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EDITORIAL

On behalf of the Editorial Board of the *African Journal of Law and Practice,* I am delighted to invite you to explore the articles presented in this comprehensive issue. The journal customarily publishes two issues each year, in January and December. This issue contains the following five articles and one book review.

Articles

1. Navigating the Arm's Length Principle: Bridging the Gap Between Transfer Pricing and Customs Valuation in the East African Community
2. Transparency and Accountability in Tanzanian Petroleum Industry: The Role of Institutions and Challenges Associated.
3. Judicial Responses to Climate Change in Tanzania: Has the Paris Agreement Sparked Emerging Jurisprudence?
4. The Legal Complexities of the Relief in Division of Matrimonial Real Property upon Divorce in Mainland Tanzania: Lessons from Kenya
5. Regulatory Oversight of FinTech in the Era of Artificial Intelligence: Assessing Consumer

Book Review

The Internet, Development, Human Rights and the Law in Africa, edited by Danwood M. Chirwa and Caroline B. Ncube, Routledge, 2023, 4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN, 250 pp., US$ 192.00 (hardcover), ISBN 978-1-032- 31072-5.

On behalf of the Editorial Board, I would like to express our heartfelt appreciation to the authors, reviewers, and content and language editors for making this special issue a reality.

Prof. Alex Boniface Makulilo
Chief Editor African Journal of Law and Practice

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ARTICLES

Navigating the Arm's Length Principle: Bridging the Gap Between Transfer Pricing and Customs Valuation in the East African Community

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Abstract

The role of the arm's length principle is significant in both transfer pricing and customs valuation for revenue collection between related multinational corporations (MNCs) within the East African Community (EAC). Taxing related MNCs is challenging when the same transaction is taxed under both transfer pricing and customs valuation frameworks using the arm's length principle. MNCs are subject to double taxation or unfair tax risks, while revenue authorities face the risk of revenue loss by handling the same transaction under different legal frameworks, despite having the same objectives. Although full harmonization is generally considered unattainable, certain areas of law can be harmonized to promote the consistent application of the arm's length principle in both contexts. This article seeks to reveal the legal challenges faced by income tax and customs departments in applying the arm's length principle. Using doctrinal and comparative methods, the study found discrepancies between domestic income tax and customs laws within the region, and that EAC laws do not fully adopt international standards for harmonizing these two sets of laws. It recommends amendments to income tax and customs laws to enhance coherence.

Keywords: *Arm's length, transfer pricing, customs valuation, multinational corporations.*

1.0 Introduction

Tanzania, Kenya, and Uganda are member states of the East African Community (EAC).[1] These countries are required to, among other things, harmonize their tax policies to eliminate tax distortions, thereby promoting a more efficient allocation of resources within the community.[2]

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[1] EAC is a regional intergovernmental organization of eight (8) partner states Tanzania, Kenya, Uganda Rwanda Burundi, Democratic Republic of Congo, South Sudan and Somalia established under Treaty for Establishment of East African Community (EAC Treaty) in 1999 which came into force in 2000 available at https://www.eac.int/overview-of-eac (last accessed 26 October 2024).

[2] EAC Treaty, Art 83 (2) (e).

In implementation, the EAC member states have signed the protocol for the establishment of the EAC Customs Union as a single customs territory[3] implemented by the EAC Customs Management Act, 2004 (EACCMA). Similarly, have established EAC Agreement on Avoidance of Double Taxation and Prevention of Fiscal Evasion with respect to Taxes on Income 2011 (EACDTA).[4] Additionally, the EAC is obligated to increase trade in industrial goods within the region and to facilitate the export of industrial goods from the partner states.[5] In promoting industrial development, the EAC Treaty requires member states to harmonize and rationalize investment incentives to promote the community as a single investment area.[6] These commitments are meant to increase revenue, among other things, for the benefit of their people.

However, the EAC countries are capital importers depending on foreign investments from developed and emerging economies. In this context, the search for foreign investment is an openly declared agenda, backed by community instruments.[7] Despite the common objective of attracting foreign investment, Tanzania, Kenya, and Uganda, have seen a steady increase in foreign direct investment compared to the rest of the member states.[8] Therefore, taxation of income generated from international investment operations through related multinational corporations (MNCs) becomes essential in generating revenue.[9]

As cross border trade and investment increase, the transfer and importation of goods between related MNCs in the EAC, as a single customs area, is bolstered. This is particularly taxation of related MNCs where goods are transferred and sold across borders between related MNCs in a controlled transaction. The cross-border transfer of goods between related parties involves transfer pricing in which income tax is paid to the revenue authority based on the profit obtained. Similarly, in the cross-border transaction between the same related parties importing goods, customs duty is paid to the customs authority based on customs value. The fact that transactions in either transfer pricing or customs

[3] Ibid, Art 75.
[4] Ibid, Art 142 (1) (d).
[5] Ibid, Art 79 (b) read together with Art 5.
[6] Ibid, Art 80 (f).
[7] Ibid, Arts 75,76, 79 and 80 (d).
[8] UNCTAD, (2020), FDI Inflows into EAC Region 2014-2019, Word Investment Report 2020 available https://www.eac.int/operating-environment/eac-investment, (last accessed 26 November 2024).
[9] A. W. Oguttu., *Base Erosion and Profit Shifting: A Blueprint for Africa's Response,* IBFD, 2021, p. ix.

valuation are made between related parties and are not controlled by market forces creates a likelihood of the price being influenced by their relationship. To avoid the influence of such a relationship on the price or customs value, transactions between related parties must be made at a market price by applying the arm's length principle.

Although both transfer pricing and customs valuation apply the arm's length standard for determining transfer prices or customs value, their results are not always consistent. Many scholars argue that fully aligning transfer pricing and customs valuation results is challenging due to differences in their structural focus, timing, and policy objectives.[10] Additionally, variations in operational functions, determination methods, documentation requirements, audit and dispute resolution mechanisms further complicate the alignment.[11] Scholars suggest that harmonization can be achieved by selecting appropriate methods, addressing timing differences, and classifying post-importation adjustments for transfer pricing at the customs level.[12] These literature focus on global, regional, or country-specific challenges in applying the arm's length principle in transfer pricing and customs valuations. As a result, there is a legal gap in how transfer pricing and customs laws is harmonizing the arm's length principle in the EAC.

The objective of this article is to examine transfer pricing and customs valuation legal frameworks in determining arm's length prices or customs values within the EAC. It identifies legal gaps between EAC income tax legislation and customs law and explores the potential for harmonized the application of the arm's length principle in both fields. The article asks how can the legal frameworks of transfer pricing and customs valuation be harmonized to bridge these gaps and ensure a more consistent application of the arm's length principle. This article employs a doctrinal

[10] T.F.M. Duarte Reis., *The tension between transfer pricing and customs valuation*, Masters Dissertation, Universidade Tenica Delisboa, 2012 p.18; M. Atci., Transfer Pricing and Customs Valuation Overlap: Is it possible to Bridge Two Worlds? *GAZI Journal of Economic business, 6 (1) 2020:* (71-85) p.72; V. Hendriksen.,'*The use of transfer pricing for customs valuation purposes: What should be the criteria for a transfer price in order to meet the custom valuation rules*? Master's Thesis International Business Tax Law, Faculty of Law, Tilburg University, January 2020.

[11] L. Ping and C. Silberztein, 'Transfer Pricing, custom Duties and VAT Rules: Can We Bridge the Gap? *World Commerce Review* 2007 (36-38) p.36. available at https://www.oecd.org/tax/transferpricng/39265412.pdf

[12] M.Atci., Transfer Pricing and Custom Valuation Overlap: Is it possible to Bridge Two Worlds? *above at note 10 p.80.* See also P. Habimana., Towards a Harmonization EAC Tax Systems: Current status, Challenges and Way Forward, *Law and Word Journal, 2023.*

research method to critically analyse the existing EAC customs and transfer pricing laws, case law, and scholarly literature. It also employs a comparative approach to assess transfer pricing laws in selected EAC countries, drawing insights from best practices found in international customs and transfer pricing instruments. Through these methods, the study will identify legal inconsistencies and propose amendments to the law for aligning EAC tax and customs laws to better apply the arm's length principle.

2.0 What is the arm's length principle, and why does it matter?

The arm's length principle describes a situation where related parties in a business are required to operate independently as if they are unrelated. The principle requires goods and services sold between related parties to be transferred at market prices where a competitive market exists.[13] In the absence of a competitive market, the prices of goods and services between related parties should be based on the marginal cost of producing them.[14] In this context, related entities are treated separately as if they are independent while taking into account the risks assumed, functions performed, and assets used for each entity. The arm's length principle originates from the economic and accounting theories of transfer pricing for MNCs operating across countries.[15] The market prices in a competitive market or marginal cost of production prices in the context of an organisation are meant to solve organisational problems such as evaluation performance and resource allocation within an organisation[16] on top of profit maximisation. However, prices set in a controlled transaction purely considered organisational interests, and host countries where related MNCs operate were not considered.[17] In the absence of external regulations, the transfer prices between related parties may be influenced by the party's relationship leading to the loss of revenue by host countries.

Consequently, host countries would need the transfer prices between related parties to be beneficial in yielding the revenue required for their

[13] J. Hirshleifer, 'On the Economics of Transfer Pricing', *29 The Journal of Business 1956,* 172-184 p.172.
[14] Ibid. p.176.
[15] A. w Oguttu., *Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts*, PhD Thesis, University of South Africa, 2007 p. 48.
[16] Organization strategy theory and Mathematical programming transfer pricing theories.
[17] H.B Kiunsi, '*Transfer Pricing in East Africa; Tanzania and Kenya in Comparative Perspective'* PhD Thesis, the Open University of Tanzania 2017 p.56.

countries' development. Therefore, market price where a competitive market exists was also seen by host countries as an ideal to protect their interest. The market price is preferred because everyone is free to enter the market, and there may be no possibility of a relationship to influence prices because market forces determine prices. Thus, specific rules to regulate transfer pricing commonly known as the arm’s length principle were established, and enshrined under international, regional [18] and domestic tax laws.[19] Internationally, the principle is enshrined under Article 9 of the 2017 Organization for Economic Cooperation and Development (OECD) Model Tax Convention on Income and on Capital, the 2017 United Nations Double Taxation Convention between Developed and Developing Countries (UN Model).[20] The transfer pricing methods are provided under the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, 2022 (OECD Guidelines). In the EAC the principle is enshrined under Article 9 (1) of the EACDTA. The transfer pricing methods are enshrined under domestic transfer pricing Regulations namely; - the Tax Administration (transfer Pricing) Regulations 2018 (TP Rules 2018) of Tanzania, Income tax (Transfer pricing) Regulations 2011 (TP Rules 2011) of Uganda and Income tax (Transfer pricing) Rules 2006 (TP Rules 2006) of Kenya.

The arm's length principle as prescribed in the laws is important in determination of prices between related parties. It counteracts transfer prices influenced by the relationship between related parties by regulating them while considering the interests of host countries where the related MNCs operate. This is because the market context of transfer pricing aligns well with tax laws, which establish the arm’s length principle, such that any transaction between related parties conducted at a market price is considered to comply with the law.[21] In addition, the arm's length principle in law considers separate entity norms which require related entities to be treated separately when determining transfer price between them. Furthermore, it considers functional analysis in determining transfer price because the principle is based on comparing different

[18] Art 9 (1) EACDTA.

[19] Sec 33(1) of Income Tax Act 2019 RE of Tanzania, (ITA Cap 332), Sec 18 (3) Income Tax Cap 370 of Kenya (ITA Cap 370), Sec 90 and Income Tax Act Cap 340 of Uganda (ITA Cap 340) and R 3 of Tax Administration (Transfer Pricing Rules) 2018.

[20] It should be noted that for the purposes of this Article, reference will be made to the OECD Model.

[21] Kiunsi H.B., *Transfer Pricing in East Africa; Tanzania and Kenya in Comparative Perspective’ above at note 17.*

comparable situations in the market, functions performed and risks assumed. In comparing such situations, independent transactions are used as a test upon which the transaction between related parties is tested.

The law also obliges related entities to provide specific transfer pricing documentation to tax administrators demonstrating the related party's operations. In this context, related parties are obliged by the law to transfer goods at market price while following special methods and procedures prescribed in the law. Where related parties fail to comply with market prices, the revenue authorities are empowered to adjust prices to reflect the market price.[22] Essentially, the arm's length principle regulates prices between related parties that are not made at arms' length for tax purposes.

Although the arm's length price originates from the transfer pricing field, it is applied similarly in customs valuation to ensure the transaction value between related parties is not influenced by their relationship. From the customs valuation perspective, the arm's length principle regulates the transaction value of goods between related parties. Internationally, the principle is enshrined under Article VII of the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) Agreement on Implementation of Article VII of the GATT 1994 (WTO Agreement). In the EAC, it is enshrined under section 122 and the Fourth Schedule of the EACCMA (Fourth schedule). The customs law provides requirements for comparability, documentation, and specific methods of customs valuation in order to determine an arm's length transaction value.

The rationale of using the arm's length principle in both sets of laws is that it places both related and unrelated parties in a transaction on equal footing by being regulated by market forces. Hence, the transfer price obtained by applying the arm's length principle is called the transfer price or arm's length price. Similarly, the transaction value obtained using the arm's length principle is called the transaction value or the arm's length value. However, the drawback of the arm's length principle is that it produces different outcomes when applied in different contexts, despite serving the same purpose.

[22] Sec 33 (2) ITA Cap 332, Sec18 (3) ITA Cap 370 and Sec 90 ITA Cap 340.

3.0 Conceptualizing Transfer Pricing and Customs Valuation

Traditionally, the process of setting prices for goods and services, including intangibles and finances transferred between related parties, is called transfer pricing.[23] From a legal perspective, transfer pricing under income tax is a system of setting the prices of goods and services between related parties at a market price by applying the arm's length principle. This is thought to be achieved by applying specific transfer pricing methods enshrined under international law[24] and domestic laws.[25] The price set is then used to sell goods between related parties, allowing governments to obtain their rightful share of income tax, while the MNCs receive their rightful share of profit.[26]

Customs valuation is a procedure applied to determine the customs value of imported goods.[27] Goods brought into the EAC for free circulation are subject to duties based on the applicable tariff, either in specific terms or as an ad valorem tariff. The former refers to a fixed charge for a quantitative description of the goods, for example, Tanzanian shillings 1000 per item per unit. The latter is a charge of duties based on the value of the goods, whereby the customs valuation is multiplied by an ad valorem rate of duty for example five percent to arrive at the amount of duty payable on imported goods.[28] However, the concept of value in the valuation of goods in international transactions is interpreted differently. This is because value does not belong to the goods themselves but to the perception of the individual assigning value to them, which is regulated by law.[29]

The concept of value is interpreted from three angles. The first is subjective valuation, which entails an individual's evaluation of goods. The second is intersubjective valuation, which commonly known as a

[23] C.T Horngren and G.L Sundem, '*Introduction to Management Accounting*,' 9th ed, Prentice Hall International Inc, 1993 p.336. It is worth noting that the transfer pricing concept is not legal; rather, it draws from economics, accounting, mathematics, and tax.

[24] Part II and III of the OECD Guidelines.

[25] R5 1(f) TP Rules 2018, R 7 (f) TP Rules 2011, R 7 of TP Rules 2006.

[26] H.B. Kiunsi, '*Transfer Pricing in East Africa; Tanzania and Kenya in Comparative Perspective*' *above at note 17 p.32.*

[27] World Trade Organization (WTO) Technical Information on Customs Valuation available at https://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm (last accessed 20 September, 2024).

[28] World Trade Organization (WTO) above at note 27.

[29] E.C. Barreira, Valuation of Goods in International Transactions: Diverging interpretations Among National Agencies, *World Customs Journal, Vol 10 No 2 2016*, (37- 46) p.37.

positive notion.[30] The last approach is supposedly objective valuation, based on an idealized pattern in which third parties are involved with a specific interest, commonly known as a theoretical notion.[31]The theoretical context of value originates from an idealized economic market value that does not arise from a particular operation. Instead, it considers the price obtained in multiple unrelated operations involving similar goods, under certain ideal conditions of an agreement.[32]

This means that the valuation of an object is subjective, as it does not stem from the object itself but from the individual making the assessment. The buyer's valuation of the object may differ from the seller's, even though it is the same object at the same time.[33] As a result, the buyer and seller perceive the transaction value of the goods differently, each considering factors that influence the acquisition of the goods from their own perspectives. In this context, the parties agree on the value of the goods being sold, expressed in a monetary price.[34] The price is then added to the specific or ad valorem percentage for customs purposes. Intersubjective valuation, reflected in the price agreed upon in the transaction, directly results from the conditions set by the parties involved in specific cases, is a valid valuation.

The concepts of transfer pricing and customs valuation are different, although both apply the arm's length principle in setting prices or customs values between related MNCs. There are differences in their meaning, scope, methods, interpretation, and theoretical manifestations. These differences form the basis of the rules that govern transfer pricing and customs valuation. Transfer pricing is regulated by income tax law, while customs valuation is governed by customs law. These rules provide different methods for determining the arm's length price or value.[35] They are administered by different departments within the same revenue authority.[36] Additionally, these departments subject taxpayers into

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[30] Enshrined under Art 1 of the WTO Agreement.

[31] Ibid, Arts 2 to 7.

[32] E.C. Barreira., Valuation of Goods in International Transactions: Diverging interpretations Among National Agencies, *above at note 31. p 37.*

[33] Ibid.

[34] Ibid. p.38.

[35] See for example r 5 TP Rules 2018 for transfer pricing and Paras 2,3,4,5,6 of Fourth Schedule for customs valuation methods.

[36] For example, in Tanzania transfer pricing is under the Large Tax Department while Customs Valuation is under the Customs and Excise Department. In Kenya and Uganda, Transfer pricing is under Domestic

different audit systems and documentation requirements to demonstrate compliance with the arm's length.

Using two sets of rules and two unrelated administrative departments with different methodologies in the same transactions complicates the situation for both taxpayers and revenue authorities. The taxpayers may be affected by being subjected to unfair or double taxation. This happens when the customs department, after assessing the imported goods for customs valuation, the tax administration may find the value of imported goods understated contrary to arm's length price, and the taxpayer may be subjected to more tax than expected.[37] In the case of *BASF East African Limited v Commissioner of Customs and Border Control*[38] The court set aside additional taxes demanded by the Kenya Revenue Authority made after the clearance audit.

Likewise, in *Wallpaper Kenya and Commissioner of Customs and Boarder Control,*[39] it was ruled that the Commissioner of Customs and Border Control errored in law and in fact in uplifting customs duty on the appellant's imported goods. Accordingly, when taxpayers are re-assessed after an audit, they may be required to pay additional taxes.[40] In *L'Oréal East African Limited v Commissioner of Cross Border and Control*[41] the appellant failed to demonstrate that the declared value was at arm's length and subsequently paid the additional uplifted taxes. This situation subjects' taxpayers to double administration, which is costly and undesirable, and may drive them toward more aggressive tax planning to reduce tax liability.[42] In such circumstances, compliance issues may arise due to the application of different laws, leading to disputes between related parties and the revenue authority.

Tax Department while customs under the Customs and Border Control Departments Uganda is Customs Department.

[37] Deloitte., *The Link between Transfer Pricing and Customs Valuation*, 2018 Country Survey, p1.

[38] [2020] TA 115.

[39] Tax appeal no 297 of 2020

[40] L. Ping and C. Silberztein, 'Transfer Pricing, custom Duties and VAT Rules: Can We Bridge the Gap? *above at note 11*.

[41] [2021] TA. 259

[42] M. Atci, *Transfer Pricing and Custom Valuation Overlap: Is it possible to Bridge Two Worlds*? *above at note 10 p. 75.*

4.0 International standards for application of arm's length in transfer pricing and customs valuation

Internationally, the determination of the arm's length price for transfer pricing purposes is enshrined in the OECD model. The model sets five standards that must be observed when determining the arm's length price. These standards include first, the threshold for identifying related parties for tax purposes. Second, the requirement for adjustments when the price between related parties does not reflect the market price provided under Chapter I of the OECD Model. Third, the comparability factors used to test controlled transactions against independent transactions in comparable circumstances as provided under Chapter III of the OECD Model Fourth, specific transfer pricing documentation standards that related parties must provide regarding their operations. Fifth, specific methods for determining the arm's length price, include the comparable uncontrolled price method, the resale price method, the cost-plus method, the profit split method, and the transaction net margin method.[43]

The determination of arm's length for customs valuation originates from Article VII of the General Agreement on Tariffs and Trade (GATT). This article sets the principle that customs value for imported goods should be assessed on the actual value of the goods imported.[44] The implementation of this principle is done through the WTO Agreement. The WTO Agreement establishes five standards upon which arm's length customs value can be determined. These standards include the threshold for identifying related parties for customs valuation purposes. The adjustment requirements to arrive at the transaction value as provided under Article 8 of the WTO Agreement, and comparability factors, which use the circumstances surrounding sales between independent parties as a test for controlled circumstances between related parties as provided under Article 2(b) of the WTO Agreement.

Where the transaction value is not in line with independent transaction value, the value must be adjusted upwards or downward to reflect the arm's customs value. Moreover, specific methods to arrive at customs value are prescribed whereby the transaction value is the primary method of customs valuation for assessment of the customs duty.[45] In case the

[43] Chapter II part I and II of the OECD Guidelines.
[44] Para 2 of the Art VII of the GATT
[45] Art 1 of the WTO Agreement.

transaction value method cannot be applied the rules require the transaction value of identical goods, the transaction value of similar goods, the deductive value, the computed value, and the fallback value to be applied in a hierarchal manner.[46] In Tanzania, Kenya and Uganda, the principle and methods of determination of Customs value are deduced under Section 122 and Fourth Schedule of the EACCMA.

International standards provide a sound benchmark for countries to mirror in their domestic tax laws. This is because the international standards create frameworks for domestic income tax and customs legislation to tax related entities, which state parties have already mirrored or agreed upon in their domestic laws. Since states mirror or adopt these standards, they provide a recognized, objective, and neutral set of guidelines to arrive at arm's length prices or customs value, ensuring that governments obtain their rightful share of tax and related MNCs receive their rightful share of profit.

Although both Model Tax and Customs convention provide for arm's length, their application in terms of methods to determine market price differs. While customs valuation requires a hierarchy of methods, no such requirement exists under transfer pricing. Consequently, the scope of related parties, comparability factors, and documentation requirements are not compatible with each other. Additionally, the adjustment criteria differ. Adjusting an arm's length transaction value between related parties typically occurs after a transfer pricing audit, which may necessitate price adjustments. In such cases, any adjustment whether increasing or decreasing the customs value subjects the taxpayer to additional audit. However, there have been different interpretations across countries regarding whether upward or downward adjustments should be considered in determining retroactive adjustments. For example, in the *Hamamatsu Photonics Deutschland GmbH v Hauptzollamt München*,[47] it was ruled that retroactive transfer pricing adjustments, either upward or downward, should not be considered when determining customs value.

This means that international laws generally agree that no complete convergence can be made in the application of the arm’s length principle in transfer pricing and customs valuation. Recognizing this challenge, and

[46] Art 2 to 7 of the WTO rules
[47] C529/16 German Federal Court (Bundesfinanzhof).

in order for countries to achieve minimum standard alignment, international law sets basic standards requiring transfer pricing documentation to provide useful information to customs regarding related parties' transactions.[48] Similarly, customs valuation can be used by tax administrations to evaluate the arm's length aspect of transactions between related parties in the context of transfer pricing. Additionally, different departments within revenue authorities must foster cooperation to reduce costs and minimize disputes that are likely to arise in the context of transfer pricing and customs valuation.[49] In general, the international standard provides an objective foundation for harmonizing the application of the arm's length principle in transfer pricing and customs valuations, and at each stage, it can facilitate aligned results.

5.0 Legal challenges in the Application of Arms' Length Principle in transfer pricing and customs valuation

5.1 Different Thresholds for Related Parties

The scope of application of the arm's length principle for determining market prices is limited to related parties. In transfer pricing, related parties are defined as entities with control over ownership, which can be measured by the percentage of voting power, capital, or involvement in the company's management, either directly, indirectly, or through one or more intermediary companies.[50] The ownership threshold typically ranges from 25 to 50 percent. Additionally, any person who acts, or is likely to act, according to the directives, opinions, or intentions of another party is considered a related party. Permanent establishments and branches are also included as related parties.[51] In the context of customs valuation, the parties to a transaction are considered related if they are officers or directors of each other's businesses, are legally recognized business partners, have an employer-employee relationship, or directly or indirectly own, control, or hold five percent or more of the outstanding voting stock or shares of each other. Additionally, they may be related if they are members of the same family or if one party is an agent or sole distributor for the other.[52]

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[48] Para D.5.1.157 of OECD Guidelines, See also WCO, *Guide to Customs Valuation and Transfer Pricing Pricing*,2018, p.5 and Chap 5.
[49] Ibid.
[50] Sec 3 h (i) and (ii)ITA Cap 340, sec 18 (6) of ITA Cap 370 and sec 3 of ITA Cap 332.
[51] R 3 TP Rules 2018.
[52] Para 1 (3) and (4) of the Fourth Schedule.

The requirement for related parties for the arm's length principle to apply differs between the two sets of laws. Unlike in transfer pricing, where related parties arise from transactions and are defined by ownership percentage and permanent establishment, the concept of related parties originates from the primary method of customs valuation, known as the transaction value. Regarding the transaction value method, the related parties' aspect is one of the elements in applying transaction value for customs duties, regardless of whether the parties are related or unrelated, as provided under paragraph 2(1)(d) of the Fourth Schedule. In addition, the ownership threshold in transfer pricing ranges from 25 to 50 percent, while the minimum threshold for customs valuation is 5 percent. In this context, the customs value diverges in a narrow sense, as the minimum ownership percentage threshold for control is lower than that of transfer pricing. The issue may arise when applying a transfer pricing study for customs valuation because any ownership threshold below 25 percent is not considered related parties for transfer pricing purposes. Similarly, transfer pricing laws exclude employee relationships[53], while the concept of related parties under customs valuation includes the employer-employee relationship.

The differences in the thresholds and the interpretation of related parties originating from transfer pricing rules may present challenges in applying transfer pricing documentation for customs valuation purposes. In *Rohto Mentholatum (Kenya) Limited v Commissioner of Customs and Border Contro* [54], the Commissioner submitted that the transfer pricing policy, in which related parties are enshrined, is not applicable in determining the customs value of imported goods.[55] However, the court rejected this argument and upheld the appeal. This means that MNCs are subject to different ranges and are likely to arrive at different results. Nonetheless, both transfer pricing and customs valuation rules establish certain criteria for determining the relationship between the parties in line with international standards.

5.2 Differences in Comparability Factors Range

In the context of transfer pricing, the arm's length principle requires transactions between associated parties to be compared with those

[53] Sec 3 of ITA Cap 340.
[54] [2023] KETAT 271 (KLR).
[55] Ibid para 42

between unrelated parties under similar circumstances.[56] The comparable factors include the characteristics of the goods transferred, the functions performed while considering the assets used and risks assumed, the contractual terms of the transactions, economic circumstances, and business strategies.[57]A transaction between unrelated parties is considered comparable if the factors of comparability are similar, and no differences between these factors are likely to materially affect the price, cost, or profit.[58] In *Alliance One Tobacco Tanzania Limited v Commissioner General TRA Appeal* [2013] TRAT 33, it was stated that in order to establish whether the price is not influenced, the transaction between related parties must test the related party's price to unrelated party's prices. The price of goods transferred between related parties is also comparable if it falls within the arm's length price range of transactions between unrelated parties, and no material adjustment can be made to the price.[59] In *East African Breweries Limited v Uganda Revenue Authority*, [2017] TAT 14, the tribunal found that the transfer pricing arrangement between the related MNCs was not made at arm's length.

In customs valuation, the comparability aspect of the arm's length principle requires the transaction value between related parties to be compared with that of unrelated parties. If there is doubt about the transaction value, the circumstances surrounding the sale and test values are used. The former refers to how the seller and buyer organize their commercial relationship and set the price.[60] The latter involves transaction values of related parties that closely approximate those of unrelated buyers of identical or similar goods, or the customs value of such goods as determined under the deductive or computed value method, as provided in Paragraph 2(b) of the Fourth Schedule.

The comparison criteria include sales at the same commercial level but in different quantities, sales of substantially the same quantities, and sales at different commercial levels in various qualities.[61]According to the EAC manual, the price of goods between related parties is compared with the sales between unrelated buyers within the region. The comparison can

[56] R 3 TP Rules 2018.
[57] R 6 (1) of TP Rules, 2018, R 4 of TP 2011.
[58] See for example r 6 TP Rules 2018.
[59] See for example r7 (2) of TP Rules 2011.
[60] Interpretive notes 3 to para 2 of the Fourth Schedule.
[61] Ibid notes 3 to para 3 of the Fourth Schedule.

also be made by checking whether unrelated buyers in partner states can purchase the same goods at the price charged between related parties. In the *Rohto* case, it was ruled that it was erroneous to compare the circumstances of a sale where the tested party did not incur the same costs as the other party.[62] If no comparison is available within the EAC, comparisons can be made with unrelated buyers from importers or third countries, provided the market development is sufficiently advanced to allow such comparisons. Thus, the transaction value between related parties will be accepted if it closely matches the transaction value of unrelated parties. If the relationship influences the price, however, the transaction value will not be accepted, and the next method in the hierarchy will be applied.[63]

Although both transfer pricing and customs valuation laws rely on independent transactions in comparable circumstances as a basis to test related-party transactions, there is no legal requirement for the transfer price and transaction value to be exactly the same. The transfer pricing rules rely on a range of prices, with no definitive right answer, as each case is evaluated on its merits. Conversely, the Customs value covers a single product. In this context, the customs authority may not easily accept a transfer pricing study. In *Rohto* case, the responded Commissioner of Customs and Border Control submitted that the transfer pricing policy of an organization is not applicable in determining the customs value of goods imported in EAC.[64] This means that a transfer pricing study is not always accepted by the customs authority until the matter is taken to the tribunal or court of law.

5.3 Uncertain Adjustments in Transfer Pricing for Customs Valuations

Adjustment is the process of adjusting the price of goods between related parties after comparing the transactions of related and unrelated parties. In transfer pricing, the revenue authorities are empowered to make adjustments to prices.[65] The adjustment by revenue authority is made by recharacterizing the source and type of income, loss, amount of payment or apportionment, and allocation of expenditure, including income from a

[62] Rohto case para *above at 54 para 32-38*
[63] Para 5.1.11 to 5.1.1.4 of the East African Customs Valuation Manual, 2012.
[64] Rohto case *above at 54 para 85.*
[65] Sec 33 (2) ITA Cap 332, Sec 18(3) ITA Cap 370 and Sec 90 ITA Cap 340.

domestic or foreign adjustment.[66] The EAC legal instruments provide for primary adjustments and corresponding adjustments.[67] Unlike Tanzania and Uganda, Kenya provides for transactions subject to adjustments, including the purchase, sale, and transfer among other transactions.[68] It also provides for safe harbour provision and encompasses any other transactions likely to affect the profit or loss of the corporation as provided under.[69] The safe harbour may be construed as taking aboard customs valuation on the price charged between related parties for transfer pricing purposes.

The primary adjustments are made by revenue authorities to make transaction prices at arm's length. Once a primary adjustment is made by one country, the other country makes a correspondence adjustment in response to the adjustment made by the first country. The role of the corresponding adjustment is to eliminate the double taxation arising from the first adjustment by the revenue authority. In this context, the transaction subject to adjustments may include customs value, directly impacting the value of imported goods at the time of importation.

In adjusting the transactions, the law requires the revenue authority to recharacterise the source and type of income of the parent company and the permanent establishment or to apportion and allocate expenditure related to the income of the permanent establishment.[70] The revenue authority may recharacterise the transaction by generating an amount that related parties did not incur. It is also challenging to establish the extent recharacterised transactions considering special circumstances that related parties face when transacting with each other a situation independent parties do not experience. However, the income tax laws are silent on the actual characterisation procedure, and the commissioners of revenue authorities are left with the discretion to recharacterise the transaction. In this context, adjustments made will likely affect customs value after the transfer pricing audit.

[66] Sec 33 (2) ITA Cap 332 Sec 91 ITA cap 340.
[67] R 10 of TP Rules Uganda.
[68] R. 6 (1) of Kenya Draft of TP Rules 2023.
[69] R 6 (f) of the TP Rules,2006.
[70] Sec 33 (2) (a) and (b) of the ITA Cap 332 as amended by section 23 of Finance Act 2016 read together with TP Rules 2018, Sec 90 (2) Cap 340.

Adjustment in the context of customs valuation is a process of adjusting the customs value of goods sold between related parties that are not made at arm's length. However, the Fourth Schedule is silent on adjusting customs value in the context of arm's length. Paragraph 9 of the Fourth Schedule provides for the adjustment of the customs value in establishing a transaction value, whether parties are related or not. In this context, the adjustment by customs authority considers either quantity or commercial factors or both commercial and quantity factors.[71] Adjusting the transaction value of an arm's length between related parties occurs after an audit, which may require price adjustments. In such cases, any adjustment, whether resulting in an increase or decrease in the customs value, will subject the taxpayer to additional customs duties. In *Game Discount World Tanzania v. Commissioner General, Tanzania Revenue Authority*,[72] the court upheld the tribunal's decision, requiring the appellant to pay the additional tax assessed in order to comply with section 9(2) of the EACMMA.

The transaction value method also permits adjustments when credit and debit notes are taken into account. In *Century Bottling Limited v Uganda Revenue Authority* [73] it was stated that a credit note showing what was not paid or payable should be considered when determining the price paid or payable.[74] This position aligns with the WCO Guide to Customs and Transfer Pricing. The Guide requires that where an adjustment is initiated by the taxpayer and recorded in the taxpayer's accounts, and a credit note is issued, it impacts the price actually paid or payable.[75] When the adjustment is initiated by the taxpayer, the impact may be limited to the tax liability. In this case, the court set aside the additional assessment arising from the adjustment in the treatment of credit and debit notes.

The adjustments between the two sets of rules occur for different reasons, leading to different results and timing. In the context of transfer pricing, the adjustment aims to align with market prices or to reveal whether the price was influenced by relationships between the parties. Similarly, the adjusted price may indicate that the prices paid or payable were either unaffected by relationships or influenced by them. Where the transfer

[71] Interpretive notes 3 to para 3 of the Fourth schedule.
[72] [2023] TA 20.
[73] [2021] TAT 24,
[74] Ibid p.8.
[75] Commentary 5.3.2 of WCO Customs and Transfer Pricing Guide,

pricing adjustment affecting the price paid or payable, the customs authority may be required to adjust the prices. The problem, however, lies in compliance when making retroactive transfer pricing adjustments to bring realized profit adjustments for customs valuation purposes arising from the transfer pricing study. This is particularly challenging, as it requires the income tax department to prove that the transaction value was influenced by related party relationships, which is not always easy. In the *GlaxoSmithKline (Kenya) Ltd v Commissioner of Customs and Border Control* the Kenya Revenue Authority failed to provide proof, and the court ruled in favour of the taxpayer.[76] The problem is further exacerbated by the fact that transfer pricing and customs valuation are administered by different departments. As a result, audits in each context are conducted at different times. While customs post clearance audits begin promptly, transfer pricing audits typically occur after several years.

In the EAC, any adjustment other than zero is subject to additional tax charged either in the context of transfer pricing or customs. In such a situation, any adjustment made, whether leading to an increase or a decrease in customs value, subjects the taxpayer to additional customs due.[77] In *L'Oréal East African Limited* case,[78] the appellant failed to demonstrate that the declared value was at arm's length and subsequently paid the additional uplifted taxes. Although the customs authority provides for the acceptability of related pricing, there is limited guidance on managing retroactive transfer pricing adjustments arising out of transfer pricing audit. The focus generally remains on ensuring that related party transactions adhere to the arm's length principle as enshrined in the respective laws.

5.4 Unacceptance of Transfer Pricing Methods for Customs Valuation

The arm's length price and transaction value are not determined arbitrarily; specific methods and procedures must be followed. In the transfer pricing context, the methods used include the comparable uncontrolled price method CUP, the resale price method (RPM), and the cost-plus method, commonly known as traditional methods. Other methods include the profit split method, the transactional net margin

[76] [2020] TA 240.
[77] L. Ping and C. Silberztein,'Transfer Pricing, custom Duties and VAT Rules: Can We Bridge the Gap? *above at not 11* p.36.
[78] *Above at note* 41.

method, and any other methods that the Commissioner General of the revenue authority may prescribe.[79] The EAC transfer pricing rules essential adopts the OECD Guidelines.

The CUP method compares the price charged on goods transferred between related parties to the price charged on goods transferred in a comparable uncontrolled transaction under comparable circumstances. The RPM compares profit margins on the price of goods and services between related MNCs and the profit margin of sales by associated parties to an independent company. This is done by reselling goods and services to an independent company with a certain gross profit margin. The resale gross profit margin is subtracted from the resale price, after considering the functions performed, to determine an arm's length price. The gross profit margin obtained is then compared with that of an independent corporation in similar circumstances. Once the gross profit margin of related MNCs is similar to that of the independent corporation, the margin is added to the initial price between associated MNCs to determine the transfer arm's length price.

Cost Plus Method (CPM) involves the cost of production of goods transferred or provided between related MNCs. The CPM compares the gross profit markup earned by the related MNCs with those earned by independent companies while considering functions performed, the assumed risk, and the market condition.[80] A comparison is then made between the profit markup of related MNCs and independent corporations. Thus, the transfer price between related is the cost of goods sold plus arm's length profit markup. The transactional net margin method (TNMM) compares the net profit margin related to the appropriate base, such as costs, sales or assets that a person achieves in a controlled transaction, with the net profit margin achieved in a comparable uncontrolled transaction. Comparison is made between the net margin earned by related MNCs and net margins between independent companies operating in similar circumstances by comparing transactions or functions performed.[81] The TNMM uses profit level indicators based on operating profit to compare the net profit margins of related MNCs of an independent company.

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[79] R5 1(f) TP Rules 2018, r 7 TP Rules, 2011, r 7 TP Rules 2006.
[80] Interpretation provisions of Transfer Pricing Rules of the EAC member states.
[81] Interpretation provisions of TP Rules of the EAC.

The transactional profit split method (TPSM) consists of splitting up the profit between the related parties on an economically valid basis, comparing the profit and loss that a person achieves in a controlled transaction with the division of profit and loss between independent persons. The TPSM aggregated profit earned by associated MNCs is split among associates based on the relative value of each related party's contribution based on performed function(s), assumed risk and assets used by each associate. The split profit of related parties is then compared with the split profit that would have been anticipated and reflected in an independent transaction made at arm's length. If the profit is in accordance with the profit of an independent party, then the profit is said to be at arm's length. In all methods the transactions of associated MNCs are comparable to independent transactions if there are no differences that would materially affect the price.[82] If differences exist, they are considered comparable if reasonable and accurate adjustments can be made.[83]

In context of customs valuation, the EACCMA provides six methods of customs valuation: the transaction value method, the transaction value of identical goods, the transaction value of similar goods, the deductive value, the computed value, and the fallback value.[84] Paragraph 2(1) of the Fourth Schedule defines the transaction value for imported goods as the price paid or payable for goods sold for export to the customs territory of the EAC for free circulation, adjusted as per paragraph 9 of the Fourth Schedule under the ordinary course of trade. The price paid or payable refers to the total payment made or to be made by the buyer or for the seller's benefit for the imported goods, and it includes all payments made as a condition of sale by the buyer to the seller.[85]

Paragraphs 2(1) (a) to (d) of the fourth schedule sets four conditions for the customs value method to apply. Transaction value is the primary method to arrive at transaction value. This requirement is in line with Article 1 and 8 of the WTO Agreement. Suppose it is impossible to determine the customs value by using the transaction value. In that case, the next method in the hierarchy should be applied as provided under paragraph 1of interpretive note of the Fourth Schedule. In *Testimony*

[82] See for example Rule 6 (2) (a) and (b) TP Rules 2018.
[83] Ibid. r 3.
[84] Paras 4-10 of Fourth Schedule.
[85] Para 2.1.2 EAC customs Valuation manual 2012.

Motors v Commissioner of Customs Uganda Revenue authority[86] the issue was whether the commissioner application of alternative methods to determine the transaction value contravened the provisions of EACCMA and whether had the power to exclude the transaction value method. The court ruled that the commissioner contravened the Act and had no power to exclude transaction value method.[87] Likewise, in *Auto express limited v Commissioner Customs and border control*[88] it was ruled that the commissioner of customs errored in law by departing transaction value method without giving an opportunity the taxpayer to justify the value declared contrary to forth schedule.[89]

The second method in the hierarchy is the transaction value of identical goods as provided under paragraph 3 of the Fourth schedule. This method compares the transaction value of the identical goods being valued with goods sold for export to the partner states, exported at or about the same time. In the absence of such a comparison, a sale of identical goods at the same commercial level but in different quantities, or at a different commercial level but substantially in the exact quantities, is allowed under paragraph 3(b) of the Fourth Schedule. Goods are considered identical if they are the same in all aspects, including physical characteristics, quality, reputation, and are produced in the same country by the owner of the goods being valued.[90] In *BASF* case[91] it was ruled that the sale of identical goods did not take place at the same commercial and in quantities of the goods being valued. The transaction value is adjusted upwards or downwards to account for the differences attributable to commercial or quantity factors is then the transaction value of identical goods.

The third method is the transaction value of similar goods. This compares the value of similar goods sold for export to the partner states and exported at or about the same time with the goods being valued, as provided under paragraphs 4(a) and (b) of the Fourth Schedule. In the absence of such a comparison, a sale of similar goods at the same commercial level but in different quantities, or at a different commercial

[86] [2021] CA 212.
[87] Ibid, para 10 and 20.
[88] [2018] TAT, 119.
[89] Ibid, para 70.
[90] Para 2.2.2 of the East African Customs Valuation Manual, 2012.
[91] BASF case *above at note 38*, para 108.

level but substantially in the same quantities, or at a different commercial level in different quantities, is allowed as provided under paragraph 4 of the interpretive note of the Fourth Schedule. The transaction value of similar goods is adjusted upward or downward to consider differences attributable to commercial or quantity factors is then the transaction value of similar goods.

The fourth method is the deductive value method, which compares the value of the goods being valued with the value of goods sold to independent customers in the EAC at or near the time of importation, after deducting certain expenses incurred from the importation and sale of the goods.[92] The customs value is based on the unit price of imported or identical or similar goods sold in the large quantity at or about the same time. The fifth method is computed value method whereby the customs value of imported goods shall base on computed value consisting sum of costs or value of the materials, amount of profit and general expenses and all other expenses adjusted in accordance with paragraph 9(2) of the fourth schedule.[93]The sixth is the fallback method, which describes the ability to establish a customs value when the other methods are not applicable. It requires a review of the other methods by abandoning the strict conditions provided under paragraph 8 of the Fourth Schedule. This method requires the transaction value of goods to be determined at a fair market value.

One of the interests for arms' length purposes is that where the seller and the buyer are related, the transaction value is acceptable if the value is adjusted per the law obtained under the ordinary course of trade in a competitive market force.[94] The importer demonstrates that the value closely approximates the transaction value in sales to unrelated buyers of identical or similar goods for export to the partner states , or the customs value of identical or similar goods obtained through the deductive method, or the customs value of identical or similar goods as determined through the computed value method as provided under paragraph 2 (b) of the Fourth Schedule.

[92] Para 6 Fourth Schedule.
[93] Ibid, para 7.
[94] Para 2(1) (d) of Fourth Schedule.

The transfer price and customs valuation methods demonstrate that in both legal frameworks, the arm's length principal mandates that the prices of goods or customs values between related parties be set at market prices. This is meant to prevent related parties from manipulating the price of goods transferred or the customs value. An unrelated price or transaction value is used as a benchmark to test the prices or customs values between related parties. However, under transfer pricing there is no requirement in the law for a hierarchical application of methods; the law simply mandates that the most appropriate method be used[95] In addition, the law requires that, when commodities are involved, the CUP method is preferred over other methods.[96]

In the context of customs, the methods must be applied sequentially, with all transactions first using the transaction value method as the primary method. In *Bidco Oil Refineries v. Commissioner of Customs Services*, [2015] application number 150, the court found that the commissioner failed to apply the valuation methods sequentially, as required by law. This means that other methods may only be applied when the transaction value method cannot provide the arm's length value.

Despite this requirement, the transaction value method is not always accepted by the customs department. In *GlaxoSmithKline (Kenya) Ltd v. Commissioner of Customs and Border Control*, [2020] TA 240 of Kenya, the Commissioner of Customs submitted that the deductive method be used instead of the transaction value method. The Commissioner's rejection was based on the transfer pricing documentation, which applied the transaction net margin and assumed compatibility with the deductive value method. The court ruled in favour of the taxpayer because the revenue authority failed to prove that the relationship influenced the price. This case upholds the position of customs laws, which require the transaction value method to be applied first, before moving on to the next method in the hierarchy. This is true even if other methods seem more relevant in the context of direct tax than the transaction value method.

When it comes to the application of transfer pricing methods in practice in establishing circumstances surrounding the sale for customs valuation

[95] Interpretive note 11 of the 4th schedule requires the valuation methods be applied in sequential order
[96] Rule 12 of TP Rules, 2018.

purposes the customs departments have been reluctant. In *BAS Case*,[97] the issue was whether the resale price method was closely appropriate to the customs value of identical goods determined by using the deductive value method. The tribunal ruled that the product imported by the taxpayer was determined in accordance with the deductive value method.

5.5 Unacceptability of transfer pricing documentation for customs valuation

In the context of transfer pricing, taxpayers are required to prepare specific transfer pricing documentation that explains the structure, nature of the business, actual computations, and other data relevant to explaining the operations of related parties.[98] The submitted transfer pricing documentation is required to be construed consistently with the OECD Model Tax and Guidelines.[99] In case of any inconsistency with domestic law, domestic law should prevail. However, the existing transfer pricing documentation requirements are narrower than those of the TP guidelines, which may lead to insufficient data for customs verification. Related MNCs often use transfer pricing documentation to support customs valuation, provided it demonstrates the arm's length nature of the transactions.

However, customs authorities do not view transfer pricing studies or advance pricing agreements as containing useful information to support the same. In the *Rohto* case, the Commissioner of Customs and Border Control submitted that the transfer pricing policy of an organization is not applicable in determining the customs value of goods imported into the EAC.[100] Similarly, in *GlaxoSmithKline (Kenya) Ltd v. Commissioner of Customs and Border Control*, [2020] TA 240, the revenue authority did not consider GSK's transfer pricing documentation and schedule of prices, which supported that the customs value was set at arm's length and was not influenced by the relationship. The judicial interpretation is consistent with the manual's stance and aligns with international instruments, which recognize that transfer pricing documentation can serve as a basis for

[97] BASF, *above* at *note 38* para 119.
[98] Sec 35 of Tax Administration Act, 2015 and r7 of the TP Rules 2018, Section 18 (b) of Cap 470 and r 10 of TP
Rules 2006 and r 8 (1) of the TP Rules 2011.
[99] R 8 and 6 of TP Rules 2011, r 7 and 9 of TP Rules 2018.
[100] Rohto case *above at note 54*.

establishing the circumstances surrounding a sale. However, this requirement is not explicitly provided in income tax or customs law.

These cases demonstrate that when such information is presented, the customs department conducts a separate analysis and requires additional evidence to ensure that the transaction value complies with customs valuation rules. This situation suggests that the two departments within the same revenue authority operate independently. As a result, reaching joint agreements on the same price paid or payable for both corporate tax and customs duties is highly subjective. A common assumption is that the initial transaction, where the arm's length principle is applied, should be used as the market price for subsequent analysis, whether for transfer pricing or customs valuation. Typically, customs valuation occurs before profit taxation in the context of transfer pricing. However, this has not been the case. The customs department reluctance to apply transfer pricing is contrary to the requirements of the EAC Customs Valuation Manual, which recognizes that transfer pricing documentation can serve as the basis for establishing the circumstances surrounding a sale.

From the foregoing, the arm's length rules of transfer pricing and customs valuation suggest potential interactions and similarities that support revenue collection from related parties' transactions. First, the application of the arm's length principle is limited to transactions involving related parties. Second, there is a focus on the comparability of transactions between related and unrelated parties. Third, both frameworks require that related party transactions be treated as if the entities were separate and unrelated. Fourth, there is a provision for adjusting prices when they do not reflect arm's length principle. Fifth, specific methods are employed to determine the arm's length price or transaction value.

Despite apparent similarities, customs valuations and transfer pricing are not always fully compatible in accommodating the arm's length principle. In this regard, customs valuation deviates from or modifies the arm's length standard in areas such as related parties, comparability, methods, and adjustments. Accordingly, existing income tax and customs laws do not require that transfer prices and customs values between related parties be accepted for both transfer pricing and customs duties purposes. The differences in transfer pricing requirements among partner states add to the existing challenges. Case law and scholarly works suggest the international standard of using transfer pricing documentation for customs

valuation. This international stance on using transfer pricing documentation for customs valuation points toward partial integration in the application of the arm's length principle in both transfer pricing and customs valuation.

It is argued that, without a legal requirement in both income tax and customs laws, the international approach to partial harmonization may not be fully implemented in the EAC. Similarly, the lack of clear guidelines and coordination in the current efforts to apply the arm's length principle in customs and transfer pricing will continue to be a barrier to enhancing revenue from foreign trade and investments.

6.0 Recommendations

Given the challenges and inconsistencies in the application of the arm's length principle in both legal frameworks, two approaches are recommended: amending the laws and fostering coordination between the income tax and customs departments. The proposed amendments include the following: Firstly, due to the differing thresholds for related parties in transfer pricing and customs valuation, it is recommended that the income tax laws specifically sections 18(6)(a) and (b) of Cap 370 (Kenya), section 3 of Cap 332 (Tanzania), and section 3(h) (Uganda) be amended to include related parties' provisions for customs purposes. These amendments would specify that, for customs documentation related to transfer pricing, legal entities will be considered related if their control threshold is between 25% and 50% or more of voting rights or capital.
Secondly, where transfer pricing adjustment affects customs value, it is recommended that the EAC amend the Fourth Schedule of the EACMA to include a provision that mandates customs authorities to accept transfer pricing documentation demonstrating an arm's length price between related parties for customs valuation, subject to verification by the customs authorities. Similarly, the transfer pricing rules should be revised to require the income tax department to accept customs documentation demonstrating arm's length transactions for transfer pricing purposes, upon verification by the income tax department. This requirement aligns with international standards, which call for the use of transfer pricing documentation to verify the circumstances surrounding the sale.

The law should require the Income Tax and Customs departments to accept transfer pricing adjustments that impact declared prices both before and after the importation of goods. In this context, the law should

specify that customs authorities take into account any pre-importation and post adjustments for customs valuation. Provided such adjustment results affected declared prices for customs valuation purposes. If transfer pricing adjustments do not affect the customs value, no changes should be made to the declared transaction value.

Third, it is recommended that the revenue authorities should establish clear guidelines for handling and coordinating arm's length issues within the revenue departments. These guidelines should consider incorporating elements such as the post-clearance audit manual, transfer pricing audits and price adjustments affecting customs transaction value and transfer pricing. This approach would align with international standards. Partial administrative integration could enhance data sharing, audit planning, and coordination between the two departments.[101]

Fourth, the revenue authorities must embrace judicial interpretation which already upholds the application transfer pricing documentation to demonstrate the circumstances surrounding the sale. This is because the arm's length principles in both transfer pricing and customs valuation cannot replace one another but can instead complement or support each other.

Firth, the EAC member to depict WCO and OECD guidelines in their domestic law. This in particular transfer pricing documentation whereby transfer pricing rules already require such documentation to be construed in line with international standards.

Sixth, the remaining member states that have not signed the EAC DTA should consider signing it to enable the protection against tax distortions that may arise from the inconsistent application of the arm’s length principle in transfer pricing and customs valuation.

7.0 Conclusion

This article examined the legal framework governing the application of the arm’s length principle in transfer pricing and customs valuation, in line with the EAC treaty's requirement to harmonize tax policies and eliminate tax distortions in order to increase revenue. The article

[101] M. Atci., Transfer Pricing and Custom Valuation Overlap: Is it possible to Bridge Two Worlds? *above at note 12*

identified both similarities and differences in the relevant laws. It found that the existing transfer pricing and customs laws do not require transfer pricing documentation to establish the circumstances surrounding sales between related parties, despite this being outlined in the customs manual. Based on case law where the arm’s length principle was applied in both transfer pricing and customs, the article found that the customs department is often reluctant to accept transfer pricing documentation and methods for determining the circumstances of a sale until the matter is brought to judicial interpretation. Additionally, the transfer pricing laws within the EAC member states vary. The article recommends harmonizing both sets of laws by amending the identified areas to align with international standards and precedents that already maintain these standards.

Transparency and Accountability in Tanzanian Petroleum Industry: The Role of Institutions and Challenges Associated

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Abstract
The petroleum industry is among the key sectors currently growing in Tanzania and contributing to the country's economic development. It needs precise regulation and management for sustainable development; in achieving that, it is essential to ensure that the setup of institutions responsible for the sector do facilitate transparency and accountability principles. The article analyses the setup of the said institutions and identify challenges hindering performance of its role in ensuring realization of the principles, in the end it provides a way out in having framework that realize the principles. Laws and scholarly works were reviewed in the analysis, direct information from personnel in the institutions also forms part of the findings, which reveals that a number on institutions are established and tasked with different roles in management of the sector, however, despite the commendable efforts, the institutions fail to facilitate realization of the principles due to several challenges including lacking independence and autonomy, limited access to petroleum information, and no specific roles assigned to some of the institutions in relation to the principles. Hence, to tackle the challenges, the article recommends assurance of autonomy, independency to the institutions and setting clear roles for each of them to perform.

Keywords: *Petroleum, Institutions, Oil, Gas, Transparency, Accountability*

1.0 Introduction

Following the conclusion of the Second World War in 1945, the majority of African nations were successful in achieving their full-scale independence. Africans' achievement of such freedom served as a wake-up call, prompting them to realize their potential, including using natural

resources such as minerals, oil, and gas.[1] Africans' achievement of such freedom served as a wake-up call, prompting them to realize their potentialities, including using natural resources such as minerals, oil, and gas.[2] A need of this magnitude forced the formation of international legislation, which acknowledged the notion of perpetual sovereignty on resources of nature as a right that governments possess.[3] This idea is supported by the fact that the Charter of Economic Rights and Duties of States, which recognized the right of states to utilize and have exclusive control over their natural wealth, came into effect. This right was recognized as a right by the Charter.[4] The sovereignty conferred upon countries about their natural resources requires careful consideration.

Using the sovereignty for growth in the Tanzanian petroleum sector, it is imperative to consider the sustainable utilization of local and national resources in the advancement of the sector, achieved through the effective application of transparency and accountability principles within the appropriate legislative and institutional framework ensuring that each stakeholder benefits from this resource.[5] The existing Tanzanian institutional framework in the petroleum sector poses a significant obstacle to implementing the principles.[6] The function of petroleum institutions in fostering transparency and accountability is essential, especially in resource-abundant nations where mismanagement and corruption may result in considerable socio-economic difficulties.[7] Turkana County in Kenya exemplifies this issue since the inability of petroleum institutions to implement the principles resulted in a lack of transparency in the administration of petroleum resources, thereby leading

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[1] Tana High-Level Forum on Security in Africa. "Background Paper on Natural Resource Governance in Africa". Available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.tralac.org/images/docs/11546/tana-2017-background-paper-on-natural-resource-governance-in-africa-conflict-politics-and-power.pdf>(last accessed 13 July 2024).

[2] S.P. Ng'ambi, 'Permanent Sovereignty over Natural Resources and the Sanctity of Contracts. From the Angle of Lucrum Cessans', *Loyola University Chicago International Law Review, Volume 12, No. 2,2015* (153-172), p.153.

[3] Ibid.

[4] The Charter of Economic Rights and Duties of States was adopted by the United Nations General Assembly Resolution No. 3281 (xxix) in its 29th Session of 1974.

[5] O. K. Bishoge and others, 'The Overview of the Legal and Institutional Framework for Oil and Natural Gas Sector in Tanzania. A Review' *Journal of Applied and Advanced Research, Volume 1, No. 1, 2018* (8-17), p.8.

[6] Ibid.

[7] V. Haufler, 'Disclosure as Governance: The Extractive Industries Transparency Initiative and Resource Management in the Developing World', *Global Environmental Politics, Volume. 10, No. 3, 2010* (53-73) p. 54.

to conflict and apprehension instead of progress.[8] This underscores the need for petroleum institutions to implement transparent processes that adhere to international norms while also addressing local community issues.[9]

The advantage of applying the principles has been shown in Zambia, where corruption levels in the industry were reduced.[10] Powerful legal and institutional frameworks were necessary to ensure that the resources, including oil and gas, were handled appropriately and efficiently. This freedom over the resources was necessary. Furthermore, as a consequence of this, Tanzania built a great number of institutions to supervise the administration of this sector.[11] Considering this pattern, the purpose of this paper is to investigate the setup of the institutions responsible for petroleum and how they facilitate the application of transparency and accountability principles in ensuring proper management of the resources for the benefit of current and future generations. The Petroleum Act defines the term Petroleum to mean naturally occurring hydrocarbons in gas, liquid, or solid states, except for substances extracted from coal or rocks. Hence, the term petroleum in this study refers explicitly to oil and gas components, and they are used interchangeably.

2.0 Institutional Framework Facilitating Transparency and Accountability in Managing Petroleum Sector in Tanzania

There are a number of entities in the country that are responsible for the administration of the petroleum sector. These institutions range from the office of the President to the National Assembly and several ministerial levels. They fulfil a variety of functions in their separate capacities, which are in accordance with many different pieces of law. Starting with the Cabinet is a constitutionally established institution;[12] it comprises the Vice President, the Prime Minister, the President of the Revolution Government of Zanzibar, all of the ministries, and the Attorney General.[13]

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[8] E. Johannes, L. Zulu, and E. Kalipeni, 'Oil Discovery in Turkana County, Kenya: A Source of Conflict or Development?', *African Geographical Review, Volume. 34, No. 2, 2014* (142-164) p. 143.
[9] Ibid.
[10] P. Villar and E. Papyrakis, 'Evaluating the Impact of the Extractive Industries Transparency Initiative (EITI) on Corruption in Zambia', *The Extractive Industries and Society*, *Volume 4, No. 4, 2017* (795-805), p.796.
[11] B. Obadia and Others, 'The Overview of the Legal and Institutional Framework for Oil and Natural Gas Sector in Tanzania. An Overview', *Journal of Applied and Advanced Research*, *Volume 1, 2008.* Available at <10.21839/jaar. 2018.v1i1.127> (last accessed 14 July 2024).
[12] The Cabinet is established under art 54(1) of the Constitution of the United Republic of Tanzania of 1977.
[13] Ibid.

The President of the United Republic of Tanzania is responsible for presiding over all Cabinet meetings. If the President is not present, the Vice President is given the responsibility of presiding over such sessions.[14] The primary responsibility of the Cabinet is to provide the President of the United Republic of Tanzania with advice on all topics pertaining to the exercise of the powers that have been granted to him or her under the Constitution. In addition, the Cabinet is obligated to deliver assistance and direction to the President in relation to any subject that has been brought to its attention per the President's directions, whether such directives be explicit or general.[15]

Regarding the petroleum sector, the Cabinet has been given a number of responsibilities, including, among other things, the promotion of accountability and transparency within the sector. This is evident in the Petroleum Act of 2015, which, in contrast to the previous Act on petroleum, assigns several roles to the Cabinet, including the determination of the country's natural gas and oil economy,[16] the ability to monitor all strategic plans and give directives and making decisions pertaining to petroleum which are final and binding on all other institutions, including the minister who is responsible for petroleum.[17] In addition, concerning transparency and accountability, the Cabinet serves as an authority that grants permission in a variety of circumstances that are associated with the petroleum industry. For instance, the minister does not automatically have the authority to execute production-sharing agreements (PSA) on behalf of the government in Tanzania Mainland; rather, he or she is required to first obtain consent from the Cabinet in order to sign the PSA that is pertinent to the situation.[18]

In the same line, in accordance with the Petroleum Act, the process of tendering for petroleum agreements must be carried out in a manner that is both open and competitive. However, in the event that such a tendering process proves to be ineffective, the Cabinet is vested with the authority to authorize direct negotiations between the minister responsible for petroleum and a company that is both qualified and eligible.[19] Although

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[14] Ibid, art 54(2).
[15] Ibid, art 54(3).
[16] Sec 4(3) of the Petroleum Act Cap 392 [R.E 2019].
[17] Ibid.
[18] Sec 47(2) of the Petroleum Act (n 16).
[19] Ibid, sec 48(3).

the Cabinet has not managed to totally control the minister's powers as it will be observed later on, it attracts good management of the sector when the cabinet operates in a way that ensures transparency and accountability and limits the minister's discretionary powers.[20] As opposed to the trend in the previous Petroleum Act where the minister was given greater leeway to make judgements at his or her own discretion, the practice that is still witnessed in some areas. This kind of governance, in a certain manner, attracts misappropriation and misuse of such resources.[21]

The oil and Gas Advisory Bureau is an additional institution that is responsible for the administration of the country's petroleum sector. This Bureau was founded under section 7 of the Petroleum Act, its primary function is to provide the President and the Cabinet with advice on problems pertaining to the economics of the sector.[22] The formation of this Bureau ensured that the President and the Cabinet, who are the ultimate decision-makers in issues pertaining to the industry, were provided with appropriate advice prior to the permission being issued to the necessary authorities for execution in order to improve the growth of the sector. The Bureau is considered to be a technical consultant to the Cabinet about the ways in which the government might invest in, make use of, and profit from the oil and gas industry in Tanzania's mainland. In spite of the fact that there are other authorities, such as the Petroleum Upstream Regulatory Authority (PURA), the Energy and Water Utilities Regulatory Authority (EWURA), the Office of the Commissioner for Oil and Gas, and the Tanzania Petroleum Development Corporation (TPDC), which are responsible for oil and gas development on a daily basis, the Bureau continues to play such a role.[23] This was done with the intention of preventing conflicts of interest and diverting attention away from responsibility among that particular authority compared to when the advise was provided by an independent authority.

Another essential institution that is contributing to the growth of the industry is the Minister responsible for petroleum. As things stand, the

[20] B. Lee B and K. Dupuy, 'Petro-Governance in Tanzania: Opportunities and Challenges' *CMI Brief Chr. Michelsen Institute*, *Volume 15, No. 14, 2016* (2-4).
[21] Ibid.
[22] Sec 7 of the Petroleum Act (n 17).
[23] R. Paasch, *Tanzania Oil and Gas Almanac: A Reference Guide Published by the Friedrich-Ebert-Stiftung Tanzania and OpenOil*, Friedrich-Ebert-Stiftung 2015, p. 19-20. Available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://library.fes.de/pdf-files/bueros/tanzania/12551.pdf (Last accessed 20 February 2024).

minister is an appointee of the President who is responsible for supervising the numerous operations that are carried out under the ministry.[24] A number of responsibilities pertaining to the administration of the industry have been assigned to the minister in accordance with the framework for oil and gas management. Under the Petroleum Act, such roles include the formulation and review of policies that regulate the petroleum industry, the execution of petroleum agreements on behalf of the government with other stakeholders in the sector, the process of making plans and developing policies that are concerned with the sector, the oversight of all managerial and supervisory responsibilities pertaining to the sector.[25]

Under the Petroleum Act, the minister who is responsible for petroleum affairs is given the responsibility of providing general oversight of the oil and gas industry. The minister also plays a variety of roles in the process of ensuring transparency and accountability in the oil and gas industry in Tanzania. These roles include making public disclosure of all concessions, agreements, and licenses in the extractive sector through the ministry's web page or other media platforms that are generally accessible. Additionally, the minister is responsible for publishing the names of individual owners who own portions in companies that are engaged in the industry.[26] Further, the minister is obligated to provide a report to the National Assembly about the execution of the tasks that have been entrusted to him in the extractive industry under the auspices of transparency and accountability for a period of twelve months after the conclusion of each fiscal year.[27]

The minister, despite being entrusted with all of these powers related to the execution of his roles, does not have the mandate to exercise those powers in his complete discretionary approach. This was the case in the previous legislation that was used to govern and regulate the extractive industry in Tanzania.[28] In accordance with the above provision, the minister is only able to make key decisions after first requesting and receiving permission from the Cabinet. In order to remedy the deficiencies of the previous legislation, which had entrusted the minister

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[24] Available at <https://www.verfassungsvergleich.de/tz00000_.html> (last accessed 20 February 2024).
[25] Sec 5 (1) (2) of the Petroleum Act (n 17).
[26] Sec 16(1) of the Tanzania Extractive Industries (Transparency and Accountability) Act, No.23 of 2015.
[27] Ibid, sec 19.
[28] Petroleum (Exploration and Production) Act, Act no. 27 of 1980.

with the authority to make decisions on behalf of the government in issues pertaining to petroleum, this restriction on the minister's authority for petroleum matters has been introduced. Taking this into consideration, it is currently challenging for the minister to handle issues pertaining to petroleum development without taking into consideration the interests of the nation and its public. This is due to the fact that the Cabinet is provided with the authority to make the ultimate decision regarding matters pertaining to the oil and gas sector, particularly when it comes to major decisions. Moreover, as a key figure in the sector's governance, the Minister plays a vital role in ensuring transparency and accountability within the industry.

This is achieved through the facilitation of local content development, the enforcement of anti-corruption measures, the assurance of adherence to internationally recognized standards, and the cultivation of transparency and accountability within the industry. Section 84 of the Petroleum Act requires the public to have access to personal information.[29] In addition, this need is backed by section 91, which says that the Petroleum Upstream Regulatory Authority (PURA), subject to the written consent of the Minister, is required to provide the general public with full information on the actions of various companies operating within the petroleum sector.[30] The payment of a price that has been indicated is required in order to have access to this information.[31] Under the provisions of sections 49 (1) and 91 (1) of the Petroleum Act, the Minister is obligated to guarantee that the general public has access to information on contracts, permits, and development plans. This is particularly important in the context of accountability and transparency within the sector.[32]

The Tanzania Petroleum Development Corporation (TPDC) is a national oil company that is owned by the government, and the Treasury Registrar is the office that holds the shares of the organization. TPDC is another institution operating in the sector.[33] The Public Corporations Act, No. 17 of 1969, as amended, was the legal basis for the establishment of TPDC,

[29] Sec 84(6) of the Petroleum Act (n 17).
[30] Sec 91(1) *above at note* 27.
[31] Ibid sec 91(2).
[32] Ibid sec 49(1) and 91(1).
[33]Available at: <https://tpdc.co.tz/about-us> (last accessed 07 July 2024).

which took place on May 30, 1969, by Government Notice No. 140.[34] TPDC is primarily responsible for ensuring the commercial elements of petroleum in Tanzania's upstream, midstream, and downstream activities, as well as the government's participation rights in the petroleum and natural gas agreements that have been entered into with different partners in the extractive sector.[35] Because of this, the government is involved in the industry via the national oil company.[36] When it comes to protecting the government's interests in the oil business, TPDC, plays different roles. Such roles include providing advice to the Government on policy issues about the industry, taking part in petroleum surveys, conducting research and development projects, and carrying out specialized activities in the petroleum supply chain through affiliates (like the Gas Supply Company Limited and TANOIL Investments Limited), management of the government's commercial participating interests in the petroleum sector, management of the marketing of the country's share of petroleum received in kind, development of in-depth expertise in the petroleum industry, investigation and proposal of new upstream, midstream, and downstream ventures in the local and international arena, contracting, holding equity in, or participating in oil service and supply chain franchises and other licenses, and management of the petroleum industry.[37]

Through either an open bidding procedure or an initial allocation of the block, TPDC can also form partnerships with local or international organizations to carry out petroleum activities.[38] On the other hand, executing such a mandate must be carried out with the previous approval of the minister in charge of petroleum and per the recommendations of PURA.[39] This indicates that the activities of TPDC are not carried out in a unilateral manner; rather, they are subject to the direction and supervision of other authorities, such as the minister and PURA. This, on the other

[34] Public Corporations Act, [Cap. 257 R.E 2002].
[35] Sec 8(1) of the Petroleum Act (n 17).
[36] M. Mutambala and B. Diyamett, 'Local Content and Technological Capability Building in the Oil and Gas Sector: Evidence from Latin America and Lessons for Tanzania' Science, Technology and Innovation Policy Research Organization (STIPRO) Brief, 2017, p.1-2. Available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://stipro.or.tz/wp-content/uploads/2018/11/Local-Content- Development-and-Technological-Capability-Building-in-the-Oil-and-Gas-Sector_2017.pdf> (last accessed 09 July 2024).
[37] Sec 9 (1) of the Petroleum Act (n 17).
[38] Ibid sec 44(4).
[39] Ibid.

hand, ensures and simplifies accountability in the event that there is misappropriation and misuse of powers, as well as transparency, which, in turn, makes it possible for the activities of TPDC to be known clearly by the public through the exercise of the minister's roles, which includes the publication of various information connected to the extractive industry. According to the legislation, TPDC is tasked with ensuring that Tanzania and its citizens actively engage in the oil and gas economy rather than allowing investors to dominate the industry completely. Participation of this kind also ensures that Tanzanians would reap the long-term advantages of oil and gas development efforts. Consequently, the TPDC can adequately protect the country's interests in the industry via the existence of these structures.[40]

On the other hand, the Controller and Auditor General (CAG) in charge of the National Audit Office of Tanzania (NAOT) leads the NAOT, the highest audit institution in the country, in carrying out auditing.[41] The office of the CAG is recognized and established under the Constitution of the United Republic of Tanzania.[42] It has been entrusted with a variety of responsibilities, such as ensuring that all of the funds, the payment of which has been authorized to be charged to the Consolidated Fund of the Government of the United Republic, or the cash, the use of which is under the legislative authorization of the parliament and which have been spent, are utilized per the required and dedicated expenditures and not in any other manner. In addition, conducting an audit and issuing a report on the audit with regard to the accounts of the Government, the accounts handled by each officer of the Government of the United Republic, the accounts of the judiciary of the United Republic, and the accounts controlled by the secretary of the National Assembly are all included in this.[43]

To strengthen the accountability of government organizations to both parliament and the general public, public auditors play a significant role

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[40] P. Bofin and R. H. Pedersen. 'Tanzania's Oil and Gas Contract Regime, Investments and Markets'. Danish Institute for International Studies, Working Paper 2017:1, p. 5-20. Available at <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://pure.diis.dk/ws/files/783639/DIIS_WP_2017_1.pdf> (Last accessed 09 July 2024).

[41] Sec 20 (1) (2) of the Public Audit Act, [Cap. 418 R.E. 2021].

[42] Art 143 of the Constitution (n 13).

[43] Available at < https://www.nao.go.tz/index.php/en/about/category/vision-and-mission> (last accessed 11 July, 2024).

in building a key relationship between the two groups.[44] Because NAOT is required to exercise supervisory powers for correct and appropriate utilization of public resources, the office is an essential organization for ensuring accountability in the nation. When it comes to the management of the petroleum sector, NAOT is responsible for a variety of tasks. The primary responsibilities include conducting investigations and generating audit reports if there is a reported discrepancy regarding the payments and receipts from oil and gas businesses in Tanzania.[45] In addition, the CAG is granted the power to carry out financial audits of the economic reports and books of accounts of the Tanzania Extractive Industries (Transparency and Accountability) Committee by virtue of Section 21(2) of the TEITA Act. Additionally, the office is responsible for conducting audits of other agencies that are associated with oil and gas enterprises. For example, in April 2024, the CAG evaluated the audits of EWURA's yearly performance appraisal for 2021/22 in order to analyse the accomplishments of the year that was being audited in comparison to the success of the previous year.[46]

During the course of such an investigation, it was discovered that an overall of 72,533.56 million standard cubic feet of petrol and petroleum products were actually traded, and that an aggregate price of TZS 1,042 billion was charged for them.[47] However, the connection fees that were levied by the natural gas distribution managers, specifically TPDC and Pan African Energy Tanzania Ltd (PAET), were not authorised by EWURA. This is in violation of Regulation 20 of the Petroleum (Natural Gas Pricing) Regulations, 2020,[48] and the organisation in question did not take any action to uphold the regulations. From this point of view, the CAG suggested that such errors would most likely have an impact on the implementation of equitable pricing and market transparency in the industry.[49] According to the findings of such a study, the liquefied petroleum gas retail locations are neither registered nor supervised by EWURA.

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[44] Art 143 (1) of the Constitution (n 12).
[45] Sec18 of the Tanzania Extractive Industries (Transparency and Accountability) Act, No. 23 of 2015.
[46] Controller and Auditor General (2024), "*Annual General Report of the Controller and Auditor General on the Audit of Public Authorities and Other Bodies for the Financial Year 2022/23*", at page 148, available at: <https://www.nao.go.tz/reports> (last accessed on 08 July 2024).
[47] Ibid.
[48] Government Notice No. 353 Published on 15/5/2020.
[49] Ibid.

Furthermore, the EWURA failed to carry out any surveillance and compliance checks of these locations, which is in violation of Rule 46(1) of the Petroleum (Liquefied Petroleum Gas Operations) Rules 2020.[50] Liquefied petroleum gas (LPG) may be handled, stored, and transported improperly as a consequence of this, which may lead to potentially dangerous circumstances such as explosions, fires, or leaks, so presenting a significant risk to the nation's safety.[51] And the same puts into question the effective accountability of EWURA in managing such petroleum dealers. The Public Audit Act of Tanzania delineates the responsibilities of NAOT in executing audits and delivering precise and prompt reports to the parliament. Actions must be implemented prior to the next budget session, considering the findings and suggestions presented in the CAG's reports. In Tanzania, the CAG is tasked with executing follow-up operations on recommendations issued to audited entities to evaluate the degree of implementation of these recommendations. Consequently, audited organizations are required to completely execute the recommendations issued by the CAG audit.[52] NAOT is a national accountability authority responsible for overseeing the proper use of public resources.

The National Assembly is another institution dealing with the petroleum sector. This organ of the state is composed of members who have been chosen on behalf of their respective constituencies, members who are appointed to seats reserved exclusively for women, the speaker, five representatives of the members of the House of Representatives of Tanzania Zanzibar, the Attorney General, and not over ten people selected by the president.[53] The National Assembly oversees and advises the government and its relevant organs in discharging their particular responsibilities.[54] The National Assembly, in precise, has been granted the mandate of checking the petroleum resources contracts to ensure the existence of reasonable terms.[55] This is done by reviewing the current and previously entered agreements connected with the available natural resources in Tanzania.[56]

[50] Government Notice No. 825published on 2/10/2020.
[51] Controller and Auditor General (n 47), p. 149.
[52] R 36, 38, 39 and 40-42 of the Public Audit Regulations GN. No. 47 of 2009.
[53] Art 66 (1) of the Constitution (n 12).
[54] Art 63 (2) above note 12.
[55] Sec 5 (2) and (3) of the Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act.
[56] Ibid.

Upon discovery of any terms that are enshrined in the said agreements which, on the other hand, are unconscionable, then the National Assembly plays a role of advising the government to re-negotiate such agreements so that they can be suitable for the promotion of the national development via the resources generated from the sector.[57] Further, the National Assembly has room for deliberations on various reports, including the reports sent by the CAG regarding the utilization of the funds collected from the sector. In doing so, it can order some government leaders, like ministers, to resign in case the offices are misappropriated or mismanaged.[58] It does this via its two committees, one of which is the Public Accounts Committee (PAC), which is responsible for monitoring both the central government and the public parastatal. Concurrently, the Local Authorities Accounts Committee (LAAC) has been entrusted with the responsibility of monitoring the activities of local government authorities in relation to problems concerning income.[59] When seen in this light with respect to the functions of the National Assembly, it is possible to assert that management of the sector is advantageous to the economic growth of the nation. One can argue that there is transparency and accountability in the sector as a result of the checks that the parliament exercises over the affairs of the government.

Another institution is the Prevention and Combating of Corruption Bureau (PCCB), which is an autonomous agency that was founded in 2007 to prevent corruption practices in Tanzania, conducting investigations into them and prosecuting those whom they expose.[60] Also, according to section 7 of the Prevention and Combating of Corruption Bureau Act, the agency is charged with various roles. These roles involve guiding public, private, and parastatal bodies on the ways and means of preventing corruption practices, as well as the methods of work or procedures that should be adopted by such entities that are compatible with the effective performance of their relevant duties, which are necessary for reducing the scandals of corruption. Additionally, the bureau assists in providing cooperation and collaboration with

[57] Ibid.
[58] The Auditor General. 'Have a New Insight in the Management of Public Resources Through the CAG's Reports for the Year 2012/13' *Journal of the National Audit Office of Tanzania, Volume 7, No. 1, 2014.* p.5-6. Available at <chrome extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.nao.go.tz/uploads/NAOT_Journal_-_April_2014.pdf> (last accessed 12 July 2024).
[59] Ibid.
[60] Sec 5 (1) of the Prevention and Combating of Corruption Bureau Act, [Cap. 329 R.E 2022].

internationally established institutions, agencies, or organizations to combat corruption.[61] The petroleum industry is among the sectors that need serious follow-up on its financial affairs as the likelihood of corruption is high.[62] Given this fact, the PCCB's primary role in managing the oil and gas sector is to prevent corruption.[63] In achieving its objectives, the Bureau formulates and executes anti-corruption policies and initiatives to enhance public consciousness regarding the detrimental impacts of corruption on the natural gas and oil economy and society at large. In doing so, the PCCB collaborates extensively with many other governmental entities like the police, the office of the director of public prosecutions, and other stakeholders to advance openness and accountability within the natural resources sector.[64] With the above elaboration, it is clear that PCCB has a great role in ensuring there is accountability for proper management and utilization of the sector's resources. This is particularly true of issues related to financial resources for the development of the nation at large via the sector's proceeds.

Additionally, the Energy and Water Utilities Regulatory Authority (EWURA) is also a part of the institutions that regulate the petroleum sector. EWURA is established under section 4 of the Energy and Water Utilities Regulatory Authority Act.[65] Regulation of energy and water utilities is one of the many functions that have been delegated to the authority. EWURA is responsible for various duties about mid- and downstream petroleum operations, including the issuance, renewal, and revocation of permits. These powers include the ability to issue licenses.[66] To participate in mid- and downstream operations linked to oil and gas in Tanzania, people and organizations must get permits from EWURA. Therefore, the institution has the authority to provide licenses, decline to issue licenses, update licenses, cancel licenses, and terminate licenses.[67]

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[61] PCCB, 'Oil and Gas Sector: Corruption Vulnerability Analysis' Available at < File:///C:/Users/Thinkpad/Desktop/Ta/Oil-and-Gas-Sector-Corruption-Vulnerability-Analysis.Pdf > (Last Accessed 18 August 2022).
[62] PCCB Above note 61.
[63] S. Lindner, 'Tanzania: Overview of corruption and anti-corruption', *Transparency International*, 2014, p. 4-10. Available at < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://knowledgehub.transparency.org/assets/uploads/helpdesk/ Country_profile_Tanzania_2014.pdf> (last accessed 18 July 2024).
[64] Ibid.
[65] Sec 4 of the Energy and Water Utilities Regulatory Authority Act, Cap 414 [R.E 2002].
[66] Sec 29 (2) (a) of the Petroleum Act (n 17).
[67] Ibid.

Another power is to appoint an administrator to manage the business of the regulated supplier whose license has been cancelled.[68]

These powers are necessary because if a regulated supplier's license has been cancelled in one way or another, then the management of its business will be subject to an administrator who will be appointed by EWURA.[69] EWURA also has the power to regulate service rates and charges.[70] This power means that the suppliers of the services regulated by EWURA, such as petroleum, have no arbitral power to set prices for their services; instead, the charges and appropriate rates are regulated and supervised by EWURA to ensure fair competition in the market.[71] Another one is the power to obtain information, which mandates EWURA to order any person who holds certain information capable of being used as evidence or relevant in any way to produce or furnish such information.[72] Such a process is done by issuing a summons signed by the chairman or secretary of the Authority.[73] Holding inquiries power is vested in EWURA when it is considered appropriate to conduct such an inquiry.[74] It is mainly used to exercise the authority to grant, renew, and cancel service licenses, regulate any rate or charge, and adopt a code of conduct. EWURA is a vital authority in the successful monitoring and control of the oil and gas sector in Tanzania, primarily with respect to the regulation of the prices under which petroleum products are to be sold in the market. It is possible that the failure of such control would result in unfair market practices and unambiguous rates of pricing in the oil and gas sector in Tanzania. This is especially true when considering the fact that the industry is expanding considerably in the country compared to the years that have passed.

The Petroleum Upstream Regulatory Authority (PURA) is another regulatory body within the petroleum industry that was formed under section 11 (1) of the Petroleum Act. An individual appointed by the President of the United Republic of Tanzania to the position of Director General, who also acts as the Authority's chief executive officer and

[68] Sec 16(2) (b) above at note 65.
[69] Ibid.
[70] Ibid, sec 17(1) and 7 (1) (b) (iv).
[71] Ibid.
[72] Ibid, sec 18(1).
[73] Ibid.
[74] Sec 19 (1) above at note 65.

accountant, is in charge of the Authority.[75] The authority is responsible for a variety of tasks that are associated with the industry. These functions may be broken down into advising and direct regulatory operations. PURA is tasked with advising the minister responsible for petroleum and the government on various issues pertaining to the industry from the perspective of its advisory functions. PURA provides the minister with initial advice about promotion, bargaining, and tendering procedures for production-sharing agreements and other contractual matters. Additionally, this kind of guidance encompasses the activities of awarding, extending, halting, and canceling production permits and licenses for petroleum exploration and production.[76] This kind of clarification makes it abundantly evident that the minister is taking action on such matters per the PURA's recommendations.

To provide advice to the government, PURA provides advice about the projected development plans, the development of infrastructure, the tail-end plan, and, finally, the detachment of facilities that have been presented to the government by license holders. PURA's responsibilities include evaluating and approving the budgets that license holders provide, monitoring the performance of the projects and programs related to petroleum affairs, conducting analysis, disseminating information, and providing information associated with the petroleum sector in Tanzania.[77] The Petroleum Act mandates that PURA maintains transparency and accountability in the upstream oil and gas sector. This requires the authority to keep a registry that provides access to information about issued agreements, licenses, and permits. PURA is required to provide the public with detailed information on the activities conducted by various players in the petroleum industry.[78]

Another key party to the facilitation of transparency and accountability in the petroleum sector is the Civil Society Organisations (CSOs), which are responsible for monitoring the acts of the government in situations when the regulatory framework that governs Tanzania's petroleum industry is found to be lacking control. On a worldwide scale, civil society organizations have made major contributions to developing international

[75] Sec 23 (1) and (2) of the Petroleum Act (n 17)
[76] Ibid, sec 12 (1).
[77] Ibid, Sec 12 (2).
[78] Ibid, sec 84 (6).

multi-stakeholder codes throughout the years.[79] Since the beginning of the Extractive Industries Transparency Initiatives (EITI), CSOs have been among the most important contributors to its formation. Within the framework of the EITI, CSOs are included in the governing board as an integral component.[80] A Civil Society Steering Committee facilitates the Tanzania Extractive Industry Transparency Initiative (TEITI). This committee also serves to develop cooperation between civil society organizations and the TEITI Board to collaboratively carry out a variety of outreach programs and activities linked with the Initiative. TEITI also has a civil society liaison officer committed to his job, and he works full-time. This officer is employed in a permanent role. The operations of the TEITI and EITI have been brought to the attention of a significant number of CSOs on both the national and international levels. An important part of this has been the promotion of awareness. A Memorandum of Understanding (MOU) has been in place since 2009, when Tanzania became a member of the EITI, to facilitate the increasing engagement of CSOs in the EITI process. This action is being taken to focus more on the mutually beneficial connection that exists between TEITI and CSOs in Tanzania.[81]

One of the civil society organizations working to improve transparency and accountability in the petroleum industry is *HakiRasilimali*. This organization is actively working to raise knowledge about petroleum operations among members of parliament and the general public. In Tanzania, it also serves as a chapter of the PWYP and offers representation for civil society organizations that serve on the TEITI Committee. In addition, the Natural Resource Governance Institute (NRGI) is responsible for publishing index reports detailing Mainland Tanzania's progress in transparency and accountability. Additionally, it offers suggestions to the government about releasing petroleum information. Policy Forum has been working with other CSOs to provide the government with advice on things about petroleum. This includes hosting and monitoring initiatives that provide information to the general public on oil and gas and encourage the government to disclose petroleum contracts. This would enable citizens to evaluate whether or not the

[79] E. Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study,* University of Toronto, 2009, 99-141.
[80] <https://eiti.org/eiti-board> (last accessed 2 June 2023).
[81] E. Mujih, 'Regulating Multinationals in Developing Countries: A Case Study of the Chad- Cameroon Oil and Pipeline Project' *African Journal of International and Comparative Law, Vol. 16, No. 1, 2008*.

government is meeting its obligations for human rights and whether or not such agreements are damaging.[82]

Throughout the process of restructuring the governance of the petroleum sector, CSOs were quite vocal. Their efforts to fight for transparency resulted in the passage of three pieces of legislation: the Petroleum Act, the Oil and Gas Revenue Management Act, and the Tanzania Extractive Industries (Transparency and Accountability) Act. The regulations that have been passed illustrate the tremendous effect that CSOs can have in lobbying for transparency and accountability in the petroleum sector. Through the legislation, CSOs have been allowed to conduct a thorough investigation of the government's activities, educate the general public, and push for more improvements.[83] A further instance of the continuing lobbying of civil society for enhanced transparency and better governance improvements in the petroleum business is the response of CSOs members to the rising practice of the government to expedite legislative proceedings. In response to the rushed legislative process in 2015, a coalition of CSOs issued a statement in which they condemned the practice and voiced their unhappiness with the lack of public discussion. Therefore, CSOs can successfully contribute to achieving the benefits of transparency if they adopt a position that is appropriate and well-prepared. The public outreach and awareness techniques that are conducted by civil society and/or the government are very important to nurture an informed populace that is capable of demanding accountability. Although transparency means that information is easily accessible, the efficient use of that knowledge is strongly dependent on its utilization. It would not have been possible to achieve significant gains in Tanzania if CSOs had not consistently pressured the government to demonstrate transparency in its operations and participate in outreach projects to guarantee that information was disseminated to the general populace.

Petroleum Companies also play a key role in fostering transparency and accountability within the oil and gas business. Particularly notable is the contribution that the petroleum sector makes to Tanzania's economy, which is considered to be of great importance. Disclosing financial and

[82] J. Poncian and H M Kigodi, 'Transparency Initiatives and Tanzania's Extractive Industry Governance', *Development Studies Research, Volume 5, No. 1, 2018* (106-121) p. 115-117.
[83] Ibid.

operational data openly and transparently is one of the most important methods that petroleum companies can use to improve the level of transparency and accountability within the industry. The disclosure of beneficial owners, the reporting of payments to government agencies (including taxes, royalties, and other levies), and the dissemination of information on oil and gas activities are all included in this. Through disseminating this information to the general public, oil and gas companies have the opportunity to demonstrate their commitment to implementing transparency and accountability, therefore promoting trust among governmental institutions, CSOs, and other key stakeholders.[84] Through the implementation of comprehensive corporate governance procedures, petroleum companies have the opportunity to improve their level of openness and accountability. A few of these steps include the establishment of ethical standards and codes of conduct, as well as the installation of internal controls and processes to identify and prevent instances of corruption. In addition to fostering integrity and improving governance standards inside the company, this program also contributes to the integrity of the industry as a whole via its contributions.[85]

In order to comply with the TEITA Regulations, petroleum companies are required to keep detailed paperwork about their activities. The records of payments, the information on beneficial ownership, the expenditures involved with production, exploration, and prospecting activities, and the specifics of the awarding or transfer of licenses are all included in this category. For each licence that they possess, businesses are required to provide documentation of their capital expenditures at each step of the investment process. Additionally, they must provide information on the amount of production and exports from enterprises in the extractive sector. Assume that a corporation is interested in maintaining the confidentiality of certain data inside the PSA framework. If such is the case, the corporation must apply to the TEITI Committee to seek that certain information included within its PSA be published.[86] Section 16 of the Finance Act of 2020 mandates that oil and gas companies must construct a register for beneficial owners and provide the Registrar of Companies with the necessary information. The Registrar of Companies will then create and manage the register at the Companies Registry.

[84] J. Poncian and H M Kigodi, (n 83).
[85] B. Lee B and K. Dupuy (n 21).
[86] R3 and 4 of Tanzania Extractive Industries (Transparency and Accountability) (General) Regulations, 2019.

Local Government Authorities (LGAs) do also have an important role to play in the petroleum sector, particularly with regard to the promotion of transparency and accountability in the administration of these important resources.[87] As a result of the widespread recognition that natural resources belong to the public, it is imperative that local authorities in regions of exploration and production work hard to maximise the advantages that are gained from the industry.[88] This is in accordance with their right to participate in the administration of national resources and to obtain compensation for the social, environmental, and health costs that are usually concentrated in close proximity to locations where exploration and prospecting are taking place. On the other hand, central governments make an effort to give solutions that are tailored to the requirements of the people that are live in these areas in order to reduce the likelihood of any possible social conflicts emanating.[89]

2.1 Challenges Observed in the Institutional Setups on Facilitating Transparency and Accountability in Managing the Petroleum Sector

As discussed earlier, institutions play a vital role in the administration of the petroleum industry; nevertheless, there are challenges connected with carrying out the responsibilities assigned to the appropriate institutions to apply transparency and accountability in managing the sector. There are several obstacles, such as:

The parliament has a limited role in achieving transparency and accountability in the petroleum industry. The legislative branch's oversight of the petroleum sector is a complicated process that includes specialized committees, strategic investigations, independent evaluations, and public monitoring. These variables work together to guarantee that the administration of oil and gas resources is transparent and accountable, therefore improving governance and fostering sustainable development in this very important area. This additional legislative oversight function ensures that petroleum institutions operate transparently.[90] It is anticipated

[87] M. W. Ross 'Does Oil Hinder Democracy?' *World Politics, Volume. 3, No. 53, 2001* (325-361) p. 330-335.
[88] Ibid
[89] A. Hassan, C. Nakhle and T. Karam, 'Policy Recommendations on the Role of Local Authorities in the Petroleum sector' Common Space Initiative, 2019. Available at: <file:///C:/Users/ThinkPad/Downloads/CSIOilgasEngweb.pdf> (last accessed 10 March 2023).
[90] I. Irawati. 'Effectiveness of Law of the Republic of Indonesia number 11 of 2020 on Job Creation Towards Oil and Gas Downstream Business Supervision Implementation in Indonesia' Proceedings of the 2nd

that the parliament would carry out several actions, such as examining and debating oil and gas contracts even before they are signed, conducting an investigation into any activity relating to the industry, requesting information on oil and gas, and holding important participants responsible.[91]

However, the Tanzanian parliament is legally obligated to oversee the petroleum sector on behalf of the Tanzanian people; yet, due to the parliament's structure, it cannot carry out this responsibility. The provisions that have previously been mentioned which only allows review of contracts entered after 2017, as well as the loyalty and composition of political parties, provide a considerable barrier to the capacity of the parliament to carry out its monitoring tasks. Given the circumstance that most affiliates put the interests of their political parties ahead of the interests of the general public, the majority of resolutions are not in the public interest. As a result of the fact that the Minister is selected from within the parliament, particularly by the party that is in power, the ability of the parliament to hold the Minister and other important actors accountable is diminished due to the dominance of the ruling party over a relatively small number of opposition members.[92]

An outstanding instance of this is the event that occurred in 2014, in which two officials from TPDC were jailed for refusing to furnish the Public Account Committee (PAC) with 26 petroleum contracts. At that time, the Attorney General sided with them when the Minister in charge of petroleum, Hon. Sospeter Muhongo, who spoke on their behalf and urged that TPDC not publish those contracts since doing so would be a violation of the petroleum agreement, which would result in liability to the country. Despite the fact that they were aware that the presence of such contracts in the house was essential for the protection of the public interest, members of the parliament did not take any action to solve the issue.[93]

International Conference on Law, Economic, Governance, ICOLEG 2021, 29-30 June 2021, Semarang, Indonesia. Available at: <https://doi.org/10.4108/eai.29-6-2021.2312619> (last accessed 25 August 2024).

[91] Interview with MP (02 June 2023, Dodoma).

[92] E. Mwanga, 'Transparency and Accountability in Tanzanian's Oil and Gas Industry: Law and Practice' *Oil, Gas & Energy Quarterly*, *Volume 64, No. 2, 2015* (337-352) p. 342-348.

[93] Ibid.

Furthermore, some functions overlap amongst institutions. This is shown by the responsibilities of the National Assembly and the Cabinet. Both of these institutions are tasked with assessing the government issues that are provided by the minister responsible for petroleum. This is because the minister is subject to the directions issued by the Cabinet. In contrast, the minister's performance of such tasks is subject to the examination of the parliament, while its choices are final. This nature of delegating a job to two separate entities has an impact, in one sense, on who will be responsible for ensuring that there is transparency and accountability in executing the minister's role in the utilization of the resources.[94] This is due to the fact that the same powers may be subjected to double standards, and the appropriate institution may not fulfil its role as necessary.[95] The overlap of functions across different institutions may result in conflicts of interest that compromise accountability. This underscores the need for an explicit definition of duties and responsibilities to avoid disputes and guarantee that all hydrocarbon institutions function within a framework that fosters transparency.[96]

Additionally, since some important institutions are comprised of members who are part of the same circle of participants in the affairs that need to be checked for accountability, the dysfunctional structure of the relevant institutions presents difficulty. For example, the Cabinet is comprised of the same people who are members of the central government, and the heads of certain institutions, such as the PCCB, are appointed by the President, who is also a central government member. As a result, the capacity of these institutions to supervise and ensure that transparency and accountability are carried out in the sector by the central government is called into question.[97] This challenge is similar to Iran where accountability in the oil and gas sector is compounded by the involvement of the same individuals or institutions tasked with enforcing oversight and hence makes it hard to apply the principles since the same key players who are supposed to be accountable for the sector are the same persons who are supposed to initiate accountability.[98] In the Tanzanian petroleum

[94] Interview by author (02 June 2023, MP, National Assembly, Dodoma).
[95] B. Lee B and K. Dupuy (n 21).
[96] D. Fianka, J. Didi, and S. Ibrighademor, 'Examining Nepotism Among Participants in the Procurement Process: An Analysis of the Nigerian Oil and Gas Sector', *International Journal of Scientific Research*, 2024 (5-7), p. 5-6. Available at: <https://doi.org/10.36106/ijsr/3226902> (last accessed 25 August 2024).
[97] Interview with John E, (8 March 2023, Policy Forum, Mikocheni, Dar es Salaam).
[98] L. Morrison, A. Alshamari, and G. Finau, 'Interrogating the Environmental Accountability of Foreign Oil and Gas Companies in Basra, Iraq: A Stakeholder Theory Perspective,' *Meditari Accountancy Research,*

industry, dual function engenders a substantial conflict of interest, hence compromising the integrity of accountability procedures and resulting in insufficient implementation of accountability norms.[99] The authors advocates for creating independent institutions in Tanzania to guarantee that accountability frameworks remain untainted by the interests of those in authority.[100] One further thing to consider is that some organizations, like the Oil and Gas Advisory Bureau, do not have a well specified composition.[101] It is generally accepted that the Bureau is an independent organization, yet, the fact that its members are not publicly known raises questions regarding the Bureau's complete independence and its ability to ensure transparency and accountability in managing the oil and gas industry. As a result, the Bureau itself is not transparent.[102]

A further challenge is observed in exercising the vested duties to be carried out by such institutions with a significant amount of discretionary authority. This creates obstacles that make it more difficult to ensure they implement transparency and accountability in the management of the industry. This is the case since most institutions operate on a discretionary basis rather than a requirements-based one. By way of illustration, the National Assembly has a discretionary role in examining the agreements that have been entered into involving natural resources, including unconscionable provisions. This means that the institution can either review the terms or ignore them.[103] In 2018, Hon. Job Ndugai, then Speaker of the National Assembly, established a committee to investigate the terms and conditions of oil and gas contracts. The special committee was established to submit its recommendations to parliament and to advise the government on necessary actions.[104] Unfortunately, addressing the inequitable terms remains at the discretion of the organ, a concern noted by several anonymous sources.[105] Similarly, the Minister is vested with the authority to exercise discretion over several domains, and he or

Volume 32, No. 1, 2023 (207-233) p. 210.

[99] C. L. Gabagambi and E. E. Longopa, 'Analysis of the Legal and Institutional Frameworks Regulating Oil and Gas Resources in Tanzania' *Journal of Law and Legal Reform, Volume 3, No. 3, 2022*.

[100] Ibid.

[101] B. Lee B and K. Dupuy (n 21).

[102] Interview with MP (02 June 2023, Dodoma).

[103] Sections 4 (1) and 5 (2) (3) of the Natural Wealth and Resources Contracts (Review and Re- Negotiation of Unconscionable Terms) Act, No. 6 of 2017.

[104] The Citizen, "Bunge Moves to Investigate Oil, Gas Agreements with Investors" (02 January 2018), available at: <https://www.thecitizen.co.tz/tanzania/news/national/bunge-moves-to-investigate-oil-gas-agreements- with-investors-2618584> (last accessed 23 November 2024).

[105] Interview with MP (02 June 2023, MP Dodoma).

she, in conjunction with the President, is responsible for appointing persons to run oil and gas institutions.

Lack of accountability from the findings and recommendations in the reports of some institutions is also a challenge in ensuring the application of the principles in the sector. Most reports involving misuse of money and associated concerns in different sectors have been without legal effects, which has been a challenge for a long time, not just in the petroleum sector but also in other sectors of the nation. For example, the reports compiled by the CAG have been presented to various authorities, such as the President and the National Assembly. Despite this, there is no legally enforceable enforcement mechanism in place to hold accountable the individuals suspected of being responsible for the anomalies.[106] This is the case regardless of the severity of the findings. This makes reporting meaningless because it only ensures one component of transparency, and the component of accountability is not considered, which makes the process an afterthought. This also applies to the Tanzania Extractive Industries Transparency Initiative (TEITI) reports that are published per section 10(2) of the TEITA Act, there are no mechanisms to enforce accountability from its findings and recommendations.[107]

Another challenge is the tendency to treat some institutions in the sector as third parties when it comes to accessing information. According to the majority of the laws regulating the oil and gas business, institutions are considered third parties when it comes to obtaining information in this sector. For example, according to the Petroleum Act, the information that license holders provide to PURA is considered secret and is only available to persons who have been authorized to see it. In such case, if any other party, including the institutions being addressed in this article, desires access to such information, then the authorization of the minister responsible for petroleum must be acquired in advance, together with an agreement between PURA and the license holder.[108] The management of the oil and gas industry is impacted when institutions such as the National Assembly, NAOT, and PCCB are treated as third parties when it comes to access to industry information. This is especially true regarding the assurance of transparency and accountability.[109] This is because the

[106] Interview with MP (02 June 2023 Dodoma).
[107] Tanzania Extractive Industries (Transparency and Accountability) Act, Cap. 447 [R.E 2019].
[108] Sec 92 (1) of the Petroleum Act (n 17).
[109] Interview with Baravuga R, (7 March 2023, TPDC, Azikiwe, Dar es Salaam).

aforementioned institutions can only function, provide advice, and take action regarding the actions and affairs that are carried out in the sector when they have sufficient information. Given these circumstances, the institutions are unable to efficiently ensure the application of transparency and accountability in the oil and gas industry.

Another challenge is that oil and gas institutions do not seem to have sufficient autonomy to enable them to ensure the application of transparency and accountability. The fact that the President of Tanzania appoints the chairman of the Tanzania Extractive Industries (Transparency and Accountability) Committee and that the Minister responsible for petroleum appoints the members of the said Committee, as well as the fact that the directors of PURA, TPDC, EWURA, PCCB, NAOT, the Cabinet, and the Minister for petroleum are also president appointees, it raises concerns about the independence of the aforementioned institutions in terms of implementing transparency and accountability. Due to the fact that they have a numerical advantage, this structure raises concerns over the possibility of government members having a dominant position in voting procedures. As a consequence of this, the guarantee of transparency and accountability becomes dubious when certain circumstances are present. During a presentation on TEITI, the chairman of the Tanzania Extractive Industries (Transparency and Accountability) Committee brought up the question of the committee's independence. It was questioned by the Chairman of the tripartite composition of the committee, which included representatives from CSOs, the government, and extractive companies, would enable the committee to maintain its independence. Concerns like this are brought about by the fact that the government appoints the Chairman.[110]

TEITI and the Tanzanian parliament are both impacted by the unfettered autonomous powers of the executive branch since executive functions and responsibilities influence members' actions.[111] An arrangement of this kind, with regard to the management and leadership of these institutions, raises questions regarding the independence of these institutions, which is necessary for putting into reality the features of accountability and transparency in the oil and gas industry.[112] The president's appointees

[110] L.S.L. Utouh, 'Transparency and Accountability Mechanism Inherent in Extractive Industries' paper presented at NGRI Virtual Training on 19th August, 2021.
[111] Lee B and Dupuy K (n 21).

have a difficult challenge when it comes to demonstrating devotion to the authority that appointed them. The same is true for the members of parliament, the vast majority of whom are members of the party now in power, in which the president acts as the chairperson.[113] A good illustration of this is seen in the case *Attorney General & Others v. Bob Chacha Wangwe,*[114] whereby the petitioner stated that section 7(1) of the National Elections Act, together with other sections, violates article 21 of the Constitution of Tanzania, which guaranteed, among other things, the right to free and fair elections. The petitioner also alleged that other provisions violated the Constitution of Tanzania. The petitioner contended that the returning officers, who are appointed by the President, have considerable hurdles when it comes to working independently and impartially during election supervision periods. The accusations made by the petitioner were supported by the High Court of Tanzania, which also ruled that section 7(1) of the National Elections Act was in violation of the constitution.

The difficulties involving the independence of presidents appointees and members of the parliament from the ruling party have not been addressed, despite the fact that the Court of Appeal finally reversed the conclusion that was presented earlier.[115] The majority of the time, presidential appointees are chosen on the basis of their political affiliation and intellectual congruence with the president, which may compromise their independence.[116] There is empirical evidence to show that appointees usually prioritize the preferences of the president above their own professional judgment, which leads to a reduction in bureaucratic performance in comparison to career civil servants who may possess more unbiased talents.[117] Numerous studies have shown that the implementation of institutional frameworks that include autonomous regulatory agencies has the potential to significantly progress both transparency and accountability in the management of resources.[118] On the other hand, when the executive branch has complete authority over

[113] E. Mwanga, 'Who votes in Tanzania? An Overview of the Law and Practices Relating to Parliamentary Elections' *African Human Rights Law Journal*, *Volume 22, 2022 (*139-160) p. 140.
[114] *Attorney General & Others vs Bob Chacha Wangwe, Civil Appeal No. 138 of 2019 (TZCA).*
[115] E. Mwanga (n 114) p. 143-144.
[116] G. E. Hollibaugh, 'Naive Cronyism and Neutral Competence: Patronage, Performance, and Policy Agreement in Executive Appointments' *Journal of Public Administration Research and Theory*, *Volume 25, No. 2, 2014* (341-372).
[117] Ibid.
[118] C. L. Gabagambi and E. E. Longopa (n 100).

these institutions, it usually leads to a lack of coordination and synchronization in the processes that regulate the institutions.[119] As a result of the executive branch's potential to prioritize private or political goals above the welfare of the general public, the absence of autonomous monitoring mechanisms increases the likelihood of corrupt practices and incompetence.[120]

Another hurdle is the lack of a clear, statutorily backed role that civil society organizations (CSOs) play in promoting transparency and accountability. CSOs in Tanzania are important players in putting TEITI into effect. Nevertheless, the participation of CSOs in ensuring transparency and accountability is met with several obstacles. In contrast to the other parties engaged in the TEITI process, such as the government and petroleum companies, whose responsibilities seem well-defined and organized in the laws, CSOs' roles, and duties remain unclear. Multiple efforts have been put into place by TEITI, including the coordination of a variety of activities and the holding of discussions with civil society organizations in various parts of the country to clarify the responsibilities that CSOs play within TEITI.[121] The absence of well-defined duties for Civil Society Organisations (CSOs) may result in inadequate oversight of the state and companies within the oil and gas industry.

In Nigeria for example, CSOs have traditionally served as watchdogs, using frameworks such as the Extractive Industries Transparency Initiative (EITI) to scrutinize corporate practices and insist on accountability from the government and oil and gas corporations. Nonetheless, without defined goals or delineated roles, these organizations may have difficulties in mobilization, leading to a diminished ability to affect policy or corporate conduct.[122] The findings of Debrah and Graham reflect a similar issue in Tanzania, indicating that CSOs in Ghana encounter difficulties stemming from inadequate capacity and limited access to information, which obstruct their engagement with

[119] K. O. Bishoge and others ‘A Literature Survey of Community Participation in the Natural Gas Sector in Developing Countries’ *International Journal of Energy Sector Management*, *Volume 13, No. 4, 2019* (765-786).
[120] S. Saidu and H. A. Sadiq ‘Production Sharing or Joint Venturing: What is the Optimum Petroleum Contractual Arrangement for the Exploitation of Nigeria Oil and Gas?’ *Journal of Business and Management Sciences*, *Volume 2, No. 2, 2014* (35-44).
[121] Interview with Shao L, (15 March 2023, HakiRasilimali, Msasani, Dar es Salaam).
[122] A. Osawe and O. Uwa, ‘Natural Resource Governance and Conflicts in Nigeria’, *British Journal of Multidisciplinary and Advanced Studies*, *Volume 4, No. 1, 2023* (17-35) p. 17-23.

the government and oil companies.[123] The absence of clearly defined CSO duties may lead to low engagement with local populations, which is essential for equitable oil and gas resource advantages.[124] CSOs are crucial in promoting transparency and accountability and ensuring that local perspectives are included in making decisions. Nevertheless, when their functions are unclear, they may fail to effectively represent community interests, resulting in a disjunction between resource management and local needs.[125] Gyampo points out the advancements achieved in the transparent management of oil earnings within the Ghanaian petroleum industry, particularly with the involvement of CSOs. The author contends that greater outcomes may be attained by proactive engagement and well-defined frameworks for CSOs participation.[126]

Furthermore, the status of the Oil and Gas Advisory Bureau is unclear. The Oil and Gas Advisory Bureau sprang into being due to the Petroleum Act of 2015. The President's Office is home to this Bureau, which plays a crucial function and strategically positions itself inside the office. Despite this, the Act does not provide extensive information on the exact authorities, structure, eligibility requirements, or activities of the Bureau. In this modern period, characterized by an emphasis on openness and accountability, which is generally recognized as vital for successful oil and gas management, the formation of the Bureau that lacks clear roles is a cause of concern at the present time.[127] Throughout its existence, the Bureau has been operating under the supervision of the President's office. On the other hand, the actual condition of the situation is unclear, which presents substantial hurdles to promoting openness and accountability.

Also, oil and gas industry institutions do not coordinate their efforts. The lack of cooperation between TEITI and PURA is a key impediment that must be overcome to fulfil the requirements of transparency and accountability. It seems that TEITI, the principal organ responsible for guaranteeing accountability and openness, has taken over the obligations

[123] E. Debrah and E. Graham, 'Preventing the Oil Curse Situation in Ghana: The Role of Civil Society Organisations', *Insight on Africa*, *Volume 7, No. 1, 2015* (21-41), p. 21-25.
[124] L. L. Kerekkum and K. K. Nwachukwu, 'The Role of Civil Society Organisations in the Public Financial Management Process of Sub-nationals in Nigeria', *International Affairs and Global Strategy, Volume 96, 2022* (26-38) p. 28-30.
[125] Ibid.
[126] R. Gyampo, 'Transparency and Accountability in the Management of Oil Revenues in Ghana', *Africa Spectrum*, *Volume 51, No. 2, 2016* (79-91) p. 80-85.
[127] Interview with Olan'g S, (7 March 2023, NRGI, Mikocheni, Dar es Salaam).

initially earmarked for PURA. The absence of any statutory mandate for TEITI to be supplied by PURA with information or reports about operations is a clear indication of the lack of coordination. Tanzania's ability to conduct its operations transparently and responsibly has been hindered by insufficient cooperation between government agencies and other players in the petroleum sector. The Acts necessitate adequate coordination among the authorities in the process of carrying out their obligations. A significant amount of collaboration across different government institutions in decision-making and authorization capabilities will be required for the successful implementation of transparency and accountability.[128]

Another challenge is the executive's excessive powers over the petroleum industry's management. It is important to note that the President and the Minister in charge of petroleum resources have a large amount of discretionary control over several different aspects of petroleum administration. The final decisions on the distribution of licenses and agreements, as well as the eventual appointment of people to take on leadership posts within PURA and the MSG, are all included in this power. The executive branch's tendency to amass excessive control over oil and gas resources often results in a lack of checks and balances, which are essential for ensuring that the government is open and honest. This challenge is acknowledged by Abgonma, who uses the Nigerian oil and gas sector as an example and states that due to discretionary powers, structural weaknesses have been uncovered that allow individuals to take advantage of administrative loopholes for personal profit, so endangering the economic well-being of the country. This consolidation of power may make it possible for individuals to steal money, as was seen in the Nigerian oil and gas industry.[129]

3.0 Conclusion

It is pertinent that these institutions, as elaborated above, play a significant role in managing the petroleum sector by ensuring that the industry is run in a way that promotes transparency and accountability;

[128] L Chuwa and J. P. Mrema, 'Strengths, Weaknesses, and Opportunities of Local Content Policy, Legal, and Institutional Framework in the Upstream Natural Gas Sector in Tanzania', *Resources Policy*, *Volume 81, 2023.*

[129] E. B. Abgonma and others, 'Misappropriation in the Nigerian Petroleum Sector: Strategies for the Accountant General of the Federation' April-May 2024, p. 15-22. Available at: <https://doi.org/10.55529/jsrth.43.15.22> (Last accessed 08 June 2024).

this is witnessed by the role played by the institutions in access to oil and gas information and how they facilitate for critical players to be responsible for what is going on in the sector. However, such institutions still face various challenges, including limited parliamentary oversight on the sector, some institutions being sidelined in accessing important information, overlapping roles between them regarding the facilitation of transparency and accountability, lack of autonomy, and excessive control from the executive. Such challenges hinder the said institutions from promoting transparency and accountability for the sector's development in furthering the economic growth of the citizens of Tanzania. Therefore, the categorized challenges must be addressed to ensure the principles are well applied for good governance in the petroleum sector; otherwise, it will remain an afterthought to realize the same.

4.0 Recommendations

From the analysis of the institutional setups that facilitate transparency and accountability in the sector, it is clear that from the existing challenges, there is something to be done as a way out of solving them. Therefore, the author recommends the following to be done in such respect:

Firstly, discretional powers granted to some institutions must be reduced so that the relevant institutions can be scrutinized to ensure transparency and accountability. As elaborated above, some institutions like the minister and the National Assembly are vested with various roles but enjoy an avenue of effecting such roles discretionally. Performance of such roles under discretion endangers the sector's best interests to the public at large because an institution may opt not to discharge specific roles while the same is of paramount importance for the betterment of the sector. So, the laws responsible for the institution's frameworks need to accommodate a way that will ensure the said institutions are not performing unmonitored discretion; for circumstances where discretion is inevitable, the laws must set specific criteria that justify the exercise of the said discretion compared to the existing way.

Secondly, the frameworks of the institutions need to be set in a way that will ensure that, in exercising transparency and accountability, the institutions can act independently and with autonomy. In doing this, there has to be an independent authority with the power to appoint or suggest

the names of individuals who can be the heads of the institutions vested with the power to oversee oil and gas management. In return, the sector will have proper management with the practical realization of transparency and accountability as critical areas in the economic proliferation of any industry.

Thirdly, the Petroleum Act of 2015 provisions establishing the Oil and Gas Advisory Bureau need to be amended to provide for its composition. This will secure the Bureau's transparency and legitimacy in executing its advisory role in the sector. Failure to do this will continue to create uncertainties regarding its setup and its exercise of roles.

Fourthly, to ensure transparency and accountability, changes must be made to the laws setting up the framework for petroleum institutions to remove the conditions that limit disclosure of information to some important institutions. As it is now that the key institutions are regarded as third parties when it comes to access to information, hence hindering their function, it is therefore paramount that these institutions have access to the relevant information in the sector. Such access will, among other things, make the functioning of these institutions effective. Leaving these institutions without direct access to the relevant information in the sector makes them act like a toothless dog in the bush. Also, granting such access will create the authenticity of such institutions' reports, actions, and recommendations.

Fifthly, to avoid the problem of functions overlap, the frameworks for the said institutions must be changed to assign specific roles to be performed in every institution so that it can be easy to ensure transparency and accountability. It is easy to conduct performance audits for such institutions when it is known which institution performs what role as far as transparency and accountability are concerned. So, separation or straightforward setup of the roles of the institutions is necessary by the relevant legal framework concerning managing the sector. This enables solving the problem of contradictions regarding the performed roles, as seen above regarding the roles of the Cabinet and the National Assembly.
Sixth, the legal frameworks setting up the petroleum institutions need to be changed to introduce accountability of responsible key players from the findings and recommendations of the reports done by the said institutions and organs. These reports include the reports from TEITI and the NAOT as submitted by the CAG. This will improve and enhance

accountability among crucial petroleum industry players. Conversely, such players will deem it a mere game with no action taken upon the conduct of undesirable activity in the sector uncovered by the reports.

Seventh, to facilitate transparency and accountability in the petroleum sector, the laws must be amended to grant supervisory powers to the parliament over the sector. Members of the parliament are representatives of the general population, and the law needs to allow them to make strong judgments on essential concerns for the country without being swayed by party connections. Granting powers to review already signed contracts is not enough to ensure that the public benefits from the sector through transparency and accountability principles. The parliament's structure has to be modified regarding how it makes decisions about significant subjects. Contracts from the industry need to be presented and reviewed even before they are signed, important decisions on the natural resources particularly oil and gas needs to be tabled, discussed and passed by the parliament. Additionally, TEITI reports, just like the one by CAG, need to be tabled for discussion, and accountability needs to be initiated per the findings and recommendations.[130]

Eighth, there have to be amendments to the laws that assign roles to institutions so that civil society organizations have specific roles in facilitating transparency and accountability in the sector. CSOs' part in the transformation of the sector cannot be ignored; as observed above, there are a number of tasks that have been performed that facilitated the new enactments in the sector. CSOs have commendable efforts in the current state of transparency and accountability in the petroleum sector, given the fact that they link the government and the general public. Having provisions of law that mandate CSOs in their role will create an obligation, and their efforts will no longer be ignored. As of now, most efforts by the CSOs tend to be ignored even if they can impact accountability in the sector; this is so because there is no legal duty assigned to them, and hence, its findings and recommendations seems to matter less.[131]

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[130] Interview with Ketagory E (22 June 2023, TEITI, Madini, Dodoma).
[131] Interview with Rwegellera S, interview (7 March 2023, NRGI, Mikocheni, Dar es Salaam).

Judicial Responses to Climate Change in Tanzania: Has the Paris Agreement Sparked Emerging Jurisprudence?

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Abstract
The Paris Agreement has set a legally enforceable legal framework that has enjoyed substantial international support thus creating a global context for climate litigation. This, however, has prompted an increase in climate change cases in many jurisdictions with courts in the global north and south forming new laws to ensure that governments and businesses are held liable for climate-related damages, although this trend has not been uniform across all countries. This study aims to analyze the role of the judiciary in addressing climate change in Tanzania, with a specific focus on the influence of the Paris Agreement in shaping emerging climate change jurisprudence. Through doctrinal research and expert survey, the study finds that Tanzanian courts primarily rely on domestic laws enacted before the Paris Agreement, and the lack of consistency with the Paris Agreement prevents the incorporation of its concepts into judicial decisions. The study suggests modernizing Tanzania's legal structure to reflect international climate commitments and increasing the judiciary's ability to handle climate-related disputes.

Keywords: *Climate Litigation, Paris Agreement, Tanzanian Judiciary, Environmental Law, Jurisprudence*

1.0 Introduction

Addressing climate change as a global issue requires the participation of all levels of government and working together because each level has its specific role.[1] In Tanzania, the legislature, the executive, and the judiciary are all vital in addressing the global effects of climate change. The consequences of changing climatic conditions are seen in the new trends in weather frequency of droughts and floods and increasing high temperatures that affect the economy and setbacks development in the nation.[2] To lessen these effects, the Tanzania government has implemented a national legal framework and policies meant to reduce climate change's effects through various international benchmarks.

[1] B.J. Preston, The Contribution of the Courts in Tackling Climate Change, *Journal of Environmental Law*, *Vol. 28, No. 1, 2016*, pp. 11-17

[2] United Republic of Tanzania, *National Climate Change Response Strategy 2021*-2026 (Division of Environment, Vice President's Office 2021)., p. 26.

Policies come up with such provisions as the management of the environment, the design of urban areas, land aspects, water, health care, and the management of disasters. In turn, the Tanzania government has responded to the issue of climate change as well as the provisions of the Paris Agreement by formulating Nationally Determined Contributions (NDCs)[3] and the National Climate Change Response Strategy (NCCRS).[4] These strategies aim to prepare the country for effective climate change and adaptation through resilience policies in different areas including social, economic, and ecological aspects.

Despite these steps, there remains a notable gap in how the judiciary interprets and enforces these measures, particularly when it comes to harmonizing national strategies with some global commitments like the Paris Agreement. Tanzania's inconsistency with the Paris Agreement significantly undermines efforts for global climate change mitigation. The country finds it hard to harmonize its policies with what other nations of the world have committed to, and this weakens the collective struggle against adverse climatic change. This inconsistency may be observed in various ways, at both local and global levels. For example, Tanzania aims to reduce its greenhouse gas emissions by 30-35% by 2030, but the implementation of this target remains unclear.[5] It is the case that not only such government and legislative actions are important, but also the dimension of mapping and drafting detailed analysis of the effectiveness, compliance, and localization of the said policies is missing. Furthermore, there is a scarce appraisal of the initiatives concerning the socioeconomic conditions set forth combating climate change or the global frameworks set forth for effectiveness and equity purposes.[6] This underscores that there is an urgent need to assess the effectiveness of the judiciary particularly in addressing those challenges and holding the government of Tanzania accountable for its climate action.

Furthermore, the judiciary ought to be the strength in fighting climate change as it is a tool through which governments and corporations can be held accountable for their activities that damage the environment, and

[3] Art 3 of the Paris Agreement, 2015, obligates states to undertake and communicate ambitious nationally determined contributions (NDCs) to the global response to climate change.
[4] NCCRS, ibid, (n.3).
[5] P.M. Ndaki, et al. Role of Renewable Energy Policies for Effective Climate Change Mitigation Actions in Tanzania, (2022) *Journal of The Geographical Association of Tanzania*, 42(2), 23-52. doi: 10.56279/jgat.v42i2.159.
[6] The Paris Agreement, ibid, n.4, art 7.

citizens who have been affected in one way or another can get redress. Judges from different jurisdictions are increasingly taking matters into their own hands and defying the ignorance of their parliaments, claiming that they must interpret and apply the law in a manner that deals with the present environmental issues. Notable figures like Justice Douglas of the American Supreme Court and Lord Carnwath of the British Supreme Court underline the judiciary's critical role in holding governments and corporations responsible for environmental damage.[7] Their viewpoint emphasizes the judiciary's responsibility in translating international obligations, such as those established in the Paris Agreement, into concrete environmental safeguards. Justice Benjamin of the Federal District Court of Curitiba in Brazil expresses this stance, emphasizing the need for the court to effectively enforce environmental legislation and preserve the right to a healthy environment.[8] His perspective highlights the crucial need for judicial intervention in locations where climate change is a direct threat to community health and livelihoods. This proactive approach is critical to effectively fighting the negative consequences of climate change.

Justice Preston of Australia goes on to argue that environmental rules should be actively implemented through rigorous judicial reviews rather than becoming just ambitions.[9] His emphasis on investigating both public and private players guarantees that environmental legislation and international commitments are followed, increasing the judiciary's role in the implementation of climate change mitigation initiatives. In Tanzania, the ideals of judicial independence and integrity, as defined by former President Julius Nyerere and Justice Mwalusanya, are critical considering climate change. Nyerere's claim that judicial independence does not imply isolation from national life underlines the significance of judges exercising their judgment and integrity to serve justice without extraneous interference. Justice Mwalusanya advocates a balanced approach in which courts navigate between government instructions and social realities, making rulings that consider current community needs and long-term environmental implications.[10] The court in diverse countries agrees

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[7] See *ClientEarth v. Secretary of State for the Environment, Foodand Rural Affairs,* [2015] UKSC 28.

[8] A.H. Benjamin, Ruling in *Federal Public Ministry v. Union of Brazil and Others*, Federal District Court of Curitiba, Retrieved from https://climatecasechart.com/non-us-case/federal-public-prosecutors-office-mpf-v-brazil-and-others-sea-advance-and-coastal-erosion/. (Last Accessed August 28, 2024).

[9] Gloucester Resources Limited v. Minister for Planning (2019) NSWLEC 7,

[10] J.L. Mwalusanya, Checking Abuse of Power in a Democracy, Constitutionalism and the Legal System in a Democracy, in S. H. Bukurura, *Judiciary and Good Governance in Contemporary Tanzania. Problems and*

that it must actively deal with and adapt to the difficulties presented by climate change.

Despite the courts' commendable role, the judicial response to climate change in Tanzania faces significant challenges that undermine effective litigation and policy enforcement. These barriers arise from a combination of legal, institutional, political, and economic factors that collectively constrain the judiciary's capacity to address climate-related issues comprehensively. The lack of a strong legal framework particularly designed for climate change considerably hinders the court's capacity to settle such cases successfully. Lacking clear legislative regulation, courts frequently rely on legal doctrines, which are insufficient to address the complex nature of climate challenges.[11] Additionally, judicial unwillingness to contest climate change cases, frequently dismissing them on grounds of justiciability, involving doctrines of *locus standi* and political questions, further limit progress.[12] Moreover, the implementation of the Paris Agreement introduces its own set of issues that confuse the international efforts to fight climate change. The principle of differentiated responsibilities which is considered an international environmental standard giving rights and duties among developed and developing nations, creates difficulties in achieving consensus on emissions reductions and financial commitments.[13]

The introduction discussion of this study revolves around the submission that, the judicial response to climate change in Tanzania is coiled into legislative and institutional constraints, judicial conservatism, justiciability issues as well as political and economic challenges. However, there are indeed notable ways that the judiciary can help in shaping or formulating such policies by adopting a proactive approach to influencing environmental policies that extend beyond short-term political and electoral cycles.[14] Tanzanian courts can emphasize the crucial role of judicial activism in climate change litigations by encouraging judges to address environmental issues that may not be adequately managed by

Prospects, Chr. Michelsen Institute Report, Bergen Norway, 1995, retrieved from https://core.ac.uk/reader/59168440 (last accessed on 20/08/2024).

[11] H. I. Majamba, *Emerging trends in addressing climate change through litigation in Tanzania*. *Utafiti*, 18(1), (2023) 1–23. https://doi.org/10.1163/26836408-15020070.

[12] K.K. Fischer, 'The Legitimacy of Judicial Climate Engagement' (2020) 46(3) *Ecology Law Quarterly* 731.

[13] L. Wu, 'Paris Agreement: A Roadmap to Tackle Climate and Environment Challenges' (2016) 3(2) *National Science Review* 153. https://doi.org/10.1093/nsr/nww030.

[14] A. Luttenberger, and L.R. Luttenberger, (2015). *The role of the judiciary in combating climate change and environmental protection*. *54*(169), 515–531.

legislative bodies. Judicial activism often manifests through the judiciary's willingness to expand the locus stand and interpret laws in ways that prioritize addressing climate protection.[15] Though these limitations are constraining in terms of Tanzania's judicial response, these opportunities illustrate the likely substantial transformational possibilities afforded the judiciary system in advancing climate change within an emerging jurisprudence framework and for adopting national efforts on international climate change commitments. This introductory analysis supports the study's objective through doctrinal research and expert surveys examining the judiciary's role in climate change in Tanzania while considering the Paris Agreement on climate change issues and environmental justice.

2.0 Integrating the Principles of the Paris Agreement into Tanzanian Judicial Practice: Progress and Challenges

The principles of the Paris Agreement and their application within the Tanzanian judiciary have both achievements and difficulties. One of the most notable is the common progress that exists between the United Nations Framework Convention on Climate Change (UNFCCC)[16] and the Paris Agreement, in particular, these two documents are united in the aim of fighting climate change through resilience and adaptation.[17] Both documents emphasize sustainable development, human rights protection, precautionary measures, and resilience and adaptation strategies, all of which become visible at certain levels in Tanzania's judicial decisions. Such court decisions do not appear to cite the Paris Agreement but pronounce the jurisprudential reasoning regarding environmental protection stated under the UNFCCC.

2.1 Tanzania's Legal Commitment to the UNFCCC and the Paris Agreement

The judiciary plays a significant role in fulfilling a state's international legal obligations in relation to the climate through the application and enforcement of national and international laws. Courts can order states to take more aggressive climate measures and consequently serve as change agents when the government fails to act.[18] Tanzania's legal commitment

[15] D. Castagno, (2024). *Challenging legal standing in climate change litigation*. *14*(1), 47–72. https://doi.org/10.1163/30504856-14010003.

[16] The United Nations Framework Convention on Climate Change, (UNFCCC) 1992.

[17] Yamineva, Y. and Löther, N. *The UNFCCC and the Paris Agreement* (2024) 249–252 https://doi.org/10.4337/9781802209204.ch47.

[18] In *Festo Belegele and Others v. Dar es Salaam City Council,* Miscellaneous Civil Cause No. 45 of 2001,

to UNFCCC and the Paris Agreement is an indication of the readiness to take part in international efforts geared towards addressing issues dealing with climate change and sustainable development. This commitment is evident through the integration of climate principles into national policies and strategies, but the effectiveness of these efforts links very much on the ability of the judiciary to enforce adherence to the concepts that will be articulated.

Tanzania is a signatory to the UNFCCC and the Paris Agreement, and the two treaties are part and parcel of their overall policy on environment and sustainable development.[19] UNFCCC provides a global response to climate change by reserving legally binding commitments on countries to reduce pollution emissions, develop plans for adaptation and provide means and technology to developing countries.[20] For Tanzania, this commitment has materialized in several national policies such as Tanzania National Climate Change Strategy that facilitates climate change adaptation and mitigation integration in the agriculture, energy and forestry sectors among others.[21] For the Paris agreement, Tanzania has presented its Nationally Determined Contributions (NDCs) in which it has pledged to abate the gas emission rate by 30-35% by the year 2030 whereby about 138 - 153 Million tons of Carbon dioxide equivalent (MtCO2e)-gross emissions is expected to be reduced.[22] This means that the set targets complement the Paris Accord's objectives, which aim to keep the global temperature rise above pre-industrial levels to no more than 2 degrees. At the same time, it is pursuing efforts to restrict the rise of global temperature to 1.5 degrees. The incorporation of such principles within Tanzania's policy context particularly through NDCs is an indication of understanding the pressing need to act toward dealing with climate change issues. This is supported and empowered by the NCCRS policies such as the Environmental Management Act[23] including the

High Court of Tanzania at Dar es Salaam, the Court compelled the Dar es salaam City Council to adopt appropriate waste management practices and stressed on the constitutional provision of the fundamental right to a healthy environment creating a strong legal framework for future controversies regarding climate change.

[19] Tanzania became a signatory to the UNFCCC on June 12, 1992, and ratified it on April 17, 1996, and became a signatory to the Paris Agreement in 2016, and ratified the agreement in 2018.

[20] UNFCCC, *above at note* 17, art 4.

[21] The National Climate Change Strategy (NCCS), 2012-2018, which is now been replaced by NCCRS 2021- 2026, *above at note*.3.

[22] URT-Vice President Office, National Determined Contributions (NDC's), 2021, p. 12, https://droughtclp.unccd.int/node/2190/printable/pdf (Accessed on 14.12.2024)

[23] Cap. 191, R.E. 2019.

commitments made towards impact assessments, sustainable land use, and forestry management practices.

The mechanism of accountability in the climate change agenda is addressed in the Paris Agreement's transparency provisions which include regular reporting by participating nations of Green House Gasses emissions, and measures to reduce and shift the effects. Tanzania has established the Climate Change Technical Committee to assist in the reporting process of the country and ensure that the country meets its obligations under the UNFCCC.[24] Yet the achievement of these obligations through the legal system still presents a gaping problem. Most of the policies for climate change in Tanzania are governed by enacted legislations in particular the Environmental Management Act and EIA regulations[25] which provide those major developments should be subjected to environmental impact assessment. These regulations arguably serve the purpose of article 4 of the UNFCCC of fostering development by promoting projects that do not destroy the ecosystem and contribute great GHG emissions. Nevertheless, the enforcement of these provisions is not uniform. In 2019, the Tanzania National Environmental Management Council (NEMC) issued an Environmental Protection Order (EPO) that provided directives to Acacia Mining (now part of Barrick Gold) to address pollution issues surrounding the tailings storage facility.[26] The fine imposed on the mine at that time was 5.6 billion Tanzanian shillings ($2.4 million), accompanied by a strict ultimatum to comply with environmental laws or face serious consequences. This came after several previous fines and disputes regarding the discharge of toxic substances and failure to follow environmental guidelines.[27] The reason cited for the NEMC order was non-compliance with environmental safeguards, raising major concerns about the legal compliance of significant development projects. In this context, the fine highlighted the urgent need for legal instruments that are more aligned with the Paris

[24] Tanzania and the United Nations Framework Convention on Climate Change: Functions of the National Climate Committee, https://unfccc.int/resource/ccsites/tanzania/coord/function.htm (last accessed on 15.12.2024).

[25] The Environmental Management (Environmental Impact Assessment and Audit (Amendment) Regulations, 2018.

[26] Mining Technology, Tanzania fines Acacia $2.4m over environmental damage, May 2019 https://www.mining-technology.com/news/tanzania-fines-acacia-2-4m-over-environmental-damage/?cf-view (Accessed 15.12.2024).

[27] Mining Technology, Tanzania fines Acacia Mining for breaching environmental regulations, January 2019, https://www.mining-technology.com/news/tanzania-fines-acacia-mining-environmental/ (last accessed 15.12.2024).

Agreement and clearly outline how to achieve climate goals through government, corporate, and individual actions. While this dispute emphasized the need for environmental protection, there has not been a broader judicial movement toward deeper climate justice accountability.[28] The legal commitment by Tanzania to the UNFCCC and the Paris Agreement principles is indeed a major move that can be seen to be directing the efforts of the country to global climate governance. The translation of these signatures into measures that can be reinforced through the courts still stands out as a major issue.

2.2 Judicial Reasoning on Environmental Protection and Climate Resilience in Tanzania

Judicial reasoning on environmental protection and climate change in Tanzania is governed by the principles of sustainable development, respect for human rights, and adaptation to climates. The judiciary normally applies a precautionary approach that emphasizes on protection of the environment and the ecosystem for the benefit of humanity as well as for the fulfillment of global commitment on climate change including the Paris Agreement.[29] Economic activities such as land and industry use are often litigated against the constitutional right to a clean environment in an attempt to strike a balance and ensure justice and corporate responsibility. This perspective ties up environmental concerns and human rights and forms the basis for climate change mitigation strategies.

In *Chama cha Wafugaji Tanzania (CCWT) & Others v. Tanzania Forest Services Agency & Others*,[30] the court sought to appreciate the economic needs of pastoralist people while protecting the environment. While unfounded conservation efforts sought to stop the former, the court's decision to deny the *mareva injunction* sought to stop the latter reinforced the broader public good and the long-term ecological perspective. This assertion proved that the judiciary has business of following the precautionary principle which is meant to avoid the occurrence of environmental degradation by acting in anticipation of national and international obligations on environmental issues. The court also stressed the interdependence of the human rights and the environmental resources,

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[28] S. Jodoin, 'Transnational Legal Process and Discourse in Environmental Governance: The Case of REDD+ in Tanzania' (2019) 44(4) *Law and Social Inquiry* 1019, doi: 10.1017/LSI.2019.7.

[29] O. Kelleher, *incorporating climate justice into legal reasoning: shifting towards a risk-based approach to causation in climate litigation* (2022) *Journal of Qualitative Research in Tourism*, **13**(1) doi: 10.4337/jhre.2022.01.12.

[30] (Misc. Civil Application No. 22804 of 2024) [2024] TZHC 9262 (5 November 2024).

stressing the people's right to a clean environment. It admitted that the forest was important for climate resilience, such as prevention of soil erosion and increasing carbon sequestration, thus complementing Tanzania's climate change adaptation measures within the framework of international agreements such as the Paris Agreement.

Similarly, in the case of *Mohamed Abdallah Champunga and others v. Nliendele College of Agriculture (MATI)*,[31] the courts further observed the importance of land-grabbing protection in the development context. In this case, the judges acknowledged that the plaintiffs depend on land for their livelihoods and therefore emphasized fairness in the process of acquiring land. The court also emphasized the need to consult people, pay them for land reasonably, and follow legal processes, which reestablished human rights principles provided in the laws of Tanzania and in international treaties as the African Charter on Human and Peoples Rights. The judgment also promoted smallholder agriculture, which contributed to food security and climate change resilience, and stopped the increase of climate-related vulnerabilities arising from involuntary resettlements. In *Bismark Hotel Mining Company Limited v. Pangea Minerals Limited*,[32] matters related to the environment within industrial practices were addressed. Although some aspects remain obscure, the judgment placed emphasis on the need for companies to take responsibility and comply with environmental laws as part of sustainable development principles. The judiciary emphasized the right to a clean and healthy environment by holding mining activities responsible for environmental and climate matters. This also touches on the issue of human rights and the expected outlook of industrial activities.

In urban environmental instances, *Festo Belegele & Others v. Dar es Salaam City Council,*[33] and as well as *Felix Joseph Mavika v. Dar es Salaam City Commission*,[34] it was ruled that the municipalities were liable for the failure to manage waste correctly as well as the failure to plan the cities in ways that reduced the environmental impact and hence contributed to challenges of climate, flooding for instance. These decisions forced local governments to comply with effective waste management practices, hence the constitutional right on the right to a

[31] [2021], HC 2 of Tanzania, Mtwara District Registry.
[32] [2024] TZHC 7434.
[33] Festo Kabelege case*, above at note 18.*
[34] Miscellaneous Civil Cause No. 316 of [2000], High Court of Tanzania at Dar es Salaam.

clean and healthy environment was firmed. The courts tackled aspects of global warming and targeted enhancing the adaptation capacity at the local authority level, this stood as the precursor to engendering growth of Tanzanian climate change jurisprudence. It is quite clear that the judicial arm is key to fostering climate resiliency for the people of Tanzania. The courts display the ability to interpret laws in a manner that takes into account international obligations on climate change and constitutional law by harmonizing development with environmental protection. This provides a basis for the development of climate change case law, which enhances the accountability of parties and encourages the adoption of more sustainable activities.

The problems of enforcement and compliance, as already mentioned, point to the need for strong judicial measures to fill the gaps between legal pronouncements and how these decisions are affected in practice. These challenges also point to the fact that the consolidation of the court system of the law not only prevents the resolution of conflicts but also assists in establishing practices that comply with the requirements of the Paris Agreement. Thus, the judiciary serves as a key driver in the transformation of climate governance in Tanzania, making its role central to achieving the objective of this study.

2.3 Integrating the Paris Agreement into Judicial Decisions in Tanzania: Issues and Barriers

Even though Tanzania signed the Paris Agreement on Climate Change, the court system in that country has not seemingly participated much in climate change-related litigation. This is even though Tanzania has made a formal commitment to the Agreement. Numerous other factors hinder the adoption of the Paris Agreement in the legal frameworks implementing the agreement. A few examples of these challenges are legal loopholes, limitations in institutional structures, and other barriers.[35] The cumulative effect of these factors makes it more difficult for the judiciary system of Tanzania to link the country's different legal structures with the requirements of the Paris Agreement. This has to do with the fact that Tanzania signed the Paris Agreement.

The main challenge faced by the judiciary sector of Tanzania in enforcing climate change enacted under the framework of the Paris Agreement is

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[35] R. Kibugi et al, *Enabling Legal Frameworks for Sustainable Land-Use Investments in Tanzania: Legal Assessment Report* (2015) https://doi.org/10.17528/CIFOR/005755. (Last accessed 16.12.2024).

the lack of Comprehensive international laws enacted domestically.[36] This problem arises out of two legal aspects: the shortcomings and weaknesses of the Environmental Management Act (EMA) and the provision in the constitution to the effect that every international treaty has to be incorporated into domestic law through parliament. The EMA, as the main law of the environmental management of Tanzania, is indeed concerned with sustainable management of the environment and natural resources, however, it is not directed at climate change or the obligations established under the Paris Agreement.[37] Elements of climate change governance and management such as mitigation, adaptation strategies, or greenhouse gas compliance mechanisms such as carbon trading, are simply not existent. This barely enables the courts to have any legal basis to hear and determine cases arising out of climate change issues or to seek to implement international climate obligations within the jurisdiction of Tanzania. Another thorn in their flesh is Tanzania's constitutional requirement under Article 63(3)(e) which provides that treaties are self-executing after Parliament has domesticated them.[38] Even though the Paris Agreement has been ratified by Tanzania since 2018, no law has been enacted to bring the terms into the domestic law meaning it has no binding force in terms of the country. Therefore, it follows, that unless the principles of the Paris Agreement were incorporated into domestic legislation or other laws fortified them, the judiciary cannot apply the terms of the agreement and give effect to it.[39] This legislative limitation affects the ability of the judiciary to deal with issues relating to climate change. The courts do not have the power necessary to enforce the observance of international climate change commitments, which means the implementation of international climate obligations remains on paper only. In contrast, neighbouring countries such as Kenya and South Africa have enacted strong climate laws, including international treaties and the Paris Agreement. A national disaster fund is also set up considering the Climate Change Act in Kenya[40] as well as the National Environmental Management Act of South Africa[41] which strengthens their climate jurisprudence. To address these gaps, Tanzania should revise the

[36] H.I. Majamba, *Emerging trends in addressing climate change through litigation in Tanzania, above at note* 11.
[37] Ibid.
[38] The Constitution of the United Republic of Tanzania, 1977, Cap. 2, as amended from time to time
[39] R. Kabugi, *Enabling Legal Frameworks for Sustainable Land-Use Investments in Tanzania: Legal Assessment Report*, *above at note* 36.
[40] The Climate Change Act, 2016, sec 25.
[41] National Environmental Management Act, 1998 (NEMA), sec 24F

Environmental Management Act so that it pays attention to climate change and provisions that complement the Paris Agreement. The parliament should also consider the enactment of the Paris Agreement into law as a way of enforcing international obligations at the national level.

Tanzania's scarcity in legal precedents on climate change and the Paris Agreement inhibits the application of the judiciary in climate change governance.[42] Considering the international operational context and the growing climate change law, the courts have faced minimal claims of climate law violations in seeking redress to development goals. This problem is compounded by the fact that the judiciary tends to follow domestic law and ignore international law in the absence of legislative backing. A typical illustration is the litigation of *Chama cha Wafugaji Tanzania v. Tanzania Forest Services Agency*.[43] In this case, the court discussed issues that pertained to the environment and land rights; however, it was silent on the international environmental principles that would have bolstered the claims of the plaintiffs. Such situations highlight a more general issue which is, that judges are limited partly by the fact that domestic law does not conform with international treaties such as the Paris Agreement.

This situation is self-perpetuated where the absence of judicial experience discourages litigants from instituting climate-related cases which in turn stunts the judiciary from acquiring the requisite skill and confidence to handle such matters.[44] Therefore, Tanzania does not have a binding precedent for the distribution of expenses in such matters, which weakens the Paris Agreement and the judiciary's role in establishing climate change policy. Hence it hinders the implementation of the Paris Agreement. Thus, it inhibits the implementation of the Paris Agreement. In this regard, the specific recommendations would be to train the nation's judiciary on the specific mandates of the Paris Agreement, promote litigation campaigns to build precedent and empower Tanzania's domestic legal framework. Such a measure will help the judiciary better deal with the problems posed in the context of climate change and improve the national structure for climate governance.

[42] H.I. Majamba, *Emerging trends in addressing climate change through litigation in Tanzania, above at note* 11.

[43] Chama cha Wafugaji case, *above at note 31.*

[44] M. E. Burge, 'Without Precedent: *Legal Analysis in the Age of Non-Judicial Dispute Resolution'* (2013) Social Science Research Network.

Another existing challenge is the unreliability of the Nationally Determined Contributions (NDCs) in Tanzania which present substantial challenges to the constituency's effective compliance and implementation of the goals enshrined in the Paris Agreement. More legally binding, the Paris Agreement that Tanzania signed in 2015 has committed to reducing global warming to at least two degrees Celsius on pre-industrial levels in principle means reducing more than half of Greenhouse gas emissions per capita by 2050.[45] These critical climate change mitigation targets have been on tables without specific details on how nations intend to achieve them after most nations ratify this agreement. Tanzania has not submitted any other NDC since 2021, which further complicates the situation created by the voluntary submissions of the NDCs under the Paris Agreement.[46]

Article 4, the Paris Agreement obliges every nation to submit NDCs and update them regularly. Even though the Agreement does not have punitive measures for violation, embedding these obligations into national legislation or associating them with constitutional provisions, like the right to a customary climate, provides grounds for intervention by the court. National and international courts can order states to start performing their NDCs based on the principles of reasonable expectations, consideration of the public interest, and climate change policies that have been enforced through litigation. For example, in *Ashgar Leghari v. Federation of Pakistan,*[47] the State was required to adopt its climate change policies for the right of the people to be protected. The absence of clear commitments weakens the application of Paris Agreement principles, which depend on robust and transparent national frameworks to support judicial enforcement.

Moreover, procedural barriers present significant drawbacks to obtaining justice for the claimants who wish to initiate climate cases. One such constraint involves the high-standing requirements in the Tanzanian courts regarding whom may bring a case.[48] Standing is the legal right to

[45] NDCs, 2021, *above at note 22.*
[46] UN Climate Change, Nationally Determined Contributions Registry, 2024 https://unfccc.int/NDCREG?gad_source=1&gclid=CjwKCAiA9vS6BhA9EiwAJpnXwwo6lyfei2JBiFkbrReyLGVjSS2pk_V9SDVf-WX3SpqVMehDmjjRRRoCpkIQAvD_BwE (last accessed 16.12.2024).
[47] [2015] W.P. No. 25501/2015 (Lahore High Court),
[48] The Constitution of the United Republic of Tanzania, Cap. 2, Art 30 (3); Order VII Rule 1(e) of the Civil Procedure Code, Cap. 33 R.E. 2019 and the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2019, sec 4(1) 5 and 6.

initiate a lawsuit. To have standing, a person must be sufficiently affected by the matter at hand, and there must be a justifiable issue that the court can resolve.[49] Such a situation presents difficulties for public interest litigants as in the case of civil society organizations or public citizens interested in protecting the environment or climate change to initiate litigations on behalf of their communities or the future generation, who are vulnerable to climate change. In the absence of simple participation rules, climate litigation is confined to several participants, restricting the reach and effectiveness of litigation measures. For example, civil society members or groups who wish to challenge government policies concerning climate change are often denied because they cannot meet the requirement of harm showing direct personal suffering. Public interest litigation on contemporary Maasai displacement from their ancestral land linked to conservation strategies and climate change mitigation efforts in Tanzania are made hard to achieve.[50] For a more varied judicial response to climate concerns, there is a need to reconsider the standing requirements so that wider participation can be allowed and those cases dealing with the environment and public interest can be in focus.

Furthermore, the existence of non-justiciable directive principles in Tanzania's Constitution constitutes a great challenge to the realization of crucial policies aimed at sustainable development and conservation of the environment through judicial means. This limitation is spelled out in the Constitution of Tanzania which in straightforward language says "the provisions of the Fundamental Objectives and Directive Principles of State Policy…are not enforceable by any court" and also that "no matter which court shall have the competency to adjudicate whether or not any person or any court action or omission, any legislation or judgment is consistent with the provisions of this Part of this Chapter"[51] Directive principles contain guidelines and straight goals that should be followed by the government in the formulation of policies, but which courts cannot put an enforceable law upon. This creates a gap that exists between what is written in the constitution and what must be implemented. The lack of judicial enforceability means that even where there is a policy agreement to the effect that within the framework of that policy, sustainable development, or environmental protection is recognized, such

[49] Garner, B.A. Black's Law Dictionary (11th Edition), Thomson Reuters, 2019.
[50] Gloppen, S. 'Public Interest Litigation, Social Rights and Social Policy' (2005).
[51] The Constitution of the United Republic of Tanzania, ibid, n. 49, Art 7(2).

commitments cannot be determined by any court of law at all. This limitation creates a barrier to communities and individuals trying to hold the government liable for climate change, emissions cuts or natural resources depletion or non-implementation of climate change commitments.

Combating these issues and barriers calls for a comprehensive strategy that encompasses legal reforms, improved training for judges, and greater involvement of the public in order to empower the courts to take effective action against climate change in Tanzania. This measure will enhance the contribution of the judiciary to the overall climate change governance of the country, especially considering the relevance of the Paris Agreement in the processes of development of climate change laws.

3.0 The Role of the Judiciary in Advancing Climate Accountability: Lessons from Tanzania and Beyond

As a party to the UNFCCC, Tanzania has incorporated important principles into its legal framework whereby courts have continued rendering decisions based on principles of jurisprudence for environmental protection. Cases in Tanzanian courts regarding these principles have already been decided in respect of the country's obligations under the UNFCCC. It should be noted that although none of the specific principles of the Paris Agreement are mentioned in Tanzanian judgments, some aspects of these principles can be seen in the supporting opinions of decisions on environmental and climate-related cases. Understanding the role of the judiciary in promoting climate accountability both in Tanzania and beyond, is crucial for identifying judicial approaches and precedents that can effectively integrate Paris Agreement principles into Tanzanian climate change jurisprudence.

3.1 Landmark Tanzanian Cases: Contributions to Combating Climate Change and Adaptation

Landmark climate change cases in Tanzania have been profoundly associated with the development of the legal framework in the country regarding environmental issues, focusing on combating climate change and assisting in its adaptation. Analyzing these cases, however, a clear division in context becomes evident, that is the division between the cases decided before the signing of the United Nations Framework Convention on Climate Change (UNFCCC) and those decided after. The earlier cases mostly discussed other forms of environmental disputes without any

direct focus on climate issues. In *Festo Belegele and Others v. Dar es Salaam City Council*,[52] the plaintiffs maintained that the City Council was unable to manage garbage disposal activities conveniently harming the environment and increasing floods which was alarming to climate change. In this case, the action was brought before the high court against the city council and the government for failing to regard the environmental management orders from the ministry which was a breach of the law. The judgment compelled the City to adopt appropriate waste management practices and stressed on the constitutional provision of the fundamental right to a healthy environment creating a strong legal framework for future controversies regarding the protection of the environment.

In the same fashion, in *Felix Joseph Mavika v. Dar es Salaam City Commission*,[53] also, the high court examined and determined the issue of environmental degradation resulting from ineffective garbage disposal and haphazard town planning by the city authorities. The court found in favour of the plaintiff, arguing that the City Commission's decision violated environmental laws and that the development would cause significant ecological harm. The judgment underscored the need for proper compliance with environmental regulations in development projects. Similarly, in the case of *Construction Company Limited v. Peter E.M. Shayo*,[54] the court examined a case that arose from an argument regarding a construction project and the environmental curb of the neighboring property. The plaintiff, Shayo, contended that however careless construction plans were and the absence of environmental measures, most of his land and, indeed, the environment was treated badly. The court upheld the appeal by Shayo, emphasizing the need for environmental impact assessments and the strict adherence to building regulations to avert ecological damage. Such a case was a turning point in making it mandatory to take care of the environment while carrying out any developmental works, impressing upon the companies the obligation to do so as a part of compliance standard.

Moreover, the case of *the National Agricultural and Food Corporation v. Mulbadaw VC and Others*[55] involved the negative environmental impact resulting from intensive farming practices. The court highlighted the

[52] Festo Belegele Case, *above at note 18.*
[53] Felix Joseph Mavika case, *above at note 34.*
[54] [1984] TLR 127.
[55] [1985] TLR 88.

responsibility of both the state and business sectors to respect the principles of sustainable development and the threats of environmental degradation. The verdict recommended a middle ground between agricultural development and environmental protection, thus reaffirming the courts' responsibility to protect the environment and accountability for offenders. It may be noted from the above court decisions that all centred on various environmental disputes without specifically addressing climate change concerns. However, the precedents set in these rulings provide a foundation for future court decisions, guiding reasoning on climate change mitigation and adaptation measures.

After the adoption of the UNFCCC, the climate change concerns expanded in the cases decided by the courts and their judgments revolved around the theme of environmental adaptation and mitigation. This evolution is evident in landmark cases where courts have increasingly emphasized sustainable development and environmental protection while aligning their reasoning with principles under the United Nations Framework Convention on Climate Change, particularly equity, sustainable development, and the precautionary approach. Although the court decisions during this period do not explicitly apply the provisions of the Paris Agreement, they serve as an essential base for the future expansion of the jurisprudence on climate change adapting the understanding and computation of its goals. In *Andrew Mahundo and others v. The Permanent Secretary the Ministry of Natural Resources and Tourism and Others*,[56] the complainants opposed government conservation measures alleging that they trespassed on land rights and violated the socio-environmental welfare of local populations. The court agreed that there was a need to for the community rights to be taken into consideration in as much as conservation initiatives were undertaken, which corresponds to the principle of sustainable development as contained in the UNFCCC.

The judgement highlighted the necessity of promoting the protection of the environment and at the same time ensuring that there are adequate strategies to provide for and respect the rights of the local people, thereby supporting the development of climate change adaptation strategies that are socially just. Similar sentiments were echoed in *Makundi and Others v. The Managing Director Bulembia Gold Mine Limited,*[57] where the

[56] [2018] TZHCL and D 45.
[57] [2013] (Unreported).

plaintiffs cited the loss of vegetation cover mining activities as well as habitat destruction and contamination of water bodies which were necessary for the support of ecosystems and the climate. The court underscored the need to conduct proper environmental assessments prior to such activities and the need to comply with the set environmental regulations to erode such consequences. This is the case for adopting a precautionary approach as posited under the UNFCCC especially regarding projects where the alteration of climate has far reached impacts, so that environmentally damaging activities are kept at bay even if there is a risk of them occurring. The displacement of populations residing in areas designated for conservation took center stage. The plaintiffs argued that the court's measures overlooked the socio-economic rights and, specifically, the climate adaptation needs of the affected people. The court stressed the need to have environmental policies fully integrating the social welfare of the concerned communities and further that conservation policies must go beyond climate change and focus on integration into a wider spectrum of development. This great decision seems to be in line with the equity principle under the UNFCCC which calls for a more holistic approach in addressing climate change especially considering the reality that the impact of climate change affects different groups differently. These cases collectively demonstrate some of the slowly and recently developing bodies of law addressing climate change and its impacts in Tanzania. The courts were able to go beyond dealing with the local environmental issues to focusing on climate change adaptation and mitigation for the subjects at hand. These decisions taken together with the above decisions also promise better development of climate change law in future.

Several climate change-related cases have been adjudicated by the judiciary following Tanzania's signing of the Paris Agreement in 2016. Despite this, a significant gap in these cases is the absence of direct references to the Paris Agreement, which could have strengthened the legal arguments supporting efforts aimed at climate change mitigation and adaptation. In *John Barnaba Machera v. North Mara Goldmine Ltd*,[58] The issue was mining activity and its negative effects on those who lived in the local community and the environment. In this sense, the court recognized the environmental damage done, but tragically, because of these laws, the court did not incorporate the Paris Agreement’s principle of sustainable development, which could have stressed the need to ensure

[58] [2023] TZHC 15926 .

economic advancement in conjunction with the environmental and social aspects.[59] In the case of *Bismark Hotel Mining Company Limited v Pangea Minerals Limited and others*,[60] The court dealt with mining operations that caused deforestation and other forms of ecological damage. The decision was predominantly based on compliance with national environmental laws and unfortunately ignored the Paris Agreement principle of mitigation, which requires action to prevent emissions and damage to the environment.[61]

Additionally, in this regard, the decision in *Tanzania Ports Authority v M/S Reza Company Limited,*[62] dealt with the problem of industrial activities and how they contributed to environmental degeneracy and the effect the degeneracy had on the people. In as much as the court decided the case in line with controlling the breach of environmental legislation, it did not strengthen its enforcement since it missed the opportunity to apply the Paris Agreement principle of climate adaptation which would have suggested how to strengthen measures against environmental changes.[63] Similarly, in the *Iddi Babu v. Grace Sillo Wawa and Others*[64] case stemmed out of a land contention wherein environmental degradation because of development was the topic of debate. While the parties recognized the importance of fighting for the environment, the case didn't utilize the Paris principle of sustainable development where the decision could have focused more on environmental conservation whilst making decisions on how the land would be allocatively utilized in a fair manner discussing plans.[65] Furthermore, the case of *Suleiman Ryoba Chacha v. North Mara Gold Mine Ltd*[66] has gone into the claims that the mining sites caused water pollution that risks the community's health and living species around the area. The conclusion urged the parties to follow the local environmental rules by prevailing the compliance yet the opportunity of stating the principles of the Paris Agreement on Environmental Integrity and Environmental Justice was lost which seeks to safeguard communities who suffer disproportionate impacts from industrial activities.[67]

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[59] The Paris Agreement, *above at note 3*, art 2(1)(a).
[60] [2024] TZHC 7434.
[61] The Paris Agreement, *above at note 3*, art 4(1).
[62]) [2024] TZHC 1485.
[63] The Paris Agreement, *above at note3,* art 7(1).
[64] [2018] TZHC 2724.
[65] The Paris Agreement, *above at note 3*.
[66] [2023] TZHC 20125.
[67] The Paris Agreement, *above at note 3,* Art 2(2).

In *Gaudensi George Milanzi & 19 Others vs. Masasi District Council & 2 Others*,[68] the court highlighted the issue of land allocation on developmental activities and its effects on availability of resources in the community. While the court ensured fairness in the cases of biases in the procedures of the case brought before it, the greatest Pairs Agreement protection was not invoked which protects vulnerable groups from the effects of changes in the environment which is necessary in combating the negative impacts of climate change.[69] Similarly, in *Joseph Wilrick Marimoto v Boay Village Council & 2 Others*,[70] the central issue was the right to the area's communal land and the environmental degradation done without authorization. The court decided to give the affected communities access to the land in use by the communities but ignored the principle articulated in the Paris Agreement which is the requirement of the public participation in the decision-making processes concerning the use and management of the environment and land resources.[71] Additionally, in *Maasai Stepps Conservancy Limited v Shongon Nakuta & 5 others,*[72] the court was tasked to adjudicate on the issued centered on the domination of conflicts about conservation initiatives with the access of local peoples to their ancestral lands. Although the court attempted to assist in harmonizing the aim of conserving biological resources with the needs of the community, the citation of the Paris Agreement principle on global climate change adaptation to enhance adaptive capacity was neglected yet it would have emphasized the role of community resilience in conservation.[73]

The above cases illustrate how Tanzanian courts handle environmental and land disputes, being more sensitive to sustainable development and social issues. But failure to mention the Paris Agreement principles at all is a missed chance to strengthen arguments and substantiate the domestic decisions in line with the international obligations on climate. When the courts integrate these principles into rulings in the future, they can ensure stronger outcomes that prioritize environmental protection, community welfare, and long-term climate change resilience.

[68] [2023] TZHC 21541,
[69] The Preamble of the Paris Agreement, *above at note* 3.
[70] [2023] TZHC 22570.
[71] The Paris Agreement, *above at note 3,* Art 12.
[72] [2023] TZHC 21111.
[73] The Paris Agreement, *above at note* 3.

3.2 Global and Local Climate Jurisprudence: Bridging the Gap

3.2.1 Comparison of the Judicial Response to Climate Change between the Global North & South

Adopting climate change jurisprudence in Tanzania based on principles of the Paris Agreement may be sparked by the trend on climate change precedents from the Global North and Global South. The North is made up of developed nations that remain the largest contributors of greenhouse gas emissions while the South consists of the less developed countries that inflict more level of climatic impacts than their lower emissions justify. Precedents from the Global North bring experience in the implementation of environmental compliance and enforcement, whereas cases from the Global South present challenges in meeting environmental demands and developmental aspirations. The case of *Urgenda Foundation v. State of Netherlands,*[74] is the first of its kind wherein the judiciary was able to force the executive to act against climate change. The Supreme Court also held that the Canadian population had a reasonable expectation that their government would take necessary actions to reduce climate change risks. The Khesht court ordered a 25 percent reduction in the total greenhouse gas emissions which were recorded in the year 1990 by the Government of Canada by the year 2020. This decision not only facilitated the establishment of strong jurisprudence for climate lawsuits, it also demonstrated the importance of the court in safeguarding environmental pledges made by the governments. This court decision relied upon the European Convention for Human Rights, which cannot be overemphasized, the right to life and the right to private and family life.[75]

In *Neubauer and others v. Germany,*[76] for example, the German Federal Constitutional Court held that climate legislation in the country would not prevent future generations from the effects of climate change. The court found that existing laws breached fundamental rights because they required future generations to fight climate change. Consequently, the tribunal directed the German government to implement emission-cutting measures more strictly. This decision reemphasized the fact, which would in due course be incorporated into the environmental law

[74] *The Urgenda Foundation v The State of the Netherlands (Ministry of Infrastructure and the Environment)* [2015] HAZA C/09/00456689.

[75] The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, art 2 and 8.

[76] [2021] 1 CMLR 3.

framework, that the current generation must be proper stewards of the environment to ensure a sustainable future for the upcoming generation.

Courts in the global south have made drastic efforts in combating climate change. For instance, in *Leghari v. Federation of Pakistan*,[77] the High Court of Lahore was cognizant of the threat of climate change and ordered the alien government to enforce the National Climate Change Policy and Framework. The court emphasized that the government's obligation to safeguard the environment was one of the rights of the person to life. This case set an important milestone on climate litigation in developing countries, showing how the courts can be useful in advancing the rights of the citizens against the governments for breach of environmental obligations. In Kenya the case of *Save Lamu and others v. National Environmental Management Authority and Amu Power Co. Ltd,*[78] marked a turning point in gods of environmental law. The Kenyan National Environmental Tribunal cancelled the license that had been issued for a coal fired power station because of inadequate public involvement and inappropriate analysis of the environmental effects of climate change. This case emphasized the importance of the judiciary in assisting the full and meaningful environmental assessments, especially in high-impact climate projects. For instance, in the Eastern Africa region, the case of *the Center for Food and Adequate Living Rights et al v. Tanzania and Uganda,*[79] demonstrated the importance attributing to transboundary environmental jurisdiction. Essentially, the case revolved around the construction of the East African Crude Oil Pipeline (EACOP), and the Court was invited to respond to the complaint regarding the project's environmental impacts in relation to climate change. Even though the said case is ongoing, it illustrates the increasing use and expansion of climate litigation as a legal approach for addressing the extraterritorial environmental harm perpetrated by both states and corporations.

3.2.2 A Connection between Tanzanian Cases and Foreign Precedents

Climate change litigation in Tanzania is based on climate justice and accountability for environmental harm that one can find in foreign cases. While in Tanzania, the case examines land, pollution, and socio-economy

[77] [2015] W.P. No. 25501/2015.
[78] [2019] NEMA/30/2018.
[79] [2020] EACJ.

over the environment's deterioration, in foreign countries the claim is about the responsibility of the government or corporations over climate change. In Tanzania for example, in cases of *Machera v. North Mara Goldmine Ltd*[80] and *Suleiman Ryoba Chacha v. North Mara Gold Mine Ltd*,[81] it was established that communities and environments suffered because of loss of environment due to mining, especially through water degradation. This is similar to what the Niger Delta people suffered after oil exploration in Delta as was established in *Gbemre v. Shell in Nigeria*[82] . In this case, Shell oil exploration activities exposed the community to a polluted atmosphere thus violating their health aspect and environment. Both jurisdictions emphasize the environmental sustainability of the corporations and the welfare of the people.

Likewise, in the case of *Bismark Hotel Mining Company Limited v. Pangea Minerals Limited and Others*,[83] Tanzanian court focused on deforestation and destruction of ecological systems because of mining activities. This case is concurrent with the Dutch Supreme Court decision in *Urgenda Foundation v State of the Netherlands*,[84] which put an importance to emissions control and ecosystem management by the state. Both courts regard emission reduction as one of the prerequisites to avoidance of degradation of the environment, although Tanzanian courts have not yet undertaken the jurisprudence of international climate integration within her jurisdiction. In another case, *Tanzania Ports Authority v. M/S Reza Company Limited,*[85] the court decided about the issue of environmental degradation through industrial pollution and how it affects the local population. This is consistent with the case of *Massachusetts v. Environmental Protection Agency*,[86] in the United States where the EPA was mandated to control the emission of greenhouse gases, to protect the environment and the health of the public. Industrialization and its relationship to the climate change cycle are both recognized in these cases, further demonstrating the need for regulatory policies to be developed to address these.

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[80] Machera case, *above at note*. 59.
[81] Suleiman Ryoba case, *above at note* 67.
[82] [2005] *FHC/B/CS/53/05.*
[83] Bismack case, *above at note* 61.
[84] Urgenda case, *above at note* 76.
[85] Tanzania Ports case, *above at note* 64.
[86] [2007] 549 U.S. 497.

In *Iddi Babu v Grace Sillo Wawa and Others*,[87] cited issues of land grabbing and environmental degradation due to development initiatives of other resources like where *EarthLife Africa Johannesburg v Minister of Environmental Affairs,*[88] was involved. In the South African case, the court did highlight the need for conducting environmental impact studies of projects likely to have climatic impacts. They also indicate the gaps in development planning and regulatory practices as both are critical in development evolution and the environmental sustainability aspects. The court in *Gaudensi George Milanzi & 19 Others v. Masasi District Council & 2 Others*[89] have also analyzed the issues of land allocation and how it in turn influences the community's resource access in the same fashion as *Juliana v. United States*.[90] This understanding gains further strength when one considers the fulcrum around which the Juliana case revolves, that is, the need of the United States government to advocate policies which ensure that future generations are protected from reality of climate change, but sadly both cases aim at the defence of helpless people and quite the fair distribution of resources in all spheres. In *Joseph Wilrick Marimoto v. Boay Village Council & 2 Others*[91] and *Maasai Stepps Conservancy Limited v. Shongon Nakuta & 5 Others*,[92] land disputes were about land use, preservation and usage of community's ancestral territories. These cases parallel *Leghari v. Federation of Pakistan,*[93] where the court ordered the state to begin processes for the introduction of measures that will ensure the protection of the weak society from climate change. Both categories of cases are pivotal in reinforcing the messages that the creation of community resilience should inform purchase priorities and other decision-making processes regarding climate change and conservation policies.

Every Tanzanian case examined above demonstrates a slow but gradual movement of the Tanzanian judges to the importance of climate issues, only that more could have been done to better translate the problems into practical application of the tenets of the Paris Agreement. Both jurisdictions appear to indicate that the addition of international tools assists in deepening climate arguments and in achieving the best results in

[87] Babu case, *above at note 64*.
[88] [2017] ZACC.
[89] Gaudansi case, *above at note* 68.
[90] [2020] 947 F.3d 1159.
[91] Marimoto case, *above at note* 70.
[92] Maasai Stepps case, *above at note* 72.
[93] Leghari case, *above at note note 77.*

said areas. Courts in Tanzania and elsewhere may also expand their participation as stakeholders in climate governance by incorporating international principles such as those enshrined in the Paris Agreement.

3.2.3 Future Pathways: Enhancing Climate Accountability through Judicial Reasoning

Climate accountability has developed into an important pillar for comprehensively dealing with the ever-growing adverse effects of climate change while legal reasoning contributes significantly to this story.[94] As the courts begin to handle government disputes involving the environment, resource allocation, and people's rights, they become important in domesticating international climate treaties. This section summarizes the changing role of courts across the globe in enforcing the obligations of the state, private sector, and other actors about climate change. It analyses how courts can effectively achieve climate change goals, foster sustainable development, and achieve social justice in climate change.

3.2.4 Examining the Potential for Courts to Interpret the Paris Agreement as a Framework for Accountability

The potential for courts to interpret the Paris Agreement and apply it to the issues of accountability is becoming stronger in climate change litigation as courts across the globe struggle with the relation of national responsibilities with international obligations on climate change policies.[95] The Agreement, although procedural, contains important normative content that increases the likelihood that courts will consider and intervene in enforcing state climate policies or even state inaction on climate. Such integration into arguments may constitute an important element in the quest to ensure that states are responsible for their legal and other obligations in respect of climate change policies, especially when it is invoked in the context of customary international law and human rights conventions.[96] The Paris Agreement is considered to be a major shift in international environmental law as it allows each country to pledge what they can minimize (NDCs) and report on their progress in a

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[94] O. Kelleher, 'Incorporating Climate Justice into Legal Reasoning: Shifting Towards a Risk-Based Approach to Causation in Climate Litigation' (2022) 13(1*) Journal of Qualitative Research in Tourism* https://doi.org/10.4337/jhre.2022.01.12, (Accessed on 21.12.2024).

[95] L. Rajamani, 'Interpreting the Paris Agreement in its Normative Environment' (2024) *Current Legal Problems* https://doi.org/10.1093/clp/cuae011. (Accessed on 21.12.2024).

[96] Ibid,

on regular basis.[97] However, the absence of enforceable substantive commitments is a major problem. Courts can fill this gap by construing its provisions such as the principles of a right to development, a right to sufficient food, or a right to the protection of particularly disadvantaged groups or regions against climate change, as benchmarks for assessing national policies and actions. For instance, in the case from Tanzania, *Joseph Wilrick Marimoto v. Boay Village Council & 2 Others*, the judge was faced with contention on communal land that was destroyed due to unlicensed use that was a violation of the community's rights. Even though the court stressed the importance of restoring the land to the vulnerable communities, it failed to use this opportunity to allege the principle of public participation as enshrined in the Paris Agreement. If the court had included this principle, it would have been able to reinforce this decision by providing it with the agreement's procedural guarantees of inclusiveness and responsibility. It is therefore correct to say that the major weakness of the court was the failure to appreciate the point of public endorsement of the decision which is fair and democratic.

3.2.5 Fundamental and Limiting Aspects of Judicial Reasoning in International Commitment

There are several fundamental aspects of judicial reasoning that the Tanzanian judiciary can hold significant to draw from international climate change jurisprudence to strengthen its approach to addressing climate change. Tanzanian courts have the potential to interpret the Paris Agreement as a framework for accountability. Tanzanian courts can apply the said international jurisprudence to apply them into domestic legal reasoning enhancing their response to the climate change problems in their country. Several foreign courts from the global north and global south have made landmark reasoning in the context of the application of the Paris Agreement and some factors can help in the use of the bilateral treaty as an enforcement mechanism for climate change obligations.[98] At the same time, this evolution has both drastic possibilities and certain restrictions that are inherent in the judicial reasoning processes of international obligations. The *Urgenda Foundation case* and *the Leghari case*[99] are two examples of how foreign cases force courts to look at governments through the prism of actions that have been undertaken

[97] The Paris Agreement, *above at note,* art 4(2).
[98] Jannika, J. 'The Paris Effect' (2024) https://doi.org/10.59704/c52530db37e7aea6 (Accessed on 21.12.2024)
[99] [2015] HAZA C/09/00456689.

because of the provisions of international instruments among which include the Paris Agreement. Such cases show that courts can invoke the Paris Agreement as a form of legal claim seeking greater accountability and compliance with climate change measures even when there are no specific compliance mechanisms within the Agreement itself.

To the Tanzanian judges, such logic would also mean placing their decisions under the pillars of the Paris Agreement such as sustainable development, climate equity, and climate justice. For example, in cases where there are conflicts between land use and industrial development with negative climate impacts, they could rely on Article 7 of the Agreement, which points to the need for adaptation and resilience to climate change.[100] This would be consistent with the global climate targets by ensuring that domestic ones are not written on paper only but that the visions are carried out in practice to ensure that Tanzania's adaptation and mitigation targets are delivered. Other courts would rely on procedural requirements of compliance imposed on them by Article 8, which deals with self-reporting and indictment, to monitor government and business compliance with environmental requirements.[101]

Nevertheless, adopting foreign judicial reasoning in Tanzania is not free from limitations. One of the most critical issues of judicial reasoning concerning international obligations is the question of respect for the principle of judicial independence[102] as well as respect for the sovereignty of states.[103] It is however the case that the judicial implementation of international treaties and covenants is not done in isolation from the domestic legal sphere, these treaties and covenants are interpreted within the confines of the domestic legal system. For example, Tanzanian courts may be limited if the national legislation does not incorporate the Paris Agreement, or the national legal framework is antipodal to the obligations under international law.[104] Such a limitation was apparent in cases such

[100] *John Barnaba Machera v. North Mara Goldmine Ltd case*, whereby allegations of environmental degradation caused by mining activities, which impacted local communities and ecosystems
[101] The Paris Agreement, above at note 3.
[102] The Constitution of the United Republic of Tanzania, *above at note* 38, Art 107B.
[103] Ibid, art1 - declares the country as a sovereign state bound by its constitution.
[104] Monism and Dualism in International Law - As a dualist state, Tanzania requires the incorporation of international law into domestic legislation through specific acts of Parliament before it can have legal effect within the country's legal system. https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0168.xml#:~:text=A%20dualist%20system%20treats%20the,application%20of%20that%20international%20nor m.

as Tanzania Ports Authority case,[105] in which the court was unwilling to dwell on universal law and opened its view to only local laws. The local laws' priorities dominated the centre of such an approach. The Paris Agreement is another barrier because it is declarative and self-executory without legal imposition of compliance.[106] Hence, the courts must try openness and original reasoning to make use of the agreed frameworks and legal regimes to check compliance with the principles and objectives of the Agreement. It demands that the judges to be partisan in that they must respect the international order they are to supervise while maintaining the correct standard of separation of powers so that their decisions do not invade those powers of the executive and legislative arms of government. Despite these limitations, Tanzania courts have the potential to build reasoning established by foreign jurisprudence to enhance climate change accountability.

4.0 Conclusion and Recommendations

4.1 Conclusion

This study has examined the role of Tanzanian courts in addressing climate change and examined the influence of the Paris Agreement in shaping emerging climate jurisprudence. The Paris Agreement is a landmark international treaty providing a comprehensive legal framework for climate action, especially through the Nationally Determined Contributions (NDCs), the adaptation approach, and the accountability mechanisms. However, its potential in Tanzania remains largely untapped. While the Agreement's emphasis on procedural obligations and transparency could significantly advance judicial enforcement of climate commitments, Tanzanian courts have hesitated to interpret its principles in ways that align with the local legal and institutional landscape.

The absence of explicit domestic laws mandating the enforcement of Paris Agreement provisions is a major hindrance to the effective implementation of the principles of this agreement in Tanzania. Being a dualist country, Tanzania requires legislative enactments to implement international agreements. This means that international treaties and agreements must be enacted into national law before they can be applied in Tanzania, but it is important to mention that legislation specifically on

[105] Tanzania Ports Authority case, ibid, n. 64

[106] T. Okonkwo, 'How International Law Can Deal with Lack of Sanctions and Binding Targets in the Paris Agreement' (2017) 10(5) *Journal of Sustainable Development* 225 https://doi.org/10.5539/JSD.V10N5P225 Last accessed on 20.12.2024).

climate change has not been effectively developed. This gap constrains the judiciary from applying the Agreement's provisions, leaving courts reliant on existing environmental laws, which often do not have the scope and flexibility necessary to incorporate in their decisions the intricate dynamics of climate change. Furthermore, judicial conservatism creates additional problems in this regard, as courts tend to focus on how rigidly defined statutory norms were enacted and not how the actual international rules could be utilized.

The contradiction between Tanzanian courts and the Paris Agreement is apparent in the limited number of climate-related cases and the absence of substantive judicial engagement with the principles of the Agreement. Unlike jurisdictions such as South Africa or Pakistan, where courts have employed innovative reasoning to advance climate accountability, Tanzanian courts have yet to embrace such approaches. This cautious stance reflects both legal and institutional constraints as well as the presence of a lack of public advocacy, as civil society and environmental groups have not exerted sufficient pressure to prompt judicial action on climate issues.

Despite these challenges, the study highlights the Paris Agreement’s potential to catalyze transformative change in Tanzania’s legal system. Constructing climate change as a human rights issue and adopting the Agreement’s emphasis on equity and transparency, Tanzanian courts can align international commitments with domestic realities. Integrating the Paris Agreement into judicial reasoning would require deliberate efforts, including legislative reforms, judicial capacity-building, and increased public awareness of climate accountability. These measures could enable the judiciary to move beyond its current limitations and address Tanzania’s pressing climate challenges effectively. This study contributes to academic and practical discourses by offering a nuanced analysis of the relationship between international climate commitments and Tanzanian judicial practices. It highlights the need for adaptive judicial reasoning and legislative coherence to bridge the gap between global frameworks and domestic action. Furthermore, it provides insights into how Tanzanian courts might draw lessons from other jurisdictions, specifically from the global north and global south to strengthen their role in climate governance.

4.2 Recommendations

More should be done to ensure meaningful engagement with the Paris Agreement and ensure climate change receives judicial attention in Tanzania. This requires compliance with the legislation and encouraging the judges and the public. The recommendations below present practical solutions to the identified constraints and seek to tap the opportunities provided by the Paris Agreement in building a sustainable climate law.

First, integrating the Paris Agreement into Domestic Law: Tanzania should enact comprehensive climate change legislation that explicitly integrates the principles and obligations of the Paris Agreement, including formalizing Nationally Determined Contributions (NDCs) as enforceable domestic commitments. For example, *in the Urgenda Foundation v. The State of the Netherlands* case, the Dutch Supreme Court relied on the Netherlands' NDC commitments to mandate stronger government action on emissions reductions. Enshrining NDCs into Tanzanian law and empowering courts with clear authority to adjudicate climate disputes, such legislation would establish the judiciary's role in determining compliance and holding stakeholders accountable for climate action.

Second, judicial Capacity Building: Tanzania's judicial officers require specialized training on climate change jurisprudence, including procedural and substantive aspects of the Paris Agreement. Workshops and seminars should be organized in collaboration with international legal institutions to familiarize judges with innovative judicial reasoning used by courts in jurisdictions such as the Netherlands (e.g., *Urgenda Foundation v. The State of the Netherlands* case) and South Africa (*EarthLife Africa Johannesburg v Minister of Environmental Affairs)*.

Third, the establishment of specialized environmental courts: Tanzania could explore establishing specialist environmental courts or tribunals, complete with technical expertise and dedicated to adjudicating climate-related disputes. Such institutions would adopt a focused and effective strategy for climate litigation, drawing inspiration from countries like India, where the National Green Tribunal (NGT), and Kenya, through the Environment and Land Courts (ELC), have significantly contributed to advancing environmental justice.

Fourth, promoting Public Engagement and Awareness: Raising public awareness is essential to empower citizens and civil society organizations

to address climate challenges through legal avenues. For instance, in the Netherlands, public awareness campaigns and strategic litigation by NGOs such as the Urgenda Foundation led to a landmark case compelling the government to take stronger climate action. Similarly, in Pakistan, public engagement and legal activism played a critical role in the Leghari case, where a farmer successfully sued the government for failing to implement its climate policies. Strengthening the capacity of NGOs and community-based groups in Tanzania to initiate similar strategic climate litigation can significantly enhance the judiciary's role in climate governance and accountability.

Fifth, bridging Legislative Gaps: The Tanzanian Parliament should prioritize enacting strong legislative frameworks for climate change adaptation and mitigation, including clear measures for judicial monitoring. Legislative reforms must address loopholes in enforcement and court procedures (such as *locus standi*), providing judges with clear instructions for interpreting and applying international commitments under the Paris Agreement.

Sixth, adopting a Rights-Based Approach: Tanzanian courts should adopt a rights-based approach to climate litigation, viewing climate change as a violation of fundamental rights like the right to a clean and healthy environment. This technique has been successfully used by Tanzanian courts in *Felix Joseph Mavika v. Dar es Salaam City Commission* in 2000 and *in Festo Belegele and Others v. Dar es Salaam City Council* in 2002 and foreign courts such as Pakistan *Leghari v. Federation of Pakistan* in 2015, where it is compatible with Tanzania's constitutional safeguards under Article 14 and 27 of the Constitution.

Seventh, adding Climate Science to Judicial Reasoning: To align judicial decisions with the global framework for addressing climate consequences, judicial reasoning must be firmly rooted in credible climate science. Courts should integrate expert testimony and scientific evidence to substantiate their findings, ensuring credibility and adherence to international standards. For instance, in the landmark case of *Juliana v. United States*, the plaintiffs relied heavily on scientific data to argue that the government’s failure to act on climate change violated their constitutional rights. Incorporating such practices in Tanzanian courts would strengthen the legal system's ability to address climate challenges effectively.

Eighth, encouraging Collaboration in Governance: The judiciary should actively foster collaborative governance by encouraging greater coordination among the executive, legislative, and judicial branches to advance climate action. This approach can accelerate the implementation of climate policies and enhance accountability across all levels of government. For example, in Tanzania, the collaboration between the judiciary and the Ministry of Lands and Human Settlements Development has been instrumental in resolving land disputes that often intersect with environmental concerns. Building on such cooperative frameworks, Tanzanian courts could work alongside other government institutions to ensure that climate policies are effectively executed while maintaining checks and balances to uphold transparency and responsibility.

Nineth, learning from Regional and Global Precedents: Tanzania's judiciary can learn from successful climate litigation in both the Global North and South, and tailor these precedents to Tanzania's sociopolitical and economic realities. Cases such as *Ashgar Leghari Case*[107] highlight the judiciary's ability to drive climate action, even in difficult circumstances. In related matters, Tanzania should harness international collaborations, as emphasized in Articles 9, 10, and 11 of the Paris Agreement, to enhance its legislative framework and institutional capacity for effective climate governance. Partnerships with international environmental organizations and multilateral agencies can provide essential technical expertise, financial resources, and legal support, enabling the judiciary to address climate change more effectively. For instance, Article 9 focuses on financial assistance, Article 10 emphasizes technology development and transfer, and Article 11 promotes capacity-building, all of which can be leveraged to strengthen Tanzania's judicial and legislative responses to climate challenges.

In general, it is recommended that Tanzania should develop its climate change jurisprudence and effectively address the country's environmental concerns by incorporating the Paris Agreement into domestic legal processes and encouraging judicial creativity. These proposals outline a strategy for aligning judicial practices with international climate commitments, closing gaps in legal and institutional frameworks, and empowering the judiciary to play a crucial role in Tanzania's climate governance.

[107] Leghari case *above at note 77.*

The Legal Complexities of the Relief in Division of Matrimonial Real Property upon Divorce in Mainland Tanzania: Lessons from Kenya

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Abstract
The Law of Marriage Act, 2019 *provides two main reliefs on the division of matrimonial property to spouses during divorce: The division of the property or the sale of property and distribution of proceeds. Division or sale of the property and the distribution of proceeds of the sale affects divorcing and non-divorcing spouses in polygamous marriages. Non-divorcing spouses can prevent the execution of a valid decree since their contribution or interest in the property was not considered during divorce proceedings. Courts are restricted to these reliefs since the Law of Marriage Act lacks other reliefs which take into consideration the convolutions of polygamous marriage and the intricacies of real property in the division. This article examines the legal complexities of reliefs in the division of matrimonial real property in polygamous marriages. The article uses doctrinal and comparative methodologies, exploring Kenya's reliefs during the division of matrimonial property to inform potential reforms in Mainland Tanzania's legal framework. The article asserts that the reliefs in section 114 of the Law of Marriage Act are insufficient to address the challenges of property division in polygamous divorce. The Article advocates for comprehensive legal reforms on reliefs to address the unique dynamics of polygamous marriages.*

Keywords: *Polygamous marriage, division of matrimonial real property, reliefs, Kenya*

1.0 Introduction

The Law of Marriage Act[1] (LMA) in Mainland Tanzania provides two primary reliefs for the division of matrimonial property upon divorce. These are the division of matrimonial property itself or the sale of matrimonial property, with proceeds distributed between the spouses. Section 114(1)[2] empowers the court to divide matrimonial property in

[1] 2019 Revised Edition.
[2] Ibid.

both polygamous and monogamous marriages, covering both movable and immovable property. However, the reliefs in this provision, are insufficient to effectively facilitate the distribution of matrimonial real property in polygamous marriages. This article examines the adequacy of the reliefs outlined in section 114(2) of the LMA and the challenges they present. Kenya is used as a benchmark for lessons that could inform potential reforms in Mainland Tanzania.

This article employs both doctrinal and comparative legal research methods to explore the legal complexities surrounding the reliefs provided in section 114(1) of LMA in the division of matrimonial real property upon divorce in Mainland Tanzania drawing insights from Kenya. Doctrinal legal research is utilized to examine the foundational legal principles, doctrines, and case law that shape the legal landscape.[1] The method is adopted in the context of reliefs in the distribution of matrimonial real property in polygamous marriages. The reason is that the doctrinal legal research method investigates primary sources such as national laws, international and regional instruments and case laws to identify underlying legal principles.[2] The examination of these primary sources facilitates uncovering the legal inconsistencies, ambiguities, and gaps in the law thus highlighting areas that may require reforms which are exposed in parts four and five of this article.

A comparative legal research method is used to assess how Kenya's approach to the reliefs in the division of matrimonial real property in polygamous marriages influences Tanzania's legal system. The comparative legal research method is adopted as it helps identify best practices and potential lessons that Mainland Tanzania can draw from Kenya in reforming its legal framework on reliefs.[3] Kenya's matrimonial regimes contain more comprehensive legal provisions regarding the reliefs available in the division of matrimonial property during divorce.[4] This serves as a model for Tanzania, promoting a more structured and

[1] E. M. Al Amaren, et al., An Introduction to the Legal Research Method: To Clear the Blurred Image on How Students Understand the Method of Legal Science Research, *International Journal of Multidisciplinary Sciences and Advanced Technology,* 2020, Vol. 1, No. 9, p. 54.
[2] A. Kharel., Doctrinal Legal Research, 2018, SSRN 3130525 https://doi.org/10.2139/ssrn.3130525.
[3] C.M Fombad., Comparative Research in Contemporary African Legal Studies, *Journal of Legal Education*, 2017, Vol. 67, No 4, pp 989.
[4] The Matrimonial Property Act, Act No. 49 of 2013 [Cap 152 R.E 2022] and the Matrimonial Property Rules 2022, Kenya Gazette Supplement No. 126 of 2022.

enforceable system of relief in polygamous marriages. Additionally, this method facilitates the identification of gaps in Tanzania's legal system, for example, the non-recognition of certain significant reliefs for matrimonial real property division in polygamous marriages for purposes of making reforms.[5]

2.0 Reliefs and Division of Matrimonial Real Property in Polygamy

The Law of Marriage Act[6] recognizes both monogamous and polygamous marriages.[7] The Act further regulates the division of matrimonial property between spouses upon divorce.[8] The primary objective of the LMA in the division of matrimonial property is to achieve a fair and equitable distribution of matrimonial assets between spouses.[9]The rules of division of matrimonial property in the LMA have however not distinguished between immovable and movable property irrespective of the fact that, in practice, different rules apply to immovable and movable matrimonial property. Still, the Act recognizes both direct and indirect contributions of the spouses towards the acquisition of matrimonial property.[10]The LMA further, require spouses to ensure the needs of dependent children are met.[11]

Currently, the LMA provides for two distinct types of specific reliefs in cases of matrimonial property disputes during the dissolution of a marriage. These reliefs are outlined under Section 114(1) of the Act and include (a) an order for the equitable division of assets acquired by the joint contribution of the spouses during the marriage, and (b) an order for the sale of such matrimonial property and the division of the proceeds thereof to parties in accordance with their respective entitlements and contribution made.[12] Considering these reliefs, it is evident that while they are intended to apply to both polygamous and monogamous marriages, they introduce complexities in the division or sale of property in polygamous marriages. The application of these provisions to

[5] M. Paris., The Comparative Method in Legal Research: The Art of Justifying Choices *in Legal Research Methods: Principles and Practicalities* (Clarus Press 2016) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper (09/16).
[6] [Cap 29, R.E 2019].
[7] LMA, sec10 and 25(1).
[8] Ibid, sec 114(1 &2).
[9] Ibid, sec 114(2) (d).
[10] Ibid, sec 114(3).
[11] Ibid, sec 114(2) (d).
[12] Ibid, sec 114(1).

polygamous unions raises unique challenges, particularly in determining the equitable distribution and the fair handling of real assets acquired within these marriages.

Tanzania has ratified several international and regional instruments that embody principles relating to marriage and the division of matrimonial property. Notable examples include the International Covenant on Civil and Political Rights (ICCPR) of 1966, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979, the African Charter on Human and Peoples' Rights (1981) also known as the Banjul Charter[13], and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[14] These instruments reflect Tanzania's commitment to upholding fundamental rights and ensuring equality in the context of marriage and property division. The examination of these instruments, among others, aims to highlight the general principles they stipulate, particularly to the division of matrimonial property, in the context of the topic of this article.

Notably, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[15] under Article 16 (g) requires state parties to ensure equal rights for both spouses in marriage and divorce. This includes the right to acquire, own, manage, enjoy and dispose of property[16] including equitable division of property. Although CEDAW does not specifically address polygamous marriages, the general principles of equality and non-discrimination imply that women in polygamous marriages should have their rights to property division safeguarded. This principle is intended to protect women from unfair treatment, ensuring that property division upon divorce reflects equitable principles.

The CEDAW committee recommendation concerning polygamy requires states practicing polygamy to enact comprehensive laws regulating the

[13] *Judith Patrick Kyamba v Tunsume Mwimbe and 3 others,* Probate and Administration Cause No. 50 of 2016, [2020] TZHC 1364, HCT, DSM, J Mlyambian, 13, 14 confirming the ratification of these instruments.

[14] In *Gerald Manyilizu Deus v Ester Mang'ero,* PC Matrimonial Appeal No. 11 of 2021, [2021] TZHC 3790, HCT, Mwanza, p.5, the court confirmed the ratification of this instrument.

[15] The Convention on the Elimination of All Forms of Discrimination against Women of 1979.

[16] Ibid, art 16 (h).

division of matrimonial property in polygamy.[17] However, Mainland Tanzania has not enacted this law to date. Additionally, it has not comprehensively defined the term 'contributions' to account for household and family care, loss of economic opportunities, tangible and intangible contributions, and career development, among others, in line with the general comment on Article 16 of the CEDAW.[18]

On the other hand, the International Covenant on Civil and Political Rights (ICCPR)[19] Article 23 (4) emphasizes the protection of the family and the equal rights and responsibility of spouses during marriage and dissolution. While it does not explicitly mention polygamous marriages, the emphasis on equality can be interpreted to support fair treatment in the division of matrimonial property. Likewise, the International Covenant on Economic, Social and Cultural Rights (ICESCR)[20] under Article 10 provides for the protection of family life and economic stability. This principle underpins the right to fair and adequate division of property upon divorce to maintain the economic well-being of family members, including in polygamous marriages.

Additionally, the African Charter on Human and Peoples' Rights (ACHPR) [21] in Article 18 guarantees the right to equality and protection of family life. It ensures that family members are treated equally under the law[22], which can influence how property is divided in polygamy. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), recognises both monogamy and polygamous marriages and calls for their promotion and protection[23]. Article 7 of the Maputo Protocol addresses the rights of women in marriage and divorce. It mandates equitable division of marital

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[17] United Nations Committee on the Elimination of Discrimination against Women, *CEDAW General Recommendation No. 28 on the Economic Consequences of Marriage and its Dissolution* (2000) CEDAW/C/GC/28.

[18] Committee on the Elimination of Discrimination against Women, *General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and Their Dissolution)*, 2013.

[19] International Covenant on Civil and Political Rights of 1966.

[20] International Covenant on Economic, Social and Cultural Rights of 1966.

[21] The African Charter on Human and Peoples' Rights of 1981.

[22] Ibid, art 18 (3).

[23] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003, art 6(c).

property and emphasizes protecting women's rights during divorce.[24] This includes ensuring that women, regardless of the type of marriage, receive fair treatment during property division. Equitable distribution in this Protocol is defined to mean the apportionment of marital property in excess of half of the property on the basis of awarding material recognition to both the unequal enjoyment of property rights that the woman endured during marriage and the non-monetary contribution of the woman to the household and the family.[25] This includes equal rights between spouses to exercise decision-making over the use, disposal of, mortgage or transfer of the property.[26]

These International and regional instruments advocate for gender equality and equitable treatment in marriage and divorce. While these instruments provide a broad framework for ensuring fairness in property division. They do not provide for specific reliefs or remedies that can be issued upon the division of matrimonial real property both in monogamous or polygamous marriages. Therefore, specific reliance upon the division of matrimonial real property in polygamous marriages depends significantly on national legislation and local practices. In Tanzania, the LMA aims to ensure an equitable division of property, but customary practices, Islamic practices and court interpretations play a crucial role in how these reliefs are applied in the context of polygamous marriages.

3.0 The Reliefs in the LMA and Lessons from Kenya

The division of matrimonial real property in polygamous marriages involves intricate legal challenges that vary widely. Understanding these challenges requires an analysis of statutory provisions, judicial interpretations, and practical implications of section 114 (1) of the LMA. Various legal challenges arise from the reliefs to be issued regarding the division of matrimonial real property during a divorce in a polygamous marriage. Different reliefs are required, taking into account the following factors: the nature of land holdings between spouses, the different contributions of spouses, the duration of the marriage, and the nature of the proceedings to accommodate all rights and interests of the spouses

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[24] Ibid, art 7(d).

[25] General Comment No 6 on Article 7(d) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Adopted at the 27th Extra Ordinary Session of the African Commission on Human and Peoples' Rights, held from 19 February to 4 March 2020 in Banjul, Gambia.

[26] Ibid, Clause 36.

concerning a particular property, among others. This necessitates the need for specific reliefs in each case, all of which are discussed below

3.1 Division under Section 114(1) and its Challenges in Polygamy

Section 114 of the LMA grants the court the authority to order the division of matrimonial property or sale of the property and division of the proceeds thereof. However, this provision does not fully address the interests of all parties involved. Specifically, it has not considered the proof of contribution of non-divorcing spouses or others who may have an interest in the property. Moreover, non-divorcing spouses are generally not required to prove their contributions to the acquisition of the property under this provision during the divorce proceedings since they are not parties to the divorce. The LMA primarily mandates that only parties seeking divorce substantiate their contributions towards the acquisition of matrimonial property during or subsequent to divorce proceedings,[27] potentially leaving out the other co-wives with legitimate claims but no divorce proceedings underway. The complexity of the rights of non-divorcing spouses brings issues and impracticability to section 114 of the LMA because the provision potentially neglects the interests of non-divorcing spouses with their legitimate claims to the property.

This exclusion of non-divorcing rights to an assessment of their contribution towards the acquisition of the property can create complications in polygamous marriages when determining who is entitled to a share of the property. Furthermore, the failure of the non-divorcing spouses to prove their contribution or right towards the matrimonial real property creates an imbalance between divorcing spouses and non-divorcing spouse's contrary to the principle of equality[28] and equitable distribution[29] between spouses provided under the law which in turn can undermine fair distribution of property. Consequently, Section 114(1) of the LMA, has not sufficiently addressed scenarios or situations where multiple spouses have competing interests in the property. This is because disputes over property ownership and division can arise, complicating the process of equitable distribution.

[27] LMA, secs 105 and 106.
[28] Ibid, sec 57.
[29] Ibid, sec. 114(2) (d).

Furthermore, dividing property can be challenging, especially when the real property assets are not easily divisible or when there are disagreements on the valuation and distribution of the property. These issues highlight the need for a more comprehensive approach to property division that considers all relevant interests and provides clearer guidelines for fair and equitable distribution. In the case of *Mmbaga v Mmbaga*[30] the Court of Appeal of Tanzania emphasized the need for a fair and equitable distribution of property, considering contributions made by both spouses and the practicalities of dividing assets. However equitable distribution would not rise if the above challenges explained in this section are not resolved.

3.1.1 Complexity of Sale and Division of Proceeds of the Sale

The LMA allows the sale of the matrimonial real property and the division of the proceeds of the sale thereof.[31] This provision does not offer sufficient mechanisms in a polygamous marriage. This is due to the following reasons, section 114(1) of the LMA does not explicitly address how to handle the claims related to the sale of multiple spouses, each of whom may have distinct interests and contributions over the matrimonial property to be sold. Thus, each divorcing or non-divorcing spouse might claim a share based on their contribution to disputes and complicating the sale process. The challenges will be how to balance the interests of multiple spouses considering that, some spouses are not interested in divorce and their contribution toward the property has not been proven. Some spouses might be residing in the matrimonial property with chidden thus they cannot be rendered destitute.

Furthermore, the requirement of section 114 of the LMA to prove contribution to the acquisition of matrimonial property in polygamy becomes challenging due to the potential lack of clear records and the blending of financial and non-financial contributions, further that non-divorcing spouses have not proved the rights or claims of the matrimonial property to be divided. To add to the discussion, there is a question of valuation of the property and fair distribution. In polygamous marriages, determining the fair share for each spouse involves complex legal and financial considerations but can be difficult to achieve, particularly when there are disputes over the value or when the property market fluctuates.

30 [2002] TLR 228.
31 LMA, s 114(1).

Additionally, equitably dividing the proceeds from the sale among multiple spouses, each with potentially different claims and needs, adds another layer of complexity. Consequently, selling real property involves legal and practical hurdles, including obtaining the consent of all spouses to the sale, and disagreements can delay or complicate the process. Much so dividing property and selling real estate can affect the welfare of children and the broader family dynamics. Ensuring that the division does not adversely impact the children or the family structure adds layer of complexity. These complexities require careful judicial handling to ensure equitable outcomes and address the unique challenges posed by polygamous marriages.

Besides, section 114(1) of the LMA brings another challenge in respect of execution by sale of the matrimonial property. According to Section 48(1)(e) of the Civil Procedure Code[32], the execution of a decree may be hindered, particularly when it comes to the sale of property that serves as a matrimonial home where spouses and children reside.[33] This provision ensures that such property cannot be sold in the execution of a decree, safeguarding the rights of all family members residing there. This protection implies that a divorcing or divorced spouse may face difficulties in claiming her share through the sale of the matrimonial property, as this could negatively impact other spouses and children living in the home. Questions arise regarding who would be responsible for providing support to the divorced spouse if the property is not sold, whether it would be the husband or other wives, and how the interests of the children will be considered. What is the purpose of the decree is it cannot be executable to give rights provided to the decree holder. These concerns highlight significant uncertainties which have no answers under the LMA.

Additionally, section 114(1) of the LMA and Section 161(1) of the Land Act[34] recognize each spouse's claim to property based on their contributions, complicating the sale process. Spouses are protected under Section 59 of the LMA, which allows them to file a caveat to protect their interests. Filing a caveat under Section 59 of the LMA to protect property

[32] The Civil Procedure Code, [Cap 33.R.E 2019].
[33] G.N. Mwaisondola., The Modern Law of Mortgages in Tanzania: The Role of the Land Act 1999, A Doctoral Dissertation Submitted to the University of Birmingham, United Kingdom, p.309.
[34] The Land Act, [Cap 113 R.E 2019].

rights can lead to additional legal complexities fairly because resolving objections from parties who are not directly involved in the divorce proceedings but have an interest in the property can complicate the process. The sale of the property is further complicated by the fact that the interests of non-divorcing spouses may not have been assessed during the divorce proceedings, as they were not parties to the case. This raises concerns about how the proceeds from the sale will be divided and how non-divorcing spouses will benefit if their shares are not considered. Section 114(1) of the LMA aims to address these issues by safeguarding the property rights of spouses in a monogamous marriage during divorce but ultimately does not provide solutions when it comes to polygamous marriages.

Thus section 114(1) of the LMA and Section 161(1) of the Land Act do not delineate how contributions are to be quantified or how property interests are to be divided in practice. This can lead to disputes over what constitutes fair distribution because some spouse's rights over the matrimonial real property have not been heard or proved since they are not parties to divorce because their claims are not formally recognized or assessed during divorce proceedings. This could result in legal conflicts or challenges to the division and sale process if their rights are not clearly defined or protected.

3.2 Lessons on Reliefs from Kenya

Kenya enacted two important pieces of legislation providing relief during the division of matrimonial real property in polygamous marriages. One of these is the Matrimonial Property Act of Kenya[35] which carters for both polygamy and monogamous marriage relationships. To facilitate the functioning Matrimonial Property Act, the Matrimonial Property Rules[36] were promulgated to facilitate the just, expeditious, proportionate and affordable resolution of disputes relating to matrimonial property.[37] Aside from providing relief for the division or sale of property and the distribution of the proceeds to spouses, the two laws offer various other reliefs that Mainland Tanzania can learn from Kenya. These are explained below.

[35] The Matrimonial Property Act, Act No. 49 of 2013 [Cap 152 R.E 2022]
[36] The Matrimonial Property Rules 2022, Kenya Gazette Supplement No. 126 of 2022.
[37] Ibid r 3(1).

3.2.1 Vesting or Partitioning the Property

The LMA is silent on the relief of vesting or partitioning property. It does not address these orders. Additionally, the LMA has not been aligned with the Land Act concerning the ownership regime in the distribution of matrimonial property at the time of divorce. Specifically, the LMA lacks provisions regarding the division of co-owned real property between spouses[38] at the time of divorce in polygamy marriages. The provision does provide for the division of interest/shares in real property owned in common. The implication of the lack of alignment is to affect the reliefs relevant to the distribution of co-owned between spouses under the Land Act.

The Matrimonial Property Act and rules[39] are very specific to the reliefs aligned with the nature of land ownership between spouses. The Rules provide the relief of vesting the property in one of the spouses.[40] The rules provide that, where the property is owned by the spouses jointly, the court can give an order vesting the property in common to the spouses in such shares as the court considers just.[41] The court can also make an order vesting or transferring the matrimonial real property, or any part of the matrimonial property, in either spouse.[42] Likewise, the court can make an order postponing the vesting or transferring of any share in the matrimonial property, or any part of such share, until a future date specified in the order or until the occurrence of a future event specified in the order.[43] Of importance to note is that, before the court gives these orders, it must consider the court must consider the rights and claims of the other spouses and how this decision impacts them.

The importance of postponement of vesting of the property in full or in portion to the spouse(s) to a specific date or future event allows the court to account for future needs or developments, ensuring that the property distribution remains fair over time as circumstances evolve. The ability to postpone the vesting of property allows the court to address long-term fairness and accommodate future needs, which is particularly relevant in

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[38] Ibid, s 158.
[39] The Matrimonial Property Act, Act No. 49 of 2013 [Cap 152 R.E 2022] and the Matrimonial Property Rules 2022, Kenya Gazette Supplement No. 126 of 2022.
[40] Matrimonial Property Rules, 2022, r. 30(1) (a).
[41] Ibid, r 30(1) (b).
[42] Ibid, r 30(1) (c).
[43] Ibid, r 30(1) (d).

polygamous marriages where the dynamics can change over time. In addition, the court can order the partition or vesting of any matrimonial property to[44] the spouse where the case of matrimonial property owned by one spouse or an order vesting the property in the spouses jointly or in common in shares that the court considers just depending on the nature of ownership.[45] Furthermore, the court can vest matrimonial property owned by spouses jointly or in common, to one of them.[46] The LMA and the rules made under lack this specific provision.

Furthermore, the Land Act and the Village Land Act[47] lack provisions which allow the conveying of real properties from one spouse to the other upon a court order, Likewise, the Land Registration Act,[48] have not provided any provision compulsorily conveying the title to the spouse who has been given a real property or a share in the matrimonial real property following a court order for execution. The Land Registration Act allows the registration by operation of law including registration by an order of the Court under Section 71. However, the said provision does not apply to real property which has not been registered.[49] In related matter, the provision of Section 53 of the Land Registration Act requires vertical registration of title as such excluding matrimonial real property interest in condominiums under the Unit Titles Act.[50] Likewise, the shares acquired by labour under Section 161(2) of the Land Act are not easily registered under Section 45 of the Land Registration Act, since it is impossible to register the same by a deed thus they may not be easily recognizable at the time of transfer since the laws have not declared them as overriding interest in the property. Moreover, domestic contribution or contribution by labour is required to be assessed by the court and not upon a party to decide to register it. Likewise, domestic contribution or contribution by labour requires to be assessed by the court and not upon a part to decide to register it.

[44] Ibid, r 30(1) (e).
[45] Ibid, r 30(1) (f).
[46] Ibid, r 30(1) (g).
[47] The Village Act, [Cap 114 R.E 2019]
[48] The Land Registration Act, [Cap 334R.E 2019]
[49] Ibid, sec 46.
[50] The Unit Titles Act, Act No.16 of 2008.

3.2.2 Payment of Money to the Other Spouses

The LMA has not specifically provided for the relief of paying the other spouses to retain the real property during the division of matrimonial real property. However, in practice, this relief exists. In the case, *Yesse Mrisho v Sania Abdul,*[51] the Court of Appeal ordered the property in question to be subjected to valuation before the finalization of its distribution. Each party was granted the right to purchase the other party's interest in the property, should they have chosen to exercise this option. The Kenyan laws provide statutory provisions for an order to pay a sum of money by one spouse to the other.[52] In a polygamous context, the application of these provisions might not fully address the complexities and unique needs of each spouse involved, leading to potential legal and financial difficulties. For example, in some cases, some spouses and children may be residing in the matrimonial property. Some spouse's rights over the property may not have been determined by the court since they are not parties to divorce among other complexities.

3.2.3 The Grant of Occupation of the Property

While the LMA does not explicitly provide for this relief, Kenyan courts have the authority to issue an occupation order. This order can grant one spouse, under specific terms and conditions determined by the court, the exclusive right to occupy the matrimonial home or other properties that are part of the matrimonial estate, potentially for designated periods.[53] However, the court must comply with the following conditions; - the court may have to pay regard to the interest of any minor or dependent children of the marriage. Sequel to the above the court can make an order vesting in either spouse the tenancy of any dwelling house. This order, however, will be made if the spouse against whom the order is made is or was the sole tenant of the dwelling house, or is or was a tenant holding jointly or in common with the applicant,[54] the other spouse is a tenant of the dwelling house, [55] and either spouse is residing in the dwelling house.[56]

[51] [2019] TZCA 597, 13.
[52] Matrimonial Property Rules, 2022, r 30(1) (h).
[53] Ibid, r 30(1) (j).
[54] Ibid, r 30(1) (k) (i).
[55] Ibid, r 30(1) (k) (ii).
[56] Ibid, r 30(1) (k) (iii).

In line with other explained relief above, the court can make an order granting, to the person in whose favour an order is made under paragraphs (j) or (k) of rule 30 of the Matrimonial Property Rules, the use of all or any of the furniture, household appliances and household effects in the matrimonial home or other premises to which the occupation order relates, or the dwelling house to which the tenancy order relates.[57] On top of the above the court can vest the rights and obligations under a hire purchase agreement or conditional sale agreement, or under an agreement to hire or lease, in either spouse or any such order shall have effect notwithstanding anything in any agreement. [58] This occupational order would assist the spouses in planning their living after the division of matrimonial real property.

3.2.4 The Transfer of Property shares and others

The LMA and the rules made there under lack explicit provisions for transferring various property interests including real property interest as part of marital disputes. However, the law in Kenya allows an order for the transfer of land, or of an interest in land, including a lease, licence or tenancy.[59] On another note, the court can order the transfer of shares or stock, or mortgages, charges, debentures, or other securities, or of the title or documents of title of any property.[60]

Accordingly, the Court can order the transfer of rights or obligations under an instrument or contract, and an order of this kind has an effect.[61] The significance of a court ordering this kind of relief of the transfer of various types of property interests such as land, shares, and contractual rights lies in its role in ensuring equitable distribution of assets and resolving disputes. Such orders are crucial in legal proceedings like divorce to facilitate the fair division of marital property and financial interests, enforce compliance with the court's decisions, and clarify ownership or obligations under contracts, thereby preventing further disputes and ensuring a just settlement for both spouses and external people.

[57] Ibid, r 30 (1) (l).
[58] Ibid, r 30 (1) (m).
[59] Ibid, r 30 (1) (i).
[60] Ibid, r 30 (1) (o).
[61] Ibid, r 30 (1) (p).

3.2.5 Relief after Disposition of Matrimonial Property

In the context of polygamous marriages in Tanzania, the legal landscape surrounding the disposition or sale of matrimonial property presents several intricate challenges. The LMA and the Land Act, while providing some protection for spouses and property rights, do not fully address the complexities that arise when a matrimonial real property is sold or disposed of, especially when non-divorcing spouses or interested parties are involved. Section 114(1) of LMA is designed to protect the property rights of spouses in a monogamous marriage upon divorce. This section ensures that each spouse's contributions to the matrimonial property are recognized and accounted for during the division process. However, in a polygamous marriage, where multiple spouses have claims to the same property, this provision does not fully address the interests of non-divorcing spouses when the property is sold to an outsider.

Section 114(1) of the LMA does not stipulate how the interests of non-divorcing spouses should be handled in such scenarios. The non-divorcing spouses may find themselves with limited recourse or unclear pathways and relief to assert their claims or protect their interests, especially if the property is sold without their knowledge or consent. Section 59 of the LMA allows spouses to file a caveat to protect their interests in matrimonial property, which can temporarily prevent the sale or transfer of the property. While this provision provides some level of protection it not effective in a matrimonial property which the spouses are not residing. Furthermore, the provision does not offer protection once the property is sold to an outsider or when the matrimonial real property is not registered. This creates a significant challenge for non-divorcing spouses who may not have been part of the divorce process but are still affected by the sale. Furthermore, when the property is sold as a result of a valid decree of the court, which did not involve the non-divorcing spouses, the non-divorcing spouses would sue but, the bonafide purchaser's right to property will not be since they claim protection under section 135 of the Land Act. This is because the judgment holder exercised the right in line with the decree.

Additionally, the Land Act governs land registration and ownership but does not directly address the situation of property being sold to outsiders in a polygamous marriage. While the Act includes mechanisms for registering and protecting land ownership, it does not offer specific

remedies or reliefs for non-divorcing spouses whose interests are impacted by such transactions. The lack of explicit legal guidance in this regard leaves non-divorcing spouses with few options for seeking redress. Furthermore, in scenarios where a matrimonial property is sold to an outsider, non-divorcing spouses might need to pursue legal action to recover their share or seek compensation. However, this process can be fraught with difficulties. The LMA is notably silent on the issue of compensating a spouse whose matrimonial property has been disposed of by another spouse. The Act does not provide any clear entitlement or procedure for a spouse to claim compensation for their share or interest in the property if it has been sold or otherwise transferred without their consent. This absence of a mechanism to address such situations means that non-divorcing spouses may find themselves without recourse or remedy if their property interests are compromised.

Establishing a legal claim often requires proving their contributions to the property, which can be challenging, especially if the property's value has already been diminished or if the sale was conducted in a manner that undermines their rights. The remedy of compensation however does not exist in the LMA and the Land Act or Village Land Act[62] and no clear pathways for recovering compensation or dividing the proceeds from the sale of property. Non-divorcing spouses may find themselves navigating a complex legal landscape, seeking to assert their claims against parties who may not have been directly involved in the initial dispute.

3.2.6 Property Right between spouses before the dissolution of Marriage

The LMA does not address how to defend or protect the rights of spouses in matrimonial property before the dissolution of the marriage. The legal framework does not clearly outline the procedures or courts with competent jurisdiction to handle disputes involving property rights or interests before a divorce is finalized. Section 2(1) of the LMA defines matrimonial proceedings as those instituted under Parts II and VI, including divorce, separation, annulment, maintenance, custody, and declaratory decrees. However, property rights between spouses and interests therein are not separately explicitly included as part of matrimonial proceedings.

[62] The Village Land Act, Cap 114 R.E 2019.

This omission means that non-divorcing spouses or people with the right to matrimonial property have limited avenues to seek relief or protect their property interests while the marriage is still intact. The Law of Marriage Matrimonial Proceedings Rules[63] defines matrimonial proceedings as proceedings which include, on an objection under section 20 of the Act, for divorce, separation, or annulment, for maintenance of a spouse, for custody or maintenance of children of the marriage and for a declaratory decree under section 94 of the Act. From these provisions, one sees that non-divorcing spouses would not claim any relief toward property right before the termination of the marriage or during the termination of a Marriage.

Additionally, the Land Act under section 167 and the Village Land Act[64] under section 62 establishes land courts but looking at the jurisdiction of the Land Court, especially under the provision of sections 13, 33 and 37 of the Land Disputes Courts Act[65] these courts appear to have no jurisdiction in the claim of right or interest in the matrimonial property before divorce is issued as such it is challenging. Thus, the matrimonial regimes and ownership of real property regimes are silent on the courts and the procedure to defend the interest or right to the real property before divorce by spouses. This jurisdictional limitation creates a significant challenge for non-divorcing spouses or any person with an interest in matrimonial real property who seeks to assert their claims or defend their interests in matrimonial property before divorce. The Matrimonial Property Act of Kenya have this provision under section 17 of the Act which accord non-divorcing spouses and any other interested parties to who claim right in a matrimonial property to assert his/her right before divorce.

3.2.7 Identification of Marital Property and Its Implication on the Relief

Determining which assets are considered marital property and which are separate can be problematic, especially in polygamous marriages where multiple spouses may have contributed to or held interests in the property

[63] The Law of Marriage (Matrimonial Proceedings) Rules, GN No 224 of 1994.
[64] The Village Land Act, Cap 114 R.E 2019.
[65] The Land Disputes Courts Act, Cap 216 R, E 2019.

directly or indirectly.[66] The complexity arises from the fact that the LMA primarily addresses monogamous unions, and while it provides a framework for property division under Section 114, it does not explicitly cater to polygamous contexts.Thus leading to a challenge of appropriate remedy after division in polygamy. The case of *Basil Ndyanabo v. Karamagi*[67], though not exclusively about polygamy, highlights the challenges of equitable division in complex family structures. Although, Section 114 of the LMA provides for the division of matrimonial property but does not offer specific guidance for polygamous marriages, necessitating judicial discretion in such cases. The case specifically, the case dealt with the difficulty of determining each spouse's fair share of property acquired during the marriage, particularly in a context where contributions and ownership were contested. Furthermore, in polygamous marriages, identifying marital property becomes complex for example it is difficult to determine which property is jointly owned and how it should be divided among several spouses can be challenging.

3.2.8 Settlement of Matrimonial Property as a Relief

The LMA has no provision allowing spouses to use Alternative Dispute Resolution as a method to settle property rights disputes among themselves. Alternative Dispute Resolution can play a significant role in facilitating the division of matrimonial property in polygamous marriages. This allows for solutions that are specifically tailored to the unique circumstances of each polygamous marriage. Mediators or arbitrators can work with the parties to craft agreements that address their specific needs and concerns, which might not be possible through a court-imposed judgment. According to the LMA every divorce petition can have, among other terms, regarding the division of matrimonial property acquired by joint efforts of the parties and where there is no such agreement, the petitioner should provide a petitioner's proposal.[68] The Act further provides that it is the duty of the court hearing a petition of divorce to inquire into any arrangements made or proposed arrangements regarding the division of any matrimonial property and satisfies that the agreement is reasonable.[69]

[66] LMA sec 114(2) (a).
[67] *[2000] TLR 356.*
[68] LMA, sec 106 (1) (f).
[69] Ibid, s 108 (b).

The legality of these types of agreements in Mainland Tanzania will very likely depend on the way the pre-nuptial agreement is drafted. The implication of section 108 (b) of the LMA is to allow agreements about the property. However, it has not prescribed the period during which the agreements should be formed i.e., whether before marriage or during the marriage, the condition in which such agreements can be made and the ground for enforceability and how they can be set aside in cases they are made to the detriment of the other spouse(s) who was misrepresented on material facts and conditions among other aspects. Which court can test its validity? Situations or grounds where such agreements are not applicable. Thus, the concept of pre-nuptial and postnuptial agreements are not comprehensively provided under the LMA. Prenuptial agreements would provide clear definitions of what constitutes marital and separate property. This is crucial in polygamous marriages where multiple spouses are involved. For instance, if one spouse acquires property independently, a prenuptial agreement can clarify whether this property is considered part of the marital estate or separate. In *Kabushenga v. Kabushenga*[70] the court emphasized the role of prenuptial agreements in providing clarity about property rights, which helps in the equitable distribution of assets. Although this case is not from Tanzania, it illustrates the broader principle of clarity that prenuptial agreements can bring. Furthermore, addresses how property is to be divided, prenuptial agreements help prevent conflicts that could arise during divorce. This is particularly significant in polygamous marriages, where disputes among multiple spouses can become complex and contentious.

Furthermore, prenuptial agreements regarding property distribution, thereby simplifying the legal process in case of separation.[71] A prenuptial agreement can protect individual assets that each spouse brings into the marriage. In polygamous marriages, this ensures that the personal assets of each spouse are safeguarded, and the division of matrimonial property is handled by pre-agreed terms. In the case of *Gould v. Gould,*[72] the court recognized the importance of prenuptial agreements in protecting individual assets, thus ensuring fair treatment and respect for each party's property rights. Prenuptial agreements play a crucial role in the division of matrimonial real property in polygamous marriages by providing

[70] [2001] HCB 155 (Uganda).
[71] R v R [1987] 1 FLR 267 (UK)
[72] [2010] EWCA Civ 30 (UK)

clarity, reducing disputes, protecting individual interests, facilitating fair distribution, and encouraging open communication between spouses in polygamous marriages taking interest of first spouses and spouses with significant contributions.

3.2.9 Relief to Protect Spousal Interest in Matrimonial Assets

The LMA appears to lack protection for spouses in polygamy in protecting matrimonial property. All it does is the protection of a matrimonial home from disposition without the consent of the other spouse with an interest in a matrimonial home. The provision specifically addresses protection in monogamous marriage in a matrimonial home.[73] The Act provides if a matrimonial home is owned by the husband or wife neither of them. At the same time, the marriage subsists and alienates the matrimonial home by way of sale, gift, lease mortgage or any other form of disposition without the consent of the other spouse.[74] The protection is not available in other matrimonial properties where the spouses are not residing. This is because, in the matrimonial home, the other spouse with an unregistered title acquires overriding interests.

In the case of *Mugo Muiru Investments Ltd v EWB & 2 Others*,[75] the court was of the following view concerning beneficial interest, that the equitable beneficial interest of a spouse in a matrimonial home is considered an overriding interest, meaning any transfer of the home's title is subject to this interest. Under common law, overriding interests are those that affect a registered title even if not listed in the register. These interests are binding on both the current owner and anyone who later acquires an interest in the property. Thus, the section does not offer statutory protection on other matrimonial property where the spouses are not residing. Furthermore, the protection exists only in monogamous property. On the other hand, Section 114 of the Land Act only offers protection of matrimonial homes in respect of mortgages, it does not specifically deal with issues of other kinds of disposition such as a sale. The provision allows the protection of spouses both monogamous and polygamous by requiring them to give consent before any disposition by way of mortgage is made.[76] The provision is silent in respect of consent

[73] LMA, sec 59.
[74] Ibid, s 59(2).
[75] [2017] eKLR.
[76] Land Act, s 114(1) (a &b).

and in respect of other matrimonial properties owned by spouses both in polygamy and in monogamy where spouses are not residing.

There is also a challenge in of protection of spouse interest in co-occupancy and relationships between spouses. The law requires spouses in co-occupation with other spouses when they undertake a disposition of land or a dwelling house, where a disposition is a mortgage, the lender should make inquiries if the borrower has or, as the case may be, has consented to that mortgage or assignment accordance with the provisions of Section 59 of the LMA. The Land Act is taking us back to Section 59 of the LMA which deals only with matrimonial homes and has no reference to polygamous marriage or other matrimonial property where spouses are not residing. It should also be noted that Section 161 of the Land Act is only relevant in a tenancy in common in a matrimonial home. Thus, may not be applicable to protect the interests of other spouses in other matrimonial assets held under co-occupancy.

In the case of *Habiba Ahmadi Nangulukuta and Others v Hassan Ausi Mchopa and others*[77], Section 161 of the Land Act was challenged on the grounds that the provision is only applicable where there is co-occupation of the suit property and the property is a dwelling house. The appellant further contended that, in this case, the suit property was not a dwelling house, as the appellants themselves testified that the property was not a dwelling house and that they had not visited it for a period of six years, from 2011 to 2017. Based on this submission, the Court of Appeal confirmed the validity of the provision in paragraph 20 of the decision. In general, the Land Act is silent on the protection of other matrimonial rights, or other interests of other spouses(s) in matrimonial property other than the property where spouses are residing. Meaning that other types of matrimonial property lack proper protection in the statutes. Also, issues of the consent of the other spouse with interest at the time of disposition may have its challenges in a polygamous marriage.

Another important matter not addressed by the Land Act, Land Registration Act, and LMA, is how a family ought to live and plan its affairs. The decisions of where a family is to reside, which land to farm, which land the children should utilize, what exact locations the children

[77] *Civil Appeal No. 10 of 2022, CAT, Mtwara, [2022] TZCA 15, pp 13 and 20*

should settle at, what and where to set aside for special uses, and such like things, are not answers that you will find when you look at these statutes. Families are dynamic and what works for one family may not work for another. For example, in many of our communities, traditionally and according to custom, the father of the house makes decisions such as where to farm, and where the children are to build their houses among other things. A question that can easily arise in our modern society is whether all spouses have to agree with such family arrangements. The fact of the matter is that in most homes the man is considered to be the head of the house and he thus takes the lead in making a lot of the decisions regarding how his family will live and generally gives direction on such internal family matters.

3.2.10 Designation of Matrimonial Property and Regimes

The LMA does not provide for a situation in which spouses may agree or change the matrimonial system when there is sufficient reason to do so and notice to be given to the creditors of the spouses in case the change will prejudice any person. This requirement is also stated in several instruments elaborated in chapter three yet the LMA has not domesticated this requirement. This would have determined the right to marital property of the spouses and the manner to deal with their future matrimonial relief. Under the LMA matrimonial property includes assets acquired before the marriage by one party which has been substantially improved by the other or by joint efforts.[78] The matrimonial property regime is usually designated by the spouses before marriage. The spouses would designate the matrimonial regime in respect of movable or immovable property and can choose which property can be used as a matrimonial home or matrimonial property and which would remain as separate property.

This would facilitate the concept of division at the time of divorce. The agreement on the choice of matrimonial regimes should be regulated by the Marriage law however the LMA is silent on the issue. Under the Kenyan Matrimonial Property Act, under section 8(2), the law allows spouses in polygamous marriage by a clear agreement to designate a particular property to be a matrimonial property of a particular wife and her husband separate from that of the other wife, then any such wife shall

[78] LMA, sec 114(3).

own that matrimonial property equally with the husband without the participation of the other wife or wives.

The lack of designation of the matrimonial regime under the LMA has necessitated the court to divide matrimonial property acquired by spouses during the marriage through their joint efforts by considering the extent of their contribution towards its acquisition.[79] The term contribution has also not been exhaustively defined in the statute courts have defined it to include domestic works. However, some aspects have been left out such as management of the matrimonial home, child care, companionship, management of family businesses or family and or farm work as part of the contribution toward the acquisition of matrimonial property.

In polygamous marriages, the designation of matrimonial property and regimes is crucial for ensuring clear property rights and responsibilities among spouses. Such designations help manage the division of assets and liabilities, providing a structured approach to property distribution in cases of divorce, separation, or death among the spouses. This legal framework can prevent disputes and conflicts by defining each spouse's share and contributions to the marital estate. Designating these regimes helps in safeguarding individual interests and joint assets and maintaining fairness among multiple spouses. This is because clear property designations aid in the equitable distribution of resources, support, and inheritance, reflecting the diverse and complex nature of polygamous family structures. This legal clarity helps protect the rights of all parties involved, ensuring that the marital estate is managed and divided by agreed-upon principles and legal norms.

3.2.11 Declaration of Rights to Property or Matrimonial Property as A relief

The LMA is silent on the relief of the Declaration of Right to Property or matrimonial property. On the other hand, the Matrimonial Property Act of Kenya provides that a person claiming a right to matrimonial property in dispute between a person and spouse or a former spouse of a person[80] may make an application for a declaration of interest in matrimonial property following the procedure stipulated[81] or may be made as the part

[79] Ibid, sec 114 (1).
[80] The Matrimonial Property Act, s 17 (1).
[81] Ibid, sec 17(2) (a).

the of the petition in a matrimonial cause,[82] notwithstanding that a petition has been filed under the law relating to matrimonial causes.[83] In the case of *JM v SMK & 4 others,*[84] the High Court citing Muchelule, J in *N.C.K v. G.V.K [2015] eKLR* at pp9-10 noted that under Section 7 and 17 of the Matrimonial Property Act 2013, a spouse can approach the court to address issues related to property entitlements in two scenarios: either during an ongoing divorce proceeding or when the spouse is no longer living with the other but does not wish to divorce.

The court can issue declaratory orders that clarify the nature of the claimed interest in the property without dividing it in line with Article 45(3) of the Constitution of Kenya 2010. On the other hand, where a declaration of any right in matrimonial property is contested between that person and a spouse or former spouses in a petition made for dissolution of marriage under the Law of Marriage Act 2014, the application can be made as part of the relief sought in the matrimonial cause in accordance of the Matrimonial Property rules.[85]

The Matrimonial Property Rules provide categories of persons who can institute matrimonial proceedings.[86] These are spouses, [87] any person against whom a spouse has made a conflicting property claim[88] and a trustee in bankruptcy, an executor under will and other testamentary grants, administrator or personal legal representatives of the spouse's estate in respect of an order or declaration relating to status, ownership, vesting or possession of any specific property by or for the beneficial interest of a spouse or formal spouse.[89]

This provision allows spouses, third parties and legal representatives to institute proceedings relating to claims of right to or interest in matrimonial property. This kind of stipulation is not availed in the Law of Marriage Act in Tanzania. The provision would allow even ex-spouses to claim an interest in matrimonial property. In the case of *JM v SMK & 4*

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[82] Ibid, sec7(2) (b).
[83] Ibid, sec 17(2) (c).
[84] [2022] eKLR.
[85] The Matrimonial Property Rules, r. 7(1).
[86] Ibid, r 4.
[87] Ibid, 4(a).
[88] Ibid, r 4(b),
[89] Ibid, r 4(c),

Others[90] explaining the rule of the Matrimonial Property Rules on who can bring claims, the Court noted as follows.

> *... It is, therefore, arguable that where a claim is based on the right of the claimant as a wife and co-owner of properties acquired jointly by the husband and the wife, the wife may well seek orders as regards her part of the estate. In other words, where it is alleged that the husband and the wife have separate estates which are capable of being determined by the Court, nothing bars the Court from determining the same whether or not the husband and the wife are still married or are divorced...*

In light of the above paragraph claims for the right to matrimonial property made under provision of rule 4(b-c) herein made during the subsistence of the marriage are made by originating summons with necessary modification in form No MPI set out in schedule[91] stating among other things the ground for which the claim is made [92] any claim made under these rules must be supported by an affidavit[93] stating the ground for which a claim is made[94] whether there have been previous claims relating to matrimonial property in question or whether the attempt to reconcile has been made,[95] in cases of a claim for a transfer or settlement of assets, the assets in which the claim is made and liability if any, [96] the assets to which the party against whom the claim is made is entitled either in possession or reversion[97] in cases of a claim to vary an agreement made before their marriage setting out their property rights or an order of a court made in determination of their property rights , all settlements whether made before or after their marriage[98], funds brought into settlement by each party[99] in cases of claim for cancellation of a transfer or other disposition the assets to which the disposition relates, [100] the persons in whose favour the disposition is alleged to have been made.[101] In case of a disposition alleged to have been made by a way of

90 [2022] eKLR.
91 The Matrimonial Property Rules, r 7(3),
92 Ibid, r 7(3)(a-b).
93 Ibid, r 7(4).
94 Ibid, r 7(4) (a).
95 Ibid, r 7(4) (b).
96 Ibid, r 7(4) (c) (i).
97 Ibid, r 7(4) (c) (ii).
98 Ibid, r 7(4) (d) (i).
99 Ibid, r 7(4) (d) (ii).
100 Ibid, r 7(4) (e) (i).
101 Ibid, r 7(4) (e) (ii).

settlement, the trustee and the beneficiary of the settlement.[102] Tanzania lacks this kind of provision.

Sequel to the above, in proceeding relating to the division of matrimonial property or cancellation of disposition that relates to immovable property, the affidavit in support of the application in addition to particulars stipulated in rule 7(4) must state whether the title to the immovable property is registered or unregistered and if registered the particulars of registration.[103] Furthermore, it must contain particulars of charge or mortgage of property and any interest therein.[104] Likewise, it should provide particulars of the registered owner(s) of the property and in case of more than one owner, how the property is held, whether joint tenant or tenants in common.[105] All the applications must be supported by an authenticated bundle of evidential documents to be lied upon. List witnesses and witness statements if any among other particulars that may be needed.[106]

This provision is very wide to allow any person who has an interest in matrimonial property to have his/her right. This kind of provision is not availed by any law in Tanzania. A spouse or former spouse is required to make the application at any time after the dissolution of marriage by a court decree after the final determination of the marriage process under the Marriage Act, [107] as part of matrimonial cause in line with section 17 of the Marriage Act 2014,[108] in case the applicant seeks a declaration of property right contested between the applicant, the applicant's spouse or the formal spouses,[109] and in respect of claims of interest under Rule (b and c) of the Matrimonial Property Rules the application must be made during the subsistence of the marriage.[110]

[102] Ibid, r 7(4) (e) (iii).
[103] Ibid, r 7(5) (a).
[104] Ibid, r 7(5) (b).
[105] Ibid, r 7(5) (c).
[106] Ibid, r 7(6) (a-c).
[107] Ibid, r. 5(1) (a).
[108] This application can be made by way of originating summons to a judge or magistrate court with jurisdiction using form MPI set out in the schedule. This is stipulated under rule 7(2) The Matrimonial Property Rules. The application must state among other things the property rights or beneficial interest asserted in the claim in line with rule 7(2)(e) of the rules
[109] The Matrimonial Property Rules, r 5(1) (b).
[110] Ibid, r 5(1) (c).

The application made by a spouse or former spouse for the declaration of a right to matrimonial property can be made after a final determination of the proceeding under the Marriage Act shall be made within twelve months from when the decree absolute was made.[111] The court may for sufficient reasons and grounds extend the time after hearing the applicant and other persons interested in the property or are likely to be affected by the order made and who have the right to be heard.[112] The application sought is made in line with the Law of Marriage (Matrimonial Proceeding) Rules[113] under rule 5(4) of the Matrimonial Property Rules.

The Matrimonial Property Rules further stipulate the courts with jurisdiction to enforce the rights relating to matrimonial property.[114] Such an application can be made High Court where the value of the matrimonial property exceeds the pecuniary value of the subordinate courts[115] and a subordinate court with civil pecuniary jurisdiction to entertain the matter.[116]

3.2.12 Islamic Law Reliefs in Division of Matrimonial Property

Law of Marriage Act acknowledges Islamic marriage[117] and divorce[118], it does not explicitly detail the division of matrimonial property according to Islamic principles. Traditional Islamic law does not acknowledge marital wealth as a collective entity; spouses maintain ownership of their respective assets brought into the marriage. Despite this, Islamic law ensures that women receive an equitable settlement upon divorce, recognizing their contributions to the marriage. The doctrine of the totality of ownership dictates that after divorce, each party retains what is rightfully theirs without encroaching on the other's property. Islamic law considers direct contributions to property acquisition when determining the division of matrimonial assets.

Islamic Law division of matrimonial property makes consideration of the doctrine of the totality of ownership which requires everybody after divorce to take what belongs to him or her without taking another

[111] Ibid, r 5(2) and5 (1)(a).
[112] Ibid, r 5(3).
[113] Law of Marriage (Matrimonial Proceeding Rules) 2020 Legal Notice No. 112 of 2020.
[114] The Matrimonial Property Rules, r. 6 (1).
[115] Ibid, r 6(1) (a).
[116] Ibid, r 6(1) (b).
[117] LMA sec 9(3); 25(1) (b).
[118] Ibid, s 107(3).

person's property.[119] Islamic law also recognizes the contribution of spouses towards the acquisition of the property in which case it allows division of the said property by looking at what has been contributed directly toward the acquisition of the said property.[120] This is quite different from the LMA since it also recognizes domestic contributions entitling a spouse to division.[121] In the case of *Bi. Hawa Mohamed v Ally Seif,*[122] the Court of Appeal stated that:

> *"Since the welfare of the family is an essential component of the economic activities of a family man or woman, it is proper to consider a contribution by a spouse to the welfare of the family as a contribution to the acquisition of matrimonial or family assets; and the "joint efforts" and 'work towards the acquiring of the assets' have to be construed as embracing the domestic "efforts" or "work" of husband and wife."*

Even though the law of LMA recognizes Islamic divorce[123] it does not have any specific provision in the Act allowing the division of matrimonial property in line with Islamic law. Islamic scholars, however, often note that domestic contributions are less emphasized because marriage is primarily for personal relationships rather than domestic services. The practice of Prophet Muhammad's wives shows that domestic responsibilities are secondary to the marital relationship. Therefore, while domestic work is essential, it is not considered a direct contribution to property acquisition.[124]

In Islamic law, the dowry (Mahr) is a crucial element of marriage, intended to safeguard the wife's financial security. A marriage contract may include provisions for property division in the event of divorce, with the Mahr often serving as financial support for the wife. If the Mahr is nominal, it may not suffice for the wife's needs, necessitating additional gifts or compensation from the husband. Upon divorce, Islamic law entitles the wife to a parting gift (Mut'ah), which is meant to alleviate the emotional and financial strain of divorce. The Mut'ah, which can take

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[119] H.O Hamad., *The Law of Divorce in Tanzania: A conflict between the Law of Marriage Act 1971 and Islamic Law,* Open University Law Journal, 2013. Vol. 4, No. 1, p. 144.
[120] Ibid.
[121] LMA sec 114(2) (b).
[122] [1983] T.L.R 32.
[123] LAM sec 107(3).
[124] A.Hashim., Muslim personal law in Kenya and Tanzania: Tradition and innovation. Journal of Muslim Minority Affairs. 2005 Dec 1; 25(3): p 556.

various forms such as money, property, or other valuables, is provided to ensure the wife's well-being and dignity post-divorce.[125]

The Quran emphasizes the importance of this gift, underscoring that it should be appropriate to the husband's means and the wife's needs. "*Give the women [upon marriage] their [bridal] gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease.*[126] The concept of Mut'ah and the Mahr are supported by both Quranic verses and Hadith. The Quran mandates that a divorced woman should receive a suitable Mut'ah and provides guidance on the appropriate provisions for divorced women. Though the exact amount of the Mut'ah is not specified, it is intended to reflect the husband's capacity and the wife's situation.[127] Under the Matrimonial Property of Kenya, a spouse who professes the Muslim faith may be governed by Islamic law in all matters relating to matrimonial property.[128] This applies to any court where a claim to enforce a right of matrimonial property under Islamic law or where the spouses request the court to Islamic law.[129] This provision recognizes the fact that statutory law may be different from Islamic law and so it gives room for Islamic law to apply. This relief and provision do not exist in the Law of Marriage Act of Mainland Tanzania.

3.2.13 Matrimonial Property of a Surviving Spouse

The LMA and the Probate and Administration of Estate Act[130] are silent on the division of matrimonial assets by a surviving spouse(s) after the death of the other spouse upon grant of probate or letters of administration. The Court of Appeal has pointed out that in such a situation a claimant should file a case in a probate court. In the case of *Leticia Mtani Ihonde v Adventine Valentina Masonyi,* [131] it was held that,

> *Where the husband has died the surviving spouse cannot seek distribution of matrimonial assets in a matrimonial cause, and any claims or perceived rights thereto must be sought in a Probate and Administration cause.*

[125] V.P Bharatiya., Syed Khalid Rashid's Muslim Law, Eastern Book Company, 4th Edn., Lucknow, p. 85.
[126] Quran 4:4.
[127] Qur'an, Surah al-Baqarah (2): 236, Qur'an, 2:241 and Qur'an 33:49.
[128] The Matrimonial Property Act of Kenya, Act, s 3.
[129] The Matrimonial Property Rules, r 6(2).
[130] Probate and Administration of Estate Act, Cap 352 RE 2019.
[131] [2022] TZCA 347.

The court did not, however, underscore the procedure to be used. Since the surviving spouse claims her interest in matrimonial property. If she is to implead the administrator or executor of the estate. The nature of documents and how the claim should be the law is silent. This is because even the filing of a caveat under Section 58 of the Probate and Administration of Estate Act would not assist the remaining spouses in proving their contribution or interest in the matrimonial property as the executor or the administrator of the estate would not be in a position to know the contribution of each spouse and issues of assessing the contribution of the remaining spouse would not fall in succession courts.

In the case of *Theofrida Mhagama v Njengafibili Mpojoli Mwaikugile,*[132] the Court of Appeal while dealing with issues of matrimonial property during the succession of a spouse who did not file a caveat said:

> *"Similarly, the issue of the disputed property being declared a matrimonial property was not among the reliefs sought by the appellant. However, even if that relief was sought, it would have been in a wrong forum because such a matter is ordinarily dealt with upon divorce or separation of spouses."*

4.0 Conclusion and Recommendations

In conclusion, the LMA provides limited reliefs for the division of matrimonial real property during divorce in polygamous marriage primarily focusing on either the division of property or the sale and distribution of proceeds emanating from sale of the matrimonial real property. Furthermore, these reliefs do not adequately address the complexities of polygamous marriages, where non-divorcing spouses may face challenges due to their contributions being overlooked in divorce proceedings. The current framework is restricted by the provisions of Section 114 which has not considered the diverse dynamics and intricacies of polygamous unions, particularly in relation to the nature of the property right involved. This gap results in difficulties in dividing or selling real property, as the Act does not offer clear guidelines on how to equitably distribute the assets among several spouses.

Consequently, the relief mechanisms available are often insufficient, leaving many spouses without fair compensation or recourse to access

[132] [2021] TZCA 6.

their rights. This article highlights the need for comprehensive legal reforms to better address the unique circumstances of polygamous divorces and ensure a more equitable and inclusive approach concerning the reliefs during the division of matrimonial property. To address these issues, Tanzania could benefit from adopting more detailed provisions similar to those found in Kenya's Matrimonial Property Act, and the rules made there under, which offer a structured approach to handling reliefs multiple for property division. Implementing such reforms could enhance the legal framework in Tanzania, ensuring more equitable outcomes and adequate relief for all parties involved in polygamous marriages. With these remarks, the following are the proposed Solution or reforms.

Amendment of the LMA specifically section 114 (1) of the LMA by enacting compressive reliefs that can be used in the event of property division in polygamous marriages. Tanzania Mainland can adopt the provision of section 17 of the Matrimonial Property Act of Kenya and rule 30 of the Matrimonial Property Rules of Kenya.

Amend the LMA to include Alternative Dispute Resolution (ADR) to be used as a mechanism to settle issues of property division in polygamous marriages. Thus, the LMA should be amended by adding a provision that would allow spouses to go through any form of ADR whether mediation, Conciliation or Reconciliation to come up with a consent agreement between spouses in respect of rights and ownership of interest before any spouse in polygamy is divorced. This would assist all parties to participate and settle their rights toward property division between divorcing and non-divorcing spouses without affecting the interest of either party.

Amend Section 114 of the LMA to allow the protection of co-wives' rights during the division of matrimonial real property in a polygamous marriage, The provision should give rights of non-divorcing wives to defend or make an application for a declaration of interest in the matrimonial real property before the court decides the division between the divorcing spouses as provided under section 17 of the Matrimonial Property Act of Kenya.

It is proposed that Section 114(1) of LMA be amended to explicitly acknowledge and address the rights and contributions of non-divorcing

spouses before the division or sale of the said properties. This amendment aims to afford all individuals with a legitimate interest in matrimonial property the opportunity to be heard and to ensure that their contributions are duly recognized. Additionally, the proposed amendment should include a provision mandating the recognition of contributions made by such interested parties, regardless of their involvement in divorce proceedings.

Amend the LMA to integrate religious law (Islamic) in the division of matrimonial property at the time of divorce, especially for those prophesying Islamic religion. This will allow spouses to claim relief in line with Islamic law.

It is proposed, that there be development of practices and guidelines to assist courts in providing equitable relief in polygamous marriage cases. This will ensure consistent and fair decisions when dividing property in polygamous marriages. The reform should provide detailed judicial guidelines on how to apply the law and make decisions based on the unique circumstances of each case. These guidelines would help judges and magistrates in determining equitable shares and addressing complex family dynamics, ensuring that the relief provided is just and aligned with legal principles.

Amend Section 48(1) (e) of the Civil Procedure Code to provide guidelines for the execution of decrees involving the sale of matrimonial property, especially where it serves as a matrimonial home when several spouses are involved in polygamy. This should ensure that the rights of all family members, including children and non-divorcing spouses, are protected during the execution process

Amend the LMA to align with land ownership and division between spouses as provided for under the Land Act. This will ensure uniformity in reliefs, especially in cases of joint ownership or joint tenancy of spouses in polygamous marriages. The provision should provide clear procedures for the division of real property held in joint ownership, including the mechanisms for partitioning, severance, transferring or dividing shares in property between spouses

Amend the Land Registration Act particularly section 71 to require the registration of property or interests in a property spouse following a court ensuring legal recognition of such transfers following the nature of land whether under the Land Act or ownership in Condominium under the Unit of Titles Act, furthermore, amend section 53 of the Land Registration Act to accommodate matrimonial property interests, including condominiums and other unit titles, ensuring that these interests are properly registered and recognized.

Amend the LMA and the rules made there under to look at all interests in the land, such as lease, mortgage and other contractual obligations on the real property in line with the law of realty at the time of divorce and subsequent division of matrimonial property.

Amend the LMA to provide a relief of compensation. This could assist non-divorcing spouses when their matrimonial property is sold or transferred without their consent or proof of their contribution. Allowing non-divorcing spouses and persons with interest in matrimonial property to file compensation claims based on their contributions or interest to the property will assist in calculating and awarding in proportion to their interests.

Amending the LMA to include provisions related to injunctions to prevent the sale or transfer of property until disputes are resolved and the interest of all spouses and or interest parties in the property is determined. This would include all interest parties in the property whether divorcing or non-divorcing.

Amend the LMA especially section 106 to include provisions that allow for the recognition and enforcement of pre-nuptial agreements in polygamous marriages. Mainland Tanzania can borrow a leaf from section 8(2) of Kenya's Matrimonial Property Act allows pre-nuptial agreements that grant exclusive property rights to one spouse, and this provision has proven valuable in protecting the interests of individual spouses in polygamous unions. By incorporating similar provisions, Tanzania can provide greater clarity and security for spouses who wish to define their property rights before marriage.

By enacting these legal reforms, mainland Tanzania will establish a comprehensive and equitable framework for the distribution of matrimonial real property in polygamous marriages. These amendments will address the current Law of Marriage Act deficiencies, offer more precise guidelines regarding reliefs and procedures for property division, and guarantee equitable remedies for all spouses involved.

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Regulatory Oversight of FinTech in the Era of Artificial Intelligence: Assessing Consumer Risks in Tanzania's FinTech Sector

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Abstract

The rapid evolution of Financial Technology (FinTech) is significantly transforming the financial sector, filling gaps traditionally left by conventional banks. This transformation is expanding access to formal financial services, fostering economic growth and reducing poverty in Tanzania. Despite its substantial growth, the FinTech industry in Tanzania operates without a comprehensive legal and regulatory framework, thereby exposing consumers to unforeseen risks. This paper examines the legal and regulatory challenges stemming from the integration of Artificial Intelligence (AI) and Machine Learning (ML) in the financial industry. To address these issues, this study employs doctrinal legal methods and a comparative study approach. It draws insights from international legal instruments, policies, and laws of other jurisdictions to identify legal gaps and propose solutions. The study utilises deductive and inductive reasoning for data analysis, applying statutory interpretation rules to evaluate Tanzanian laws and identify existing gaps. Furthermore, the Ejusdem Generis rule is employed to assess the legal landscape and challenges associated with AI adoption. Key Tanzanian laws and Regulatory bodies are scrutinised to pinpoint regulatory shortcomings. This study identified deficiencies and provide recommendations to enhance FinTech security in Tanzania.

Keywords: *M-money, FinTech, Artificial Intelligence (AI), Machine Learning (ML), Risk, Tanzania*

1.0 Introduction

The financial landscape is currently experiencing an insightful metamorphosis, driven by the swift ascent of Financial Technology, commonly known as FinTech. FinTech stands as a catalyst for revolutionising the management of finances, disrupting conventional banking models, and reshaping the entirety of the financial sector.[1] With innovative technologies like mobile payments, block chain, Artificial Intelligence (AI), and data analytics, FinTech is bringing about unprecedented changes in how we bank, invest, and access financial services. FinTech represents the synthesis of advanced technologies into the fabric of

[1] E Feyen., FinTech and the digital transformation of financial services: implications for market structure and public policy, Bank for International Settlement, Papers No 117, 2021

financial services, enhancing delivery and accessibility to consumers across the globe. This combination spans a diverse array of applications and processes, propelling both respected banking institutions and agile startups into the forefront of economic transformation. The proliferation of FinTech has not only democratised financial services, facilitating access for previously unbanked populations, but it has also introduced a new level of efficiency and security in financial transactions.[1]

The use of technology in financial services is not a new phenomenon, but recent developments have increased its pace, scope, and impact. The innovation in financial technology is rapidly disrupting the financial industry and bridging the gaps left by banks.[2] While there is no single definition for FinTech, the working definition adopted by the Financial Stability Board defines it as "technologically enabled financial innovation that could result in new business models, applications, processes, or products with an associated material effect on financial markets and institutions and the provision of financial services".[3] In Sub-Saharan Africa, FinTech presents opportunities that have not existed before. FinTech is increasingly recognised as a key enabler for financial sectors worldwide, enabling more efficient and competitive financial markets while expanding access to finance for traditionally underserved consumers.[4] The rise of the FinTech sector has profoundly impacted individuals at the base of the economic pyramid, lifting them to higher levels. Mobile technology, particularly digital finance, is spearheading greater access to financial services and promoting digital financial inclusion. Financial inclusion is crucial for achieving sustainable development goals (SDGs). Studies suggest that expanding financial inclusion within countries can advance nine of the seventeen SDGs and potentially support two additional SDGs that have yet to be fully explored by researchers.[5] Traditional banking institutions have significantly contributed to integrating a large portion of the population into the formal financial system. However, in sub-Saharan Africa (SSA), there are notable limitations due to the insufficient number of bank branches, with most branches concentrated in urban areas, thus neglecting the rural population. Additionally, the formal financial systems' stringent Know Your Customer (KYC) requirements and high initial deposit amounts have often hindered

[1] W. Zhou, *The Transformative Impact of FinTech on Financial Services*: A Comprehensive Analysis, (2021). p. 86
[2] UNCDF. (2021). Tanzania, the FinTech start-up landscape in Tanzania, p. 3
[3] Ibid.
[4] A.K Kamara and B Yu, The Impact of FinTech Adoption on Traditional Financial Inclusion in Sub-Saharan Africa, Risks, 2024. 12: 115. https:// doi.org/10.3390/risks12070115
[5] Ibid.

ordinary people from accessing banking services.[6] Given the limitations of the traditional banking system and existing economic disparities, FinTech has emerged as a transformative force for many individuals at the bottom of the pyramid.

1.0 Overview of FinTech Technology

Financial Technology, commonly known as FinTech, denotes the utilisation of technology to deliver financial services. This sector covers technology-driven startups that compete with traditional banks and financial institutions by offering diverse services such as mobile payment solutions, crowd funding platforms, online portfolio management, and international money transfers.[7] It includes a wide range of financial services and products that intersect with technology. These include peer-to-peer (or P2P) lending, online payments and foreign exchange services, digital wallets and e-money, automated or robo investment advice, artificial intelligence (AI), big data analytics, block chain and crypto-currencies and many more.[8] The realm of FinTech comprises a wide range of activities traditionally associated with the financial sector. This includes services such as payment processing, lending, asset management, and insurance, among others.[9] The Financial Stability Institute has developed a "FinTech tree" that categorizes different FinTech activities and the underlying factors enabling them. This tree has three main components: the crown, the trunk, and the roots. The crown **r**epresents the FinTech activities themselves, such as payment mediation, lending, asset management, and insurance-related services. The Trunk**,** consists of various technologies that support these FinTech activities. Examples include distributed ledger technology (DLT), artificial intelligence (AI), and machine learning (ML). The Roots**,** comprise various policies implemented by authorities to promote the use of technology and foster innovation within the financial system. Examples include policies on digital identification methods that enable public access to digital services, open banking regulations, and initiatives to facilitate innovation. Open Banking, allows third-party developers to access client data from banks to build various financial services and functions.[10]

[6] T, Beck, et al. Banking in Africa Opportunities and Challenges in Volatile Times, World Bank Group, Policy Research Working Paper, 10632, (2023).
[7] S. Anyfantaki, The evolution of Financial Technology (FinTech), *Economic Bulletin, volume 44,* 2016. *pp. 47-62.*
[8] Ibid.
[9] H. Eklööf, An overview of FinTech and crypto assets,2022.
[10] D. Wilsby and K.Winström, Financial Technology's effect on the Swedish banking Industry, egree Project in Production Management Division for Production Management at Faculty of engineering LTH Lund University 2023.

In innovation facilitation, authorities may set up innovation centers or regulatory sandboxes where new entities can test their products or services in a controlled environment. For instance, in Sweden, Finansinspektionen (FI) has established an innovation center to guide firms on organising their operations according to persisting legislation. Similarly, in the UK, the Financial Conduct Authority (FCA) has established a regulatory sandbox. Legislators worldwide are also creating regulations to promote innovation within financial services. An example is the Payment Services Directive (PSD2) of the European Union, which requires banks to share information with other entities, such as FinTech firms. Regulatory sandboxes, introduced in 2015 by the UK FCA, have gained significant interest from regulators and innovators globally.[11] In Tanzania, the Bank of Tanzania has established the FinTech Regulatory Sandbox Regulations, 2023. These regulations aim to enable the testing and deployment of FinTech innovations in a live environment within specified parameters and timeframes.

While FinTech products and services vary widely, they all leverage new or emerging technologies to deliver traditional financial services in a more cost-effective, accessible, and consumer-friendly manner. They also facilitate the development of innovative financial products and services. Typically, these offerings are more innovative and significantly cheaper compared to those provided by traditional financial institutions. [12] The use of technology to deliver financial services is not new and in fact, the financial industry has always been at the forefront of technological adoption. Examples of this include the development of innovations such as the use of telegraphic networks to perform transactions in the XIX century, the creation of credit cards in 1950 or the Automated Teller Machines in 1967. As financial institutions started to embrace digital computing, services such as online and mobile banking started to emerge during the 1980s and 1990s, facilitating remote access of services' users and operators.[13]

One of the most noted disruption trends arising out of FinTechs is the increase of non-financial companies offering financial services. It refers to Financial Services Provides (FSPs) that are generally outside the traditional banking institutions and cater specific financial services to its customer segments. They include the Technology companies such as PayPal, Google Wallet, Apple Pay, Samsung Pay, Konga Wallet and We Chat that offer e-wallet, payment, and

[11] Ibid.
[12] Ibid.
[13] FinTech Regulatory Aspects Working Group (REG WG). Key Aspects around Financial Technologies and Regulation Policy report, 2019. p. 10.

transfer services. Also, the Mobile Network Operators (MNOs) have found application of innovative business models especially in the payments and lending space across developing and less developed economies such as in Africa.[14] These MNOs provide a range of financial services such as basic payment services or micro-loans to the unbanked population.

The other beneficiaries of Technology are the Cash networks, which are companies that are neither a bank nor a telecommunication company and that create their own network of agents. These agents are retail outlets, at which clients of the cash network can deposit or withdraw cash, or make transfers. In addition, there are E-Retailers which are companies that are focusing on creating a market place for various products and services online. These include companies such as Alibaba & Amazon who leverage their extensive customer database to offer additional financial services like e-wallets, payments as well and lending facilities.[15] These disruptions, driven by innovative value propositions, have given rise to thousands of FinTechs worldwide, marking an unprecedented startup phenomenon. Many FinTechs, leveraging their robust business models, have achieved significant success while also fostering opportunities for traditional financial institutions to explore collaboration and partnerships, enhancing their reach and efficiency. More importantly, FinTechs are now pushing the traditional players to become more creative and agile.[16] Today, FinTech affects every area of the global financial system, with perhaps the most dramatic impact in China, where such technology firms as Alibaba, Baidu, and Tencent have transformed finance. China’s inefficient banking infrastructure and high technology penetration make it a fertile ground for FinTech development.[17]

Emerging markets, particularly in Asia and Africa, have begun to experience what we characterise as FinTech 3.5, an era of strong FinTech development supported by deliberate government policy choices in pursuit of economic development. FinTech development in Africa has been led by telecommunications companies on the back of two factors: the rapid uptake of mobile telephones and the underdeveloped nature of banking services. Mobile money the provision of basic transaction and savings services through e-money recorded on a mobile phone has been particularly successful in Kenya and

[14] Bhattacharjee, I et al. (2024). The Rise of FinTech: Disrupting Traditional Financial Services, Educational Administration: Theory and Practice, Vol. 30(4), pp. 89-97.
[15] Ibid.
[16] Ibid.
[17] Ibid.

Tanzania.[18] Mobile money has significantly spurred economic development by providing customers with a means to securely save and transfer funds, pay bills, and receive government payments. M-Pesa, launched in 2007, remains Africa's best-known success story.

Although FinTech is transforming the economy and financial landscape through offering wide-ranging opportunities it has also been the cause of raising potential risks. As the technology is growing it has also been captured with the inclusion of Artificial Intelligence and Machine learning in its operations.[19] The inclusion of AI, brings new risks that were not anticipated before. Although the integration of AI in the financial sector brings several advantages such as reshaping the FinTech industry, driving innovations that enhance efficiency, reduce risk, and deliver personalized customer experiences. Transforming traditional banking and financial services, automating processes, improving decision-making, and providing customized services. Machine learning algorithms continuously monitor transaction data in real-time, identifying anomalous patterns that suggest fraudulent activities, thereby reducing risks and building consumer trust in digital payment platforms. However, AI brings also various risks and regulatory challenges such as liability issues that need a careful handling process.[20]

2.0 Artificial Intelligence in the FinTech

The rapid development of FinTech is driven by innovative technologies, such as artificial intelligence and block chain, and it has gained attention from innovators, academics, and regulators. The integration of AI in the financial sector is reshaping the FinTech industry, enhance efficiency and productivity and deliver personalised customer experiences.[21] There are varying reasons for the adoption of AI /ML in the financial sector. Some uses of AI/ML include powering chatbots in customer service functions, identifying investment opportunities, executing trades, augmenting lending models or making lending decisions, and identifying and preventing fraud.[22]

The extent to which a sector or firm adopts various technologies reflects a variety of factors, including a firm's ability to fund internal development and

[18] D. W Arner, et al, FinTech and RegTech in a nutshell, and the future in a sandbox, CFA Institute Research Foundation, 2017, pp.7-8.
[19] Y. Han, et al, The Impact of Artificial Intelligence on the Financial Services Industry, *Academic Journal of Management and Social Sciences,* Vol. 2, No. 3, 2023, pp. 83-85
[20] Ibid.
[21] K.L Siau, et al., Artificial Intelligence in Financial Technology, Conference paper, 15th China Summer Workshop on Information Management (CSWIM 2022).
[22] Ibid.

regulatory requirements.[23] Artificial intelligence (AI) is the general term used to describe the process of programming computers and machines to think and operate like humans. Machine learning (ML) is a subset of AI that describes computers and programs that may be programmed to operate with minimal human intervention and can in some instances learn and/or update themselves. According to Boucher,[24] AI refers to systems that display intelligent behaviour by analysing their environment and taking action with some degree of autonomy to achieve specific goals. AI is an umbrella term including a wide range of technologies and applications that have little more in common than their apparent intelligence, a quality which remains very much open to interpretation.

Several actions over the past few years have helped raise the profile of AI/ML and its role in delivering financial services. Open AI's introduction of the large language model (LLM) ChatGPT in 2022 was a rare moment when an AI/ML technology became directly accessible by the broad public.[25] Artificial intelligence (AI) has fundamentally changed the way financial industry interact with their customers, ushering in a new era of personalised and seamless experiences. Traditionally, banking interactions were often generic and impersonal, with limited scope for customization. However, AI technologies have enabled banks to leverage vast amounts of customer data to understand individual preferences, behaviors, and needs. By analysing transaction histories, browsing patterns, and social media interactions, AI algorithms generate insights into each customer's financial goals, lifestyle choices, and risk tolerance.[26] Machine learning algorithms continuously analyse transaction data in real-time, detecting anomalous patterns indicative of fraudulent activities. This proactive approach not only mitigates risks but also instills confidence in consumers, fostering trust in digital payment platforms. Moreover, AI-powered chatbots and virtual assistants are revolutionizing customer interactions in the realm of payments.[27]

These intelligent agents leverage natural language processing algorithms to understand and respond to user queries in real-time. By offering personalised recommendations, resolving inquiries promptly, and facilitating seamless

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[23] P. Tierno, Artificial Intelligence and Machine Learning in Financial Services, Congressional Research Service, R47997, 2024.

[24] P. Boucher, Artificial intelligence: How does it work, why does it matter, and what can we do about it? European Parliament, 2020.

[25] Ibid, p. 1.

[26] A. Abbas, The Role of AI in Disrupting Traditional Banking and Financial Services: Harnessing Data Analytics and Machine Learning for Competitive Advantage, 2024. DOI:10.13140/RG.2.2.32110.22087.

[27] Ibid.

transactions, AI-driven chatbots enhance the user experience and drive customer satisfaction.[28] Furthermore, the integration of AI and blockchain technology is transforming transactional processes within the supply chain through the use of smart contracts. These self-executing contracts, encoded on a blockchain ledger, automatically execute and enforce the terms of an agreement when predefined conditions are met. By automating contractual agreements, such as purchase orders, invoices, and payments, smart contracts streamline transactional processes, reduce administrative overhead, and mitigate disputes.[29]

In Tanzania, the convergence of FinTech and AI has notably bolstered the integration of mobile wallets with major digital payment networks like Visa, MasterCard, and PayPal. This synergy has introduced innovations such as virtual cards including Master Pass and M-Visa, enabling users to conduct card transactions seamlessly without the need for conventional bank accounts. Moreover, the embrace of contactless payment methods alongside the widespread accessibility of ATMs has not only streamlined domestic transactions but also enhanced the ease of conducting international card payments, thereby propelling the evolution of Tanzania's digital payment landscape.[30] However, the widespread adoption of AI in the financial industry is not without its challenges. Significant hurdles include concerns about data privacy, security, and algorithmic biases. Additionally, the autonomous capabilities of AI have sparked legal discussions regarding liability issues in both contractual and criminal contexts.[31]

3.0 Consumer Risks in Tanzania's FinTech sector

The evolution of FinTech, coupled with its integration with AI, has introduced significant risks to the financial services sector. This is primarily due to the abundance of highly sensitive and valuable data it manages. As user numbers flood, hackers increasingly target everything from credit card information to personal financial data, exploiting it by selling on the deep web or for personal gain.[32] Moreover, cybercriminals have advanced their tactics, now capable of executing sophisticated cyber-attacks such as ransomware and Distributed Denial of Service (DDoS) assaults to breach confidential systems.[33]

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[28] F. Akram., Innovations in FinTech: AI-Enhanced Payments and Supply Chain Management, 2024, p.2
[29] Ibid.
[30] Bank of Tanzania, Bank of Tanzania National Payment Systems annual report, 2022.
[31] O. Owolobi et al, Ethical Implication of Artificial Intelligence (AI) Adoption in Financial Decision Making, *Computer and Information Science; Vol. 17, No. 1,* 2024, pp. 49-56.
[32] C.H Patil et al, Challenges in FinTech Security, *Grenze International Journal of Engineering and Technology, June Issue,* 2023 pp. 2100-2105.
[33] Ibid.

According to Bank for International Settlement,[34] technological advancements in banking have increased risks to bank soundness and financial stability. Digital fraud is one example, where criminals exploit digitalization to commit online fraud on a greater scale and scope than previously, enabled by the agility provided by digitalization. The cybercriminal ecosystem has become increasingly industrialized, allowing non-technical criminals to access and use cyber tools without technical expertise. Dedicated marketplaces on the dark web facilitate the sale and purchase of payment card data and online banking access. Fraudsters and attackers employ increasingly sophisticated techniques, with malicious codes adapted to many banking applications that can bypass current security measures.[35]

Risk in the financial sector represents the likelihood of undesirable events occurring unexpectedly, and risk management involves skillful handling of this possibility. While theoretically, risk can also entail potential favorable outcomes, it predominantly refers to adverse circumstances rather than beneficial ones. Risk is a fundamental aspect of banking operations, regulatory frameworks, and the occurrence of banking crises.[36] In banking, risk pertains to the potential for a reduction in economic gain due to monetary losses, expenses, or adverse outcomes associated with the transactions or activities of a bank. It can also be construed as the impact of uncertainty on objectives.[37] Technological developments in the financial sector, such as the introduction of various digital platforms like M-money services, have introduced risks impacting both bank-led and non-bank-led models. Traditional risks that previously affected conventional banks now extend to mobile banking entities. However, there are distinctions in the degree to which specific risks apply to traditional banks compared to their manifestation in mobile money operations. To mitigate security risks within the industry, it is imperative to establish a robust legal framework capable of addressing critical issues and guiding the mobile banking sector.[38]

The rapid advancements in financial services have opened new opportunities while simultaneously introducing security challenges and risks for financial providers, telecommunications carriers, and the overall financial system.[39]

[34] Bank for International Settlement, Digital fraud and banking: supervisory and financial stability implications, Discussion Paper, 2023.
[35] Ibid.
[36] A.J Hafeth, Risk definition in banks, 2017 p.78.
[37] Ibid.
[38] M. Tashtamirov, Financial Innovation and Digital Technology in the Banking System: An Institutional Perspective, SHS Web of Conferences, 2023, 172, 02004.
[39] A. Ally, *Mobile Money Regulations in Tanzania*, PhD thesis, The Open University of Tanzania, 2017. p. 99.

Efforts to regulate mobile banking services have been undertaken, including distinguishing between bank-based and non-bank-based models. However, regardless of whether a telecommunications company or a bank leads the initiative, there remains insufficient insight into the specific risks associated with individual mobile money schemes. The extensive use of electronic and mobile money causes additional risks, complicating the work of electronic money issuers (EMIs) and the functioning of payment systems.[40]

The potential "disruptive" nature of FinTech presents new risks and challenges for regulators, which could negatively impact financial stability and integrity if not properly managed. While some of these risks are new, many are simply new forms of existing risks, arising not only from the technology behind FinTech but also from new or modified business models, product features, and provider types. Additionally, consumers now have greater access to more complex or unfamiliar financial products. For instance, the rapid growth of the P2P lending market in China during the early 2010s led to significant platform collapses, fraud, and operator misconduct, resulting in substantial consumer losses.[41]

In October 2018, the World Bank Group (WBG) and the International Monetary Fund (IMF) introduced the Bali FinTech Agenda, comprising 12 policy elements aimed at leveraging the benefits of FinTech while managing associated risks.[42] Policy six underscores the need for nations to adapt regulatory frameworks and supervisory practices to ensure the orderly development and stability of the financial system. This facilitates the safe introduction of new products, activities, and intermediaries while preserving trust and confidence and addressing emerging risks. While existing regulatory frameworks may mitigate several FinTech risks, new challenges may arise from innovations lying beyond the current regulatory perimeter, necessitating regulatory adjustments. Holistic national policy responses, guided by international standards, are imperative.[43] To mitigate risks and ensure the security of mobile banking transactions, a robust legal framework is essential. As the adoption of mobile money services grows, financial regulators worldwide are addressing risks associated with mobile technology use. Policymakers and regulators are drafting regulations tailored to the mobile

[40] K.Croxson, et al. Platform-based business models and financial inclusion, BIS Working Papers 986, Bank for International Settlements, 2021.
[41] WBG, Consumer Risks in FinTech New Manifestations of Consumer Risks and Emerging Regulatory Approaches, *Policy Research Paper*, 2021 p.12.
[42] Ibid.
[43] IMF, IMF policy paper, the Bali FinTech agenda, 2018.

money era, albeit facing challenges in synchronizing financial and telecommunication regulations to enhance mobile banking services.

Furthermore, the Bali FinTech Agenda underscores the importance of safeguarding the integrity of financial systems by identifying, understanding, assessing, and mitigating the risks of criminal misuse of FinTech. Technologies that bolster compliance with anti-money laundering and combating the financing of terrorism (AML/CFT) measures are essential. While FinTech innovations generally serve legitimate purposes, some may facilitate criminal activities, posing threats to financial integrity. Country responses vary, but strengthening AML/CFT compliance and monitoring, aided by technology, remains paramount.[44] Efforts to regulate mobile banking services, whether led by telecommunications companies or banks, must address the specific risks associated with each mobile money scheme. Given the array of FinTech products and services available, this paper will focus on addressing varieties of financial risks, efforts that have been taken and the remaining gaps that need to be bridged.

4.0 Prevalent Risk Types in the FinTech Sector in the Era of AI

The integration of Artificial Intelligence (AI) in the FinTech sector has revolutionized financial services, but it also introduces a range of risks. Here are the common risk types prevalent in the FinTech sector amid AI advancements

4.1 Operational Risks

Operational risk pertains to the possible financial loss stemming from ineffective or malfunctioning internal procedures, structures, personnel, or external occurrences. It encompasses a broad spectrum of risks that may emerge during the routine functioning of an entity. It is also encompassing disruptions caused by system malfunctions, data breaches, or inadequate monitoring of AI-driven applications. External factors like cyber-attacks or natural disasters further amplify this risk. As per the Basel Committee on Banking Supervision, operational risk is defined as "the risk of experiencing losses due to deficient or unsuccessful internal processes, personnel, and systems, or due to external events.[45] According to the risk management guidelines for banks and financial institutions in Tanzania, 2010, Operational risk can stem from various sources including human actions, internal procedures, system failures, and external incidents like terrorism, vandalism, and earthquakes. This risk is present in both

[44] Ibid.
[45] A. Ally, Mobile Money Regulations in Tanzania, PhD thesis, *above at note* 40.

conventional banking and mobile banking, particularly in Payment Systems, encompassing Processing, Authorization, and Computational functions. For instance, whether a payment transaction is processed manually or through automated systems (or a blend of both), there's a risk associated with its successful completion within a satisfactory timeframe or at all.[46]

4.2 Fraud Risk

One of the fundamental risk surrounding consumers with respect to FinTech products, and transactions that are taking place online are losses from fraud or other misconduct by Financial Service Providers (FSPs) as well as third-party fraud. While AI enhances fraud detection, it also introduces new avenues for sophisticated fraud techniques that exploit AI tools. Fraud risk is the possibility of any unexpected loss, be it financial, reputational, or material, due to fraudulent activity by an internal or external actor. The Association of Certified Fraud Examiners (ACFE), the world's leading anti-fraud body, defines fraud as any activity that relies on deception in order to achieve a gain. Fraud becomes a crime when it is a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.[47] Mobile money fraud can therefore be defined as fraud that takes place on assets owned or held by a mobile money service to the detriment of a mobile money service provider, its customers, agents or third parties. Assets include money, information, and intangible assets such as brand, reputation, or services.[48] The conditions under which such losses do occur are numerous, such as internal theft of funds, identity theft, or phishing. Potential perpetrators include FSPs themselves, their employees, agents, merchants, business partners and service providers, and external actors. These criminals, and the data or facilities being affected, may be located remotely such as in the cloud and even internationally, creating additional enforcement and evidence gathering difficulties.[49]

The impact of fraud can be seen in the form of financial losses**,** due to theft, embezzlement, or other types of financial crime. Fraud in the digital environment could be classified into two categories namely, direct and indirect frauds. Direct fraud would include credit/debit card fraud, employee embezzlement, and money laundering and salami attack. Indirect fraud would include phishing, pharming, hacking, virus, spam, advance fee and malware. It

[46] Ibid.
[47] GSMA, Mobile money fraud typologies and mitigation strategies, 2024.
[48] Ibid.
[49] World Bank Group, Consumer Risks in FinTech New Manifestations of Consumer Risks and Emerging Regulatory Approaches, Policy Research Paper, 2021.

involves impersonation and theft of identity, credit card number or other identifying information to carry out fraudulent activities.[50]

Fraud poses a significant risk within both mobile money systems and traditional banking institutions. Funds can be illicitly siphoned from the system through a variety of unlawful methods. For instance, account details may be compromised leading to unauthorized debits from customers' accounts. Other fraudulent practices encompass techniques such as phishing for PIN codes to access e-wallets or assuming false identities to gain remote entry into a service provider's server. The potential for large-scale fraud increases substantially in cases of data security breaches occurring at payment providers or any entity storing payment information along the payment process.[51]

According to Global Risk Report 2020 issued by World Economic Forum, Data & Money Theft, Fraud Risk and Cyber security attacks occupy the 6th and 7th place among the world's Top 10 risks. In terms of likelihood and impact on a scale of 1 to 5, Data Theft/Fraud and Cyber-attack map to close to 4 in terms of both likelihood and impact. This explains why the Trio of Data Privacy, Fraud & Cyber-attacks must be a locus of attention for Business entities, Regulatory bodies and the Government.[52] Different fraudulent techniques typically put consumers and targeted institutions at risk. Attackers employ various sophisticated tactics to gain unauthorized access to data. Cyber-attacks can result in data breaches, allowing unauthorized parties to access sensitive or confidential information, often serving as a precursor for criminals seeking to make unauthorized payments. Scammers successfully acquire personal information or credentials belonging to individuals or businesses, enabling them to manipulate targets or access payment accounts to initiate transactions.[53]

4.3 Regulatory Risk

One significant risk associated with the FinTech sector is regulatory uncertainty. Consumers using FinTech products may find themselves with less protection compared to those using traditional financial services, primarily due to gaps in existing financial consumer protection regulations. This can leave consumers vulnerable, lacking adequate legal safeguards and access to complaint-handling mechanisms specifically tailored to address issues arising

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[50] S. Dzomira, Electronic fraud (cyber fraud) risk in the banking industry, Zimbabwe, Risk governance and control: *financial markets and Institutions, Vol. 4, Issue 2,* 2014. p.17.

[51] Ibid.

[52] K. Chari, Fraud Risk in a Digitized FinTech ecosystem troubling trends, issues and approaches to mitigate Fraud Risk, 2020, p.1.

[53] WBG, Fraud risks in fast payments, 2023, p.4.

from FinTech services.[54] Regulatory risk is defined as the potential for financial loss due to non-compliance with laws, regulations, or standards. This risk encompasses the challenges and consequences associated with adhering to or failing to adhere to regulatory guidelines and rules. Key areas of regulatory compliance include anti-money laundering (AML) and combating the financing of terrorism (CFT) measures, Know Your Customer (KYC) protocols, data privacy requirements, account and transaction limitations, trust account regulations, and the use of agents. Ensuring compliance in these areas is critical for mitigating regulatory risk and safeguarding the integrity and stability of financial operations.[55]

For instance, consumers who use e-deposit services under the non-bank-led model face significant risks because their deposits are not protected by deposit insurance, which is only available for the bank-led model.[56] The current dominance of FinTech in the financial sector, particularly with the integration of AI, lacks a specific legal framework, resulting in numerous unresolved legal gaps. The liabilities of autonomous agents remain a contentious issue in the legal sphere. Consequently, compliance and regulatory risks are more pronounced in FinTech services. There are several blind spots and loopholes in existing financial laws, regulations, and supervisory rules. The industry's inadequate legal treatment and supervision allow for some illegal operations. Institutions exploit these legal gaps to engage in criminal and unlawful activities, leading to economic losses for financial entities.[57]

4.4 Technology Risk

Technology Risk refers to technology failure that leads to the inability to transact. It is closely linked to operational risk. Transactions within a Digital Financial Services (DFS) travel through several communications systems and devices in order to initiate the transaction, transfer funds, and communicate confirmations with clients.[58] There are numerous examples of technology risks within financial technology systems, one of which pertains to transaction delays

[54] World Bank Group. (2021). Consumer Risks in FinTech New Manifestations of Consumer Risks and Emerging Regulatory Approaches, Policy Research Paper.

[55] The Master Card Foundation and International Finance Corporation. (2016). Digital financial services and risk management, Handbook, p. 24.

[56] A.M Ally, Legal and regulatory framework for mobile banking in Tanzania, *International Journal of Law and Management Vol. 66 No. 1*, Emerald Publishing Limited, 2024.

[57] M. Hasan and A. Hoque., FinTech Risk Management and Monitoring, *International Series in Operations Research and Management Science, Volume 336,* 2023 pp. 3-16.

[58] The Master Card Foundation and International Finance Corporation, Digital financial services and risk management, Handbook, 2016), p.24.

arising from insufficient capacity to handle demand, consequently leading to system queues.

According to Huang and Tan,[59] it is having been revealed that the technological developments such as the Internet, computers, and other technological infrastructure have made the security of data during long-distance transmission to be increasingly complex. The more base stations that data passes through, the greater the risk of leakage, posing significant threats to data security. FinTech, which relies heavily on emerging technologies such as artificial intelligence (AI), big data, and cloud computing, faces additional challenges in ensuring the secure collection, transmission, and storage of data. Security vulnerabilities in these processes can be exploited by criminals, leading to potentially severe financial losses for users.[60] Besides, when financial service providers are constrained by their technological capabilities, often resort to outsourcing strategies to build their data platforms. However, the quality and trustworthiness of employees in outsourcing companies can be inconsistent. Malicious actions by such employees, including deliberate information leaks, can expose users to significant risks.[61]

Jain et al[62] has observed that the rapid development of domestic FinTech has occurred in an environment lacking a robust social credit system. This leapfrog growth, while impressive, is accompanied by technological limitations that hinder the ability to identify and mitigate newly emerging financial risks. Consequently, these unidentified risks can spread more easily, exacerbating potential threats to the financial ecosystem. To address these challenges, it is crucial for FinTech companies and traditional banks to implement rigorous security protocols, conduct thorough vetting of outsourcing partners, and continually update their technological safeguards. Additionally, the establishment of a comprehensive social credit system could play a pivotal role in mitigating these risks and fostering a more secure financial environment.

The complexity of Digital Financial Services (DFS) involves multiple interconnected systems, wherein a breakdown at any juncture can trigger

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[59] A. Huang and D. Tan, The Study and Overview of FinTech's Impacts on the Risk-Taking of the Traditional Bank Industry. Theoretical Economics Letters, 2024, 14, 1441-1454. https://doi.org/10.4236/tel.2024.144069

[60] Ibid.

[61] J.A Barefoot, Digital Technology Risks for Finance: Dangers Embedded in Fintech and Regtech, Mossavar-Rahmani, Center for Business and Government Weil Hall | Harvard Kennedy School | 2020, www.hks.harvard.edu/mrcbg.

[62] R. Jain, et al, Systematic Literature Review of the Risk Landscape in Fintech. Risks 11: 36, 2023, https://doi.org/10.3390/risks11020036.

transaction delays, often leaving both customers and agents uncertain about transaction completion. This uncertainty may manifest in delays in receiving confirmation SMSs on the customer's device. Another significant risk in DFS is Network Connectivity Failure, presenting challenges such as intermittent coverage, insufficient availability, and network downtime, all of which impede transactions and pose a threat to business continuity. Connectivity encompasses internal networks of providers, communication infrastructure linking third-party channels, and clients. When networks falter, users are unable to initiate transactions, potentially resulting in reputational damage due to prolonged wait times for network restoration, thus undermining the customer experience.[63]

4.5 Agent Management Risk

The introduction of agents to act on behalf of financial services providers presents many benefits in cost, geographical reach, and scale, but also introduces new risks. The management and supervision of agents is imperative to a well-functioning service that protects customers. The use of agents can trigger operational, technological, legal, reputational, and fraud risk. An agent’s business operations may be put at risk from excessive deposits.[64] The cash may be stolen, and this is especially the risk if the agent develops a reputation for holding large amounts of cash. Agents and their tellers may make key stroke errors in entering transactions or counting errors in cash management that will result in a float being unreconciled and sustaining losses either to the agent or to the customer. Teller errors also include the risk of losing or damaging paper records that may put the agent and provider at risk of regulatory non-compliance.[65] In the realm of AI, the integration of agents in FinTech services offers a wide array of benefits, significantly transforming how financial services are delivered. These advantages include cost efficiency, as AI-driven agents reduce operational expenses by automating routine tasks and optimizing resource allocation. Additionally, they enhance geographical reach, enabling financial institutions to penetrate underserved or remote areas where traditional banking infrastructure is limited. Scalability is another key benefit, as AI systems can handle an increasing volume of transactions and interactions without proportional increases in costs or time, thus supporting business growth.[66]

However, the integration of AI into agent management introduces a range of complex risks and challenges that demand careful consideration. One primary

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[63] Ibid.
[64] M. Kerse, The use of agents by digital Financial Services Providers, Technical Note, CGAP/World Bank, 2020.
[65] Ibid.
[66] Ibid.

concern is the security of AI systems, as these agents become potential targets for cyberattacks, data breaches, and manipulation. The reliance on AI also raises questions about reliability, particularly in situations where algorithmic errors or biases could lead to financial inaccuracies, regulatory non-compliance, or discrimination against certain customer groups. Moreover, the use of AI in managing FinTech agents necessitates addressing ethical concerns, such as transparency and accountability. The decision-making processes of AI agents often lack explainability, making it difficult for stakeholders to understand or challenge outcomes. This opacity can erode trust in financial services and complicate regulatory oversight.[67]

4.6 Liquidity Risk

Liquidity reflects a bank's capacity to fund the expansion of its assets and meet both expected and unexpected cash or collateral demands at a manageable cost, all while avoiding substantial losses. Proper liquidity management is essential, as it enables a bank to maintain operations and fulfill its financial obligations, even during periods of economic stress or financial uncertainty.[68] Liquidity risk arises when a financial institution cannot meet its cash flow needs and obligations as they come due, potentially leading to insolvency. This risk is particularly critical because it can affect a bank's solvency, market reputation, and overall stability. Managing liquidity risk involves maintaining an adequate cushion of liquid assets, ensuring access to funding markets, and implementing robust contingency funding plans.[69] A bank's capacity to manage liquidity risk effectively is crucial for its resilience and long-term viability. Inadequate liquidity can force a bank to sell assets at a loss or resort to expensive emergency funding, both of which can erode capital and undermine confidence. Therefore, banks must continuously monitor their liquidity positions, stress-test their funding strategies, and adopt proactive measures to mitigate potential liquidity shortfalls. In today's interconnected financial environment, liquidity risk management also involves understanding and preparing for systemic risks. Disruptions in one part of the financial system can quickly propagate and amplify liquidity pressures across institutions, highlighting the importance of regulatory oversight and coordination among financial entities. By adopting

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[67] M. Kerse, et al, The use of agents by digital Financial Services Providers, Technical Note, CGAP/World Bank, 2020.
[68] Bank for International Settlements. (2008). Principles for Sound Liquidity Risk Management and Supervision, Basel Committee on Banking Supervision
[69] M. Kumar and G.C Yadav, Liquidity risk management in bank: a conceptual framework, *AIMA Journal of Management & Research, May* 2013, *Volume 7, Issue 2/4*

comprehensive liquidity risk management practices, banks can better navigate financial uncertainties and maintain their operational integrity.[70]

The integration of financial institutions and the telecommunications sector in offering e-money stored in trust accounts has introduced significant consumer risks, particularly concerning insolvency. One major concern with e-money arrangements is the potential insolvency of the provider, which could result in insufficient funds to meet the demands of e-money holders.[71] Unfortunately, e-money deposits kept in trust accounts are not covered under deposit insurance schemes. This lack of protection means that, in the event of insolvency, e-money holders would be treated as unsecured creditors. Consequently, they would be paid only after deposit holders, secured creditors, and other creditors with statutory priority. This situation places e-money holders at a considerable disadvantage, potentially leading to substantial financial losses.[72]And the sad story is that the e-money deposit kept in a trust account is not covered under deposit insurance scheme. The result of this lack of protection is likely to be that e-money holders will rank with other unsecured creditors and will be paid after any deposit holders, any secured creditors, and any other creditors with some other form of statutory priority.[73] To mitigate these risks, regulators and policymakers need to consider extending deposit insurance or creating specific safeguards for e-money deposits. Enhanced oversight and stricter regulatory frameworks can also help ensure that e-money providers maintain sufficient reserves to protect consumers. Additionally, increased transparency and consumer education about the risks associated with e-money can empower users to make more informed decisions.

4.7 Money-laundering risks

The Financial Action Task Force on Money Laundering (FATF), which is recognized as the international standard setter for anti-money laundering efforts, defines the term money laundering as “the processing of criminal proceeds to disguise their illegal origin” in order to legitimize the ill-gotten gains of crime.[74] Money laundering risk refers to the potential of financial institutions, businesses, or individuals to be used as a conduit for illegal activities, such as drug trafficking, terrorism financing, or other criminal activities. The innovations in FinTech have advanced traditional ways of

[70] Ibid.
[71] Fraud Net, Top 7 Risks for Financial Institutions and FinTech, 2023.
[72] Ibid.
[73] WBG, *above at note* 42, p.138
[74] M. Yusarina. Etal, Money Laundering Risk: From the Bankers’ and Regulators Perspectives, 7th International Conference on Financial Criminology, 2015.

undertaking transactions and provided immense opportunities to individuals and businesses, such as faster and more efficient settlement of payment. However, it has also fueled illegalities such as money laundering, which essentially involves making illegally-gained financial proceeds appear to have legitimate source.[75]

A primary concern regarding FinTech is that many FinTech firms operate outside the scope of traditional banking regulations and are not fully subject to existing anti-money laundering (AML) legislation and regulations. Although mobile money (M-money) service providers are required to adhere to Know Your Customer (KYC) rules, they are not encumbered by the same rigorous banking regulations that govern traditional financial institutions. Additionally, the rapid growth of crypto currency assets poses significant money laundering risks due to the lack of comprehensive regulation in this sector. Criminals can exploit the quasi-anonymity of block chain and place assets on the market without being identified. Furthermore, the transactions are even harder to detect when criminals use mules in the layering phase, Moreover, crypto currencies provide opportunities to cash out illicit gains by transferring them anonymously to individuals which can be challenging, if not impossible, to trace.[76] As FinTech firms often bypass professional intermediaries such as banks, they may not be held to the same financial reporting standards, which are crucial for maintaining market stability.[77]

Technological innovations in payment services have made the world a global village and this enables criminal syndicates to perpetrate crime from any part of the world, particularly jurisdictions with ineffective money laundering regulations and enforcement. Hence with the aid of technology, 'dirty money' can conveniently be transferred undetected across dual or multiple regions in the global space in a snap of fingers.[78]The e-money can also be a tool for money launderers due to the impossibility of tracking it, its confidentiality, and its speed, as it is possible, in a short period, to transfer any amount through it without any obstacles and without the need for a financial intermediary.[79] In

[75] U. Anichebe, Combating Money Laundering in an Age of Technology and Innovation, 2020, SSRN Electronic Journal. doi:https://doi.org/10.2139/ssrn.3627681.

[76] M Heidimaria, The Anti-money Laundering Challenges of FinTech and Crypto currencies,2023, *Nordic Journal of Legal Studies*, Vol.2(1) pp.7-19.

[77] A.R Nicholas, FinTech and Anti-Money Laundering Regulation: Implementing an International Regulatory Hierarchy Premised on Financial Innovation, 2022. *9 Tex. A&M L. Rev. 465* Available at: https://doi.org/10.37419/LR.V9.I2.5.

[78] Ibid.

[79] I . A Gailan, Fintech in Iraq and the risks of using it in money laundering operations, World Economics & Finance Bulletin (WEFB), 2022 Available Online at: https://www.scholarexpress.net Vol. 17, ISSN: 2749-3628

traditional transactions a third-party, typically a licensed bank, has had an important role in guaranteeing the authenticity and the integrity of fund transfers.

4.8 AI risks

The integration of Artificial Intelligence (AI) and Machine Learning (ML) into the financial sector is reshaping operations, data analysis, and customer service.[80] These technologies enhance efficiency, from personalized chatbots to predictive analytics for investments. Yet, they also introduce significant risks that demand careful management. AI in FinTech poses concerns like data privacy breaches, biases influencing lending decisions, and systemic risks from interconnected AI systems. Unregulated, these technologies can amplify vulnerabilities. Mitigating AI risks is vital for consumer protection, financial stability, and trust in evolving technologies.[81]

Regulatory oversight balances innovation with risk management, aiming to harness AI's potential while safeguarding against downsides. Challenges include fairness and bias; while AI aims to be unbiased, it can perpetuate biases in training data, impacting loan approvals and exacerbating inequality. Moreover, AI's deployment in finance raises cyber security concerns. Instances such as ChatGPT's restrictions due to privacy issues highlight regulatory scrutiny and potential misuse for phishing and deep fakes. Safeguarding against these risks is crucial for maintaining cyber security and trust in AI-driven financial services.[82]

The decentralised architecture of many AI-driven financial platforms, particularly those built on block chain technology, presents significant challenges in terms of jurisdiction and dispute resolution. The distributed nature of these platforms surpasses national borders, often making it difficult to determine which legal authority has jurisdiction over cross-border transactions. Traditional legal frameworks are generally ill-suited to address the complexities that arise from these decentralized, often anonymous, platforms.[83] A key issue for the AI legal risk is the lack of harmonization in the legal and regulatory approaches taken by different countries. This creates substantial legal risks for

[80] N. Deepaak, The Future of Finance in the Era of Artificial Intelligence and Machine Learning, 2024.
[81] Y. Han et al, The Impact of Artificial Intelligence on the Financial Services Industry, *Academic Journal of Management and Social Sciences*, 2023Vol. 2, No. 3.
[82] G Shabsigh, and E. Boukherouaa, E. Generative Artificial Intelligence in Finance: Risk Considerations, 2023.

[83] H. Daiya, H, AI-Driven Risk Management Strategies in Financial Technology, *Journal of Artificial Intelligence General Science JAIGS, Vol., 5 Issue 01*, 2024, pp. 194-216.

both consumers and FinTech companies operating across multiple jurisdictions. While some nations have proactively updated their legislative frameworks to accommodate the rise of FinTech and AI technologies, others have been slower to adapt, leading to inconsistent regulatory environments. This regulatory fragmentation results in a complex and often contradictory legal landscape, which can hinder the global scalability of FinTech solutions. Companies must navigate not only the technical and operational challenges of working with emerging technologies but also the varied legal standards related to data privacy, cyber security, financial compliance, and consumer protection.[84]

The lack of global regulatory consensus poses additional risks in terms of enforcement and compliance. For example, in some jurisdictions, block chain transactions may be classified differently under financial law, complicating the resolution of disputes. Moreover, the absence of clear regulatory guidance on issues such as smart contracts and algorithmic governance leaves significant gaps in accountability. As the adoption of AI in FinTech continues to accelerate, international cooperation and the establishment of more uniform legal standards will be crucial to fostering innovation while ensuring consumer protection and regulatory oversight.[85]

5.0 Legal Framework for Addressing Consumer Risks in the FinTech Industry in the Era of AI

The legal framework governing the FinTech sector in Tanzania is complex, encompassing various laws designed to regulate the industry and provide a secure platform for commercial transactions. These regulations establish the groundwork for financial institutions offering mobile banking services and set the standards for electronic transactions. Key legislation includes the Banking and Financial Institutions Act (BFIA) of 2006, which oversees the operations of financial institutions. The Electronic Transactions Act (ETA) of 2015 provides guidelines for conducting electronic transactions, while the National Payment System Act, 2015, focuses on the regulation of payment systems. Additionally, the Electronic and Postal Communications Act of 2010, the Cybercrime Act of 2015, and the Personal Data Protection Act of 2022 address various aspects of digital communication, cyber security, and data privacy, respectively.[86]

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[84] F. Igbinenikaro and A.O Adewusi, Navigating the legal complexities of artificial Intelligence in global trade agreements, *International Journal of Applied Research in Social Sciences, Volume 6, Issue 4*, 2024 pp. 488-505.

[85] Ibid.

[86] D. P. Macha, and N.M Massawe, Financial Technology in Tanzania: Assessment of Growth Drivers, AERC Working Paper FI-007 African Economic Research Consortium, Nairobi, 2023.

The Tanzania Insurance Regulatory Authority (TIRA) and the Capital Markets and Securities Authority (CMSA) also play roles in regulating specific sectors within the FinTech ecosystem. However, the primary regulatory bodies for the FinTech sector are the Bank of Tanzania (BOT) and the Tanzania Communication Regulatory Authority (TCRA). These institutions are chiefly responsible for overseeing and ensuring compliance within the industry, thereby fostering a stable and secure environment for FinTech innovations to flourish.[87] Section 4(1) of the National Payment System Act, 2015 grants the Bank of Tanzania (BoT) a broad range of regulatory and supervisory powers over the country's payment systems. Under this section, the BoT is authorized to issue licenses and approvals, regulate and supervise payment system operations, investigate potential issues, and ensure oversight of the entire ecosystem. Additionally, the BoT is responsible for providing settlement services to payment systems, clearinghouses, and central securities depositories. It also has the authority to own and operate a real-time gross settlement system, coordinate activities with relevant stakeholders, and participate in inter-bank clearing and settlement operations. In essence, the BoT is tasked with the administration and enforcement of this Act, ensuring the integrity and efficiency of payment systems in Tanzania.

Furthermore, Section 5 of the Act extends these powers by mandating that no individual or entity may operate a payment system without obtaining a valid license issued by the BoT. This ensures that all operators are subject to stringent regulatory scrutiny, thereby safeguarding the security and stability of the payment infrastructure in the country. While the Bank of Tanzania (BoT) is tasked with overseeing the financial sector, the Tanzania Communications Regulatory Authority (TCRA) is responsible for regulating electronic and postal communications in the country. The TCRA’s mandate is defined by the Electronic and Postal Communications Act (EPOCA) of 2010 and the TCRA Act of 2003, which govern telecommunications, broadcasting, postal services, and the management of the radio spectrum. These laws cover a wide range of electronic technologies and Information and Communication Technologies (ICT). TCRA’s key objective is to ensure the delivery of high-quality ICT services while promoting their widespread and reliable implementation.

In the FinTech sector, the Tanzania Communications Regulatory Authority (TCRA) plays a pivotal role in ensuring that mobile network operators comply with established standards for conducting financial transactions, particularly within the mobile money ecosystem (TCRA Act, 2003). However, while TCRA

[87] Ibid.

oversees the operational and technical aspects of these companies, the regulation of financial transactions is the mandate of the Bank of Tanzania (BoT). This dual regulatory framework introduces a potential risk factor within the FinTech industry, as the overlapping responsibilities between TCRA and BoT can lead to governance challenges and regulatory ambiguities, potentially hampering effective oversight and enforcement.[88]

In the midst of evolving financial technologies in Tanzania, the rise of mobile money systems, which operate under two distinct models bank-led and non-bank-led has introduced significant regulatory challenges. Notably, the non-bank-led model exhibits a certain lenience in Prudential Financial regulations, creating potential loopholes for illicit activities such as money laundering and financial terrorism. Compounding this issue is the emergence of crypto currencies, which remain beyond the regulatory scope of the Bank of Tanzania (BoT), raising serious concerns about consumer protection and the potential for misuse in illegal financial activities.

While the National Payment System Act of 2015, aligned with the 2022 G20/OECD High-Level Principles on Financial Consumer Protection, aims to safeguard consumers in both the bank-led and non-bank-led models, the effectiveness of these protections is undermined by gaps in the regulatory language. For example, Section 51(1) of the Act grants broad regulatory powers to financial authorities, yet the ambiguous language within the section detracts from its intended purpose, failing to adequately protect consumers from the risks inherent in emerging financial technologies.

Further complicating the regulatory landscape is the legal oversight of international remittances within the non-bank-led model. A closer examination of both the National Payment System Act of 2015 and the Electronic Transactions Act of 2015 reveals a critical lack of provisions addressing cross-border remittance activities. This omission is particularly concerning given the increasing role of telecommunication companies in facilitating cross-border financial transactions within the East African Community (EAC). Despite the growing importance of such initiatives, these efforts have yet to be adequately integrated into the legal and regulatory framework.

[88] A.M. Ally, Legal and regulatory framework for mobile banking in Tanzania, *International Journal of Law and Management Vol. 66 No. 1, Emerald Publishing Limited, 2024, pp. 44-60.*

In this complex legal environment, a thorough review of Tanzania's financial regulatory system is necessary. The current framework not only leaves significant gaps that increase risks for consumers but also fails to address the realities of a rapidly evolving financial ecosystem. Strengthening the regulatory oversight of non-bank-led mobile money services, ensuring the inclusion of crypto currency within the regulatory perimeter, and addressing cross-border remittance activities must all be priorities in order to mitigate risks and enhance consumer protection. A more coherent and comprehensive approach is essential for the sustainable development of FinTech in Tanzania, ensuring both innovation and security in the financial sector.[89]

Within Tanzania's current legal landscape, consumer protection faces significant challenges, particularly as laws addressing consumer rights in the FinTech sector remain fragmented. Key legislation, such as the Constitution of the United Republic of Tanzania, 1977 (specifically Articles 11, 14, and 18), offers broad consumer protection. Additionally, various statutes like the Fair Competition Act, 2003, the Bank of Tanzania Act, 2006, the Tanzania Communications Regulatory Authority (TCRA) Act, 2003, the Cybercrimes Act, 2015, the National Payment Systems Act, 2015, and the Electronic Transactions Act, 2015 aim to address specific areas. However, these laws do not comprehensively cover the unique challenges posed by FinTech innovations like mobile money (M-Money).

The rise of M-Money services presents a critical legal gap, as they fall outside traditional financial sector regulations. Telecommunications companies, which provide these services, are regulated by the TCRA rather than financial authorities, creating regulatory ambiguity. While the Bank of Tanzania (Financial Consumer Protection) Regulations, 2019, attempt to safeguard consumer rights within financial services, M-Money operations have exposed a legal void. This gap leaves M-Money consumers vulnerable to risks not adequately addressed by the current regulatory framework.

Further complicating consumer protection efforts is the inadequacy of laws like the Cybercrimes Act, 2015. Although the Act was established as a penal statute to criminalize offenses involving computer systems and Information and Communication Technologies (ICT), it falls short in addressing jurisdictional challenges in the digital realm. Part III of the Act, particularly Section 30(1),

[89] Ally, A.M. (2024). Legal and regulatory framework for mobile banking in Tanzania, International Journal of Law and Management Vol. 66 No. 1, Emerald Publishing Limited,pp. 44-60.

briefly touches on jurisdiction but lacks clarity and detail, failing to specify which courts have original jurisdiction over cybercrime cases. This ambiguity becomes problematic in the context of a virtual, global, and borderless FinTech environment where anonymity reigns, complicating the enforcement of laws across borders. Without clear jurisdictional guidance, Tanzanian courts may struggle to assert authority over complex cross-border cybercrimes, hindering effective legal proceedings.

The rise of Artificial Intelligence (AI) in FinTech further exacerbates these challenges. The Cybercrimes Act does not account for offenses that could emerge from the increasing integration of AI in financial systems. Autonomous systems can be exploited to commit various financial crimes, such as generating fraudulent transactions, automating phishing schemes, engaging in identity theft, and unlawfully harvesting personal data. These actions pose significant privacy risks and can result in severe financial and personal harm to consumers. These gaps in the legal framework underscore the urgent need for a more robust and forward-looking regulatory approach. A comprehensive strategy is essential to address the jurisdictional complexities inherent in cross-border FinTech activities and to mitigate the emerging threats posed by AI technologies. Strengthening legal provisions in these areas will be crucial in ensuring that consumer rights are adequately protected in an increasingly digital and interconnected financial landscape. Another significant legal challenge that jeopardizes consumer rights in the FinTech sector is the rapid growth of artificial intelligence (AI). While AI holds the potential to transform financial services by improving efficiency, accuracy, and expanding financial inclusion, it also introduces a range of risks within the regulatory landscape. One such risk is the ambiguity around accountability and liability when AI systems malfunction or cause unintended consequences.

Although Section 26 of the Electronic Transactions Act of 2015 attempts to establish the validity of contracts formed between individuals and interactive systems, the current legal framework is limited in scope. It addresses the initial formation of contracts but fails to extend its coverage to more complex issues arising from the deployment of autonomous agents in the financial sector. These autonomous systems, which can make decisions without human intervention, create new layers of uncertainty regarding liability. For instance, if an AI system causes financial loss due to an error in decision-making, who is held responsible? The developer of the system, the financial institution using it, or the AI itself?

This gap in the law raises important questions about consumer protection. As AI technologies become more sophisticated, the potential for errors or unintended outcomes also increases, making it critical for regulators to provide clear guidance on liability and accountability. The absence of such clarity not only threatens consumer rights but also undermines trust in AI-driven financial services. Moreover, this challenge is compounded by the global nature of FinTech, where different jurisdictions may have varying standards of regulation, creating inconsistencies that could further expose consumers to risks.

To address this issue, it is imperative for regulators to update existing legal frameworks to reflect the realities of AI in financial services. This might include creating provisions that assign liability in the case of harm caused by autonomous agents, as well as establishing safeguards to ensure transparency and accountability in the deployment of AI systems. In doing so, regulators can help strike a balance between fostering innovation in the FinTech sector and ensuring robust consumer protection.

6.0 Conclusion and Recommendations for Strengthening the Legal Framework

The evaluation of the legal framework for managing risks and security issues in mobile banking in Tanzania highlights both strengths and weaknesses. While the current laws and regulations establish a foundation for secure mobile banking transactions, significant gaps persist, particularly regarding consumer protection and trust in the sector. These gaps underscore the urgent need for specific regulations that directly address the unique challenges posed by the FinTech sector, which operates largely within a telecom-centric model. One key area requiring attention is the question of liability, especially in an era where autonomous agents and artificial intelligence (AI) are becoming integral to financial services. While AI adoption offers numerous advantages, such as increased efficiency and enhanced financial inclusion, it also introduces new challenges related to consumer risk. The lack of clear liability provisions when these technologies fail or act unpredictably puts consumers at risk. Therefore, it is crucial to establish clear legal standards that define liability in cases where AI systems and other automated technologies are involved in financial transactions.

Moreover, regular security audits of mobile banking platforms should be mandated to ensure that any vulnerabilities are identified and rectified promptly. Alongside this, public awareness campaigns are essential to educate

consumers about the potential risks and best practices for securing their mobile banking activities. This would help bolster trust in the system, encouraging broader adoption of mobile banking services.

Additionally, while the introduction of the Agent Banking Guidelines for Banks and Financial Institutions, 2017 was a positive step, these regulations do not cover financial activities conducted under non-bank-led models. This regulatory gap creates a significant loophole for consumers using mobile financial services offered by telecommunications companies. Without adequate legal protection in place, these consumers are left vulnerable to risks that are not adequately addressed by the existing regulatory framework. To remedy this, it is necessary to develop a legal instrument specifically targeting agent banking within the telecom-centric model. This would ensure that all participants in the mobile banking ecosystem, regardless of the platform they use, are afforded the same level of legal protection and security.

BOOK REVIEW

The Internet, Development, Human Rights and the Law in Africa, edited by Danwood M. Chirwa and Caroline B. Ncube, Routledge, 2023, 4 Park Square, Milton Park, Abingdon, Oxon OX14 4RN, 250 pp., US$ 192.00 (hardcover), ISBN 978-1-032- 31072-5

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One cannot undervalue the interaction between the Internet and development. The Internet has become fundamental to development. It promotes inclusion, efficiency, and innovation. Both globally and locally, people acknowledge the connection between the Internet, human rights, and development. A wide range of measures are taken collectively and individually to harness this link for the benefit of people, yet it is coupled with risks and controversies. At times, ferocious national and strong institutional stances on human rights protection and Internet provision have led to an increased risk of fragmented jurisprudence.

The issues it addresses and its scope primarily motivate the selection of the book under review. It offers more than a mere rhetorical contribution to an increasingly intricate legal field. The Internet, Development, Human Rights, and the Law in Africa is among the first books dealing with issues and challenges that the Internet poses for development and human rights in Africa.

The Internet, Development, Human Rights, and the Law in Africa is an edited volume that is multidisciplinary. The introduction of the book promises to track and critique the impact of the Internet in Africa. Its main gist is to explore the legal policy implications of and responses to the Internet in matters spanning human rights, development, technology, trade, criminal law, intellectual property, and social justice. It exposes the continent from different perspectives, citing examples from several African countries and regions. The authors' main discussion focuses on issues the Internet raises for human rights and development to unlock its full potential for the benefit of humankind. Ten chapters, grouped into four themes, coherently divide the book. These are access to the Internet as a right; Internet freedom of expression, privacy, and intellectual property; e-commerce and cybercrimes; dispute resolution; and the Internet. It contains a table of contents, which helps the reader easily locate the chapters. There is also a list of tables that are good for referencing. Additionally, there is a list of contributors and a preface that introduces the

book's premise to the reader. Additionally, the book provides a bibliography for reference. The preface promises an account of the challenges that the Internet raises for human rights and development from an African perspective.

The book begins by laying the foundation for the subsequent chapters. In Chapter 1, it introduces the connection between the Internet, human rights, and development. The book emphasises that the world is more connected now than at any other time in history. Throughout this chapter, the book presents human rights in an African context, as well as the relationship between the Internet, development, and human rights. More importantly, it covers the regional and sub-regional responses to Internet-related policy and legal issues. Furthermore, it emphasizes that African regional and subregional levels have adopted policies and strategies to address Internet-related issues. The chapter also highlights the structure of the book.

In chapter 2, the book discusses access to the Internet as a human right. The chapter not only considers several arguments against access to the Internet as a right, but also dissects those arguments and finds them to be unsatisfactory. Furthermore, it focuses on international and some African instruments, as well as how they recognize access to the Internet as a human right. The instruments presented include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the African Charter on Human and Peoples' Rights (the African Charter), the African Union Convention on Cyber Security and Personal Data Protection (the Malabo Convention), the African Union Declaration on Internet Governance, and the Development of Africa's Digital Economy, among others. We primarily appreciate the author's focus on these instruments, considering their growing citation as the foundation for acknowledging Internet access as a fundamental human right. The chapter provides a fascinating chronology with a nod to current events, showing that Internet access is an evolving, comprehensive right.

Chapter 3 of the book discusses privacy as a human right in Africa and the global Internet. The chapter provides an overview of privacy protection in international law, the African region, sub-regional and national constitutions, and data protection legislation. The author's approach to navigating human rights in this chapter is commendable. For instance, he uses a broad-brush approach in discussing the state of the global Internet in Africa and the protection of privacy under international law. Subsequently, the author turns specifically to African perspectives on privacy protection. The discussion covers not only instruments like the African Charter, the African Charter on the

Rights and Welfare of the Child (ACRWC), and the Malabo Convention, but also how they evolved from human rights perspectives, the then European Data Protection Directive 95/46/EC, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data 1980, and the OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data 1981. The discussion is interesting as the author critiques the African data privacy policy frameworks. Within the discussion, he offers an analysis of privacy protection through national constitutions and data protection legislation. He believes that constitutional protection is weak because its scope is too broad, it excludes the private sector, and it attracts different remedies than those provided in data protection legislation.

Chapter 4 provides a discussion on the data subject of privacy and mHealth with insights from Kenya and South Africa. The authors endeavour to provide a comparative analysis that details, for example, the point of departure in legal and ethical measures applicable in Kenya and South Africa. They specifically discuss the ethical and legal measures developed to safeguard the privacy and confidentiality of sensitive mHealth data. The authors conclude the chapter by suggesting the creation and execution of strategies to guarantee that mHealth participants receive not only legal tools but also codes of practice, guidelines, and essential information to safeguard their privacy and prevent exploitation.

Chapter 5 addresses the questions raised by the interface between the Internet, freedom of expression, and intellectual property. The chapter underscores the extent to which African states have addressed these questions in their legislation and case law. In a very interesting way, this chapter provides an overview of constitutional protection of intellectual property rights and freedom of expression in Africa, drawing examples from a few selected countries (e.g., Kenya, South Africa, Tunisia, Uganda, and Egypt). The chapter discusses not only the available legislation and existing case law but also how the law regulates intermediaries' liability.

Chapter 6 addresses a legal framework for e-commerce in Africa. The chapter discusses not only the progress but also the challenges and opportunities of e-commerce. It provides an overview of international, regional, and national legislative attempts on e-commerce. The chapter cites examples of United Nations model laws at the international level, such as the Model Law on Electronic Commerce, 1996, the Model Law on Electronic Signatures, and many others. Instruments such as the Malabo Convention, the Southern African Development Community (SADC) Model Law on e-Commerce, the Southern African Development Community (SADC) Model Law on Cyber Crimes, and

the Economic Community of the West African States (ECOWAS) Directive on Fighting Cybercrimes illustrate legislative attempts at the regional level. The chapter not only presents the efforts made in regulating e-commerce using the instruments above but also highlights the weaknesses or limitations of the latter. The African experience with ICTs, crime, and human rights is the focus of Chapter 7. One cannot help but praise the chapter's presentation of not only the linkage between ICT, crime, and human rights but also the types of cybercrime and the prevalence of the problem. Although the chapter has a regional and sub-regional focus, it particularly focuses on southern Africa. The chapter considers the fact that, as with all crimes, cybercrimes also undermine human rights and fundamental freedoms. Most welcome is the submission that individual cybercrimes may also undermine other human rights and freedoms. For example, hacking and data interference violates the right to privacy. Furthermore, cybercrimes that cause damage to ICTs can lead to the loss of money or property, as well as violate the right to property, among other violations.

Chapter 8 contains a discussion on the Internet and dispute resolution. It analyses the challenges of resolving disputes that arise between people in the online space. To name a few, there is the difficulty of establishing jurisdiction and the prohibitive cost. The chapter recommends the use of online dispute resolution (ODR). Interestingly, the chapter does not only suggest that ODR can enhance access to justice due to its flexibility, reduced cost, and simplicity but also the need for sufficient legislative measures. It further reviews the potential of ODR in the African context by assessing the continent’s readiness and other factors. It argues that there is clear existing evidence that African nations can use ODR tailored to meet African public policy goals and be responsive to society's broader needs.

Chapter 9 discusses emerging African practices regarding the admissibility and weight of electronic evidence. The chapter critically analyses the admissibility requirements for electronic evidence under the Malabo Convention. It makes a comparative analysis between Tanzania, Nigeria, and South Africa. The analysis details the notable efforts made and the common points of departure in practice. The chapter concludes that it is high time for African states to ratify the Malabo Convention and modernize their domestic laws in light of the Convention because cybercrime is borderless and effective combat requires international cooperation.

Chapter 10 is essentially a concluding chapter. It summarises all the preceding chapters. The chapter concludes by stating that without addressing human rights

and development issues through law and policy at both regional and national levels, Africa may not reap the benefits and opportunities associated with the Internet and related technologies (p. 225).

Overall, the editors' endeavour with this book has been successful, maintaining an African perspective on the subject matter throughout the text with expert comparative insights. One cannot help but commend this edited volume for contributing to the body of knowledge in this emerging field, focusing on the African continent. One would have expected a chapter on COVID-19 issues and their impact on human rights, given the book's 2023 publication. This is because COVID-19 was a global hot topic, and contact-tracing apps were associated with privacy and data protection breaches. The concluding remarks in Chapter 10 do not adequately cover the topic and its impact. However, the references, which date back before the breakup of COVID-19, clearly demonstrate that the book was in print during the COVID-19 pandemic. Nevertheless, the book misses a disclaimer from the editors that it will not cover some hot topics like COVID-19.

Despite the book's focus on Africa, it only presents a few of the nation's experiences, which is surprising. This makes the discussion very blunt. Perhaps it would be better if the contributions in the edited volume could reflect national experiences rather than majoring in regional instruments while drawing experiences from a few selected countries that purport to represent the entire African continent. However, this remains a robust legal text with coverage relevant to audiences across Africa and beyond. Academics and practitioners in this particular field, as well as ordinary people affected by Internet-related issues, find the provided substance useful. The contributors successfully present the topics and employ a comparative approach. It not only reveals expertise in the field but also improves comprehension of the presented subject matter.

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