A great number of registered advocates are not practicing.

<sup>1027</sup> Mr. Ishaq Sharif is the only advocate residing in Pemba and is the Coordinator of ZLSC Pemba Office. This has resulted in him and the ZLSC office in Pemba having a really heavy load. . This also questions of whether the people in Pemba effectively exercise the right of access to justice.

<sup>1028</sup> A statement by a senior private advocate when interviewed by a researcher concerning the legal representation of people living in Pemba.

<sup>1029</sup> Paralegal is a person who is provided with the rudimentary knowledge of law and can provide 'first aid' to the society. He is a kind of a 'barefoot lawyer'

related problems at both individual and community levels. It is believed that if paralegals will be provided with reasonable legal training majority of Zanzibar residents will benefit from that scheme.

Legal education has been provided by paralegals on the aspect of Constitution, land laws, criminal law, human rights, Shehas and Police powers. The chart below shows the number of people trained by the paralegals in Pemba in 2008:

S/N	Constituency	Female	Male	Total
01	Wawi	270	210	480
02	Micheweni	320	400	720
03	Konde	200	350	550
04	Mtambwe	270	480	750
05	Chonga	103	255	358
06	Mkoani	492	393	885
07	Mgogoni	510	550	1060
08	Kiwani	152	224	376
09	Wete	405	422	827
10	Kojani	311	525	836
11	Chambani	217	206	423
12	Tumbe	252	327	579
13	Ziwani	217	402	619
14	Chake Chake	304	270	574
15	Mtambile	216	503	719
16	Gando	318	420	738
17	Ole	216	264	480
18	Mkanyageni	401	320	721
	<b>Total</b>	<b>5174</b>	<b>6521</b>	<b>11695</b>

Increase of land disputes in Zanzibar has forced the Revolutionary Government of Zanzibar to establish a Land Tribunal to deal with land disputes<sup>1030</sup>. The number of cases instituted in the Tribunal is reported to increase in 2008. There are complaints against Land Tribunal due to delays in cases because of shortage of manpower<sup>1031</sup>. It was reported that only 4210 cases had been resolved and more than 10,267 cases are pending<sup>1032</sup>. With the increase of land disputes, and especially the land grabbing that is reported all over Zanzibar, there is an urgent need for the Government to look again at the land laws with an aim of entrenching guarantees that Zanzibaris own their land. There is also a need to reconstitute the Land Tribunal and equip it with competent staff under the Judiciary. The present situation where the Chairman is an employee of the Judiciary

<sup>1030</sup> Land Tribunal under Section 3 of the Zanzibar Land Tribunal Act, 1994 (Act No. 7 of 1994).

<sup>1031</sup> In 2008 there was only one person who was both the Chairman and a member of the Tribunal and had to hear cases all over Unguja and Pemba.

<sup>1032</sup> Statement of the Land Tribunal official, 15/12/2008.

but paid for by the Ministry of Lands, Water and Energy makes to be accountable to no one.

## 2.8 Freedom of Opinion, Expression and Information

Freedom of speech as that of expression is recognized in international and regional human rights legal instruments. This right is enshrined in Article 19 of the International Covenant on Civil and Political Rights 1966, as well as Article 9 of the African Charter on Human and People's Rights. Freedom of speech today is seen as a multifaceted right that includes not only the right to express or disseminate information and ideas but also the right to seek, receive and impart information and ideas.

International, regional and national standards also recognize that freedom of speech as that of expression includes the use of any medium, be it oral, in written or print form, through the internet or through art forms. This means that the protection of freedom of speech as a right includes not only the content, but also the means of expression.<sup>1033</sup> This right is also guaranteed in the Zanzibar Constitution 1984.<sup>1034</sup>

In 2008, a group of people calling themselves elders of Pemba (*Wazee wa Pemba*) aired their views on the need of having a separate authority for Pemba Island. They were arrested and interrogated and some government officials started to suggest that they be prosecuted for treason.

Freedom of opinion has improved in 2008 compared to previous years. According to a report dated October 2008 presented before the Zanzibar Broadcasting Board, there are 8 Government Radio stations<sup>1035</sup>, 8 private owned radio stations<sup>1036</sup>, two Government Television stations<sup>1037</sup>, 3 Cable television station<sup>1038</sup>, and 2 satellite television stations<sup>1039</sup>. All these stations are registered and licensed. Other 8 radio stations and 5 Television Stations have been granted building permits.<sup>1040</sup>

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<sup>1033</sup> Andrew Puddephatt, *Freedom of Expression, the Essentials of Human Rights*, Hodder Arnold, 2005, p. 128.

<sup>1034</sup> Section 18(1) of the Zanzibar Constitution provides the right of every person to be free, to have an opinion on any matter; every person has the right to express his or her opinion; to seek, receive or impart information through any media without any interference.

<sup>1035</sup> Spice FM Station 90.5 MHz Pemba.; Spice FM Station 97.4 MHz Unguja; STZ 90.5 MHz Unguja; STZ (shortwave 1) 11.735 MHz Unguja; STZ (Shortwave 2) 6.015MHz Unguja; STZ (Medium wave 585) KHz Unguja ; STZ/BBC 93.5 MHz Pemba; STZ/BBC 94.1 MHz Unguja.

<sup>1036</sup> Adhana Broadcasting Station 104.9MHz Unguja; Bomba FM Radio 87.5 MHz Unguja; Chuchu FM 90.9 MHz Unguja; Coconut FM 100.9 MHz Unguja; Radio Maria (Booster) 103.5 MHz Unguja; Radio Maria (Booster) 103.5 MHz Pemba; Zenj FM Radio 96.8 MHz Unguja; Zenj FM Station 96.8 MHz Unguja.

<sup>1037</sup> Television Zanzibar Channel 21 UHF Unguja; Television Zanzibar Channel 9 VHF Pemba;

<sup>1038</sup> Furaha Cable Company Unguja; Pemba Cable TV Pemba; Zanzibar Cable Television Unguja.

<sup>1039</sup> GTV Zanzibar and Multi choice Tanzania Zanzibar.

<sup>1040</sup> Alnoor 92.6 MHz Unguja; Bhaa FM Radio 98.3 MHz Unguja; Doxa FM 103.8 MHz Unguja; Radio Uhuru 100.0 MHz Pemba, Coconut FM 91.1 MHz Pemba; STZ/China 99.7 MHz Unguja; Voice of Istiama 107.1 MHz Pemba; Zanzibar One FM 97.1 MHz Unguja; Island TV Channel 38 Unguja,

Although the existence of FM radios and other media in Zanzibar brings alive freedom and right to information, it is complained by various people that some of programmes are against the Zanzibar culture. Without censoring programs broadcasted by those stations there is a possibility of corrupting morals of the society. Among the functions of the Zanzibar Broadcasting Commission are to regulate and supervise broadcasting activities, and to protect policy, security, culture and tradition of Zanzibar in order to ensure that they are not destroyed.<sup>1041</sup>

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TVZ/China Channel 34 Unguja; Zanzibar One Television Channel 29 Unguja, Zanj Television Channel 8 Unguja; Multivision Television Network MMDS Unguja.

<sup>1041</sup> Section 7(1) (b)(f) of the Zanzibar Broadcasting Commission Act, 1997.

## Chapter Three

### Political Rights

#### 3.1 Introduction

Political rights entail the propensity to participate in the running of state affairs. They are the rights that protect people in the course of their participation in politics. Such rights include freedom of association and assembly, and the right to demonstrate and protest; the right to vote and to contest for a public office.<sup>1042</sup> Universally, political and civil rights are provided under the provision of the International Covenant on Civil and Political Rights, 1966. The rights to association and assembly and to participate in public affairs are also enshrined in Article 13 of the African Charter on Human and Peoples' Rights, 1981

#### 3.2 Freedom of Association and Assembly

Freedom of assembly and association is provided under Article 20 of the Zanzibar Constitution 1984. The Article provides that every person is entitled, subject to one's free choice, to freely and peaceably assemble, associate and cooperate with other person (s), and more specially to form or join associations or organizations of his/her choice, provided they are established in accordance with the laws of the land. These can be political parties, trade unions, professional organisations, religious bodies or sports and cultural organisations.

In Pemba, the right to freedom of association is hampered because of the centralization of the registration of non-governmental organisations in Zanzibar Town. There is a sub-office of the Registrar General in Pemba, but registration of societies is only conducted in Zanzibar Town. The sub-office in Pemba receives applications and transfers the same to Zanzibar Town for action. Moreover, the Registration of Societies Act of 1995 is outdated and there is an urgent need for a new one that will meet the standards of a modern democracy.

Part two the Labour Relations Act 2005 provides for fundamental rights of employees and employers. Section 4 of the Act provides for basic employee's rights such as the right to take part in the formation of trade unions or federation of trade unions, and the right to be a member of a trade union subject to its constitution. Other rights guaranteed under the Act are protection of basic employees' rights in respect of freedom of association<sup>1043</sup>,

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<sup>1042</sup> LHRC :Tanzania Human Right Report 2005, p. 29.

<sup>1043</sup> The Labour Relations Act, 2005 (Act No. 1 of 2005), Section 5.

basic employers' rights<sup>1044</sup>, protection of employers' and employees' basic rights<sup>1045</sup> and protection of trade unions against interference<sup>1046</sup>.

In 2008, the National Reconstruction Alliance (NRA)<sup>1047</sup> organised a demonstration to express their views that Zanzibar is a country. The demonstration did not get the blessing of the Police and was declared illegal. Generally, there is no equal treatment by the Police between the ruling party and the opposition parties on the issue of being permitted to hold demonstrations or public rallies. In most cases Police have been favouring the ruling party.

### **3.3 The Right to Take Part in Governance**

The issue of ethnicity and class are still a problem in African politics. It is believed that the effect of British colonial administration continues to spread negative impact in African societies. This problem is also experienced in the process of governance in Zanzibar. The right to participate in governance is very controversial in Zanzibar. It is commonly known in the whole world that Pemba is a stronghold of the opposition party Civic United Front (CUF) but under the system of 'a winner takes all', the ruling party monopolises power on its own. The opposition parties and their followers are sidelined when it comes to governance.

Currently issues of employment in government departments are under the control of District Commissioner's office. For one to be employed he/she must have a strong recommendation from his/her area's Sheha. The Shehas are known for their strong support to the ruling party.

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<sup>1044</sup> Op. cit. Section 6.

<sup>1045</sup> Op. cit Section 7.

<sup>1046</sup> Op. cit. Section 8.

<sup>1047</sup> One of the political parties in Tanzania.

## Chapter Four

### Economic and Social Rights

#### 4.1 Introduction

The economic, social and cultural rights are the products of the society. This means that life of the people depends on such rights. Consequently, most of such rights are guaranteed under international legal instruments such as the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic Social and Cultural Rights, 1966. They ought also to be provided under the Constitutions and other domestic laws.

#### 4.2 Labour Rights

Tanzania has signed and ratified the International Covenant on Economic, Social and Cultural Rights of 1966 which urges the state parties to it to provide opportunity for people to attain a high standard of living through *inter alia*, guaranteeing the right to work and payment of fair remuneration. Both Constitutions which are operational in the country partially address economic and social rights.<sup>1048</sup> Article 21(3) of the Zanzibar Constitution 1984 is to the effect that every Zanzibari has a right to work and is entitled to equal opportunities and rights on equal terms to hold any office or discharge any function under the state authority of Zanzibar. Sub-Article (4) of the very Article provides that every person without discrimination of any kind is entitled to a remuneration commensurate with his work and all persons working according to their ability shall be remunerated according to the measure and nature of the work done.

There are international labour standards, such as the ones proclaimed by the International Labour Organization (ILO), and the Zanzibar government has designed its laws, policy and action plan to adhere with such international labour standards. These include the Employment Act 2005, the Workman Compensation Act, the Occupational Safety and Health Act 2005, Social Security Fund Act 2005, Labour Relation Act 2005. Others are the Zanzibar Youth Employment Action Plan 2007, the Job Programme for Zanzibar 2007, the Zanzibar Children Protection and Survival Policy of 2001 and the Zanzibar Employment Policy of 2007

Part II of the Employment Act 2005 provides for fundamental rights and protection. Such rights include prohibition of forced labour, restriction of employment of children, prohibition of the worst forms of child labour, prohibition of discrimination, prohibition of sexual harassment in employment and freedom of association and collective bargaining.<sup>1049</sup>

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<sup>1048</sup> Article 22 of the Constitution of Tanzania 1977 and Article 21(3) in the Constitution of Zanzibar 1984.

<sup>1049</sup> Employment Act, 2005, Sections 5 to 12.

Part VII of the Act provides for employment standards and rights such as length of working hours and overtime work, all kind of leaves, accommodation, traveling expenses, medical treatment, obligation in case of death of employee and provision of uniform and protective gears<sup>1050</sup>. It also provides for offences and penalties for violation of such rights.<sup>1051</sup>

Although such rights have been clearly provided under the law, the Government, which is the main employer in the country, is blamed for violating such rights. For instance, employees of the Zanzibar Municipal Council do cleaning work without protective gear which may endanger their health. No legal action has been taken for violation of such right by the Labour Commissioner who is responsible for administration of the provisions of the Employment Act 2005.

### **4.3 Rights to property**

Article 17 of the Zanzibar Constitution 1984 provides for protection from deprivation of property. The Article provides that no person shall be deprived of his property interest or right in that property except and upon compliance with the following conditions:

- a) that the acquisition and occupancy of the property is of utmost importance for defence and security of the people, health requirement, town planning and any other development in the public interest;
- b) that the need to acquire the property in question is absolutely necessary to the extent that it legalizes its acquisition even if it is detrimental to its owner;
- c) that there exists a law in respect of which acquisition or occupation of the property provides for fair and adequate compensation.

Section 56 of the Land Tenure Act, 1992 provides for termination of right to own land in public interest. The Government may terminate any right of occupancy on grounds of national interest provided that the Government shall prove before the Lands Tribunal that clear and convincing reasons exist for the repossession of such right of occupancy; and pay market value compensation for the land and any unexhausted improvements thereon. Such compensation is to be paid before an order of termination is issued. The Act also provides for forfeiture of abandoned and idle land.

To ensure that personal property is respected from being deprived, the Minister under Section 46 is empowered to lease any public land which does not comprise a right of occupancy. This means that the Minister is restricted by law to lease any land owned by a person. The real situation seems to be different. In 2008, there have been reported claims of deprivation of landed property committed by the Revolutionary Government of

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<sup>1050</sup> Ibid. Sections 62 to 82.

<sup>1051</sup> Ibid. Section 83.

Zanzibar and its agencies<sup>1052</sup>. In all those cases procedures enumerated under the Land Tenure Act were not followed. This is contrary to principles of rule of law.

Research conducted under the auspices of the Zanzibar Legal Services Centre and the cases received by the Centre indicate prevalence of land disputes in the whole of Zanzibar. Most of the disputes are between the government on the one hand and the people on the other. The government is always on the side of investors wanting to acquire land which is legally owned and occupied by Zanzibaris. This is the main bone of contention.<sup>1053</sup> The research found some issues of land disputes between the residents and government. One was the case that happened in Matemwe Muyuni, North 'A' district in South Region.

Land disputes are not restricted to rural areas in Zanzibar only but are also prevalent in urban areas. For instance, the media has covered extensively the case of Masoud Suleiman Salim against Amina Amani Karume, the daughter of the Zanzibar President and a niece of the Minister of Land, Energy, Water and Environment. This dispute arose out of a land situated at Forodhani in Zanzibar Stone Town which is said to be inverted from its owner Masoud. According to the source in the office of the chairperson of the Land Tribunal, the case is about to finish and the judgement to be delivered, because all witnesses from both sides have already finished to provide evidences. This case has attracted a lot of interest because of obvious reasons.

#### **4.4 Right to Education and Health**

Rights to health and education are not included in Chapter III of the Zanzibar Constitution of 1984. Instead, such rights are put in Chapter II as fundamental objectives and directive principles and policies, which, under the Anglo-Saxon legal tradition, one cannot enforce in the courts of law. Article 10 of the Zanzibar Constitution 1984 provides that for the purpose of promoting unity and development of the people and social welfare in the country, it shall be the responsibility of the Revolutionary Government of Zanzibar to ensure that every person has access to adequate health care and equal opportunity to adequate education for all.

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<sup>1052</sup> The Government had been taking lands occupied by individual persons, surveying the same and distribute building plots without payment of compensation. Mr Kombo Simai Kombo was granted a two acre plots at Chukwani near the Zanzibar Airport. His land was surveyed by the land officials and plots were distributed to different persons including Mr Abdalla Rashid. The Director of Land Mr. Simba admitted that the land is of Mr Kombo and that he deserved to be compensated. He instituted a case before the Land Tribunal without success.

<sup>1053</sup> A good example of the types of disputes which began and continued in 2008 is that involving the son of the President of Zanzibar and the people of Matemwe, Muyuni, North 'A' District in South Region. In this case the Centre received complaints that a clan land which includes a cemetery was being taken over by the government. All the complaints of the people were ignored by both District and Regional authorities. The Limitation Decree Cap 12 Law of Zanzibar is very clear that it is contrary to the law to invade and take over a clan land which has been improved for over 12 years and people have been living without any dispute.

The Education Act, 1982<sup>1054</sup> provides that every Zanzibari has the right to education up to basic education.<sup>1055</sup> Section 19 of the Act provides for right to compulsory education. That is to say, every child between the ages of 7 and 13 years, must be enrolled for primary education. According to the Zanzibar Minister for Education and Vocational Training, a total of 31,412 students were enrolled for primary education in government's schools<sup>1056</sup>. Children of the age of 13 years and above, who did not have an opportunity to be enrolled for primary education or for any other reasons they dropped off from school are enrolled for alternative education. There are 20 Centres of alternative education with a total of 988 pupils. In 2008/9 more children were enrolled<sup>1057</sup>. As to vocational training in 2008/9 there existed 72 Centres with a total number of 1432 trainees.

The government has also established a Higher Education Fund to sponsor students at degree level. The budget of the Fund for 2007/8 was sh. 1, 145,000,000/= . The fund has sponsored 1001 students in different Universities within Tanzania and abroad<sup>1058</sup>.

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<sup>1054</sup> Act No. 6 of 1982 as amended by Act No. 4 of 1993.

<sup>1055</sup> According to Section 20(2) of Act No. 6 of 1982 basic education means basic primary and junior secondary education which every child of any citizen in Zanzibar is entitled to be provided.

<sup>1056</sup> Budget Speech of the Minister for Education and Vocational Training in the House of Representatives for 2008/9 budget, p25.

<sup>1057</sup> Ibid. p. 43.

<sup>1058</sup> Ibid. p. 30.

## Chapter Five

### Rights of Vulnerable Groups

#### 5.1 Introduction

Human rights instruments are intended to provide for protection of all people including vulnerable groups because they are vulnerable to the violation of their fundamental human rights. Vulnerable groups are particular groups, for various reasons, are weak and for various reasons they are unable to enforce their rights and consequently require special protection for the equal and effective enjoyment of their human rights. These groups include women and girls, children, refugees, internal displaced persons, stateless persons and national minorities, indigenous people, migrant workers, disabled, elderly persons and HIV positive persons and AIDS victims.

#### 5.2 Women and Girls

One of the most important instruments for the protection of women is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It reflects the scope of exclusion and restriction suffered by women solely on the basis of their gender. It sets out equal rights for women regardless of their marital status in all fields – political, economic, social, cultural and civil, and calls for national legislation banning discrimination. It allows for temporary measures such as affirmative action to accelerate the achievement of equality in practice between men and women ; to take action to modify social and cultural patterns that perpetuate discrimination;<sup>1059</sup> to provide equal rights for women in political and public life;<sup>1060</sup> to have equal access to education and equal choice of curricula,<sup>1061</sup> non-discrimination in employment and pay,<sup>1062</sup> and guarantees of job security in the event of marriage and maternity.<sup>1063</sup>

Zanzibar as a part of the United Republic of Tanzania is obliged to ensure that women are treated equally as men, that they should not be discriminated against in any way in daily life; this is because Tanzania is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1985<sup>1064</sup>. Article 11 of the Zanzibar Constitution 1984 provides for the equality of all human beings. It specifically states that all human beings are born free, and all are equal and that every person is entitled to recognition and respect for his/her dignity. The Constitution stipulates further,

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<sup>1059</sup> Article 5.

<sup>1060</sup> Article 7.

<sup>1061</sup> Article 10.

<sup>1062</sup> Article 11.

<sup>1063</sup> Article 11.

<sup>1064</sup> Not only that but also Tanzania has signed and ratified other international and regional instruments that include the International Covenant on Civil and Political Rights, 1966, and The Beijing Platform for Action.

under its Article 12, that all persons are equal before the law and are entitled without discrimination, to protection and equality before the law. There will be no law that is discriminatory either on its face or on its effect. The term *discrimination* is defined under Article 12(5) of the Constitution as “to privilege the needs, rights or other requirements of persons on the basis of their nationality, tribe, place of origin, political opinion, colour, gender, religion or station in life, such that other categories of people are regarded as weak or inferior and are subjected to restrictions or conditions to their detriment”. For the purpose of ensuring equality before the law, the Constitution provides for the several principles to be taken into account.

### 5.3 Sexual Abuse

Women and children in Zanzibar are protected from sexual violence. In Zanzibar legislation, there exist a number of opportunities to protect women and to facilitate sexual and reproductive rights. Among the laws enacted with the view to combating sexual violence in Zanzibar is the Penal Act 2004. Part XV of the Act provides for offences against morality. The most famous of the offences against morality are rape, indecent assault, defilement, abduction, grave sexual abuse, defilement of idiots and imbeciles, procuring for prostitution, detaining female person in brothel, prostitution, keeping brothel, living on earnings of prostitution, sexual harassment and adultery.

Knowing that sexual violence impairs physical and mental health of the victim, section 126(1) of the Penal Act 2004 provides protection to victims of rape cases. The court apart from sentencing the offender to imprisonment and fine shall order the offender to compensate the victims for the physical or psychological injuries suffered. However, the gap is observed in execution of order of compensation. None of the victims of rape had ever been compensated due to complexities to execute such order of compensation. However, there are some deficiencies in the Penal Act such as lack of minimum age for marriage and allowing intercourse with a child wife who has not attained puberty.

Section 11 of the Employment Act, 2005 prohibits all forms of sexual harassment in employment. Instances of sexual harassment in employment include a request to that employee for sexual intercourse, use of unreasonable language whether written or spoken of sexual nature; use of unreasonable visual material of a sexual nature; or showing physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that, either by its nature or through repetition, has a detrimental effect on that employee’s employment, job performance, or job satisfaction. However, there is no provision which provides for sanction.

The Criminal Procedure Act 2004 provides for the protection of the dignity of woman. It provides for mode of searching woman that whenever it is necessary for a woman to be searched, the search must be made by another woman with strict regard to decency.<sup>1065</sup>

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<sup>1065</sup> Criminal Procedures Act, 2004, Section 19.

## 5.4 Sexual Abuse of Children

In 2008, the number of cases of child abuse increased. According to the Ministry's annual report<sup>1066</sup>, more than 47 cases of child abuses were reported in the Ministry. The Centre's paralegals have reported 24 cases of sexual abuse of children from Unguja and 8 cases from Pemba<sup>1067</sup>. For instant a one year old girl was about to be raped by a man of 32 year old who was a tenant of their house at Kisima Majongoo within Zanzibar Town<sup>1068</sup>. In an interview with victim's mother, she said that the offence was committed since September 2008 and she reported to police soon after the action but until the day of interviewed no necessary step was taken by the police and the case was not filed in court for further action. The interviewee complained to receive threat messages from the relatives of suspect.

Another reported case of child sexual abuse was from Mwanakwerekwe Constituency<sup>1069</sup>, in which a 7 years old girl was raped by her neighbour. Unfortunately the case was not reported to the police for the reason of avoiding trouble and difficulties with the police<sup>1070</sup>. In Kizimkazi- Unguja a 3 years old girl was raped. According to the newspaper report<sup>1071</sup>, in an interview with Tanzania Media Women Association (TAMWA), the mother of victim stated that soon after she found about the incidents, she reported to the family where it was resolved that the culprit compensates the victim's mother with Sh.100,000/=, which is contrary to the law and best interest of the child.

## 5.5 Domestic Violence

Domestic violence is widely recognized as a worldwide problem that transcends cultural boundaries and more. It affects people across society, irrespective of economic status. It occurs when a family member, partner or ex-partner attempts to physically or psychologically dominate another. It often refers to violence between spouses, or spousal abuse but can also include cohabitants and non-married intimate partners. Domestic violence occurs in all cultures. People of all races, ethnicities, religions, sexes and classes can be perpetrators of domestic violence<sup>1072</sup>.

Domestic violence may take the form of physical violence<sup>1073</sup>, including direct physical violence ranging from unwanted physical contact to rape and murder. Indirect physical violence may include destruction of objects, striking or throwing objects at or near the

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<sup>1066</sup> Ministry of Labour, Youth, Women and Children Development (MLYWCD) Report, 2008.

<sup>1067</sup> Paralegal Annual report up to October, 2008.

<sup>1068</sup> Interview with Mrs. Maryam Moh'd who is the victim's mother, on 29<sup>th</sup> December, 2008 at ZLSC office.

<sup>1069</sup> Monthly Report of Mwanakwerekwe Constituency, August 2008.

<sup>1070</sup> The statement was said by the parents of the victim to paralegal when he was trying to convince them to report the case to police soon after they found that their neighbour used to rape their child.

<sup>1071</sup> *Zanzibar Leo*, Namba 2441, of Sunday, 27<sup>th</sup> September, 2008.

<sup>1072</sup> See Domestic violence in: <http://en.wikipedia.org/wiki/Domestic-violence>.

<sup>1073</sup> Physical violence is the intentional use of physical force with the potential for causing injury, harm, disability, or death, for example, hitting, shoving, biting, restraint, kicking, or use of a weapon.

victim, or harm to pets. In addition to physical violence, spousal abuse often includes mental or emotional abuse, including verbal threats of physical violence to the victim, the self, or others including children, ranging from explicit, detailed and impending to implicit and vague as to both content and time frame, and verbal violence, including threats, insults, put-downs, and attacks<sup>1074</sup>.

It may also take a form of emotional abuse (psychological abuse) which includes humiliating the victim, controlling what the victim can or cannot do, withholding information from the victim, deliberately doing something to make the victim feel diminished or embarrassed, isolating the victim from friends and family, and denying the victim access to money or other basic resources. Women undergoing emotional abuse often suffer from depression, which puts them at increased risk for suicide, eating disorders, and drug and alcohol abuse.

Economic abuse is another form of domestic violence. It occurs when the abuser has complete control over the victim's money and other economic resources. Usually, it involves putting the victim on a strict "allowance", withholding money at will and forcing the victim to beg for the money until the abuser gives some money. This also includes (but not limited to) preventing the victim from finishing education or obtaining employment, or intentionally squandering or misusing communal resources.

When domestic violence is applied to a pregnant woman it may also affect fetus resulting in pre-maturity or premature rupture of membranes. Other effects include interference in relationship, eating and sleeping disorders, emotional neediness, long term ill-health, problems at school and even suicidal ideation. Although emotional, psychological and financial abuses are not criminal behaviours, they are forms of abuse and can lead to criminal violence.

Like many other African countries, Zanzibar does not have a specific legislation dealing with domestic violence issues. They are however addressed in several legislations the basic of which being the Constitution of the United Republic of Tanzania 1977 and the Zanzibar Constitution 1984 which provide for individual rights and freedom and protect the same. For instance, Part XVI of the Penal Act 2004 provides for offences relating to marriage and domestic obligations. The Act prohibits fraudulent pretence of marriage.

Part XVII of the Act provides for offences against the person. These include murder, manslaughter and infanticide<sup>1075</sup>. Every head of the family is duty bound to provide the necessities of life to a child of below 14 years. Unlawful removal of human organs in the body of a person whether living or dead, without a consent of that person or a consent of the next of kin of the deceased person or of a child below the age of 14 years is an offence punishable with 20 years imprisonment<sup>1076</sup>.

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<sup>1074</sup> See Domestic violence in: <http://en.wikipedia.org/wiki/Domestic-violence>.

<sup>1075</sup> See Penal Act, 2004, Sections 195, 196 and 205.

<sup>1076</sup> Ibid. Section 239(1).

Part XXIV of the Act provides for offences of assaults which are common in domestic violence<sup>1077</sup>. Offences against liberty are enumerated from section 250 to 265 of the Act. They include offences of kidnapping from lawful guardian, kidnapping or abduction with intent to confine person, kidnapping in order to subject person to grievous harm, wrongful confinement and forced labour.<sup>1078</sup>

## **5.6 Children's Right**

Children have the right to grow to adulthood in health, peace and dignity. They are vulnerable and dependent on adults for their basic needs such as food, health care and education. The Convention on the Rights of A Child 1989 is meant to encompass and sets out civil, political, social, economic and cultural rights for every human being below the age of 18 years,<sup>1079</sup> principle of non-discrimination,<sup>1080</sup> the best interest of the child<sup>1081</sup> right to life, survive and development<sup>1082</sup> and respect for the views of the Child.<sup>1083</sup>

## **5.7 Child's Right to life**

In Zanzibar, there is no specific law dealing with rights of children. The law protects the child while is in the womb of its mother by criminalising abortion. It is a crime under the Penal Act 2004 to both the one who procures it and the one who administers it. Abortion threatens child survival and is a denial of right to life. In ensuring the survival of the child, Section 305 of the Criminal Procedure Act, 2004 restricts death sentence be imposed upon pregnant woman and children below 18 years of age.

## **5.8 Right to Education**

As to the right to education, nutrition, parental and social care, Article 10 of the Zanzibar Constitution 1984 provides for political objectives of the Revolutionary Government of Zanzibar which include provision of education. According to Zanzibar Constitution, the government has an obligation, within its economic capacity and development limits, to make adequate provision for securing right to work, to education and to public assistance in cases of old age, sickness and disablement, and in other cases of undeserved want.

However, the above obligations under Article 10 of the Constitution are unenforceable, since no one can go to court to enforce his/her right to education or other such rights in case of violation. If the government is serious enough in providing such right it should

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<sup>1077</sup> Ibid. Scctions 248 and 247.

<sup>1078</sup> See Sections 250 to 265 of the Act.

<sup>1079</sup> Article 1.

<sup>1080</sup> Article 2.

<sup>1081</sup> Article 3.

<sup>1082</sup> Article 6.

<sup>1083</sup> Article 12.

incorporate it within the Bill of Rights in Chapter III of the Constitution so that any Zanzibari can go to court to enforce it.

Section 20(1) of the Education Act 1982 provides for compulsory attendance of pupils at school, that a parent or guardian of every child compulsorily enrolled for primary education is under legal obligation to ensure that the child regularly attends school until he/she completes the basic education, or if he/she has not completed, he/she attained the age of 18 years. The word “basic education” is defined to mean basic primary and junior secondary education which every child in Zanzibar is entitled to.<sup>1084</sup>

Section 20(3) of the Act strictly prohibits such an enrolled student to marry before completion of basic primary and junior secondary education. Where this provision is violated such a pupil who has entered into a contract of marriage is expelled from school. This is totally a denial of child’s right to education provided under the CRC. Best interest of the child here is not taken into consideration.

Section 4 of the Spinster and Single Parent Children Protection Act 2005 provides for protection of right of education to a ‘child mother’<sup>1085</sup>. The Education Act 1982 under section 20(4) provided for the expelling of a female pupil found pregnant as well as the expelling from school the male pupil found responsible for the pregnancy. That provision is now repealed by section 16(1) of the Spinster and Single Parent Children Protection Act 2005. The section reads:

- 4(1) where a girl is found to be pregnant while still at school she may immediately be suspended from school.
- (2) A girl suspended under subsection (1) of this section may be reinstated to the school in the next academic year following her delivery or at any time deemed most appropriate by the education authority, but in any case suspension shall not exceed two academic years.

However, the same section allows the education authority to withhold permission to reinstate a spinster on account of her apparent unreformed behaviour.

## 5.9 Maintenance of Children

In Zanzibar, husbands and alleged fathers have been blamed for failure to fulfil their statutory obligations of providing maintenance to their children<sup>1086</sup>. According to Ms. Asha Abeid Masoud, who is Children’s Officer in the Social Welfare Department,<sup>1087</sup> in

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<sup>1084</sup> This is provided in Section 20(2).

<sup>1085</sup> Section 4 repealed Section 20 (4) of the Education Act, 1982 (Act No. 6 of 1982).

<sup>1086</sup> This was reported by one of the participant at a 2 days workshop of harmonizing children laws in Zanzibar, organized by African Child Policy Forum and UNICEF on 26<sup>th</sup> and 27<sup>th</sup> November, 2008 at Zanzibar Beach Resort.

<sup>1087</sup> As interviewed on 2<sup>nd</sup> December, 2008.

2008 the Ministry has received several claims concerning maintenance of children whereby majority of such claims were resolved, and about 17 children were admitted to the Government's orphanage house.<sup>1088</sup>

According to Spinster and Protection of Single Parent Act, 2005, any father or alleged father of the child is under obligation to provide maintenance to his child regardless of their legal status.<sup>1089</sup> The question here is since the male person responsible for pregnancy of the spinster is imprisoned to five years imprisonment, how an imprisoned father can afford to provide maintenance of that child. It is argued that by imprisoning the alleged father and requiring him to provide maintenance while in prison is an obstacle to the safeguarding the best interest of the child. In other words, imprisoning the alleged father is an indirect denial of the child's right to have maintenance.

The mother of the child born out of the wedlock may institute a suit of maintenance on behalf of the child in the District court and she is exempted from paying court fees. If the child is born within the Islamic marriage such a suit may be instituted before a Kadhi's Court. However, in Kadhi's court fee must be paid.

Although, the law aims to protect children's rights by forcing the alleged fathers to maintain their children, such an order is issued upon being proved that the alleged person is the one responsible for the pregnancy of the spinster. This may only be proved after birth of the child and conducting of the DNA test. Such test is costly and not available in Zanzibar. It is observed that failure of Government to have a specific budget for DNA test hampers the children to be provided with maintenance. Due to that failure the number of pregnancy cases of girls less than 18 years old has increased in 2008 and majority of such cases are pending at police stations for not completing the investigation.

## **5.10 Child Labour**

Various laws have been enacted to protect children from being subjected to torture. A good example is the Employment Act 2005 which protects children from the worst forms of child labour. According to section 6 of the Employment Act 2005 all child labour including the worst forms of child labour are prohibited. Under section 3 of the Act a child is defined to mean a person under the age of 17 years; but for the purpose of employment in hazardous sectors child means a person under the age of 18 years. The only type of work allowed to employ a child is domestic work to which a parent or guardian has to ensure that a child has sufficient time to attend to matters pertaining to education and sufficient time of rest. Any person who employs a child or procures a child for employment contrary to section 6 of the Act is guilty of an offence and is liable to a fine of not less than Sh. 500,000/= or imprisonment for a term of not less than six months.

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<sup>1088</sup> Annual Report of the Department of Social Welfare, 2008.

<sup>1089</sup> Section 8 of the Spinster and Single Parent Children Protection Act, 2005.

Section 7 of the Act provides for prohibition of the worst forms of child labour. Child labour includes:

- All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- The use, procuring or offering of child for illicit activities, in particular for production and trafficking of drugs as defined in the relevant international treaties;
- Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Violating the provision of section 7 above is an offence punishable by a fine not less than Tshs. 3,000,000/= or imprisonment of not less than one year or both penalties.

Employing a young person who attends or is required to attend compulsory education is also prohibited under Section 8 (1) of the Act. For a young person who does not or is not required to attend compulsory education is allowed but subject to following conditions:

- A young person so employed shall not be assigned to heavy duties, duties involving chemicals or any other duty which may be injurious to the health and safety of a young person;
- A young person requiring to be employed shall first undergo medical check up and that medical officer shall certify that he or she is fit to be employed in that particular work according to his or her age;
- The employer shall ensure that a young person so employed undergoes regular medical check-up until he or she attains the age of 21 years.

For the purpose of this Act a *young person* means a person, other than a child who is under the age of 21 years.

### **5.11 Rights of Persons with Disabilities**

Persons with disabilities are regularly excluded from participation in the society and denied their human rights. Discrimination against disabled can take many forms, ranging from limited educational opportunities to more subtle forms, such as segregation and isolation because of physical and social barriers. Generally, international human rights instruments protect the right of persons with disabilities through the principles of equality

and non-discrimination. Several international and regional human rights instruments contain specific provisions concerning persons with disabilities. For instance, Article 25 of the Universal Declaration of Human Rights 1948 expressly refers to disabled persons of their right to security. Article 23 of the Convention on the Rights of the Child, 1989 specifically discusses the rights of handicapped and disabled children. Sub-article 4 of Article 18 of the African Charter of Human and Peoples' Rights, 1981 stipulates that the disabled shall be entitled to special measures of protection. Also Article 13 of the African Charter on the Rights and Welfare of the Child, 1990 discusses the rights of handicapped children.

### **5.12 Persons with Disabilities (Rights and Privileges) Act No. 9 of 2006**

Among the efforts taken by the Revolutionary Government of Zanzibar to ensure that human rights are not violated and are enjoyed without discrimination is the enactment of the Persons with Disabilities (Rights and Privileges) Act 2006. Part II of the Act provides for rights and privileges of persons with disabilities. It imposes an obligation to every person to provide rights and privileges to such disabled person according to his means.<sup>1090</sup> Every person as well as Government has to take steps to the maximum of available resources with a view to achieve the full realization of rights of people with disabilities. What are provided under the Act are minimum legally obligatory standards for the realization of such rights and accessibility of such rights. The term accessibility under the Act is defined to mean enabling or allowing person or persons with disability or disabilities to have access in the most integrated setting possible, to the benefits of public in all spheres of society and in any aspect it includes access to education, information, communication and physical environment such as sign language, interpretation for people with hearing disabilities, tapes, Braille, computer based information and programmes and making physical environment such as houses, buildings, public transport and streets accessible for them<sup>1091</sup>.

The rights enumerated under the Act include non-discrimination on employment,<sup>1092</sup> right to employment,<sup>1093</sup> access to education,<sup>1094</sup> entitlement to medical care and accessibility and mobility<sup>1095</sup>. According to Section 12(2) of the said Act, public buildings and facilities for public use, roads and other social amenities should be accessible to persons with disabilities 12 months after the Act comes into effect. Since, the Act came into operation on 5<sup>th</sup> December, 2006, it was expected that all barriers would be eliminated by 6<sup>th</sup> December 2007. But to date, majority of public buildings are not accessible to persons with disabilities.

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<sup>1090</sup> The Persons with Disabilities (Rights and Privileges) Act, 2006 (Act No. 9 of 2006).

<sup>1091</sup> Ibid. Section 3.

<sup>1092</sup> Ibid. Section 6.

<sup>1093</sup> Ibid. Section 7.

<sup>1094</sup> Ibid. Sections 9 and 10.

<sup>1095</sup> Ibid. Section 12 - Persons with disabilities shall be entitled to a barrier-free and disability friendly environment to enable them to have access to public buildings and facilities for public use, roads, other social amenities, assistive devices and other equipment to promote their mobility.

It is an offence to deny a person with disability access to public premises, to which members of public are ordinarily admitted, or to deny the provision of any services or amenities to which ordinarily provides to members of public on ground of his disability, unless such denial is for the safety of such disabled person<sup>1096</sup>. Television stations registered in Zanzibar shall provide a sign language inset or subtitles in all newscasts, education programmes and programmes covering national events<sup>1097</sup>. However, 2008 has passed without implementation of such a provision.

Section 17 of the Act requires providers of public telephones services to install and maintain telephone devices or units for persons with hearing disability and tactile marks on telephone sets to enable persons with visual disability to communicate through the telephone system. This provision was also not implemented in 2008. Other rights are right to judicial equality and protection, entitlement for free of charge to the use of recreational or sports facilities owned by government during social, sports or recreational activities<sup>1098</sup>.

Part III of the Act provides for civic rights. These include appointment of persons with disabilities in the organs of state,<sup>1099</sup> and universal suffrage<sup>1100</sup>. Polling stations should be made accessible to persons with disabilities during election, and such persons should in addition be provided with necessary devices and assistive devices and services to facilitate the exercise of this right<sup>1101</sup>. At least this has been achieved and election rules provide for such accessibility.

### 5.13 Sexual Abuse to People with Disabilities

The tendency of abusing persons with disabilities has increased in 2008 compared with that of 2007<sup>1102</sup>. The table below shows reported cases of sexual abuse to persons with disabilities in 2008:

S/N	Name of the Victim	Age	Type of Disability	Place
1.	A	15 yrs.	Mentally	Chanjaani-Pemba
2.	B	16 yrs.	Mentally	Kwale- Pemba
3.	C	13 yrs.	Dumb	K/Panza - Pemba
4.	D	15yrs	Physically	Konde – Pemba
5.	E	25 yrs	Physically	Mbuzini -Pemba

<sup>1096</sup> Ibid. Section 14(1).

<sup>1097</sup> Ibid. Section 16.

<sup>1098</sup> Ibid. Section 20.

<sup>1099</sup> Ibid. Section 23.

<sup>1100</sup> Ibid. Section 24, that Persons with disabilities have the same right to participate in the political life in society as all other citizens; right to be assisted to vote in presidential, parliamentary and civic education and that the assistant to do so strictly in accordance with the instructions of the voter.

<sup>1101</sup> Ibid. Section 25.

<sup>1102</sup> 2008 report of Association of People with Disabilities.

6.	F	22 yrs	Mentally and Dumb	Micheweni- Pemba
7.	G	20 yrs.	Mentally	Kianga- Unguja
8.	H	19 yrs.	Mentally	Bumbwini -Unguja
9.	I	15 yrs.	Physically	Kisauni - Unguja

### 5.14 Rights of the Elderly

The rights stipulated for the elderly in international instruments stem from the principles of dignity and no-discrimination. Neither the Universal Declaration of Human Rights, 1948 nor its derivatives, the International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966, contain any explicit reference to older persons, but many provisions of these instruments are of direct relevance to ensuring equal opportunities and the full participation of the elderly. However, the Economic and Social Rights Committee expressly addresses the economic, social and cultural rights of older persons. These are:

- To pay particular attention to older women as they have often not engaged in a remunerated activity entitling them to an old age pension;
- To institute measures to prevent discrimination on grounds of age in employment and occupation;
- To take appropriate measures to establish general regimes of compulsory old age insurance, and
- to establish social services to support the whole family when there are elderly people at home and assist elderly persons living alone or elderly couples wishing to remain at home.

In implementing such rights, the Revolutionary Government has established the Zanzibar Social Security Fund (ZSSF) whose functions include paying benefits to members or their dependents due to attaining old age or in case of death<sup>1103</sup>. In respect to older people, specific place has been reserved for accommodating them.<sup>1104</sup>

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<sup>1103</sup> See Section 4 and 26 of the Zanzibar Social Security Fund Act, 2005 (Act No. 2 of 2005).

<sup>1104</sup> The accommodation is located at Sebleni Amani and certain allowance is paid to them though claimed to be insufficient.

## Chapter Six

### HIV/AIDS and Human Rights

#### 6.1 Introduction

HIV positive persons and AIDS victims are often subject to violations of many rights, such as work related rights and access to health care facilities, but also in relation to the enjoyment of civil rights, such as the right to privacy and freedom of movement. HIV/AIDS demonstrates the indivisibility of human rights since the realization of economic, social and cultural rights, as well as civil and political rights, is essential to an effective response to the epidemic. The key human rights principles essential for effective protection of people with HIV/AIDS are to be found in existing international instruments, such as the International Covenant on Economic, Social and Cultural Rights, 1966; International Covenant on Civil and Political Rights, 1966; and Convention on the Elimination of Discrimination Against Women, 1979; and Convention on the Rights of the Child, 1989. Furthermore, all regional instruments enshrine general state obligations, which are applicable to persons affected by HIV/AIDS. There are however, no binding international human rights standards dealing specifically with HIV/AIDS.

The HIV/AIDS is the world epidemic affecting everybody regardless nation, colour, age or gender. Among the major ongoing challenges that face the world is HIV/AIDS. Realizing that HIV/AIDS is a global phenomenon, various measures have been taken in various corners of the globe to fight against it. These measures are aimed at preventing, caring and treating. Efforts are needed to save the people from the scourge of AIDS and iron out stigma to all infected.

Success and failure of the national response against HIV/AIDS depend on clear policy and legal framework that support prevention and care efforts on the ground. The Zanzibar National Policy on HIV/AIDS was launched in 2007. This policy is the only comprehensive and promising instrument that provides for a framework for leadership and coordination of the national multi-sectoral response to the HIV/AIDS epidemic. In order to have effective fight against HIV/AIDS the policy must be made legally enforceable document, to make it highly persuasive in judicial decisions<sup>1105</sup>.

#### **6.2 Rights to Accessible Health Services**

Immediately after Revolution of Zanzibar of 1964, the Government declared that health services would be free of charge. The current health policy of Zanzibar requires for a citizen's contribution to health services. Since majority of people living with HIV are poor, they cannot afford to pay such a contribution. However, according to the Chairperson of ZAPHA+, accessibility of Anti-Retroviral Therapy (ARVs) is good in

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<sup>1105</sup> Hassan, A.A "HIV Related Laws in Zanzibar," A paper presented at Bwawani on 2008 in preparation of drafting HIV law, p. 1.

Zanzibar. However, stigmatization of HIV/AIDS victims is the main problem facing government's effort to combat HIV. It has been reported that discrimination and stigma surrounding HIV/AIDS in the Isles has increased<sup>1106</sup>. This is mainly due to lack of awareness and unavailability of specific law prohibiting stigmatization of people living with HIV/AIDS.

On 18<sup>th</sup> November, 2008, six members of ZAPHA+ were detained at Paje police in Southern Region of Unguja alleged to have committed an offence of doing acts likely to result breach of peace to the villagers. However, it was realized that the allegations were not true, and they were so treated because they are known to be people living with HIV/AIDS<sup>1107</sup>. Stigmatization is still practiced at homes, work places and at entertainment Centres and emphasis on awareness should be put in order to promote equality and human rights without discrimination of any kind.

### 6.3 Information Dissemination

Right to information is a constitutional right in Zanzibar. The dissemination of information about HIV/AIDS is still not satisfactory. Apart from the fact that many NGOs and CBOs provide for knowledge concerning HIV/AIDS, people living with HIV/AIDS continue to face critical stigmatization in the society. This will lead to increase of infection rate.

#### Distribution of HIV by Sectors in Unguja 2008

Sector	Tested	Positive	Percent
Businesspeople	799	45	5.6
Men in uniform	32	4	12.5
Farmers	765	64	8.4
Drivers	141	8	5.7
Fishermen	245	9	3.7
Hotel staff	146	15	10.3
Students	309	6	1.9
Teachers	207	3	1.4
Health workers	60	7	11.6

Sources from Zanzibar AIDS Commission

### 6.4 Zanzibar Laws and HIV/AIDS

In order to ensure enforceability of human rights conventions in our country, fundamental rights and freedom were entrenched in the Zanzibar Constitution, 1984. These rights and freedoms include equality of individuals, equality before the law, right to life, right to

<sup>1106</sup> *Jihadhari* Issue No. 8 of 2008.

<sup>1107</sup> Report by ZAPHA+ Chairman.

personal freedom, right to privacy and personal security, protection of freedom of movement, protection from deprivation of property, freedom of expression, right to freedom of religion, protection of freedom of assembly and association, freedom to participate in public affairs and right to work, and receive remuneration. However, there are some challenges in enforcing such guaranteed rights.

## **6.5 Limitations of Enjoying Such Rights**

As to the issue of HIV/AIDS, Zanzibar has no specific law enacted to respond to such issues. There is no specific law intended to control intentional spread of the AIDS epidemic. There were some general legal provisions dealing with infectious diseases under the Public Health Decree, 1934 which is now repealed by the Foods, Drugs and Cosmetic Act, 2006, without retaining provisions on prevention of infectious diseases. The objective of such repealed provisions was to prevent the spread of infectious diseases by defining the nature of the illnesses that require notification to medical authorities and by empowering authorities to quarantine areas and regulate the entry into and exit from such areas. The list of infectious diseases was provided but HIV/AIDS was not included. The Minister of Health was however given power to declare any other disease as an infectious disease under the Decree. Apart from that, there is no specific law for protection of people living with HIV/AIDS against stigmatization and discrimination.

Courts have been using general provisions in several pieces of legislation in dealing with issues of intentional spread of HIV/AIDS as well as protection of people living with HIV and victims of intentional or negligent spreading of HIV/AIDS.

Sexual conduct is stated to be the main way of transmission of HIV/AIDS infections. The Penal Act 2004, is in the front line in prohibiting illicit sexual conduct such as homosexual, rape, defilement of idiots and imbeciles, procuring for prostitution, detaining female in brothel, prostitution, keeping brothel, living on earnings of prostitution, sexual harassment and adultery (with a married woman). Generally, there is Part XV of the Act which specifically deals with offences against morality. A challenge observed in the definition of rape is that a husband can not commit rape to his wife unless they are lawfully separated. Thus, if a wife refuses to have sexual intercourse with her husband on ground that the husband is suspected to be affected with HIV/AIDS or that he is alleged to have sexual affairs with a person who is HIV positive, the husband may tie her with a rope and satisfying his desire and no crime is committed.

Further more, Section 10 of the Act seems to prohibit discrimination but in factit does not. It provides:

10. (1) No employer may discriminate, directly or indirectly against an employee, in any employment policy or practice on any ground including race, gender, colour, religion, social origin, national extraction, political opinion, marital status, pregnancy, disability, HIV/AIDS status real or perceived.

By using the term “may”, the inference is that discrimination (including that of people living with HIV/AIDS) is allowed and is discretion of the employer. Again under subsection (4) of section 10, it is not a discrimination to distinguish, exclude or prefer any person on the basis of the inherent requirement of a job. The worst of this provision is that it does not specify categories of job to which discrimination of people living with HIV/AIDS is allowed. This provision is a blank cheque to which employers are free to decide.

Section 10(5) of the Act puts a hot nail on the sore by giving employer discretionary option to require his employee or a person applying for employment to undertake an HIV test. The subsection reads:

(5) No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee’s or applicant’s HIV status.

To show that Section 10 of the employment Act has nothing to do with the protection of people living with HIV/AIDS, but is just a mockery of justice as well as violation of human rights, the law does not provide any sanction for discriminating such people. Worst enough is that none can enforce such a right before court on the basis of the Zanzibar Constitution because, as stated earlier, the interpretation of discrimination does not include HIV/AIDS status. This is a big gap in our laws, and must be addressed quickly.

## Chapter Seven

### SMZ Special Departments and Human Rights

#### 7.1 Introduction

Special Departments are established under Article 121 of the Zanzibar Constitution 1984. These departments are: Special Force for Prevention of Smuggling normally known as (*Kikosi Maalum cha Kuzuia Magendo - KMKM*)<sup>1108</sup>, Economic Development Force (*Jeshi la Kujenga Uchumi - JKU*)<sup>1109</sup>, Educational Centre for Offenders (Chuo cha Mafunzo)<sup>1110</sup>, which really is a Prison Department; Fire Brigade (*Zima Moto*),<sup>1111</sup> and the Volunteers (*Kikosi cha Valantia Zanzibar - KVZ*)<sup>1112</sup>.

In order to ensure better working conditions, the law regulating general activities of the Special Departments of Government was enacted<sup>1113</sup>. Functions of these departments are provided by respective laws and are generally to maintain peace and security and in so doing, they are required to work together with Police or Defence Forces. Unlike 2007, there are no reported cases concerning violation of human rights by these special departments.<sup>1114</sup> The only occasions reported concerned disciplinary action within the departments of KVZ and Fire Brigade.<sup>1115</sup>

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<sup>1108</sup> Regulated under Kikosi Maalum Cha Kuzuia Magendo Act, 2005 (Act No. 1 of 2003).

<sup>1109</sup> Regulated under Act No. 6 of 2003.

<sup>1110</sup> Act No. 1 of 1980 as Amended in 2007.

<sup>1111</sup> Act No. 7 of 1999.

<sup>1112</sup> Act No. 5 of 2004.

<sup>1113</sup> Special Department Service Commission Act, 2007 (Act No. 6 of 2007).

<sup>1114</sup> However, it is important to note that these departments are extremely active during elections in Zanzibar and the last time they were in action was in 2005.

<sup>1115</sup> One officer from KVZ, whose name was not disclosed for security reasons, on 18/11/08 was suspended from his work for the allegation of driving in high-speed car No KVZ 192 without good cause. After a follow up that allegation was found not to be true. Likewise, one worker from Fire Brigade whose name was not disclosed again because of security reasons was suspended for alleged stealing of flight fuel. This allegation was, however, not proved and the officer is still under suspension. Another occasion which is marked as violation of human rights through these special Departments is that from KVZ department where one officer who was returning from work operation got injured. He was not given a medical care, or compensation. When he made a follow up for compensation because he was injured in the course of his employment as the law requires he was neglected and nothing has been done till now. Other incident was reported to the Centre by one fire brigade officer whose name we cannot disclose that it is regular now to see the deductions of the staff's salaries contrary to law and without notice nor reasonability. Even if these departments are have their own rules and regulations, the general principles of human and workers rights must be observed.

## **7.2 People's Perceptions on the Forces**

These departments are perceived by the population to be very much politically partisan. The way people are recruited into these forces also raises a lot of question marks. It is therefore very important that they discard that notion and be seen that they are neutral. One does not know the kind of curricular they undergo during training but they need to be taught on the country's constitutional order, the legal system, the laws that establish the special departments and their role in society. They need also to understand the international human rights instruments and various international standards. In fact, like in the Tanzania Police Force, human rights training must be a component of their general training in the forces.

## Chapter Eight

### Collective Rights

#### 8.1 Introduction

All rights enjoyed by all the peoples in any community irrespective of their age, sex or status are termed as “collective rights”. These include the right to development, clean environment, peace, preservation of culture and language. These rights are found in various international legal instruments and in particular the African Charter on Human and Peoples’ Rights, 1981 as well as in Zanzibar Constitution 1984. Article 21 (2) of the said constitution stipulates as follows:

Every Zanzibari has the right and freedom to participate fully in the process leading to the decision on matters affecting him, his well being or the nation.

#### 8.2 Right to Development

Collective rights have been very clearly enshrined in Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which reads.

All people have right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.<sup>1116</sup>

Thus, the right to development is one among the very important rights of a human being. Organisations like the United Nations Development Program (UNDP) have been created to help provide policy, advice and help to states and peoples to build capacities in exercising this right.

In the year 2008, no fundamental changes have been observed in social and economic development in Zanzibar. Economy is still characterized by extreme poverty due to a number of reasons. These include lack of technological know-how and high costs of living. The introduction of user charges, cost sharing and contribution in water, education and health services has had a tremendous negative impact on the lives of the ordinary people. Electricity service which is very important for economic development which is sometimes dubbed as an engine for development of any nation is very bad in Pemba.

Freedom in economic activities is enjoyed to some extent but in reality this is much more enjoyed by foreign investors than local ones. Loans from Banks are mostly enjoyed by foreign investors and other registered companies because they are capable of adhering with terms and conditions of the loans. Small businessmen, farmers and fishermen are not

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<sup>1116</sup> International Covenant on Economic, Social and Cultural Rights, 1966.

eligible for loans since they engage in informal sector. In supporting small businesses owned by local people several funds have been introduced by the Government.

There are people who are of the view that a question of economic development by the people of Zanzibar is a myth on ground that the price of cloves is not determined by clove growers but by the Government. Also the Government is the sole buyer of cloves in Zanzibar. The Cloves Act 1985 is mentioned as evidence of such allegations<sup>1117</sup>. One clove farmer when interviewed said:

We clove farmers are cultivating cloves for the benefit of our families and the nation. We are thus always looking for good markets of our cloves but once we have found a very lucrative market we are arrested and then charged for clove smuggling. This piece of legislation is a setback to us and the entire industry.<sup>1118</sup>

In 2008 alone more than five hundred bags of cloves which are estimated to fetch Millions of shillings were intercepted by members of Anti-Smuggling Unit (KMKM) who confiscated the proceeds and the vessels.

Generally, there have been complaints by clove farmers and Non Governmental Organisation (NGOs) against this. They complain that the legislation is unconstitutional as it violates Article 12(1) and (2) of the Zanzibar Constitution by discriminating clove farmers and other farmers. One clove grower from Chake Chake had this to say:

... this piece of legislation is against our constitution as it discriminates cloves farmers from other farmers. Why all these obstacles to clove farmers only while other farmers enjoy their rights without any interference from the government.<sup>1119</sup>

On the other hand the Government is of the view that the restriction is for the benefit of the clove pickers, clove growers and the nation. It is the Government which pays compensation to clove pickers who suffer damage for falling from the clove trees, and the restriction is aimed to safeguard the market price for the farmers.

### **8.3 Right to a Clean Environment**

Right to a clean environment is provided under the international and regional treaties as well as under the Zanzibar Constitution 1984. Article 13 of the Zanzibar Constitution

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<sup>1117</sup> According to Cloves Act, 1985 (Act No. 11 of 1985), the Zanzibar State Trading Corporation (ZSTC) is a sole dealer of cloves in Zanzibar. Keeping stock of cloves in the house after the clove season is over is an offence with severe punishment of 10 years imprisonment together with planting one hundred clove trees. Vessels used for committing such offences are confiscated.

<sup>1118</sup> Interview with a clove farmer at Wete on 13<sup>th</sup> December, 2008.

<sup>1119</sup> Interview with a Clove farmer at Chake on 18<sup>th</sup> December, 2008.

1984 provides for a right to life which includes a right to the preservation of one's life. Clean environment is one of the necessary components of good health.

In Zanzibar, this right is not well known among the citizens as well as in the government sectors. A lot of projects established lack environmental guidelines hence creating a lot of environmental hazards. The question of environmental destruction such as deforestation made by Jeshi la Kujenga Uchumi (JKU), *Kikosi cha Valantia Zanzibar* (KVZ) and Vyuo vya Mafunzo, and pollution in Wawi by Clove Stem Oil Industry which discharges oil waste in Washa. The environmental destruction is so serious in Pemba which formally was known as Green Island.

Several measures have been taken by the government to prevent environmental destruction. These include implementation of the Environmental Management for Sustainable Development Act, 1996,<sup>1120</sup> the Forest Resources Management and Conservation Act, 1996<sup>1121</sup> and making regulations for restricting use of plastic bags in Zanzibar. However, trees have been cut contrary to law and those who are arrested and convicted are sentenced to a fine of not less than 100,000/= or imprisonment of not exceeding 3 years. Surprisingly, law enforcing agencies, such as the KMKM (the Zanzibar anti smuggling unit), KVZ (the Zanzibar Volunteers unit), JKU (the Zanzibar Economic Building Brigade) and the Educational Centres are in fact number one perpetrators of deforestation and no action is taken against them. This is contrary to principle of equality before the law.

An interview with one resident of Mtambwe where most of these units go to cut down trees revealed that these units have got chain saws and they usually cut down trees for timber, firewood and charcoal. Without implementing these environmental laws against these Special Departments the fear is that the Island would soon be turned into a desert.

Collection of solid and liquid waste materials is a serious problem due to lack of equipments and technological know-how. All liquid wastes from cesspits are dumped into the sea. Despite the rise in population in town areas, there are no treatment plants to treat these liquid wastes from causing environmental hazards before being dumped into the sea. Solid wastes are deposited in dumps which are close to residential areas.

This problem is also very serious in the so called tourist reserved areas. Most of these areas are allocated to investors without taking into account environmental hazards. A number of hazards are starting to emerge from solid wastes produced by the hotels and other investments in those areas. There has been an increase in population in those areas attracted by the tourism boom. Areas like Nungwi and Kiwengwa are very much affected with population growth caused by tourism boom with high population production of wastes also increasing and at the same time vegetation is cleared to give room for construction of residential houses.

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<sup>1120</sup> Act No. 2 of 1996.

<sup>1121</sup> Act No. 10 of 1996.

## 8.4 Rights to Basic Needs

Basic needs include a balanced diet, clothing, shelter and medical care<sup>1122</sup>. Despite all the efforts taken by both governments, Zanzibar government and the Union Government, to eradicate poverty in Tanzania, the level of poverty is still on the rise especially in Zanzibar. More than 75% of Zanzibaris live far below the poverty margin. Lack of adequate income has resulted in most families failing to afford three meals a day. For instance, a minimum salary in the government sectors is sh. 60,000/= which is not enough even to cover meal allowances of the employee himself<sup>1123</sup>. A part from that he is supposed to pay for costs of water, school and medical fee in terms of user charges, cost sharing, as well as house rent and electricity.

In the business community things were also not smooth. Most interviewed businessmen complained of duplicity of taxes imposed by several institutions of government such as the Zanzibar Revenue Board (ZRB), The Tanzania Revenue Authority (TRA), Municipalities, District councils, Commission of Tourism, Zanzibar Investment Promotion Authority (ZIPA), the Port Authority, and even Shehas charge fee for any public service they provide as part of business transaction transacted within his shehia.<sup>1124</sup>

## 8.5 Right to Peace and Security

In 2008, there has not been an act of violence that has in one way or another jeopardized peace and security in the Isles. Despite this tranquillity, things are not so smooth as they appear to be .It looks like a gathering storm as indicators are showing that there are occurrences of some events which are very rare to happen in Zanzibar. Acts like armed robbery or killing of one another are becoming normal things nowadays and the main reason that makes these things happening is poverty.

The Government must maintain an environment of peace by ensuring that poverty is really eradicated and that this must be seriously taken care of at all levels .There should be no place for brands of vocabularies to impress donors. People must assured of the basic needs and their basic human rights must be guaranteed. There must also be tolerance and respect to all ideas even if it is bitter one. If this is practiced then peace and security will flourish.

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<sup>1122</sup> See Tanzania Human Rights Report 2007, p. 191.

<sup>1123</sup> A price of a kilogram of rice is 1500/=, sugar 1000/=, a small bundle of fire wood 1000/=, kerosene 950/= per litre, fish 1000/= and others 1000/= . This makes a sum of about 5000/= per day. Per day he is being paid 2000/= . While his basic needs is 150,000/= . This amount is for a single person with no family.

<sup>1124</sup> Interview with a Businessman in Pemba.

## Chapter Nine

### Domestic Initiative in Human Rights Protection

#### 9.1 Introduction

The United Republic of Tanzania has signed and ratified a number of international human rights instruments. Zanzibar, as a part of United Republic of Tanzania, has the obligation to take domestic initiatives to make sure that human rights are protected and promoted within its geographical jurisdiction and that the rule of law prevails throughout its borders. Failure to undertake those measures is a breach of international Obligation on the protection of Human rights.<sup>1125</sup>

#### 9.2 Tanzania Commission for Human Rights and Good Governance

The Tanzania Commission for Human Rights and Good Governance (CHRAGG) was established under Article 129(1) of The Constitution of United Republic of Tanzania 1977, as amended by Act No. 3 of 2000. It is an independent Government department established as a national focal point institution for the promotion and protection of human rights and duties as well as good governance. It became operational on the 1<sup>st</sup> July 2001 after coming into force of the CHRAGG's Act No. 7 of 2001 as amended by Act 16 of 2001. The first members of the Commission were appointed in March 2002.

Section 3 the CHRAGG Act stipulates that it shall apply to both Zanzibar and Tanzania Mainland. However, due to legal technicality of the said Act,<sup>1126</sup> CHRAGG delayed to operate in Zanzibar until 30<sup>th</sup> April 2007 after Minister responsible for human rights declared the Legal Notice No. 31 of 2007, that the 30<sup>th</sup> April, 2007 would be the commencement date of the Commission to extend its business to Zanzibar.<sup>1127</sup>

The Commission has legal and constitutional mandate to protect and promote human rights and principles of good governance. It has power to investigate any human rights violation or abuse of power on its own initiatives or by receiving complaints from aggrieved persons and conduct investigation. It has a role to inspect prisons and similar places of detention; review law and follow up government obligations in relation to human rights international conventions and provide recommendations.

In the year 2008, the Commission's office in Zanzibar received 64 complaints, 46 of which were on human rights violation and to date they are still pending, and 18 complaints on good governance. Also in 2008, the Commission in collaboration with

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<sup>1125</sup> Tanzania Human Report 2006, p. 120.

<sup>1126</sup> The main contention over the years has been whether human rights are 'Union' under the Articles of the Union of 1964 and the various amendments to the Constitution of the United Republic of Tanzania which are themselves disputed.

<sup>1127</sup> See Commission for Human Rights and Good Governance (Extension ) Act, 2003 (Act No. 12 of 2003).

UNICEF conducted public inquiries on child abuse in 6 district of Zanzibar. The final report of the inquiries will be launched in 2009. In the year 2007/2008, the Commission visited 9 Educational Centres (prisons) and 26 police stations with a view to assessing and inspecting the conditions therein. Its report was launched in October 2008 and some recommendations were made<sup>1128</sup>.

### **9.3 Law Review Commission**

The Zanzibar Law Review Commission (LRC) was established by Act No. 16 of 1986. The functions of Law Review Commission as enumerated under section 4 of the Act are:

- To review any law or branch of the law and propose measures necessary for bringing law into accord with current circumstances of Zanzibar, eliminating anomalies or other defects in the law, repealing obsolete or unnecessary laws and reducing the number of separate enactment, and the proper modification and simplification of that law or branch of law.
- To consider and advise on proposal for the adoption of new or more effective methods for the administration of the law and the dispensation of justice;
- From time to time, to prepare and submit to the government programs for the examination of different branches of law with a view to reforming those laws including recommendation as to the agency whether the Commission or another body by which any such examination should be carried out;
- At the request of the government, to prepare comprehensive programmes for the consolidation and revision of laws, and undertake the preparation of any draft Bill pursuant to any such programme approved by the government.
- At the instance of the government, provide advice and assistance to any Ministry or department or any public authority or institution by undertaking the examination of any particular branch of the law and making recommendation for reform to bring it into accord with current circumstances.

The Commission is composed of a Chairman and not less than four, no more than seven other commissioners to be appointed by the President of Zanzibar. Their qualifications includes being a high judicial officer in Zanzibar or being qualified for such, being enrolled as an advocate in Zanzibar for not less than five years, holder of LL.B with five years experience, tutor of law in any University, etc.

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<sup>1128</sup> These recommendations include provision of entertainment, information through media such as newspapers, TV and Radio, improvement of food and uniforms in Education Centres. With respect to Police stations it observed that some Police stations do not have lockups for females and kids, lack of ventilation in lockups, lack of benches for sitting remands, and lack of clean water for drinking.

In the year 2008, the Commission had been dormant and no function of the Commission has been performed due to the absence of Commissioners.<sup>1129</sup> According to the budget Speech of the Minister under whose docket the Commission falls, functions of the Commission are expected to improve in 2008/2009 after appointing Commissioners and recruiting manpower and working equipments.<sup>1130</sup> The above statement infers that functions of the Commission are hindered by the lack of sufficient staff, lack of appointed Commissioners and working tools.

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<sup>1129</sup> Until December, 2008, there were only Chairman and three staff who are fresh graduates from Zanzibar University and University of Khartoum in Sudan.

<sup>1130</sup> Budget Speech of the Minister for Constitution and Good Governance 2007/2008.

## Chapter Ten

### Corruption and Abuse of Power

#### 10.1 Introduction

Corruption and abuse of power are two things which go hand in hand. Corruption refers to dishonest or illegal behaviour especially on the part of the people in authority. It also refers to acting with an intent to give someone an advantage inconsistent with official duty and the rights of others; a fiduciary or official use of a situation or office to procure some benefit either personally or for someone else, contrary to the rights of others. Corruption is a serious hindrance to the development of any country as it undermines good governance and democracy, and when it implicates an agent of state, it compromises the rule of law. There are several economic impact of corruption such as slowing down development, increasing the cost of private business and diversion of public investments.

As reported in Zanzibar Human Rights Report 2007, although corruption may be seen in different sectors in Zanzibar, it is rarely reported due to absence of legislation for combating corrupt practices. Until the end of 2008, the draft Bill of an Anti-Corruption law and Anti-Corruption Authority have not been returned to the Committee of Principal Secretaries by the Revolutionary Council (Cabinet).

In 2008, there were a number of incidents done by senior Government officials which in a way suggested that there were corrupt practices, but due to the lack of legislation no action has been taken against any of the officials concerned. The best example of this is the disposal of Government properties contrary to Procurement Act. Those who are in power have been abusing their position for personal interest. There are a number of complaints concerning deprivation of land not for public interest but personal interest.

#### 10.2 Corruption in Public Services

Corruption in Zanzibar is very common practice. It has been revealed that no case on corruption has been filed in any court in Zanzibar in 2008. Likewise, no disciplinary action has been taken against any government official for corrupt practices though there are a number of complain about corruption in granting government land lease as well as in the administration of justice. One interviewee was quoted as saying that there is a need for Government officials and those in the administration of justice in Zanzibar to declare their wealth in a very specific way, from the first day of holding office and the end of their tenure of office.<sup>1131</sup>

Generally, it is stated that in 2008, the question of corruption in Zanzibar has been worst and that no efforts taken by the Zanzibar government to combat corruption.

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<sup>1131</sup> Interview made at Wete on 8<sup>th</sup> December, 2008.

The question of abuse of power also exist and at an overwhelming rate. In May 2008, licenses of six businessmen from Kiungoni area in Pemba were cancelled by the Wete District Council's Secretary following allegations that they were discriminating C.C.M members from selling goods to them. These people were charged with criminal offence and some of them were required to pay fine. The worst thing is that the Council which is governed by Councillors from various wards acted contrary to the law. Under the District and Town Council Act No. 4 of 1995 the District Council Clerk has no mandate to revoke any licence.<sup>1132</sup> There are also instances where a Regional Commissioner had confiscated proceeds from sell of cloves which were apprehended by member of Zanzibar Anti Smuggling Unit (KMKM).<sup>1133</sup>

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<sup>1132</sup> Report from Paralegal Kojani constituency.

<sup>1133</sup> See the Kikosi cha Kuzuia Magendo Act, 2003 (Act No. 1 of 2003) requires that after KMKM has arrested any smuggled goods they have to surrender the same to police for investigation. That is not done, instead Regional Commissioners, particularly those from Pemba order the goods to be sold.