THE UNITED REPUBLIC OF TANZANIA

THE LAW REFORM COMMISSION OF TANZANIA

FINAL REPORT ON DESIGNATED LEGISLATION IN THE NYALALI COMMISSION REPORT

PRESENTED
TO THE MINISTER FOR JUSTICE
AND CONSTITUTIONAL AFFAIRS,
MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS,
DAR ES SALAAM, TANZANIA

APRIL, 1994
DAR ES SALAAM

The Law Reform Commission of Tanzania was established under section 3 of the Law Reform Commission of Tanzania Act, 1980 to take and keep under review all the Laws of the United Republic with a view to its systematic development and reform.

THE COMMISSIONERS ARE:

*Hon. Mr. Justice Raymond Jumbe Ambikile Mwaikasu - Chairman

Mr. Damian Saleka Meela	-	Full time Commissioner
Ms. Julie Catherine Manning	-	Full Time Commissioner
Hon. Mr. Pius Msekwa (MP)	-	Part Time Commissioner, Speaker, National Assembly of Tanzania
Mr. Mohamed Ismail	-	Party Time Commissioner, Advocate of the High Court and Court of Appeal of Tanzania
Mr. Harold Reginald Nsekela	-	Part Time Commissioner, Chief Corporation Counsel, Tanzania Legal Corporation
Mr. Stella Longway	-	Part Time Commissioner, Principal Resident Magistrate, The Judiciary

Mr. Stephen E. N. Ihema is the Secretary of the Commission.

RESEARCHERS:

Mr. Albert A. Msangi	-	Principal Law Research Officer
Ms. Fauster Mkakili Ngowi	-	Law Research Officer
Ms. Mary Anita Ngowi	-	Law Research Officer
Ms. Farida Idrisa	-	Lawyer/Researcher TAWLA

The Commission Offices are located along Sokoine Drive/Ohio Street N.I. C. Building, Life House, and Wing c, P. O. Box 3580, Dar es Salaam, Tanzania, Telephone Number 051-32598.

*Mr. Justice Mwaikasu finished his five years term of office with the Commission on 15th April, 1996.

THE UNITED REPUBLIC OF TANZANIA

THE LAW REFORM COMMISSION OF TANZANIA

Telegrams: **"TUMESHERIA**
Telephone: 32598

P. O. Box 3580
DAR ES SALAAM

In reply please quote:

1st October, 1996

Ref. No. LRCC/LD.40/1/38

Hon. Harith Bakari Mwapachu (MP),
Minister for Justice and Constitutional Affairs,
Ministry of Justice and Constitutional Affairs,
P. O. Box 9050,
DAR ES SALAAM.

REPORT ON THE DESIGNATED LEGISLATIONS IN THE NYALALI COMMISSION REPORT

On February, 27th 1991 the then President of the United Republic of Tanzania, His Excellency AL HAJ ALI HASSAN MWINYI appointed a Presidential Commission on Mono Party or Multi Party System. The Commission, composed of eminent and distinguished personalities in the United Republic of Tanzania, was headed by His Lordship Francis Lucas Nyalali the Chief Justice of the United Republic of Tanzania. It submitted its Report on 17th February, 1992.

After recommending changes in both Constitutions, the Commission set upon itself to "recommend changes which are required in the laws of the two Governments" because of the fact that "those laws either remove from the people' their freedom and basis rights or at times impinge on the freedom of the people's rights". A set of forty (40) laws were further identified to be of "oppressive nature" and were considered unconstitutional and in some cases outdated.

The Commission recommended that either the Attorney General's Chambers or the law Reform Commission of Tanzania should examine those legislations with a view to recommending repeal or amendment as appropriate.

It is from the above premise that the Law Reform Commission of Tanzania undertook the STUDY, the subject of this Report sometime in 1993. In November 1993 the Commission submitted its initial recommendations to the Government on the designated legislations.

The Commission has now accomplished the task assigned to it. The Research on he project has been arduous, time consuming due its importance, complexity and controversy. The Commission made extensive Consultations by way of a Workshop in Dar es Salaam and public meetings throughout the Mainland Tanzania.

In accordance with section 14(1) of the Law Reform Commission of Tanzania Act, 1980, we have the honour to submit the final Report on the Designated Legislations in the Nyalali Commission Report.

Damian Saleka Meela
FULL TIME COMMISSIONER

Julie Catherine Manning
FULL TIME COMMISSIONER

Mohamed IsmailHon. Pius Msekwa
PART TIME COMMISSIONER

PART TIME COMMISSIONER

Ms. Stella Longway
PART TIME COMMISSIONER

Harold R. Nsekela
PART TIME COMMISSIONER

ACKNOWLEDGEMENTS:

In the course of writing this Report the Commission has received contributions from various people within and outside the Commission i.e. Parliamentarians, Researchers, scholars and Academicians, alike. The commission is particularly indebted to the Government of the Royal Kingdom of Denmark through the Royal Danish Embassy for substantially funding the Project, thereby facilitating the early completion of the project.

The Commission would also like to record its appreciation to the Leaders at all levels as well as the Members of the Public in all the Regions in Tanzania Mainland for their valuable comments and views which have immensely enriched the Report.

The Commission would like to put on record that this Report would not have been produced save for the dedicated members of the Commission Staff, the staff of the Bunge Library in Dodoma and those who contributed unnoticeably.

In the final analysis however, the Commission bears full collective responsibility for both the form and contents of the Report.

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION

1.0 "QUOTATIONS ON DEMOCRACY AND HUMAN RIGHTS"

1.1 "To command the support of the people it is essential that the processes of government and decision – making should be as open as possible. This is a vital characteristic of any democracy. If people do not know what is going on they are not able to bring their influence to bear before final decisions are taken. The greater the secrecy, the greater the sense of exclusion from the decision making process and the greater the difficult of gaining public acceptance for decisions arrived at – and very probably, too, the worse the decisions. No doubt it will always be necessary to impose limitations on the principle that in a democracy those limitations must clearly be kept on an absolute minimum."

Royal Commission on the Constitution Vol..1) Memorandum of Dissent by Lord Crowther – Huntand Prof. A. T. Peacock cmnd 5460 –1/1973 Para 136).

1.2 "The essence of a democratic government lies in the ability of people to make choices about who shall govern, or about which policies they support or reject. Such choices cannot be properly made unless adequate information is available. It cannot be accepted that it is the government itself which should determine what level of information is to be regarded as adequate."
(The Australian Senate Standing Committee on Constitutional and Legal Affairs (concluded in 1979) (Freedom of information paras 3.7))

1.3 "What the Statute itself enacts cannot be unlawful, because what the Statute says and provides is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, he highest law in this country, is illegal".
(In Cheney V Conn (1968) 1 ALL ER 779. Thomas J. said)

1.4 "Authority invested with discretionary powers by an Act of parliament can only exercise such powers within the limits of the particular statute. So long as they do not transgress their statutory powers, their decisions are entirely a matter for them.. subject, however, to one important proviso. This is...that they must not exercise their powers arbitrarily or so unreasonably that the exercise of the discretion is clearly unjustifiable...

If an aothority misdirects itself in law or acts arbitrarily on the basis of considerations which lie outside its statutory powers, or so unreasonably that its decisions cannot be justified by any objective standard of reasonableness, then it is the duty and function of the Courts to pronounce such decisions are invalid when these are challenged by anyone aggrieved by them and who has the necessary locus standi to do so."
(The principle of Judical Review. In R.v. London Transport Executive, exp Greater

London Council (1983) QB 484, 490: Kerr LJ. Stated."

1.5 The Rule of law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but to establish social, economic, educational and cultural conditions under which the individual legitimate aspirations and dignity may be realized."
(The Congress of he International Commission of Jurists held in Delhi in 1959),

1.6 "A Constitution is a thing antecedent to a government, and a government is only the creature of a Constitution... A Constitution is not the act of a government, but of a people constituting a government and government without a Constitution, is power without a right. **(Tom Paine: Rights of Man, (ed H. Collins) pp.93 and 207).**

1.7 Our position is based on the belief in the equality of human beings, in their rights their duties as human beings and in the equality of citizens, in their rights and duties as citizens... We in Tanganyika believe that only a wicked man can make colour the criterion for human rights. Here we intend to build a country in which the colour of persons, skin or the feature of his hair will be as irrelevant to his rights and his duties as a citizen as it is irrelevant to his value in he eyes of God." **(VIDE NYERERE FREEDOM AND UNITY –PAGE 70).**

1.8 There are certain ethnical principles which lie at the basis of the Tanganyika Nation, and the whole political, economic and social organization of he State must be directed towards their rapid implementation.

1. The fundamental equality of all human beings and the right of every individual to dignity and respect.

2. Every Tanganyika citizen is an intergral part of the nation and has the right to take an equal part in Government at local, regional, and national level.

3. Every individual citizen has the right to freedom of expression, of movement, of religious belief, of association within the context of the law, subject in all cases only to the maintenance of equal freedom for all other citizens.

4. Every individual has the right to receive from society protection of his life, and of property held according to law, and to freedom from arbitrary arrest. Every citizen has the corresponding duty to uphold the law, constitutionally arrived at and to assist those responsible or law enforcement.

5. Every individual citizen has the right to receive a just return for his labour, whether any hand or brain." **(See Guide to the One – Party State Commission – NYERERE FREEDOM AND UNITY PAGE 262).**

"If a Bill of rights is enacted it will not at a stroke secure the individual liberties that it affirms; a new chapter will have opened of campaigns and cattle battles to make good the protected rights in debatable and difficult cases. There will, too, remain

many claims and expectations that will not find their resolution in a Bill of rights; in addition the quest for openness, equity and accountability will go on. There will still be the need for unremitting critical scrutiny of the processes of government and the machinery for its control – but also for a continuing political effort to ensure that the benefits of responsible government and the rule of law are not usurped by entrenched interest but are channeled to those without voice or power."
(Turpin Colin, British Government and the Constitution, 3rd Ed. Butterworth London, Dublin, Edinburgh, 1995 P. 553)

2.0 HISTORICAL PERSPECTIVE:

2.1 CONCERN FOR AND ENDEAVOURS TO PROMOTE AND PROTECT HUMAN AND CONSTITUTIONAL RIGHTS AND DEMOCRACY:

2.2 The notion of Democracy and Human Rights in western countries has a long and checkered history. History tells us that in the united Kingdom it dates back to 1215, when MAGNA CARTA was conceived. The Magna Carta attempted to assert Rights and liberties which were already well established and sought to redress grievances which for most part arise from novel interpretations of the ancient liberties of the English people[1]. After the Magna Carta there followed the petition of rights of 1628 and he Declaration of Rights[2] assented to by King William III. On the importance of the bill of Rights, the historian Macaulay[3] had this to say:-

"The Declaration of Rights though it made nothing law which had not been law before, contained the germ of the law which made religious freedom to Dissenters, of the law which secured the independence of judges, of the law which limited the duration of Parliaments, of the law which placed the liberty of press, of the law which every good law which may herein after, in the course of ages be found necessary to promote the public weal and to satisfy the demands of public opinion.'

2.3 On December 10, 1948 the General Assembly of the UN adopted and proclaimed the Universal Declaration of Human Rights[4]. Following this historic act all member Countries were called upon to publicize the text "to cause it to be disseminated, displayed, read and expounded without distinction based on the political status of countries or territories. The Declaration recognized the inherent dignity and the equal and inalienable rights of all members of the Human family as the foundation of freedom, justice and peace in the world. However the rights are subject to limitations as provided for by Article 29(2) of the universal Declaration of Human Rights[5]

---

[1] See civil liberties Cases in Zambia by Muna Ndulo and Kaye Turner pg. 14

[2] Later came to be known as the Bill of rights

[3] History of England Vol. III pg. 1311 reproduced in civil Liberties cases in Zambia

[4] This set out in 30 articles, a "Bill of rights" for the inhabitants of all the nations of the world

[5] Article 29 (2) of universal Declaration of human Rights provides: "In the exercise of his rights and freedom everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Also see Article 27(2) of he African charter on Human and People's Rights provides,
"The Rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and Common interest."

2.4 The Heads of State and Government of the Organization of African unity at their 18th Assembly in Nairobi June 24-27, 1981 unanimously adopted the African Charter on human and People's Rights[6]. Tanzania ratifies the Charter on 31st May 1982 and it came into force 21st October 1986.

2.5 However the Tanzania experience on Human Rights dates back with the founding of the Tanganyika African National Union **(TANU)** on **7/7/1954.** The Constitution of the party had a clause which stipulated equality of all men in dignity as human beings and against discrimination of any kind[7]. The Party Constitution together with the subsequent Independence and republican Constitutions incorporated the notion of universal Declaration of Human Rights.

2.6 In 1984 the Bill of Rights was incorporated into, the 1977 Constitution of the United Republic of Tanzania following the Fifth Amendment of the Constitution (Act No. 15 of 1984) The incorporation of the bill of rights into the constitution of the United Republic of "has stimulated a tide to judicial actiovism that already promises brighter moments in the future." 1984).[8] The incorporation of the Bill of Rights into the Constitution of the united republic "has stimulated a tide to judicial activism that already promises brighter moments in the future"[9]

2.7 An ideal conception of a democratic society is that it is one in which the people "continuously and actively participate" in political affairs[10]. In the real world, societies that fall short of this ideal are nevertheless termed democratic if by their constitutions the people freely elect a government and can at frequent interval dismiss it and elect another. Periodic elections provide for an accountability of the government to the people in their role as electorate – who have in this respect a place in the constitutional system.

2.8 The Preamble to the Constitution, of the United Republic of Tanzania 1977[11] provides that:-

- **"Whereas we, the People of the United Republic of Tanzania have firmly and solemnly resolved to found in our country a society which adheres to the principles of freedom, justice, fraternity and concord.**
- **And whereas those principles are only best realized in a democratic society the Government of which is responsible to a freely elected legislature representative of the citizens and whose Judiciary is independent and dispenses justice without fear or partiality of any kind, thereby securing the maintenance of the duties of all person.**

---

[6] The charter of the organization of African Unity, which stipulates "freedom equality, justice and legitimate aspirations of the African people."

[7] See Clause 4 of the Constitution. Also see clause 4 of CCM Constitution 1984.

[8] The Bill of rights was entrenched in the constitution in 1985 by Amendment No. 8 of he Constitution and became effective on 15th March 1988.

[9] Lugakingira, K. S.K. 'Personal Liberty and Judicial Attitude." The Tanzania Case, Volume 17 No. 1" Eastern African law Review, 1990, p.107.

[10] Turpin, C. British government and the constitution, Third Edition pg. 416

[11] See also preamble of 12th Amendment of the constitution 1995

NOW THEREFORE THIS CONSTITUTION IS ENACTED BY THE CONTITUENT ASSEMBLY OF THE UNITED REPUBLIC OF TANZANIA:
On behalf of the People, in pursuit of the founding of that society and for the purposes of ensuring the governing of Tanzania by a Government which complies with principles of democracy and socialism."

2.10 In Tanzania the monopoly of one Party System came to an end on 29th May 1992 when the President of the United Republic of Tanzania assented to the 8th Constitutional Amendment[12] which was followed by the enactment of the Political Parties Act 1992[13] (No. 5/1992) thereby ushering in multiparty democracy in the country.

2.11 The introduction of multiparty system was a result of the report of the Presidential Commission[14] which was appointed on 27th February, 1991 by the then President of the United Republic of Tanzania, His Excellency Alhaj Ali Hassani Mwinyi. The Commission, was headed by His Lordship Francis Lucas Nyalali, he Chief Justice of the United Republic of Tanzania. The Commission was given a number of terms of reference, one of which is the basis of their Report and it reads:

> **"to consider an recommend and amendments which should be made in the provisions of the Constitution of the United Republic of Tanzania as well as well as the Constitution of Zanzibar and any other or any modification in the country's political culture.'**

2.12 In accordance with the above mentioned term of reference, the Commission recommended what provisions ought to be dealt with in the Constitution of the United Republic of Tanzania and the Constitution of Zanzibar as well as other laws in both United Republic of Tanzania and Zanzibar. The Commission submitted its final Report on 17th February 1992.

2.13 In paragraph 597 of its Report[15] the Nyalali Commission dealt with changes required in some of the laws. The free translation of the Swahili version of he recommendation reads as follows:

> **"After recommending changes in both Constitutions of the United Republic of Tanzania and Zanzibar, we shall now continue to recommend changes which are required in the laws of the two. Governments. The basic reason for recommending the changes lies in he fact that those laws either remove from the people their freedom and basic rights. Further this report in Book Three examines in extenso "all the laws required either to be repealed completely or be amended so that they may accommodate principles of democracy for the purpose of ensuring protection of freedom and basis human rights"**

[12] Incorporated the Bill of Rights
[13] Introduced mult-party system in Tanzania
[14] Nyalali Commission
[15] See book 1pg. 142

2.14 In addition the Commission identified a set of forty (40) laws which came under its examination. From the Report it is clear that those laws are not numerically forty (40) but more. Some of the laws were considered under one set of laws which mean they involved more than one laws eg, the Land Laws and Local Government laws and each of these two sets involve about four pieces of legislation.

2.15 Out of these set of forty (40) laws, twelve (12) are for Tanzania Zanzibar over which the Law Reform Commission of Tanzania has no jurisdiction. The remaining twenty eight (28) are laws which come under the Jurisdiction the Government of the United Republic of Tanzania.

2.16 In its Report the Commission indicated that the set of the forty (40) laws were of "oppressive nature" restricting democratic participation as well as violating basis freedoms and therefore unconstitutional and some in any case in he opinion of the said Nyalali Commission were outdated. There was recommendation that either the Attorney General's Chambers or the Law Reform Commission of Tanzania should examine those legislations with a view to recommending repeal or amendment as appropriate.

3.0 THE REFORM PROCESS:

3.1 The Government decided to deal with these laws through reference to the law Reform Commission which undertook a detailed study so as to see to it that the Reform of the said laws conform with the principles of human Rights and the changed political situation in the country. Before the detailed study, the law Reform Commission of Tanzania submitted initial recommendations to the Government in November, 1993.

3.2 **At** page 732-734 of the HANSARD REPORT of 29th November, 1994 during the first reading of the written laws Miscellaneous (Amendment Bill) 1994, he Honourable Attorney General stated as follows:

"Mheshimiwa Spika Muswada huu unapendekeza kufanya mabadiliko kwenye sheria Mbalimbali takriban 10. Sheria hizo zimegawanyika katika makundi matatu. Kundi la kwanza linajumuisha sheria tatu yaani **The Collective Punishment Ordinance**. Sura ya 74 ya sheria za nchi na sheria ya kuwafukuza Nchini Wageni wasiohitajika yaani **The Expulsion of undesirable Persons Ordinance**. Sura ya 39 ya sheria za Tanzania. Pamoja na Sheria ya Usalama waTaifa yaani **The National Security Act ya mwaka 1970.** Sheria hizi zinafanyiwa mabadiliko ili kutekeleza mapendekezo ya Tume ya Nyalali.

Kundi la pili, linajumuisha sheria sita. Sheria hizo zinafanyiwa marekebisho ya kawaida ya kuziboresha ili ziende na wakati. Kundi latatu, lina sheria mbili, **Sheria ya Uchaguzi ya mwaka 1985 na Sheria ya Vyama vya Siasa ya mwaka 1992.** Mheshimiwa Spika, kama Waheshimiwa Wabunge wanavyofahamu, "Tume ya Nyalali" ilipendekeza kwamba ili kuimarishwa domodrasia ya vyama vingi hapa nchini, Sheria 40 ilizoziorodhesha ilizoona ama zinaweza kuathiri kushiriki kwa kisiasa, ulio huru au zinakiuka haki za msingi wa binadamu na hivyo, zifuatwe au zirekebishwe/Serikali iliahidi kwamba itazishughulikia sheria hizo kwa mkondo wa kawaida wa kurekebisha Sheria kupitia 'Tume ya Kurekebisha

Sheria.' Nafurahi kuliarifu Bunge lako tukufu kwamba baadhi ya sheria ambazo ziliorodheshwa na 'Tume ya Nyalali' sasa zimekwisha kufanyiwa tathmini na Tume ya Kurekebisha Sheria, na sasa ziko tayari kufanyiwa mabadiliko ili ziendane na matakwa ya haki za binadamu na vilevile na mfumo wa vyama vingi vya hapa nchini.

Mheshimiwa Spika, katika kundi la kwanza sheria ya kwanza inayohusishwa katika Muswada huu, ni ile ya **Collective Punishment Ordinance, sura ya 74 ya sheria za Nchi.** Sheria hii ilitungwa mahususi kwa kuzingatia matatizo sugu ya wizi wa mifugo yaliyojitokeza hususani kwenye maeneo ya wafugaji. Sheria hii ilikuwa inatoa madaraka kwa Mahakimu kutoa adhabu ya jumla kwa vijiji vinavyothibitika kwamba vinawaficha wezi wa mifugo kama pale inapodhihirika kwamba kuna mifugo iliyoibiwa kutoka sehemu nyingine na mkazi wa kijiji hicho na wanakijiji wanamficha mwizi huyo. Kwa kiwango kikubwa adhabu iliyokuwa inatolewa ni kukamatwa kwa ng'ombe wa kijiji kinachohusika ili kufidia watu walioibiwa.

Ingawa Sheria imekuwa ikitumika vizuri, lakini kwa wakati huu haikidhi masharti ya Katiba yanayotaka kwamba hakuna mtu atakayeadhibiwa isipokuwa kwa makosa yatakayothibitika dhidi yake Mahakamani kwa mujibu wa sheria.

Sheria hii ilikuwa inaadhibu watu kwa makosa ya watu wengine na bila kufuata utaratibu wa kawaida wa mashtaka. Serikali imekubali pendekezo la 'Tume ya Nyalali' kwamba Sheria hii sasa ifutwe (Makofi).

Mheshimiwa Spika, sheria ya pili inayopendekeza kufanyiwa mabadiliko ni ile ya kuwafukuza nchini wageni wasiotakiwa. **The expulsion of Undesirables Persons Ordinance,** Sheria hii inatoa madaraka makubwa kwa Rais ya kutoa amri kwa mgeni yeyote aliyetiwa hatiani au anayemwona kwamba ni hatari kwa usalama waTaifa na hivyo, afukuzwe nchini. Aidha Mahakama inakatazwa kumpa dhamana mtu huyo bila kibali cha Rais.

Madaraka haya ni makubwa mno. Hata hivyo, kutokana na matumizi ya sheria yenyewe, serikali bado inaamini kwamba bado umuhimu wa kuendelea nayo, tunachopendekeza kifanyike ni kuirekebisha sheria hii ili iendane na masharti ya Katiba, hivyo Muswada unapendekeza kwamba sheria hii ifanyiwe mabadiliko ili kumpa haki mhusika ya kuelewa sababu za kufukuzwa kwake nchini, vilevile, inampa haki ya kujieleza kwa Rais na kuipinga amri hiyo Mahakamani kama ikibidi. Aidha, kama muhusika hatakuwa ameelezwa sababu za kufukuzwa kwake katika muda wa siku 15 basi awe na haki ya kuachiwa huru.

3.3 It is to be noted that as of November 1994 the Government, in line with the recommendations by both the Nyalali Commission and the Law reform Commission of Tanzania, has taken measures to amend some provisions in the following legislations identified by the Nyalali Commission have either been amended or repealed:

- The Deportation ordinance –(Cap 38) amended by Act No. 3/1991
- The Government proceedings Act No. 16 of 1967 as amended by Act 40/74 and 30/94
- The Tanzania News Agency Act, Act No. 114 of 1976 amended by Act 11/92

- The News Papers Act No. 3 of 1976 amended by Act 10/1994
- Collective Punishment Ordinance repealed by Act No. 32/1994
- The Acquisition of buildings Act 1971 repealed and replaced by Act No. 2/90
- The Societies Ordinance Cap. 337 as amended by Act 13/1991 Act No. 2/90
- The National Security Act, No 3/70 amended by Act, No. 32/94
- The Expulsion of Undesirable Persons Ordinance Cap. 39 amended by Act 32/1994.

3.4 Despite the aforesaid amendments the Law Reform Commission examined the various legislation with a view to recommending reform as appropriate. The Commission's observation and recommendations are reflected in this Report.

4.0 THE STUDY

4.1 Due to financial constrains the law Reform Commission of Tanzania could not commence the STUDY in time. It was not until April, 1996 that the Law Reform Commission formally launched its STUDY after securing a generous grant totalling Tanzania Shs. 34.2 million from the Royal Danish Embassy. The launching was by organizing and holding a workshop in Dar es Salaam on 11th and 12th April, 1996 at the British Council.

4.2 The Workshop, which was opened by Hon. Harith Bakari Mwapachu (MP) Minister for Justice and Constitutional Affairs, was attended by members of Parliament mostly from the Legal and Constitutional Affairs Committee, representatives from Government Ministries, the faculty of law of the University of Dar es Salaam, the Tanganyika Law Society, the Tanzania Women Lawyers Association, Tanzania Women Media Association, members of the Press media in Dar es Salaam etc. His Excellency FI Bjork Pedersen the Ambassador of the Royal Danish Embassy and Ms. Mete Knudsen, the Embassy's First Secretary also attended the Workshop.

4.3 The Workshop discussed four papers prepared by the Commission Secretariat, grouped in the following order:

1. PENAL LEGISLATION

a) Stocktheft Ordinance 1960, (Cap 422) as amended by Acts 2/72, 12/87 and 13/84

b) Witchcraft Ordinance 1928 (Cap 18) R/L 1974

2. SELECT CRIMINAL PENALTIES

a) Corporal Punishment Ordinance, 1990 (Cap 17) as amended By Acts 11/70 and 10/89

b) Capital Punishment sections 39, 40, 196, 197, of the penal Code (Cap. 16)

3. REGULATORY LEGISLATIONS

a) Registration and Identification of Persons Act No. 1986 (Act No. 11/1986).

b) Human Resources Development Act, 1983 (Act No. 6/1983).

c) Societies Ordinance Act, 1954 (Cap 337) as amended by Act 16/69, 13/91 and 5/92.

d) Refugees (Control) Act, 1966 (Act No. 2/1966).

e) The Tanzania News Agency Act, 1976 (Act No. 14/1976 as amended by Act No. 11/92

f) The Newspapers Act, (Act No. 3/76) as amended by Act No. 10/94
g) The Graves (Removal) Act, 1969 (Act No. 9/69).
h) The Peoples Militia laws Acts No. 27/73, 25/75, and 9/89.
i) Destitute Persons Ordinance, 1923 (Cap. 41)
j) Regions & Regional Commissioners and Districts & District Commissioners Acts, 1962 (Cap. 461 & 466) Acts, 1962.

4.4 Useful and valuable observations were made by the workshop participants. These observations have, to a certain extent, helped to enrich the STUDY on one hand and on the other hand to confirm the Commission's position/views that there was room for further reflection after a detailed study on the desirability for continued application of the various legislations including those recommended for repeal by the Nyalali Commission.

4.5 In carrying out the Study, the Law Reform Commission of Tanzania divided the various legislations into two categories as follows:

(I) Legislations which required expert(se) and informed analysis to be done through consultancy. These were:-

1. The Preventive Detention Act No. 60/1962 (Cap 490) as amended by Act No. 2/85.
2. The Deportation Ordinance, 1921 (Cap 38) as amended by Act No.3/91.
3. The Expulsion of Undesirable Person Ordinance, 1930 (Cap 39) as amended by Act No. 32/94
4. The Regions and Regional Commissioners Act 1962 (Cap 461) and District Commissioners Act 1962 (Cap 466).
5. The Resettlement of offenders Act 8/69
6. The Emergency Powers Act No.1/1986.
7. The National Security Act No. 3/1970 amended by Acts 17/89 and 32/94.
8. The Criminal Procedure Act No. 9/1985 – The Question of bail and Arrest and amended by Act 2/87, 10/89 and 27/91.

4.6 (II) Legislations which needed Public views. These were:-

1. The Stocktheft Ordinance, 1960 (Cap 422) as amended by Acts 2/72, 12/87 and 13/84
2. The Witchcraft Ordinance, 1928 (Cap 18) R/I 1974
3. The Corporal Punishment Ordinance 1930 (Cap 17) as amended by Act 11/ 70 and 10/89
4. Capital Punishment Ordinance 1930 (cap. 16) sections 39, 40, 196 & 197.
5. The Preventive Detention Act No. 60/62 as amended by Acts 17/89 and 32/94
6. The National Security Act No. 3/1970 as amended by Acts 17/89 and 32/94.
7. The Emergence Powers Act No. 1/1986.
8. The Tanzania News Agency Act No. 14/76 as amended by Act No. 11/1994
9. The Newspapers Act No. 3/76 as amended by Act No. 10/1994.
10. The Societies Ordinance 1954, (Cap 337) as amended by Acts 16/69, 13/91 and 5/92.
11. The Human Resources Deployment Act No. 6/1983
12. The Refugees Control Act No. 2/1966

13. The Peoples Militia Laws – Acts No. 27/73, 25/75 and 9/89.
14. The Destitute Persons Ordinance 1923, (cp 41).
15. The Regions and Regional Commissions Act 1962 Cap 461 and District and District Commissioners Act 1962 cap (466).
16. Registration and Identification of Persons Act No. 11/1986.
17. The Graves (Removal) Act No. 9/1969.

5.0 THE CONSULTANCY

5.1 The Commission engaged a team of three lawyers from the Faculty of Law, the University of Dar es Salaam to undertake an in-depth study of the legislations listed in Para 4.5(I). The team's reports have been received by the Commission and upon examination, the reports have been found inadequate, lacking among others, the expertise analysis and academic input envisaged by the Commission. The assignment had to be carried out by the Commission itself.

6.0 PUBLIC PARTICIPATION

6.1 In terms of Section 10(1) of the law Reform Commission of Tanzania Act No. 11/1980, the Commission, in carrying out an examination of any matter, may so arrange its work as to enable it to educate the public on the issues involved in that matter and to obtain the views of the greatest possible number of the people of Tanzania on the issues in question.

6.2 The law Reform Commission undertook research visits to all the Regions of mainland Tanzania from 12th may, 1996 to 13th June, 1996 for the purpose of seeking views of the public on the various legislations. The following chart shows the programme, meetings and the number of people consulted as well as the places visited.

THE LAW REFORM COMMISSION OF TANZANIA

REGION	DISTRICTS	DATE OF VISIT	TEAM NUMBER	NO. OF MEETINGS	NO. OF PARTICIPANTS
MARA 13-9/5/96	ARRIVAL MUSOMA TARIME SERENGETI	12/5/96 13-14/596 15-16/5/96 17-19/96	TEAM ONE	7	955
MWANZA 19-26/96	MWANZA GEITA SERENGETI MAGU	19-21/5/96 21-22/5/96 23-24/5/96 25-26/5/96	"	11	1522
SHINYANGA 26/5-2/6/96	SHINYANGA MASWA BARIADI KAHAMA	26-28/5/96 28-29/5/96 29-30/5/96 31-02/6/96	"	10	1580
TABORA 02-07/6/96	NZEGA IGUNGA TABORA	02-03/6/96 04/06/96 05-06/6/96	"	8	1000
KAGERA 13-23/5/96	ARRIVAL BUKOBA MULEBA BIHARAMULO NGARA	13/05/96 13-15/05/96 16-18/05/96 19-21/05/96 22-23/05/96	TEAM TWO	16	5390
KIGOMA 24-31/5/96	KIBONDO KASULU KIGOMA RETURN TO DSM	24-26/06/96 26-28/06/96 29-31/06/96	"	13	5100
D'SALAAM	TEMEKE ILALA KINONDONI	03/06/96 04/06/96 05/06/96	"	4	415
IRINGA 13-18/06/96	ARRIVAL IRINGA MUFINDI NJOMBE	12/06/96 13-14/05/96 14-15/05/96 16-18/05/96	TEAM THREE	12	2657
MBEYA 18-26/06/96	MBEYA CHUNYA TUKUYU MBOZI	18-21/05/96 21-22/05/96 23-24/05/96 25-26/05/96			
RUKWA 27-30/05/96	SUMBAWANGA MPANDA	27-28/05/96 29-30/05/96	"	5	1953

RUVUMA 31/5-07/06/96	SONGEA TUNDURU MBINGA SONGEA IRINGA RETURN TO DSM	31/5-3/6/96 04-05/06/96 06/06/96 08-09/06/96 07/06/96	"	16	8555
MTWARA 13/19/5/96	ARRIVAL MTWARA NEWALA MASASI	12/05/96 13-14/05/96 15-16/05/96 17-19/05/96	TEAM FOUR	8	590
LINDI 19-24/5/96	LINDI NACHINGWEA KILWA	19-21/05/96 21-22/05/96 23-24/05/96	"	5	338
PWANI 25-30/05/96	RUFIJI KISARAWE BAGAMOYO KIBAHA	25-27/05/96 28/05/96 29/05/96 30/05/96	"	4	145
MOROGORO 31/5-5/6/96	MOROGORO KILOSA KILOMBERO MAHENGE RETURN TO DSM	31/5-2/6/96	"	9	863
TANGA 13-18/5/96	ARRIVAL TANGA MUHEZA PANGANI HANDENI LUSHOTO	12/05/96 13/05/96 14/05/96 15/05/96 16/05/96 17-18/5/96	TEAM FIVE	5	331
KILIMANJARO 19-25/05/96	SAME MWANGA ROMBO MOSHI HAI	19-20/5/96 21/05/96 22/05/96 24/5/96 25/05/96	"	8	600
ARUSHA 26/5-4/6/96	ARUSHA KITETO MONDULI MBULU BABATI HANANG	26-28/5/96 28-29/5/96 30/5-2/6/96 2-3/06/96 04/06/96	"	9	1777

SINGIDA 5-8/06/96	SINGIDA IRAMBA MANYONI	5-6/06/96 07/06/96 08/06/96	"	8	1300
DODOMA 9-12/06/96	DODOMA KONDOA RETURN TO DSM	9-11/06/96 12/06/96 13/06/96	"	4	460

6.3 Overall the organization of the meetings conducted and the participation of the members of the Public, who included leaders at every level was commendable and rewarding. A number of constructive views and recommendations were received to enrich the STUDY.

CHAPTER TWO

PENAL LEGISLATIONS

In this Chapter we are concerned only with the specified penal legislations, i.e. (i) Stocktheft Ordinance 1960 (Cap 422) as amended 2/72, 12/87 and 13/84, (ii) Witchcraft Ordinance 1928 (Cap. 18) R/L 1974 and (iii) Economic and Organized Crime Control Act, 1984 (Act No. 13/ 1984) as amended by Acts No. 13/88, 10/89, 4/91and 3/92. Criminal legislations attract criminal penalties.

According to Collins New English Dictionary, penal means pertaining to inflicting punishment and punishment means penalty for a crime or offence. In Bouvir's law Dictionary Penal Statutes are defined as statutes which inflict a penalty for the violation of some of their provisions. Strictly and properly, they are those laws which the executive has power to pardon and the expression does not include statutes which give action against a wrong doer.

-Penalty is therefore the punishment provided for by a law for its violation. The terms "Punishment" and "penalty" in this report are used interchangeably; so are the items "legislations", "Acts" and "Statutes". We shall now look more closely at the word "punishment as used.

Punishment might be defined as an authoritative infliction of suffering for an offence and that the punishment of a criminal is the combined operation of Parliament, the Courts and the Administration. There are three major elements involved in the notion of punishment[1].

(i) Imposition by someone in authority over the person punished.
(ii) infliction of something unpleasant on he victim mainly to discourage criminal conduct.
(iii) Infliction of punishment for an offence or retribution for wrongdoing. In the normal case the person punished and the offender are one and the same.

The aims for punishment fall into two categories. One category comprises such aims as the exaction of retribution, the demand of he members of society for justice. The other category comprises the aim of protecting society and its individual members by preventing certain kinds of conduct.

The infliction of punishment secures this aim by deterring potential offenders, by reforming actual offenders and at the same time by preventing an actual offender from further criminal activity. But given the requirement that it should be restricted to actual offenders and proportional to the offence, the major problem (here) is the practical one of deciding what type of punishment will best achieve the best prospect.

In 1764 the Italian writer Beccaria' put forward the view that the only justifiable purpose of punishing offenders is the protection of society by prevention of crime.[2] Punishment inflicted on

[1] Fitzgerald – Criminal Law & Punishment Page 199
[3] pj Fitzgerald, op cit. p. 207

the offender may not act as deterrent to others but can operate to render him incapable of comitting further crimes. Bentham puts: "the offender's own behaviour is Controllable, by reform and by disablement."[3]

Fitzgerald also writes that, the prevalence of Capital punishment in England in the18th century is evidence of the importance attached to the idea of using the penalty to prevent the actual offender from further wrong doing. The death penalty is a deterrent and a uniquely successful preventive measure.

"If we are to prevent crime and attain security, then the punishment of offenders is an indispensable sacrifice." Further within the range of punishment, moral considerations are a further brake on the amount of punishment which should be imposed, in that the penalty must not be wholly disproportionate to the offence,"[4]

The emphasis on reform and reclamation, however, is not without difficulties. The selection of the appropriate penalty is no easy matter, for the courts must bear in mind the effect of the penalty both on the offender and on the community.[5]

To forecast what this effect will be, requires detailed knowledge both of the general deterrent effect of different kind of sentence and of the reformative results of such sentences on different kinds of offenders. Such knowledge can only be acquired by detailed consideration of evidence gained by sociological investigations and by familiarity with particular problem presented by the offender in question. The courts may rely on probation officers, medical experts the prison Commissioners and others.[6]

[3] (Margery Fry, Arms of the Law, Bentham 3-11 part II)
[4] P.J. Fitzgerald page 11 - 112
[5] Fitzgerald, Criminal Law & Punishment pg. 215
[6] Ibid

(i) STOCKTHEFT ORDINANTMCE 1960, CAP. 422: AS AMENDED BY ACTS NO. 2/77, 12/87 AND 13/84

1.0 STATE OF THE LAW

1.1 The Stock Theft Ordinance was enacted in 1960 to grapple with the problem of stock theft in the country. It is a unique piece of legislation which attempts to deal with communal crimes by imposing communal sanctions. When the ordinance was enacted it applied only to 12 districts in the Central province, Lake province, Northern province and Western province. "The reason for that limitation was that the Ordinance was designed to combat a particular type of offence, which although then prevalent in those specified area was not common to the country as a whole.

1.2 The provisions of the Ordinance befitting the crime of stock theft are severe and it was not therefore desirable that they should be applied more widely than it was absolutely necessary[7]. However, due to increased incidences of stock theft and the resultant cruel loss of life and property, the Ordinance has been extended to the whole country by section 1A of Cap. 422, an amendment incorporated in the Third Schedule to the Economic and Organized Crime Control Act; 1984[8].

1.3 Section 3, 4, 5 and 6 place upon the accused in the specified areas, the burden of proof e.g in section 3 the possession of stock in such circumstances as might reasonably lead to the belief that such stock had been stolen, was lawful, Section 4 deals with intent to steal stock and is analogous to section 295 of the Penal Code, a section referring to entry of a dwelling house with the intent to commit a felony. Section 5 refers to being found near stock in suspicious circumstances, an section 6 refers to breaking through and tampering with fences around stock enclosure and section 7 refers to offences relating to brands.

1.4 Section 12 empowers the District magistrate whenever he is informed that members of the community within a specified area are likely to act in a manner leading to bloodshed or theft of stock, to proceed to inquire into the truth of such information.

1.5 However, the problem with this Ordinance lies especially in the provisions which impose collective punishment, and deny appeal to higher courts as provided in sections 3, 14(2) and 15(6) of the Ordinance.

1.6 Section 13(1) provides that if he is satisfied that members of the community within a specified area are likely to act in a manner which may lead to bloodshed, he may by order in writing direct that within a period not exceeding one year the members of such community should keep peace an be of good behaviour, but if they fail to do so then the stock of the value not exceeding an amount of money specified in the order shall be confiscated from such community.

1.7 Section 13(2) of the Ordinance, provides that the leader of the community concerned will be informed of the order made under the provisions of section 13(1) and if he is not present

[7] Hansard 15th February 1962 p. 142
[8] Third Schedule of Act No. 13 of 1984

in court the magistrate will issue summons requiring his attendance and once he appears in court the order shall be read and explained to him.

1.8 Section 14(1) of the Ordinance on the other hand provides that if the magistrate is informed that members of the community in respect of which an order was made under section 13(1) of the Ordinance within the period specified in the order, have acted in such manner as to have stolen stock, shall inquire into such information, giving representatives of the community concerned an opportunity of being heard; and if he is satisfied of the truth of such information he shall order stock to the value of the amount as he thinks fit, to be confiscated from such community or any members thereof. Section 14(2) of the Ordinance, provides that an order of the magistrate under Section 14(1) shall be final with no provision or right of appeal to the higher court.

1.9 Section 15(1) provides that if any authorized officer is satisfied that any stock has been stolen within or outside the specified area but members within the specified area have taken part in the theft, or are sheltering or in any way are concealing any stolen stock, may seize and obtain stock, from that community or any member or members residing in such a community, equal to the value of the stock stolen.

1.10 Section 15(2) provides that after the seizure of the stock, the authorized officer shall report forthwith to the first Class Magistrate who shall as soon as is convenient hold an inquiry into the facts of the case in such manner as he thinks fit giving, if practicable, and opportunity to the representative of the community, from which stock has been seized to be heard. However, section 15(3) provides that after the inquiry under section 15(2), if the magistrate is satisfied that the seizure of the stock was justified, he shall order that all such stock or any specified number thereof should be given to the person from whom stock was stolen; provided that such an order may not be carried into effect if it contravenes the provisions of the Animal Diseases Ordinance, where-upon he shall order the specified number of stock to be sold and the proceeds of such sale to be given to the person from whom stock was stolen.

1.11 Under section 15(4) where the magistrate makes an order under section 15(3) to return to the person whose stock was stolen only a specified number of the seized stock, he may order the remaining stock to be returned to the community from which it was seized. Section 15(5) provides that after holding an inquiry under section 15(2) if a magistrate is not satisfies that the seizure of the stock was justified, he shall order such stock to be returned to the community form which it was seized, and he may also order such compensation as he may think fit to be paid to the community in respect of such seizure; and the order of the magistrate under this section shall be final, with no right of appeal to the higher court.

2.0 MISCHIEF FOR THE ENACTMENT OF THE STOCK THEFT ORDINANCE, 1960 (CAP. 422)

2.1 Stock theft has been a serious problem for a long time, especially in the major stock rearing areas. In 1959 during the colonial rule a livestock census was taken and it showed a total population of cattle as over $7^1/_2$ million and at an average price of shs. 160 per cattle, the total value of all the cattle in he country was $60,000,000.00, and over 7 million head of small stock (sheep, goats, pigs) at an average price of shs. 30/= each, the total value of all the small animals in the country was $10,000,000.00. However, a bulk of the stock was centered in the four provinces namely:

(i) The Lake Province, which had just under 3 million head of cattle and just over $2^1/_2$ million head of small stock;

(ii) The Central Province with a population of 1 million head of cattle and just over $^1/_2$ million head of small stock.

(iii) The Northern Province had $1^1/_2$ million head of cattle and just over $1^1/_2$ million head of small stock; and

(iv) Western Province which had just under 1 million head of cattle and just over $^1/_2$ million head of small stock.

2.2 Out of the total cattle population of approximately 7 million head, just over 6 million head were in the same four provinces. However, the Government was concerned about the prevalence and increasing incidence of cattle theft in the territory, particularly in those four provinces, and in 1959 the total number of stock theft cases reported to the police were 1,431 involving 8,400 stolen stock, worth £ 70,000.00; and 1,115 stock theft cases were reported from the above mentioned provinces, involving 7500 stolen cattle, with a total value of £ 60,000.00.

2.3 As a result of the steady increase in stock theft, the Government instituted th following administrative measures to deal more effectively with the problem.

1. a) The appointment of a Gazetted Officer of Police stationed at Monduli in the Northern Province as an overall co-coordinator of stock theft preventive measures in all the provinces.

   b) The officer had under his command, 5 Stock Theft preventive Officers scattered about that vast area at Tarime, Maswa, Ngare-Nairobi, Oldonyo Sambo and Singida.

2. The enrolment of Masai Special Constables' who had received basic police training at the Police Training School in Moshi, who were employed full time on stock theft duties in Masai land.

3. Constitution of tracks in certain remote areas, particularly in Masailand to facilitate the movement of search parties. Fuel damps were provided in the area most affected by stock theft.

4. Establishment of close liason both by the Police and Provincial Administration with the Kenya authorities in the Masai boarder areas.

5. Up-grading of the posts of Stock theft preventive office and of Tracker to Assistant Superintendent of Police and to Constable in a attempt to attract better type of a person to fill such posts and that resulted in improved rate of recovery of stolen stock[9]. Inspite of the administrative measures which the colonial Government instituted, the problem of stock theft continued unabated, causing both social unrest and economic problems.

2.4 In the circumstances the government consulted and received representations form the Native Authorities, the Chief's Convention, Tanganyika National Farmers Union and the Provincial Commissioners' Conference, indicating the need for additional measures to deal more effectively with stock theft problems. The Minister for Lands and Surveys summed up the situation appropriately when he stated;

" I wish to draw the attention of the House to the feeling that Africans have towards their cattle. The African people of this Territory attach the greatest importance to cattle, indeed livestock of all kind a play an important role in the lives of the people. Cattle are also associated with many of the African indigenous rites, at birth, even burial.

Cattle tend to breed a great deal of friction between African tribes, and indeed the situation arises at times where something approximating to tribal warfare happens. Although some of these measures may appear to be irksome and perhaps not consonant with some principles of British justice, I think the situation demands that everything possible is done to minimize cattle theft" [10]

2.5 When the Ordinance was being debated in Parliament, as a Bill, the members of the Legislative Assembly did not like the severe provisions, which they condemned as being primitive, uncouth and uncivilized." They almost rejected it until the "Father of the Nation" stood and defended it stating that it was just an emergence measure. Consequency, its applicaton was limited to areas with prevalent incidents of tock theft but the severe provisions resulted into the reduction of stock theft in the specified areas.

2.6 The difference could be seen between the reduced numbers of stock theft in areas in which the ordinance applied and the rampant stock theft in the other areas where it did not apply. Consequently, Iringa District (in he Southern Highlands Province) where stock theft cases had increased greatly was declared in 1962 to be a specified area to which the Ordinance would apply. During the debate in the Legislative Assembly relating to the inclusion of Iringa District in the list of the specified areas, most of the Members of Parliament, unlike the first time the Bill was being debated in the Legislative Assembly, wanted its provisions to apply to the whole country.

2.7 Consequently in 1984 the Ordinance applied to the whole country, by the insertion of section 1A in Cap. 422 through an amendment included in the Third Schedule to the Economic and Organized Crimes Control Act, 1984, (act No. 13 of 1984). It appears however that the application of Cap. 422 to all of Mainland Tanzania is not automatic because orders or directions relating to specified areas have to be given, though the Act is silent as

[9] Hansard Report 26th April 1960 p. 45
[10] Hansard Report - 16th April 1960 p. 46

to who would give such orders or instructions. It would therefore appear that the inclusion of "specified areas" in the Ordinance, when its provisions have been extended to the whole of mainland Tanzania would defeat or negate that objective.

3.0 CRITICISM OF THE LAW BY NYALALI COMMISSION

3.1 "The Nyalali Commission observed that the Stock Theft Ordinance like the collective Punishment Ordinance; allows the ordering of punishment to a section of members of a society suspected of having committed an offence. This offends the basic principle that punishment should be personal only on the actual offender. The Ordinance also has been abused on too many occasions by District Commissioner when dealing with suspected cattle thieves. Arrests and detentions have been done en masse. Power granted to the District magistrates have been usurped by District Commissioner and the Militia/Sungusung. It is recommended that the ordinance be repealed."[11]

4.0 PEOPLES VIEWS:

4.1 During the Workshop, the participants observed that stealing cattle in some communities is a cultural belief, that is, it involves the retaking or repossession of their cattle from whoever had stolen them. It was therefore argued that the continued application of the legislation tends to perpetuate old traditions, a phenomenon which is not acceptable at this point in time. It was also contended that, even though cattle theft is associated with culture, it is important that such cultural behaviour should not impinge on development. Cattle theft should therefore be regarded as theft like any other theft. Alternatively, it was suggested that every stock theft in view of its nature is an issue which should be squarely dealt with by the local authorities/councils, where cultural approach could still be used as method of conflict resolution.

4.2 Other views were that Stock Theft Legislation was a necessary evil because the Police Force is not effective and adequate enough to reach the scene of crime while the community can easily be found at the scene of crime. Since the crime is community based therefore the practical way of imposing punishment is through the community itself or collective punishment, and also stock theft should be viewed as a temporary phenomenon but with economic motivation.

4.3 However, the majority view of the participants was that Stock Theft Ordinance is still valid and relevant to deal with the intended mischief, that is to preserve social order and justice. There are still people, who resort to hostilities where members of certain communities have been killed; villages have been fighting against each other and the pastoralists move across the country in search of fresh pastures hence have turned stock theft to be a pan territorial problem.

4.4 Despite the fact that the law is still needed the following amendments were recommended to strengthen it::

[11] Book Three of the Nyalali Commission Report page 13-24.

1. The enomous powers given to the inquiring magistrate should be checked for the purpose of controlling abuse of power.
2. Inquiry to include other players, such as the Primary courts and other organs i.e. Local authorities which are nearer to the scene and the people to expedite the process.
3. Inquiry Courts be assisted by lay people for transparency, fair trial etc.
4. Rules of Evidence and Procedure for inquiry to be prescribed to ensure that justice is done.
5. The question of Proof should be emphasized although in some instances in it a problem of one community against another community.
6. The question of community responsibility where the law punishes the innocent and the guilty at one and the same time should be explored further – e.g. collective punishment.
7. The question of inquiry coming first may not address the problem especially in border areas.
8. That the right of appeal is a basic right but this should not operate to delay dispensation of justice. There should be a time frame to guide the appeal process.
9. That education was identified as a means of moulding such culture.
10. Enhancement of sentence for identified stock thieves.

4.5 Research findings in all the regions of Mainland Tanzania recommended that the Stock Theft Ordinance should not be repealed because the incidence of stock theft is still notorious, rampant and a menace to society. The participants stated that the increase of stock theft in the areas where stock is reared is partly due to the fact that cattle have become a very valuable commodity with a very high value, which has a ready market across the country's borders. They also reiterated that stock theft is a highly organized crime, involving local and foreign groups, using modern weapons and transportation, thus posing a grave threat to both life and property in the concerned communities.

4.6 The Participants further recommended that the Ordinance should be amended to strengthen it by incorporating the following:

1. Inquiry to be conducted by Magistrates at all levels with preference to Primary Court Magistrates because of their proximity to the scene of incidents. Local leaders and traditional elders should be involved in the inquiry for transparency.
2. Inquiry findings should not be subject to appeal.
3. Inquiry on stock theft should have a specific time limit for if it takes a long time, cattle, etc. may be lost or die due to diseases or lack of proper fodder.
4. The (Sigingi) Presidential Order made by the retired President Nyerere to apply in Mara Region imposing community punishment, that is ten (10) heads of cattle from each household in the village where foot-marks are traced but no stock is detected to the part of the law.
5. Compensation should follow the traditional formula of two to one in order to cover costs as well as an element of punishment.
6. Community participation in policing and protecting life and property through the use of traditional defence groups.
7. Regular census on stock to be conducted at village level and a register to be maintained in the village.
8. Distinctive brands for stock to be designed for every district, village and owner.

9. Stock routes and holding grounds should be revived and publicized, with the provisions of veterinary services, which would provide treatment to the animals.
10. Movement of stock should only be during the day time, from 6.00 am. to 6.00 pm.
11. Village authorities should ensure that every stock being taken across its borders have movement permits.
12. Stock Theft Preventive Unit (STPU) should be strengthened and extended to cover the whole country.
13. Secular and religious education to be given to eradicate traditions encouraging stock theft.
14. Sentences on identified stock thieves should be enhanced.
15. Complaints of stock should be accompanied by documentary proof such as cattle movement permits, cattle tax receipts etc.
16. Informers of stock thieves should be rewarded.
17. Secret balloting be conducted to identify stock rustlers as a means to help combating stock theft.
18. Burden of proof in stock theft should lie on the accused (that is already the case in section 3,4,5 and 6 of the Ordinance.

4.7 However, the minority view condemned the Ordinance, claiming that it violates human rights by allowing the imposition of punishment to a community based only on suspicion of having committed an offence under the Ordinance. They were afraid that the application of the provision might punish even the innocent members in the community. They, instead recommended the strengthening of investigative organs of the state to track down stock thieves.

5.0 THE LAW REFORM COMMISSION'S WEIGHING UP:

5.1 The Law Reform Commission is of the view that the Stock Theft Ordinance is still needed to combat stock theft, which is still rampant, resulting into cruel loss of human lives and property and therefore a menace to society. Appropriate legal measures must therefore be in place first to protect both life and property of the victims of such institutionalized tribal incidents and secondly to punish the perpetrators of these criminal undertakings. The imposition of the collective punishment on the community seems to be the only practical way to deal with the peculiar cases of increased stock theft, which are taking place on communal basis.

5.2 The payment of compensation by the clan or family may be equated to some form of collective punishment but it appears to be the only appropriate way to deal with the peculiar and notorious stock theft cases. Since stock theft is institutionalized or is taking place at communal basis therefore the provisions of the Penal Code could not be sufficient/ appropriate to deal with this problem. In other words, the provisions of the Ordinance were the best evil to deal with the rampant and notorious stock theft.

5.3 The District Commissioners have not been given any role to play in the Stock Theft Ordinance, but under the power conferred upon them by the Regional and District Commissioners Acts, 1962, they can quell riots or uprising occurring as a result of the

stock theft, involving large numbers of stock by arresting and detaining the thieves for twenty four and forty eight hours respectively. Similarly even the Peoples Militia/ Sungusungu have no specific duties given to them under the Ordinance save for the powers under Peoples Militia (Powers of Arrest) Act No. 25/75.

5.4 The purpose of the punishment is to deal with the peculiar attitudes of some pastoral members of society who do not respect the constitutional right of others to own stock and at the same time influenced by their anachronistic cultural code of silence desist from cooperating with law enforcement agencies in disclosing the perpetrators of the stolen stock. Though the punishment appears to offend the basic principle that punishment should be personal and imposed only on the actual offender, collective punishment in respect of stock theft is saved by he provisions Article 30(2)(b) of the Constitution as it serves to protect public safety and public order.

5.5 In the absence of the punishment a "greater evil" would descend in the form of war between the victims and the culprits communities. This would result in the loss of lives and property of even innocent persons. In imposing collective punishment the victim is compensated and message is sent to the (offending) culprits community that the society will not allow them to infringe the right of ownership of stock of owners nor allow them to hide behind the code of silence. As testified in the regional tours the punishment has helped to reduce the rate of stock theft and the resultant incidents of conflict between these pugnacious communities.

5.6 Current Statistics show an increase in the number of cattle, sheep and goats in the raring regions; (cattle has increased from 7...million) (in 1959) to 13,618,000 cattle in 1994.[12]

[9] See the National Sample Census of Agriculture 1993/94 Tanzania Mainland Report Volume 11 page 10.

REGION	NO. OF CATTLE	GOATS	SHEEP
SHINYANGA	1,886,000	1,113,000	405,000
DODOMA	1,600,000	955,000	275,000
ARUSHA	1,139,000	1,238,000	469,000
SINGIDA	1,382,000	677,000	377,000
TANGA	1,087,000	539,859	159,309
MBEYA	911,000	841,507	274,247
MWANZA	1,652,000	627,000	144,000
MARA	1,689,246	314,433	140,000
TABORA	524,827	259,201	110,000

6.0 RECOMMDENDATIONS

6.1 The Law Reform Commission recommends that the Law be retained and the following amendments be made to give it more teeth:

1. (a) That the Law should be amended to include Resident magistrates, District magistrates and Primary Court Magistrates to conduct enquiry in stock theft cases while the stock has been seized by an administrative officer an kept in an appropriate place so that they can not be lost or smuggled away. The inquiry should also be held and completed within a specified period of time.

   (b) The Law should also provide that local leaders i.e. Village Councils, District Councils should assists the Magistrate in conducting the inquiry in order to achieve transparency, speed and effectiveness.

2. There should not be any appeal in cases of inquiries held under sections 12(1), 14(1) and 15(2) of Cap. 422 because, since the magistrate will be assisted by the Village Councils/authorities and traditional elders, who know the village and the stock owners the possibility of making wrong findings or orders are minimal. In any case appeals do not lie against finding of facts.
3. The "Presidential order" GN 163/84 should be incorporated in the law so as to facilitate the quick recovery of the stolen stock form the communities, in which they are hidden by the cattle thieves as community, punishment brings with it community sense of responsibility and alertness.
4. (a) The law should provide that in assessing the compensation a formula of two (2) to one (1) should be applied in order to cover an element of costs and punishment.

   (b) The village Authorities should be required by law to keep a register of cattle owners farmers showing the number of live stock each one owns and whenever he buys cattle he should be required to inform the village government about such purchase and he should be required to produce a movement permit from

the stock or cattle auction or market, showing the number of cattle purchased, their type and colour description. Failures to produce documentary proof should attract criminal sanctions.

5. There should also be a provision requiring every Stock owner who takes stock out of the village to obtain a stock movement permit, indicating the destination, the number of stock, and its description..
6. Each District and village should have its own distinctive brands of stock and the stock owner should also have his own brand to enable him to trace his missing or stolen stock without difficulty.
7. The law should provide that stock or cattle kraals or bomas should be built within the villages and the community should participate in policing and protecting life and property through the use of traditional defence groups.
8. Stock routes and holding grounds should be established and /or revived and publicized after consultations with the Department of Livestock Development (Veterinary section); so as to provide services to the stock in holding ground.
9. The stock/cattle should be moved during day time only, from 6.00 am. to 6.00 pm.
10. the law should include the establishment and strengthening of the stock Theft Preventive Unit (STPU) to cover the whole country.
11. The sentences on identified stock thieves should be enhanced i.e. 30 years imprisonment.
12. The definitions in the Ordinance should be reviewed and amended to reflect the changes which have taken place in the country. (consequential amendments to the Ordinance)

(ii) THE WITCHCRAFT ORDINANCE, 1928 (CAP. 18) R/L 1974

1.0 THE STATE OF THE LAW:

1.1 This Ordinance was enacted in 1928, and came in to operation on 28th December, 1928. It was enacted "to provide for the punishment of witchcraft and of certain Acts connected therewith. "The law was therefore enacted to curb activities of people engaged in sorcery, enchantment, bewitching, the use of instruments of witchcraft, the purported exercise of any occult power, and the purported possession of any occult knowledge (vide definition of witchcraft in section 2 of Cap. 8). The definition of instrument of witchcraft is very comprehensive as reflected in section 2 of the Ordinance and it entails holding beliefs in mediums and things/phenomenon such as charms.

1.2 Section 3 of the Ordinance creates offences which are punishable under the law. In short those offences are:-

1. One shall be punished if through statements, or actions represents himself to have power of witchcraft;
2. If one makes, uses, has in his possession or represents himself to possess any instrument of witchcraft;
3. If anyone supplies to any other person any instrument of witchcraft;
4. If one advises any other person upon the use of witchcraft or any instrument of witchcraft or;

5. If anyone threatens to use or resort to the use of witchcraft or any instrument of witchcraft upon or against any person or property.
6. If a person names or indicates any person to be a witch or wizard by imputing to him the use of witchcraft or any instrument of witchcraft.

1.3 Any person who does any of the things listed in 1-6 shall be guilt of an offence against the Ordinance. The section under which such person shall be punished is section 5 i.e. imprisonment of either description for a period not exceeding seven years or to fine not exceeding 4,000/= or to both such fine and imprisonment.

1.4 In addition a person:
(i) who commits an offence against the ordinance without intent as described hereinabove shall be liable to fine not exceeding one thousand shillings or to imprisonment of either description for any period not exceeding one year.
(ii) Who abets or attempts to commit an offence shall be guilt under the provisions of section 6 of the Ordinance. Such as person if convicted shall be guilt of the said offence.
(iii) For any person employs or solicits any other person to resort to the use of witchcraft or any instrument of witchcraft for any purpose whatsoever shall be guilt of an offence against the Ordinance.

1.5 Under section 8 of the Ordinance, the District Commissioners may order persons practicing witchcraft to reside in certain places after due inquiry.

2.0 CRITICISM BY THE NYALALI COMMISSION:

2.1 The law as stated hereinabove was examined by the Nyalali Commission. At paragraph 610 page 145-146 of Book one of the report the Commission states that: -

> **"this law dates back to colonial rule and it has remained todate. Under this law, the District Commissioner has been given powers to order a person suspected of practicing witchcraft to reside in any specified locality within his district. The law is useless; it should be repealed."**

2.2 In Book Three, of the Nyalali Commission Report at page 7-8 the Commission examines this law in more details and makes more observations on the said section with regard to the District Commissioner's powers, that the powers may be abused in arresting, detaining and deporting people. The said Commission alleges that in most cases there will be no valid reasons.

2.3 The Nyalali Commission also takes issues with the procedure generally on three aspects which are connected with the courts' jurisdiction of courts to award punishment under section 5 of the Ordinance and concludes that the powers given to the District Commissioners are "unnecessary and in fact gratuitous."

2.4 Finally the Nyalali Commission was of the view "that the Ordinance violates Article 17(1) of the Constitution because it restricts freedom of movement of individuals. It also curtails freedom of residence. It is recommended that the Ordinance be repealed.

3.0 PEOPLE'S VIEWS

3.1 The Workshop held on 11th and 12th April in Dar es Salaam, whose participants included Members of Parliament recommended the retention of the Law and advised to look into the definition section, to remove the power of consent of the Director of Public Prosecutions as well as to review the provisions relating to sentencing.

3.2 It was further proposed that research be carried out to identify more appropriate actions to control and curb the perpetrators of witchcraft. Witchcraft was seen as anti-development and destructive; it was urged that the reform under reference should address the mechanics how to deal with problems brought about by beliefs and practices of witchcraft, the evils associated with those beliefs as well as the protection of those maliciously accused of witchcraft.

3.3 On the other hand there were views which did not support the existence of witchcraft and urged that the concept and practice of witchcraft should not be entertained instead Education was identified as a means and tool to deal with the problem.

3.4 A common view from the members of the public in all the regions visited is that witchcraft and the belief thereof exist within the society and that this phenomenon cuts across both the educated and the uneducated. It was pointed out that Witchcraft is also mentioned and condemned at one and the same time by the Holy Scriptures i.e the Bible and the Quran. The Witchcraft has a negative impact on the community. It courses death, terror and insecurity, fostering disharmony and hatred among people and impedes development.

3.5 It was therefore recommended that the law should be retained with the following amendments:

1. Traditional experts, traditional tribunals and traditional defence groups be allowed to expose witchcraft practices.
2. In order to facilitate proof of witchcraft:
   (a) The evidence of traditional experts in exposing and identifying witchcraft be accepted as expert evidence.
   (b) Proof of being found with unusual instruments, hiding people considered dead and performing usual nocturnal activities while naked should form prima facie case of witchcraft.
3. Sentence against witchcraft be enhanced to life imprisonment without option of fine.
4. Public demonstrations by magicians, sorcerers, consultation of medium/media and conjures should be prohibited as the practice spreads the belief of witchcraft.
5. District Commissioner should remain with the powers to order a person practicing witchcraft to reside in a specified place.
6. The requirement for the Director of Public Prosecution's consent to prosecute witchcraft cases be dispensed with for the purpose of speeding up trials of witchcraft offences.

7. The Government should research into the science of witchcraft to identify the magnitude of the problem and determine how it can be utilized positively for the benefit of the society.

3.6 On the other hand a minority view expressed that witchcraft is only a belief which cannot be eradicated through legislative measures. The group recommended the repeal of the Ordinance as they contended that witchcraft will die a natural death as society develops.

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION

4.1 Taking into account the state of the law, the Law Reform Commission of Tanzania examined at length the law and asked itself whether the mischief for which the law was enacted is still in place. The Law Reform Commission noted at the time when the Ordinance was enacted people of all walks of life believed in witchcraft. People believed in occult power, in mediums, in sorcery in witches/wizards, all connected with witchcraft.

4.2 Although it may not be possible to know when beliefs in witchcraft started, it has been in existence from time immemorial in every corner of the world. It appears in the Biblical writings in the year 1420 B.C. In the Book of Exodus it thus appear: -

> **"The Pharaoh called in his sorcerers, the magicians of Egypt and they were able to do the same thing with their magical acts. Their rods Became serpents too. But Aaron's serpent swallowed their serpents." (EX. 7;11 – 12)**

4.3 In the whole of the United Republic of Tanzania every tribe has some notion of what is witchcraft and the difference in the belief from tribe to tribe is a matter of degree and not of substance.

4.4 Taking the background as above stated, the Law Reform Commission is of the view that the law is intended to protect the people of this country from the consequences of the beliefs in witchcraft. People do know that witchcraft is the performing of magic to make especially bad things. Many people believe that witchcraft is connected with magical and mysterious power hidden from knowledge or understanding.

4.5 It would not appear to the Nyalali Commission that the mechanism built in the law is important and therefore should be addressed i.e. that the District Commissioner has to assure that:-

1. A person must first and foremost be suspected of practicing witchcraft which is prohibited by the law.
2. District Commissioner must carry out an inquiry.
3. The inquiry must satisfy the Commissioner that the person so suspected causes or is likely to cause fear, any annoyance or injury in mind of a person or property to any other person by means of pretended witchcraft or is practicing witchcraft for gain on reward.
4. Once he is satisfied as above he may, for reasons to be recorded order the person so suspected to reside at a particular locality in his district.

5. The suspected person shall live in such locality until such order is varied or revoked.
6. The District Commissioner may in the alternative order such person to report to him or to Local Authority at such interval not being less than 7 days until his order is varied or revoked.
7. The District Commissioner shall immediately forward the Order to the Regional Commissioner of his Region with reasons thereof.
8. The report to he Regional Commissioner shall be accompanied by a record of the enquiry.
9. The Regional Commissioner has power to suspend, reverse or vary the order.
10. The Regional Commissioner is duty and legally bound to report such order of the District Commissioner and the action taken to the President.
11. The President may at any time disallow, vary such order of he District Commissioner.

4.6 The considered opinion of the Law Reform Commission is that there is validity of the Witchcraft Ordinance and the said validity is justified. It is justified because there are still fears arising form beliefs in witchcraft among the people.

4.7 After all, the Nyalali Commission does not analyse and tell the Tanzanians what may happen if the Ordinance is repealed (in accordance with its recommendation) without any other law in place.

4.8 The Nyalali Commission Report apparently does not appear to indicate that the Commission did address the issues as to whether or not:-

1. There are practices of witchcraft, taking judicial notice of section 3,4,5 and 7 of the Ordinance.
2. There should be a law to contain people's fear on witchcraft.
3. There are people who consult mediums, witches and those who use charms.
4. There are people who claim to be able to use witchcraft to bring death, sickness and destroy property through their sorcery and occult power.
5. There would be instant justice if there is no law to deal with suspected practitioners of witchcraft:

4.9 The Law Reform Commission is of the view that the complaints by the Nyalali Commission on section 8 is answered by the following propositions:-

(i) There is enough protection for the suspected person; that it is almost impossible for the District Commissioners to misuse the powers.

(ii) If he did the enquiry record would show the Regional Commissioner. So the Regional Commissioner would do the needful.

(iii) At the end of the day the President would assist such affected person to be set free. If the Commission had looked into the law, that the District Commissioner must act bearing in mind the quasi judicial powers bestowed on him by the provisions of section 8(1)(2)(3), it would have come to the conclusion that there are enough safeguards to curtail misuse of power by the District Commissioner.

4.10 In the Workshop mentioned hereinabove the Minister of Justice and Constitutional Affairs, gave key note address wherein he stated:-

"The Nyalali Commission, in part reckoned the repeal of the laws on ground of

constitutionality, particularly on the issue of human right. ..... However, it is my duty to point out to you that some of these laws which were recommended for repeal cater for such matters as public tranquility and safety within the context of the conditions and circumstances prevailing in the country. I have in mind such laws as Witchcraft Ordinance etc. the repeal of such laws without putting anything in place or without suggesting how the mischief for which the laws were enacted, will be taken care of, would leave a dangerous vacuum".

4.11 Witchcraft is an anti-development element among people and it is destructive as it induces fear and threatens people's tranquility. It is because of the aforestated reasons that he law must be retained. People of this country should have laws which enable them to coexist peacefully with one another.

4.12 Bearing in mind the mischief aimed at in section 8 of the Ordinance the Nyalali Commission did not address the issue of existence of witchcraft and its consequences on the life of Tanzanians. Therefore the power of the District Commissioner is not gratuitous. It is necessary and can coexist with the power of the courts. The High court under its powers to supervise lower Tribunals has a duty to check misuse of the powers of the administrative personnel.

4.13 The Nyalali Commission argues that the Witchcraft Ordinance violates Article 17(1) of the Constitution, in that it restricts freedom of movement and freedom of residence of individuals. It further interferes with due process of law. Article 17(1) states:-

"Every citizen of the United Republic is entitled to freedom of movement and resident, that is to say the right to move freely within the United Republic and to reside in any part of it to leave and enter into it and immunity form expulsion from the United Republic."

4.14 What arises from above is an issue whether or not there should be limitations. In order for an individual to enjoy his rights he must not impinge on the rights of others. Therefore article 17(1) must be ready in conjunctions with article 30(1) (2-5). Article 30(1) states:-

"30(1) The rights and freedoms whose content have been set out in the Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights and freedom of other or the public interest."

4.15 There is evidence that in the world there are sorcerers who are ordinary people who perform magic by using the power of the evil spirits (vide Longman Contemporary English Dictionary). What appeared in the newspaper "MTANZANIA" on Monday 20th May 1996, not so long ago, tells a story and runs as follows:

"There is today in America a man of 40 years by the name of David Copper field who is the child of his parents and was brought up in New Jersey. Two years ago he married one Claudia Schiffer. This man is a wizard and he is the richest wizard in the world. He earns 25 million dollars a year through witchcraft. When newspapers journalists confront him with barrage of questions he replies that he is wiling to answer questions on condition that so soon as he

finishes answering question, the respective questioner must be dead shot, or the questioner must take poison to enable him to go to the next world because he will have the whole story to narrate there. He states that questioner should be killed because asking him about his witchcraft activities is the same as signing warrant of death for him."

4.16 Those of us that are curious about witchcraft should heed this message. It is obvious that belief in witchcraft is not rampant only in Tanzania but also contemporary Americans are practicing witchcraft.

4.17 In accordance with the Bible, it is recorded:

"A man named Simon had formerly been a sorcerer for many years, he was a very influential proud man because of amazing things he could do; in fact the Samaritan people often spoke of him as the Messiah"
(ac 8:9 – 10),

4.18 In accordance with QURAN – YUNUS(10) JUZUU 11 Verses 78-83 it is written:

"Pharaoh said: "Bring every skilled magician to my presence. When the magicians came, Musa said to them: "Cast down what you may". And when they had thrown, he said: "What you have brought is deception. Surely God will render it vain. Allah does not bless the work of he evil-doers not bless the work of the evil-doers. By His words he vindicates the truth, much as the guilty may dislike it"

4.19 It behooves us to take note that sorcerers have always been there. These are connected with witchcraft in accordance with Longman English Contemporary Dictionary which defines the word sorcerer as:

"A person who performed magic by using the power of the evil spirits".

4.20 In accordance with Scriptures this is demonstrated first by what the people at Pathos saw, where a Jewish sorcerer had attached himself to the governor, Sergius. Evidence goes as hereunder:

"Afterwards they preached from town to town across the entire island until they reached Pathos where they met a Jewish sorcerer, a fake prophet named Bar Jesus. He had attached himself to the governor Sergius Paulus, a man of considerable insight and understanding. The governor invited Barnabas and Paul to visit him for he wanted to hear their message from God. But the sorcerer Elymas (his name in Greek) interfered and urged the governor to pay no attention to what Paul and Barnabas said trying to keep him from trusting the Lord, Then Paul and Barnabas filled with the Holy Spirit glared angrily at the sorcerer and said, You son of the devil, full of every sort of trickery and villainy, enemy of all that is good will never end your opposition to the Lord. And God has laid his hand of punishment upon you and you will be stricken awhile with blindness. Instantly mist and darkness fell upon him and he began wondering around begging for someone to take his hand and lead him. When the governor saw what happened he believed and was astonished at the power of God's message." (Vide Acts 13:6-12).

4.21 Even God saw the need to give laws of conduct to his favourite people. Leviticus is a book written in he year 1420 BC. It sets down regulations that were to govern the life of God's people in general. One of he regulations states:-

"Do not defile yourselves by consulting mediums and wizards, for I am Jehovah your God" (LV. 19.31) "I will set my face against anyone who consults mediums and wizards instead of me an I will cut that poison off from his people. So sanctify yourselves and behold for I am the Lord your God. You must obey all my commandments for I am the Lord who satisfies you" (LV 20:6-8)

4.22 What are contained hereinabove quoted passages are in short what are contained in section 3,4,5 and 7 of Witchcraft ordinance. Governments issue to the people laws through "consensus" of people as law are made through representatives of people. This law was made in 1928 to ensure that people who threaten the lives of others shall be punished. Threats are connected with consulting mediums, naming others as witches/wizards, using instruments of witchcraft etc. all these activities are punishable under the law.

4.23 In view of the analysis of the law and the views of the people form history of the ancient times to modern times the Tanzanias in particular, nobody is entitled to infringe on the rights of the Tanzanias through witchcraft activities as enshrined in the witchcraft Ordinance (cap. 18). Therefore none of the sections offend Article 17 of the Constitution.

5.0 RECOMMENDATIONS:

5.1 The law Reform Commission endorses the public views that:

1. Tanzanias in general believe that witchcraft, witchcraft beliefs and attendant activities connected thereof exist within the society and this phenomenon cuts across among both educated and uneducated members of the Tanzania society.
2. Witchcraft has a negative impact on the Tanzanian Community as it has been a source of deaths, terror, threats and insecurity; it fosters disharmony and hatred among people in the final analysis.

5.2 The Law Reform Commission is of the considered opinion that the validity of the legislation is justified and it should be retained. It is saved by Article 30(1) and (2)(a) of the Constitution. Equally if the argument of unconstitutionality is based on application of section 8 of the Ordinance then it is also saved by the same Article 30(1) and (2)(a). the Law should therefore be retained to curtail witchcraft activities and beliefs as well as to punish witchcraft perpetrators.

5.3 However, the following amendments are recommended;-

1. Section 5 on sentencing should be reviewed i.e life imprisonment and increased fines of shs. 10,000/= 15,000/= and 40,000/= respectively.
2. The District Commissioners should continue to have the powers under section 8 of the Ordinance.
3. The Director of Pubic Prosecutions should dispense with his power of consent for purpose of speeding up trials of witchcraft offences.

(iii) THE ECONOMIC AND ORGANISED CRIME CONTROL ACT, 1984 – ACT NO. 13 of 1984 (As amended by act No. 12/87, No. 13/88, No. 10/89, No. 4./91, No. 3/92).

1.0 STATE OF THE LAW

1.1 The Economic and Organized Crime Control Act No. 13 of 1984 was passed to replace the Economic Sabotage (special Provisions) Act, No. 9 of 1983 which was enacted for the purposes of dealing with increased acts of corruption, racketeering, profiteering, illegal trade, and other acts of social and economic nature in the country. These social and economic evils posed a real threat to the peaceful running and good management of the country and of its people.

2:0 CRITICISM BY THE NYALALI COMMISSION

2.1 In the Nyalali Commission Report Book Three at page 38, the Commission observed that, not all offences listed under the Act are economic offences in the real sense of the word. Most of the offences are ordinary criminal offences adequately covered (as they were) by the Penal Code and other pieces of lagislation from which they were extracted.

2.2 The Procedure for arrest, investigation and trial are unnecessarily long the effect of which is to cause unnecessary delays, congestion in the courts, unnecessary hardships and harassments to the accused persons thereby defeating the constitutional right of an accused to have a speed trial and determination of his case.

2.3 In certain cases the Director of Public Prosecutions has been given discretion to decide whether or not an accused person should be granted bail. It is a constitutional right that an accused person should be given bail and this right should be decided by the courts only.

2.4 None of the offences under this Act can cease to be economic offences unless and until it is so declared by an Act of Parliament. And that like any other piece of legislation there is absolutely no magic whatsoever in the Act.

2.5 The Commission recommended that the relevant Authorities do revisit this law for he purpose of determining whether there is read to maintain it in its present form.

3.2 PEOPLE'S VIEWS

3.1 During the regional visits views were expressed to the effect that people were concerned about the unnecessary legal problems connected with this law. People are aware that trial of offences under the Act, take long time to complete because of the cumbersome and irksome investigation and prosecution. In view of this process, suspects are kept in remand for along time and in many cases bail is denied. It was therefore recommended that the law should be amended or repealed to remedy the situation.

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION

4.1 Upon examination of the Act the Law Reform Commission concurs with the criticism by the Nyalali Commission.

4.2 The Acts introduced the procedure to deal with offences which are still covered by other existing legislations such as the Penal Code, Drug Trafficking Act, Prevention of Corruption Act, etc. the Commission further observes that the procedure under reference is cumbersome, protracted and time consuming thereby causing unnecessary delays in the disposal of cases; hence denies the accused person his constitutional right to have speedy trial.

5.0 RECOMMENDATIONS

5.1 In the light of the above observation the Law Reform Commission recommends that the offences envisaged by the Act be dealt with by the existing relevant legislations and the Act be repealed accordingly. However, the existing legislations should be revisited to reflect the spirit of he Economic and Organized Crime Control Act particularly in respect of sentencing pattern. i.e. the sentences should reflect the gravity of the respective offences.

CHAPTER THREE

SELECT CRIMINAL PENALTIES

This Chapter deals with Select Criminal penalties. It covers two important penal legislations: i.e Corporal Punishment and Capita Punishment. It sets out the state of the law, Nyalali Commission criticism, People's views, The Law Reform Commission's weighing up and thereafter recommendations.

Any civilized society must protect its members against physical injury and other kind of harm but this aim is not pursued in complete disregard of individual liberty and other considerations. Not every wrongful act necessarily attracts the Criminal sanction. Provisions are made for fair and impartial determination of the suspect's guilt. It has been argued that the penalties inflicted for crimes must not offend against consideration of humanity.[1]

A man is only punished for his own conduct and not for that of others. The Principle is summed up in the maxim "nulla poena sine lege", according to which no one should be punished by law except for a breach of law. The Principle of legality demands that the citizen should be ruled by law and not by the decisions of individual men.[2]

1.4 Further, the fundamental requirement of any society is the ability to protect itself against annihilation or subjection, and the chief duty of any government is to safeguard the state and its institutions against external and internal attack. A government which fails in this duty cannot provide and ensure the freedom and stability necessary for the members of society to work out their own destines in peace. Without such guarantee of stability the rest of the law both civil and criminal, is for the most part inefficacious.[3]

1.5 The punishment of Criminal is justified by the aim of protecting the community by preventing crime.[4] According to Lord Denning in his evidence to the Royal Commission stated, 'the Ultimate justification of any punishment is ...that it is the emphatic denounciation by the community of a crime and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denounciation of all, namely the death penalty.[5] Such denounciation serves, partly by fostering an abhorance of crimes, to lessen the incidence of such and so to protect the community.

---

[1] Fitzgerald, Criminal law & Punishment P.223
[2] ibid p. 83
[3] ibid p. 169
[4] ibid p. 223
[5] cf p. 204 n.1

(i) CORPORAL PUNISHMENT ORDINANCE, 1930 (CAP. 17): AS AMENDED BY ACTS NO. 11/70 AND 10/89

1.0 STATE OF THE LAW

1.1 Corporal Punishment which appears in item 3 of section 25 of the Penal Code Cap. 16, was enacted at the same time as the Ordinance; is a type of punishment or penalty which may be imposed by courts. It has; however, have to be administered in compliance with the Ordinance. Section 2 of he Ordinance, defines corporal punishment to mean:-

a) Whipping in case of adults.
b) Caning in case of juveniles.

The word 'Punishment' is not defined by the Ordinance or the Penal Code, but borrowing the definition from the Concise Oxford Dictionary, the Word 'Punish' can mean "to cause (offender) to suffer for offences, chastise, inflict penalty on ..." Briefly therefore punishment means the penalty for transgressing the law.

1.2 The *Minimum Sentences Act 1963* made corporal punishment mandatory for certain offences and so the provision of section 28 of the Penal Code which states:-

> **"Subject to the provision of the Minimum Sentence. Act 1963 when in this Code it is provided that any person shall be liable to undergo corporal punishment, such punishment shall if awarded, be inflicted in accordance and the adjustments to sections 3 and 11 of the ordinance with provision of corporal Punishment Ordinance which restricted and modified the application of corporal punishment to offences specified in the Act 29 of 1963.**

The provision of section 5 provides that:

> **"Any person convicted of any offence mentioned in Part I of the Schedule to the Ordinance shall be liable to corporal punishment in lieu of or in addition to any other punishment which he may be liable for such offence"**

1.3 There then followed the Minimum Sentences Act 1972 which abolished the provisions of its predecessor. The provisions were again brought back by the written law (Miscellaneous Amendments) Act No. 10 of 1989.

1.4 The infliction of penalty of that kind is a must for offences listed in Part I of the Schedule to the ordinance. The offences envisaged are:

Part I of the Schedule;

1. Offences made under section 222 of the Penal Code involved acts done with intention of maiming, disfiguring causing grievous bodily harm or preventing arrest.
2. Offences under Chapter 24 of the penal Code, including any assault included in Chapter 24 of aggravated nature by reason of he youth, condition or sex of the prisoner upon whom or by reason of the nature of the weapon or the violence with which such assaults have been committed.
3. Offence of cattle theft as per Penal Code section 268.
4. Offences of burglary where at the time of commission of the offence, the offender is armed with a dangerous or offensive weapon as per Penal Code. S. 294

Section 6 of the Ordinance spells out the liability of juveniles to corporal Punishment.

Part II of the Schedule:

1. Rape S. 131 of Penal Code Cap 16
2. Attempted Rape section 132 Penal Code.
3. Defilement of a girl under age of 12 years S. 136 Penal Code.
4. Attempted defilement – S.136(2) Penal Code.
5. Defilement or Attempted defilement of an idiot or imbecile – S137 Penal Code.
6. Indecent assault of a boy under 14 years – S.156. the other offences have been substituted by Act No. 10 of 1989 and these were robbery with violence, attempted robbery with violence, mutiny incitement to mutiny by a convict.

1.5 There is subsidiary legislation made under S.9 which lays down Rules of inflicting corporal punishment: Rules 2 and 3 deals with how to inflict the corporal punishment on adults and juveniles as well as giving the description of the cane to be used. Rule 4 describes the need to make the person secured so that the cane cannot fall on another part of the body. Rule 5 provides for a piece of cotton soaked in an antiseptic solution to be kept spread over the buttocks of the person undergoing the punishment.

1.6 Section 8 of the Ordinance limits the power to award sentence of corporal punishment so that it shall not apply to

- Females
- Males convicted of death and males of over 45 years.
- Males of over 45 years.

1.7 The law ensures that for adults sentenced for corporal punishment shall be those for offences mentioned in the schedule of the Ordinance and that (for adults) the number of strokes shall not exceed 24, while for those juveniles shall not exceed 12. It is provided for that no two inflictions of corporal punishment shall be administered within 14 days of the previous infliction, nor shall the administration be in public unless the court finds it so desirable in case of juveniles.

1.8 There is a prohibition that there shall not be infliction in default of fine or accumulation of punishment. The law further provides for the mode of infliction and that where confirmation of sentence is required, it should not be carried out unless confirmed. Section 12 as repealed by (Written Law (Miscellaneous Amendment Act No. 10 of 1989) provides that the court should specify the number of strokes to be inflicted and that for Part III of the Schedule to the Ordinance the number of strokes shall be 12.

1.9 The offences in Part II are:

1. Robbery with violence.
2. Attempted Robbery or Attempted, armed robbery.
3. Assault with intent to steal.
4. Unlawful possession or unlawfully dealing in trophies or Government trophies, unlawfully capturing, hunting or trapping animals in a game reserve, game controlled area or national park.

1.10 Section 12(3) of the amendment also provided for infliction of corporal punishment in two installments one half at the commencement and the second half immediately before release. There is a further amendment to the Part II of the Schedule by substituting items 7, 8 and 9 as follows:

7. Robbery with violence or armed robbery
8. Attempted robbery, robbery with violence or armed robbery.
9. Assault with intent to steal.
10. Unlawful possession of ammunition or arms of war.
11. Mutiny or incitement by a convict.
12. Unlawful possession of or unlawful dealing in trophies or Government trophies, unlawful capture, hunting, or trapping of animals in a game, reserve, game controlled area of national park.

1.11 With regard to the execution of the sentence section 13 of the Ordinance as was amended by the Act. No. 11 of 1970, provided that the sentence be carried out before the expiry of 6 months and that where there is an appeal, within 6 months from the date of disposal of the appeal.

1.12 There are also provisions as to detention pending the carrying out of sentence, medical examination as to fitness to undergo punishment and lastly consideration for suspension of the sentence incase the offender is declared unfit. The provisions travailed show that the Ordinance is intended to be complied with only in the manner provided, which manner is mandatory.

CORPORAL PUNISHMENT IN ADDTIION TO IMPRISONMENT

1.13 General provisions of law do exist which prohibit that no person may be sentenced to corporal punishment where the term is less than that specified or by which no corporal punishment in excess of a specified number of strokes may be carried out without prior confirmation by the High Court.

1.14 Corporal Punishment is a punishment based on policy rather than the discretion of the judicial officers. It is a punishment prescribed for offences where offender's act involves some force or threats to use force to the victims of the crime, or offences which are related to those offences which cause bodily harm on one hand and on the other hand cause great social harm to the community. In other words the policy is that the culprit should suffer bodily harm where his act causes an individual or society to suffer. From this sentence the offender will be made to suffer pain for his deed but also deter other would be offenders by reflecting what might fall or them, therefore refrain from committing such offences.

From the above discussion of the philosophy and policy of sentencing, it can be reasoned why the offences in part I – III of the Schedule to the Ordinance can attract corporal punishment as provided for under section 28 of the Penal Code. The offences under the parts to the schedule have already been shown earlier.

1.15 CORPORAL PUNISHMENT FOR ADULTS

Section 5 of the Ordinance states: -

"Any adult person convicted of any schedule offence in Part I of the Ordinance is liable to corporal punishment either in view or in addition to any other, punishment to which he may be liable for such offence".

1.16 CORPORAL PUNISHMENT FOR JUVENILES:

Section 6 of the Ordinance states: -

"Any juvenile convicted of any offence under the Penal Code other than an offence punishable with death, or any offence punishable under any law with imprisonment shall be liable to corporal punishment either in lieu of any other punishment to which he may be liable for such offence".

2.0 THE MISCHEF FOR THE ENACTMENT OF ORDINANCE

2.1 The Ordinance was enacted on the 1st July 1930, to regulate the infliction of corporal Punishment. This punishment can be traced back to the days of Moses when he wrote the book of Deuteronomy in about 1220 or 1420 B.C. as seen in the chapter 25 verses 1-3 of that book which states:

"If a man is guilty of a crime, and the penalty is a beating, the judge shall command him to lie down and be beaten in his presence with up to forty (40) stripes in proportion to the seriousness of the crime; but no more than forth stripes may be given lest the punishment seem too severe, and your brother be degraded in your eyes".

2.2 The colonial government in enacting this law followed the footsteps of the Holy Books as did the Germans and our tribal customs. The administration of the corporal Punishment was, as a punishment for various serous offences including the chastisement of children who did not comply with the norms of the community.

2.3 It is still a correctional measure against children in many homes even today. History seems to show that the law has changed in its application from times when it was applied to Africans only.

2.4 Major de Toit a member of the Legislative Council from Arusha is recorded in the Hansard to have expressed that without the 'kiboko' the African's advancement in education would be very slow. This reference of application to the 'African's' was noted to be 'unfair' by Hon Mr. Paul Bomani in his maiden speech on 2nd December 1954. It is not certain but we may only have our customs to blame for the existence of the law. In 1951, a Bill called the Corporal Punishment (Amendment) Bill was introduced in the Legislative Council by the then Minister for Legal Affairs. The amendment was to effect a reduction in offences for which corporal punishment was to be awarded. The task was based on the Government's Compliance with its policy of progressive reduction in offences awardable with corporal punishment. The Bill was how ever, stood down to 1954 when the second reading took place in November 1954.

2.5 From the description of the law and its provisions, it is very clear that the Ordinance is still

a law which has for the last 66 years been existing to regulate the infliction of corporal punishment from time to time meeting the prevailing changes of time, with amendment to the law. From its inception, it seems to have carried the principle of 'do unto others as you would have done unto you.'

2.6 The law has all through excluded its application to females an element which today has invited questions as to why it should be so, given that women have quest for equal rights as declared by the Constitution. However, this is different in the National Education Act No. 25/78. Corporal Punishment is administered to pupil's under the National Education Corporal Punishment Regulations (Control of Administration of Corporal Punishment in Schools) 1979. These regulations are made under section 60(1) of the National education Act. In this Act Corporal Punishment means "punishment by striking a pupil on his hand or on his normally clothed buttocks with a light flexible stick but excluded striking a child with any other instrument or any other part of the body.." Corporal punishments are administered for serious breach of school discipline or grave offences. The strokes shall not exceed 6 strokes on any one occasion. Female pupils may only receive corporal punishment from female teachers except where there is no female teacher with a written authorization from the head of the school.

2.7 The question is even louder when females are found to be the partners in some offences listed in the schedule to the Ordinance. In 1989 when the Written Laws/Miscellaneous Amendment Act No. 10 as regards inflicting corporal punishment upon female offenders, the Minister for Justice responding to the question of equality stated that the exclusion of females was no discrimination and if anything had the backing of the Constitution. The Honorable Minister expressed the hope that the issue if given time might resolve itself. Unfortunately the commission research has failed to lay its hands on the record of the debate at the first reading of the Bill for the Ordinance to see what was intended as against female offenders.

2.8 In 1951 during the second Reading of the Amendment Bills to the Ordinance, the Honorable member for law and order had then said of the amendment.

"The view of this Government is that quite clearly corporal punishment at this stage of the development of this territory cannot be possible be abolished completely, but they do consider that corporal punishment should only be reserved for grave offence and offences which involve real violence. Contributions to the debate include the following statements

"We have got to so conduct our affairs that they fit in with conditions in the country in which we live, not in the country used to live, or in which we see any other people live..."

"The fact that the law allows corporal punishment does not necessarily mean that corporal punishment is always inflicted on infringement we also know that we can trim our laws and make them more up to-date without doing any damage whatsoever but we can say and say it with an open heart – that we have examined our laws, we have examined our state of affairs in our own country, we have behind us the knowledge of what goes on in this country, what our people are like and how to administer them, and in the light of that knowledge we have amended our laws and are satisfied that we have gone as far as is

desirable and necessary. It may be that in a few more years time five, ten or fifty... our successors will examine the laws again and trim them again and once again bring them up to modern standards."

2.9 These sentiments have been repeated as late as 1989 by the Minister for Justice when winding up the debate he expressed the view that the amendments which had been effected satisfied the needs of the time for the offence concerned those of hijacking and possession of firearms. So we should wait and see what reaction the amendments would produce. From the premise above the Law Reform Commission is of the view that the Ordinance still fulfills the intention for which it was passed.

3.0 CRITICISM OF THE LAW BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission in Book Three page 10 of its report criticizes corporal punishment as being cruel, inhuman and degrading punishment. It also castigates therefore that the punishment is unconstitutional because it violates Articles 13 *6) of the Constitution.

3.2 The commission observed that in other democratic societies such as United Kingdom, Canada, Australia the United States of America and lately Zimbabwe, corporal punishment has been declared unconstitutional and cited Article 3 of the European Convention of Human Rights as Confirmed by the court in the case of Tyrer UK (ZE.H.R.R.1)

3.3 The Commission considered corporal punishment to be a manifestation of anger rather than reason.

3.4 Both the Education Act No. 25 of 1978 and the Prisons Act, No. 34/1967 were cited as Acts which allow corporal punishment. The commission recommended that the Law Reform Commission should look into the appropriateness of maintaining corporal punishment as a punishment and make necessary recommendations:

4.0 PEOPLE'S VIEWS

4.1 The Nyalali Commission recommendation to the Law Reform Commission was put to the participants of the Workshop on the designated laws in the light of the state of the law as applicable today. Few agreed with the proposition that corporal punishment was primitive and unconstitutional because it was torturous, degrading and inhuman, and contravenes Article 13(6) (e) of the Constitution and therefore that it should be abolished in line with countries of the Western World like the UK, Canada etc. The majority had opposite view did not equate corporal punishment with torture because it was legally applied and proportionate to the offences committed. They stated therefore that the Constitution was not contravened.

4.2 In the same vein, the participants were of the unanimous view that corporal punishment is still desirable and was appropriate means of chastisement from time immemorial. It was indeed pointed out that it was a correctional measure still in use against children.

4.3 Further the participants noted with horror and condemnation that there was an increase in

incidents of rape, robberies with violence and defilement of children, acts which were inhuman, degrading and which cause intolerable bodily pain. In such cases it was argued that the present corporal punishment should be enhanced to act as both punitive and deterrent. Additional views were expressed to the effect that in Tanzania corporal punishment was necessary and proper punishment for the offences specified. Special note was taken of the fact that our society still holds dearly the cultural values of family love and communal living which has to be conserved. Participants even felt that the proverb 'spare the rod spoil the child' is still relevant today.

4.4 Members of the public who were visited in the regions were briefed on the state of the law of corporal punishment with the view to obtaining views on whether corporal punishment should be abolished or not. On the issue of the propriety of corporal punishment the general view of the members of the public supported its retention. The public noted with horror and condemnation the increase in the rate of crime like defilement, rape, armed robbery, stock theft act. Particular concern was expressed on the danger of victims of rape and defilement being infected with aids. It was further contended that the victims' lives may be endangered with intense physical, psychological as well as emotional suffering. With this background, it was argued that corporal punishment is most appropriate for being both punitive and deterrent. The argument that corporal punishment is inhuman, degrading and torturous to the culprit was rejected as in committing these serious offences the culprit ought to know the consequences thereof.

4.5 It was therefore recommended as follows: -

1. The punishment be enhanced by doubling the number of strokes and canes applicable.
2. The execution of the punishment be in public to maximize the punitive and deterrent effect.
3. The punishment should not discriminate between sexes but should apply to both men and women.
4. The punishment should not be restricted to convicts aged up to 45 years but should be applicable to convicts of all ages.
5. The punishment should be included in the Minimum Sentence Act and the minimum sentence be twenty four strokes and twelve canes.
6. The list of offence to which corporal punishment is applicable should include drug trafficking and witchcraft.

4.6 On the other hand the minority view was that corporal punishment should be abolished as it infringes on human as it is inhuman, degrading and torturous.

5.0 THE LAW REFORM COMMISSION'S WEIGHING UP

5.1 The issue in hand should be considered bearing in mind the stage of development here in Tanzania as compared to the countries of Western World. A good example is the simple factor when Tanganyika as a Territory in 1930 was enacting the corporal punishment Ordinance, Britain for one had already moved towards the abolition of corporal Punishment for juveniles and adults with one exception for certain offences committed by inmates of prisons, notably mutiny and offering gross personal violence to prison officers. This took place in 1948 through the Criminal Justice Act of 1948. Then between 1951 – 1954 when

again Tanganyika territory was passing a Bill to amend the Ordinance by way of reducing offences under the Penal Code where corporal punishment may be inflicted on one hand and on the other hand an implementation of the Government's policy of progressing reducing corporal punishment for adults. Needless to say, that even at that time corporal punishment was branded to be a cruel punishment. These time gaps in development are relevant as much as we have also to be seen to be making an effort to move with the time. The time gaps are relevant because those democratic societies have gone through a cycle which enable them to do extensive research on the issue and therefore to be in a position to properly propound alternative means.

5.2 It is the opinion of the Law Reform Commission and indeed that of the majority of public who discussed the issue in hand and whose opinion form part of this report that since no research has yet developed for us alternative means, and that corporal punishment has yet to complete a cycle, it remains to be acceptable to the public at large, as a fit mode or punishment for an adult person in respect of offences specified under the Ordinance. The nature of basic principle of this law, is that of "doing to the neighbour, what you wish done unto yourself". In other words the law is proportionate to the seriousness of the criminal conduct vis a vis the offences listed in the schedule of the Ordinance.

The Article 13(6)(e) of the Constitution provides that:

"no person shall be subjected to torture or to inhuman or degrading treatment."

5.3 This provision applied to the corporal punishment perse, it is contended that the Ordinance offends the Constitution. It also submitted that in view of the necessity of the punishment in our society Article 30(2)(a) and (c); of the constitution for:

(a) ensuring that the rights and freedoms of the others or the public interest are not prejudiced by the misuse of the individual rights and freedoms.

(b) .....

(c) Ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceedings.

5.4 The Corporal Punishment is therefore a valid law of this country, and as observed earlier it has strict provisions of how it is to be complied with. Indeed it is observed that the changes effected to the Ordinance have been needful of the changing circumstances.

5.5 The amendments effected which include the Minimum Sentence Acts of 1963 and 1972 enacted to curb prevalence of crime have tended to provide for specific sentences for specific offences. It would appear that the authorities have complied with the provisions of Article 30(2)(a) and (c) of the Constitution.

5.6 The provision for corporal punishment derives its origin from our customs as a means to chastise children who did not comply with the community norms and remains a correctional measure against children. The punishment under the education Act No. 25 of 1978 was intended to match that which a parent would administer and more importantly to nip the evil in the bud' as it were. The Prisons Act No. 34/1967 was intended to consolidate and amend the law relating to prisons and to provide for the organization, powers and duties of prison officers and for matters incidental thereto and connected therewith.

The 'penalty' section has two provisos, that corporal punishment shall not be awarded except for an offence involving personal violence to a prison officer and .....that no sentence of corporal punishment shall be carried out unless such sentence has been confirmed by the Commissioner.

5.7 For a premise like the prison, the conduct of a prisoner officer, towards another prisoner or prison officer, is relevant to the safeguard of the rights of inmates vis a vis the prison officers and their duties in ensuring execution of order of the court. A disturbance of this balance would definitely prejudice public interest. It is in this context that the Commission is of the view that the two Acts above like the Corporal Punishment Ordinance are saved by the Article 30(2)(a) and (c) quoted earlier.

6.0 RECOMMENDATIONS:

6.1 The Law Reform Commission observes that corporal punishment is proportionate to the offences listed under the Schedule to the Ordinance.

6.2 The Commission recommends that:

(a) The law be retained.

(b) The punishment should not be discriminatory between sexes; it should apply to both men and women.

(c) The punishment should be enhanced and the minimum sentence be twenty four (24) strokes and twelve (12) canes.

(d) The punishment should not be restricted to convicts aged up to 45 years but should be applicable to convicts of all age.

(e) The list of offences to which corporal punishment is applicable should include drug trafficking and witchcraft.

(ii) CAPITAL PUNISHMENT

(Section 39, 40, 196, 197 of the Penal Code, Cap. 16)

"When the Death Penalty goes, it should go for good. It's abolition therefore should be the result of careful thought and consideration, not of emotionalism and snap decisions."[6]

1.0 THE STATE OF THE LAW

1.1 Capital Punishment is the legal taking of a person's life as punishment for crime committed. Death penalty was introduced in Mainland Tanzania by the Colonial rule. The legislation was passed to apply section 302 of the Indian Penal Code, to the territory and such legislation was replaced by section 2 of the Punishment for Murder Ordinance, No. 28 of the Tanganyika Territory , in 1921.

1.2 In Mainland Tanzania the only offences, which attract capital punishment are murder contrary to sections 196 and 197 of Penal Code, (Cap. 16). In the case of murder it is mandatory for the High court to impose the death penalty, while on the other hand, it is discretionary in the cases of offences of treason and treasonable felonies.

---

[6] P.J. Fitz Gerald - Criminal law and Punishment Page 228

1.3 The provisions of the law that provide for such penalty are the following:
"S 196" Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."

S.197 Any person convicted of murder shall be sentenced to death:

Provided that, if a women convicted of an offence punishable with death is alleged to be pregnant, the Court shall inquire into the fact and, if it is proved to the satisfaction of such court that she is pregnant the sentence to be passed on her shall be a sentence of imprisonment for life instead of a sentence of death.

S. 39 (1) Any person who being under the allegiance to the United Republic: -

(a) In the United Republic or elsewhere attempts to murder the President, or;

(b) In the United Republic, levies war against the United Republic shall be guilty of treason and shall be liable on conviction to suffer death.

(2) Any Person who, being under allegiance to the United Republic, in the United Republic or elsewhere, forms an intention to effect, or forms and intention to instigate, persuade, counsel or advise any person or group of persons to effect or to cause to be effected, any of the following acts, deeds or purposes, that is to say: -
(a) the death, miming or wounding, or the imprisonment or restraint of the President or
(b) the deposing by unlawful means of the President from his position as President or from the style, honour and name of Head of State and Commander in-Chief of the Defence Forces of the United Republic; or public order or the government of the United Republic, or
(c) the overthrow by unlawful means of the government of the United Republic; or
(d) the intimidation of the executive, the legislature or the Judiciary of the United Republic and manifests such intention by publishing any writing or printing or by any overt act or deed whatsoever shall be guilty of treason and shall be liable on conviction to suffer death,

(3) Any person who, being under allegiance to the United Republic:
(a) adheres to the enemies of the United Republic of gives them aid or comfort, in the United Republic or elsewhere, or
(b) instigates, whether in the United Republic or elsewhere any person to invade the United Republic with the an armed force.
(c) takes up arms within the United Republic in order, by force of constraint, to compel the government of the United Republic to change its measures or counsels, or in order to put any force or constraint on, or in order to intimidate or overawe, the Government of the United Republic, shall be guilty of treason and shall be liable on conviction to suffer death.

(4) Any person who, being under allegiance to the United Republic, in the United Republic or elsewhere, with intent to help any enemy of the United Republic does any act which is designed or likely to vie assistance to such enemy, or to interfere with the maintenance of public order or the government of United Republic, or to impede the operation of the Defence Forces or the Police Force, or to endanger life, shall be guilty of treason and shall be liable on conviction to suffer death.

S.40 Any person who, not being under allegiance to the United Republic, in the United Republic or elsewhere, commits any act or combination of acts which if it were committed by a person who is under allegiance to the United Republic, would amount to the offence of treason under section 39, shall be guilty of a felony and shall be liable on conviction to be sentenced to death.

S.26(1) When any person is sentenced to death, the sentence shall direct that he shall suffer death by hanging.

(5) Sentence of death shall not be pronounced on or recorded against any person, who in the opinion of the court, is under eighteen years of age, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affairs may direct, and whilst so detained shall be demanded to be in legal custody.

(6) When a person has been sentenced to be detained during the President's pleasure under the last preceding subsection, the presiding judge shall forward to the Minister for the time being responsible for legal affairs a copy of the notes of evidence taken at the trial, with a report in writing signed by him containing such recommendation or observations or the case as he may think fit to make"

2.0 CRITICISM BY THE NYALALI COMMISSION

2.1 In Book Three at page 25 and 26 the Nyalali Commission had this to say on Death Penalty: -

2.2 DEATH PENALY:

"The Penal Code; Cap. 16 provides for death penalty for two offences:
(a) Murder contrary to sections 197 and 196 (mandatory) of the Penal Code
(b) Treason contrary section 39 and 40 of the Penal Code".

2.3 GENERAL COMMENTS

"During the First Phase Government a few death sentences were carried out. However, this trend has changed. Several death sentences have been executed during the Second Phase Government and to date there are over 400 condemned prisoners awaiting execution".

"In democratic societies, death penalty is regarded as a barbaric form of punishment. Amnesty International has pleaded to all civilized and democratic states to abolish DEATH

PENALTY. During its 1977 conference at Stockholm a Declaration was adopted on the Abolition of the Death Penalty. This is known as Declaration of STOCKHOLM, 1977."

The Stockholm conference on the Abolition of the Death Penalty composed of 200 delegates and participants from Africa, Asia, Europe, The Middle east, North and South America and the Caribbean region.

RECALLS THAT:
"The death penalty is the ultimate cruel, inhuman and degrading punishment and violates the right to live".

CONSIDERS THAT:
"The death penalty is frequently used as an instrument of repression against opposition, racial ethnic, religious and under privileged groups.

- Execution is an act of violence, and violence tends to provoke violence.
- The imposition and the infliction of death penalty is brutalizing to all who are involved in the process.
- The death penalty has never been shown to have a special defferent effect.
- The death penalty is increasingly taking the form of unexplained "disappearances," extra judicial executions and political murders.
- Execution is irrevocable and can be inflicted on the innocent.

AFFIRMS THAT:
"It is the duty of the state to protect the life of all persons within its jurisdiction without exception."

DECLARES:

- Its total and unconditional opposition to the death penalty.
- Its condemnation of all executions, in whatever from, committed or condoned by governments.
- Its commitment to work for the universal abolition of the death penalty.

CALLS UPON:

- Non-governmental organizations, both national and international to work collectively and individually to provide public information materials directed towards the abolition of death penalty.
- All governments to bring about the immediate and total abolition of the death penalty.
- The United Nations unambiguously to declare that the death penalty is contrary to international law.

2.4 RECOMMENDATIONS:

The Nyalali Commission recommended that the Law Reform Commission look into this law and make the necessary recommendation to the appropriate authorities in respect of maintaining or otherwise of Capital Punishment as one of the punishments under the Penal Code, Cap. 16.

3.0 PEOPLE'S VIEWS:

3.1 During the Workshop held by the Law Reform Commission on the 11th and 12th April 1996 in Dar es Salaam a divergence of views emerged from the participants on the issue of capital punishment. It was strongly argued on one hand that every punishment is supposed to be corrective to the person who is being punished but this is not the case with capital punishment. Equally, it was pointed out that since Society can not give life to a person it has no authority to take it away. In addition it was argued that capital punishment in treasonable offences could be used for political ends. Supporters of this view therefore recommended the abolition of capital punishment and replacing it with imprisonment for life with hard labour.

3.2 Conversely, there was another view which supported capital punishment for murder and treasonable offences. The argument is that capital punishment is punitive, retributive and deterrent. Further, since a person has no right to take the life of another but when he does so the community has in turn the moral obligation to average the deceased and deter others from committing the same offence.

3.3 In respect of treason it was argued that Capital punishment may be appropriate as deterrence for people who intend to take political power by arms which usually involve taking lives of innocent persons.

3.4 It was recommended that the Commission should continue to research on the matter and collect more data on the following.

1. To find out how much capital punishment has reduced the crime of murder;
2. How many convictions of murder were made in the High Court over a certain period;
3. How many convictions of murder were given by the Court of Appeal over the same period as (2) above;
4. How many convicts were executed;
5. How long it took from conviction to execution.

3.5 The majority views of members of the public from the Regional visit supported the retention of death penalty for murder, treason and treasonable be offences. They observed that capital punishment is retributive and deterrent thus befitting the offences of murder and treason. It is needed to ensure the maintenance of peace and order in the community, since it was felt that people would be afraid of killing each other unwantodly.

3.6 With regard to murder, it was argued that whosever violates the right to life of another loses his right to life and , the society has in turn the obligation to avenge the deceased and thus deter others form committing the offence.

3.7 As for treason and treasonable offences it was contended that this can be the cause of civil strife, loss of lives, property ad total destabilization of a Country or Nation.

3.8 The proponents of this view were also convinced that society has the right and authority to impose capital punishment for the purpose of protecting itself and ensuring its continued existence. Murder and treason were observed to be heinous offences calling for

condemnation by the society/community as they threaten the foundation of peace, security and tranquility of society. Therefore, they deserve to be seriously dealt with. They further recommended that the following offences should attract capital punishment:-

1. **Robbery with violence**
2. **Defilement and rape**
3. **Drug trafficking**
4. **Witchcraft**
5. **Burglary**
6. **Abortion**

3.9 It was further recommended that punishment be executed in public with minimum delay.

3.10 On the other hand the minority view was that capital punishment should be abolished and instead life imprisonment without remission be imposed on offences of murder and treason for the following reasons:

1. Capital punishment has no rehabilitative effects on the culprit.
2. Society has no right to take one's life because it cannot take what it cannot give.
3. Capital Punishment is inhuman and cruel.
4. With regard to cases of treason and treasonable offences, it was observed that these are politically motivated offences which might be of benefit to the society in the future.

4.0 THE LAW REFORM COMMISSION'S WEIGHING UP

4.1 SURVEY OF STATE OF THE LAW OF THE OTHER COUNTRIES: THE UNITED STATES OF AMERICA.

4.2 The United States of America through the Eight amendment to its Constitution provides that "Excessive bail shall not be required, not excessive fines be imposed, nor cruel and unusual punishment be inflicted." However, the death penalty is included in the statutes of thirty seven (37) states (as on 1st October, 1986). It is imposed on crimes of murder and the death penalty or execution is either by lethal injection, electrocution, using the electric chair, exposure to lethal gas, hanging or by a firing squad.

4.3 The abolitionists in the United States of America who were fighting against death penalty such as the lawyers of the legal Defence and Educational Trust (LDF) and the American Civil Liberties Union (ACLU) assisted the convicted prisoners to challenge the constitutionality of the state capital laws. In 1972 the Supreme Court in the case of Furman v Georgia, ruled five vote to four that the death penalty, was imposed under the then existing laws, constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendment to the US Constitution. The Fourteenth Amendment prohibits the state from depriving a person of "life, liberty and property, without due process of he law" The ruling was based on what the judges saw as the death penalty's arbitrary and capricious application due to the unlimited discretion afforded to the sentencing authority (juries or judges) "in capital trials". That judgment forced 33 states to introduce revised death penalty statutes which in 1975 was tested in Gregg. V. Georgia (1976). The appeal cases involved prisoners sentence to death under the new laws enacted in Georgia, Texas and Florida and the court ruled that the death penalty was constitutional if imposed for the crime of murder.

4.4 It should be noted that in Georgia and several other states retained the death penalty for a number of other crimes e.g rape as in Coker v. Georgia (1977) the Court ruled that the death penalty was " grossly disproportionate and excessive" for the non-homicide) rape of an adult woman therefore rape of an adult person was no longer a capital offence. That case was followed by Eberheart v. Georgia (1977), in which the Supreme Court also held that a sentence of death imposed for the crime of kidnapping would be "cruel and unusual."

4.5 Moreover in the case of Lockett v. Ohio (1978), Sandra Lockett was convicted of participating in a murder committed by an accomplice during a robbery of a pawn shop; she was outside in the car while the robbery and murder took place therefore she did not participate in the murder and she did not know that a killing would occur or was planned. The Supreme Court struck out an Ohio statute which provides that a death sentence must be imposed on an offender convicted of aggravated murder, unless one of any three specifically enumerated mitigating circumstances was present. The Supreme court held that the Eight and Fourteenth Amendments to the Constitution required the sentencing authority to consider by circumstances that may be present in mitigation before choosing between life and death. However, in Enmund v. Florida (1982) Earl Enmund had participated in armed robbery, during the commission of which an elderly couple was killed. It was found that he was not present when the killings occurred because he was waiting in a car outside the house, where the robbery took place. Though he had helped to plan the robbery there was no evidence that he had intended for any one to be killed or anticipated that lethal force would be used. The Supreme Court held that the Eighth Amendment prohibited states from sentencing to death accomplices an act to a of murder unless they show that the accomplice actually did the killing or attempted to do it or interned that the killing should take place or that lethal force be employed.

THE UNITED KINGDOM OF GREAT BRITAIN:

4.6 In the United Kingdom of Great Britain death penalty was suspended for an experimental period by the Murder (Abolition of Death penalty) Act. 1965, except for certain forms of piracy (Piracy Act, 1837), or for offences committed by members of armed forces during wartime and setting fire to her majesty's ships or stores (Dockyard Protection Act, 1772).[7] However, the abolition of death penalty for murder was made permanent by resolutions of both Houses of parliament in 1969. In December 1975 a motion tabled in the House of Commons to reintroduce the death penalty for terrorist offences involving murder, but the motion was defeated. Moreover, death penalty may not be imposed on any person, who at the time of committing the offence was under 18 years or on a pregnant woman.

4.7 In Northern Ireland, the distinctions between murder and capital murder was abolished by the Northern Ireland Emergency Provisions Act, 1973, which provided life imprisonment because the Queen granted him, the Royal prerogative of mercy.

[7] see David Feilman, Defendant's Rights Today p.387

4.8 GERMANY (FORMER FEDERAL REPUBLIC):

In Germany the death penalty was abolished in 1949 and Article 102 of the Basic Law of the Federal Republic of Germany, made public on 23rd May, 1949, provided that "Capital Punishment shall be abolished".

SWEDEN (THE KINGDOM OF):

4.9 In Sweden the death penalty for ordinary crimes was abolished in 1921, even though it was retained for crimes of high treason in war time but was eventually abolished in 1973.

4.10 Article of the present Constitution, which came into force on 1st January, 1975, provides that "no law or other regulation must imply that death penalty can be imposed."

UNION OF SOVIET SOCIALIST REPUBLIC (THE USSR)

4.11 In the former USSR, the death penalty could be imposed for 18 different offences in peace time, including offences not involving the use of violence such as, rape under certain circumstance when committed by a group, or against a minor, or particularly serious consequences for the victim or by an especially dangerous recidivate; actions disrupting the work of the labour institutions, making or passing counterfeit money or securities, violation of rules for currency transactions (when committed) as a form of business or on a large scale, or by a person previously convicted under this Article and taking a bribe, with especially grave consequences.

THE PEOPLE'S REPUBLIC OF CHINA

4.12 Under the provisions of the Punishment for Counter Revolution Act, 1957 in the people's Republic of China, death penalty could be imposed for among other things, collaborating with the imperialists to betray the mother land (Article 3) insurrection (Article 4), espionage, aiding the enemy (Article 5) or harbouring major counter revolutionary criminals (Article 13).

4.13 Moreover, under the punishment for Corruption Act, 1952, each penalty may also be imposed for corruption where the amount involved is 100,000,000 Yuan or more and the circumstances of the case are especially serious, or for purchasing economic intelligence for private interest or obtaining the same by force.[8]

SOUTH AFRICA

4.14 According to Amnesty International Report of 1979, South Africa is a country with the highest rates of judicial executions in the world; for example in 1974, 86 people were sentenced to death and were executed; in 1979, 67 people were executed. The death penalty in South Africa could be imposed on a wide range of offences such as murder, robbery with aggravating circumstances and for certain political offences under the Terrorism Act and those related to security laws such as Treason. A moratorium on execution was declared pending a review of the death penalty. However, in the case of Themba Makwayane and Musa Mchunu v The State[9], the appeal was heard by the South African Constitutional Court, where the appellant lawyers argued that the law under which they were sentenced to death was contrary to the provisions of the South African Constitution, which came into

[8] Amnesty International Report – The Death penalty p.72

[9] was held from 15 – 17 February 1995 (see Death Penalty news December 1995

force in April, 1994, guaranteeing among other basic human rights, the right to life. The court ruled that the death penalty was a cruel, inhuman and degrading punishment and therefore unconstitutional.

NAMIBIA:

4.15 According to the Country report on Human Rights practices for 1991 at page 269, the Namibia Constitution provides that no person shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

4.16 A debate spearheaded by Amnesty International is currently ranging at the national and the international level, that is at different fora, whether or not capital punishment should be abolished. Inspite of all the reasons advanced by the Amnesty International, a large number of the States in the world retain capital punishment in heir statute books.

4.17 In Africa, only the Republic of South Africa cannot impose the death penalty because of the decision of the South Africa Constitutional Court in the case of **Themba Makwayane and Musa Mchunu v. The State** [10] which declared capital Punishment/death penalty unconstitutional. In some countries such as Kenya, Nigeria and some Islamic Countries such as Iran, the death penalty is also applicable to other offences such as armed robbery, burglary, drug trafficking and in the case of the people's Republic of China it is imposed on people convicted in corruption cases as well as some countries, which had abolished capital punishment have restored it, such as the USA, in the State of California, Northern Carolina, Texas, New York State, and other countries eg. Guatemala, Mauritius and Zimbabwe. However, in the United Kingdom of Great Britain, and Northern Ireland there is a public outcry for the restoration of the death penalty as an effective measure to combat heinous crime of violence, such as bombings.

4.18 Since the death penalty or capital punishment is controversial, there are those who favour the retention of such a penalty that is the retentionists, who argue among other things that it is reasonable in the public interest or for common good. They further argue that for particularly reprehensible offences, death is the only fitting and adequate punishment, consequently those who commit certain grave offences, must be put to death for the protection of the society at large.[11] The main objective of the law is to protect the society from unwanton killings. In this case death penalty is not unconstitutional because it is saved by Article 30(2) of the Constitution which provides:

> "(2) It is hereby declared that no provision contained in this part of this Constitution, which stipulates the basic human rights, freedom and duties shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for-
>
> a) ensuring that the rights and freedom of other or the public interest are not prejudiced by the misuse of the individual rights and freedom;
>
> b) .....
>
> c) ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceedings."

[10] South African Constitutional case op.cit, The appellants' lawyers argued that the law under which they were sentenced to death is incompatible with the South African Constitution which came into force in April 1994

[11] Dominic Mnyaroje and Another Vs Republic, Court of Appeal of Tanzania Criminal Appeal No. 142/94

4.19 On the other hand the abolitionists hold the view that such a penalty is cruel, inhuman and degrading, in-effective as a deterrent mechanism for murderers. Death penalty is reprehensible in its execution and can be inflicted upon an innocent person. Consequently, people in democratic societies regard death penalty as a barbaric form of punishment as it is merely vengeful. However, their main argument is that society has no right to take away what it can not give, that is a right to life. The death penalty has no rehabilitative effect on the offender and in cases of treason and treasonable offences they should not be executed because these cases are politically motivated and might be of benefit to the society in the future.

4.20 It may be noted that in most of the African customsand traditions, in cases of murder, no demands were made for the imposition of the death penalty, though blood money was demanded as compensation to appease the spirits. In certain circumstances, a murderer was only killed when blood money was not paid to the relatives of the deceased.

PHILOSOPHICAL BASIS OF PUNISHMENT

4.21 It may be important to consider the basis of punishment in order to understand where capital punishment fits in. The purpose of the punishment, revolves around three notions, that is Retribution, Deterrence and Reformation and the importance of each has differed depending on the historical period, the authorities, philosophers and penologists arguing the case in question.

THE PRINCIPLE OF RETRIBUTION:

4.22 Retribution is an old notion derived form the Code of "Humarabi" which was focused on vengeance and reprobation. Whenever a state imposed punishment it was taken to mean that there was need to satisfy the wronged individual's desire to be avenged of a wrong committed against them or the State's disapproval of an "individual's act or breaking of a law therefore the punishment is assumed to be proportionate to the gravity of the offence (a measure for measure). However, some of the authorities on the subject do not approve of the first alternative because in their views it is a manifestation of the primitive notion of atonement or retribution, on the other hand they favour the notion in which the state punishes an individual wrong doer in order to protect the society. Lord Templeton once said:-

"I think there would be general agreement that the justification of capital punishment, as for other salient features of our penal system must be sought in the protection of society and that alone... There in no longer in our regard of criminal law any recognition of such primitive conceptions of instrument of retribution."

4.23 In the debate concerning deterrence there is a presumption that the punishment should not be greater than the offence deserves, hence there is a strong and widespread demand for retribution in the sense of reprobation and expiration as lord Denning[12] once said:-
"The ultimate justification of any punishment is not that it is deterrent, but that it is the emphatic denunciation by the community of a crime; and from this point of view, there are

[12] p. J. Fitzgerald, Criminal law and Punishment oxford At Clarendon press 1962 p.223

murders which, in the present state of public opinion demand the most emphatic denunciation of all, namely the death penalty."

THE REFORMATION OF THE INDIVIDUAL OFFENDER:

4.24 Some people have argued that the offender is not alone responsible for the offence or the crime he commits but that the community in which he has been brought up has contributed to him/her what he/she has become, that is a criminal. Consequently punishment must be aimed at making the offender a law abiding citizen; but if reformation means not only repentance to reestablishment in normal life as a good citizen, then it is not possible for murderers to reform.

THE DETERRENT EFFECT OF THE PUNISHMENT:

4.25 Punishment should be aimed at preventing the offender from repeating or committing the same offence again and also must act principally to the imagination or impression it makes on those who are still innocent, the horror of punishment will stop the thought or temptation to commit crime, and capital punishment serves to deter any person from committing murder. The deterrence theory in the case of capital punishment is founded on the belief that people who have in mind to commit a capital offence may be prevented from doing so if they know that they will risk forfeiting their lives too.

4.26 From the foregoing, the Law Reform Commission reiterates that Death penalty is still recognized as the only legal punishment in cases of persons convicted of murder while of those who commit treason and treasonable offences, there be discretion to impose death penalty or life imprisonment. It should be noted that since the United Republic of Tanzania became independent no prisoner has been executed for committing treason or treasonable offences. Once they were found guilty an convicted of he offence, they were imprisoned for life and most of them have already been released form prison. The following chart as shown in 1996/97 Budget Speech are cases as dealt with by the Department of Director of Public Prosecutions.

REGION	DSM	MZA	ARUSHA	DOM	MTWARA	MBY	TABORA	TANGA	SONGEA	MOSHI	TOTAL
MURDER CASES	74	125	36	105	17	63	50	54	97	31	652

4.27 The Court of Appeal of Tanzania has declared that capital punishment/death penalty is not unconstitutional in Mbushuu Mnyaroje and Another vs Republic.[13]

4.28 The Court of Appeal in its considered opinion states that the right to life is not absolute because though "every person has a right to life and to receive from the society protection of his life, that is both the right to life and right to the protection of ones life by the society. The right to life is not absolute, is subject to the other law. Article 14 of the Constitution does not expressly provide for the deprivation of life as in Article 13(1) of the Constitution of the Republic of Ghana, 1992, which provides:

[13] Criminal Appeal No. 142/94

"No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence and the law of Ghana of which he has been convicted."

4.29 Similar provisions are found in Article 2(1) of the European Convention which provides:

"Every right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law:.

4.30 Moreover, the International Convention on Civil and Political Rights (or International Convention) provides in Article 6(1):

"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."

4.31 The International Instruments which declared the inherent and universal right to life, demand that right to be protected by law and prohibit the arbitrary deprivation of that right, in other words the right can be denied by due process of the law.

4.32 However, in order to fortify the continued imposition of death penalty, the Court of Appeal14 referred to ... Sieghart in the International Law of human Rights (Oxford university Press) 1985, p 1130:

"As human rights can only attach to living human beings, one might expect the right to life itself to be in some sense primary, since none of the other right would have any value or utility without it. But the international instruments do not in fact accord it any formal price: on the contrary ... contain qualifications rendering the right less than absolute, and allowing human life to be deliberately terminated in certain specified cases. The right to life thus stands in marked contast to some of the other rights projected by the same instruments for example, the freedom from torture and other ill treatment and the freedom from slavery and servitude are both absolute, and the subject to no exceptions of any kind. It may therefore be said that international human rights law assigns a higher value to the quality of living as a process, than to existence of life as a state ... the law tends to regard acute or prolonged suffering (at all events in cases where it) inflicted by others, and so it is potentially avoidable) as a greater evil than death, which is ultimately unavoidable for everyone."

4.33 On the other hand the Constitution of Ghana presumed the existence of the inherent and universal right to life and its protection by law. The position in Tanzania is summed up by the Court of Appeal[15] as follows:

"it appears that Article 14 lies between the two sets. Article 14 declares the inherent right to live as universal right and its protection to law. That means there can be instances in which due process of law will deny a person his right to life or its protection. This is why the learned trial judge found that the right to life under Article 14 is not absolute but qualified, and here, we agree with him."

[14] see Mbushuu Dominic Mnyaroge an Another v. R Criminal Appeal No. 142 of 1994 at p. 32
[15] Mbushuu's case ibid p.19

4.34 The death penalty was also condemned to be inherently a "cruel, inhuman and degrading" Punishment contrary to in Article 13(6)(d) and (e) of the Constitution, but it appears that was saved by Article 30(2) of the same Constitution as explained by the court of Appeal in Mbushuu's case which the Court of Appeal stated;

"This Court has on two occasions dealt with Art. 30(2): in **Daudi Pete v. A. G.** and also in **Kukutia Ole Pumbun v. A.G.** in the letter case we said:

"... the Court in Pete's case laid down that a law which seeks to limit or derogate from the basic right of the individual on ground of public interest will be saved by two essential requirements: First, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does noes not meet both requirements, such law is not saved by Article 30(2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with those requirements, otherwise the guaranteed right under the Constitution may easily be rendered meaningless by the use of the derogative or claw-back clauses of that very same Constitution."[16]

4.35 On the criticism that death penalty which is provided by section 197 and 196 of the penal code, is arbitrary, the Court of Appeal observed that:

"Any person convicted of murder shall be sentenced to death." Except pregnant women are exempted, therefore only those convicted of murder are subjected to death penalty under section 197. However, conviction comes after a full trial by the High Court sitting with assessors, the prosecuting State Attorney and defence counsel and there is an automatic appeal to the Court of appeal. That can not be despotic or arbitrary. The main object of the death penalty is to protect the society aright to life and requires the society to protect this right, the society has a constitutional duty to ensure that its law abiding members are not deprived of this right..... The society can only discharge its duty of protecting the right to life by deterring persons form killing others. Tanzania like many other societies, has decided to do so through death penalty ... For the purposes of the society to perform its duty under Article 14, deterrence is the legitimate object."

4.36 The Court of Appeal[17] also noted that in certain countries death penalty has been held not to be necessary either to deter the commission of capital crimes or to protect society (Furman v. Georgia (1972) 408 cited in Mbushuu Dominic Mnyaroje v. R. (Crm. App. 142/94 at pages 28 – 29). However, the Court was of the opinion that what measures are necessary to protect society are matters to be decided by every individual in the community.

[16] see also Mbushuu's case at pp. 24 – 25

As regards the question whether the death penalty is not the most effective punishment, the Court stated that there was no conclusive proof either way to show that death penalty was not the most effective punishment. The Court stated:
"But the crucial question whether or not the death penalty is reasonably necessary to protect the right to life. For this we say that it is the society which decides ..."

4.37 The Court of Appeal[18] concluded that:

"So we find that though death penalty is provided by section 197 of the Penal Code, which offends Article 13(6)(c) and (e) of the Constitution, it is not arbitrary, hence a lawful and it is reasonably necessary and it is saved by Article 30(2). Therefore it is not unconstitutional."
If we accept these arguments, as some people today do, then we must admit that the death penalty should be abolished if, but only if, there is some other penalty that could serve as a practical alternative while not involving its undesirable effects. For the main bone of contention is that the punishment of criminals is justified only by the aim of protecting the community by preventing crime.

4.38 The Law Reform Commission contends that, murder is a serious offence deserving severe punishment i.e. death penalty. The arguments against Capital Punishment though relevant are not justifiable.

5.0 RECOMMENDATIONS:

5.1 The Law Reform Commission recommends that;

1. Capital punishment should be retained for murder and treason or treasonable offences. It should remain mandatory for murder but discretionary for treason and treasonable offences.
2. Investigations should be streamlined so that the accused person should not spend a long time in remand prison before trial and another long time in the death row before execution.
3. The procedure used in the exercise of the Prerogative of mercy should be reviewed so that the convicted prisoner does not stay in the death row for a long time awaiting to hear whether or not the death sentence has been commuted or his petition for clemency has been rejected by the President.

[17] Mbushuu's case pp 28, 29
[17] ibid pp.31, 32

CHAPTER FOUR

REGULATORY LEGISLATIONS

Law may be distinguished both from scientific laws (the laws of nature) and from the value of morality; and it may be defined as a body of rules for the guidance of human conduct which are imposed upon, and enforced among, the members of given state.[1] In the 19th century English jurist John Austin pointed out that[2] "whereas obedience to law is enforced by the state, which imposes "sanctions" (penalties) upon those who transgress it, the rules of morality are not so enforced. If I commit a crime I know that unpleasant consequences will follow if I am found out, but the State will not be concerned."

Since the law is of prepositions (i.e.commands) there must within each state, be some person, group of people, institution or institutions having power to impose laws within that State.[3] law can be classified into two groups, public law which consists of those fields of law which are primarily concerned with the State itself. Secondly Private law is that part of the law which is primarily concerned with the rights of individuals.

This Chapter covers eighteen legislations classified as Regulatory Legislations. It concerns the state of law of the said legislations, criticisms by he Nyalali Commission, People's views, The Law Reform Commissioner's weighing up and Recommendations.

[1] James S. Philip, Introduction to English Law, 8th Ed.p.5
[2] James, ibid
[3] James, ibid
[4] James, ibid. page 6

PART I

I) REGISTRATION AND IDENTIFICATION OF PERSONS ACT. No. 11/1986

1.0 STATE OF THE LAW:

1.1 The Registration and Identification of Persons Act. No. 11 of 1986 was enacted to provide for the registration of citizens as well as foreigners aged 18 years and above and thereafter to issue them with Identity Cards. The Act applies to Tanzania.

1.2 The administration of registration is done by the Registrar, Assistant Registrars, immigration officers or any other public officer appointed by the Minister under section 5 of the Act.

1.3 Under section 7 to 9 of the Act, all persons resident in Tanzania whether citizens or aliens of the age of or above 18 years may apply for registration in the prescribed form. However under section 15 of the Act the Minister may issue an exception to compliance with registration provision.

1.4 Sections 10 to 14 deal with identify cards. According to section 10 a registered person shall, be issued with an identity card which under section 11 shall be used for all dealings with the Government or of public nature, and under section 14, for situations, services, facilities or any other thing whose grant or obtaining of may be conditional to production of an identify card as may be specified by the Minister.

1.5 Section 12 requires every registered person to keep the identity card in safe custody and gives discretion for carrying it on his person for identification purposes. In this respect section 14 also empowers the Registrar, Assistant Registrars and Immigration Officers to require production of an identify card for inspection from any person purporting to have been registered.

1.6 Section 20 creates offences and penalties while s.21 gives powers of arrest without warrant to the Registrar, Assistant Registrar, Police Officers and Immigration officers of any person believed to have committed an offence under the Act, Section 23 indemnifies public officers against any suit in respect of anything done in good faith in exercise of functions under the Act.

2.0 MISCHIEF FOR THE ENACTMENT OF THE LAW:

2.1 The Act is intended to identify and assist in providing progressive data of adult citizens and foreigners. Such registration could enable the Government to prepare register for presidential, National Assembly and local government elections. Moreover, the registration of foreigners should also facilitate the tracking-down and cracking down of illegal immigrants, especially those residing along border towns and villages. The data collected during the registration of persons would provide a useful database for the preparation of various development projects.

3.0 CRITICISMS BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission Report Book three at P.28 criticised that the Registration and Identification of Persons Act, 1986 violates rights and freedoms guaranteed under the Constitution. The Commission even equated it to the Pass Laws in South Africa where some people have been arrested, detained and harassed for failure to carry such an identify card.

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION:

4.1 On examination of the Registration and identification of Person's Act, 1986, we find no provisions which discriminate people along racial lines, but conversely, that the identity cards would be applicable to every person of 18 years of age and above.

4.2 Equally there is no provision which requires a person to carry the identity card at all times as claimed in the Nyalali Commission Report. Section 12 provides, inter alia, that a registered person may carry the identity card on his person for identification.

4.3 Even section 14 which deals with production and inspection of identity card by a person who purports to be registered does not contain a mandatory provision. It allows either production of identity card of other proof of registration. In addition it empowers the Registrar, Assistant Registrar and any Immigration Officer to give room to a person purporting to be registered to produce an identity card or other proof thereof within such time, to such person and at such a place as they may specify.

4.4 In additional under s.20 of the Act there is no offence of failing to carry an identity card. Therefore, there is no reason to fear that people will be arrested, detained or harassed for failure to carry identity cards.

4.5 The Law Reform Commission is aware that other countries such as Ghana use such identity cards for Parliamentary and Presidential elections. Similarly the identity cards could be used in Tanzania for similar purposes. The propriety of using the registration data for purposes of preparations of development projects is equally credible.

4.6 In its initial examination of this legislation the Law Reform Commission recommended the immediate implementation of the Act. The Commission reiterates its position and is informed that the Government is taking measures to implement the provisions of the Act.

4.7 However, the Commission notes that according to the spirit of the law it is supposed to be mandatory for all persons resident in Tanzania to register and obtain identity card. The Commision contends therefore that the process of registration should not be optional as provided for under section 7(1) of the Act.

5.0 RECOMMENDATIONS:

5.1 The Law Reform Commission therefore recommends that:

(1) The Registration and Identification of Persons Act, No. 11/1986 be retained.
(2) Section 7(1) the Act be amended to make the process of registration mandatory.

(II) THE SOCIETIES ORDINANCE CAP. 337 (as amended by Acts No. 16/69, 13/91 and 5/92)

1.0 THE STATE OF THE LAW

1.1 The Societies Ordinance was enacted on 1st June 1954. The Ordinance provides for the registration of societies and other matters incidental and connected therewith. The Ordinance lays down conditions as well as procedure for registration of civil societies in the country. Under the Ordinance society is defined to mean any club, company, partnership or association of ten or more persons whatever its nature or object.

1.2 Section 3 of the Ordinance empowers the President to appoint a Registrar of Society, who is obliged to receive directives as to the performance of his duties and exercise of his powers.

1.3 Under section 6(1) of the Ordinance the President is given absolute discretionary powers to declare any society unlawful for non-compliance, for being incompatible with Ordinance the Registrar is empowered to exempt any such local society from registration. In both cases grounds are given upon which the President and Registrar exercise such powers, for example to maintain peace, order, good governance or non-Compliance with the provisions of the Ordinance.

1.4 Further under sections 11 and 12 of the Ordinance the Registrar is empowered to rescind at any time any exemption granted or cancel the registration of any local society. These are discretionary powers on the part of the Registrar but grounds are provided for such exercise i.e.

(i) the society is a branch of or is affiliated to or concerned with any organization or group of a political nature established outside Tanzania.
(i) the society is being used or is likely to be used for unlawful purpose prejudicial to or incompatible with maintenance of peace, order and good government or
(ii) the society has altered its objects or pursues objects other than its declared objects.
(iii) the society has failed to comply with an order made under s.16 within the time stated in such order.

1.5 A safeguard is given to the effect that prior to cancellations, the Registrar is required to notify the society concerned for the purpose of giving an opportunity to show cause. (Sees.12). Further, a right of appeal to the Minister against the Registrar's decision is provided for under section 13. However, on any such appeal the decision of the Minister is final.

1.6 Section 15 and 16 empower the Registrar to order to be furnished with information regarding the constitution and rules of al local society in force at the time, a true and complete list of office bearers; members as well as duly audited accounts.

1.7 Sections 19, 20 and 21 provide for penalties that any office bearer or any person managing or assisting to manage any unlawful society s guilty of a felony... Likewise, any person who allows a meeting of unlawful. The President may, however revoke or vary such order at any time as per s.6(3) of the Ordinance. Either the President is empowered under s.32 of the Ordinance to make rules of a general nature for the better performance of the provisions of the Ordinance.

2.0 MISCHIEF FOR THE ENACTMENT OF THE ORDINANCE

2.1 The mischief aimed at is clearly stated in the Societies Bill, 1954. The Bill was presented for first reading in 1954 by Honourable The Acting Member for Legal Affairs. The Bill was moved that, it did not seek to repress the natural tendency of people to form themselves into associations but it was aimed to lay down conditions and procedures for registration of civil societies in Tanganyika (as then was) and to require the aforesaid associations to furnish information on the associations to the Government and the members of the association themselves for assurance of integrity and solvency. Equally, the Bill was aimed to avoid subversion and create associations which are conducive to the good of the members themselves or to the community connected therewith.

2.2 In explaining the Bill, provisions, the Hon. The Acting Member for Legal Affairs moved that if a society is prejudicial to order or good government, if it is a sham of a society. To that effect such a society is outside the possibility of being registered, no application for registration and no appeal will be entertained.

In contributing to the Bill, the Hon. Chief Kidaha M. Makwaia emphasised that there should be proper and careful publicity as to the aims of this Bill once it is passed into law so that particularly the African population understand that there is no idea of trying to suppress lawful activities of societies.
He stated:
"....There are possibilities of some people distorting the whole object and saying that Government is interested in suppressing people who get together for lawful objects."....
This ought to be made clear by whoever is in authority in various parts of the territory."[5]

2.3 The Hon. MP went on the emphasize that political associations ought to be registered as long as it is understood that people are not being suppressed to go underground and meet secretly and then do more harm.

3.0 CRITICISMS BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission in Volume III of its Report page 44 condemns the Ordinance as unconstitutional as it violates Article 20 of the Constitution. The Nyalali Commission Report, further argues that the Ordinance is one of the Laws that hinders the enjoyment of freedom of association and freedom of assembly as it makes it extremely difficult to form and run civil associations including * political parties, *Trade Unions etc. Besides any decision made either by the President, the Registrar of Societies or the Minister cannot be challenged in courts of law.

[5] Hansard Report on Tanganyika Legislative Council debates of 14/4/54

Article 20 of the Constitution states:
20(1) Subject to the laws of the land every person is entitled to freedom of peaceful assembly, association, and public expression that is to say, the right to assemble freely and peacefully, to associate with other persons and, in particular to form or belong to organizations or associations formed for the purpose of protecting or furthering his or any interests.

4.0 PEOPLE'S VIEWS

4.1 Views obtained from Workshop participants were that criticisms notwithstanding, the legislation is necessary to regulate the formation of societies in the country. The controls imposed by the ordinance are necessary. However, it was proposed that the Minister responsible would be the final authority in dealing with civil societies in the country including the making of regulations in place of the President.

4.2 As far as the members of the Public are concerned a view was expressed that an amendment be effected to decentralize the powers of registration by making Regions centers of registration.

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 It is the considered view of the Law Reform Commission of Tanzania that the Societies Ordinance is relevant and useful legislation. A close examination of the Ordinance shows that there are no provisions that violate Article 20(1) of the Constitution of the United Republic. On the contrary the Ordinance clearly lays down procedures and conditions for registration of local/civil Societies.

5.2 Further still, the law makes it mandatory for a society to furnish information to the members of society as well as the Government for assurance of integrity and solvency. Suffice to say that, safeguards are within the Ordinance (See section 12 and 13), and that the rights to assemble under the Constitution is not absolute as it is subjected to other laws of the land e.g. societies Ordinance itself or the Political Parties Act, 5/92 etc. And that is a way of life that **Rights** are accompanied by **Obligations** and Responsibilities so that good governance, order and peace are mainanted.[6]

5.3 In addition the Ordinance has been amended by the Political Parties Act, 5/92 to exclude political parties in the definition section.

5.4 On the discretionary powers of the President, the Minister and the Registrar envisage under the Ordinance, both the Minister and the Registrar of Societies are clothed with guidelines to avoid arbitrariness and the like while the President is guided or acts on public interests. The actions of the Registrar of Societies are appealable to the Minister whose decision is final. But such finality shall not be construed as precluding judicial review of the decision for the purpose of ascertaining that the authority concerned exercises his powers correctly and judiciously or that the principles of natural justice have been followed.

6.0 RECOMMENDATIONS

6.1 In the final analysis, the Law Reform Commission of Tanzania strongly recommends that:

-

(i) the law be retained,

(iii) THE TANZANIA NEWS AGENCY ACT No. 14/76 AMENDED BY ACT NO 11/12 STATE LAW

1.0 THE STATE OF THE LAW

1.1 The Act was enacted to establish a National Institution known as the Tanzania News Agency (SHIHATA) a body corporate with perpetual succession and official seal.

1.2 Among its principal functions are to provide, develop and promote the establishment and operation of facilities for the collection and distribution of news and news materials. Within Tanzania the Agency was to act as a sole receiver and distributor of news materials from sources outside Tanzania as well as control and regulate the collection and distribution and dissemination of news and news materials.

1.3 Further the Agency shall have regard of, interalia the need to promote national and aspirations of the people of Tanzania, to facilitate expeditious dissemination of news and news materials in the interest of the public, to promote the dissemination accurately of truthful news.

2.0 MISCHIEF FOR THE ENACTMENT OF THE LAW

2.1 Initially the Tanzania News Agency was given the monopoly in the collection and distribution of news and news material from sources within and outside the country. It was intended that the Agency should provide the machinery for effective co-ordination of activities of all public institutions engaged in the collection and dissemination of news material and further facilitate optimum use of human and material resources available in the field.

3.0 CRITICISM BY THE NYALALI COMMISSION

3.1 The Nyalali Commission found certain provisions in the Act to contravene Article 18 of the Constitution. The Commission expressed concern over those provisions of the Act which violate the freedoms of press and expression much as they make the Agency to monopolise collection and distribution of news and news materials within and outside Tanzania.

---

[6] See Article 29(5) of the Constitution which provides:
"For the purposes of the better enjoyment by all persons of the rights and freedoms specified in this Constitution, every person shall so conduct himself and his affairs as not to prejudice the rights and freedoms of others or the public interest."

Besides the Minister's powers to refuse, revoke and suspend any authorization without giving any reason at all while his decision is not appealable were considered unconstitutional. Therefore the Commission recommended for the removing of monopoly over news collection and distribution while repealing the provisions of the Act that violate the freedom of expression and free press.

4.0 PEOPLES VIEWS

4.1 Views from members of the public supported the retention of the Tanzania News Agency (SHIHATA) as a national news institution for the purpose of guarding and promoting national interest in the field especially on the need to collect and disseminate truthful information. It was noted further that SHIHATA is the only news Agency with reliable network in the country hence well placed to collect and disseminate news relating to development activities especially in the rural areas.

4.2 It was strongly recommended that the Government should strengthen the Agency, while at the same time taking steps to help it operate commercially.

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 A reflection of the objects and reasons in the 1977 Bill show that the principal objects of establishing the New Agency clearly stated to "provide machinery for effective coordination of the activities of all public institutions engaged in the collection and dissemination of news and news material and facilitate optimum use of human and material resources available in the Field" thereby help to promote national policies and aspirations of the people of Tanzania in the expeditious dissemination of truthful news and news material.

5.2 The record of performance of the Agency since its establishment is reported to be satisfactorily and measured fairly well with other national News Agencies of the Region i.e, ZANA in ZAMBIA, ZINA in ZIMBABWE, etc . However, it is the monopoly which has brought the provisions of the act under criticism in the light of the introduction of Bill of rights as well as multiparty politics in Tanzania.

5.3 In 1994 through Act No. 11 of 1994 massive amendments were effected to the Act in Order to curtail the monopoly role of SHIHATA, i.e sole receiver and distributor, controller and regulator in the collection, distribution and dissemination of news and news materials in and outside Tanzania by repealing sections 7, 8, 9, 11 and 12 of the Act.

5.4 However, despite these amendments, the Tanzania News Agency SHIHATA remains a public institution, a body corporate with its original functions of providing, developing and promoting the establishment and operation of facilities for collection and distribution of news and news materials in the country (section 4 of the Act.)

5.5 The Law Reform Commission in its Position Papers in 1993 concured with observations made by the Nyalali Commission with respect to those provisions which gave the Agency absolute monopoly in the collection and dissemination of news and news material within and outside Tanzania. However, the Commission is of the considered view that since the

amendments of 1994 have only dealt with the issue of realignment of some of the provision of the act with the Constitution, there is need to strengthen the AGENCY in terms staffing and working facilities in order to effectively continue to discharge its public role and functions. The long term strategy should be to help the Agency operate commercially.

5.6 It is also desirable that Regulations should be made to help guide the performance of the other news Agencies in their functions and responsibilities for the purpose of facilitating the expeditious dissemination of truthful news and information for the benefit of the public.

6.0 RECOMMENDATION

6.1
1. The TANZANIA NEWS AGENCY ACT, 1976 should be retained.
2. The Agency should be strengthened in terms of staff and working facilities.
3. Regulations be made to regulate other news agencies, their functions and responsibilities.

(iv) THE NEWSPAPERS ACT NO. 3/76 AS AMENDED BY ACT NO. 10/94

1.0 STATE OF THE LAW

1.1 The Newspapers Act, 3/76 as amended was enacted in April 1976 to repeal and replace the Newspapers Ordinance (Cap. 229). The Act applies also to Zanzibar and came into operation on 1st January, 1977.

1.2 The Act is a comprehensive piece of legislation divided into eight parts:
Part one which is the operative part contains provisions on the definitions, the appointment of the registrar of Newspapers by the Minister and his principal functions7. Part two provides for the manner of registration of Newspapers while Part three contains provision prescribing bond conditions for publishers to executive before registering with the office of the registrar. Part four has general provisions relating to Newspapers, such as evidentiary value of copies, extracts and certificates, requirements for printing of name and address of printer on the news papers, for retention of a newspaper for six months, the production in the public interest, peace or good order and the power by which a Minister may prohibit publication of a newspaper.

In Part five offences against the republic are enumerated. These offences relate to seditious publication, importation of prohibited publications, publication of false news/information likely to cause fear and alarm to the public as well as incitement to violence.

Part six contains provisions relating to the offence of Defamation while Libel, Defamatory Matter, unlawful publication absolute or conditional privilege through publication of defamatory matters are defined. Further the penalty for LIBEL is provided for in this part of the Act.

[7] Practice and usage is hat of the Director of Information services has always been appointed the Registrar of Newspapers.

Part seven contains miscellaneous provisions on offences by corporations, societies, associations or body of persons or companies; liability of employer or principal, service of process and notices, the jurisdictions of courts; indemnification of public officer and power of the Minister to make regulations for the better carrying into effect the purposes and provisions of the Act.

Part eight has provisions for special procedure for trial of cases of defamation in suits of a civil nature in respect of any action arising out of anything or matter published in newspapers. It is provided that in all proceedings under this part, the court shall sit with not less than three competent assessors but the court is not bound to follow their opinions.

1.3 The Act contains also provisions which amends certain sections in the Penal Code i.e. Chapter VII, VIII and XVII. In 1994 through Act No. 10/94 amendments made were limited to enhancing the sentences of fines in sections 32, 36, 37 and 47.

2.0 MISCHIEF FOR THE ENACTMENT OF THE ACT

2.1 In its objects and reasons, it was stated, inter alia, that the proposed legislation was intended to bring about changes with regard to publication of newspapers so as to meet needs/ requirements of the day.

3.0 CRITICISMS BY THE NYALALI COMMISSION

3.1 The Nyalali Commission in Book Three of its Report at page 45 has levelled criticism that the Act contains provisions which give the President wide discretionary powers that violate some basic rights and freedom of the press, freedom of opinion and expression as well as the Right to be informed. Therefore the Act was adjudged unconstitutional for violating the provisions of Article 18 of the Constitution – i.e. Freedom of Expression/UHURU WA MAONI. Article 18 of the constitution states:

> "18 (I) Subject to the law of the land, every person is entitled to freedom of opinion and expression that is to say, the right to freely hold and express opinions and to seek, receive and impart information and ideas through any media and regardless of frontiers and freedom from interference with his correspondence.
>
> 18 (ii) Every citizen has the right to be kept informed of development in the country and in the world which are of concern for the life of the people and their work and of questions of concern to the community".

4.0 PEOPLE'S VIEWS

4.1 Views expressed by members of the public on the validity and usefulness of the Act support its strict application in order to check on the correctness of information and news published on one hand and control professionalism and ethics of publishers on the other. Concern was also raised on newspapers which publish false, distorted and defamotory news, thereby justifying the need to control the freedom of expression of newspapers through legislation.

4.2 While the public recommended the retention of the law the following amendments to the Act were recommended: -

- The Registrar be required to reply to an application for registration of newspaper within a specified time and that three months period was proposed.
- The Minister's power to prohibit publication of a newspaper in the public interest or in the interest of peace and good order be subject to Appeal (Section 25(1).

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 From the analysis of the Act it is evident that central authority lies with the Minister, the Registrar of Newspapers (section 3,5 and25 of the Act) while the President has absolute and discretionary powers to prohibit the importation of any publication of in his union the important of such publication is contrary to public interest – (section 27 of the Act).

5.2 As it has been pointed out, the issue of contention is the violation of basic rights and freedoms of the press, opinion and expression and information as provided for in Article 18 of the constitution of the United Republic. The most offending provisions are sections 25 and 27 of the Act which give absolute discretionary power to the Minister to prohibit publication of a newspaper and to the President to prohibit importation of any publication respectively.

As to the powers of the President section 27 reads: -
"(1) If the President is of the opinion that the importation of any publication would be contrary to the public interest, he may, in his absolute/discretion, by order, prohibit the importation of such publications, and in case of a periodical publication may, if by the same or subsequent order, prohibit the importation of any part or future issue thereof.

(2) If the President is of the opinion that the importation of the publications of any specified person would be contrary to the public interest may, in his absolute discretion, by order, prohibit either absolutely, or subject to specified exceptions or conditions, the importation of the future publications of such person."

As regards the powers of the Minister section 25 reads inter alia.
"25(1) Where the Minister is of the opinion that it is in the public interest or in the interest of peace and good order so to do, he may by order in the Gazette, direct that the newspaper named in the order shall cease publication as from the date hereinafter referred to as "the effective date" specified in the order.

5.3 Close examination of these provisions show that the discretionary powers of the Minister and President are guided by public interest whereas at the Minister and the President are custodians of such interest. It is contended that individual freedom should at all times be subjected to public interest and that the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest[8] Further the rights and freedoms enshrined in Article 18 are to be subject to the laws of the land including the Newspaper Act and that the right to be informed is based on, among other "questions of concern to the community" it could be safely argued that traverse public interest cannot by any stretch of imagination be questions of concern to the community

in the positive sense. Consequently sections 25 and 27 of the Act nor its spirit do not violate the provisions of Article 18 of the Constitution to be declared unconstitutional.

5.4 One equal strength the discretionary powers of the Minister and the President in section 25 and 27 of the Act to act in the public interest are saved by Article 30(2)(a) and (f) of the Constitution which provides as following:

"It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law making provision for: -

(a) ensuring that the right and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;

(f) enabling any other thing to be done which promotes, enhances or protects the national interest generally."

5.5 In addition to the constitutionality of the Act, the Law Reform Commission has considered the proprietness of the restrictions therein. In so doing the Commission has taken into account the current situation with respect to news being disseminated to the public, the level of education of the society of Tanzania and other socio-political and economic matters. The Commission shares the opinion of the majority of participants in the Workshop and regional tours that the restrictions are currently necessary to check the credibility of information and news published and also control professionalism and ethics of publishers.

5.6 The Commission has noted that the Act, provides no mechanism of appeal against the decisions of the Minister or the President. However, it has also considered that a person aggrieved thereby can still have recourse to the High Court for review under Article 30(3) of the Constitution which provides;

"Where any person alleges that any provision of this Part of this Chapter or any involving a basic right or duty has been, is being or is to him or any part of the United Republic he may, without prejudice to any other action, or remedy lawfully available to him in respect of the matter, institute proceedings or relief in the High Court"

6.0 RECOMMENDATIONS

6.1 In the final analysis the Law Reform Commission recommends that:

(i) the Act be retained.

(ii) On amendment be made to the Act to require the Registrar to reply to an application for registration of a newspaper within a specified time. A three-months period is proposed. Otherwise it should be deemed that the application has been accepted.

[8] See article 27(12) of the African Charter on Human and Peoples' Rights

PART II

(i) THE HUMAN RESOURCES DEPLOYMENT ACT 83 ACT NO. 6/1983

1.0 STATE OF THE LAW

1.1 The Act was enacted in 1983 to make provisions for the establishment of a machinery designed to regulate and facilitate the engagement of all able bodied persons in productive work and for connected matters in the best economic interest of the nation.

1.2 The Preamble to the Act states, inter alia, that the Constitution of the United Republic of Tanzania upholds the principal that every person be enjoined upon to believe that WORK is a measure of human dignity and to actively that pursuant to the Arusha Declaration of 1967 (which resolved the building of a socialist society, whose principles) are that only children, the aged, the disabled (those for whom the state cannot, at any one time provide employment) are permitted to live on the sweat of others.

1.3 The Act does among other things define WORK as any lawful income generating occupation through which a person obtains his livelihood and that AGRICULTURE is the major source of income for the majority of the people of TANZANIA.

The salient provisions of Act are: -
The Establishment of the Human Resources Deployment Scheme and its Central Administration involving the Government, public, private and agricultural sectors for the purpose of ensuring that that all residents who are capable of working, work more skillfully and productively.

1.4 Under section 4(1) of the Act, the Minister responsible for the Matter is empowered, after consultation with other government departments, the public and private authorities, to work out a National Scheme to ensure that every able bodied persons works. The National Scheme is to be administered by each Local Government Authority charged with the implementation of the spirit of the Act with powers to formulate properly organized employment generating projects and enact appropriate by-laws to that effect in their areas or jurisdiction including those which provide for cultivation of certain crops in specified acreage of land. A National Committee to be known as the National Human Resources Development Advisory Committee is to be established for supervising the execution of national policy on the development of human resources.

1.5 Section 13 provides that all employers be registered while Section 14 empowers the Minister to make regulation, which would enable the Commissioner for Labor to direct every local authority to establish and maintain a Register of all residents capable of working and the Register be available for use by the registered employers.

1.6 Section 15 requires the Labour Commissioner, subject to the direction of the Minister, and in cooperation with employer in Government, public and private sectors, to establish and maintain a register for non skilled manpower who are employed within and outside Tanzania. Identity cards are to be issued for this purpose.

1.7 In Section 17 of the Act the Minister is empowered to make for smooth and coordinated transfer of the unemployed people to their home districts or usual residence and their subsequent employment. Furthermore section 26 and 27 of the Act empower the Minister after consultation with the National Committee and other Government Departments to make arrangements so as to provide for a smooth and coordinated transfer or measure which will provide for rehabilitation and fully deployment of persons chargeable with previously convicted of being vagabonds under section 177 of the Penal Code. In making the arrangements provided for in subsection (1) the Minister under subsection (2) of s. 17 has special regard to the need to secure full deployment of:

(a) residents who have retired from public services
(b) residents below or above the age of 18 who still depend on their parents or relatives for their livelihood.
(c) Law-abiding adults who have no known source of income
(d) Housewives
(e) Non-citizens

1.8 Section 21-24 are penal provisions for the contravention of the Act, while section 25 gives power of prosecutions, to the Director of Public Prosecution or the Labour Commissioner or any Authorized Labour Officer.

2.0 MISCHIEF FOR THE ENACTMENT OF THE LAW:

2.1 The law is designed to fight against unemployment, and inefficiency by pulling together public and private resources through a scheme known as the National Human Resources Deployment Scheme for the purpose of ensuring that all who are capable of working, work more skillfully and productively.

2.2 It is envisaged that the success of the scheme will curb vagrancy thereby reduce the every increasing problem of destitutes laiteres, regular ..... and even either criminal activities.

3.0 CRITICISM BY THE NYALALI COMMISSION

3.1 In volume Three of its Report at pages 12 and 13 the Nyalali Commission observed that "the implementations of the provisions of the Act have led to serious abuse of powers by the authorities. That serious human rights violation such as arrests, detention and prosecutions of pure harassment have been committed under the Act. Authorities providing for forced by-laws have been passed by Local Authorities providing for forced cultivation of certain specified minimum acreage of food and cash crops.

3.2 The Nyalali Commission consequently found the act unconstitutional for violating the rights and freedoms guaranteed by the Constitution i.e., the right and freedom of residence, choice of work, arrests and detentions without trial and forced labor. The Commission recommended the act to be repealed.

4.0 PEOPLE'S VIEWS

4.1 Views collected by the Law Reform Commission supported the prosperities of Law to the Tanzania Society for the purpose of bringing development at the family and national level and its absence breeds evil and poverty. It was argued that the law helps to create a better awareness on the importance of work and gives the necessary inputs for productive work. Work is essential to life, a communal responsibility which maintains human dignity, lending its testimony from Holy Scriptures. Further views re-expressed were that in traditional societies the youth are taught how to work and the importance of work. The old generation are concerned with the negative attitude to work on the part of the youth and consequently the Human Resource Deployment Act is considered essential in that it establishes well defined and productive oriented work programmes. It is a positive attempt to make every person to be productive in his area thereby control unwanted movement especially the rural-urban migration.

4.2 In the final analysis there was agreement that the law was in consonance with Article 25 of the Constitution, thus dismissing the contention that the Law was unconstitutional. Emphasis was placed on the implementation and close supervision of all the players starting with the family.

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 The Act has been declared unconstitutional in that in a number of ways it violates, the rights and freedoms of movement of residence, and at the same time curtailing the right of choice of any work by encouraging forced labour and allowing arrests and detention without trial. It is because of these criticisms that the Human Resources Deployment Act No. of 1983 is now a subject of reexamination by the Law Reform Commission of Tanzania. The issue of concern and debate is about Human Rights because it is argued that the Act has provisions which offend the right and freedoms of the people of Tanzania. This contention is based on Article 17(1) of the Constitution of the United Republic of Tanzania.

The article reads:
"Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say the right to move freely within the United Republic and to reside in any part of it and immunity form expulsion from the United Republic"

5.2 It is to be noted that the Human Resources Deployment Act 1983 was enacted in conformity with Article 25 of the constitution of United Republic of Tanzania. Article 25 reads as follows:

(1) Labour alone creates the materials wealth of human society and is the source of well being of the people and the measure of human dignity. Accordingly every person is obliged:

(a) to voluntarily and honestly participate in lawful and productive work and

(b) to observe labor disciplines and strive the individual and communal production targets required or prescribed by law.

(2) Notwithstanding the provisions of sub-section (1) there shall be no forced labour in the United Republic;

(3) For the purpose of this section, and in this constitution generally no work shall be deemed to be forced labor, compulsory labor inhuman services, if that work subject to any law, is

(4) Labour or Services which forms a part of

(i) normal social services or other civics obligations for well being of the society;

(ii) the national endeavour at the mobilization of human resources for the enhancement of the national, social and economical survival, progress and advancement of national productivity"

Further Article 17(1) must be read in conjunction with article 17(2) which provides that:
"Any lawful act or law made for the purpose of:-

(a) imposing reasonable restrictions on the exercise of freedom of movements, and to subject him to restriction or arrest or

(b) imposing restriction on the exercise of movement so as to: -

(i) to secure fulfillment of any obligations imposed by that law on that person, or

(ii) to protect the interest of the public in general or in any specific interest of the of a category of the public.

Such act or law shall not be or be deemed to be invalid or inconsistent with this section"

5.3 From the foregoing it is safe to argue that the Human Resources Deployment Act 1983 is saved by Article 25 and 17(2) respectively, hence not unconstitutional. It is valid law and as observed by the majority of member of the public during the regional visits, and by the Workshop participants the Law is useful and necessary for the Tanzania Society. It should be implemented and supervised methodolically from the family to the national level.

5.4 Furthermore in so far as Act attempts to curb rural-urban migration, control vagrancy and loiterers and the unemployed, it is prudent that provisions of the Township (Removal of Undesirables Persons) Ordinance Cap. 104 and the Destitute, Persons Ordinance Cap.41 be harmonized and consolidated with the Human Resources Deployment Act. 1983.

6.0 RECOMMENDATIONS

6.1 Finally the following recommendations should be taken into account for effective implementation of the Act:

1. By-laws be made at district and Village levels identifying the types of activities acceptable and to provide sanction for non compliance.

2. The Central Government in close collaboration with the Local Authorities should provide working facilities and a conductive atmosphere for a smooth implementation of the Act.

3. The Government in collaboration with other players e.g. NGOs carry out programmes of continued education in use of available resources and opportunities.

4. The National Service be revived to provide centers for imparting relevant skills to the Youth.
5. Community participation starting from the family be sensitized to supervise the Youth and Jobless.
6. Serf-reliance work should continue to be part of primary education
7. The preamble to the Act be amended to reject the changed political situation.
8. The Destitute Persons Ordinance be incorporated into the Human Resources Deployment Act. 1983.

(ii) THE DESTITUTE PERSONS ORDINANCE (CAP. 41) 1923

1.0. THE STATE OF THE LAW

1.1 The Ordinance makes a provision for the control of Destitute Persons. The Ordinance defines a "destitute person as any person without employment and unable to show that he has visible and sufficient means of subsistence"

1.2 The Ordinance is operationalized through an order of the Court once the magistrate is satisfied that a person is destitute person by the ordering that person:

(i) to find work and report to the magistrate before a named date,

(ii) to be detained in custody for a period not exceeding one month with a view to work being found for him, or

(iii) to return his usual place of residence if he is not dwelling in his usual place of residence and in case of a destitute person not being a native born in Tanganyika, the President may order that person to be detained in custody until deportation.

2.0 MISCHIEF FOR THE ENACTMENT OF THE LAW

2.1 This is one of the pieces of legislation known as "Vagrancy Laws" which are intended to provide powers to the Executive to deal with the ever-increasing problem of unemployment in urban areas. The Ordinance is intended to curb migration of uneducated and untrained labour from rural to urban areas without means of subsistence.

[9] section 2.

3.0 CRITICISMS BY THE NYALALI COMMISSION

3.1 It was observed by the Nyalali Commission that it is partly under this law categorized as "vagrancy law" whereby periodic "round ups" and crack downs" and campaigns against "loiterers" in Dar Es Salaam and other towns are carried out. The Commission further observed that in these "round ups" people are harassed, detained, taken to court, imprisoned or transported to their homes completely ignoring rules of procedure and evidence. The Commission was therefore of the opinion that this Ordinance has become a readily available political weapon i.e., quick means of getting rid of political opponents and further violates freedom of movement and freedom of residence.

4.0 PEOPLE'S VIEWS

4.1 The Law Reform Commission of Tanzania canvassed views of members of the public on the Ordinance. The view of the majority were that the Ordinance though partly outdated was still relevant. They cited the provision whereby a person without work or other means of livelihood is to be remanded while work was being found. Considering that employment in public and private sectors is in short supply such a provision is indeed out of date. It was further observed that the law is still useful as it ensures that people do not loiter in urban centers and that a group of people may become available labour force to be availed to sisal and sugar cane estates which are in need of constant labour. On the other hand a minority view opposing the Ordinance argued that it was not possible for the Government to find employment for the destitute due to short supply of work and that the detention of destitute awaiting for work allocation or deportation for both citizens and non citizens alike was unconstitutional.

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 The Law Reform Commission of Tanzania addressed itself to the observations by the Nyalali Commission and is one of the considered view that since the duty to work is imposed on everybody by Article 25 of the constitution itself does not tolerate the state of destitution. The state of destitution is contrary to Article 25(1) (a) and 29(1) and (5) of the Constitution. The Ordinance in the view of the Commission is relevant to ensure that every able bodied person in Tanzania works. However for better enforcement of the provisions of the ordinance it is recommended that they be incorporated into Human Resources Deployment Act. No. 6/1983.

6.0 RECOMMENDATIONS

7.1 The Law Reform Commission therefore recommends that the Ordinance be incorporated into the Human Resources Deployment Act, No. 6 of 1983 and thereafter be repealed.

(iii) TOWNSHIP (REMOVAL OF UNDESIRABLE PERSONS) ORDINANCE 1954 CAP. 104 as amended – (Supp. 58 of 28/2/1958)

1.0 STATE OF THE LAW

1.1 The Ordinance is one of the vagrancy laws making provision for the Removal of Undesirable Person from certain areas when public interest demands. District Commissioners are given powers to issue removal orders, to arrest and detain for a period not exceeding one month and inquiry to be made where necessary.

1.2 A Removal Order may be issued under 5.3(2)(a) and (b) on the grounds that:

1. a person has been convicted and sentenced for an offence against the person or in relation to property or an offence contrary to Intoxicating Liquor Ordinance,
2. a person has no regular employment or other reputable means of livelihood.
3. a person of any age which according to law or custom should render him subject to control by a person outside the township or other area.
4. a person having no settled home within the township or other areas.

1.3 The Ordinance accords the person to whom a Removal Order is made an opportunity to object to the removal order by way of appeal to the District Court as provided for by the Townships (Removal of Undesirable Persons) (Appeals) Rules 1953 GN No. 214 of 1953 undoubtedly to minimize the possibility of abuse. However failure to comply with a removal order is an offence under the Ordinance.

2.0 MISCHIEF FOR THE ENACTMENT OF THE LAW

2.1 The legislation is designed to contribute to the attempt to deal with the ever increasing problem of unemployment and criminal activities in urban centers.

3.0 CRITICISMS BY THE NYALALI COMMISSION

3.1 Criticisms by the Nyalali Commission is that it violates individual rights of movement as provided for in Article 17(1) of the Constitution which provides that: -

"Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say, the right to move freely within the United Republic and to reside in any part of it....."

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION

4.1 On examining the salient provisions of the Act it is the considered view of the Law Reform Commission that Article 25 (1)(a) and 29(5) of the Constitution imposed to the individual a duty to the Society whereas better enjoyment of those rights and freedom of others for the public interest. Hence the provisions of Article 17(1) appear to be saved by Article 25 (1) and 29 (5) of the Constitution in relation to other Ordinance under reference.

4.2 In any case the Commission would like to observe quite realistically and practically that no body will render himself removable under the Ordinance by becoming undesirable unless he first goes against a social order as envisaged in Section 3(2)(a) and 3(2)(b). In the final analysis the Law Reform Commission contends that the Human Resources Deployment Act, 1983 addresses itself to the mischief intended by the Township (Removal of Undesirable Persons) Ordinance Cap. 104

5.0 RECOMMENDATION

5.1 The Law Reform Commission recommends that the Township (Removal of Undesirable Persons) Ordinance be incorporated in the Human Resources Deployment Act. 1983, and thereafter the Ordinance be repealed.

PART III

(I) THE DEPORTATION ORDINANCE, 1921 (CAP. 38) (As amended by Act No. 3 of 1991)

1.0 THE STATE OF THE LAW

1.1 The Ordinance is a colonial legacy whereby powers to deport were given to the Governor. After independence these powers were retained by the Independent government and inherited by the President.

1.2 Under s.2 of the Ordinance the President is empowered to deport any person from one part of the country to another and restrict him to that place of deportation if he is satisfied that such a person is conducting himself so as to be dangerous to peace and good order in any part of the United Republic, or is endeavouring to excite enmity between the people of the United Republic and Government or against the Government. Whilst awaiting deportation the person may be detained in custody or prison until opportunity for his deportation occurs as provided by s.5 of the Act.

1.3 Substantial changes to the Ordinance took place in 1991 by the Deportation (Amendment) Act, NO.3/1991. The Amendment Act extended the Ordinance to Zanzibar instead of being restricted to Mainland Tanzania as was hitherto. It also included the audi alteram patern rule. S.5 of the Amendment Act repealed and replaced s.3 of the main Act. By the new section 3 a deportee is allowed to petition to the High Court on any ground pertaining to compliance with the procedure under the Ordinance.

1.4 The Act also introduced a provision for treatment of a deportee similar to those under the Preventive Detention Act, required to inform the deportee, within fifteen days of execution of the deportation order, the reasons for his deportation. In addition the deportee must be afforded an opportunity of making representations in writing to the President in respect of the order. Going by the same provision, the deportee shall be released in case he is not informed of the grounds of his deportation within the prescribed period.10

1.5 On this his part the President is obliged by sections 10 and 11 of the Ordinance to publish in the Government Gazette the name of every person deported. In addition the President has to refer the matter of every deportation order to the Advisory Committee which consists of five members, the Chairman and two members thereof appointed by himself and the other two members by the Chief Justice. The reference to the Advisory Committee must be made as soon as possible after the deportee has made his representation or otherwise within three months of the execution of the deportation order, and thereafter at intervals not exceeding a year if the deportation order has not been rescinded.

1.6 The Advisory Committee is charged with the duty of advising the President on the

---

[10] s. 3A

continuation, recision or suspension of the deportation order but the President is not bound to act in accordance with the advice. If the matter of deportation order is not referred to the Advisory Committee in the period prescribed, the law provides that the deportee shall be entitled to release.

1.7 The President is also empowered to make regulations to regulate the status of the deportee while in custody or in prison[11]. The President can also vary, revoke the order or grant permission to a deportee to leave, for a temporary purpose, the place to which he is deported[12]. The deportee is required to abide by the condition of permit and not to leave the place to which he is deported at the pain of a penalty of up to three months imprisonment with or without a fine not exceeding one thousand shillings[13].

2:0 MISCHIEF FOR ENACTING THE ORDINANCE

2.1 The rationale behind the Deportation Ordinance is to deal with a few elements bent on disrupting the security of the Nation, peace and order in any part of the country.

3.0 CRITICISM BY THE NYALALI COMMISSION

3.1 Condemnation of this Ordinance has been voiced by many quarters including the Nyalali Commission. The general criticisms evolve around the infringement of the Constitution. It is contended that the Ordinance contravenes the rule of law, the right to personal freedom and the freedom of movement as provided for by Articles 13, 15 and 17 of the Constitution respectively.

3.2 According to the Nyalali Commission Report Book Three at page 4 & 5, the Ordinacne and the Preventive Detention Act, 1962 are similar, existing side by side and used as instruments of coercion and means of combating crime. The Commission contended that sometimes the ordinance is used to detain a person whose detention under the Preventive Detention Act, 1962 has been challenged or whose release has been ordered by the Court for some irregularity. Further, that the Police have used the Ordinance quite often to detain people they feel cannot be charged in a Court of law for lack of evidence

3.3 It was also the contention of the Nyalali Commission that the Ordinance is used to silence strong political opponents who are popular with the masses by deporting them to remote areas far removed from their political base in order to undermine and quietly kill their popularity.

3.4 The Commission also criticized the procedure used in arresting and detaining deportees. It observed that it is common practice for the Police to detain a person first and then obtain a detention order from the President. Further that the Police take too long, even a year, to finalize deportation formalities once the deportee is in their custody. In the mean time the deportee who has committed no cognizable offence and is not supposed to be physically detained in the place of deportation languishes in prison like a criminal.

---

[11] S.5(2)
[12] S.8
[13] S.9

3.5 To sum it up the Commission noted that in a true democratic society the Rule of Law is strengthened by punishing the offender according to the laws of the land in courts of law rather than detaining him without trail. It declared the Ordinance unconstitutional like the Preventive Detention Act, 1962 and recommended that the Ordinance be repealed.

4:0 WEIGHING UP BY THE LAW REFORM COMMISSION

4.1 In discussing the Ordinance it is pertinent first to dispel a claim voiced by some legal quarters that the ordinance does not legally exist having been declared null and void since 1988. The claim is based on the High Court judgment in the case of CHUMCHUA s/o MARWA v. OFICER IN CHARGE OF MUSOMA PRISON AND THE AG[14]. In that case Mwalusanya J. declared the Ordinance "unconstitutional, void and of no effect" for being violative of fundamental rights particularly that of equal protection before the law and the right to be heard before incarceration as enshrined under Article 13(6) (a) of the Constitution.

4.2 Brief facts of the case are that the applicant's father together with 155 others were detained on 29/2/87 pending deportation from Mara to Lindi Region. A habeas corpus application was filed on his behalf by his son five months later while the father was still under detention.

4.3 The Attorney General preferred an appeal against the High Court decision. The Court of Appeal quashed the purported trial of the issue of constitutionality of the Deportation Ordinance, which had been raised by the High Court suo mutto, for not giving the parties reasonable opportunity to prepare themselves. The court decided that the High Court had thus violated the provisions of Article 13(6)(a) of the Constitution.

4.4 It ordered remission of the proceedings to the High Court with directions that the issue of constitutionality be tried again and the record be retransmitted to the Court of Appeal for final judgment on the Appeal. This exercise has yet to be completed and since the High Court judgment had been quashed it is of no consequence as to the constitutionality of the Ordinance though the issues raised therein are pertinent and will also be discussed herein below. This settles the question of the legal existence of the Ordinance.

4.5 Having dispensed with the legal existence of the Ordinance one must determine the constitutionality of that existence in the light of criticisms by the Nyalali Commission that the Ordinance infriges Articles 13, 15 and 17 of the constitution. There is no doubt that the constitution recognizes and affirms the rule of Law, the right to personal freedom and the right to freedom of movement. These concepts of the Bill of Rights are entrenched in Articles 13, 15, and 17 respectively. Therefore, the principle issue is whether the Ordinance conforms with these provisions of the Constitution.

4.6 However, in determining whether the ordinance contravenes the above-mentioned Articles, the Law Reform Commission has considered also other provisions of the constitution. In doing so the Commission is aware of the principles of interpretation laid down by the

[14] Miscellaneous Criminal Cause No. 2 of 1988.

Court of Appeal in the case of the DPP v. DAUDI PETE 15 In that case the courts of Appeal considered the constitutionality of s.148(5)(e) of the Criminal Procedure Act, 1985 which denied bail to the accused in a criminal case in certain circumstances.

4.7 The Court took judicial notice of the intertwined and symbiotic existence between an individual and the society within which an individual lives with the resultant two way system of right and duties. It therefore laid down the following basic principles of interpretation;

"First, the Constitution of the United Republic recognizes and guarantees not only basic rights, but also, unlike most constitutions of countries of the West, recognizes and guarantees basic human duties.

Second...is a corollary of the reality of coexistence of rights and duties of the individual on the one hand, and the collective or communitarian rights and duties of society on the other. In effect this coexistence means that the rights and duties of the individual are limited by the rights and duties of society and vice versa"

In principle therefore, rights and freedoms of individuals are not absolute but limited to accommodate the interest of the society as a whole. Some of the restrictions and derogations are contained in Articles 15(2), 17(2), 30 and 31 of the Constitution as will be demonstrated herein below.

4.8 The Ordinance was said to contravene the rule of law in particular Articles 13(6)(a) of the constitution which requires any organ of the government which has the power to decide a matter affecting the right of a person to contain a provision for the principal of natural justice, that is, the right to be heard.

4.9 Article 13 of the Constitution provides for the rights of equality before the law.. Sub-Article (1) reads: -
"All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law"

In the same vein sub-article 6(a) provides: -

"For the purposes of ensuring equality before the law, the state shall make provisions:

(a) that every person shall, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned and be guaranteed the right of appeal or to another legal remedy against the decisions of courts of law and other bodies which decide on his rights or interests founded on statutory provisions.

4.10 In considering whether the Deportation Ordinance contained provisions for the application of the audi alteram partern rule the trial judge in Chumchua's case held otherwise and said;

---

[15] Criminal Appeal No. 28 of 1990 at Dar es Salaam.

"Therefore, in so far as the Deportation Ordinance does not provide for a right to be head it violates a fundamental right provided in Article 13 and so it is of no effect.

The same Article 13(6) (a) provide for a right of appeal to either the detainer or any other organ provided. But I note, that s.3 of the Deportation Ordinance forbids the right of appeal. The statute is for that reason unconstitutional. At least the said statute should have provided a mechanism for review".

4.11 Admittedly until then, in 1988, s.3 of the Ordinance ousted the jurisdiction of courts of law and there was no alternative for the detainee/deportee to be heard or for an appeal against order of deportation. However, the situation has changed with the legislation of the Deportation (Amendment) Act, No. 3 of 1991.

4.12 As explained hereinabove the amending Act introduced, inter alia, the following provisions:

(1) repeal of the old section 3 of the Ordinance and replacing it with another section which provides for the rights to challenge the legality of the deportation order in the High Court. There is in essence both hearing and appeal against the executive order;

(2) the right for the detainee/deportee to be informed of grounds of deportation and to be afforded an opportunity to make representation to the President in writing;

(3) the establishment of an Advisory Committee to which the President must refer the matter of deportation order together with the deportee's representations for its advice to the President, and it is supposed to meet the deportee and hear him out during determination of the deportation order.

4.13 These provisions avail the deportee the right to be heard and appeal against the Deportation Order. The amendments are in line with those made to the Preventive Detention Act, 1962 by the Preventive Detention (Amendment) Act, 1985 which the trial judge in Chumchua's case approved but lamented when considering the Deportation Ordinance.

"This piece of legislation needs to be revamped in line with basic rights enacted in 1994. One wonders why this piece of legislation was not amended during the three year period of grace along side the Preventive Detention Act, Cap. 390 which was amended by Act No.2 of 1985...."

4.14 As the trial judge had held, indeed the amendments of 1991 to the Deportation Ordinance answered the criticism of the right to be heard and the right of appeal. They complied with the provisions of Article 13(6)(a) of the constitution and minimum rights for administrative detention formulated by the International Commission of Jurists at an International Commission Conference in Bangkok in 1962 and the Human Rights Law Committee of the Conference held in Paris in 1984 as mentioned in the Chumchua's case. That far therefore the right to be heard has been satisfactorily provided for.

4.15 The other criticism that the Ordinance contravenes Articles 15 and 17 of the Constitution is geared towards the protection of personal liberty which is considered the most fundamental human right of all. It is usually jealously guarded and only limited by clear provisions of law.

4.16 In the Union Pacific Railway Co. v. Botsford case the US Supreme Court pointed out;

"No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law."[16]

As indicated in the quotation though a fundamental right, personal liberty is not unbridled licence. It can be limited by the authority of law.

4.17 Montesquieu had this to say about personal liberty, inter alia;

"Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow – citizens would enjoy the same power."[17]

4.18 In the same vein Webster observed inter alia;

"Liberty exists in proportion to wholesome restraints; the more restraints on others to keep off from us, the more liberty we have. It is an error to suppose that liberty consists of paucity of Laws... The working of our complex system full of checks and restraints on legislature, executive and judicial power is favourable to liberty and justice. These checks and restraints have so many safeguards set around individual rights and interests. That man is free who is protected from injury.: [18]

4.19 This recognition of the importance of checks and restraints on personal liberty conforms with observation of the Court of Appeal of Tanzania in Pete's care on co-existence of an individual and the society. Therefore in determining whether the Ordinance infringes the provisions of Articles of 15 and 17 of the Constitution restraints on the exercise of the rights concerned must also be considered.

4.20 It is noted that Article 15 of the Constitution guarantees the right to personal liberty. It reads:

"15(1) Man's freedom is inviolable and every person is entitled to his personal freedom however, a close examination of the other sub-article of the said Article reveals that there are two situations under which a person may be denied or deprived of personal liberty, inter alia, as sub-article (2)(a) thereof provides:

(a) in certain circumstances, and subject to a procedure provided by law; or

(b) in the execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted or upon reasonable suspicion of his having committed a criminal offence.

---

[16] (1891) 141 250 quoted in the African Journal of International and comparative Law p. 622

[17] The Spirit of yhe Law, Book 111 Chapter 3

[18] Works Vol. 11,393.

It is evident therefore from these provisions that a person may be deprived of his personal liberty under "certain circumstances", and "subject to procedure, "both of which must be "prescribed by law."

4.21 The "certain circumstances" prescribed by the Ordinance can easily be found in section 2 by which the President can issue a deportation order where he is satisfied that a person is conducting himself in a manner dangerous to peace and good order, endeavouring to excite enmity between the people and the Government of Tanzania, or is intriguing against the Government.

4.22 There is also a procedure for exercising the power. Under section 2 of the Ordinance the President must act on sworn evidence and on being satisfied that the evidence reveal the circumstances which allow him to exercise the powers. Then the deportation order must be issued by the hand and official seal of the President. Other procedures have been elaborated herein before which deal with informing the deportee reasons for the issuing of the deportation order, giving him opportunity to be heard by the President in writing and through an Advisory Committee within a time frame, and review by the said committee and even by the Courts of law.

4.23 Hence, both the "certain circumstances" and the "procedure" for the invocation of the deportation powers are provided for within the Ordinance itself and therefore satisfy the requirements of the claw-back provisions of Article 15(2) of the Constitution.

4.24 On its part the Nyalali Commission condemns the Ordinance for also infringing the provisions of Article 17(1) of the constitution which guarantees freedom of movement. The English version of the Article provides;

"Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say, the right to move freely within the United Republic and to reside in any part of it, to leave and to enter into it and immunity from expulsion from the United Republic."

It is apparent that viewed against this provision the Deportation Ordinance contravences the constitution.

4.25 However, Article 17(2) states

a) "Any lawful act or law made for the purpose of;
b) imposing restriction on the exercise of movement so as to-
c) protect the interest of the public in general or any specific public interest of
a category of the public.

Such act or law shall not be or be deemed to be invalid or inconsistent with this section.

[18] Works Vol. 11,393

4.26 It is evident that the Ordinance is designed to deal with people whose conduct is geared towards compromising public peace, good order, defence and security of the nation. Thus the Ordinance is used to impose restriction on the freedom of movement of an individual so as to protect the interest of the public in general. Therefore that far it is lawful and not against the Constitution.

4.27 In addition there is also derogation from the freedom of movement and residence in Article 30(2) of the Constitution to suit public interest. Article 30 states as follows:

"(2) It is hereby declared that no provision contained in the Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for: -

(a) ensuring that the rights and freedoms of others or the public interest are prejudiced by the misuse of the individual rights and freedoms;
(b) ensuring the interests of defence, public safety and public order..."

4.28 In order to be saved by Article 30(2) of the constitution however the Court of Appeal in the case of KUKUTIA OLE PUMBUN AND ANOTHER VS.AG.[19] following Pete's Case echoed, that a law which seeks to limit or derogate from the basic rights of the individual on grounds of public interest has to satisfy two essential requirements:

"First the law must be lawful in the sense that is is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object, this is what is also known as the principal of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society"

4.29 Consequently, even though it has been demonstrated herein before that the Ordinance is intended to safeguard public safety, public order and security of the Nation still yet it has to satisfy the requirements laid down in the cases mentioned above.

4.30 The first requirement that the law must not be arbitrary has been satisfied by the inception of provisions which give room for the exercise of the right to be heard and review by the Courts of law and an Advisory Committee as already demonstrated hereinabove. In additional the procedure imposed upon the Executive in dealing with a deportee ensures that Administrative officials will not misuse the deportation powers.

4.31 Through the amendments brought about by the Deportation (Amendment) Act. 1991 the legislature introduced a procedure of handling deportees which safeguards the abuse of the powers of deportation. These provisions include the right of the deportee to be informed of grounds of deportation within 15 days of the execution of the order and be afforded of

[19] civil Appeal No.32 of 1992 at Arusha (unreported)

an opportunity to make representations to the President; a deportee to be released if not so informed. The deportee's name be published in the Gazette and reference of matters of a deportation order to an Advisory committee within three months of the issuance of the deportation order otherwise the deportee be released. These provisions coupled with the right of the deportee to petition to the High Court under S.3 are an effective control on the Executive.

4.32 It is also the view of the Law Reform Commission that Ordinance satisfies the second requirement of proportionality. The legislation is designed to catch only those persons who by their conduct satisfy the President that they endanger peace and good order, endeavour to arouse enmity between the people of Tanzania against their Government, or are intriguing against the Government. These provisions are not too wide but quite reasonable and necessary to preserve public peace and security.

4.33 In addition, the encroachment into the right to personal freedom can be saved if it falls within the provisions of Article 31 of the Constitution which provides;

"31-(1) Notwithstanding the provisions of section 30(2), an Act of Parliament shall not be invalid for the reason only that it provides for the taking, during periods of emergency, or in Ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security, of measures that derogate from the provisions of sections 14 and 15 of this Constitution."

4.34 As the Ordinance deals with conduct which the President is satisfied undermines essentially national security it is covered by Articles 31 of the Constitution. However, in order to be saved by this derogatory clause the ordinance has to pass the criterion established by sub-article (2) of the said. Article. This requires that the law has to be necessary and reasonably justified for containing the conduct of that individual. The sub-article reads as follows:

"No measures referred to in sub-section (1) shall be taken in pursuance of any law during the period of emergency, or in ordinary times in relation to any person, save only to the extent to which they are necessary and justifiable for dealing with the situation that exists during the period of emergency or in ordinary times dealing with the situation created by the conduct of the individual in question."

4.35 Matters of national security are vital issues in any nation. More so for the developing world where young nations are still grappling with economic hardships, social and political changes. Whether in the ordinary times or periods of emergency efforts to preserve national security must continuously be high on the national agenda. This may be exercised inter alia, by using the Preventive Detention Act, 1962 or the Deportation Ordinance to remove for sometime, from the rest of the community, instigators who conduct themselves in a manner which may undermine national security, and either detain or deport them to another place where the circumstances and environment are unfavourable for their dangerous activities.

4.36 The serving of the Ordinance is also reasonably justified in the sense that it intends to ensure that the activities of the individual are subjected to the interests of the society in order to protect the society from the consequences of a breakdown of peace, good order and security in general.

4.37 Admittedly it is through peace and security of the society that an individual can hope to live, exercise and enjoy his personal rights and freedoms. It is therefore, the contention of the Law Reform Commission that the Ordinance meets the conditions set by sub-article (2) of Article 31 of the Ordinance. Therefore, the Ordinance is also saved by this derogatory Article.

4.38 As discussed above, the Ordinance remains Constitutional and serves the interests of the society in general. However, it is noted that is no time frame in relation to the Deportation Orders. The Law Reform Commission is of the view that as recommended in respect of the detention order under the Preventive Detention Act, 1962, there should also be a prescribed period of deportation subject to renewal. This will encourage a deportee to strive to mend his way in order to regain his full liberty within the prescribed initial period.

4.39 The Nyalali Commission mentioned also that the Ordinance like the Preventive Detention Act, 1962 is subject to abuse and therefore should be abolished. The Law Reform Commission is of the opinion that abuse of the Ordinance does not constitute a sufficient ground for abolition of the legislation nor is it the issue. There are numerous ways of dealing with such abuses whether committed by the Police or other government agencies, inter alia, by using the Courts of Law in petitioning to the High Court as provided for by section 3 of the Ordinance.

4.40 On their part the Courts have already demonstrated time and again that they can play a vital role in ensuring that a person's liberty is not unwantonly tempered with. In cases involving deportation and detention orders under the Deportation Ordinance or the Preventive Detention Act, 1962 the Court of Appeal has established that Courts will jealously safeguard the freedom of a detainee by ensuring that the powers of deportation and detention are exercised rightly, honestly and bonafide even where there are provisions which oust the jurisdiction of the Courts. The Court of Appeal stated categorically in the case of AG vs Lesinoi Ndeinai & others;

"The liberty of the individual is so precious to the concept of the rule of law that the Courts are duty bound to see that it is not taken away except under express provisions of the law of the land."[20]

4.41 Consequently, in the above mentioned case, citing decisions like the English case of Rev. Thomas Relham Dale[21] and the Zambian case of William Musala Chipango V. the Attorney General,[22] the Court of appeal took the position that strict compliance with procedural requirements is necessary before a person can be deprived of his personal liberty in Tanzania.

4.42 Hence it was held that an order of detention which is not affixed with the Public Seal as required under s.2 of the Preventive Detention act, 1962 is a complete nullity and therefore illegal. As a result the Court ordered the release of the respondents who had been detained under a detention order was not affixed with a Public Seal.

4.43 As both s.2 of the Preventive Detention Act, 1962 and s.3 of the Deportation Ordinance provide the same requirement of affixing Public Seal or official seal to detention or deportation orders the above decision can also be applied mutatis mutandis in cases of deportation orders.

4.44 In the same vein the High Court has held that omission to specify the place of where the subject of a Deportation order and the Detention Warrant is to be sent can not be said to be a mere technicality, but is a material irregularity. This was held in the matter of an application for a writ of habeas corpus subjiciendum and in the matter of detention Of Wilfred Ngonyani at Keko remand prison, Dar es salaam, [23] where an application for the release of a detainee detained under the Deportation Ordinance was considered. Both the Detention Order and the Deportation Order did not state the place where the detainee was to be deported to. For that reason the Court ordered the release of the applicant/deportee.

4.45 It can therefore be summed up that the Courts will oversee the strict observance of all procedural requirements in order to guard personal liberty thereby safeguarding individuals against executive abuses.

5:0 RECOMMENDATIONS:

5.1 The Law Reform Commission has found the Ordinance still valid and constitutional. Further that is contains enough safeguards for individual rights and against misuse of the powers of deportation. However, the Ordinance requires some modification and therefore the Commission recommends as follows:

1. The Ordinance be retained.

2. The Period of deportation be specified. A maximum period of two years is recommended with provisions for renewal if necessary.

3. The fine of one thousand shillings imposed for contravention of a deportation order is too small. It should be enhanced to shs. 10,000.

(ii) EXPULSION OF UNDESIRABLE PERSONS ORDINANCE,1930 (CAP. 390). AS AMENDED BY ACT NO. 32/94

1.1 THE STATE OF THE LAW:

This is another legislation which owns its origin to the colonial days but retained after independence and the powers thereof inherited by the President

1.2 According to s.2 of Ordinance the President is empowered to make expulsion order to a non native of mainland Tanzania under two circumstances:

(a) where a person has been convicted for a felony by a court than a Primary Court and the Court recommends that an expulsion order should be made against him in addition to or in lieu of sentence;

(b) where the President deems it to be conducive to public good or advisable in the interest of the public morals that such order should be made.

---

[20] 1980, TLRN 214 AT P. 239

[21] (1981) 6 Q.R.D. 376

[22] (1970) selected Judgements of Zambia No. 28 of 1970 – 1970 H.P.

Thus the President may order such a person to leave the country and remain so as long as the order remains.

1.3 The Ordinance also, under s.3, allows the detention in prison of any person in respect of whom a recommendation is made by a court that an expulsion order be made, but against whom no sentence has been passed pending decision of the President.

1.4 Under s.6 of the Ordinance the President may order, if he thinks fit, that any person against whom an expulsion order to leave the country has been made, be arrested and deported instead and while awaiting deportation be detained under section 7 of the Ordinance. A person detained on an expulsion order can be admitted to bail only on the consent of the President.

1.5 In addition a procedure befitting the principle of natural justice, that is the audi alteram partem rule, bas been provided for. Accordingly to s.7 of the ordinance as amended by Act No. 32/94, the person suffering an expulsion order may petition to the High Court against the said order. He shall be informed in writing within fourteen days of the execution of the order grounds on which he is being expelled. He should also be afforded an opportunity of making representation in writing a memorandum to the President on excuse or reason for non enforcement, or delay in complying with the expulsion order, or else be released if he is not informed within fifteen days.

1.6 Under ss.9-12 of the Ordinance an expulsion order made under the Ordinance may be reviewed by an ad hoc Board of Inquiry appointed by the President. The Board which has the power of subordinate court is enjoined to hold to hold its inquiry in public in the presence of the expellee memoralist who has the right to be represented before the Board by an advocate. It shall then advice the President in respect of the situation dealing with the expulsion. However, the President is not bound to abide by the recommendations of the board.

2:0 MISCHIEF FOR THE ENACTMENT OF THE LAW

The Ordinance was designed to enable the country to expel from its territory persons who may be considered undesirable for one reason or another than political.

2.1 When presenting the bill of the Ordinance to the Legislative Council the Attorney General stated that the intention was to seek powers similar to those available under the Tanganyika Order in Council, the Deportation Ordinance and the Immigration Ordinance. The new legislation was intended to go beyond the scope of these other legislations which were meant to deal with political offenders. It was also argued at the time that the law was "merely an expression of inherent right of every civilized country to expel from its country persons who are considered undesirable for one reason or another" [24]

[24] Hansard Reports on Tanganyika Lagislative Council debates of 10th February, 1930

3:0 CRITICISM BY THE NYALALI COMMISSION

3:1 The Ordinance has also undergone criticisms mainly based on violation of the Constitution. The Main grounds of condemnation are contained in Book Three at page 12-13 of Nyalali Commission Report as follows:

"The Ordinance (Cap.39) like others is unconstitutional as it interferes with the rights and freedoms guaranteed specifically: -

- It gives no reason for an order for expulsion
- It denies the right to challenge the order in courts of law.
- It denies right to bail and review by court of law.
- It does not stipulate the period for which such an order shall terminate that is it is open – ended order form of sentence.
- Above all it allows detention without trial."

3:2 The Nyalali Commission recommended that the law be retained but the Law Reform Commission be advised to look into it and make the necessary recommendation where necessary.

4:0 WEIGHING UP BY THE LAW REFORM COMMISSION:

4.1 In weighing up the criticisms the Law Reform Commission has also dealt with criticisms from some other legal quarters which include, inter alia, that,

(1) The Ordinance gives too much powers to the President under section 2(1)(b) to decide without being provided with a criterion what is good to the public and what is repugnant to good morals. Fear was expressed that the President may abuse these powers and infringe rights and freedoms of individuals.

(2) Denial of bail to a person under the expulsion order and detained pending deportation is another sentence or punishment and amounts to holding a person in detention without trial. Further that as the President has power to direct anything he may even keep the detainee incommunicado.

4.2 It should be noted at this juncture that some of the criticism by the Nyalali commission have already been addressed to. These are in respect of giving the expellee reasons for the issue of the expulsion order, and the right to challenge the order in court. According to section 7 of the ordinance as amended by the Expulsion of Undesirable Persons (Amendment) Act, NO. 39/94 the expellee has to be informed reasons for his expulsion within fourteen days of the execution of the Order or else be released if not so informed. The sections also gives the expellee the right to petition to the High Court against the Order.

4.3 The Law Reform Commission has considered the intention of the legislators in enacting the law to empower the Governor then, now the President, to expel non-citizens who are undesirable for having committed serious criminal offences or where he considers to be of

public good or advisable in the interest of public morals. It appears that the legislators have entrusted the Executive arm of the Nation the responsibility of deciding the conduct of foreigners whether they ascribe to the culture, norms and ideals of our society and put upon it the option of expelling those who fall short of the required standard of conduct. In order to ensure that these powers are properly exercised the Act contains several safeguards against the abuse of the powers and the inordinate tempering of the rights and freedoms of individual as will be demonstrated herein below.

4.4 On the criticism that the President's powers under s.2(1)(b) of the Ordinance are too wide, the Law Reform Commission is of the opinion that the procedure introduced by the Expulsion of Undesirable Person (Amendment) Act No. 32/94 by which the person to be expelled is informed of grounds thereof and afforded an opportunity to make representation to the President; the matter of his expulsion considered by an Inquiry Board and ultimately the right to petition to the High Court on the expulsion order, offer sufficient safeguard against abuse of expulsion powers by the President and avail the person to be expelled an opportunity of being heard and redressed.

4.5 The Commission is also convinced that the detention of a person awaiting the decision of the President under s.3 of the Ordinance does not infringe his rights. On one hand the person concerned will have been convicted of a felony

and the expulsion order recommended by the magistrate is either part of the sentence or in lieu there of. Invariably the sentence of a felony includes or involves imprisonment. Therefore, the detention of such a person does not make him in a worse situation than if he was imprisoned or he sarved a longer term of imprisonment which appear to be the alternatives.

4.6 Equally, the Commission finds no fault in detaining a person awaiting execution of an expulsion order unders.7 of the ordinance on the discretion of the President. There could be a situation where if the foreigner is let loose he may continue doing acts which have necessitated his being issued with an expulsion order. At the same time foreigner's general conduct, credibility and missions may not be matters of general knowledge. Therefore, it should be left to the good wisdom of the President who will be assisted by state organs to decide whether a person awaiting expulsion is fit for detention or otherwise.

4.7. Moreover Article 15(2) allows arrest and detention, inter alia in circumstances certain and subject to a procedure prescribed by law. This claw-back clause reads:
"For the purpose of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases: -

(a) in certain circumstances, and subject to a procedure, prescribed by law; The Expulsion of Undesirable Persons Ordinance, 1930 provides for detention and expulsion of a person on certain circumstances and by procedure mentioned herein before which is elaborate. Therefore, the detention and the expulsion are acts permitted by the Constitution.

4.8 It has also been argued that the detention of a person arrested under an expulsion order is tantamount to giving him another punishment over and above the expulsion and amount to holding him in detention without trial.

4.9 While considering whether detention without bail means imposing another punishment, the law reform Commission considered the decision of the Court of Appeal in DPP v. DAUDI PETE [25] in which it agreed with the interpretation of **section 148(5)(e) of the Criminal Procedure Act, 1985 by MSUMI, J. in the case of Republic v. Peregrin Y. Mrope[26], where he stated inter alia. "Section 148(5)(c) does not contravene the provisions of Article 13(6)(b) (of the Constitution), ... Denying bail to accused person does not necessarily amount to treating such a person like a convicted criminal.**

4.10 Equally, the Court of Appeal in the case of DPP v. SIMON MARWA and another,[27] Criminal Appeal No.46 of 1984 at Arusha held that a detention under the Preventive Detention Act, 1962 did not amount to punishment within the meaning of s.21 of the Penal Code and that a person detained under the said Act may also be sentenced to jail.

4.11 The respondent though detained under the Preventive Detention Act, 1962 had also been convicted of unlawful possession of a pistol and six rounds of ammunition c/s 8(1) of the National Security Act,1970. He had successfully argued in the High Court that since he was in detention under the Preventive Detention Act, 1962 it would amount to giving him a second punishment for the same offence which was contrary to section 21 of the Penal ode ifsentenced. The section states:

"A person shall not be punished twice, either under the provision of this code or under the provision of any other law for the same offence"

4.12 These decisions can therefore be used mutates mutandis in this case to hold that the detention of a person under an expulsion order can not be equated with punishment of a criminal convict.

4.13 As to the time frame of an expulsion order the Law Reform Commission considers that the matter be left to the wisdom of the Chief executive, for its determination depends on various factors inclusive of the nature of the offences and the conduct involved such that is would not be appropriate to provide for a specific time frame.

4.14 As observed while discussing the Preventive Detention Act 1962 and the Deportation Ordinance individual rights and freedoms are clothed with limitations to suit public interests as evidenced by several provisions in the Constitution including Articles 17(2), 30(2) and 31(1) of the Constitution.

4.15 The Law reform Commission has noted that section 7(4) of the Ordinance which permits the expellee to petition to the High Court is inconsistent with section 20 of the Ordinance which ousts the jurisdiction of the courts. According to section 7(4):
"Any person whom an expulsion order is made may petition to the High Court on any ground pertaining to compliance with the procedure prescribed by or required under the Ordinance."

---

[25] Criminal Appeal No. 28 of 1970 at Dar es Salaam (unreported)

[26] Miscellaneous Criminal Appeal No. 43 of 1989 (unreported)

[27] Criminal Appeal No. 46 of 1970 at Arusha (unreported)

On the other hand section 20 provides:

"No court of law in the Territory shall have any jurisdiction to review, quash, reverse or otherwise interfere with any proceedings, Act or Order had, done or made under this Ordinance."

4.16 It is apparent that in exercising powers conferred to it under section 7(4) of the Act, the High Court may at the same time infringe the provisions of section 20. This cannot be the intention of the legislature. The Law Reform Commission considers that while amending section 7(4) by Act. No. 35/94 there was an over-sight to repeal section 20 of the Act.

4.17 After all in the light of the inherent powers of courts of Law to review administrative powers despite ouster provisions sections section 20 of the Act appears to be of no consequence. In the case of AG v. LESINOI NDOINAI and others (1980)[27] the Court of Appeal while considering section 3 of the Preventive Detention Act, 1962, which then ousted the jurisdiction of courts of Law, held that courts of law have power and the duty to see that powers of detention conferred on any person are exercised rightly, honestly and bona-fide notwithstanding ouster of jurisdiction clauses. This applies mutatis mutandis with respect to expulsion orders thus rendering s.20 of the Ordinance ineffective.

4.18 At the same time the Constitution has provided for enforcement and protection of basic right and freedoms which any person can recourse to. To this end Article 30(3) provides,

"Where any person alleges that any provision of this Part of this chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United republic, he may, without prejudice to him in respect of the same matter institute proceedings for relief in the High Court."

The proceedings are instituted by procedure provided by the basic rights and Duties Enforcement Act, 1994.

4.19 It is also noted that s.18 of the Ordinance prohibits the person against whom an expulsion order has been made to sue for indemnity. This discriminates those aggrieved by this Ordinance as against persons who might fall victims of other legislations. Indeed it is against the spirit of Article 30(3) of the Constitution. It is advised that in this era of human rights the Victim of a detention order proved to have been detained unjustificably should be compensated or be allowed to take civil action in Court for compensation.

4.20 Another anomaly which has been noticed is that the rate of fines to be imposed for contravention of the provisions of the Ordinance are outdated. One can be sentenced to a fine of shs. 500/= for contravening section 9(6) of the Ordinance which deals with summons, attendance, giving evidence and other matters related to hearing by a Board of Inquiry, and a fine of shs. 1,000/= as an alternative or addition to imprisonment of up to six months for offending any other provision of the ordinance. These fines are very low and therefore need to be reviewed in line with the current situation.

[28] Tanzania Law Reports (TLR), p. 214)

5:0 RECOMMENDATIONS:

5.1 The Expulsion of Undesirable Persons Ordinance 1980 (Cap.39) as amended by Act No. 32/94 is still a useful legislation and should be retained as advised by the Nyalali Commission. Therefore, the Law Reform Commission recommends the following:

(1) The law be retained.

(2) Provisions of fines be reviewed by enhancement from shs. 500/= and shs. 1,000/= to shs. 5,000/= and shs. 10,000/= respectively.

(3) s.18 of the Ordinance be reviewed so that a person served with expulsion order under s.2(2)(1)(b) of the Ordinance be entitled to seek for compensation in Court where it is established that his detention was not justified.

(4) s.20 of the Ordinance be repealed.

(iii) THE RESETTLEMENT OF OFFENDERS ACT NO. 8/69

1.0 STATE OF THE LAW:

1.1 The Act was enacted to provide for resettlement of certain offenders and habitual offenders. It is contended that the Act was enacted in response to the socialist and self reliance policies of the then Ruling Party – (TANU) – declared in 1967 through the Arusha Declaration, i.e. to urge the importance of work and curb the increased crime rate especially in urban centers.

1.2 The Act is classified as one of the vagrancy laws enacted to supplement other like pieces of legislation, such as the Township (Removal of Undesirable) Ordinance, the Destitute Persons Ordinance etc. When introducing the Bill in the House the Minister responsible stated, inter alia, that the intention of the law was not to punish the criminals to be resettled but to teach them the policy of self-reliance whereas every one should earn his or her living through sweat. Rehabilitation and eventual integration of habitual offenders into the society was the ultimate goal.

1.3 The Act however does not define who a habitual offender is; one has to resort to other jurisdictions to find the definition of a habitual offender. The Uganda Habitual Criminals (Preventive Detention) Act Cap. 122 defines a habitual offender as: -

> "a person who is not less than 30 years of age, convicted of an offence punishable with imprisonment for a term of two years and has been convicted on at least three previous occasions since the age of 16, of offences punishable with such a sentence and at least on two of those occasions sentenced to imprisonment".

The English Prevention of Crime Act 1908 and Cap. 59 has a definition of habitual criminal which reads:

> "Formally a person who after attaining the age of 18 has been three or more time convicted of certain crimes and who was proved previously to have been leading a dishonest or criminal life. Such person might be sentenced to a term of preventive detention from five to ten years to follow a sentence of penal servitude".

In Criminology, a habitual offender is a person who has developed a habit of committing crimes or a **RECIDIVIST**.

1.4 The lack of definition of a habitual offender is considered to be a grave anomally or omission which has the effect of over stretching the types of offenders who may be kept in resettlement centers. Section 4-8 of the Act outline the categories of offenders eligible for resettlement orders as follows:

- persons convicted of a scheduled offence under the Minimum Sentences Act 1962 (cap. 52).

- persons convicted of any offence whatsoever punishable with imprisonment for a term of two years or more if the Commissioner for Social welfare so recommends.

- where a person is under security for good behaviour under section 45 and 52 of the Criminal Procedure Code (Act).
- a person issued with a deportation order or order under section 8 of the witchcraft Ordinance.

2.0 CRITICISM BY THE NYALALI COMMISSION:

2.1 The Act has been criticized by the Nyalali Commission first and foremost in that it lacks a definition, thus over-stretching the categories of offenders who may be issued with resettlement orders. That the Act does not stipulate age limit and/or requirement for a previous conviction. Due to its ambiguity it clearly offends a cardinal principle that one attribute of any law is its certainty in terms of substance, application and procedure, hence the room for glaring abuse leading to miscarriage of justice.

2.2 The Nyalali Commission has further complained that the Act has been used as a political weapon to get rid of the so called political trouble shooters, as means by which the police obtain detention of people believed to have committed offences but without sufficient evidence to win a conviction in a court of law.

2.3 That the Act does not stipulate the maximum or minimum period of the resettlement order except that the order is subject to the Minister's review upon the application of the settler or officer in charge or once in every year upon the request of the commissioner for Social Welfare. In is contended that a sentence of imprisonment must have a clear beginning and a clear ending but the orders for detention and settlement are open-ended. Furthermore section 16 of the Act ousts the power of review of the court once the Minister has given his order.

2.4 The Nyalali Commission in conclusion submitted that the resettlement center have been turned into punitive institutions (see High Court case of SAMWEL KUBEJA Vs R[29]. The Act was therefore condemned to be unconstitutional, and not serving the purpose of rehabilitation originally envisaged. Appropriate review was recommended to make the Act serve the intended purpose.

3.0 WEIGHING UP BY THE LAW REFORM COMMISSION

3.1 Ever since the Resettlement Offenders Act was enacted five settlement centers were established the Government under the charge of the Departments of Social Welfare and the Prisons respectively. These were: -
Kitengule in Kagera
Songwe in Mbeya
Molo in Sumbawanga
Wami ni Morogoro
Ngwala in Chunya

Three out of the five centres, i.e. Songwe, Molo and Wami Resettlement Centres, have ever since been closed mainly because settlers proved a menace to neighbouring urban centres of Morogor, Mbeya and Sumbawanga. It is reported further that even the two remaining settlement centres are not utilized as no settlers have been sent to these centres.

3.2 The Law Reform Commission supports the concept of rehabilitating habitual offenders to be an ideal that society should cherish. The most important factor lies on how the objective/ ideal should be achieved. Incidentally the critics of the Resettlement of Offenders Act are in support of the concept behind it. In its recommendations the Nyalali Commission, despite its negative note that the Act violates the rights and freedoms of individuals, called for appropriate review so as to make the Act serve the intended purpose.

3.3 The Law Reform Commission, upon examination of the Resettlement of Offenders Act is in full agreement with the concerns pointed out regarding the various defects and short comings in the Act. These are:

1. the lack of definition of a 'habitual offender' in the Act which has the obvious effect of over stretching the categories of offenders. Once a definition is provided for section 4, 5, 8 and 9 will be realigned accordingly.
2. The resettlement order lack of definitive period of time. Section 10 is open ended as it does not stipulate the period a person may spend in a resettlement centre.
3. Lack of definite grounds upon which a review of the resettlement order should be based.
4. The denial or ouster of judicial review on resettlement orders.

[29] (1981) TLR 72

4.0 RECOMMENDATIONS

4.1 Therefore, the Law Reform Commission recommends that the law be retained subject to the following amendments:

(1) a definition of a 'habitual offender' be provided in the following lines:
"Habitual offender" means a person who is not less than 25 year old, who, after attaining the age of 18 years, has, on three or more times, been convicted of any crime of moral turpitude for which he was, on each of such occasions, sentenced to imprisonment for a period of three years or more and has how been sentenced to imprisonment for not less than three years upon conviction of another offence or moral turpitude."

(2) That a person so defined as a habitual offender should be liable to be served with an order of resettlement of offenders, which should follow after serving his last sentence of imprisonment .

(3) That the resettlement should be for a minimum period of two years.

(4) Grounds for review of resettlement order be provided for.

(5) Section 16 of the Act which ousts judicial review of resettlement orders be repealed.

(iv) THE GRAVES (REMOVAL) ACT NO. 9/1969

1.0 STATE OF THE LAW

1.1 The Act enacted in 1969 to provide for the removal of the graves from the land required for public purpose. The provisions of section 3 of the Act, empowered the Minister to cause any grave and any dead body buried in any land which is required for a public purpose to be removed from such land and take such steps as may be convenient for the reinstatement of the grave and the reinterment of the dead body in a place approved for that purpose. The definition of "public purpose" is contained in Section 4 of the Land Acquisition Act 1967 – i.e. for exclusive Government use, for general public use, of sites for industrial, agricultural or commercial development, social services or housing, for use by the Community or a corporation within the Community. The Act requires the Minister to give notice of the intention to remove graves or dead bodies to interested parties and such notice to be published in the gazette after service (section 4 on the Act).

1.2 Section 9 of the Act, provides for compensation to be paid to an interested person, who undertakes the removal, transportation, reinstatement and reinterment of a grave or dead body on behalf of the Government. Moreover, section 10 of the Act provides for a penalty of a fine not exceeding four thousand (4000/=) shillings or imprisonment not exceeding 2 years or to both such fine and imprisonment for obstruction or hindrance in exercise of any rights or powers of entry upon land to undertake the removal of any grave or dead body.

2.0 CRITICISMS BY THE NYALALI COMMISSION

2.1 The Nyalali Commission in its report argued that the Act does not provide for clear procedure for payment of the compensation and that the Minister has been left with the discretion to award compensation at the amount which he may thing proper. Consequently, the Nyalali

Commission further suggested that the provisions of section 11(1) of the Land Acquisition Act, 1967, should be followed in awarding compensation under the Graves (Removal), Act, 1969, since they are comprehensive and that they provide for fair adequate and prompt compensation.

3.0 WEIGHING UP BY THE LAW REFORM COMMISSION

3.1 The Law Reform Commission agrees with the observation by the Nyalali Commission to bring the issue of compensation in the Graves (Removal) Act 1969 in conformity with the provisions of Land Acquisition Act 1967 thus enable the people claiming compensation to be certain of being paid and also know the formula being used to award them such compensation.

4.0 RECOMMENDATION

4.1 The Law Reform Commission therefore recommends that the Graves (Removal) Act, 1969 be amended so that provisions of section 11(1) of the Land Acquisition Act, 1967 be used in awarding compensation under the Act (No. 9/69).

PART 4

THE PREVENTIVE DETENTION ACT, NO.2 OF 1962
As Amended by The Preventive Detention (Amendment) Act No.2 of 1985

1.0 THE STATE OF THE LAW

1.1 The Preventive Detention Act, 1962 as amended by the Preventive Detention (Amendment) Act No. 2 of 1985 is designed to safeguard peace good order and security of the United Republic. Under s.2(1) of the Act, the President is empowered to detain a person who in his opinion is conducting himself so as to be dangerous to peace and good order in any part of Tanzania, or to the defence or security of the state. The President exercises this power by issuing a detention order in his own handwriting and the Public Seal directing the detention of such person.

1.2 After execution of the order the detainee acquires several rights, inter alia, the right to challenge the legality of the order in the High Court an any grounds. This provision was brought about by the amending Act No.2/85 which repealed and replaced s.3 of the main Act. Hitherto the detention order could not be reviewed by any court of law.

1.3 On his part the President is enjoined under s.6 A of the Act to publish the name of every detainee in the Government Gazette. In addition under s.3 he is required to inform the detainee within 15 days after his detention the grounds on which he is detained. Otherwise, the detainee is entitled to be released.[30] The Act requires also that the detainee be given opportunity of making representation in writing to the President in respect of the detention.[31]

1.4 Thereafter, should he continue to hold the person in detention, the President shall refer the matter of the detention order to an Advisory Committee immediately after the detainee has made his representations or within three months of the execution of the detention order if the detainee makes no representation.[232] The Advisory Committee established under s.7 of the Act consists of five members the Chairman and two members of which are appointed by the President and the other two members by the Chief Justice. The Committee is charged with the duty of advising the President whether the order should be continued, rescinded or suspended. In the conduct of their business the Committee has to be given a opportunity of interviewing the detainee in addition to being supplied with the grounds of his detention and his representations,

if any, to the President with respect to the detention order .If no such reference is made within the period stipulated the detainee shall be entitled to be relased.[33]

1.5 While under detention the detainee is subjected to communication restrictions. According to s.3 of the Preventive Detention (Communication with Detainee) Regulations, 1963 made by the President under s.4 of the Act, no detainee shall except with the previous authority in writing by the Minister for Home Affairs receive any visitor or write or receive any written communication.

[30] Section 6 (2)
[32] Section 6 (1)

1.6 At the sometime the President is empowered to rescind or suspend a detention order under s.5 of the Act.

2.0 MISCHIEF FOR THE ENACTMENT OF THE LAW:

2.1 The Act is designed to preserve peace and security in Tanzania. This was revealed first and discussed by the National Assembly during presentation of the Bill to the Act. During the Second Reading of the Bill in the National Assembly on 26th September, 1962, the Minister for Home Affairs remarked that the continuing stability and security of the State necessitates the Executive having the power to detain person who threatens that stability and security and that the Bill made provision accordingly. The Minister also stated the Principal grounds for the Bill (Act) to be.[34]

1. To secure and preserve freedom for the people of Tanganyika (now Tanzania by Act No.2/ 1985).
2. A greater desire to maintain the integrity and safety of the state;
3. To remain in a state of complete readiness to deal with any threats to the security of the State; and
4. To rest, permanently, the power to deal, with such threat in someone who could use it promptly when the need arose.

2.2 During the debate other members of the National Assembly made more contributions to the objects of the law. Hon. Miss Johanson was of the view that the Bill was there to prevent the activities of those who do not believe in the ballot box as a way of expressing the wishes of the people regarding matters of the Government and state and who therefore use other ways. That it tends to prevent such exceptional people from using these other means.[35] Hon. Mr. Joseph Nyerere concerned by saying that the Bill was intended to prevent chaos and that it is only those who try to use undemocratic means of achieving what they want would be affected.[36]

2.3 It would seem therefore, that the Act was aimed at nipping in the bud political troublemakers, coup plotters and the like who threatens peace and security of the Nation.

2.4 Several reasons have been assigned for the propriety of using this Act instead of the usual judicial system to reach the object of the law. During the presentation of the Bill for the Act the Home Affairs Minister also conceded that concept of "freedom" included the right of individual to be free from personal restrains and that an independent judiciary could be maintained so that those whose person freedoms have to be curtailed are so done through due process of law through the Courts for proven offences against the law. However, the Minister contended that it was not always possible to use the criminal law for the protection of the state from those who threaten its security because the process of criminal law ..." is naturally very slow and by the time the evil doer has been caught harm has already been done."[37]

---

[32] section 7 (4)
[33] s. 7 (5)
[34] Hansard Report of National Assembly debates between 25-27 of September, 1962 as reported by Hansard at pp. 109-119.
[35] Hansard, op. cit. P. 111
[36] Hansard, op. 111, 112
[37] Hansard op cit. p. 109

2.5 The Minister explained the need for expedience of action in protecting peace and security. He pointed out that..."the complexity of a modern state the knowledge and power now makes even individuals or small groups capable of becoming a serious menace to the society." That the suddenness with which individuals or small groups can become such a danger makes it necessary for the type of power to deal with them to be permanently held by someone ready to use it with equal speed when need arises.[38]

2.6 During the debate of the Bills of this Act Hon. Mr. Bajay observed that was a period of revolutionary change throughout Africa and that Tanganyika (Tanzania Mainland) was a young country and under those circumstances it was right and fair and necessary that the Government should have such powers. [39]

2.7 Emphasizing the importance of the Act the former President of Tanzania Mr. J.K Nyerere when inaugurating the University College of Dar es Salaam stated inter alia.

> **"Our nation has neither the long tradition of nationhood nor the strong physical means of national security which older countries take for granted. While the vast mass of the people give full and active support to their country and its government a handful of individuals can still put our nation into jeopardy and reduce to ashes the effort of millions."[40]**

2.8 In summary the Act is designed to vest the President with the power of detention for the purpose of effective governance in protecting society from bad elements and prevent imminent threat to peace and security expeditiously.

3.0 CRITICISM BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission considered the Act and criticised that it empowers the President to violate all other laws including the Constitution, allows him to ignore the principle of the Rule of Law that is fundamental in the democratic state and empowers him to do whatever he likes with the life and personal liberty of an individual. Further, that the mischief aimed at by the Act are in respect of the acts (deeds) that may be committed in the future and not which have already been committed. The Commission also commented that section 4 of the Act and the Regulation thereof make the legal status of the detainee more o less like that of an ordinary convicted and imprisoned criminal and the President is neither required to act in accordance with the advice of the Advisory Committee nor is there any other administrative control of the powers of the President.

3.2 The Commission further observed that the Act has constantly been abused by Regional and District Commissioners and the Police. Further that it has become a weapon to silence political opposition as well as common means used by the police to combat ordinary crimes in the country. The Commission concluded that the Act violates the provisions of Article 17(1) of the Constitution which guarantees freedom of movement and recommended that the Act as amended by Act No.2/1985 be repealed.

---

[38] Hansard, op.cit.109

[39] Hansard,op.Cit

[40] J.K. Nyerere, Freedom and Unity DSM Oxford University Press 1967 p.305

4.0 PEOPLE'S VIEWS

4.1 During both the Workshop and the regional tours two divergent views were expressed on the propriety of the Act. One of the views which emerged from the minority of participants coincided with criticisms of the Nyalali Commission that the Act gives the President enormous powers which may be used to muzzle the opposition, curtail freedom and undermine development. Further that the Act was enacted to protect a budding nation then jealously protecting its newly acquired independence but that it was no longer necessary.

4.2 Proponents of this view contended that in as much as the Act curtails freedom of movement and communication it is unconstitutional. Therefore, they recommended that any provision that is necessary to guard the security and peace of the state should be transferred to the National security Act, 1992 to be dealt with by the normal law enforcement agencies. Further that the Preventive Detention Act, 1962 be repealed.

4.3 Conversely, the view of the majority expressed support for the retention of the law arguing that the security of the state is vital matter. Hence, it was important for the Executive to be vested with powers of detention for the purposes of ensuring effective governance, protecting society from bad elements and preventing imminent threat to security, peace and tranquility. That government clout must not only be seen but must equally be felt to be present.

4.4 Further that given the current situation of political reforms and economic hardships which could be used by few people to try to compromise peace and security, it was considered desirable for the Executive to continue to be clothed with powers of detention. Observation was made that the Preventive Detention Act, 1962 in as much as it gives legal authority to the Executive to detain a person for purposes of preserving peace, order and security maintains balance of powers.

4.5 This group tried to dispel fears that the detention powers would continue to be used to arbitrarily infringe peoples rights and freedoms by arguing that several safeguards have been incorporated into the Act. Special mention was made that the powers of the President under the Act are controlled by the procedure to deal with a detainee especially by the provision of review by the High Court on petition filed by the detainee. It was also observed that there is a constitutional safeguard should President act in a manner incompatible with the spirit of the Act for the Parliament can now impeach him under Art.46 of the Constitution.

4.6 The retentionists noted also the presence of other legislation dealing with matters of national security i.e. the National Security Act, 1970 and the Emergency Act. 1989. Therefore, recommended that:

1. acts envisaged to be covered by the Preventive Detention Act be specified;
2. the role, function and composition of the Advisory Committed be reviewed;
3. a period of reference of the detention order to the Advisory Committee be reduced to two months;
4. The President should abide by the advice of the Advisory Committee;
5. The President be obliged to inform the Speaker of Parliament names of persons in detention immediately if it is in session or if other wise at the following session.
6. A time limit detention be provided for by the law. A renewable period of one year was suggested.

7. A detainee be permitted to make communication in line with the provisions under the Prisons Act, 1967;
8. A person detained without sufficient reasons should be entitled to compensation.
9. The Preventive Detention Act, 1962 be merged with the National Security Act. 1970

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 The basic criticism about the propriety of the Act is the alleged violation of the freedom of movement as enshrined in the Constitution vide Article 17(1) thereof. The provision according to the English version of the Constitution provides:

> **"17(1) Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say, the right to move freely within the United Republic and to reside in any part of it, to leave and to enter into it and immunity from expulsion from the United Republic."**

5.2 However, the Law Reform Commission has taken legal notice of the fact that rights and freedoms enshrined in the Constitution are not absolute but clothed with duties which subject the rights and freedoms to restrictions, limitations and derogations. It should be bone in mind that an individual human being is a social animal and hence does not live in isolation. He exists and lives in society. Therefore, the Constitution has recognized the coexistence of the individual human being and society as well as the coexistence of rights and duties of the individual and society.

5.3 In considering whether the Preventive Detention Act, 1982 violates the afore quoted Article 17(1) of Constitution we are bound to follow the principles enaciated by the Court of Appeal of Tanzania in the case of DPP v. DAUDI PET[41]. In the case the court of Appeal pointed out that in order to inteprete the Constitution and the law of the land properly there is a need to bear in mind the following basic concepts, principles and characteristics concerning the Bill of Rights and Duties enshrined in our Constitution:

> **"First, the Constitution of the United Republic recognizes and guarantees not only basic rights, but also unlike most constitutions of countries of the West, recognizes and guarantees basic human duties.**
>
> **...Second...is a corollary of the reality of coexistence of rights and duties of the individual on the one hand, and the collective or communitarian rights and duties of society on the other. In effect this coexistence means that the rights and duties of the individual are limited by the rights and duties of society and vice versa."**

5.4 The Court of Appeal was determining inter alia, whether the provision of section 148(4) and (5) of the Criminal Procedure Act, 1985 which prohibited the granting of bail in certain cases violated Articles 13 and 15 of the Constitution which guarantee equality before the law and the right to personal freedom respectively. the Court took judicial notice of the

[41] Criminal Appeal No.28 of 1990 at Dar es Salaam (unreported)

existence of provisions which limit and derogate the rights and freedoms of individuals in particular Articles 15(2), 30 and 31 of the Constitution which could save some legislations and provisions which are otherwise violative of rights and freedoms of individuals.

5.5 In this respect any statute which limits or derogates from the rights and freedoms of an individual is not automatically null and void for it could be served by the serving provisions. In Pete's case the Court of Appeal also commented as follows:

> **"It would seem that learned trial Judge is of the view that every statute which derogates from the right to personal liberty "is exfacie ultravires the provisions of Article 15". This view is obviously wrong because Article 15 itself provides for derogation under sub-article(2)."**
>
> **Ultimately the Court held as follows: -**
>
> **"...we find that the provisions of section 14(5)(e) are violative of Article 15(2)(2) of the Constitution. To the extent that section 148(5)(e) violates the Constitution, it would be null and void, "..." unless it is served by the general derogation clauses, that is Article 30 and 31, which permit certain derogations from the basic rights of the individual."**

5.6 The basic issue is whether the Preventive Detention Act, 1962 contravenes Articles 17(1) of the Constitution quoted herein before. Admittedly, the Preventive Detention Act, 1962 is designed to legally, inter alia, interrupt or curtail the freedom of movement of person and also freedom of residence. A person on whom the powers of detention are exercised is arrested and detained as a civil prisoner in custody or prison. Therefore the Act violates Article 17(1) of the Constitution.

5.7 Nevertheless, that is not the end of the matter. One has to consider whether the limitation put on the freedom of movement and residence by Article 17(2) accommodates the Preventive Detention Act, 1962 or whether the Act is saved by the general derogative provisions of Articles 30 and 31 of the Constitution.

To this end Article 17(2) of the constitution provides:
Any lawful act or law made for the purpose of:

"(a) imposing restriction on the exercise of movement so as to-

(iii) protect the interest of the public in general or any specific public interest of a category of the public.

Such act of law shall not be or be deemed to be invalid or inconsistent with this sectiohn."

5.8 Therefore according to Article 17(2)(b)(iii) of the constitution any law made for the purpose of imposing restriction on freedom of movement to protect public interest is not invalid or inconsistent with Article 17 in general. As mentioned hereinabove the Preventive Detention Act, 1962 is intended to safeguard public peace, good order, defence and security of the country which are matters of public interest. Therefore, the Act fits within Article 71(2)(b)(ii) of the constitution and therefore not null and void.

5.9 Since the Act is geared towards pre-serving public interest it seems to be served also by the general derogation provisions of Articles 30 and 31 of the Constitution. Under Article 30(1) the Constitution forbids the exercise of rights and freedoms of others or the public interest. In particular sub-article (2) provides:

"It is hereby declared that no provision contained in this part of this constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law making provision for: –

(a) ensuring that the rights and freedoms of others or of public interest are not prejudiced by the misuse of the individual rights and freedoms,

(b) ensuring interests of defence, public safety, public order..."

In the same vein Article 31(1) reads,

> "Notwithstanding the provision of section 30(2) an Act of Parliament shall not be invalid for the reason only that it provides for the taking, during periods of emergency, or in ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security, of measures that derogate from the provisions of section 14 and 15 of this Constitution."

Articles 14 provides for the rights to live and as explained herein above Article 15 deals with the right to personal freedom.

5.10 In determining whether the Act is saved by the above quoted Article 30(2) we are bound by the principles set out in Daudi Pete's case and eleborated in the case of KUKUTIA OLE BUMBUNI and another v.AG[42]. Observing the need to harmonize the rights of an individual and those of society the Court of Appeal echoed.

"...the court in Pete's case laid down that a law which seeks to limit or derogate from the basic rights of the individual on grounds for public interest will be saved by Article 30(2) of the constitution if it satisfies two essential reqiurements: First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality.... If the law which infringes a basic right does not meet both requirements, such law is not served by Article 30(2) of the constitution, it is null and void."

5.11 Therefore what has to be determined now is whether there are sufficient provisions in the Preventive Detention Act, 1962 to avoid arbitrary decisions and whether the Act is reasonably necessary. On the question of safeguards there have been criticism that the President' power of detention is too wide and has no control. But this is unfounded having regard to the amendment made by the Preventive Detention (Amendment) Act, No.2 of

[42] Civil Appeal N0. 32 of 1992 at Arusha (unreported)

1985. By the act the Preventive Detention Act, 1962 now provides for the following procedure of ensuring the detainee is heard and the powers of the President to detain are checked by the Court.

1. The detainee can petition to the High Court to challenge the detention order on any ground.
2. The President has to inform the detainee reasons for issuance of the detention order within fifteen days of its execution.
3. The President has to publish the name of person thus detained.
4. The detainee shall be availed opportunity to make representations in writing to the President in respect of the detention Order.
5. The President has to refer the matter of the detention order within three months of its execution to an Advisory Committee together with the grounds of issuing the detention order and the representations of the detainee if any and give the Committee opportunity to meet the detainee so that he may defend himself. The Committee advices the President whether to continue suspend or rescind the detention order.
6. The provision by which if some of the procedures are not followed the detainee shall be released immediately or is entitled to be released, eg. Failure to inform the detainee within 15 days of his detention ground for issuing the detention order and failure to refer matters of the detention order to the Advisory Committee within three months after its execution.

5.12 These provisions are in line with the minimum standard for an administrative detention order set by the Human Rights Law Committee of the International Association in 1982 and earlier on by International Commission of Jurists at an International Conference held in Bankok in 1962 as quoted by the trial judge in the case of CHUMCHUA MARWA V. OFFICER IN CHARGE OF MUSOMA PRISON AND THE AG[43]. The Commission considers the provisions contained in the Preventive Detention Act 1962 enough to guard against arbitrary decisions.

5.13 This leads to the other issue whether the Act has provisions to control abuse of the detention powers. Another criticism leveled against the Preventive Detention Act, 1962 is that it has been abused by Regional and District Commissioners and the police. This may be true. However, the Law Reform Commission does not consider this to be sufficient reason to necessitate the abolition of the Act nor water down its importance.

5.14 The Commission is aware that there are safeguards within the Act to guard against such abuses. The safeguards are partly the procedure which required the detainee to be informed grounds of his detention and be given opportunity to give his representations and the review of the detention order by the Advisory Committee and the Court of law.

5.15 Courts of law have demonstrated time and again their power to review or to handle cases of abuses of or non compliance with the procedures of issuing and handling of a detainee after execution of a detention order. In the case of Attorney General v. Lesinoi Naoinai and others[44] the Court of Appeal took the position that law such as the Preventive Detention

[43] Miscellaneous Criminal Case No. 23 of 1980 (unreported)

Act, 1962 which infringes the freedom of the individual should be contrued strictly so that even if the provision was capable of different interpretations there should be assigned to it that interpretation which protects the right of the individual. Therefore strict compliance with procedural requirement is necessary before a person is deprived of his persona liberty in Tanzania.

5.16 The case went to the Court of Appeal on appeal by the Attorney General against the order of the High Court of Tanzania directing the release of respondents from prison because that Court held that the detention order under which they were imprisoned was invalid as it was not shown that the President had delegated to the Vice-President (the maker of the material order) the power to make the order.

5.17 The Court of Appeal, citing decisions of, inter alia, the English case of Re.v. Thomas Pelham Dale[45] and the Zambia case of William Musala Chipango v. The Attorney General[45] also held that an order for detention which is not affixed with public Seal as required under s.2 of the Act is a complete nullity and therefore illegal. Further persuaded by the Indian case of Mohamed Shafi v. the State of Jammu and Kashmir[47] the said Court also held that a person arrested and detained under S.4 of the Preventive Detention Act, 1962 has a right to be shown the detention order at the time of arrest. The Indian case is authority for the view that in India, failure to inform a detainee of the ground of detention as required by law is fatal.

5.18 Consequently; it can be deducted that the Courts will use their powers to ensure that the powers of detention are exercised rightly, honestly and bona-fide. Further, that any infringement of the procedure of detaining and dealing with detainee will render the detention invalid. This is in line with the position taken by Courts that strict compliance with procedural reqiurements is necessary before a person is deprived of his personal liberty in Tanzania (Lesinoi Ndoinai's case)

5.19 As demonstrated hereinabove adequate safeguards are in place to protect the rights and freedoms of an individual by guaranting that the detention powers are not used arbitrarily or unreasonably.

5.20 The second principle set by the Pete's case demands determination whether the Act is reasonably necessary. It has been started herein above that the present socio-political and economic velatile situation make it necessary to give the President the power to act in defence of national security when the need arises. The majority of the people in the regional tour and the workshop which was arranged in Dar es Salaam to discuss the designated legislations in the Nyalali Commission favoured the retention of the Act. Reasons given to that end herein above are in line with those summarised by John Hatchard as follows:

[44] (1980) TLR p. 24
[45] (1981) 6 Q.R.D. 376
[46] (1970) selected Judgement of Zambia No. 28 of 1970 - 1970 H.P. CONST/RFF/2
[47] (1970) A.I.R. 688

"1. The State has the right and duty to employ its best efforts to protect society against those who threaten its security.
2. The Criminal law is not always a suitable vehicle for the detention of individuals because its objective is to punish convicted offenders. The objective of preventive detention is to permit the executive to hold a person on suspicion of being a potential threat to State security.
3. The criminal justice system is not always capable of handling a security-threatening situation. For example, the continued existence of widespread unrest, subversion or politically motivated crime may require the use of preventive detention order to prevent the breakdown of law and order.
4. In security related cases, the evidence against the detainee may be so sensitive or secret that the State is not prepared to divulge, it even to the courts.
5. Widespread intimidation of prosecution witnesses often makes it impossible to secure a conviction."[48]

5. 21 These reasons make the existence of the Act reasonably re-completes the requirements set by Pete's case. In conclusion the Preventive Detention Act is also saved by the Provisions of Article 30(2)(b) of the Constitution.

5.22 It is also apparent as demonstrated herein above that the Preventive Detention Act, 1962 as much as it provides for measures in relation to persons who endanger or compromise national security is also served by the provisions of Article 31(1) of the Constitution. Therefore, the Act is Constitutional.

5.23 The Law Reform Commission has taken note of the current economic hardships and the socio-political change taking place in the country and considered the environment fertile ground for ill intentioned people to try to destabilize peace and security of the Nation. On the bass of this state of affairs the Commission is convinced that the abolition of detention powers might consequently compromise peace and stability of the country. The Commission is also of the opinion that should the amendments suggested by the retentionsts herein above be adopted they would contribute to further strengthen safeguards against abuse of the powers of detention by the Executive.

5.24 Criticisms have been levelled also at the fact that the President in not bound by the decision of an Advisory Committee established under section 7 of the Act. It has been suggested that an amendment be made to the section to make such decisions binding on the President as the Advisory Committees is seen as one practical protection against arbitrary exercise by the executive of the prerogative powers. It is function is to establish the truth of the allegations against the detainees by investigating and evaluating the factual basis for the detention.

5.25 The Commission has considered the matter. It has observed that decisions on national security depend on the intricate problem of balancing of natural justice, political discretion and national security. The problem of achieving a balance of these conflicting interests is generally a decision of political and executive nature which must finally lie with the Executive.

John Hatchard: Individual Freedoms and Security in the African Context Baobab Books Harare. Ohio University Press pp. 46

5.26 The Commission is of the opinion that as long as there is also provision for recourse to the courts of Law the Advisory Committees should retain their advisory nature and the executive carry its role of finally deciding, on the basis of the advice of the Committee, whether or not to maintain the status quo of the detainee.

5.27 The Law Reform Commission would like to draw public attention on the Court of Appeal's decision in the case of DPP v. SIMON MARWA[49] that a detention under the Preventive Detention Act, 1962 the does not amount to punishment under section 12 of the Criminal Procedure Act, 1985. Commission is not sure whether this is the intention of the legislative.

5.28 The Commission has also noted with concern the fact that two laws loaded with detention powers are still applicable to Tanzania Zanzibar. By the Preventive Detention (Amendment) Act, 1985 the main Act was made applicable "throughout the United Republic" (s.2(b) of the amendment Act) Hitherto it covered only Mainland Tanzania while Tanzania Zanzibar has had its Preventive Detention Decree, 1964 (Presidential Decree No. 30/64) which gives also the President of Zanzibar powers of detention.

5.29 However, when the Preventive Detention (Amendment) Act, 1985 was made pan-territorial nothing was said about the Decree and to date nothing has been done to repeal it. This state of affairs could herald a multiplicity of problems inter alia conflict of laws. Constitutionally defence and security are Union Matters. Under the fifth Constitutional Amendment Act, 1984, item 3 of the First schedule to the Union Constitution was extended from just "Defence" to "defence and security". Since the Preventive Detention Act, 1962 deals with, inter alia, matters of defence and national security it falls under Union Matters, and applies to Tanzania Zanzibar under Article, 64(2)(c) of the United Republic Constitution, which provides:

"No law enacted by Parliament in relation to any matter shall apply to Tanzania Zanzibar save in accordance with following provision:

(c) .....the law relates to Union Matters."

5.30 In addition it is only the Parliament of the United Republic which can enact a law on "Union Matters". According to Article 64(1) of the Constitution:

> "Legislative powers with respect to all Union Matters in and for the United Republic and with respect to all other matters in and for Mainland Tanzania is vested in the Parliament."

5.31 In order to avoid duplicity and conflict of laws sub-article (3) stipulates:
"(3) If any law enacted by the House of Representative relates to any matter in Tanzania Zanzibar which is within the jurisdiction of the National Assembly that law shall be null and void."

[49]Criminal Appeal No. 46 of 1984 at Arusha (unreported)

As the Preventive Detention Decree, 1964 deals with matters of defence and security of Tanzania Zanzibar which is a Union Matter it Is therefore by Article 64(3) of the Union Constitution null and void.

6.0 RECOMMENDATION

6.1 Therefore, the Law Reform Commission recommends as follows:

1. The powers of detention be retained but as they are exercised for the purpose of protecting national peace and security, the relevant provisions be incorporated into the National Security Act, 1970 and the Preventive Detention Act, 1962 be repealed.
2. A period of reference of a detention order to an Advisory Committee be reduced to two months
3. A time frame for a detention order be provided for by the law. A renewable period of one year is proposed.
4. A detainee be permitted to make communication in line with the provisions under the Prisons Act, 1967.
5. A person detained without sufficient reasons be entitled to compensation.
6. Arrangements be made to have the Preventive Detention Decree, 1964 repealed.

(ii) THE NATIONAL SECURITY ACT NO. /70 AS AMENDED BY ACTS NO.17/89/ & 32/94

1.0 THE STATE OF THE LAW:

1.1 The National security Act is an Act to make better provision relating to state security, to deal with espionage, sabotage and other activities prejudicial to the interests of Tanzania and for the purposes incidental thereto or connected therewith. The Act extends to Tanzania Zanzibar by virtue of the fifth Constitutional Amendment Act. 1984 i.e. Section 5(1) of Act No. 16/84

1.2 The Act makes provisions for other activities such as communication of certain information, protection of classified information, unauthorized use of uniforms and passes, interfering with persons on guard at protected places, possession of offensive weapons or materials spying on certain organizations and bodies. Other offences listed in the Act are harbouring or concealing, attempts to commit an offence under the Act.

1.3 The Act has extra territorial application in that any act, omission or other conduct constituting an offence under the Act shall constitute such offence whenever such conduct took place whether within or outside the United Republic. The Act further repeals the Official Secrets Ordinance (Cap. 45).

1.4 When introducing the Bill on 19th March 1970 the Second Vice President of the United Republic of Tanzania contended that the legislation was crucial to the security of any sovereign nation with the principle justification of protecting: -

(1) The sovereignty and security of Tanzania.
(2) Official Secrets and
(3) Tanzania Based Liberation Movements

1.5 It was further emphasized by the 2nd Vice President that state security was the concern of every Tanzanian, hence the necessity of and nationwide public education campaign on the matter.

2.0 CRITICISM BY THE NYALALI COMMISSION

2.1 With specific reference to the National Security Act 1970 the Nyalali Commission observed that the state maintains and runs a Department on State Security and the people know its existence but there is no law which establishes it. The Commission recommended that one way of assuring that basic human rights and freedoms are protected and respected it is essential to ensure the establishment of the Department of State Security through a legislation. Further criticisms given are that: -

(i) Power given to the Executive through the Minister responsible for National Security and other authorized officers are wide and extensive.
(ii) The definitions under section 2(1) of the Act i.e. "Classified matters" offensive weapon" and "protected places" are very wide to include practically "everything."
(iii) The rights to bail and presumption of innocence have been denied to accused persons. The right to bail depends on the discretion of the Director of Public Prosecutions rather than the courts the courts of law.

(iv) Arrests may be made by any police officer without warrant and the person so arrested may be detained for an indeterminate period of time.

(v) Penalties under the Act are harsh and strict, ranging from ten years to life imprisonment.

2.2 Consequently the Nyalali Commission recommended the examination of the Act with a view to making necessary changes.

3.0 PEOPLE'S VIEWS

3.1 The participants of the Workshop conducted by Law Reform Commission were of the view that the National Security Act is a necessary and useful piece of legislation and in view of its importance there is need to strengthen it by making the following amendments.

(i) The Act should be looked into so as to introduce provisions to curb the rampant leakage of government secrets.

(ii) The Department of State Security be established by law so that its duties and responsibilities/functions are specified.

(iii) The definition section be revisited to give more clarity to the various terms and phrases.

3.2 It was further observed by the majority members of the public during the regional visits that matters of National Security are of paramount importance to the nation and a concern of every Tanzania. However, handling of matters of National Security should be restricted to appropriate organs. That there is need to protect the sovereignty and official secrets of the government and although there may be need for transparency on the part of the government, transparency should not compromise National Security

3.3 With regard to the Department of State Security the majority view was that is should be retained in its present form in line with most other like Agencies in the world. Establishing it by law would expose and weaken it because its strength lies in its secrecy.

3.4 On the powers of the Director of Public Prosecutions to object to bail, the majority view was that these powers should remain in order that the safety or interest of the United Republic of Tanzania should not thereby be prejudiced. It was therefore recommended that the law be retained and further be strengthened to effectively protect the security and interests of the United Republic.

3.5 The minority view, however, argued for the abolition of the powers of the Director of Public Prosecutions with regarding to denial of bail and if necessary bail application be conducted in camera. They further argued for the establishment of the Department of State Security through legislation for the sake of transparency.

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION

4.1 The Law Reform Commission of Tanzania addressed its mind on the area of concern pointed out by the Nyalali Commission and is of the considered view that these concerns are not wholly justified. Ever since the Act was enacted its application has been tested in the

courts of law as demonstrated in the cases of Juma Thomas Zangira Vs. (1980) on the burden of proof in section 8(1). But it is argued that the court did not go into the propriety, not to mention constitutionality of the National Security Act because these rights were yet to be enshrined during the time of the trial of these cases the position would not have been different in view of Articles 26(1) and 29(5) of the Constitution.*

4.2 As to the question of the right to bail which denies an accused the right to Bail as provided for in Article 13(6)(b) of the Constitution, s. 19 of the Act also is served by claw-back clause in Article 29(5) of the Constituion.

4.3 The Law Reform Commission of Tanzania would like to reiterate its stance that matters of national security are of paramount importance to the nation and a concern of every Tanzanian. It is a matter of greatest public interest. The Bill of the Act was introduced on 19th March 1970 and has further been emphasized during the course of the study.

4.4 Pursuant of Article 28(1) of the Constitution of the United Republic of Tanzania, every citizen of Tanzania has the inalienable right and duty to defend, protect and promote the independence, sovereignty, territorial integrity and unity of the nation. Citizens can only discharge such duty if they know what "National Security" is and what their role therein is. Consequently public education conducted in the mid – 1970 should be revived and be conducted for that purpose.

4.5 The Law Reform Commission of Tanzania would like to take judicial notice of the repeal of section 9 of the Act through Act No. 32/94 which provided for spying on certain organizations and bodies.

5.0 RECOMMENDATIONS:

5.1 In conclusion the Law Reform Commission recommends the following:

1. The Act be retained.
2. Public education on the role and duty of citizens in maintaining and defending national security be conducted.
3. The need to protect the sovereignty and official secrets of the state demands that while there is need for transparency on the part of the Government conduct caution should be taken that transparency should not be used to the extent of compromising national security. Therefore, we recommend that new offences be introduced under the Act to include leakage of official secrets, examination papers etc.
4. The Department of State Security be established by law.
5. The Director of Public Prosecutions' powers to object to bail should remain so as not to prejudice the safety or interest of the united Republic of Tanzania.

---

* Article 26(1) provides:
"Every person is obliged to comply with Construction and the laws of the United Repulic".
Article 29(5) provides:
"For the purposes of the better enjoyment by all persons of the rights and freedoms specified in this constitution, every person shall so conductive himself and his affairs as not to prejudicethe rights and freedoms of others or the public interest."

(iii) THE REGIONS AND REGIONAL COMMISSIONERS ACT, 1962,(CAP.461) AND THE AREA COMMISSIONERS ACT, 1962 (CAP. 466)

(as amended by the Regional and Area Commissioners Acts (Amendment Act. No. 49/1963))

1.0 THE STATE OF THE LAW

1.1 The Regions and Regional Commissioners Act, 1962 was designed to restyle Provinces and Provincial Commissioners to Regions and Regional Commissioners. Equally, the Area Commissioners Act, 1962 changed District commissioners into Area Commissioners. The Written Laws (Miscellaneous Amendments) Act No. 17/1985, amended the Area Commissioner Act, 1962 changing "Area", into "District" and Area Commissioner" into "District Commissioner".

1.2 Section 7 of both Acts brought about the Regional and Area Commissioners Acts (Amendment) Act, No. 49/1963, gives Regional and District Commissioners powers to arrest and detain a person for 48 hours if the Regional or District Commissioner has reason to believe that such person is likely to commit a breach of the peace or disturb the public tranquilty, and that such breach can not be prevented otherwise than by detaining such a person in custody.

1.3 Where a Regional or District Commissioner exercises these powers, the person arrested must be taken before a magistrate within 48 hours after his arrest and detention otherwise he should be released and not arrested again for the same cause in pursuance of the powers conferred by these Acts.

1.4 The Commissioner ordering the arrest or detention is obliged to record his reasons thereof in writing and deliver a copy thereof to a magistrate at the time the detainee is brought before that magistrate, or if the detainee has been released before being brought before a magistrate as soon as is practicable after such release. Should the detainee be brought before a magistrate, the magistrate may detain such person in custody until the completion of the inquiry as prescribed by s.51 of the Criminal Procedure Act. 1985.

2.0 MISCHIEF FOR ENACTMENT OF THE LAW:

The powers of arrest and detention were given to the Regional and District Commissioners for the purpose of protecting peace and public tranquility to be exercised whenever other methods can not be brought to use.

3.0 CRITICISM BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission has condemned the two Acts in Book Three at page 6 of its Report for giving wide powers to Regional and District and District Commissioners who misuse them to detain people who in their opinion are trouble markers in their areas of jurisdiction. The categories of such persons are said to include political trouble makers, persons who resist self projects, suspected criminals, suspected persons (old people) practicing witchcraft, and even those people who resist CCM Contributions.

3.2 Further criticism by the said commission was that the Acts are unconstitutional as they violate the right to appeal or Review by Courts of Law and the right to freedom of movement which are guaranteed by Article 13(6)(a) and 17(1) of the Constitution respectively. The Commission contended that there are adequate provisions under the Criminal Procedure Act and other relevant legislations that can take care f the mischief aimed at by these Acts. It recommended that the Regions and Regional Commissioners Act, 1962 and the Area Commissioners Act, 1962 be repealed.

4.0 PEOPLE'S VIEWS

4.1 During the Workshop and the regional tours the majority view supported the retention of the Acts because they were convinced that the powers of detention are necessary for the Commissioners who are assistant of the President and therefore guardians of peace and order in their respective areas of jurisdiction. They argued further that the powers are necessary for containing volatile situations when other methods can not be applied to ensure safety, public tranquility and peace. This group was satisfied that the provision requiring the Commissioners to inform the magistrate in writing grounds of the arrest or detention and taking the detainee to the magistrate within 48 hours are enough safeguards against the Commissioners misusing these powers.

4.2 Conversely, the minority view recommended the abolition of the Acts because of the likelihood of abuse of the powers by the authorities and instead the offences envisaged be dealt with under normal judicial process.

5.0 WEIGHING UP BY THE LAW REFORM COMMSSION:

5.1 The fundamental criticism by the Nyalali Commission is the unconstitutionality of the Acts especially with respect to Articles 13(6)(a) which deals with the right to appeal and review by Courts of law, and 17(1) which guarantees right to freedom of movement.

5.2 In considering this criticism one must bear in mind that a human being is a social animal and therefore apart from having his individual basic rights he in-turn has duties to the society to which he belongs. Therefore in recognition of this co-existince the Court of Appeal of Tanzania in the case of DPP.v DAUDI PETE, [50] pointed out that in interpreting the Constitution and the law of the land the following basic concepts and principles have to be borne in mind, that is:

"First, the Constitution of the United Republic recognizes and guarantees not only the basic human rights, but also, unlike most constitutions of countries of the west, recognize and guarantees basic human duties."

"...Second... is corollary of the reality of coexistence of the individual and society, and also the reality of co-existence or rights and duties of the individual on the one hand, and the collective or communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa."

[50] Court of Appeal Criminal Appeal No.28 of 1990 at Dar es Salaam (unreported)

Article 13(6)(a) provides:

"For the purpose of ensuring equality before the law the state shall make provisions: -

(a) that every person shall, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned and be guaranteed the right of appeal or to another legal remedy against the decision of courts of law and other bodies which decide on his rights or interests founded on statutory provisions."

5.3 In our opinion the provisions of the above quoted Article of the Constitution are not applicable to the Acts in question. This paragraph (a) deals with a situation where the "rights and obligations" are being determined while the Acts deals with the prevention of commission of crime that is, breach of peace and disturbance of public tranquility. The right or obligation of the person arrested and detained would be determined when the detainee is brought before a magistrate.

5.4 Even if the criticism is aimed at the detention of the person without bail for the 48 hours the paragraph would not be applicable. In this respect we may stretch the decision of the Court of Appeal in DPP v DAUDI PETE's case in which the Court held, inter alia, that denying bail to an accused person under section 148(5)(e) of the Criminal Procedure Act, 1985 does not fit into the provisions of Article 13(6)(a) of the Constitution. In the relevant Acts a Regional or District Commissioner can detain a person for up to 48 hours, and that means without giving him bail. Even then this would not

5.5 Equally, the Acts do not oust the powers of the courts of Law nor prohibit appeal. In fact by section 6 of both Acts the detainee is to be taken to Court within 48 hours or otherwise be released. The Regional or District commissioner concerned is obliged to deliver a written record of reasons for ordering the arrest and detention of the person involved whether the person is taken to Court within the 48 hours period or has been released.

5.6 If the person detained is taken to Court then the Court will deal with him according to judicial procedures which include right of appeal and review by higher courts. Therefore the criticism that the Regions and Regional Commissioners Act and Area and Area Commissioners Act both of 1962 contravene Article 13(6)(a) of the constitution is unfounded.

5.7 On the issue of the Regional and District Commissioners Acts contravening the right to freedom of movement it would be pertinent to quote the provisions of Article 17(1) of the Constitution which states as follows: -

"Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say, the right to move freely within the United Republic and to reside in any part of it, leave and to enter into it, and immunity from expulsion from the United Republic."

5.8 However in line with the observations of the Court of Appeal in DAUDI PETE's case this right of freedom of movement is limited in line with the co-existence of the individual and the society. Some of the limitation and derogation clauses are contained in Article 17(2)

and 30(2) of the Constitution.
Article 17(2) provides:

"Any lawful act or law made for the purpose of: -
(a) imposing reasonable restrictions on the exercise of freedom of movement and to subject him to restriction or arrest; or
(b) imposing restriction on the exercise of movement so as to: -
    (i) (na)
    (ii) (na)
    (iii) to protect the interest of the public in general or any specific public interest of a category of the public.

Such act or law shall not be or be deemed to be invalid or inconsistent with this section."

5.9 Therefore, according to sub-article (2) the right to freedom of movement can be restricted by any lawful act or law designed to impose reasonable restriction on the right or imposing restriction to inter alia, protect the public interest.

5.10 In reference to the Regional and District Commissioners Acts the powers of arrest and detention are intended to be used to protect public peace and tranquility. Therefore, the restriction is covered by Article 17(2)(b)(iii) of the Constitution and can not be deemed to be invalid or inconsistent with the said Article 17 and hence the Constitution itself.

5.11 At the same time the Acts appear to be served by Article 30 which states: -
"30(2) It is hereby declared that no provision contained in this part of this constitution, which stipulates the basic human rights freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for: -

(a) ensuring that the rights and freedoms of others or the public interest are prejudiced by the misuse of the individual rights and freedoms;
(b) ensuring the interests of defence, public safety and public order..."

5.12 In determining whether the Regional and District Commissioners Act are saved by the above quoted Article we are bound by the principles set out in DAUDI PETE's case and elaborated in the case of KUKUTIA OLE BUMBUN and another V. AG.[51] Observing that due to the need to harmonize the rights of an individual and those of a society the Court of Appeal echoed:

"....the Court in Pete's case laid down that a law which seeks to limit or derogate from the basic rights of the individual on grounds of public interest will be served by Article 30(2) of the constitution if it satisfies two essential requirements. First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of

[51] Civil Appeal No. 32 of 1992 at Arusha (unreported)

proportionality..... If the law which infringes a basic right does not meet both requirements, such law is not served by Article 30(2) of the Constitution, it is null and void."

5.13 Therefore, the issues now are whether the Acts provide enough safeguards against arbitrariness and whether they are reasonably necessary. Regarding the issue of safeguards s.6 of both Acts require that the detainee has to be taken to a magistrate within 48 hours or else be released. In addition the relevant Regional or District Commissioner is enjoined to report in writing to a magistrate grounds of the detention when the detainee is taken before him (a magistrate) or if he has been released as soon as possible.

5.14 At the sametime the Police Officer in charge of a Police Station in which the person was detained is required by law to report to the nearest magistrate all apprehensions made without warrant. According to s.33 of the Criminal Procedure Act. 1985;

> "Officers in charge of police stations shall report to the nearest magistrate within twenty four hours, or as soon as practicable, the case of all persons arrests without warrant within the limits of their respective stations, whether or not such persons have been admitted to bail."

5.15 Therefore even before the detainee is taken to Court or the Regional or District Commissioner involved presents his written report the magistrate concerned will have been informed by the officer in charge of the Police Station in which the person concerned will have been detained. This puts pressure on the Regional or District Commissioner concerned to report the matter to a magistrate. These provisions are in addition to the constitutional right provided by Article 30(3) of the constitution by which any person aggrieved of violation of his basic right can institute proceedings for relief in the High Court as will be dealt with herein below.

5.16 Therefore, the Act contain safeguards against arbirtariness. Nevertheless, though we consider this control as sufficient it is our opinion that an additional provision be put so that if a Magistrate is of the opinion, that the Regional or District Commissioner has acted in a manner which amounts to an abuse of office, which is an offence under section 96 of the Penal Code, he should forward the report with his comments to the High Court.

Section 96 of the Penal Code provides

> "Any person who, being employed in the public service, does, or directs to be done, in abuse of the authority of his office, arbitrary act prejudicial to the rights of another is guilty of misdemeanour.
>
> If the act is done or directed to be done for purposes of gain he is guilty of a felony, and is liable to imprisonment for three years. A prosecution for any offence under this or either of the two last preceding sections shall not be instituted except by or with the sanction of the Director of Public Prosecutions."

5.17 If the High Court is satisfied that the Magistrate's opinion is correct it should forward the report with its comments to the Attorney General who will advice the President as to what

course of action to be taken. This procedure will strengthen the control mechanism against abuse of the powers under the Acts.

5.18 However, it stands to be shown whether the Acts are reasonably necessary. The Nyalali Commission was of the opinion that the mischief targeted could be taken care of under the Criminal Procedure Act, 1985 and "other relevant and related legislations." However, neither the relevant provision under the Criminal Procedure Act, 1985 nor 'the relaxant and related legislations" were mentioned.

5.19 It is admitted that there are situations which can be taken care of by the Criminal Procedure Act, 1985 and other related legislations. Nevertheless, the Commission has also considered circumstances under which the use of the detention powers may be necessary. Consideration has been made of the vastness of most of the Regions and Districts, the extensive distances between Police Stations and between courts, the responsibilities placed on the shoulders of the Regional and District Commissioners, the unscheduled nature of such acts likely to cause breach of peace and public tranquility, and the likely possibility of the said Commissioners failing to interrupt their scheduled work in order to expeditiously deal with the person detained. The Commission is of the view that there are situations where in the absence of a Police Officer and a justice of Peace the regional or District Commissioner may be forced to act to preserve peace and public tranguility. This makes the powers conferred by these acts necessary and the time frame of 48 hours befits the circumstances.

5.20 In the same vein it has been suggested also that the Regional and Area Commissioner should depend on the powers of a private person to arrest. These powers are provided for under section 16 of the Criminal Procedure act, 1985 as follows: -

"16(1) Any person may arrest any person who in his presence commits any of the offences referred to in section 14"

Section 14 of the Criminal Procedure Act, 1985 deals with offences which a police officer arrest without warrant. The offences enumerated therein which could be relevant to the Regional and Area Commissioners Acts are commission of breach of the peace and acts which are calculated to insult the national emblem or the national flag. However, the arrest under this section is exercised on commission of the offences while the Regional and Area Commissioners Acts allows arrest and detention where any person is likely to commit a breach of the peace or disturb public tranquility. These powers are aimed at preventing the actual commission of the offences while section 16 of the Criminal Procedure Act, 1985 deals with a situation where an offence has already been committed. Therefore these powers can not play the same role.

5.21 It is also true that a detainee can exercise his right of being heard. Courts of law have power to review quash or reverse or interfere with proceedings, acts or orders made under these Acts since the detainee has to be taken to a magistrate within 48 hours where he will be dealt with like any other accused person. Even where the detainee is released within the 48 hours without being taken to Court the Regional or Area Commissioner involved is required by law to inform the magistrate in writing of the grounds of the arrest or detention.

5.22 At the same time Article 30(3) of the Constitution and the Basic Rights and Duties enforcement Act, No. 33 of 1994 provide the right and procedure of petitioning to the High Court for contravention of basic rights and duties. Article 30(3) of Constitution provides.

"where any person alleges that any provision of this Part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the united Republic he may without prejudice to any other action or Remedy lawfully available to him in respect of the same matter institute proceeding for relief in the High Court."

5.23 The Basic Rights and Duties Enforcement Act, No. 33 of 1994 is enacted to facilitate the application of Article 30(3) of the Constitution. Section 4 of Act provides:

"If any person alleges that any of the provisions of section 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available apply to the Higher Court for redress".

5.24 Therefore, as herein above demonstrated, a detained person can challenge his arrest and subsequent detention in a court of law by using the normal criminal procedure if he is taken before a magistrate or by involving Article 30(3) of the Constitution and section 4 of the Basic Rights and Duties Enforcement Act, 1994.

5.25 Admittedly of the incidents of misuse of the powers of arrest and detention under these Acts might have been committed in the former atmosphere and environment of one political party system and before the Bill of Human Rights had been entrenched in the Constitution. The situation has totally changed now and therefore it is hoped that such incidents will not happen again and even if they occur there is in place a legal mechanism for redress as mentioned herein above.

5.26 The Commission has also considered the argument that Regional and Area Commissioners should not have detention powers as there are other organs of the State which can handle situation where public peace and tranquility are really in danger of being violated. Being the chief executive in their areas of jurisdiction it would not be in the interest of the public that they should find themselves helpless to contain the situation. This would throw the Government into disrepute and put into question its effectiveness and capability of maintaining law and order.

6.0 RECOMMENDATIONS

6.1 Therefore the Law Reform Commission having found the Acts Constitutional and still relevant recommends as follows:

1. The Regions and Regional Commissioners Act, 1962 and the Area Commissioners Act, 1962 be retained.
2. The Acts should provide that where either by the Regional or District Commissioners' report or by proceedings in Court, a Magistrate is of the opinion that the Commissioner has abused his powers in detaining a person, he (the Magistrate) should report the

same to the High Court which if it concurs should in urn report the matter to the Attorney General for necessary action against the relevant Commissioner.

(iv) THE EMERGENCY POWERS ACT 1986 (ACT NO. 1/86)

1.0 THE STATE OF THE LAW

1.1 This is an Act to repeal the Emergence Powers Orders in Council 1939 to 1961, to make better provisions which provide for and confer certain emergency powers upon the President for the purpose of ensuring public safety and maintenance of public order during emergencies and for connected matters. Coverage of the Act includes provision for procedure relating to declaration of State Emergency (Section 4).

1.2 Section 5 of the act provides that the President may, by order published in the Gazette, delegate all or any of the emergency powers conferred upon him by the provisions of this Act to any specified authority. And for the purpose of this Act "Specified Authority" include Regional Commissioner, District Commissioner and any other person authorized by the President.

1.3 Further Section 7 empowers any specified authority to whom the President may delegate his powers to arrest and detain suspected persons. Section 8 covers power to control suspected persons, powers to prohibit meetings or procession. While section 18 provides that the President may, if in his opinion it is necessary for the purpose of implementing the provisions of this Act, suspend or disapply any written law for the time being in force. However, such suspension or disapplication shall lapse with the revocation of the proclamation issued in terms of the provisions of section 4(4) of the Act. Procedure for trial of offences is provided for under section 25 of the Act.

2.0 CRITICISM BY THE NYALALI COMMISSION

2.1 The Nyalali Commission noted that the Act gives the President wide powers, and that section 5 of the Act allows the President to delegate all or any of the emergency powers conferred upon him to Regional and District Commissioners or any other authorized person and that, therefore, the Regional and District Commissioner may, according to section 7 of the Act, order the arrest and detention of persons. This is not only unconstitutional but it amount to abuse of powers. The Commission recommended that powers to declare a state of emergency should be entrusted to the President and be confirmed by the National Assembly.

2.2 In an apparent reference to section 18 of the Act (powers to amend, suspend or dissaply law) the Nyalali Commission recommended that even during a state of emergency basic individual rights and freedom should not be violated.

3.0 PEOPLE'S VIEWS

3.1 It was observed that the power to proclaim a state of emergency is crucial in the realm of government but the difficulty may lie in the need for an appropriate balance between public order on the one hand, and rights of individuals on the other hand. The Emergency Powers Act is an attempt to, inter alia, strike the balance by prescribing the procedure for the exercise of such powers.

3.2 The common views expressed by members of the public recommended that the President should be the only authority to declare a state of emergency for the purpose of maintaining national harmony as well a facilitating the marshalling of local and international support. However, there should be a system of assisting the President in the operalization of the state of emergency. On the other hand a minority view recommended that in specified matters or situations, the President be empowered to delegate the emergency powers to the Regional and District Commissioners to proclaim the state of emergency in their respective areas in view of the vastness of the country and inadequate facilities especially communication facilities.

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION

4.1 The criticism in the Emergency Powers Act relate to Section 5(1) of the act empowering the President to delegate his powers to Regional and District Commissioners or any other authority for being contrary to Article 32(1) of the Constitution and section 18 of the Act empowering the President to amend, suspend or disapply any written law and Section 25(3) which empowers the President to direct trial of any offence by a court of his choice.

4.2 As regards section 5(1) of he Act the Law Reform Commission concurs with the criticism that the provision contravenes Article 32(1) of the Constitution. This has consequential effect on sections 7, 10,, 11, 13(2), 14, 16, 17 and 20. The Commission submits that if it was the intention of the legislature that the President delegate his powers to Regional and District Commissioners or any other authority then it would have been stated clearly in the Constitution – the principal Law of the land. Further, if at all the delegating provisions exists it should not undermine the Constitution. As it is emphasized that wherever there is inconsistency between any law and the provision of the Constitution. The Constitution should prevail and that other law shall, to the extent of the inconsistency be void"[52] But if it is desirable that the President should delegate then the cure lies in amending Article 32(1).

4.3 The Commission finds that emergency power is amongst the areas subjected to constitutional control and that the President should be the sole authority to declare state of emergency. In t he same vein Article 4(4) of the Constitution provides that the executive authority should exercise its functions in accordance with the provisions of the Constitution.

4.4 With reference to Section 18 of the Emergency Powers Act 1986 which empowers the president to amend or disapply any written Law during state of emergency, it is within the spirit of the law and importance of the matter, that safety and maintenance of public order individual rights and he like are subsumed.

4.5 During the debate of the Bill consequences of state of emergency were articulated while emphasizing the fact that rights of individuals may have to take back seat to measures ensuring public safety and maintenance of public order.

4.6 Mindful of the foregoing views it is therefore safe to conclude that the law is relevant and useful except it needs some amendments for easy and effective implementation.

5.0 RECOMMENDATIONS

5.1 In view of the above the Law Reform Commission recommends that:

1. The Act be retained.
2. The aspect of delegation with regard to the powers of proclamation of a state of emergency be removed.

[52] see Art. 64(5) of the Constitution of United Republic of Tanzania

PART 5

(i) THE CRIMINAL PROCEDURE ACT, 1985 AS AMENDED BY ACTS NO. 2/87, 10/89 AND 27/91

1.0 BAIL AND ARRESTS:

1.1 STATE OF THE LAW:

1.2 The Criminal Procedure Act, 1985 is an Act to repeal the Criminal Procedure Code and to make better provisions for the procedure to be followed in the investigation of crimes and the conduct of Criminal trials.

1.3 ARRESTS:

1.4 Arrest under this Act is covered by section 11 to 45 while provisions as to Bail are contained by sections 148 to 163.

1.5 Section 11 and 12 prescribe how arrest should be made and that a person arrested should not be subjected to more restraint than is necessary to prevent his escape.

1.6 Where an information on oath is laid before a Magistrate, Ward Secretary of a village Council alleging that there are reasonable grounds for believing that a person has committed an offence, section 13 provides that a warrant for arrest of the person and for bringing him before a specified court to answer the information may be issued. The affidavit must set out grounds on which the issue of the warrant is being sought. However, section 14 provides the circumstances on which a police officer may arrest a person without a warrant. For example:-

(i) a person who commits a breach of the peace in his presence;
(ii) any person who willfully obstructs a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;
(iii) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonaly be suspected of having committed an offence with reference to such thing;
(iv) any person whom he finds lying or loitering in any highway, yard or garden or other place during the night and whom he suspects upon reasonable grounds of having committed or being about to commit an offence or who has in his possession without lawful excuse any offensive weapon or house breaking implement;
(v) any person for whom he has reasonable cause to believe a warrant of arrest has been issued;
(vi) any person whom he suspects of being a loiterer in contravention of the provisions of the Human Resources Deployment Act No. 6 of 1983.

2.0 BAIL:

2.1 According to section 148 of the Act, when any person is arrested or detained without

warrant by an officer in change of a police station, or appears or is brought before a court, or at any stage of the proceeding, the officer or the court as the case may be can admit that person to bail.

2.2 By virtue of section 148(5) a police officer or a court cannot admit a person to bail under the followings:

i) If a person is accused of murder or treason, and armed robbery contrary to section 285 and 286 of the Penal Code.

ii) If it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years.

iii) If it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded.

iv) If it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety.

v) If the offence with which the person is charged involved actual money or property whose value exceed ten million shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of bond.

2.3 The proviso to this condition of granting bail provide that, where the property to be deposited is immovable, it is sufficient to deposit the title deed, or if the title deed is not available such other evidence as is satisfactory to the Court in proof of existence of the property, can be deposited.

3.0 CRITICISM BY THE NYALALI COMMISSION

3.1 At page 39 of Book 3 of the Nyalali Commission it is stated that:

"Powers of arrest conferred by this Act to the authorized officers are extensive. Proper use of these powers must be made in order to protect freedoms of individuals. However, these powers have been constantly abused by the Executive and the police, especially People's Militia. It is recommended that the Law Reform Commission look into this law and specifically explore the posibility of introducing a system whereby arests can only be effected with an arrest warrant signed by a Judicial Officer."

3.2 The Nyalali Commission on the issue of bail states:
"Bail is a constitutional right. It is guaranteed under Article 13(1) of the Constitution in respect of "equality before the law." Bail is granted to a accused person upon the presumption that he is innocent until proven guilt by the state.

> "In true democratic states, courts are usually given unfettered right to grant or refuse bail.. And bail conditions must be reasonable. Where bail is refused adequate reasons must be given by the court not by the STATE."

3.3 The Nyalali Commission therefore recommended that the Law Reform Commission should look into this aspect (bail) with the view to ensuring that the Spirit behind the whole principle governing bail is respected and acted upon accordingly.

4.0 WEIGHING UP BY THE LAW REFORM COMMISSION:

4.1 The Law Reform Commission has examined the relevant provisions in the light of the comments by the Nyalali Commission and is of the considered views that: powers conferred to authorized officers are not extensive as alleged on the following reasons:

i) The provisions relating to arrest are complete and clothed with safeguards. For example section 23 provides clearly that "A person who arrest another person shall at the time of the arrest, inform that other person of the offence for which he is arrested."

ii) By virtue of section 21(1) and (2) A Police Officer or other person in the course of arresting a person is not allowed to use excessive force, or subject the person to greater indignity unless the police officer believes on reasonable grounds that the doing of that act is necessary to protect life or to prevent serious injury to some other person.

iii) Section 14 provides for situations whereby a police officer can without a warrant of arrest a person who commits a breach of the peace in his presence.

iv) A police officer making an arrest without a warrant is required according to section 30 of the Act without unnecessary delay, (subject to provisions as to bail) send the person arrested before a court having jurisdiction in the area of the police station. Likewise any private person arresting any person without a warrant is required to hand over the person so arrested to a police officer or in the absence of a police to a nearest police station.

v) In the same vein an officer in charge of police station is required (as provided for under section 33 of the Act) to report to the nearest magistrate within twenty four hours as soon as practicable, the cases of all persons arrested without warrant within the limits of their respective stations whether or not such persons have been admitted to bail.

4.2 From the foregoing it is important to note that, the law relating to arrest is well defined. The question of abuse by the Executive and the police is subjective and relative and does not invalidate the law. Further where it is believed that there is such an abuse a person has a right to institute proceedings against the person who arrested him. The mechanism of control of the executive do exist and that the powers of arrest under sections 11-35 of the Criminal procedure Act No. 9/85 are, universal. They are like those in the Commonwealth jurisdictions and they carry with them the usual safeguards. Where the police or arresting officers have exceeded their powers or abused their office, they have usually been prosecuted or other administrative actions taken against them.

4.3 The criticism by the Nyalali Commission as regards arrest by peoples militia is covered by Peoples Militia (Powers of Arrest) Act No. 25/75 which empowers peoples' militia to arrest. Where they misuse their powers they can always be held responsible just like police officers.

4.4 In relation to the recommendation by the Nyalali Commission the Law Reform Commission should look into the system of effecting arrest with arrest warrant signed by judicial officers only, it is contended that such a system is impracticable, on one hand because it is not easy to secure warrant of arrest in every commission of an offence or suspicion of commission of an offence and on the other it is not possible to have a system whereby all arrests all the time in the whole vast country to be effected by arrest warrant signed by a judicial officer.

5.0 BAIL

5.1 According to Mozley and Whiteley's Law Dictionary,[53] Bail is defined as "the freeing or setting at liberty one arrested or imprisoned.

5.2 In respect of Law relating to Bail it is agreeable that Bail is Constitutional right but is subject to a procedure prescribed by law.
Article 13(1) of the Constitution[54] provides:

"All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of law.

On the other hand Article 15(2) of the Constitution provides:

"For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:

a) in certain circumstances, and subject to a procedure, prescribed by law:
or

b) In the execution of the sentence or order of a court in respect of a criminal offence for which he has been convicted or upon reasonable suspicion of his having committed a criminal offence."

5.3 It is therefore important to note that the guaranteed right under Article 13(1) of the Constitution is not absolute due to the fact that in order for one to enjoy that right, he has to comply with the provision of Article 15(2) (a) and (b) of the Constitution. This, the provisions as to bail in the Criminal Procedure Act which deny bail are served by Article 15(2) (a) and (b)

5.4 Further sections dealing with bail have been amended in a manner that a person is given conditions for been granted bail when for example he/she is charged with an offence involving property whose value exceeds ten million shillings; he has to deposit cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of bond.
Where the property to be deposited is immovable, it is sufficient to deposit the title deed, and if the title deed is not available such other evidence as is satisfactory to the Court in proof of existence of the property can be deposited. [55] It is contended that the conditions to grant or refuse bail are reasonable as they are mostly based on gravity of the offences and the safety of the accused person.

[53] 10th Edn. London, Butterworth, 1980 p..43
[54] The Constitution of United Republic of Tanzania. Written Laws (Miscellaneous Amendments) No. 27 of 1991
[55] The Constitution of United Republic of Tanzania.

5.5 The amendment of section 148(5) provides that a person charged with murder, treason and armed robbery contrary to section 285 of the Penal Code should be denied bail. The offences identified are grave acts which demand necessary protection of accused person and public safety.

Furtherstill, Article 30(1) of the Constitution stipulates that:

> "The rights and freedoms whose basic content have been set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the freedoms of others or the public interest."

5.6 From the foregoing, the Law Reform Commission reiterates that the law relating to bail as amended conforms with the provisions of Article 13(1) of the Constitution which has to be read together with Article 15(2)(a) and (b) 30(1) of the Constitution.

6.0 RECOMMENDATIONS:

6.1 The Law Reform Commission recommends that:

i) The law be retained.

ii) Section 148(5) (a) be amended to include offences such as defilement, rape, drug trafficking, burglary, offences under National Security Act 1970, section 19, Economic Organized Crime Control Act 1984 section 35(2).

iii) Provisions which empower the DPP to refuse bail should be retained as long as they are served by Article 30(2) (a) of the Constitution. In case of abuse of powers Article 30(3) of the Constitution allows affected person to institute proceedings for relief in the High Court.

iv) When effecting arrests authorized person or police after should comply with the provisions of the Criminal Procedure Act. For example the wording of section 21(1) of the Act which says "A police officer or other person shall not, in the course of arresting a person, use more force, or subject the person to greater indignity, than is necessary to make the arrest or to prevent the escape of the person after he has been arrested. 'It is further recommended that police officers should be educated or acquainted with the Act and other provision relating to basic human rights enshrined in the Constitution.

v) Section 148(5)(b) which concerns an accused person who has previously been sentenced to imprisonment for a term exceeding three years be amended because it is so broadly enacted as to be capable of netting even those who are not envisaged by the law.

vi) The offence "armed robbery" as it appears in section 148(5)(a) should be defined under Penal Code.

(II) THE REFUGEE (CONTROL) ACT, 1966 (Act No. 2/1966)

1.0 THE STATE OF THE LAW:

1.1 This law was enacted "To make provision for the control of Refugees and for connected matters". The need for this enactment seems to be undoubted since without it there would be chaos, intolerable miseries and suffering to the people.

1.2 The Minister responsible for refugees who in this case is the Minister for Home Affairs is empowered to issue an order declaring a group or a class of people who are prior to their entry into Tanganyika were ordinarily resident outside Tanzania to be refugees for the purposes of this Act.

1.3 The declaration order it is noted, affects those people who ordinarily would have been resident outside Tanzania before its issuance. This provision in subsection 3 places an onus of proof on the person concerned in proceedings to prove or disprove his status as the case may be.

1.4 The Minister under section 4 may declare any part of the country to be an area for the reception or residence of any refugees or any category of refugees. Thereafter the competent authority may establish a reception area to be a settlement for-refugees or any category thereof and appoint a settlement commandant to be in change of such settlement. In section 5 the Minister is also empowered with competent authorities each in respect of his area, these are Regional Commissioner and District Commissioners, to declare places of entry to and departure from Tanzania, including routes to be used by refugees while moving in the country. These orders may be subject to conditions as the Minister or competent authorities may think fit. Any contravention is an offence against the Act. Section 6 provides for the refugees to surrender their arms and ammunitions, any instrument or tool which could be used as a weapon, immediately on entry as specified by the competent authority. The authority has to appoint an authorized officer to whom the surrender is made. The competent authority may give written authority as to continued possession of the weapons. Non compliance leads to a commission of an offence which may attract up to two years imprisonment. The relevant definitions under the section are those drawn form the Arms and Ammunition Ordinance Chapter 223.

1.5 By virtue of section 7, all animals imported into the country by a refugees shall be detained in a place and subject to veterinary regulations, may be slaughtered or disposed of and the proceeds therefrom be given to the owner refugee or to a fund for the benefit of refugees. An obstruction of this process shall be an offence. In section 8 the competent authority may also direct the detention of all vehicles or authorize officer to take possession of any vehicle brought into an area by refugees. The vehicles so seized may be authorized to be used in the area for moving refugees or their stores and equipment.

1.6 In section 9 the Minister, competent authority in respect of his area an the court upon convicting a refugee, may detain him pending deportation, usually to a country from which he entered this country. The deportation would not be effected where there is a belief that he may be tried for a political offence or be attacked physically. A deportee, who has been

in Tanzania some 3 months before the order, may present his case to the Minister for review. In the meantime the deportation shall be suspended.

1.7 Where the Minister or competent authority is satisfied that a refugee is acting in a manner prejudicial to peace and good order in Tanzania or to relations between Tanzania and any foreign government, he is empowered to detain such a refugee for an indefinite period subject to review. As provided in section 10, such detention could be also in respect of an offence committed by the refugee in a foreign country for which he could have been punished with imprisonment in Tanzania. Where a refugee has been detained or arrested pending transportation to prison the order must be confirmed by the Minister if issued by competent authority other than by himself, within 14 days of the arrest the order lapses and the refugee cannot be arrested for the same cause again.

1.8 An authorized officer may issue permits to refugees of the category under section 11 to enable them to remain in Tanzania, but such permit shall not be withheld if the officer has reason to believe that on the refugees return to the country from which he entered Tanzania will be tried for a political offence or suffer physical attack. Where a permit is refused he will be dealt with under section 2 of the Immigration Act, No. 41 of 1963 as amended. Where the refugee will have been in the country for about 3 months before refusal of permit, he should be informed of the grounds so that he may make a representation to the Minister for review.

1.9 There is a requirement that a refugee must reside in settlement/reception area as provided for in section 12 and this may be subjected to various rules and conditions, the breach of which may necessitate action against him. A refugee is also subject to control while in the settlement. Therefore a refugee may be subject to arrest by various named officers and be held in custody pending the institution of proceedings as provided for in section 13. in section 14, 15, 16 and 17 there are provided restrictions on persons to enter settlements, to address refugees in meetings, offences and penalties, arrest and the fact that some force may be used to compel compliance. Section 18 offers protection to officers for bonafide acts. Section 20 provides for powers of competent authorities to deal with refugees even if they are outside their areas, and lastly, section 21 repeals the War Refugees (Control and Expulsion) Ordinance Cap. 40).

2.0 THE MISCHIEF FOR THE ENACTMENT OF THE LAW:

2.1 The title of the Act and the particulars from the foregoing survey which also give the implementation proves, clearly show that, the law intended to provide a machinery whereby Tanzania as a host country would be able to provide the facility to keep refugees. This facility demands on Tanzania to maintain a status of humanity and peaceful co-existence amongst the people. The respective machinery is for the control of Refugees, including the taking of punitive measures for non-compliance of conditions, orders, rules and or directions.

3.0 CRITICISM BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission in its report had observed that under this Act, the Minister, Regional Commissioners and District Commissioners have been given wide discretionary powers

in respect of aspects of life of refugees in Tanzania. That the powers included powers to arrest, detain and deport as appears in the provisions of sections 9, 10, 12, 13, 14 while section 17 allows the use of force by authorized officers and competent authority.

3.2 On spying and sabotage activities the Commission noted that:
"These powers have been used extensively at the request of recognized Liberation Movements against 'persons' (spies) alleged to sabotage the activities of these movements. In some cases, these people have been kept in detention for as long as four years. Detention of this nature were justified under this Act since sabotage or spying of liberation movements should not fall under the provisions of the preventive Detention Act. However section 9 of the National Security Act 1970 now makes such spying and sabotage activities an offence. Therefore, detentions of these nature under this Act are no longer justifiable.

3.3 The Nyalali Commission also observed that because we have in Tanzania refugees from different parts of Africa, their control was necessary, although their detention without trial as a means of controlling them was not justifiable. The Commission criticized that the powers granted to the Minister, Regional Commissioners and Area Commissioners (District Commissioners) are too wide and that as there are no administrative or judicial control, abuses by these authorities are bound to occur.

3.4 It is on this ground that the Commission recommended that:
"Some provisions of this Act do violate basic rights and freedoms guaranteed under the Constitution and the relevant International conventions in respect of treatment of refugees. It is recommended that the appropriate authorities look into this law with the view to making sure that it does not contravene the Constitution and the relevant International conventions on refugees.

4.0 PEOPLE'S VIEWS:

4.1 There are two sets of views which were expressed, that is those of the workshop participants and members of the public in the regions visited.

4.2 As regards the former groups, the Law Reform Commission exposed the participants to the general scope of the law as currently applicable as well as the view that the existing circumstances, social, political and economic environment in this country indicated that the law was still relevant although that there was need for a review in the light of the Nyalali Commission criticism.

4.3 The participants general view was to support the retention of the Act because they did not find it to be unconstitutional. They argued in favour of more stringent provisions so as to control the refugees especially because some of them have involved themselves in criminal activities leading to loss of life and property of the innocent people/citizens in Kagera Region. Another proposal made by the workshop participants was that when making a decision of where to settle refugees, the Minister for Home Affairs should consult the Minister for Defence in order to cater for the various categories of refugees eg. Political, soldiers etc.

4.4 As regards the second group, that is the members of the public in the regions, great concern was expressed on the utility of the law in that the control of the refugees in Tanzania was unlike that of the neighbouring countries of Kenya. Uganda and Zaire. They felt that the laxity in control had given room for refugees to participate in crime ranging from robbery with violence to drug peddling, spying and subversive activities. Laxity was also observed on the part of camp among the local citizens commanders who issue whole sale permits to refugees to leave camps and live at time enjoying more and better rights than the indigenous. It was pointed out that geographically, the camps should be located away from the borders to sever the inter relationship between tribes at the border areas and reduce the influx of refugees.

4.5 There was a further concern expressed on the briefing on the Act and urged that the law be retained with stringent amendments and effective implementation so that there is control of refugees who have so for been a menace to citizens and have been a threat to security and the economy of the country and above all the political life of Tanzania.

4.6 The proposed amendments made by members of the public included the following:-

- that camps be established away from borders where refugees can be easily identified and prevented from crossing the border and issued with identity cards.
- That permit be issued out of camps for official and approved activities.
- that those who have married be registered for identification or process of naturalization.
- that harbouring refugees be made an offence.
- that the Government should have a limited number of refugees it can accommodate there should also be a time limit considering social economic and political factors.
- that a refugee convicted of an offence should automatically lose his right to live in the country and Penal provisions be reviewed in order to enhance sentences.
- that conditions for receiving refugees be made more stringent.
- that no work permits be granted to refugees.
- that conditions for applying for citizenship for refugees be made more stringent by subjecting them to scrutiny by the village, local and District authorities.
- that refugees control units should be strengthened and that Immigration offices in the border areas should be adequately manned and be given working tools to assist in the ministering and control of movements of refugees.
- that traditional defence group in border areas be empowered and used to control the flow of refugees.
- that a reporting mechanism for new comers and visitors be put in place and be strictly observed by village authorities.
- that an inventory of all immigrants be established and reviewed from time to time.

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION

5.1 Considering the criticism on the use of powers for spying or sabotage activities, the Law Reform Commission in of the considered opinion that no powers were given to perform such activities. If it is true that they are used, the powers, to do such things, that would amount to misuse of the powers and or abuse of office. The arm of justice should take its course to curb this illegal activity under cover of the Act. There is no need to complain about a fact or situation which can be taken care of by law.

5.2 The Commission agrees with the criticisms by the Nyalali Report that the National security Act should deal with the issues touching on spying and sabotage and that at no time should the Act be used for that purpose.

5.3 The other criticism by the Nyalali Commission is that detention without trial provided for under the Act should not be used as a means of controlling the refugees. This criticism refers to section 10 of the Act where by the Minister or competent authorities of Regional and District levels are empowered to detain persons who prejudice peace, order or foreign relations or who are believed to have committed offence outside Tanzania. We are of the considered opinion that in this instance the detention here is a necessary evil and we are also of the opinion that the refugee should be against with a charge as soon as evidence is obtained, rather than detain him indefinitely. The Commission is of the further view that the Act will need to have relevant amendments so that refugees can be charged as according to the existing relevant amendments so that refugees can be charged as according to the existing relevant laws of the land. We observed that the National Security Act 1970, the Penal Code Cap. 16 and the Immigration Act 1963 are just a few of the laws under which charges could be processed. Indeed processes under the Administrative Law in our view should be utilized whenever there are instances of misuse of the Act.

5.4 The Nyalali Commission does not itemize the incidents of breach of basis rights and freedoms infringed by the Act, as against the Constitution and International Conventions. We observe that the basis rights are covered by Article 12-30 of the Constitution and they include:

The Rights to Equality, The Rights of Freedom of Conscience, The Rights to Freedom of work. The Duties to Society, and the General Provisions.

5.5 None of the above have been specifically stated to have been breached nor have any suggestions been made as to the limitations or modus operandi which we should be adopted in-order to control, protect refugees as well as protect our country. It has been observed earlier in this report, that some powers under the Act have been used as the necessary evil to control a problematic situation. We believe that the law still has means by which violations of natural justice can be remedied and that the same should be taken advantage of pending the relevant amendments.

5.6 It is the Commission's view that Tanzania has learnt through refugees that political refugees can be a source of trouble and even war between nations, as was the case of the Tanzania – Uganda war brought about because we hosted the then President Milton Obote and his people after he was ousted by the then President Idi Amin Dada. Tanzania lost many of its kith and kin and incurred a lot of expense for the war resulting in deprivation of its people. Currently, over the last 3-4 years the Rwanda and Burundi refugees in Kagera and Kigoma Regions have entered our country, beyond the accepted entry points have used untraceable routes, have devastated our environment, they have committed murders and other serious crimes. The result of all this has not only rendered the native a refugee in his own country but has caused unfathomed pain and loss.

5.7 There is no doubt whatsoever that the influx of some 500,000 odd refugees in the KAGERA AND KIGOMA regions has brought forth a mischief of a completely new horizon, than could ever have been predicted. This new mischief of the indigenous having to suffer loss of life and property and to be rendered "a worse off" than refugee in their our country, leaves the Law Reform Commission to wonder as to how best to control such a people amongst us.

5.8 The Commission concedes to the misuse the Act may have been put to, but is of the view that the same can be curbed by the Administrative Law machinery.

5.9 The Law Reform Commission as already seen has appreciated the anxiety of the Nyalali Commission. The main issue on our hands is how to control the people who have come to our country to live in unpredictable circumstances and be able to say at the end of the day that we have done a duty to protect the refugees and above all our country. It is in these premise that we agree that the law needs to be amended so that it suits the occasions discussed.

6.0 RECOMMENDATIONS:

6.1 The Law Reform Commission recommends:

1. The law be retained.
2. The penalties provided for in sections, 13 and 15 be enhanced to not less than shs. 10,000/=
3. There be provisions to:
   i). prohibit refugees to do business outside their settlement camps/areas;
   ii). involve Local and Village authorities empowering them to endorse permits to be issued to refugees.
   iii). require refugees to carry identity cards bearing their photographs.
   iv). make harbouring and aiding refugees an offence.
   v). prohibit refugees to own immovable properties including land.
3. There be provisions to:
4. More stringent conditions for receiving refugee be made for the purpose of controlling the influx of refugees.
5. Application for citizenship by refugees be made stringent subjecting them to scrutiny by Village/Local and District Authorities.
6. A refugee convicted of an offence should automatically lose his right to live in the country.

6.2 In addition the Commission recommends:-

1. Refugees camp be established far away form the boarders for easy identification of refugee as well as making cross border movement difficult.
2. An operation be made to identity all refugees in the country.
3. All refugees be ordered back to their respective camps.
4. Resident Refugees who have inter-marriage be registered for purpose of identification and process of naturalization if need be.
5. Government should determine the number of refugees the country can accommodate.
6. Refugee Control Units be strengthened and Immigration offices in border areas be

adequately manned in order to monitor and control movements of refugees.

7. A reporting mechanism for immigrants and visitors should be established and strictly observed at every level from village to national level.

(iii) PEOPLES MILITIA LAWS

(ACTS NO. 27/73, 25/75 AND 9/89)

1.0 STATE OF THE LAW:

1.1 There is no law which specifically established the Peoples Militia notwithstanding that Peoples Militia and traditional vigilante groups are legally recognized and perform public duties in the society. Three legislations, that is, Act No. 27/73, 25/75 and 9/89 recognize and give certain powers and rights to Peoples Militia and traditional armies.

1.2 The Peoples Militia (Compensation for Deaths or Injuries) Act, No. 27 of 1973 makes provisions for compensation for death or injuries while on duty to members of the people militia.

1.3 The Peoples Militia (Power Of Arrest)Act No. 25/1975 redefined Peoples Militia under section 2 and under section 3 gives power of arrest for criminal offences.

1.4 By Act No. 9 of 1989, Acts relating to Peoples Militia were amended and the definition of Peoples Militia in section 2 of Act No 27 of 1983 extended to cover traditional armies as follows:

> 'Peoples Militia means an organized group of the people of United Republic, operating with the authority of and under the aegis of the Government and which is receiving or participating in any military, quasi military or law enforcement exercise for the protection of the sovereignty of the United Republic or by whatever name know whether by Wasalama, Sungusungu or any other, but does not include the police force, any army or branch of the Defence Forces, Prisons Services, the National Service or the Immigration Services."

2.0 MISCHIEF FOR THE ENACTMENT OF THE LEGISLATION

2.1 History tells us that the concept pf 'Peoples Militia" was accepted in the 1970's particularly after the invension of Guinea by the Portuguese and the overthrow of the President of Uganda by Idi Amini Dada. On account of these two events it was thought by the then Ruling Party (TANU) that the people had to guard and protect their country. This would be done by establishing Peoples Militia, which is a force of enrolled men and women drilled as soldiers but only liable to home service. Through the Guidelines of 1971 these people learned politics and the use of arms to defend their country, her people and property. This means Peoples militia became part of the armed forces and mostly acted as auxiliary police to assist police to keep law and order among other things in the country. Members of the Peoples' Militia fought along side the armed forces during the Kagera War with Idi Amin Dada of Uganda in 1989 – 1979.

2.2 Subject to the afore-stated background, in the course of duty some members of the militia were injured and some died. Those who were from government service, parastatal and other employers could not be easily compensated. Those who were unemployed suffered even more. Therefore Act No. 27 of 1973, Peoples Militia (Compensation for Deaths and Injuries) Act 1973 was enacted to recognize the role of he militia and fill the legal gap as far as compensation for deaths and injuries to members of Peoples' Militia were concerned.

2.3 It has been seen above that it was under the auspices of the Party that the peoples Militia started. This means the TANU Party Organs recruited militia members and as the government was the government of the only party, it was easy to instruct the army to train the members of the militia. The militia would be recruited in all the District, work places, divisions, wards, and villages to undergo training designed, to produce a soldier an equivalent of private soldier rank. It is clear therefore that Peoples Militia is a creature of the Party, but after training it forms part of the reserve (volunteer) army. During peace time the militia do as we have seen police duties including participation in various operations mounted by the state.

2.4 The duties assigned to Peoples Militia needed the legal powers to do the tasks as police officers. Hence the need to enact the Act No. 25 of 1975 to redefine "Peoples' Militia" and to give Militia Power of arrest for criminal offices.

2.5 In Tabora Region, there arose a group of traditional army to combat cattle rustlers particularly in Urambo and Tabora Rural Districts. The cattle rustlers were known as "Chama cha Kumi." These stock thieves spread to other areas such as Shinyanga and Mwnza. The Police could not cope with this situation and therefore the people of those areas decided to protect themselves and their stock or cattle by reviving their traditional armies. The groups of traditional Militia were known in Shinyanga as Sungusungu and in Tabora as Wasalama. In 1980s these groups were more pronounced in Mwanza, Shinyanga and Tabora and later they appeared in other areas such as Kagera, Rukwa and Singida.

2.6 In 1989, the Government taking recognizance of the useful work that was being done by the groups of traditional militia to amend Acts No. 27 of 1973 and No. 25 of 1975 to include the traditional militia so that the benefits and powers accorded by the two acts to the Peoples Militia may also be bestowed on the traditional militia. Henceforth traditional armies acquired legal powers of arrest and the right to be compensated for injuries and deaths which occurred in the course of duty.

3.0 CRITICISMS BY THE NYALALI COMMISSION:

3.1 The Nyalali Commission traced the genesis of the Peoples Militia and its function and made a finding that it was established by the then TANU Political Party as a Para-Militia group. Further that it is not established by law and to that extent the existence of Peoples Militia including Sungusungu/Wasalama/Jeshi la Jadi is contrary to Article 147 of the Constitution which state:

"147 (1) No person or organization or other body of persons than the Government shall raise or maintain in Tanzania military force of any kind.

2) The Government of the United Republic may, in pursuance of some legislation,

raise or maintain Tanzania military forces of various categories for the purpose of the defence of security of the territory and the people of Tanzania".

4.4 PEOPLE'S VIEWS

4.1 People's views as expressed by the workshop participants and in the regional tours are that since Peoples' Militia and traditional defence groups have played a commendable effective role in fighting crime especially stock theft, witchcraft and banditry they should not be disbanded. Being community based these armies are therefore better placed to easily identity criminals within their community.

4.2 On account of the positive contribution to the maintenance of law and order the society in the respective areas has placed in the traditional vigilantes the greatest trust and confidence. The society is supportive of using peoples' Militia in defence of lives and properties and expressed fear of escalation of crime rate should these armies be disbanded.

4.3 It was reiterated that the practice of using traditional or communal vigilantes is recognized in many parts of the world eg. Switzerland and USA. They called for the legal establishment of Peoples' Militia and traditional defence groups.

4.4 However the lack of legal authority and backing has brought conflicts with state organs especially the Police and the Courts of law. It was therefore recommended that a law be put in place to formally establish them whereby their powers, authority, identity, line of command, training etc.. be defined. It was further observed that the traditional character of the groups be maintained to distinguish them from other forces.

4.5 As regards their powers it was recommended that:

1. Local traditions and customs be maintained to guide their "modus Operandi" including revival of traditional tribunals.
2. Powers of search, arrest, investigation, prosecution and punishment be given but limited to specific offences.
3. Transparency in their work should be emphasized and fostered.
4. Both traditional tribunals and the village leadership be vested with legal powers of control, supervision and discipline over the traditional defence forces.
5. The District Commissioner be the commander in chief of the traditional defene forces.
6. The traditional defence groups be protected in the course of the discharge of their function.
7. Recruitment and training of the members of traditional defence groups be stream lined and controlled. Village authorities to supervise recruitment while the Police Force to coordinate training.
8. Traditional weapons continue to constitute the core of the weaponry of the traditional defence groups.
9. A fund be established at the village level to cater for the requirements of groups i.e uniforms, allowances, weapon, identity cards etc.
10. A machinery for appeal from the traditional tribunals to the Primary Court be provided for.
11. Operational manual regulations be provided for.

5.0 WEIGHING UP BY THE LAW REFORM COMMISSION:

5.1 The Law Reform Commission has examined the laws touching upon the peoples Militia and is in agreement with the Nyalali Commission that the Peoples Militia and the traditional armies though recognized by law have not been legally established. In that respect their existence violated the provisions of Article 147(1) of the Constitution.

5.2 Taking into consideration the views of the people as to the proprietness of these armies, the law Reform Commission is of the considered opinion that the armies are viable and necessary in the maintenance of peace and order in the country and therefore should continue to exist.

6.0 RECOMMENDATIONS

6.1 The Law Reform Commission recommends as follows:

1. Peoples Militia and traditional defence groups be legally established in line with the provisions of Article 147(2) of the Constitution.
2. Local traditions and customs be maintained to guide their "Modus Operandi" including revival of traditional tribunals.
3. Powers of search, arrest, investigation, prosecution and punishment be given but limited to specific offences.
4. Transparency in their work should be emphasized and fostered.
5. Village leadership be vested with legal powers of control, supervision and displine over the traditional defence groups.
6. The traditional defence groups be protected in the course of the discharge of their function.
7. Recruitment and training of the members of traditional defence groups be streamlined and controlled. Village authorities to supervise recruitment while the Police Force to coordinate training.
8. Traditional weapons continue to constitute the core of the weaponry of the traditional defence groups.

CHAPTER FIVE

SUMMARY OF RECOMMENDATIONS

The Law Reform Commission of Tanzania has addressed itself to the mischief intended to be dealt with by each law in the design laws in the Nyalali Commission Report to determine whether or not the mischief still exists. The Law Reform Commission, unlike the Nyalali Commission, concerned itself with both the safeguards of Human Rights as well as the corresponding duties thereto as provided for in the Constitution. The law Reform Commission has noted that the safeguards on Human Rights in Articles 12 to 24 of the Constitution, have corresponding duties which are enumerated in Articles 25 to 24 of the Constitution. Equally Article 29 and 30 articulate the fundamental rights and duties on one hand and the limitations thereof on the other hand.

The following is a summary of recommendations of each law.

I PENAL LEGISLATIONS

STOCK THEFT ORDINANCE 1960 (CAP. 422): AS AMENDED BY ACTS 2/72, 13/84 & 12/87

1. The law be retained and the following amendments be made to give it more teeth.
2. Enquiry in stock theft cases while the stock has been seized by an administrative officer and kept in an appropriate place should involve resident Magistrates, District Magistrates, Primary Court Magistrates as well as Village Authorities. The inquiry should be held and completed within a specified period of time.
3. There should not be any appeal in cases of inquiries held under section 12(1), 14(1) and 15(1) of Cap. 422 because, since the magistrate will be assisted by the village authorities who know the village and stock owners thereby minimizing the possibility of making wrong findings or orders. In any case appeals do not lie against finding of facts.
4. The "Presidential order" GN 163/84 should be incorporated in the law so as to facilitate the quick recovery of the stolen stock from the community, in which they are hidden by the cattle thieves as community punishment brings with it community sense of responsibility and alertness.
5. In assessing compensation a formula of two (2) to one (1) should be applied in order to cover both an element of costs and punishment.
6. The Village Authorities should be required by law to keep a register of cattle owners/ farmers showing the number of livestock each one owns and whenever he buys cattle he should be required to inform the village government about such purchase and he should be required to produce a movement permit from the stock or cattle auction or market, showing the number of cattle purchased, their type and colour/description. Failure to produce documentary proof should attract criminal sanctions.
7. There should also be provisions requiring every stock owner who takes stock out of the village to obtain a stock movement permit, indicating the destination, the number of stock without difficulty.

8. Each District and Village should have its own distinctive brands on stock and the stockowner should also have his own branch to enable him to trace his missing or stolen stock without difficulty.
9. The Law should provide that stock or cattle kraals or bomas should be built within the villages and the community should participate in policing and protecting life and property through the use of traditional defence groups.
10. Stock routes and holding grounds should be established and/or revived and publicized after consultations with the Department of Livestock Development (Veterinary Section) so as to provide services to the stock in holding grounds.
11. The stock/cattle should be moved be moved during day time only from 6.00 a.m to 6.00 p.m.
12. The law should include the establishment and strengthening of the Stock Theft Preventive Unit(STPU) to cover the whole country.
13. The sentences on identified stock thieves should be enhanced i.e 30 years imprisonment.
14. The definitions in the Ordinance should be reviewed and amended to reflect the changes which have taken place in the country (consequential amendments to the Ordinance).

THE WITCHCRAFT ORDINANCE, 1928 (CAP. 18) R/L 1974

1. The law be retained.
2. Section 5 on sentencing should be looked into for purpose of enhancement i.e life imprisonment and fines of shs. 10,000/=, and 40.000/= respectively.
3. The District Commissioners should continue to exercise the powers provided for under section 8 of the Ordinance.
4. The Director of Public Prosecutions should dispense with his power of consent for purpose of speeding up trials of witchcraft offences.

II SELECT CRIMINAL PENALTIES

CORPORAL PUNISHMENT, 1930, (CAP. 17): AS AMENDED BY ACTS 11/70 & 10/89

1. The law be retained.
2. The punishment should not be discriminatory between sexes i.e it should apply to both men and women.
3. The punishment should be enhanced and the minimum sentence be twenty four (24) strokes and twelve (12) canes.
4. The punishment should not be retracted to convicts aged up to 45 years but should be applicable to convicts of all age.
5. The list of offences to which corporal punishment is applicable should include drug trafficking and witchcraft.

CAPITAL PUNISHMENT Section 39, 40, 196, 197 of the Penal Code, Cap. 16

1. Capital Punishment should be retained for murder and treason or treasonable offences. If should remain mandatory for murder but discretionary for treason and treasonable offences.
2. Investigations should be streamlined so that the accused person should not spend a long time in remand prison before trial and another long time in the death row before execution.
3. The procedure used in the exercise of the prerogative of mercy should be reviewed so that the convicted prisoner does not stay in the death row for a long time awaiting to hear whether or not the death sentence has been commuted or his petition for clemency has been rejected by the President.

III REGULATORY LEGISLATIONS

REGISTRATION AND IDENTIFICATION OF PERSONS ACT No. 11/1986:-

1. The law retained.
2. Section 7(1) of the Act be amended to make the process of registration mandatory.

THE SOCIETIES ORDINANCE, 1954 CAP. 337 AS AMENDED BY ACTS16/69, 13/91 AND 5/92

1. The law be retained.

THE TANZANIA NEWS AGENCY ACT, NO. 14/76 AS AMENDED BY ACT NO. 11/92

1. The Tanzania News Agency Act should be retained and strengthened in terms of staff and working facilities. Regulations be made to regulate other new agencies, their functions and responsibilities.

THE NEWSPAPERS ACT. NO. 3/76 as amended by Act No, 10/94

1. The Act be retained.
2. An amendment be made to section 6 of the Act to require the Registrar to reply to an application for registration of a newspaper within a specified time. A three months period is proposed. At the expiry of the specified time the application should be deemed to be granted.

THE HUMAN RESOURCES DEPLOYMENT ACT, 1983 ACT NO. 6/1983

1. The Act be retained.
2. By-laws be made at district and village levels identifying the types of activities acceptable and to provide sanctions for non compliance.
3. The Government in close collaboration with the Local Authorities should provide working facilitates and a conducive atmosphere for a smooth implementation of the Act.
4. The Government in collaboration with other players. e.g NGOs should carry out programmes of continued education in the use of available resources and opportunities.
5. The National Services be revived to provide centers for imparting relevant skills to the youth..

6. Community participation starting from the family be sensitized to supervise the youth and jobless.
7. Self-reliance work should continue to be part of the primary education.
8. The preamble to the Act be amended to reflect the changed political situation. Further the Act be reviewed for consequential amendments including the enhancement of sentences as following: imprisonment from three to twelve months. Fines from 1.000/= to 10.000/=

THE DESTITUTE PERSONS ORDINANCE 1923 (CAP. 41)

1. The provisions of the Ordinance be incorporated into the Human Resources Deployment Act, No. 6/83 and thereafter be repealed.

TOWNSHIP (REMOVAL OF UNDESIRABLE PERSONS) ORDINANCE 1954 (CAP. 104)

1. The provisions of the Ordinance be incorporated in the Human Resources Deployment Act, 1983 thereafter be repealed.

THE DEPORTATION ORDINANCE, 1921 (CAP. 38) AS AMENDED BY ACT NO. 3 OF 1991

1. The law be retained.
2. The period of deportation be specified. A period of two years is recommended with provisions for renewal if necesary.
3. The fine of one thousand shillings imposed for contravention of a deportation order is too small. It should be enhanced to ten thousand shillings.

EXPULSION OF UNDESIRABLE PERSON ORDINANCE 1930 (CAP. 39) AS AMENDED BY ACT NO. 32/94

1. The law be retained.
2. Provisions on fines in Sections 9(6) and 16(1) be reviewed by enhancement from shs. 500/ = to shs. 5,000/= and shs. 1,000/= to shs. 10,000/= respectively. While the term of six months imprisonment be retained.
3. Section 20 of the Ordinance be repealed.

THE RESETTLEMENT OF OFFENDERS ACT NO. 8/1969

1. The law be retained.
2. A definition of a "habitual offender" be provided in the following lines:

   "Habitual offender" means a person who is not less than 25 year old, who, after attaining the age of 18 years has, on three or more times, been convicted of any crime of moral turpitude for which he was, on each of such occasions, sentenced to imprisonment for a period of three years or more and has now sentenced to imprisonment for a period of not less than three years upon conviction of another offence of moral turpitude.'
3. That a person so defined as a habitual offender should be liable to be served with an order of resettlement of offenders, which should follow after serving his last sentence of imprisonment.
4. The resettlement order should be for a minimum period of two years renewable.
5. Grounds for review of resettlement order be provided for.
6. Section 16 of the Act which outs judicial review of resettlement orders be repealed.

THE GRAVES (REMOVAL) ACT NO. 9/1969

1. The law be retained.
2. The Act be amended so that provisions of section 11(1) of the Land Acquisition Act 1967 which provide for compensation be adopted.

THE PREVENTIVE DETENTION ACT NO. 2 OF 1962 AS AMENDED BY THE PREVENTIVE DETENTION (AMENDMENT) ACT NO. 2 OF 1985

1. The powers of detention be retained but as they are exercised for the purpose of protecting National peace and security, the relevant provisions be incorporated into the national Security Act, 1970 and the Preventive Detention Act, 1962 be repealed.
2. A period of reference of a detention order to an Advisory Committee be reduced from three to two months.
3. A time frame for a detention order be provided for by the law. A renewable period of one year is proposed.
4. A detainee be permitted to make communication in line with the provisions under Prisons Act, 1967.
5. A person detained without sufficient reasons be entitled to compensation.
6. Arrangements be made to have the Preventive detention Decree, 1964 repealed.

THE NATIONAL SECURITY ACT NO. 3/70 AS AMENDED BY ACTS 17/89 AND 32/94

1. The Act be retained.
2. The New offences be created under the Act to include; leakage of official secrets.
3. The Department of State Security be established by law.
4. The Director of Public Prosecutions Powers to object Bail should remain so as not to prejudice the safety or interest of the United Republic of Tanzania.
5. Public education on the duty and role of citizens in maintaining and defending national security be conducted.
6. The need to protect the Sovereignty and official secrets of the state demands that while there is need for transparency on the part of the Government his should not be used to the extent of compromising national security.

REGIONS AND REGIONAL COMMISSIONERS AND DISTRICT AND DISTRICT COMMISSIONERS ACTS 1962 (CAP. 461 & 466)

1. The laws be retained.
2. Amendments be made to provide that where either by the Regional or District Commissioner report or by proceedings in court, a Magistrate is of the opinion that the Commissioners have abused powers in detaining a person, he (the Magistrate) should report the same to the High Court which if it concurs should in turn report the matter to the Attorney General for necessary actions against the relevant Commissioner.

EMERGENCY POWERS ACT, 1986 (ACT NO. 1/86)

1. The law be retained.
2. Removal of the aspect of delegation of powers with regard to the powers of proclamation of a state of emergency in compliance with the Constitution.

THE CRIMINAL PROCEDURE ACT 1985 AS AMENDED BY ACTS NO. 2/87, 10/89 AND 21/91

1. The law be retained.
2. Section 148(5)(a) be amended to include offences such as defilement, rape drug trafficking, burglary, robbery with violence, offences Under National Security Act 1970, Economic and Organized Crime Control Act 1984.
3. Provisions which empower the Director of Public Prosecutions to refuse bail should be retained since they are served by Article 30(2)(a) of the Constitution. In case of abuse of powers Article 30(3) of the Constitution allows affected person to institute proceedings for relief in the High court.
4. When effecting arrests, an authorized person or a police officer should comply with the provisions of the Criminal Procedure Act. For example the wording of section 21(1) of the Act provides: " A police officer or other person shall not, in the course of arresting a person use more force, or subject the person to greater indignity, than is necessary to make the arrest or to prevent the escape of the person after he has been arrested."
5. It is further recommended that police should be adequately educated and acquainted with the Act and other provisions relating to basic human rights provisions enshrined in the Constitution.
6. Section 148(5)(b) which concerns an accused person who has previously been sentenced to imprisonment for term exceeding three years be amended as bail is a mechanism of ensuring that the axcused person avails himself or herself for trial rather than a form of punishment.
7. The offence "armed robbery" as it appears in section 148(5)(a) should be defined under Penal Code.

REFUGEE (CONTROL) ACT, 1966 (ACT NO. 2/1966)

1. The law be retained.
2. The penalties provided for in section 13 and 15 be enhanced to not less than shs 10,000/=
3. there be provisions to-
   i) prohibit refugees to do business outside their settlement camps/areas.
   ii) empower Local and Village authorities to endorse permits to be issued to refugees.
   iii) require refugees to carry identity cards bearing their photographs.
   iv) make harbouring and aiding refugees an offence.
   v) prohibit refugees to own immovable properties including land.
4. More stringent conditions for receiving refugees be made for the purposes of controlling the influx or refugees.
5. Applications for citizenship by refugees be made stringent subjecting them to scrutiny by Village/Local and District Authorities.
6. A refugee convicted of an offence should automatically lose his right to live in the country.
7. In addition the Commission recommended:-
   1. Refugees Camps be established far away from the borders for easy identification of refugees as well as making cross boarder movement difficult.
   2. An operation be carried out to identify all refugees in the country.
   3. All refugees be ordered back to their respective Camps.
   4. Resident – refuges who have inter-marriages be registered for purpose of identification and process of naturalization if need be.

5. Government should determine the number of refugees the country can accommodate.
6. Refugees Control Units be strengthened an Immigration Offices in boarder areas be adequately manned and equipped in order to monitor and control movements of refugees.

PEOPLE'S MILITIA LAWS: ACTS NO. 27/75 AND 9/89

1. Peoples Militia and Traditional Defence Groups be legally established in line with the provisions of Article 147 of the Constitution.
2. Local traditional and customs be maintained to guide their "Modus Operandi" including revival of traditional tribunals.
3. Powers of search, arrest investigation, prosecution and punishment be given but limited to specific offences.
4. Transparency in their work should be emphasized and fostered.
5. Recruitment and training of the members of traditional defence groups be stream-lined and controlled. Village authorities to supervise recruitment while the Police Force to coordinate training.
6. Traditional weapons continue to constitute the core of the weapons of the traditional defence groups.