

THE UNITED REPUBLIC OF TANZANIA
THE LAW REFORM COMMISSION OF TANZANIA

REPORT ON
PRIVATE LEGAL PRACTICE

PRESENTED TO THE ATTORNEY- GENERAL
AND MINISTER FOR JUSTICE

The Law Reform Commission of Tanzania *was* established by the Law Reform Commission of Tanzania Act, 1980 and began functioning on 21st October 1983.

The Commissioners are:

Hon. Mr. Justice Hamis A. Msumi – Chairman

Mr. George B. Liundi – Full Time Commissioner

Mr. Pius Msekwa – Principle Secretary Office First Vice- President and Prime minister

Prof. Josephat L. Kanywanyi – Associate Professor of Law, University of Dar es Salaam

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TO

The Honorable *Mr. Justice* 2.3. Lubuva, M.P.,
Attorney—General and Minister for Justice,
DAR ES SALAAM.

Dear Mr. Minister,

REPORT ON PRIVATE LEGAL PRACTICE

Pursuant to section 8(1) of the Law Reform Commission of Tanzania Act, 1980, the Commission acts on your Reference No.3 sent to it under cover of your letter dated 17th November, 1983, appointed a committee of ten people, headed by Prof. Issa G. Shivji, Professor of Law, University of Dar es Salaam, to exercise the subject and report to the Commission.

2. In August 1985, the Committee issued a working Paper No.1/1985 entitled Discussion Paper on Issues on reform in the Private Legal Practice in Tanzania for the purposes of soliciting views of the members of the public, the bar and the bench and members of other professional bodies as well as interested persons in academia. The Committee held public consultations and conducted seminars at the University of Dar es Salaam and at the National Central Library in August 1985; and at Arusha in February 1986 to discuss issues contained in the paper. The Committee presented its Report to the Commission on 29th September 1986.

3. In compiling this report the Commission has been greatly assisted, by the findings of the Committee. Are satisfied that the views expressed in our report reflect the views of the majority of the people of Tanzania consulted on the issues in question.

4. Having completed the study of this important subject I have the honour, on behalf of the Law Reform Commission of Tanzania, to submit herewith our Report on Private Legal Practice in Tanzania.

Yours respectfully,

Justice Hamisi A. Msumi

CHAIRMAN

LAW REFORM COMMISSION OF TANZANIA

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INTRODUCTION – TERMS OF REFERENCE

In terms of section 8(1) of the Law Reform Commission of Tanzania act, 1980, the Honorable! & Attorney – General and minister for Justice under cover of his letter dated 17th November, 1983, sent to the Commission, inter alia, a Reference on Private Legal Practice in Tanzania. The terms of the Reference read as follows: –

“...3. The government accepted the recommendation

Of the Judicial System Review Commission that the~ private practice of the legal profession 00 abolished. It however rejected the establishment of another corporation beside the Tanzania Legal Corporation. The Commission is invited to consider and advise on –

- (a) How that recommendation Can best be carried out without jeopardizing the Constitutional and statutory right of persons to legal assistance and representation;
- (b) What measures could be taken to ensure that members of the public in urban as well as in rural areas are availed an opportunity to obtain legal assistance and representation;
- (c) What measures should be taken to mould the legal profession into an organ of The people of Tanzania, more responsible

And responsive to the needs of the public, and whose functions and system of operation are more and better understood by the people."

2. According to our reading the Reference, the Government implicitly agrees that abolition of private legal practice will create a vacuum in the provision of legal services Which must be filled, and the Commission is asked to find the best method on how~ to fill this vacuum, otherwise than by creating another legal public corporation.

ABOLITION OF PRIVATE LEGAL PRACTICE

1 Findings of the judicial system review commission:

We have noted that in making the recommendation for the abolition of private legal practice the Judicial System' Review Commission (the Msekwa commission) was influenced by the. Following factors: –

(a) That the private bar was wholly dominated by minority group of -the society viz, the

Asian Community;

(b) that the geographical spread of private advocates showed a concentration of them in few regional centres, particularly Dar es Salaam, Arusha , Moshi and Tanga. There is dire neglect of the rural areas where the majority of people live and where most of the courts are situated;

(c) that between 1971 and 1976 •there was a marked exodus of advocates from Tanzania resulting. Into a depletion of the roll from a total 'of 97 in 1971 to 43 in 1976;

I-C) that advocates' fees are prohibitively high leading -to a situation of selective justice; - that is, only the rich, could afford the services of Advocates.

(e) 'that there were persistent public complaints of unethical conduct on the part of some T'3private advocates. -

2. Observations of' the Commission:

- (i) We observe that the Msekwa Commission worked

- From '197q -to '1977 when it submitted its Report to the Government, and that since 1977 to the time when the Government sent this Reference to the commission, there have been a number of changes which necessitate having

- A fresh look 'at the decision to abolish private legal practice. For example, in contrast to *the* situation that prevailed up to 1977, the Current roll of advocates has tremendously increased. Research shows that in July 1986 the total number of advocates enrolled was 136 as compared to 43 quoted in the Report of the I.4sekwa Commission. Furthermore, advocates of Asian descent no longer dominate the roll. For example, out of' the 73 advocates enrolled between 1977 and 1986 only 2 were of Asian descent.

(ii) We have found out that the current law *an* oriented towards urban centres', while most of the courts', particularly primary courts', are in fact situated in rural areas throughout the country. This means that the bulk of court work is transacted in the rural

areas at the court level, unfortunately, under the magistrate Courts Act, 1984, advocates are not allowed to appear in primary courts to represent parties. This restriction partly explains their concentration in urban centres. The present unequitable distribution of private advocates appears to be largely dictated by the statutory provision which prohibits appearance of advocates in primary courts.

(iii) On the complaint of prohibitively high fees, it has come to our notice that the Advocates (Remuneration and Taxation of Costs) Rules -which set out the scales of advocates' fees were originally promulgated prior to 1951 and were last revised in 1962. This means that despite persistent escalation of cost over the years, -an- advocate 'is expected to charge fees according to scales fixed in 1962. Section 49 of advocates Ordinance allows' the formation of a Remuneration Committee by advocates elected by the Tanganyika Law Society. Alternatively the Chief Justice is empowered to make Orders to regulate remuneration of advocates. None of the two authorities has taken steps to review the scales for more than' two decades:

(iv) There have been complaints on poor quality of legal services provided by some advocates and some incidents of misconduct among them. -However, the Commission 'is convinced that the law regulating legal practice is adequate 'enough to control these shortcomings. Both the Advocates Ordinance and the Notaries Public and' Commissioners for Oaths Ordinance provide for disciplinary machinery in' case. -Of infringement of the law or in case of misconduct. The remunerative aspect of the legal profession is taken care of by both the Advocate Ordinance and the Notaries -Public and Commissioners for Oaths Ordinance, furthermore, there is the inherent supervisory powers of the ~high Court over advocates. We feel that most of the complaints of indiscipline and professional incompetence would be minimized if the law regulating the legal profession were strictly enforced.

'We feel that the law on the provision of legal aid by the State is not fully utilized. Under the Legal Aid (Criminal Proceedings) -Act, 1969 a Judge of the High Court or the Chief Justice may certify that an impecunious accused person ought to have legal aid when conducting defence or preparing an appeal. Sections 2 and 3 of that Act clearly state that any accused person charged, in any court except primary' court, is entitled to legal aid provided that the Chief Justice or a Judge of' the High Court so certifies. If the case is before a district court or a court of resident Magistrate then the certifying authority is the chief Justice. Our. Research has revealed that invariably state legal 'aid is only given to accused persons charged in the High Court with capital offences. Besides, legal aid is provided to these ace used persons as a matter of right, that is, regardless of

Whether or not they are impecunious. On the other hand no consideration is given to the majority of the accused persons facing other categories of criminal charges in the district courts or courts of -resident Magistrate.

RECOMMENDATIONS

In making our recommendations we have- taken into account the findings of the Msekwa Commission, and our observations on those findings. We have dealt with each of the three points raised in the terms of reference in their chronological order viz.

(a) How the Government decision to abolish private practice could be carried out without jeopardizing the constitutional and statutory right of persons to legal assistance and representation;

(b) What measures could be taken to ensure that members of the public in urban as well as rural areas are afforded an opportunity to obtain legal assistance and representation; and

(c) What measures should be taken to mould the legal profession into an organ of the people of Tanzania, more responsible and responsive to the needs of the public, and whose functions and system of operation are more and better understood by the people.

2. On the basis of the outcome of in depth and extensive research, including interviews of various individuals from different walks of life, the commission submits to the government the following recommendations; -

(1) Having regard to the present stage of development of the legal profession and the country and all the circumstances surrounding the subject matter of the Reference, we have been unable to find a workable alternative to private legal practice without jeopardising the Constitutional and statutory right of persons to legal assistance and representation. This conclusion takes into account the following factors among others

(a) In contrast to the situation that prevailed at the time of the publication of the report of the Msekwa Commission in 1977; the current roll of Advocates has increased, and it shows that Advocates of Asian extraction are no longer dominant;

(b) the 1984 Constitutional amendments to the Constitution of the United Republic have introduced a Bill of Rights, which includes the right of an individual to have legal counsel of one's choice;

(c) Zanzibar, which abolished private legal practice in 1967 has restored it since 1985,

(2) For the purposes of ensuring that members of the public in urban as well as in rural areas are afforded an opportunity to obtain legal assistance and representation) the following measures should be taken

(a) The legal services provided by the State under the Legal Aid (Criminal-Proceedings) act, 1969 (No.21 of 1969) should be fully utilized by extending it to impecunious accused persons in the district courts, and for easy administration of the scheme it is further recommended that for the cases before these courts the Certifying authority should be any Judge of the Court;

(b) The Government should establish a special fund from which to make grants to institutions engaged in the operation of voluntary legal aid schemes to support their activities. These institutions include such agencies as the Legal Aid committee of the Faculty of Law of the University of Dar es Salaam, Institute of Development Management Mzumbe Institute of Finance Management and Moshi Co-operative College;

(c) the Government should help the Tanzania Legal Corporation in every way possible to implement its expansion programme,

so that the Corporation may be enabled
to serve well 'its expanding clientele.

(3) As regards the need to mould the legal profession into an organ of the people of Tanzania, the Government should —

(a) Strengthen the Faculty of Law of the University of Dar es Salaam in terms of resources, in order to enable the Faculty to train undergraduates at required academic standard levels. -

(b) More formally systematize and invigorate the internship programme or, alternatively, establish a Law School, to strengthen the practical training of newly qualified lawyers and enhance their awareness of the various aspects associated with the practice of the profession, including professional ethics and etiquette. The current programme does not meet these needs.

(c) Urge the institutions entrusted with the administration of law regulating legal practice to enforce the law strictly particularly those provisions relating to discipline and professional competence.

(4) The High Court should take measures necessary to approve the administration of the Advocates Ordinance; -these measures should include:

(a) Merging under one authority the functions connected with enrolment and enforcement of discipline~ of advocates;

(b) Appointing a Senior member of the Magistracy to take over the functions mentioned in sub—paragraph (a) of this paragraph, who should also be the Secretary to the Council of Legal Education, and be responsible to the Chief Justice directly.

(5) The Government should take note of the formation of the Law Association of Tanzania and assist it in every way possible to formulate a clear policy and related implementation strategy and action programmed designed to promote the attainment of the objectives intended for the new form of organization and: working of 'the legal profession in Tanzania.

RECOMMENDATIONS ON CO- OPERATIVE FORM OF PRIVATE LEGAL PRACTICE, AND PARA- LEGAL PERSONNEL IN THE LEGAL PROFESSION IN TANZANIA

1. We also considered suggestions for the introduction of a cadre of para—legal personnel in the legal profession -in Tanzania. On the lines of para—medical personnel, 'and the formation of co—operative firms of private legal practitioners. This suggestion was made in the context of the need for expanded and effective legal representation. -

2. On the question of legal representation by Advocates and para—legal personnel in Primary Courts, both in urban as well as in rural areas, we have the following observations -

(a) That advocates be allowed to represent parties before Primary Courts where the presiding Magistrate holds a Diploma in Law from the Institute of Development Management Mzumbe, or an equivalent qualification from other recognized institutions;

(a) That para—legal personnel be allowed to Represent parties in primary Courts, presided

by any competent magistrate provided that Such para—legal personnel act as agents of the respective parties and not purporting to be advocates. We have, however, decided that there is a need for the commission 'to carry out further studies on the question of the provision of legal' services by para— legal personnel. It is necessary, for example, to collect statistics and other data on the number of persons currently engaged in the preparation of various types of legal documents, their basic qualifications or level of training and their spread in the country. Upon completion of these additional studies the Commission will prepare a supplementary report in answer to point (b) of the terms of' reference on ensuring that members of the public in urban as well as in rural areas are afforded an opportunity to obtain legal assistance and representation.

3. On the issue of co—operative form of private legal practice, ~re are of the view that the best way of realizing this ideal is not to force the idea upon the profession; the Government and the Co—operative Union of Tanzania should, instead,' take positive steps to encourage and assist advocates to organize their practices on a co—operative basis.

SUMMARY OF MAJOR RECOMMENDATIONS

1. V/e recommend that private legal practice should continue to be part of our legal system in order not to jeopardize the constitutional and statutory right of' persons to legal assistance and representation.

2. We recommend that; —

(a) the definition of certifying authority in section 2 of the Legal Aid (Criminal Proceedings) Act, 1969 (No.21/69) be amended
To include any Judge of the High Court for the purposes of granting legal aid to ~accused persons in subordinate courts;

(b) the provisions of. The Legal Aid (Criminal Proceedings) Act, 1969 be publicized and used

-Extensively for indigents even in District Courts and Courts of Resident Magistrate in deserving cases for more people to benefit from the provision of legal 'aid services than it is' at present.

3. We recommend that the Government establish a special fund from which to make grants to support voluntary legal aid schemes,

4. 'We recommend that the Government should help the Tanzania Legal Corporation to implement its expansion programme in order to 'enable it to serve well its expanding clientele.

5, 'We recommend that the Government should strengthen the Faculty of Law of the University of Dar es Salaam in terms of resources in order to enhance its training capacity.

6. We recommend that the Government should review and revitalize the internship programme or, alternatively, establish a Law School, to strengthen the practical 'training of newly qualified lawyers.

7. We recommend that the Government should urge the competent authorities to pay particular attention to the effectiveness of the administration of the Advocates Ordinance, the Notaries and Commissioners for Oaths Ordinance and the Tanganyika Law Society Ordinance.

8. We recommended that the High Court should take measures to streamline the functions relating to enrolment and enforcement of discipline of advocates.

9. We recommend that the Government should take positive steps to help the newly formed Law Association of Tanzania contribute effectively to the improvement and strengthening of the Legal profession in Tanzania.