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Plot. No. 391 | House No. 21 | Chato Street | Regent Estate
P.O.BOX 2148 | Dar es Salaam | Tanzania
Telephone: +255 22 277 5313 | **Fax:** +255 22 277 5314
Email: *info@tls.or.tz*
Website: *www.tls.or.tz*

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FOREWORD

Welcome to the Tanzania Lawyer Journal, volume 2 issue number 2 of 2021. One of the functions of the Tanzania Lawyer Journal is to update the legal fraternity and the general public on emerging legal issues within and outside our country. This first issue of the journal has largely fulfilled that function.

Mr. John S. Ombella in his paper analyses the legal framework regulating mining activities with the view to identify the bottlenecks that inhibits Mine-host communities from effectively accessing clean water in Tanzania. On the other hand, *Dr. Talib Salum Zahor* explores the influence of the tax ombudsman towards the promotion and protection of tax justice in relation to the existing laws and rules or regulations that describe powers vested to tax ombudsman on resolving complaints the assessment is made to attest the contribution of the ombudsman in the promotion of tax justice.

Mr. Eugene E. Mniwasa in his papers, examines issues concerning regulation of virtual currencies around the world and highlights some lessons that Tanzania can learn in the process of setting up the regime for regulating virtual currencies. The article shows that the revolution in financial technologies, which forms part of the 4th Industrial Revolution, has resulted in, among other things, the invention of virtual currencies. Furthermore, *Dr. Nkuhi, Mathias Sylvester* in his paper analyses Indian and Tanzanian National Human Rights Institutions in the Protection of Workers in Hazardous Occupations and he recommends for strategic measures to ensure efficient working of the NHRIs, particularly the CHRAGG. Lastly, *Dr. Helen B. Kiunsi* in her article intends to provide an insight and understanding of the transfer pricing by providing nature, theories, origin and role of arm's length principle and current situation of transfer pricing laws in Tanzania. The contribution of this article shall be useful to legislators, Tax administrator, tax advisers, and taxpayers.

I wish to assert that we have a voluminous edition this time. This volume consists of six articles. This is a result of many authors increasingly becoming interested to feature in the Tanzania Lawyer Journal. My sincere thanks go to all contributors, our blind peer reviewers, the Chief Editor, the Editorial Board and the Secretariat for the job well done.

Prof. Alex B. Makulilo

Chairperson

Research and Publications Committee

EDITOR'S NOTE

Dear readers,

I am pleased to present to you the second issue of volume 2 of our Journal for the year 2021 with articles relevant to your day to day legal practice. The foreword by the Chairperson of Research and Publication Committee, Prof. Alex B. Makulilo summarizes the contents of the present issue. I hope you will enjoy reading this issue. We also encourage you to consider submitting your work for future publications in our journal, whether a book review, original research, case note or legislation commentary that relates to our legal practice.

Enjoy your reading!

Dr. Clement B. Mubanga

Chief Editor

INDIAN AND TANZANIAN NATIONAL HUMAN RIGHTS INSTITUTIONS IN THE PROTECTION OF WORKERS IN HAZARDOUS OCCUPATIONS: A COMPARATIVE BREAKDOWN

Dr. Nkuhi, Mathias Sylvester*

Abstract

National Human Rights Institutions (NHRIs) are key state institutions responsible for human rights protection and promotion under national human rights systems. They are designated as independent human rights watchdogs. NHRIs protect and promote a wide range of rights (civil, political, economic, social and cultural) including multiple other specific issues for specific groups. The protection and promotion of human rights of the workers is within the domain of the NHRIs works. Such protection and promotion is critical to the materialisation of the decent work agenda and minimisation of workplace sufferings (fatalities, injuries and diseases) resulting from precarious working conditions. This essay summarises author's comparative and critical analysis of the Indian National Human Rights Commission (NHRC) and the Tanzanian Commission for Human Rights and Good Governance (CHRAGG) works on the protection of Workers' Health and Safety (WHS) right in the most hazardous occupations i.e., agriculture, construction, mining and manufacturing. Documentary review was employed in gathering information necessary for the analysis. Pertinent to author's observation is the significant variation in terms of levels of protection and impacts to the working class. The NHRC work is comparatively, far beyond that of the Tanzanian counterpart. There are multiple reasons for that including the constitutional and legal set up and organisation and commitment. The author recommends for strategic measures to ensure efficient working of the NHRIs, particularly the CHRAGG.

Keywords: *NHRC, CHRAGG, WHS right protection, hazardous occupations*

* LL.M, Ph.D (Law), *Lecturer, Researcher and Consultant,* Department of Law, Moshi Co-operative University, Advocate of High Court of Tanzania, contact email address: mathias.nkuhi@yahoo.com.

1.0 *Introduction*

The protection and promotion of the rights of members of the human family is an undertaking that involves many stakeholders at international, regional and national levels. In advancing human rights, the work of inter-governmental, national/state organisations as well as non-governmental and privately owned institutions is widely acknowledged. Multiple mechanisms are deployed in the protection and promotion process.[1] At the national level, government and non-governmental organisations, civil societies, academia, inter-governmental institutions, political parties, media, groups with special needs and workers' associations are instrumental in the protection and promotion of the rights. Even though they have a common goal amongst them, which is to ensure effective safeguard of fundamental human rights, the works of these entities do vary in terms of approaches, resources, scope and coverage. This article discusses the works of the Indian and Tanzanian NHRIs in protecting and promoting human rights at work agenda. The author's special focus is on the Workers' Health and Safety (WHS) right. The author analyses the same with reference to agriculture, construction, mining and manufacturing which are still regarded as the most hazardous occupations. The role of the NHRC and the CHRAGG in the protection of WHS in these occupations is thus at the core of the discussion. The discussion is divided into five sections. Immediately after this introduction is section that analyses WHS right providing, *inter alia,* the status as a fundamental human right, global concerns about it and why it is significant for this discussion. The third section hosts a discussion on NHRIs and their roles in the protection of WHS. The NHRC and CHRAGG mandates and roles are critically discussed. The discussion is followed by the fourth section where the author compares the works of the NHRIs and pointing out lessons to be learnt by particular NHRI. Section five is the last one, and it is where the author has drawn conclusions and discusses some ways forward.

The author's discussion in the present work is drawn from finalised doctoral degree research project on the legal regime for the protection of WHS in India and Tanzania. Most of the data

1 The techniques employed include: complaint disposal, litigation, strategic research studies and publication, lobbying and advocacy as well as training.

was obtained during the study through the doctrinal approach. An intensive documentary review was carried out with a view to, *inter alia,* understanding the scope and extent of the Indian NHRC and Tanzanian CHRAGG workings on protection and promotion of WHS right. Human rights instruments, court cases, national constitutions, national legislation, reports, books, research articles and other online sources were reviewed, analysed and synthesised to the objective of this work. The author has updated the information to reflect on the current state of affairs.

2.0 *WHS Right, Global Concerns and Significance of the Discussion*

2.1 *WHS Protection Framework and its Scope*

Understanding WHS as a fundamental right of workers and its significance in the present state of affairs is paramount prior to discussing its protection by the NHRC and the CHRAGG. Developments in human rights protection have embraced the protection of the rights of workers. WHS is one of such rights and it is recognised by the International Bill of Rights. The Universal Declaration of Human Rights, 1948[2] (UDHR) provides for the right to just and favourable conditions of work.[3] It guarantees everyone's right to work, right to free choice of employment and right to just and favourable conditions of work. The International Covenant on Economic Social and Cultural Rights, 1966 (ICESCR)[4], just like the UDHR, recognises the right to just and favourable conditions of work.[5] It also recognises everyone's right to health.[6] The right to just and favourable conditions of work under the Covenant safeguards among others safe and healthy working conditions.[7] Under the ICESCR States Parties, individually and

2 UNGA Resolution 217 A (III) (10 December 1948).

3 *Id.*, Art. 23, 24 & 25.

4 UNGA Resolution 2200 A (XXI) (16 December 1966).

5 *Id.*, Art. 7.

6 *Id.*, Art. 12, the Covenant prescribes the taking of various measures in order to safeguard workers. Such measures include the prevention of occupational diseases, provision of medical services and industrial hygiene.

7 *Id.*, Paragraph (b), further reference can be made to Article 10 which provides for special health and safety protection for young persons. The ICESCR prescribe for special measures to be taken for the social and economic protection of children and young persons including imposition of punishments on employment practices which are harmful to their morals or health or dangerous to life).

through international assistance and co-operation, undertake to progressively achieve full realisation of rights recognised therein, to the maximum of their available resources.

Besides, the International Bill of Rights there are other UN core human rights instruments providing for WHS protection.[8] Notably, India and Tanzania have ratified most of these treaties particularly the ICESCR. On the other hand, the protection of health and safety of workmen, women and children is also an entitlement under regional human rights systems. The African, Inter-American, European, Arab and ASEAN human rights systems have, in varying ways, recognised the enjoyment of just and favourable working conditions as critical to protection of health and safety of workers.[9] The protection of WHS is also a critical component of the International Labour Organisation (ILO) Decent Work Agenda[10] (DWA) and the United Nations 2030 Agenda for Sustainable Development (UN SDGs).[11] The DWA acknowledges challenges brought by globalisation including and which had harmful effects to the health and safety of workers. The ILO approach to the challenges is based on *Rights, Employment, Protection and Social Dialogue*. The UN reinforced the ILO approach in 2015 through the adoption of DWA into the SDGs. The UN SDG goal 8 focuses on the need to promote sustained, inclusive and

8 International Convention on Elimination of All Forms of Racial Discrimination (CERD), 1965 UNGA Resolution 2106 A (XX) (21 December 1965) (*right to just and favourable conditions of work under Art. 5*); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979 UNGA Resolution 34/180 (18 December 1979) (*protection of women workers health and safety including the function of reproduction under Art. 11*); Convention on the Rights of the Child (CRC), 1990, UNGA Resolution 44/25 (20 November 1990) (*the right of a child to be protected from economic exploitation and performance of works that are likely to be hazardous, harmful to child health or interfere with child's education under Art. 32*); and the International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (ICPRMW), 1990 UNGA Resolution 44/158 (December 18, 1990) (*right to equal treatment in respect to health and safety i.e. medical care, health services under Art. 27, 28 and 45*)

9 Save as for the health of working children, the African human rights system does not cater for the right. It provides for general right to health whose scope does not encompass occupational health and safety protection. The rest of the regions have the right enshrined in relevant treaties.

10 Under the *ILO Declaration on Social Justice for a Fair Globalisation 2008;* The Declaration is marked as a compass in the attempts to promote Fair Globalisation that is based on Decent Work.

11 UN, 'Transforming Our World: the 2030 Agenda for Sustainable Development', UN, A/RES/70/1 (25th September 2015).

sustainable economic growth, full and productive employment and decent work *for* all. Of special significance is goal 8.8 which expresses the UN's intent to protect labour rights and promote safe and secure working environments for all workers including those in precarious employment.[12]

All these developments explain the common global understanding over the need to protect the health and safety of workmen, women and children. The question however, that arises is the one as to what should be underlined as constituting WHS right. Undeniably, human rights are neither fixed in scope nor are they absolute in application. Fortunately, there are multiple attempts all aimed at defining the scope of the right.[13] The existing literature confines WHS right to the right to information; freedom to raise concerns; right to refuse or decline unsafe work; right to be free from retaliation for raising concerns or refusing unsafe work; right to work in the environment that is free from hazards; right to participate in health and safety issues; as well as the right to occupational healthcare.[14]

2.2 *Global Concerns and Significance of the Discussion*

The current state of affairs makes the discussion over the protection of WHS inevitably significant. *Inter-alia,* existing literature on the subject takes aboard reasons as to why the international, regional and national community should focus on the protection of WHS. At the core is the need to do away with the long and overdue infringement of WHS right through occupational fatalities, injuries and diseases caused by occupational health hazards.

12 *Id*. Goal No. 8.8, There is also goal 3 on health for all at all ages with components of WHS protection.

13 See attempts by: EA Spieler, 'Risks and Rights, The Case of Occupational Safety and Health as a Core Worker Right', in JA Gross, Workers' Rights as Human Rights, (Cornell University Press, 2003) 87 and J Hilgert, 'A New Frontier for Industrial Relations: Workplace Health and Safety as a Human Right', in JA Gross & L. Compa, Human Rights in Labour and Employment Relations: International and Domestic Perspectives, (LERA, 1st Edition, 2009) 43.

14 The scope is summarised in MS Nkuhi & MS Benjamin, 'Workers' Health and Safety (WHS) Right and Future of Occupational Health and Safety in India and Tanzania', in JM Singh, (Ed), Labour Law Reforms (CTAG, National Law University of Delhi, 2021) 291.

The hazards constitute major human rights crises[15] as they have deprived workers of a bundle of their rights including WHS right, rights to health, life, and human dignity, security of a person and family and private life.[16] Occupational fatalities, injuries and diseases have caused serious human and economic losses. The ILO estimates about 2.78 fatalities (86% a result of diseases and 13% a result of accidents), 360 million injuries and 160 million occupational diseases every year.[17] According to Oldfield, there are higher fatalities in workplaces than those in death rows and armed conflicts.[18] Admittedly, there is a universal threat to fundamental rights of life and security of a person posed by unhealthy working conditions.[19] There are missing statistical explanations on the situation in developing countries including India and Tanzania. The fact is however, there are effects and that they are severe.

Elsewhere, the author has underlined the economic and human sufferings of the workers resulting from fatalities, injuries and diseases.[20] The effects include loss of working days which globally represents almost 4% of the world's Gross Domestic Product (GDP) and in some countries rising to 6% or more.[21] There is also an intangible cost, not fully recognised in these figures, of the

15 J Hilgert, *supra* note 14, at 44.
The author is blaming scholarship for not offering what he calls "calamity" the attention it deserves.

16 *Consumer Education and Research Centre v Union of India* 1995 AIR 922; (the Supreme Court of India held the right of health to a worker as an integral facet of a meaningful right to life); *Brincat & Others v Malta* (60908/11, 62129/11, 62312/11, 62338/11) 24 July 2014 (the European Court of Human Rights held the Government of Malta liable for breach of right to life and right to respect of one's private and family life awarding pecuniary damages to victims of asbestos exposure); and in *Torillo Atillio Amedeo case*; (the National Supreme Court of Argentina allowed damages for occupational fatality under Civil Code based on occupational policy aims and human rights law).

17 Report of the ILO, 'Prevention of Occupational Diseases', (ILO, 2013) available at; https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_208226.pdf, accessed on 17 March 2017
Report of the ILO, 'Improving the Health and Safety of Young Workers', (ILO, 2018) accessed at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_625223.pdf, on 13 November 2019.

18 Y Oldfield, 'Safe and Healthy Work: A Human Right', (2014) 39(2) NZJER, 73, 73.

19 IL Feitshans, 'Occupational Health as Human Rights', retrieved from www.iloencyclopedia.org/part-iii-48230, on 09 April 2017.

20 MS Nkuhi, & MS Benjamin, 'Disorders in Developing Countries' Legal and Regulatoo ry Frameworks on Protection of Workers' Health and Safety', (2020), 2(1) EAJ-SAS, 1.

21 ILO, 'Safety and Health at the Heart of Future of Work: Building on 100 Years of Exx perience', (ILO, 2019) 1.

immeasurable human suffering.[22] Sadly, it is only 5% to 10% of the workers in developing countries (including India and Tanzania) having access to adequate occupational health services.[23] Protecting WHS is thus essential as it is WHS which has direct relation with the sacredness of life of men, women and children who labour.[24] All the necessary measures should therefore be taken to effectively and successfully eliminate occupational hazards and associated working conditions. The mechanisms are ones in connection with international and national state obligations towards the protection of human and constitutional rights. As earlier stated, the focus in the present discussion is on the mechanisms which the Indian and Tanzanian NHRIs employ in protecting WHS including measures on eliminating occupational hazards and associated working conditions. The author discusses the mechanisms in the next section but with preceding explanations on NHRIs, their mandate and roles in protection and promotion of human rights at workplaces.

3.0 *NHRIs Mandate and Role in Human Rights and WHS Protection*

3.1 *NHRIs and Human Rights at Work Protection and Promotion*

NHRIs are independent national bodies established for the purpose of protecting and promoting human rights. They are creatures of the Constitution or specific legislation.[25] NHRIs protect and promote a wide range of rights mostly civil, political, economic, social and cultural rights embodied in the International Bill of Rights. Critical to the establishment, mandate and operational principles of NHRIs are the UN Principles relating to the Status of

22 *Id*.

23 R.G. Lucchini & L. Luslie, 'Global Occupational Health: Current Challenges and the Need for Urgent Action', (2014), 80, AGH, 251.

24 JA Gross, 'Takin' It to the Man, Human Rights at the American Workplaces', in JA Gross & L Compa, Human Rights in Labour and Employment Relations: International and Domestic Perspectives, (1st Edition, LERA 2009) 33.

Protecting life require the protection of WHS The author wonders why the right is sacrificed to economic development and is disappointed by the failures and preferences of governments and courts in enforcing and adjudicating the right respectively.

25 They are described *as "state mandated bodies, independent of the government, with a broad constitutional or legislative goal of protecting and promoting human rights"*. About National Human Rights Institutions - ENNHRI accessed on 24/12/2020.

National Institutions (the Paris Principles) of 1993.[26] According to the Paris Principles, NHRIs are primarily responsible for advising government on matters pertaining to human rights. They are equally responsible for promoting and ensuring domestic laws and practices are effective and in harmony with international human rights instruments.[27]

In discharging their mandate, NHRIs are expected to co-operate with UN and regional human rights institutions. The mandate is fairly wide encompassing other critical roles. NHRIs are tasked with the role of probing for the ratification of international human rights instruments. They are required to participate in state reporting to international human rights bodies; to assist the formulation and teaching of programmes on the rights to learning institutions; to publicise the rights and combat all forms of discrimination.[28] They are to act *suo moto* or having been moved. Pertinent to the present discussion is the role of NHRIs in promoting human rights at work and so particularly workers' right to health. It is expected to fall within the scope of their day-to-day responsibilities. NHRIs are to ensure that government and private entities respect, protect and fulfill workers' health and safety right calling for, *inter-alia,* new measures and implementation of existing measures in the pursuit of eliminating hazardous working conditions in hazardous occupations.

3.2 *NHRIs and WHS Protection*

The author analysis involves the NHRI of two States, India and that of Tanzania. The discussion is on the works of the National Human Rights Commission (NHRC) of India and the Commission for Human Rights and Good Governance (CHRAGG) on the protection and promotion of safe and healthy workplace. The choice of the two NHRIs is justified by the authors' research background. The research project was carried out focusing on the Indian and Tanzanian legal regime. There is a nexus in multiple aspects of these countries legal systems including the commonness

26 UNGA Resolution 48/134 (20 December 1993).
Among other things, the principles do cater for the NHRIs competence and responsibilities, composition and guarantees of independence, quasi-judicial competence and methods of operation.
27 *Id.*, Art. 3 (b).
28 *Id.*, Art. 3 (f & g).

in the ideals and functional principles regarding NHRIs, human rights and constitutional obligations as well as occupational health and safety hazards and impacts.

Precarious working conditions and hazards are manifested in large scale in agriculture, mining, construction and manufacturing sectors. They are responsible for workers' fatalities, injuries and diseases. The conditions and hazards are presently interpreted to constitute a human rights crisis. The presence of precarious working conditions and hazards, *ipso facto*, violates the right to just and fair working conditions guaranteed by the International Bill of Rights.[29] As earlier stated where the impacts are fatal or lead to diseases and injuries, multiple human rights violations are deemed to have occurred. Workers, in significant figures, are deprived of their rights to life, right to dignity of a person, right to personal security, and other bundles of fundamental human rights under the right to social security. Violations are ones by States (as a protector and employer) and other private enterprises which have the obligation to protect the health and safety of workers.[30]

NHRC and CHRAGG, being the duly established NHRIs for India and Tanzania, respectively, must ensure that WHS right is effectively and efficiently protected. The sub sections below offer detailed analysis of the NHRC and CHRAGG works in the protection and promotion of WHS right in India and Tanzania, respectively. The analysis encompasses mandate conferred to each, the mechanisms employed in the protection as well as the role in protection of workmen, women and children, health and safety.

3.2.1 *NHRC Work on Protection of WHS in India*

(a) *Establishment, Roles and Powers*

The NHRC was established in 1993 by the Protection of Human Rights Act, 1993 (hereinafter the PHR Act,).[31] The enactment of the PRH Act was another significant move by the Government of India in an attempt to protect the rights of its citizens including rights at work. The NHRC represents the commitments of India

29 MS Nkuhi, *Legal Regime for Workers' Health and Safety: Human Rights Dimension with Reference to India and Tanzania*, Ph.D. Thesis, (University of Mysore, 2019) 12 & 278.

30 *Id*.

31 Protection of Human Rights Act, 1993, S. 3.

to human rights.[32] Its functions and powers with regard to the protection of human rights are numerous. The NHRC mandate and powers includes inquiry into violations, abatement or negligence involving violations of Human Rights (in its own motion or on receipt of complaints from victims or anyone on their behalf).[33] The NHRC reviews human rights safeguards under the Constitution and other laws and recommend proper course of actions for their implementation.[34]

The Commission work encompasses research in human rights, promotion of human rights as well as all other activities considered necessary for human rights protection.[35] The NHRC inquires and investigates human rights violations.[36] It is a quasi-judicial body with human rights violations, a reviewer of the human rights treaties including ones on WHS protection, information disseminator, policy reformer, researcher and enforcer of human rights including those at work (WHS inclusive). Under the Protection of Human Rights Act, the NHRC receive complaints and make recommendations and directions to the Government and State and Union Territories governments.

Where the NHRC establishes violations of human rights or negligence in preventing such violations by a public servant or cases of abatement, it recommends to the Government or authority concerned measures to be taken. The measures include payment of compensation or damages to the victims or members of a family, taking of other suitable measures including prosecution, or any other action as it may deem fit.[37] The NHRC is also engaged in follow-ups to ensure the perpetrators are brought to justice and victims are compensated accordingly.

32 NHRC, *Annual Report 2013/2014*, 98; NHRC, *Annual Report 2011/2012*, 73.

33 *Op.cit*. S. 12. The NHRC can intervene any proceedings in any court of law involving violation of human rights provided that it obtains approval from such court.

34 *Id.*, the review includes factors inhibiting the enjoyment of human rights and the application of international human rights treaties in India.

35 *Id*.

36 *Id.*, S. 13 & S. 14, respectively. Under S. 13 of the Act the NHRC has powers like those of a civil court while trying a case under the Code of Civil Procedure, 1908. In particular, the NHRC can summon and enforce witness attendance, discovery and production of document, receive evidence on affidavits, call for public records or copies from any court or office, examine witnesses or documents or any other matter as may be prescribed. S. 14(2) addresses the NHRC powers in cases of investigation.

37 *Id.*, S. 18.

(b) *Protection of Workers' Health and Safety Right*

(i) *Workers Health Right in India and the Nexus with the Works of the NHRC*

The protection of health and safety of a worker forms part of the Directive Principles of State Policy (DPSP) under the Constitution of India.[38] The principles are described by constitutional law experts as the basis of socio-economic rights of the workers. Articles 39 and 42 of the said Constitution are critical to WHS protection in India. While Article 39 proscribes abuse of health and strength of workers by economic necessities,[39] Article 41 imposes mandatory requirement to States authorities to make provisions for securing, *inter alia,* just and humane conditions of work.[40] Unfortunately, the DPSP are not enforceable.[41] However, there are judicial decisions to the effect that the protection of health and safety of a worker is construed as the protection of right to life under Article 21 of the Constitution.[42]

Since its establishment, the NHRC has not only handled civil and political rights violations but also economic, social and cultural rights including those of workmen, women and children. The Commission work seeks to eliminate violations of WHS right in the dangerous occupations. In discharging its duties under this role, the commission invokes multiple approaches including carrying out inquiry, issuing 'directives'[43] to relevant institutions and making subsequent follow-ups. The NHRC work on pursuit of just and favourable conditions of work and in addressing other equally important violations of the right is discussed below.

(ii) *The Complaint System, Inquiries and Directives on WHS Violations*

The NHRC *suo moto* or on receipt of complaints carries out inquiry/ investigation on diverse issues involving violations of WHS right in hazardous and non-hazardous occupations and which impacts

38 Constitution of India 1949, Part IV, Art. 36 – 51.
39 *Id.*, Art. 39 (e).
40 *Id.*, Art. 42.
41 *Id.*, Art. 37.
42 *Consumer Education and Research Centre and others* (*supra*) note 16.
43 The annual reports make use of the word directives, not recommendations and they practically sound to carry more weight and, in most cases, effective.

to occupational fatalities, injuries and diseases.[44] The Commission work involves inquiries into poor working conditions and specific occupational health problems. Most of the Commission's works are manifested in mining, factories, agriculture and construction (legal and illegal). There are also works addressing specific cases like child and bonded labour and specific occupational diseases.

Up to November 2021 the NHRC had received 9847 fresh complaints, disposed about 12937 with 21182 others under consideration. Particularly on WHS, there are multiple complaints which have already been investigated, actions recommended and file closed due to compliance by relevant work enterprises (government and private). A few are worth referring to. The NHRC has successfully determined the complaint on fatalities due to factory explosion.[45] The Commission investigated and finally directed the State of Uttar Pradesh to prosecute the perpetrators and pay financial benefits to victims' next of kin. It also made an order that the factory should not operate unless it complies with health and safety measures. Immediate relief was paid to the victims' next of kin with compliance to the rest of the Commission directives. The NHRC intervention on WHS protection has at times seen to have positive State wide impacts.[46]

The NHRC has had also entertained complaints on basic facilities demands by plantation workers[47] in which poor living and

44 The cases are reported in the NHRC's annual reports and the reporting encompasses follow-up on previous years (pending) cases.

45 Case No. 19900/24/97-98 reported in NHRC Annual Report 1998/1999. The case involved the death of 8 workers which was caused by an explosion in a factory in UP. The explosion was caused by the leakage of an inflammable chemical substance namely hexane. Not long after the incidence, the factory resumed its operations without the taking of any safety and health measures.

46 The sustained intervention of NHRC usually leads to corrective action. As one example out of many, it received a complaint late in 2008 that workers in the stone-crushing industry in a District in a mineral-rich State were exposed to health hazards. In the course of its enquiry, it became clear that this was a problem endemic to the State, and it therefore called on the Government to take corrective action throughout its territory. Under the monitoring of NHRC over three years, the State now has an inventory of all stone-crushing units and a rigorous licensing process for all 1862; 181 units were closed down and another 134 ordered to close, because they had not met environmental standards. NHRC's intervention has therefore had a State-wide impact on an industry that has the potential to damage health and the environment if not carefully regulated.

47 Case No. 465/22/99-2000 (*Basic Facilities to Plantation Workers*), Tamil Nadu.

working conditions were reported as leading to the death of 17 workers in the plantation. On NHRC's intervention compensation was paid for loss of lives. There are also multiple complaints and *suo moto* action by the NHRC on Safety in Mines. The Commission has inquired into and issued directives to relevant authorities on issues involving fatalities and injuries due to floods in coal mines as well as exposure to silicosis in mines and stone and quartz crushing factories. There are also reported evidences of the NHRC successfully playing its role as a WHS right watchdog in cases all over India involving fatalities and injuries in manufacturing industries,[48] child labour (health, safety, and rehabilitation)[49] pesticides and farmers cancer,[50] critical occupational diseases[51] and other health rights issues in mining, agriculture and manufacturing sectors. The NHRC, in certain cases, would require relevant States governments to inquire and report to the NHRC allegations which

48 See for instance Case No. 1059/30/0/2014 reported involving death of workers in Bawana Industrial Area; Case No. 3349/24/2004-2005 *Cracker Factory Explosion and Fatalities* (State of Uttar Pradesh was held responsible for 11 fatalities and 2 injuries. Only 3 families had been compensated. The NHRC recommended payment of Rupees 3,00,000 to each of the remaining families.

See also: Case No. 8827/24/2002-2003, *Fire and Fatalities in Footwear Manufacturing Industry*, Agra, Uttar Pradesh reported in NHRC Annual Report 2005/2006 and Case No. 716/30/2005-2006 on *Death of a Worker in a Sewer*.

49 Examples includes: Case No 389/34/11/2011 *Child Labour in Illegal Coal Mines in Hazirabagh, Jharkhand,* (based on the report on the Hindu Newspaper, the NHRC asked the chief secretary Government of Jharkhand to submit reports on allegations of hazardous child labour). See: NHRC Annual Report 2010/2011; Case No. 45/10/2005-2006-FC *Children in Hazardous Occupations in Hospet, Sandar and Ilkar Belt Mines in Karnataka* (NHRC calling for reports from the State government on measures taken including prosecution, shutting down of the mines and rehabilitation); and Case No. 1797/4/2005-2006 on *Non-Rehabilitation of Child Labourers in Bihar.* (NHRC intervention led to rehabilitation of the non-rehabilitated and rescue of more children). See: NHRC Annual Report 2009/2010, 54, 55 & 56.

See also: Case No. 401/1/2006-2007 *Child Labour and Compensation* reported in NHRC Annual Report 2008/2009.

50 See for instance: Case No. 705/19/2/2011 reported in NHRC Annual Report 2010/2011 *Pesticides and Farmers Cancer in Malwa Region, Punjab* in which the NHRC directed the banning of manufacturing, importation and use of pesticides injurious to farmers health.

51 Common are cases involving exposure to Silicosis. See for example: Case on *Silicosis in Quartz Mining in Nagar District, Andhra Pradesh*, NHRC Annual Report 2003/2004 at 125 and 126; Case No 1573/20/19/09-10 *Silicosis in Jodhpur Mines in Rajasthan,* Case No. 1012/6/9/2011 on Silicosis related Fatalities in Stone Crushing Factory in Gujarat (reported in NHRC Annual Report 2012/2013) and Case No. 212/6/9/2010 involving *Silicosis in Quartz Crushing Units, Dahod and Vadodara Districts, Gujarat* (reported in NHRC Annual Report 2016/2017).

fall within their territorial jurisdiction. The orders of payment of compensation as well as rehabilitation have been part and parcel of relief orders by the NHRC, and they have proved useful. Most of the reported complaints were successfully dealt with.

There are evidences of even State Governments making specific inquiries required and victims or their next of kin getting the recommended compensation.[52] The work is not a hundred percent smooth as there are also cases where faulty States denied responsibility making the NHRC work one hard.[53] The directives have not only been one-time directives as the NHRC has a system of tracking them down until the matter is closed, leading to the closure of a particular complaint. Due to the seriousness of the health and safety of workers, the NHRC receives complaint in very simple form including letters and acts *suo moto* even on allegations reported by media.

(iii) *Other Forms of Protection and Promotion of WHS by the NHRC*

Apart from the complaint and or *suo moto* mechanisms, the NHRC seeks to protect and promote WHS through multiple other ways. The NHRC commissions studies, organises workshops and seminars on various issues relating to WHS protection. The idea is to raise awareness on matters pertaining to workers' health and safety particularly in hazardous sectors. The NHRC has commissioned a series of studies and workshops and seminars, for instance, on silicosis and impacts to health and safety of workmen, women and children in mines.

Besides, the Commission undertaking on WHS manifest itself in the Business and Human Rights (BHR) agenda. The NHRC work on states and private enterprises duties to protect and promote human rights gained momentum post 2011 following the adoption of the United Nations General Principles (UNGP) on Business and Human Rights. The agenda is to monitor state duty to protect, corporate entities compliance to human rights, and availability of

52 See: Note 46, 48 and 49 (*supra*).

53 Reference can be made to Case No. 45/10/2005-2006-FC (*supra* note 49), Case No. 3349/24/2004-2005 (*supra* note 48).

remedies.[54] Its work includes the works on the impact of business on WHS. NHRC work on protection of human rights takes aboard the protection of right to health.[55] The Commission acknowledges health as fundamental to human dignity and wellbeing.[56] The right comes along with various entitlements including the system of protection, prevention, treatment and control of diseases. The NHRC underlines the significance of protecting lives of the people through protection of health. And so, it works closely by monitoring the accessibility, availability, affordability, quality and reliability of healthcare and health services.

The Commission's efforts to protect and promote the right have evolved in a variety of interconnected ways. Focus is on, among others, healthcare, sanitation and hygiene, occupational health and safety as well as mental health.[57] The NHRC has formed *Core Group on Health* which advises on the aforementioned areas. Significantly, the NHRC role in the protection of right to health and particularly workers' health is by pressurising State functionaries of their duties to fully realise the right. It monitors government obligations of ensuring adequate healthcare infrastructure i.e., hospitals, community health centres, primary health centre, medical equipment and well trained and sufficient staff.[58] WHS right protection is within the scope of NHRC work on right to health. The same is manifested by programmes, directions, recommendations and researches on silicosis, asbestos, other occupational diseases, accidents and fatalities.

1.1.2 *CHRAGG and Protection of WHS in Tanzania*

(a) *Establishment, Roles and Powers*

The CHRAGG is established by the Constitution of the United Republic of Tanzania.[59] The Commission is composed of the

54 Report of the NHRC, 'Business and Human Rights: The Work of the National Human Rights Commission of India on the State's Duty to Protect', retrieved from: https://nhri.ohchrc.org/EN/Themes/BusinessHR/Business, on 11/08/2019.

55 Acknowledging however, that the right is not a fundamental right under the Constitution of India, See: NHRC, *Annual Report 2016/2017*, 81.

56 NHRC, *Annual Report 2015/2016*, 103, Item 6.1.

57 *Id*. Similarly, the NHRC Annual Report 2015/2016, 103 underlines that right to health encompasses access to healthy working conditions.

58 NHRC Annual Report 2015/2016 at 103.

59 The Constitution of the United Republic of Tanzania, 1977, Art. 129.

Chairman, Vice Chairman, Five Commissioners and other Assistant Commissioners who are the appointees of the President. Its mandate is to promote and preserve human rights in Tanzania.[60] The Commission has mandate to receive and adjudge (in its *quasi-judicial* capacity) human rights violation allegations. Its mandate extends to inquiring on the allegations/complaints. CHRAGG is also duty bound to carry out research on multiple angles of human rights as well as to provide relevant advice to the Government and non-governmental institutions. CHRAGG discharges multiple other functions and enjoys more other powers.[61]

Significantly, the use of good office is one of the mechanisms available for CHRAGG with regard to the protection of rights of people in imminent danger. The Commission is to function independently, not subject to any direction or control by any other organ or person. Its proceedings with regard to complaints before it are equivalent to those of court of law.[62] However, its decisions have the status of recommendations.[63]

(b) *CHRAGG on Workplace Health and Safety*

(i) *Workers' Health and Safety: The Constitution of Tanzania and Practices*

Unlike the Indian Constitution, the Constitution of the United Republic of Tanzania, 1977, has no express provision on protection of health and safety of workers. Both the provisions on fundamental rights and DPSP are silent on the protection of the health and safety of the working class. The problem is understood from the reality that the Constitution has a limited scope in terms of fundamental rights (civil and political as well as economic, social and cultural). The Constitution provides for only the rights

60 *Id*. Art. 130 (read together with S. 6 of the CHRAGG Act).

61 *Id*. CHRAGG is empowered to make recommendations relating to any existing or proposed legislation, regulations, or administrative provisions to ensure compliance with human rights norms and standards and with the principles of good governance; promote ratification of or accession to treaties or conventions on HRs, harmonize national legislation, monitor and assess compliance by the government and other persons, with human rights standards under international treaties and law to which Tanzania has obligations; to cooperate with UN agencies, the AU, the Commonwealth and regional and national institutions; and to perform other functions provided by any other law.

62 The Commission for Human Rights and Good Governance Act, 2001, S. 17.

63 *Id*. However, CHRAGG is empowered, under S. 28 of the CHRAGG Act, to seek judicial recourse when the Government refuses to honour its recommendations.

to work, right to just remuneration and right to own property as enforceable socio-economic rights.[64]

However, and significant to this discussion is the recognition of right to life.[65] The protection of WHS is construed as part and parcel of protecting their right to life. However, the same is yet to materialise as a common understanding in Tanzania. Discussions on the right to life in Tanzania have special attention to 'mob violence', 'extra judicial killings', 'death penalty' and 'road accidents'.[66] Nonetheless, CHRAGG has portrayed the intent to protect the working class from precarious working conditions and associated menaces through approaches analysed herein below.

(ii) *WHS, Human Rights in Business and CHRAGG*

CHRAGG work on WHS is manifested in its National Baseline Assessment (NBA) of the implementation of Human Rights in Business.[67] The NBA was a prerequisite under the National Human Rights Action Plan (NHRAP) on Business and Human Rights.[68] The same was Tanzania's response to UN Human Rights Council directive to implement the UN Guidelines on Business and Human Rights.[69] The NBA examined the State duty to protect, ensuring human rights abuses in business are prevented, businesses have human rights responsibility and victims have effective remedies.

Significantly, the NBA acknowledged the explicit exclusion of economic, social and cultural rights as a gap in the implementation of human rights in business in Tanzania.[70] This means that WHS right, being a socio-economic right is part of the ESCR explicitly

64 See: Art. 22, 23 & 24 of the Constitution of the United Republic of Tanzania (*supra*) note 59; and AP Mbuya, 'Justiciability of Economic, Social and Cultural Rights in Tanzania', (2019) EAJ-SAS 16.

65 Under Art. 14.

66 The National Human Rights Action Plan, (Government of Tanzania, 2013) 1 & 2.

67 Report of the Government of Tanzania, 'the National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks in the United Republic of Tanzania', (CHRAGG, 2017) 4 https://www.chragg.go.tz/images/publications/REPORTS/Tanzania-BHR-NBA_FINAL_Nov2017.pdf, accessed on 14 August 2019.

68 The Government entrusted the CHRAGG a task to carry out a study and come up with a plan of action.

69 *Id.*, at 5.

70 It identifies, *inter-alia,* the lack of Constitutional Avenue for justiciability of socio-economic rights. Refer to note 64 (*supra*).

excluded in implementation of the BHR in Tanzania. However, the NBA acknowledged the existence of legal framework on WHS, precisely the preventive and curative legislation i.e. the Occupational Health and Safety Act, 2003 and the Workers' Compensation Act, 2008. Unfortunately, it underlines multiplicity of gaps with regard to their implementation.[71]

(b) *The Complaint System, Inquiries and Directives on WHS Violations*

As earlier stated, CHRAGG is empowered by law to receive and entertain complaints on alleged violations of human rights in Tanzania. The only possible way to ascertaining the discharge of this power would be through the reporting system put in place by the Commission. The author attempt to get evidence on the same was nowhere near fruition. Even the ten years report by the Commission does not reveal details on the operationalisation of the mechanism. Significantly, the report underlines what was done by CHRAGG in connection with the promotion of civil and political liberties. No information is available for public consumption. The unknown makes it difficult to suggest that CHRAGG has entertained a number of WHS right violations in Tanzania, issuing recommendations to the Government and private enterprises and making the necessary follow-ups.

(c) *NHRAP and CHRAGG Works in WHS Protection*

The NHRAP is a plan that was adopted with intent of providing a comprehensive approach in the protection of Human Rights in Tanzania.[72] Its adoption was a result of the lack of a homogenous and comprehensive approach by the CHRAGG. Largely, the adoption of the plan followed a recommendation by the United Nations Human Rights Commission (UNHRC).[73] The NHRAP centres on the protection of socio-economic rights and the

71 *Id.*, at 10. The gaps include insufficient of personnel, knowledge of the rights, as well as non-compliance with the legislation. The study recommended an increase of resources to the ministries responsible and the OSH Authority. Similarly, it recommended for the placing of labour inspection offices at each district.

72 Government of Tanzania, (*supra*), note 66.

73 Report of the UN Working Group on the Universal Periodic Review, 'United Republic of Tanzania', (2011) 14, A/HRC/19/4, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-4_en.pdf retrieved on 11/08/2019.

strengthening of the institutions responsible for the protection of the rights. CHRAGG is vested with the task of implementing it. In implementing the NHRAP, the Government of Tanzania strives to more effectively discharge its three basic duties to respect, protect and fulfil human rights.[74] The NHRAP has identified twenty-three human rights issues arranged in four thematic headings as priorities for improving coordination, protection and promotion. They are civil, political, economic, social and cultural rights.[75]

There is no specific provision on WHS. Moreover, even with the thematic areas encompassing groups with special needs, yet there is no specific reference to the vulnerable workers in hazardous as well as unorganised sectors. NHRAP provides for institutional strengthening and the human rights and business agenda.[76] Rights to health and right to work are amongst the ESCR for the agenda. Unfortunately, public health is not linked with occupational health prolonging the problem of linking public health and occupational health. Apparently, the NHRAP objectives on the right are on *infectious*, *endemic*, *pandemic* diseases as well as immunisation and vaccine.[77]

Fortunately, on the other hand, the scope of right to work takes aboard the protection of WHS. The NHRAP seeks to ensure proper regulation of working conditions and subsequently WHS. It acknowledges privatisation and high unemployment as responsible for the weakening of working conditions and welfare noting substandard working conditions under which workers are frequently subjected to including poor working conditions and absence of social protection in the informal economy.[78] Particular reference is made to health issues in the mining and agriculture

74 *Id.*, i.e., *to ensure there are no breaches of enjoyment of any human right by duty bearers; to* take measures that prevent third parties from abusing the right and to take adequate legislative, administrative and other measures to fully realise human rights, respectively.

75 *Id.*, (including the right to life, right to work and the right to health). The scope of protection of right to life is not extended to encompass occupational fatalities. The NHRAP focus is on killings of people with albinism, old women on witchcraft suspicion, mob violence and road accidents. (Government of Tanzania, *supra,* note 66, at 11). The same has the impact of marginalising government efforts to protecting workers from precarious working conditions and hazards.

76 *Id.*

77 *Id.*, at 29, 30 & 31.

78 *Id.*, at 27 & 28.

sectors.[79] CHRAGG work on implementation of the NHRAP and particularly on WHS protection and promotion is manifested in national human rights studies on state and private enterprise operations.

Initially, the NBA encompassed two national studies in Mining and Agriculture. CHRAGG sought among other information on the status of human rights in the operations. Working conditions generally and workers' health and safety were amongst the issues studied. The studies' findings included: casual labourers non coverage to health protection and workers' knowledge gap in accessing judicial and non-judicial remedies where there are violations of their rights.[80] The studies had also found unconducive working conditions in the operations with injuries, diseases and lack of medical attention to the victims.[81]

Of latest, CHRAGG in collaboration with Business and Human Rights in Tanzania (BHRT) and International Peace Information Service (IPIS) is engaged into case studies on BHR[82] under a project entitled 'Voices in Tanzania'. There are reports from 2019 to 2020 in three distinct volumes for each year. The 2019 volume focuses on BHR in the extraction, agriculture, tourism and infrastructure. The 2020 volume focuses on land rights and environment. The latest i.e., the 2021 volume is on human rights impacts of large-scale infrastructure projects. Of interest to the present discussion are four studies, the first two in the 1st volume and the rest from the 3rd volume.

The studies analysed the application of human rights standards at work touching, *inter alia,* the health and safety concerns of the working class. They analysed conditions on work in: *Cut flower industries in Arusha*; the *East African Crude Oil Pipeline (EACOP) project*; the *Dar es Salaam–Moshi railway revival project*; and *energy*

79 *Id*., e.g., high incidence of child labour and its most harmful forms, particularly in the agricultural and mining sectors.

80 *Id*., at 30.

81 Fumigation personnel were amongst the victims; there were harms caused by ace cidents, chemicals and machinery. Sadly however, there were findings that victims did not get adequate medical attention and operated without healthcare schemes and CHRAGG recommendations sounded "light" as if it had no role to play. Only called upon perpetrators to ensure relevant measures are taken.

82 These are donor funded studies. i.e., their carrying out was possible because of donor funds.

supply in Mwanza rural communities. The studies found out violations or the dangers of non-compliance with WHS standards. In the previous, working conditions were poor, leading to occupational injuries and fatalities. There were also reports of long working hours and non-compliance with provision of protective gears. Awareness of rights, violations and the remedy system were also found to be insufficient.[83]

The studies recommended, *inter alia,* the streamlining of projects with human rights standards, enactment of legislation for implementation, WHS standards implementation follow-up by relevant government authorities,[84] information sharing amongst project participants and engagement of multi stakeholders in awareness creation and monitoring.[85] The worries over non-compliance were for the EACOP project.[86] The studies are just a few examples of violations of health and safety right of the workers in Tanzania. There is also a possibility that they do not represent the true image and gravity of the violation since the 'test subjects' were mostly aware of the studies and might have concealed (somehow) the reality.

4.0 *Comparisons, Conclusion and Ways Forward*

4.1 *Similarities and Disparities in the WHS Protection Undertakings*

From the discussion above, both the NHRC and CHRAGG appears to have similar mandate, roles and functions as it is the case with other NHRIs. They are to protect and promote human rights in their civil, political, economic, social, cultural and other forms. This study's focus was on workers' health and safety right which is a fundamental socio-economic right of, *inter alia,* the working class. The mandate, roles and powers of the NHRC and CHRAGG are equally the same. They both have powers to receive and hear

83 See for instance: Voices from Tanzania, *Case Studies on Business and Human Rights,* (2021) 3, 98.

84 See for instance: Voices from Tanzania, *Case Studies on Business and Human Rights,* (2019) 1, 25. Occupational Safety and Health Authority (OSHA) is cited as an example of such authorities.

85 *Id*., at 28; *supra* note 93 at 98.

86 From the wide spectrum of consultations held, it was concluded that potential human rights issues to watch in the construction of the EACOP are those related to conditions of work and employment.

complaints on violations of fundamental human rights, including human rights of the workers in general and WHS in particular.

They equally employ a number of mechanisms in the protection and promotion of the right. *Suo moto* inquiries, the commissioning of studies on such violations, periodic human rights reporting as well as implementation of the BHR agenda are worth referring to. The NHRC, just like the CHRAGG enjoys the power to sue where authorities fail to comply recommendations offered in relations to a particular violation. Besides, the two NHRIs are statutory and constitutional creatures with wide mandate of protecting and promoting human rights at the national levels.

In so far as WHS is concerned, the two NHRIs have commissioned studies on WHS on the hazardous sectors. They have developed national human rights action plans for BHR to address multiple ESCR including WHS. Similarly, and unfortunately, however is that the National Human Rights Institutions, NHRC for India and CHRAGG for Tanzania mandates and the functioning are limited. Their recommendations are not completely binding to the authorities. Similarly, the two are overloaded and the discharge of their roles is limited in terms of financial and human resources.

From the study of the works of the NHRC and CHRAGG on WHS, the disparities are on the extent of discharge of the roles and powers. Whilst the NHRC, has overtime developed a 'popular' system of addressing violations of WHS rights in India using *inter alia,* widespread practice of complaint system and *suo moto* actions, national wide committees/working groups on WHS, frequent reporting of WHS violations complaints and their outcomes, to name a few, the CHRAGG has so far been able to commission a few studies on WHS and which are small part of the bigger studies of HRB agenda. There is little to suggest that CHRAGG's works on WHS are systemic. After all, reporting is uncommon and untimely. While NHRC has been publicly sharing annual reports for its works from 1994 to 2019, CHRAGG has only done the same up to 2012.

There are also differences observed in terms of the operational functioning of the two NHRIs. The NHRC has, in some ways, successfully handled violations of WHS right as well as precarious and hazardous working conditions. On NHRCs directives,

victims of such violations are compensated, measures to improve working conditions put in place and consequently occupational hazards minimised. As stated earlier, there is less to suggest similar initiatives by CHRAGG. No public reports are available on the same. The CHRAGG functioning ten years report only encompasses the violations relating to civil and political rights.[87]

The handling of complaints and publicly reporting them is critical to successful protection and promotion of human rights, including WHS right. Successful protection of human rights including the WHS depends on *inter alia* a widespread public knowledge of the NHRIs, their works as well as the outcome. Studies on BHR are welcome, but as the author observed above, they do not address WHS menaces in Tanzania. Utilising the complaint system,[88] frequent reporting of complaints and their outcomes, having national wide committee on WHS and commissioning of studies (not solely depending on donor funding) are inevitable.

Besides the foregone and of significance to the present discussion is the approach in the pursuit of healthy working conditions. The NHRC approaches WHS from the general right to health and specific right to just and fair working conditions. The approach is useful in making occupational health problems as part of public health issues. The CHRAGG on the other hand, and particularly the NHRAP, does not link WHS with right to health (public health) making the progress slow. As earlier stated, focus on public health under the NHRAP is on *infectious*, *endemic*, *pandemic* diseases as well as immunisation and vaccine.

There are outside factors that might be responsible for the disparities between the two NHRIs including constitutional foundations and strength of judicial systems in enforcing fundamental rights. India, unlike Tanzania, has the constitutional basis for enforcing WHS right[89] and enjoys a strong judicial system.[90] For instance, WHS, apart from being part to the DPSP under the Constitution of India, it is construed component of right to life. The same makes easier

87 And as earlier stated, even the scope of right to life is narrow falling short of encompassing WHS protection.

88 Including an in place online system of filing complaints. CHRAGG website is hardly available and resourceful.

89 Refer to notes 38 and 42 (*supra*).

90 See note 16 (*supra*).

the work of NHRC. CHRAGG, on the other hand, lacks similar basis and the reality is felt even in the scope of protection of right to life where CHRAGG and other human rights institutions have kept the scope of protection of right to life with mob violence, extra judicial killings, death penalty and road accidents. Occupational fatalities are going down un-recognised.[91]

The factors notwithstanding, the author's argument that NHRC work on WHS is systemic remain intact. Not that the Constitution of India recognises WHS as an enforceable socio-economic right nor is it takes court decision to understand that the protection of WHS is within the scope of protecting right to life. CHRAGG is mandated to advise the government on matters pertaining to human rights protection, including the proper protection mechanisms.

4.2 *Conclusions and Ways Forward*

From the foregone discussion, it is apparent that NHRIs have fundamental obligations with protecting human rights under their national frameworks. It is on that footing, that violations of rights of the members of human family including violations in hazardous work, are within the ambit of the NHRIs mandate and the NHRC and CHRAGG works are evidential. Unfortunately, however, is that the extent to which NHRIs discharge their roles and execute their powers varies from one country to the other. In the present case, and as observed above, the NHRC work over the protection of WHS right in India is way ahead the Tanzanian CHRAGG.

The NHRC works on WHS underline the Commission's plan, commitment and willingness to fight against precarious working conditions, ensure just and working conditions as well as the health and safety of workmen, women and children in the Indian sub-continent. The widely known and utilised complaint handling and disposal mechanism, the *suo moto* interventions, directives/ recommendations and their respective implementation follow-ups, research studies and works of the committees/working groups on WHS are critical to the visibility of NHRC work.

91 See: MS Nkuhi (*supra*) note 29 at 214 and 215.

The works of CHRAGG, comparatively on the other hand, fall short of the Indian counterpart. Apart from studies on BHR implementation, there is less to suggest CHRAGG work as encompassing complaints on violations of WHS, *suo moto* interventions, systemic recommendations and implementation follow-up mechanisms. The complaint system is barely recognised and if ever engaged on WHS violations, the outcomes and subsequent remedial actions remains hardly accessible to the public. There is also less to suggest CHRAGG's work on WHS right awareness creation, sensitization and dissemination through workshops and or seminars. The understanding that OSHA is responsible in matters pertaining to WHS is correct when discussing WHS as an industrial relations agenda. CHRAGG intervention is critical and inevitable when WHS protection is viewed with human rights lens. The same is the practice in India.

The question that follows is what needs to be done by CHRAGG? From the discussion, the author's thoughts on ways forward entail the need to effectively utilize the complaint mechanism,[92] and to act, *suo moto* on public availed information in order to holistically address WHS violations in Tanzania. CHRAGG has to ensure its undertakings on human rights violations are widely and timely made public.[93] Significantly, the protection of right to life in Tanzania should be construed as encompassing the protection of health and safety of workmen, women and children. To holistically address occupational menaces in hazardous occupations, CHRAGG works on right to health shall be expanded to encompass occupational health. CHRAGG works have to find a way to the public through regular reporting.

Both NHRIs are constrained with multiple challenges pertinent being financial and human resources challenges. Admittedly, the challenges hinder the effective disposal of complaints, investigations, research and information dissemination on *inter-alia* WHS. Their independence is of extreme urgency and

92 The idea is to have one functional, accessible (including online access) and without legal technicalities.

93 Except for few sensitive and which it may be prudent not to publicize. So far it is the Legal and Human Rights Centre (LHRC) which somehow exposes the violations of WHS in its HRB Reports.

empowering them financially and with human resources will underline the same. Besides, even though directives have been preferred in India by the NHRC, they remain as recommendations and which, in some instance, have not been implemented. It is the author's opinion that the recommendations should be made binding to both governmental and private enterprises as WHS protection entails worker's life protection.

LEGAL IMPEDIMENTS AFFECTING MINE-HOST COMMUNITIES' ACCESS TO CLEAN WATER IN TANZANIA

John S. Ombella*

Abstract

Mining activities have a potential of contributing significantly to the socio-economic development of a particular society. In many areas mining has uplifted remote villages to the level of urban and townships. Social services like schools, hospitals and clean water too are some of the positive impacts of mining activities. Notably, however, in areas where mining activities are not properly regulated mining has a very gross bearing on social services such as access to clean water. In order to guarantee communities surrounding mines access to clean water there is a need of strong legal framework that will protect all the water sources from potential harms of mining activities. Inversely, many mineral-rich African countries, Tanzania inclusive exhibit inadequate legal frameworks which may offer such a guarantee. This study carries out an analysis of the legal framework regulating mining activities with the view to identify the bottlenecks that inhibits Mine-host communities from effectively accessing clean water in Tanzania. It is shown that non-justiciability of the right to water, non-involvement of mine-host communities in resources allocation decisions, adoption of double standards in water protection approaches and multiplicity cum delinked resources allocating authority are some of the legal obstacles that impairs Mine-host communities from effectively accessing clean water in Tanzania. In order to guarantee Mine-host communities access to clean water a call for reform of the legal framework is recommended in this study.

Key words: *Mine-host communities, impediments, clean water, Tanzania*

*Lecturer at the Faculty of Law, Mzumbe University, PhD candidate at the Open University – Tanzania.

1. *Introduction*

Access to clean water is one of the basic human rights for every one that has an international,[1] regional,[2] and domestic recognition in a number of States.[3] According to the Ministerial Declaration of The Hague,[4] there is no life either in plants or animals without water. Consequently, water support life and hence it is important it be preserved. Preservation of water resources is inevitable owing to the increasing competition on the use of the same resources from various sectors such as industries, ecosystem, agriculture and domestic use which makes water scarce and hence inaccessible. This is even exacerbated by factors such as demographic increase, and global impacts of climatic change.[5] Such a concern of access to clean water, although being global in nature, developing countries (Tanzania inclusive) are more prone to them owing to underprivileged situation, inadequate technologies to treat and distribute water to name but a few.[6]

1 UN Convention on the Rights of the Child, 1989, Art 4(2) (c); UN Convention on the Rights of Persons with Disabilities, Art. 28(2) (a); UNGA Resolution on the human right to water and sanitation, Resolution 64/292 Adopted by the General Assembly on 28th July 2010, para 1.

2 The African Charter on the Rights of the Child Art. XIV (2) (c).

3 Republic of South Africa, Constitution 1996, Art. 27 (b); Republic of Kenya, Constitution 2010, art. 43 (1) (d); Republic of Zimbabwe Constitution 2013 Art. 77 to name but a few.

4 The Ministerial Declaration of the Hague on Water Security in 21st Century, para 1; African Union, Africa Water Vision 2025, para 2; Southern Africa Development Community, Regional water policy 2005, para 3.3.1; The Republic of Uganda, Ministry of Water, Lands and Environment, National water policy, 1999, para 2.1; United Republic of Tanzania, National Water policy, 2002, para 1.

5 NAIK K P, "Water crisis in Africa: Myth or reality?" Vol. 2, *International Journal of Water Resources Development,* 2017, p. 335.

6 NHAPI Innocent, "Challenges for water supply and sanitation in developing countries: Case studies from Zimbabwe", in GRFTON Q, and others,(eds) Understanding and managing urban water in transition: Global issues in water policy, Springer Science + Business Media Dordrecht,, 2015, p. 95-97; MAKAUDZE M. E and GELLES M.G, 'Challenges of providing water and sanitation to urban slum settlement in South Africa' in GRFTON Q, and others,(eds) Understanding and managing urban water in transition: Global issues in water policy, Springer Science + Business Media

In Tanzania for example, majority of her population leave in rural areas where access to clean water is a challenge. According to the EAC records, the percentage of access to clean water by the rural communities in Tanzania is very low compared to those who leave in cities and townships. The record indicates that, while the percentage of access to clean water in rural areas is 59%, that of cities and townships rates at 80%.[7] Consequently, most rural communities in Tanzania depend on untreated waters from rivers, lakes, streams and boreholes.[8] Notably, however, anthropogenic activities such as mining seem to exacerbate the challenge of access to clean water to rural communities in Tanzania. According to Ashton and others[9] mining activities pose a threat on access to clean water at its different levels of development. For example, at the time of construction it may pose a challenge of competition on the access to clean water with the communities adjacent to mines, at the time of extraction, mining poses a threat of disruption of water table, pollution of underground and surface waters with heavy metals.[10]

Dordrecht, 2015 (DOI 10.1007/978-94-017-9801-3_5),p. 128-131.

7 East African Community Secretariat, East African Community Facts and Figures (2016) Report, para 2.4

8 ALMAS Asgeir, Kweyunga Charles and Mkambwa Manoko, Investigation of trace metal concentrations in soil sediments and waters in the vicinity of 'Geita Gold Mine' and 'North Mara Gold Mine' in the North West Tanzania, IPM Report, 2009, p. 22; MBOGO A Shabaan, "A novel technology to improve drinking water quality, using natural treatment methods in rural Tanzania", vol. 7, *Journal of Environmental Health Association*, 2008, p. 49.

9 ASHTON, P.J., D. Love, H. Mahachi, P.H.G.M. Dirks, An Overview of the Impact of Mining and Mineral Processing Operations on Water Resources and Water Quality in the Zambezi, Limpopo and Olifants Catchments in Southern Africa. Contract Report to the Mining, Minerals and Sustainable Development (Southern Africa) Project, by CSIREnvironmentek, Pretoria, South Africa and Geology Department, University of Zimbabwe, Harare, Zimbabwe. Report No. ENV-P-C 2001-042, 2001, para 2.3.

10 Ibid. para 2.3.4.2.

According to Sachs,[11] mining activities can contribute positively to the communities adjacent to mining (Mine-host communities) and State in general if well managed. Among the benefits are inclusive infrastructure development on water, road and electricity [emphasis added]. However, Emel and others[12] cautioned that, mining companies at times exaggerate the reporting of what good things have been contributed to Mine-host communities (hereafter MHCs). In order to benefit from the mining activities, Sachs is of the view that, there should be strong legal and policy framework to carter for, among others environmental protection.[13] This is necessary because mining activities are known for their gross impacts on environment. However, the problem at hand is inadequate legal framework that can address the potential and actual challenges that are posed by mining activities in Tanzania among others limiting the MHCs access to clean water.

To avoid doubt in this paper the term clean water is used to refer uncontaminated colourless and test less liquid formed as a result of chemical combination of hydrogen and oxygen. This definition is influenced by the manner the Black's Law Dictionary defines the term water.[14] This paper is organised into six parts inclusive this introduction. Part two provides for the method applied while part three provides for the background to the problem. Part four describes the legal framework relevant to guaranteeing MHCs access to clean water in Tanzania, while part five identifies and

11 The Morningside Post, The Student run newspaper of Columbia, 'Great Debate: Mining in Latin America: Is Mining the Key to Latin American Prosperity? Lisa Sachs, Jenik Radon, Leonith Hinojosa, and others weigh in, 25th April 2013.

12 EMEL J, Makene M and Wangari E, "Problem with reporting and evaluating mining industry community development projects: A case study from Tanzania", p. 22.

13 The Morningside Post (n11).

14 GARNER A. Bryan, Black's Law Dictionary (8th Edition), 1622.

discuss the legal limitations of MHCs access to clean water in Tanzania. Part six offers conclusive remarks of this paper.

2. Methodology

This is a doctrinal study whereby review is carried of primary sources such as conventions and statutes related to safeguarding MHCs access to clean water in Tanzania. Notably, secondary sources such as policies, journal articles, books, reports and internet sources are also reviewed to support the argumentation derived from the review of legal instruments. In particular, the study illuminates on the legal impediments affecting MHCs access to clean water in Tanzania, however, a random reference is made to legal frameworks of other mineral-rich African countries where mining activities takes place as well.

3. Background to the problem

Mining activities in Tanzania are reported to have contributed hardship towards MHCs accessing clean water in a number of ways. Among the common way mining impacts MHCs access to clean water have been through water pollution through discharge of toxic wastes into the surface (rivers, lakes and streams) or underground (wells or boreholes) water system. On the one hand of surface waters, according to Ikungura and Akagi,[15] fishes sampled from Lake Victoria were found to be contaminated with high levels of heavy metals (mercury) that leaked from the surrounding mining sites in the Lake Zone. Presence of heavy metals in water sources contaminates them hence they become

15 IKUNGURA JR and Akagi H, "Monitoring, fish and human exposure to mercury due to gold mining in the Lake Victoria goldfields, Tanzania", Vol. 191, *The Science of Total Environment*, 1996, p. 63.

unfit for human consumption. A similar finding was also reached by Spiegel[16] when investigating occupational health issues on the exposure to mercury in Rwangamisa locality bordering Lake Victoria. Almas and others[17] investigated on the soil, sediments and water pollution by heavy metals near north western mining companies (Geita Gold Mine and North Mara Gold Mine) in Tanzania. In their study they concluded that, mining activities contribute to the deposition of heavy metals into river waters and sediments.

Moreover, evidence from the study carried out on water sediments of river Mara proves that mining activities contributes to high deposition of heavy metals on surface waters.[18] Other instances of water pollution with heavy metals are also reported to have happened in river Songwe basin due to negative impacts of mining in Chunya.[19] On the other hand of underground waters, according to Gomezulu and others,[20] mining activities in Buzwagi has contributed to a wide spread of heavy metals such as iron, lead and cyanide both on the surface and underground waters. Consequently, boreholes adjacent to mining sites proved to be

16 Speiegel Samuel J, "Occupational health, mercury exposure and environmental juss tice: Learning from experience in Tanzania", Vol. 3, *American Journal of Public Health*, 2009, p. 554.

17 Almas Asgeir and others (n8) 17.

18 KIHAMPA C and Wenaty A, "Impacts of mining and farming activities on water sediments quality of the Mara River basin, Tanzania", Vol.3, *Research Journal of Chemical Science*, 2013, p. 22.

19 WREM International: Lake Rukwa Basin Integrated Water Resources Management and Development Plan, Final Report, Volume II (b): Songwe Sub-basin Water Resources Management and Development Plan. Technical Report prepared for the Ministry of Water, United Republic of Tanzania, 2016, para 1.

20 GOMEZULU E. S, Mwakaje, A, and Katima HJ, "Heavy metals and cyanide distribuu tion in the villages surrounding Buzwagi mine in Tanzania", Vol.1, *Tanzania Journal of Science*, 2018, p.121.

more contaminated with such heavy metals.[21] Presence of heavy metals poses a threat to MHCs in accessing clean water for their domestic and agricultural use.

Additionally, apart from the pollution of water system noted as a challenge towards MHCs access to clean water, another factor is the interference of the natural flow of water system like rivers and underground water. The interference of natural flow of water system happens in two major ways; firstly, where the river is captured and directed into a different flowing route from that of its natural flow to provide a room for mining activities to take place. On this it is reported that, Luka Mining Company captured river Luika in Songwe region, causing water stress to Maleza and Mbangala villagers who depended on the river waters for their domestic use.[22] Secondly, mining contributes negatively on the water table which renders wells and or boreholes adjacent to mining activities run dry due to its variation.[23] This is a paradox owing to legal framework that regulates mining activities in Tanzania under which interests of the MHCs ought to have been taken care of. The description of this legal framework is provided herein below as follows;

4. Legal framework governing Mine-host communities' access to clean water in Tanzania

The term access to water used in this paper refers to physical accessibility, economic affordability and quality available water

21 Ibid.

22 Kandonga Gabriel, Kampuni ya madini yawakosesha maji wananchi Songwe, ITV Habari, 2:18pm, 5th June 2017.

23 Ugya A, Ajibade F and Ajibade T, Water pollution resulting from mining activity: An over view, Proceedings of the 2018 Anhual Conference of the School of Engineering and Engineering Technology (SEET) The Federal University of Technology. Akure, Nigeria, 17-19 July 2018, 713.

resources to MHCs.[24] In order to ensure that the MHCs have access to clean water in Tanzania a number of legislation are in place. This part presents a description of the legislation regulating MHCs access to clean water in Tanzania as hereunder;

Firstly, the URT Constitution 1977 is relevant to this study owing to the fact that, the constitution is the mother law of the country, and that all other laws must conform into it. Consequently, the relevancy of the constitution in this study may be described in two ways that are; fundamental rights based and the natural resources based. On the first hand, of fundamental rights, the URT Constitution 1977 is a legal document which provides for the fundamental human rights that may be enjoyed in Tanzania.[25] Among such rights are right to life for example.[26] As noted from the introduction part, the right to water is one of internationally recognised human right. Despite not expressly provided for under the URT Constitution, but may be implied under the right to life.

On the second hand of regulation of natural resources such as water and mineral resources which are relevant to this study, the URT Constitution 1977[27] firstly declares that all the natural wealth of Tanzania belongs to the Tanzanians and must be safeguarded. It further requires the use or exploitation of the natural resources to benefit Tanzanians and the nation. In particular, the use of the natural wealth has to be geared towards eradication of ignorance, diseases and poverty.[28] Consequently, exploitation of mineral

24 NKONYA K L "Realizing human right to water in Tanzania", vol. 3, *Human Right Brief*, 2010, p. 3.
25 URT Constitution 1977, part III.
26 Ibid. Art. 14.
27 Ibid. Art. 27 (1).
28 Ibid. Art. 9(i).

resources ought not to cause hardship to MHCs on access to clean water which results into chronic diseases instead.

Secondly, are the water resources regulating laws in Tanzania, there are two major legislation namely; the Water Resources Management Act 2009 and the Water Supply and Sanitation Act 2009. Generally, according to section 4 of the Water Resources Management Act 2009 the key objective of the Act may be explained in three key points that are; to secure water resources from potential or actual pollution; regulation in terms of management and allocation of water rights through issuing permits and preservation of water resources in order to guarantee its sustainable use. In order to achieve this objective some institutions such as the office of the Minister responsible for water resources,[29] National Water Boards [30]and Basin Water Boards[31] to name but a few are established and tasked to various functions. The Minister for example and the Basin water Boards are responsible for issuing water use permit. Notably, the Basin Water Boards[32] issue a temporal water use permit. In addition to functions the Basin Water Boards are tasked to monitor and enforce the Act with the view to preventing water pollution but also water use and discharge permit.[33]

Another law in water resources regulation is the Water Supply and Sanitation Act 2009. This legislation is aimed at ensuring effective and accessible water supply and sanitation services to all Tanzanians.[34] The Act establishes Water Authorities which

29 The Water Resources Management Act 11 of 2009, s 13.
30 Ibid. s 20.
31 Ibid. s 22.
32 Ibid. s 45(2).
33 Ibid. s 23(i).
34 The Water Supply Sanitation Act 12 of 2009, s 4.

are tasked to supply water and sanitation services to respective communities in their jurisdiction.[35] In a very special way, the Act recognises the community owned and managed water resources in supplying water services to its registered members.[36] According to LUC and others[37] water regulating legislation are relevant to mining activities not only because mining impacts surface and underground waters, but also mining activities needs water in mining and processing of the minerals from the ore and storage of the mineral wastes [emphasis added].

Thirdly, environmental issues in Tanzania are regulated under the Environmental Management Act 2004 (hereafter EMA 2004). In this Act, principles and standards are set upon which environment protection has to be adhered to. Examples of the principles are inclusive polluter pays principle, public participation in decision making and minimisation of adverse effects on environment through effective integration, to name but a few.[38] It also provides for institutional set up in management and preservation of environment in Tanzania. The National Environmental Council (hereafter NEMC) for example is tasked to oversee the implementation of the Act.[39] In relation to MHCs access to clean water, the EMA 2004 regulates Environmental Impacts Assessment (hereafter EIA) of all the grand projects in Tanzania, prior to their establishment.[40] It therefore, required that before any grand project like mining takes off, its potential

35 Ibid. s 13.
36 Ibid. s 31 (1).
37 LUC, GEUS and Matrix Development Consultant (2013) SESA of the Tanzania suss tainable management of mineral resources project. para 5.21.
38 Environmental Management Act 2004, s 7(3).
39 Ibid. s 16 - 17.
40 Ibid. s 81 read together with s 101. Further discussion on this legal requirement is provided below under part five.

impacts be assessed and potential mitigation and or remedies be identified. Notably, mining activities are listed among projects that compulsorily require EIA before their initiation in Tanzania.[41] It is thus believed that, if the potential impacts are adverse and may not be remedied then the intended project will not be established in Tanzania.

Fourthly, mining issues are provided for under the Mining Act 2018[42] which is the parent legislation that regulates mining activities in Mainland Tanzania. This legislation also establishes institutions which regulates mineral activities, such as the Mining Commission which is tasked with the function of issuing licenses under the Act[43] and generally to oversee mineral sector among others.[44] Additionally, the legislation provides procedures to be followed for those intending to invest in mineral sector in Tanzania and conditions that have to be observed by those who are granted mineral rights under the law.[45] In particular, mineral rights holders are expected to contribute to the wellbeing of the MHCs through the Corporate Social Responsibility, albeit not expressly on access to clean water.[46] The Mining Act 2018 also regulates the procedures of exiting from the mineral sector once one has been granted mining licences and operates the same in Tanzania.[47]

41 Third Schedule to the Environmental Management Act 2004, para 6; See also, the first Schedule to the The Environmental Management (Environmental Impact Assessment and Audit) (Amendment) Regulations, 2018 GN No. 474, para 16(b).
42 The Mining Act CAP 123 of 2018.
43 Ibid. s 22 (b).
44 Ibid. s 21-22.
45 Ibid. s 41, 49, 54.
46 Ibid. s 105.
47 Ibid. s 64 and 72 (1-2) which provides for partial or full termination of mineral rights under the mining license.

5. *Legal impediments posed by the framework on mine-host communities' access to clean water in Tanzania.*

The introduction part above has highlighted the fact that most African countries, Tanzania inclusive have weak legal frameworks that regulates mining activities such that, they may not guarantee access to clean water to MHCs. Notably, it is worth to note that, it does not mean that there are no established legal frameworks, but they do not address the negative impacts mining bears on water sources in areas where they are carried. Considering the foregoing part, discusses the identifiable and existing bottlenecks in the Tanzanian legal framework regulating MHCs access to clean water.

1.1 Justiciability of the right to water

As noted from the introduction part, the right to water is one of the fundamental human rights recognised both at international and regional level. Consequently, States are required to guarantee such a right under their municipal laws for their citizen to progressively enjoy the same subject to available resources. However, to a largest extent the right to water in African States as it is for Tanzania is not recognised and hence not justiciable. The legal implication of the right to water not being justiciable is that, when the MHCs right to access to clean water is infringed by the mining companies, they do not have a right to file a suit in courts of law claiming for the actual or potential violation of the right to water by the State as the accomplice of mining companies. In Zimbabwe for example, the right to water is justiciable under the constitution, hence one may sue in case access to clean water

is denied by either the government or its agent.[48] In Tanzania, the right to water seems to be aspirational objective to be achieved by the government but not a full-fledged right one may sue on it. This is evidenced by the general clause under the URT Constitution 1977.[49] A similar reflection of the aspiration is also under the Water Resources Management Act 2009[50] and the Water Supply and Sanitation Act 2009[51] which regulate access to water in Tanzania [MHCs inclusive].

Notably, however, MHCs may still defend their right to clean water through environmental class actions and or civil law of torts. While the environmental action is envisaged under the Environmental Management Act 2004,[52] the tort approach is based on common law principles of neighbourhood.[53] Under both approaches, anyone may file an action to defend environment, on his behalf and or his community from potential or actual harm of water pollution by mining companies.[54] In Zambia, where the constitution does not provide for the right to water and hence not justiciable in courts of law, affected communities by the spillage of toxic wastes into river waters successfully sued the mining company under the law of tort.[55] Records indicates that, MHCs in

48 The Constitution of Zimbabwe (n3) Art. 77 read together with Art. 85; City of Harare vs Farai Moshoriwa Supreme Court of Zimbabwe, Case No.SC228/14 of 2018, 25.

49 The URT Constitution (n25), part II on Fundamental objectives and directive principles of state policy; The URT Proposed Constitution 2014, Art. 51 however, provide for the right to water as one among the human rights. Since this Proposed Constitution is not yet enforced, the legal status of right to water in Tanzania still remains not justiciable.

50 The Water Resources Management Act (n29), s 4 (1) (b).

51 Water Supply and Sanitation Act, (n34), s 4(1).

52 The Environmental Management Act (n38) s 5.

53 Ibid. s 225, also seems to recognize the possibilities of injured person to file a civil suit to claim for compensation in case of environmental pollutions.

54 According to the Water Resources Management Act 2009, s 7, everyone is duty bound to protect water resources from all actual and potential harms.

55 James Nyasulu and 2000 others vs Konkola Copper Mines PLC, Environmental

Tanzania ends up becoming victims of water pollution by mining companies with little negotiated compensation as companies deny liability of polluting water sources.[56] In addition, environmental approach, offers a room to sue mining companies when they pollute water and hence become inaccessible basing on its quality, the same legal approach may not be relied by the MHCs when the mining companies impacts the quantity and not quality of the water, say for example through deviation of rivers and or streams and variation of water table.

1.2 Multiplicity and delinked nature of the resources rights allocating authorities

Natural resources like minerals, water, soil and forests are regulated under different legislation and sectors in Tanzania. The crafting of the legislation regulating such resources seems to have ignored the existence of potential harm that may be caused by harvesting of one of or some of the resources to others. Mining for example, is governed under the Mining Act 2018. The mineral right allocating authority is the Mineral Commission.[57] Water resource is governed under the Water Resources Management Act 2009. The water allocating authority is the Minister who issues water use permit,[58] and the Basin Water Board that also issues

Council of Zambia and Chingola Municipal Council, High Court for Zambia, 2007/HP/1286, 21.

56 ATHUMAN Mtulya, Gold mining firm reaches payout settlement with Mara villagers, The Citizen, 12 February 2015; LEIGH Day, Statement form Leigh Day in relation to legal action against African Barrick Gold, https://www.business-humanrights.org/en/tanzania-african-barrick-gold-makes-out-of-court-settlement-for-claims-by-locals-at-its-north-mara-mine-for-injuries-fatalities accessed on April 2020); JONATHAN Watts, Murder, rape and claims of contamination at Tanzanian goldmine. (2019).https://www.theguardian.com/environment/2019/jun/18/murder-rape-claims-of-contamination-tanzanian-goldmine (accessed on April 2020).

57 The Mining Act (n42), s 54 and 57.

58 The Water Resources Management Act (n30), s 11(1).

a temporary water use permits.[59] Issuance of prospecting and mining licences seems not specifically directing the need to meet the standards set under water regulatory legislations. The Mining Act 2018 seems general when it requires the mineral rights holder to comply with the environmental laws and other laws, without specifically pointing water related laws.[60]

Experience from South Africa shows that, one among the conditions of an issued Prospecting and Mining Licence has been the requirement to meet the standards of a specific water regulatory legislation. The section here under reveals more;

> "subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and…"[61]

Perhaps, setting water protection as one of the conditions under the prospecting and mining licence expands the purview of water protection from the potential harm of mining and offers MHCs a better access to clean water. This is because mining company will know upon breach of this condition the mining or prospecting license may be revoked by the government.

59 Ibid. s 45 (1).
60 The Mining Act (n42), s 107(1).
61 The Mineral and Petroleum Resources Development Act 28 of 2002, s 5(3) (d).

1.3 Application of double standards in water protection approach in Tanzania

The essence of protection of water sources from the potential and or actual harm caused by anthropogenic activities are vivid under sectoral and water regulating legislation in Tanzania. One among the key approach taken in these legislation is the distance from water sources, in which anthropogenic activities are prohibited. Generally, the Environmental Management Act (hereafter EMA 2004) sets a distance of sixty metres (60m) from all sources of water such as rivers, dams, reservoirs, lakes, and oceans. Notably, EMA 2004 being a general law, it cuts across all economic and social sectors activities like house constructions, industrial activities and others.[62] Also, EMA 2004 seems to take primacy of any other law on issues of environmental management to the extent that all other laws have to conform to it.[63] Mining sector however, is regulated by the Mining Act 2018. Under the Mining Act 2018, the distance from which mining activities are restricted from water sources is two hundred metres (200m).[64] In particular, the Mining Act 2018 specifically pointed out only two water sources, namely dams and water reservoir.[65] In addition, the Mining Act 2018 qualifies the restriction and the water sources to be owned by the government.[66]

In the light of the above, it is apparently clear that there are double standards in water protection approach. Firstly, the double standard may be noted on the differences on the distance from

62 The Water Resources Management Act (n30), s. 34 seems to abide with the fact that, the EMA 2004 takes primacy when it comes on environmental management issues, by setting the same distance as under the EMA 2004.
63 The Environmental Management Act (n38), s 232.
64 The Mining Act (n42), s 95(1) (a) (iii).
65 Ibid.
66 Ibid.

which human activities are restricted under the EMA 2004 and the Mining Act 2018. Notably, one may wish to say that the approach taken by the Mining Act 2018 is more protective owing to the above noted negative impacts of mining. A closer look of the listed water sources in the Mining Act 2018 however, seem to shatter this view. As noted above, the Mining Act 2018 is only concerned with the dams and reservoir as sources of water, not rivers, lakes, natural springs and boreholes. This means that, mining activities in areas adjacent to rivers, lakes, natural springs and or boreholes will be regulated under the EMA 2004, which offers a short distance and hence less protective to these specific water sources. Lakes, rivers, natural springs and boreholes are major sources of water in rural areas in Tanzania, where majority do not have access to piped water.

Secondly, the aspect of application of double standards in protection of water sources is seen on the ownership of the water sources. As noted above, only the government owned dams and reservoir are covered under the Mining Act 2018. It is correct that all water resources in Mainland Tanzania is owned by the government as is vested in the President as a custodian.[67] The principle of custodial ownership for example, does not prohibit one to sink his own borehole and or construct his own dam for domestic and agricultural activities, respectively. Under the Water Resources Management Act 2009 for example, it is allowed for anyone to sink a borehole for domestic use[68] and also allow an association of water users to own, manage and control water sources.[69] Consequently, privately owned water sources seem not

67 The Water Resources Management Act (n29), s 10(1).
68 Ibid. s 11.
69 Ibid. s 80 (1).

to fall under the purview of the protection offered by the Mining Act 218 a fact that poses a challenge to MHCs access to clean water.

1.4 Little or absence of involvement of MHCs in allocation of mineral rights

As noted from above, water resources are owned, managed and shared by communities in groups that are issued permit by the Minister. Consequently, the Water Users Associations and or groups have vested interest on their water resources in their locality.[70] In the contrary however, allocation of mineral rights which is carried out by a different organ of the government is not compelled by the law and does not have clear mechanisms in place to consider the interest of such associations. The process of allocation of mineral rights does not involve MHCs. The allocation is carried by the Mining Commission which issues both prospecting and mining licences. Although the law requires the process of allocation of mineral rights to procure the consent of the landowners and or occupiers, the Minister responsible for minerals retains mandate to waive such a requirement.[71] Procuring the consent of the landowners and or occupiers offers a room to protect their potential interest like sources of clean water. Notably, the right to participate in decision making is also reflected in international instruments that obliges States to assure public participate in all decisions affecting access to water.[72] Also, the

70 The Water Supply and Sanitation Act (n34), s 31 (1); The Water Resources Manage ment Act (n29), s 80 (1).

71 The Mining Act (n42), s 95 (1) (b).

72 Rio declaration on environment and development, 1992, principle 10; General Comm ment No. 15 Right to Water (art. 11 and 12 of the Covenant), Adopted at the Twenty-ninth Session of the Committee on Economic, Social and Cultural Rights, on 20 January 2003 (Contained in Document E/C.12/2002/11) para 24; UNGA Resolution Transforming our world: The 2030 Agenda for sustainable development, Resolution adopted by the General Assembly on the 25th September 2015, A/RES/70/1, goal 6

right of public to participate in decision affecting water is reported to be recognised in a number of States globally.[73] According to Lange,[74] non-consultation of the landowners and or occupiers in Tanzania, is caused by outdated geological maps which do not depict their presence among others. Consequently, prospecting and or mining licence may be issued to a potential investor under assumption that the area under the license is unoccupied.

Notably, experience from elsewhere such as South Africa and Kenya show that, the process of allocation of mineral rights requires consultation with the potentially affected persons, most of whom are the MHCs. In that regard, in South Africa for example, at the time of application of mineral rights by the potential investor, a notice of such application is issued to potentially affected persons for 30 days.[75] Such a notice offers a room for potential objection and or registration of concerns with the office of the Regional Manager. In case of concerns and or objection received from the affected persons the Regional Mining Development Environmental Committee will advise the Minister to reconsideration whether to grant the application or not.[76]

Similarly, in Kenya, all potentially affected persons are issued with the notice of any pending application for either mining and or prospecting licence.[77] In order to be sure that information about the pending applications reach the intended communities, the notice apart from being issued in the government gazette, it

para (6.6) (6.b).

73 Blanco E and Razzaque J, *Globalisation and natural resources law: Challenges, Key issues and Perspectives,* Cheltenham-UK, Edward Elgar, 2014, pp.320-321.

74 Siri Lange, Land tenure and mining in Tanzania, CMI Report, 2008, para 4.

75 Mineral and Petroleum Resources Development Act (n61), s 10 (1) (b).

76 Ibid. s 10(2).

77 Kenyan Mining Act, 12 of 2016, s 34 (1) (a-b).

is also circulated in the local newspapers in Kenya.[78] The notice states the areas proposed to be subjected to mineral operation under the applied licence.[79] It also offers 21 and 42 days period for potential objection to granting of prospecting or mining licence, respectively.[80] Such objections are considered by the Cabinet Secretary and the Mineral Rights Board before the issuing of the exploration and or mining licences.[81] Additionally, MHCs in Kenya seem to be guaranteed of compensation in any situation where the mineral rights holders will negatively impact their right to access to water.[82] The Kenyan Mining Act takes cognisant of the fact that, mining activities may negatively affect underground water levels.[83] Consequently, it requires mineral rights holders whose activities depreciate the water table to compensate the affected communities.[84]

1.5 Inadequate environmental impact assessments and audit carried prior and during mining activities

Environmental Impact Assessment (EIA) is a mandatory procedure to be carried out before all the grand projects are to take off in Tanzania and many other countries.[85] As noted above, its essence is to provide scientific findings of the potential harm or other impacts that may occur as the result of establishing the intended project both to the human being and environment in general. UN call for States to broaden the EIA to include human

78 Ibid. s 34 (2).
79 Ibid. s 34 (3) (a).
80 Ibid. s 34 (4) (a-b).
81 Ibid. 34 (5).
82 Ibid. s 153(1) (c) and (e).
83 Ibid. s 153(1) (c).
84 Ibid. s 153(1) (e).
85 Environmental Management Act (n38), s 81 (1-2).

rights impacts to guarantee non-violation of human rights in the due process of establishing grand projects.[86] Environmental Audit (hereafter EA) however, is an assessment that is carried out after the projects have been initiated. EA is aimed at reflecting the extent to which the established project complies with the previously carried EIA and its recommendations.[87] It is through this EA where the government gets assurance whether the projects harms humans and or environment or otherwise after its establishment. In order to achieve this goal the EMA requires the use of experts in carrying out the assessment.[88] While the EIA is to be carried out by independent experts, the EA is to be carried out by the government owned experts.[89] Consequently, the potential investor is given a right to choose who to recruit to carry out the EIA among the roll of expert maintained by the government and answerable for the cost of EIA.[90]

Notably, however, the EMA seems to be silent on a number of issues which makes the EIA process not to achieve its intended goal. Among such issues are such as conditions upon which the environmental experts will have to comply with and relation between the EIAs carried out in intended projects and in different sectors. On the first hand of the conditions upon which the experts have to comply with it is worth to reiterate the fact that these experts are expected to maintain impartiality when they are carrying out the assessment. They should not be biased on either side between the government and the potential investor who recruits and pay

86 UNGA Human Rights Council, Human rights and access to safe drinking water and sanitation, A/HRC/15/L.14 of 4th September 2010, para 8(d).
87 Environmental Management Act (n38), s 101(2).
88 Ibid. s 83(1).
89 Ibid. s 101 (1-2).
90 Ibid. s 81(1) and 83 (2- 5).

them. However, the EMA does not limit the possibilities of the experts from being biased as it allows the potential investor to not only choose, but pay them accordingly. Investors are business oriented men who seek for profit maximisation hence may use the opportunity to pay the expert as a room to influence the findings of the assessment.

Also, the EMA is silent on how many times an expert may be chosen by the investor to carry out the EIA for him/her and the potential relations that might have existed or that is existing between the potential investor and the chosen expert(s). For example, one might have been an employee of the potential investor before he is enrolled as an expert by the government, he/she might also be a shareholder[91] in the mining company to be investigated, facts that may impair his impartiality. A similar weakness is also noted in the EA where the government experts have no limit on how many times he/she may inspect one investment project. Recently, his Excellency President of Tanzania was concerned of possibilities of the EA experts being influenced by the mining investor in releasing the EA report on the spillage of poisonous wastes in river Tigithe in Mara and ordered re-investigation.[92] The president states that,

> "I am sure the first report on the matter was cooked and I know this since I was a minister, but could not act on the matter then. NEMC has to carry out a fresh probe on the scandal…"[93]

91 Mining Act CAP123 R.E of 2018, s 126, requires all special mining license holders to list with the local Capital Markets in Tanzania and offer a portion of their shares to Tanzanians. This legal requirement offers a room for any Tanzanian to buy shares and become a stakeholder in the mineral sector. Being a shareholder one is expected to benefit from the profit made by the mining companies which is to be shared in a form of dividends.

92 THE GUARDIAN Reporter, JPM Tough on NEMC over water chemical pollution by goldmine, The Guardian, Saturday, 8th September 2018, 1; RUGONZIBWA Pius, JPM Revives Tigite river saga…orders fresh investigation as first report was 'doctored', Daily News, Saturday, 8th September 2018, 1.

93 PIUS, Rugonzibwa (n 92) 1.

This shows that the independency of the experts is questionable and hence the need to perfect it under law is called for. An example of rules that perfect and guarantee independency and professionalism may be borrowed from the Companies Act 2002 as it regulates auditors who audit accounts of companies. According to Krishnan Loganathan, *'auditors are trained professionally to audit companies' accounts independently…'*[94]In order to perfect professionalism and independence of auditors, the Companies Act[95] requires that, auditors not to be employees of the company, and or have interest in the company or its subsidiaries.

On the second hand, the EMA 2004 does not provide a mandatory linkage between one EIA results and other EIA results carried out in the same or different sectors by different potential investors. Consequently, the appointed experts carry independent assessments of the appointing investor in a specific sector under ignorance of potentially other EIAs that carried or being carried out in a number of projects in the same or different sectors. According to Norfork and Cosjni[96] this seems to be the trend of most of Least Developing Countries which make the results of the EIAs narrow and hence do not depict the actual or potential harm the investment projects may bear on the environment when all of them will be approved at once. Consequently, although EIA is intended to safeguard social and environmental aspects against the potential harms of large-scale investment projects like mining,

94 KRISHNAN, Loganathan, "A legal scrutiny on the auditors' role to whistle-blow", vol. 15, JUUM, 2011, p. 150.

95 The Companies Act 12, 2002, s 175(2).

96 NORFOLK S and Cosijn M "Towards legal recognition of governance of forests ecoo system services in Mozambique", *Potchefstroom Electronic Law Journal*, 2013, pp. 147-148.

such a goal seems to be derailed by the weakness in the governing law leave alone its practice.

6. Conclusion

The discussion above shows that although there is a legal framework to regulate MHCs access to clean water in Tanzania, still the framework is not ideal in achieving its intended purposes. In particular, the discussion noted existence of key impediments in the legal framework which pose a challenge on MHCs access to clean water. These key impediments are; the right to water not being justiciable in Tanzania; conflicting legal position in water resources protection; multiple and delinked natural resources rights allocating authority; inadequate participation of MHCs in decisions that allocates resource rights to potential investors and inadequate EIA process.

In order to guarantee MHCs access to clean water in Tanzania, the above identified and discussed legal impediments have to be addressed. Consequently, there is a need for reforming the legal framework. The proposed reforms should address among other issues such as Adoption of the new proposed constitution which among other things guarantees the right to water. Guaranteeing right to water signify that the right will be justiciable in case of its violation or threats of potential violation. Consequently, MHCs will sue the government and the mining companies as its agents, where mining activities will affect negatively their access to clean water.

Moreover, it is imperative that the recommended reforms to align the environmental and mining legislation on the aspect of

distance to be maintained from water bodies. The Mining Act 2018 position of 200 metres seems preferable as it offers a wider protection to the water resources, although the scope of the nature of water resources to be protected has to be as per the EMA 2004. In addition, EMAs' position on the conducting its assessments; firstly, with regard to EIA, the scope need to include human rights impacts as well. Companies therefore should be obliged to carry out human rights impacts assessment before they invest in mining sector in Tanzania. Secondly, EIA and Environmental Audit (EA) need be revised, with a view to reflect the independence and professionalism perfecting rules under the Companies Act 2002 in order to reduce possibilities of influenced findings in the assessments.

Lastly, both mineral and water resources cut across a number of sectors in Tanzania owing to their nature of occurrence and use. Consequently, effective management of these resources compels there be effective communication among the sectors and other stakeholders. To achieve this, first, any grant of resource rights in mineral sector, should consider water resources in the area covered by the license and guarantee the requirements of its reservations. Mining Act 2018 therefore, may borrow the experience from South Africa, where among the conditions of issuing mining license one has to abide to laws regulating water resources. Secondly, the Mining Act 2018 has to be reformed to effectively consider interests of potentially affected people in the due process of granting mineral rights. Experience may be borrowed from Kenya and South Africa, where potentially affected persons are given a room to register their concerns before a decision to grant mineral rights or not.

REGULATION OF VIRTUAL CURRENCIES: SOME REFLECTIONS AND LESSONS FOR TANZANIA

Mr. Eugene E. Mniwasa*

Abstract

This article examines issues concerning regulation of virtual currencies around the world and highlights some lessons that Tanzania can learn in the process of setting up the regime for regulating virtual currencies. The article shows that the revolution in financial technologies, which forms part of the 4th Industrial Revolution, has resulted in, among other things, the invention of virtual currencies. There has been the proliferation of virtual currencies both in industrialized nations and developing countries. Authorities and regulators around the world are pondering over setting up mechanisms to regulate virtual currencies. It is apparent that regulating virtual currencies - and other aspects of financial technologies - is a complex matter that involves cross-cutting issues that should be considered. The article recommends that authorities in Tanzania should carefully consider and integrate all those matters in order to come up with the framework for regulating virtual currencies.

Key words: *Co-regulation, FinTech law, self-regulation, RegTech, virtual currencies, Tanzania.*

*LL.B (Hons) (Dar), Dip in Law (Zimbabwe), LL.M (Zimbabwe), Master of Policy Studies (Zimbabwe/Fort Hare), and PhD in Law (Kent, UK). Senior Lecturer, the Institute of Finance Management, Dar Es Salaam, Tanzania. The Advocate, Notary Public and Commissioner for Oaths. Contacts: eugene.mniwasa@ifm.ac.tz or mniwasa@gmail.com.

1. *Introduction*

The advancement of innovative technologies and the proliferation of financial technologies (FinTech) in the last few decades have resulted in, among other things, the innovation of new financial products and the transfiguration of payments systems and instruments. FinTech forms part of the technological revolution dubbed the Fourth Industrial Revolution.[1] FinTech has enabled financial services such as the Internet-enabled banking, mobile payments and data analysis and others to be innovated and transformed speedily. The financial service industry has been using FinTech to innovate new financial products, to improve provision of services, and to enhance the efficiency of the industry.[2] The invention and use of virtual currencies form part of this revolution in the innovative and financial technologies.[3]Authorities around the world have been searching for regulatory models that will enable national authorities to regulate virtual currencies. The absence of robust regulatory regimes makes the financial service industry vulnerable to instabilities and failures and creates opportunities for criminals to use virtual currencies to commit

1 See Imerman, M. B., and Fabozzi, F. J., "Cashing in on innovation: A taxonomy of FinTech," *Journal of Asset Management*, 2020, Vol. 21, No. 3, pp 167-177. See also Hamdan, A., Hassanien, A., E, Razzaque, A., and Alareeni, B., (eds), *The Fourth Industrial Revolution: Implementation of Artificial Intelligence for Growing Business Success*, Springer: Cham, 2021.

2 Alt, R., Beck, R., and Smits, M. T., "FinTech and the transformation of the financial industry," *Electronic Markets,* 2018, Vol. 28, pp 235–243. See also Lee, I., and Shin, Y. J., "Fintech: Ecosystem, business models, investment decisions, and challenges," *Business Horizons*, 2018, Vol. 61, No. 1, pp 35-46. See also Feyen, E., Frost, J., Gambacorta, L., Natarajan, H., and Saal, M., "Fintech and the digital transformation of financial services: Implications for market structure and public policy," BIS Papers No. 117, the Bank for International Settlements and the World Bank Group, 2021, pp 1- 54.

3 Cox, M. D., Green, L., Borodako, K., Miko□ajewicz-Wo□niak, A., and Scheibe, A., "Virtual currency schemes–The future of financial services," *Foresight*, 2015, Vol. 17, No. 4, pp 365-377.

financial crimes including theft, frauds, tax evasion, financing of terrorism and money laundering.

In many jurisdictions laws do not recognize virtual currencies as legal tenders, but the currencies are used as means of payments and to effect commercial transactions. The emerging evidence indicates that there is a potential risk that the use of virtual currencies can adversely affect the stability of the fiat currencies and monetary policies. The possibility of criminals of using the virtual currencies to commit financial crimes such as theft, frauds, tax evasion, terrorist financing and money laundering cannot be ruled out. Governments and national authorities in many countries are pondering over issues concerning virtual currency use and regulation to enable the oversight of the virtual currency transactions and ecosystems and address externalities arising from the use of those currencies.

The objectives of this article are: to describe issues concerning virtual currencies generally; to examine regulation of virtual currencies; and to explore some challenges involved in regulating virtual currencies. In view of the above objectives, the article addresses the following main questions:

- What are the salient features of virtual currencies and how do the virtual currency systems work?
- How are virtual currencies regulated? and
- What are the challenges that are involved in currencies?

In terms of the methodology, this article draws on a library-based qualitative research. It is premised on the assumption that the law is the dominant policy instrument for regulating virtual

currencies in many jurisdictions.[4] Based on this assumption, the article applies the law-based approach to explore regulation of virtual currencies. Also, the article considers the fact that the use, transactions and regulation of virtual currencies involve non-law aspects (computer science, finance, economics, politics and international cooperation).[5] Thus, the article explores how these non-legal aspects interact with or impact on laws that regulate virtual currencies.

The data were sourced from written materials: books, articles, unpublished dissertations, research papers, reports, magazines and newspapers. Data were analyzed applying the qualitative content analysis technique.[6] This is a technique used to analyze qualitative whereby a researcher identifies certain words, themes, or concepts within given qualitative data (texts).Using the content analysis method, the researcher can analyze meanings and relationships of such certain words, themes, or concepts in

4 Greebel, E. L., Moriarty, K., Callaway, C., Xethalis, G., "Recent key Bitcoin and virtual currency regulatory and law enforcement developments," *Journal of Investment Compliance,* 2015, Vol. 16, No.1, pp 13-18. See also Hughes, S. J., and Middlebrook, S. T., "Are these game changers: Developments in the law affecting virtual currencies, prepaid payroll cards, online tribal lending, and payday lenders," *Business Lawyer,* 2015, Vol. 70, pp 261-270. See also Trautman, L. J., "Bitcoin, virtual currencies, and the struggle of law and regulation to keep peace," *Marquette Law Review*, 2018, Vol. 102, pp 447-538. See also Malloy, M. P., "There are no Bitcoins, Only Bit payers: Law, policy and socio-economics of virtual currencies," *Athens Journal of Law*, 2015, Vol. 1, No. 1, pp 21-32.

5 Merediz-Solà I, Bariviera A. F., "A bibliometric analysis of Bitcoin scientific production," *Research in International Business and Finance*, 2019, Vol. 50, pp 294-305. See also Salami, I., "Terrorism financing with virtual currencies: Can regulatory technology solutions combat this?" *Studies in Conflict & Terrorism*, 2018, Vol. 41, No. 12, pp 968-989. See also Mikołajewicz-Woźniak, A, Scheibe, A., "Virtual currency schemes–The future of financial services," *Foresight*, 2015, Vol. 17, No. 4, pp 365-377.

6 Ravindran V., "Data analysis in qualitative research," *Indian Journal of Continuing Nursing Education*, 2019, Vol. 20, No. 1, pp 40 - 45. See also Renz, S. M., Carrington, J. M., and Badger, T. A., "Two strategies for qualitative content analysis: An intramethod approach to triangulation," *Qualitative Health Research*, Vol. 28, No. 5, pp 824-831.

the texts.[7] In this study, themes emerging from the contents of various materials were synthesized. This helped to draw relevant conclusions on the issues under examination.

The rest of the article is organized as follows: Part 2 presents the background information about the virtual currency invention by associating virtual currencies with FinTech as one of the aspects of the 4th Industrial Revolution. It describes the salient features of virtual currencies and how the virtual currency systems work. Part 3 explores the legal status of virtual currencies and the approaches taken by authorities around the world to regulate virtual currencies. Part 4 highlights on some complexities involved in regulating virtual currencies. It hints on some models that may be opted to regulate virtual currencies. Part 5 highlights on lessons that Tanzania may learn with regard to virtual currency regulation. Part 6 concludes the article.

2. Digital Innovations, Financial Technologies, and Virtual Currencies: Conceptual Issues

2.1. The Fourth Industrial Revolution, innovative financial technologies and virtual currencies

Virtual currencies are among the digital financial innovations that have been made in the last few decades. These digital currencies, particularly cryptocurrencies, invented as a result of the use of FinTech, rely on blockchain and distributed ledger and related technologies.[8] The blockchain technology involves, among other

7 Assarroudi, A., Heshmati Nabavi, F., Armat, M. R., Ebadi, A., and Vaismoradi, M., "Directed qualitative content analysis: the description and elaboration of its underpinning methods and data analysis process," *Journal of Research in Nursing*, 2018, Vol. 23, No. 1, pp 42-55.

8 Fernandez-Vazquez S., Rosillo R., De La Fuente, D., Priore P., "Blockchain in Finn Tech: A mapping study," *Sustainability*," 2019, Vol. 11, No. 22, at p 6366.

aspects, decentralized networking, consensus mechanisms, and cryptography.[9]The invention of virtual currencies and the associated blockchain and distributed ledger technologies are among the important aspects of the revolution in the financial service industry.

The use, trading and the conduct of transactions involving virtual currencies including cryptocurrencies are phenomena that form part of innovative financial technologies referred to as FinTech.[10] FinTech is the term that describes different innovative business models that have transformed the financial services industry. It comprises technologies that the financial industry applies to improve financial activities and services.[11] FinTech business model offers various financial products or services through the use of the Internet and digitalized facilities. FinTech embraces the innovative technologies that are among the driving forces of the Fourth Industrial Revolution (also known as the 'FIR', or '4IR' or 'Industry 4.0').[12]

The FIR can be described as the beginning of the application of cyber-physical systems that involve entirely new capabilities for

9 Suyambu, G. T., Anand, M. and Janakirani, M., "Blockchain–A most disruptive technology on the spotlight of world engineering education paradigm," *Procedia Computer Science*, 2020, Vol. 172, pp 152-158.

10 Alam, N., and Zameni A., "The regulation of FinTech and cryptocurrencies," in Osseni, U. A., and Ali, S. N. (ed), *Fintech in Islamic Finance: Theory and Practice*, Routledge London, 2019, pp 159-173. See also Mo□teanu, N. R., and Faccia, A., "Digital systems and new challenges of financial management–FinTech, XBRL, blockchain and cryptocurrencies," *Quality-Access to Success Journal*, 2020, Vol. 21, No. 174, pp 159-166.

11 Sangwan, V., Prakash, P., and Singh, S., "Financial technology: A review of extant literature," *Studies in Economics and Finance*, 2019, Vol. 37, No. 1, pp 71-88.

12 Leong, K. and Sung, A., "FinTech (Financial Technology): What is it and how to use technologies to create business value in Fintech way?," *International Journal of Innovation, Management and Technology*, 2018, Vol. 9, No. 2, pp 74-78 at p 75. See also Lee, S. M., and Lee, D., "Untact": A new customer service strategy in the digital age," *Service Business*, 2020, Vol. 14, No. 1, pp 1-22.

persons and machines.[13] While these capabilities are reliant on the technologies and infrastructures invented mostly during the 3rd Industrial Revolution, the FIR represents entirely new ways in which technologies have become embedded within societies and even in human bodies.[14] The FIR can, thus, be described as the blend of technologies that obscures the lines between the physical, digital, and biological spheres.[15]

The FIR can also be understood in terms of the technologies that are applied. Some of the technologies applied during the FIR include: artificial intelligence and robotics, virtual and augmented realities, additive manufacturing, blockchain and distributed ledger technologies, advanced materials and nanomaterials, energy capture, and storage and transmission. Other technologies are biotechnologies, geoengineering, neurotechnology, space technologies, machine learning and cognitive computing.[16]

13 Lee, J., Bagheri, B., and Kao, H. A., "A cyber-physical systems architecture for induss try 4.0-based manufacturing systems," *Manufacturing Letters*, 2015, Vol. 3, pp 18-23. See also Oks, S. J., Fritzsche, A., and Möslein, K. M., "An application map for industrial cyber-physical systems," in Sabina Jeschke, S., Brecher, C., Song, H. and Rawat, D. B (eds), *Industrial Internet of Things: Cybermanufacturing Systems*, Springer, Cham, 2017, pp 21-46.

14 Maynard, A.D., "Navigating the fourth industrial revolution," *Nature Nanotechnology*, 2015, Vol. 10, No.12, pp.1005-1006.

15 Prisecaru, P., "Challenges of the Fourth Industrial Revolution," *Knowledge Horizons-Economics*, 2016, Vol. 8, No. 1, pp 57-62. See also Mpofu, R., and Nicolaides, A., "Frankenstein and the Fourth Industrial Revolution (4IR): Ethics and human rights considerations," *African Journal of Hospitality, Tourism and Leisure*, 2019, Vol. 8, No. 5, pp 1-25. See also Butt, R., Siddiqui, H., Soomro, R. A, and Asad, M. M., "Integration of Industrial Revolution 4.0 and IOTs in academia: A state-of-the-art review on the concept of education 4.0 in Pakistan," *Interactive Technology and Smart Education*, 2020, Vol. 17, No. 4, pp 337-354.

16 Skilton, M., and · Hovsepian, F., *The 4th Industrial Revolution: Responding to the Impact of Artificial Intelligence on Business,* Palgrave Macmillan, Charm, 2018. See also Naudé, W., "Brilliant technologies and brave entrepreneurs," *Journal of International Affairs*, 2018, Vol. 72, No. 1, pp 143-158. See also Oztemel, E., and Gursev, S., "Literature review of Industry 4.0 and related technologies," *Journal of Intelligent Manufacturing*, 2020, Vol. 13, No. 1, pp 127-182. See also Yorks, L., Rotatori, D., Sung, S., and Justice, S., "Workplace reflection in the age of AI: Materiality, technology, and machines," *Advances in Developing Human Resources*, 2020, Vol. 22, No. 3, pp 308-319.

Cryptocurrencies whose operations rely on blockchain and distributed ledger technologies are among the financial inventions that came up during the FIR.[17]

FinTech involves transformative and disruptive technologies.[18]The transformative technologies enable the creation of new business models and financial products; the revolutionalization of systems for the provision of financial services; the transformation of that ways actors in the financial service industry transact; and the improvement in financial products and the provision of the financial services. As disruptive technologies, FinTech has enabled new start-ups in the financial markets to compete with the existing financial service providers; has rendered the existing business models outdated; has brought about potential risks to both service providers and consumers; and has created new regulatory challenges to the authorities.[19] The invention of virtual currencies has transformed systems of digital payments to simplify digital payments, enabling swift online transactions, and lowing

See also Chaka, C., "Skills, competencies and literacies attributed to 4IR/Industry 4.0: Scoping review," *International Federation of Library Associations and Institutions Journal*, 2020, Vol. 46, No. 4, pp 369-399.

17 Morrar, R., Arman, H., and Mousa, S., "The Fourth Industrial Revolution (Industry 4.0): A social innovation perspective," *Technology Innovation Management Review*, 2017, Vol. 7, No. 11, pp 12-20. See also Tsekeris, C., "Industry 4.0 and the digitalisation of society: Curse or cure?," *Homo Virtualis*, 2018, Vol. 1, No. 1, pp 4-12. See also Stankevicius, A, and Andrulevicius, A., "Cryptocurrency and national security: Peculiarities of interaction," *Transformations in Business and Economics*, 2020, Vol. 19, No. 2, pp 42-59. See also Gleason, N. W., "Introduction," in Gleason, N. W. (ed), *Higher Education in the Era of the Fourth Industrial Revolution*, Palgrave Macmillan, Singapore, 2018, pp 1-11.

18 Gomber, P., Kauffman, R. J., Parker, C., and Weber, B. W., "On the Fintech revolution: Interpreting the forces of innovation, disruption, and transformation in financial services," *Journal of Management Information Systems*, 2018, Vol. 35, No. 1, pp 220-265. See also Omarova, S. T., "Dealing with disruption: Emerging approaches to FinTech regulation," *Washington University Journal of Law and Policy,* 2020, Vol. 61, pp 25-54.

19 Harris, J. L., "Bridging the gap between 'Fin'and 'Tech': The role of accelerator networks in emerging FinTech entrepreneurial ecosystems," *Geoforum.* 2021, Vol. 122, pp 174-82 at p174.

costs of transactions. In this sense, the virtual currency use and transactions are transformative. The invention of virtual currency was a disruptive phenomenon in that the currency emerged as a 'challenger' to 'conventional' means of payment or an alternative payment solution. The use of virtual currencies may, in the long run, render some conventional means of payment obsolete. It is against this backdrop, this article highlights on issues concerning virtual currency use and transactions as part of FinTech.

2.2. *Virtual currencies*

The term 'virtual currency' (also known as 'digital currency') has been defined differently.[20]There is no single universally accepted definition of the term 'virtual currency'.[21] In 2012, the European Central Bank (ECB) has defined a virtual currency as "a type of unregulated digital money, which is issued and usually controlled by its developers, and used and accepted among the members of a specific virtual community."[22] In 2014, the European Banking Authority (EBA) defined a virtual currency as "a digital representation of value that is neither issued by a central bank or a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically."[23]

20 Toscher, S., and Stein, M. R., "Cryptocurrency and IRS enforcement—Get ready for Uncle Sam to look into your digital wallet," *Journal of Tax Practice and Procedure*, 2018,pp 31-39.

21 Tu, K. V., and Meredith, M. W., "Rethinking virtual currency regulation in the Bitcoin age," *Washington Law Review*, 2015, Vol. 90, No. 1, pp 271- 347.

22 European Central Bank, *Virtual Currency Schemes*, 2012, at p 6 <https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf> (accessed on 15 September 2021). See also See also European Central Bank, *Virtual Currency Schemes – A Further Analysis*, 2015 at p 4 <https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf>

23 European Central Bank, *EBA Opinion On 'Virtual Currencies*, 2014, <https://www.eba.europa.eu/sites/default/documents/files/documents/10180/657547/81409b94-4222-45d7-ba3b-7deb5863ab57/EBA-Op-2014-08%20Opinion%20on%20Virtual%20

In its Anti-Money Laundering Directive (5th AMLD), the European Union (EU) has adopted a definition of virtual currency derived from the guidance of the Financial Action Task Force (FATF).[24]The Directive defined a virtual currency as:

> … a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons to exchange and which can be transferred, stored and traded electronically.[25]

In the report entitled *Virtual Currencies: Key Definitions and Potential AML/CFT Risks*, the FATF has described a virtual currency as:

> …a digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status (i.e., when tendered to a creditor, is a valid and legal offer of payment) in any jurisdiction. It is [neither] issued nor guaranteed by any jurisdiction, and fulfils the above functions only by agreement within the community of users of the virtual currency. Virtual currency is distinguished from fiat currency ([also known as] "real currency," "real money," or "national currency"),

Currencies.pdf?retry=1> (accessed on 15 September 2021).

24 The Financial Action Task Force (FATF) is an inter-governmental body established in 1989. Its mandate is to set standards and to promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats globally. For a discussion about the FATF see Hopton, D., *Money Laundering: A Concise Guide for All Business*, Gower Publishing Limited, Aldershot, 2006, pp 17-24. See also Nance, M. T., "The regime that FATF built: an introduction to the Financial Action Task Force," *Crime, Law and Social Change*, 2018, Vol. 69, No. 2, pp 109-129. See also Murrar, F., and Barakat, K., "Role of FATF in spearheading AML and CFT," *Journal of Money Laundering Control*, 2020, Vol. 24, No. 1, pp 77-90.

25 European Union, *Directive (EU) 2018/843 of the European Parliament and of the Council* of 30 May 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN> (accessed on 15 September 2021).

> which is the coin and paper money of a country that is designated as its legal tender; circulates; and is customarily used and accepted as a medium of exchange in the issuing country. It is distinct from e-money, which is a digital representation of fiat currency used to electronically transfer value denominated in fiat currency. E-money is a digital transfer mechanism for fiat currency—i.e., it electronically transfers value that has legal tender status.[26]

As noted above, cryptocurrencies are among many types of virtual currencies.[27] A cryptocurrency can be described as a digital currency[28] whose generation of its units and verification of payments are authenticated by cryptography.[29] It is a digital currency with verifiable mathematical properties that can be transferred between users on a distributed ledger without relying on a centralized protocol operator. This digital currency relies upon cryptogenic algorithms to ensure network and transactional validity, and is distributed over the network of computers, but is not issued by a centralized source.[30] It depends on cryptographic proof to validate transactions and provide consensus about the

26 Financial Action Task Force, *Virtual Currencies: Key Definitions and Potential AML/CFT Risks, FATF Report,* 2020, <http://www.fatf-gafi.org/media/fatf/documents/reports/Virtual-currency-key-definitions-and-potential-amlcft-risks.pdf> (accessed on 15 September 2021).

27 Chuen, D. L. K., Guo, L., and Wang, Y., "Cryptocurrency: A new investment opportunity?," *Journal of Alternative Investments*, 2017, Vol. 20, No. 3, pp 16-40. See also Reddy, E., and Minnaar, A., "Cryptocurrency: A tool and target for cybercrime," *Acta Criminologica: African Journal of Criminology and Victimology*, 2018, No. 31, No. 3, pp 71-92.

28 The term 'digital currency' refers to a digital representation of either virtual currency (non-fiat) or e-money (fiat) and thus is often used interchangeably with the term "virtual currency". See Financial Action Task Force, *supra* note 26.

29 Nian, L. P., and Chuen, D. L. K., "Introduction to Bitcoin," in Chuen, D. L. K., (ed), *Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments, and Big Data,* Elsevier, London, 2015, pp 5-30 at p 8.

30 Bierer, T., "Hashing it out: Problems and solutions concerning cryptocurrency used as Article 9 collateral," *Case Western Reserve Journal of Law, Technology and the Internet,* 2016, Vol.7, pp 79-94.

network activity without reliance on a trusted third-party such as a bank or other financial institution.[31]

Drawing on the above conceptualization, one can summarize that a cryptocurrency can is a digital currency which:

- represents value;
- does not possess the legal status of currency or fiat money;
- is not attached to a legally established currency;
- is decentralized;
- is electronically transferable, storable and tradeable; and
- is verified using cryptographic mechanisms.

Virtual currencies can be broadly grouped into two classes: decentralized and centralized currencies.[32] In a centralized virtual currency system there is a single administrating authority (administrator), a third party that controls the system. The administrator issues the currency; establishes the rules for the currency use; maintains a central payment ledger; and is vested with powers to withdraw the currency from circulation. Examples of the centralized virtual currencies include: Second Life 'Linden dollars,' PerfectMoney; WebMoney 'WM units,' and World of Warcraft gold.[33]

31 Financial Action Task Force, *supra* note 26.
32 *Ibid.*
33 Giambelluca, G., and Masi, P., "The regulatory machine: An institutional approach to innovative payments in Europe, in Gimigliano, G., (ed), *Bitcoin and Mobile Payments: Constructing a European Union Framework*, Palgrave Macmillan, London, 2016, pp 3-25 at p 19.

The term 'decentralized virtual currency' is sometimes used interchangeably with the term 'cryptocurrency.' A decentralized virtual currency system does not require a central issuer of the currency or an authority to enable or verify the validity of a transaction within a network, or to generate and issue new units.[34] In this decentralized system, cryptocurrencies function as 'digital cash' that enables peer-to-peer, direct transfers between parties. Examples of the decentralized virtual currencies include Bitcoin, LiteCoin, and Ripple.[35]

Bitcoin was the first decentralized virtual currency that traces its origin in 2008 when an unknown person or a group of persons using the pseudonym Satoshi Nakamoto introduced the idea to create a computer platform that would enable users to make transfers of digital representations of value.[36] From this idea the cryptocurrency called Bitcoin came into existence in 2009 and this digital currency has become the most widely used cryptocurrency.[37] Since its introduction, BitCoin has had the largest market value, the total virtual currency market capitalization and the number of daily transactions.[38] The introduction of BitCoin has led to the emergence of alternative virtual currencies (AltCoins) including

34 De Filippi, P., and Loveluck, B., "The invisible politics of bitcoin: Governance crisis of a decentralized infrastructure," *Internet Policy Review*, 2016, Vol. 5, No. 4, pp 1-28 at p 5.

35 Ciaian, P., and Rajcaniova, M., "Virtual relationships: Short-and long-run evidence from BitCoin and Altcoin markets," *Journal of International Financial Markets, Institutions and Money*, 2018, Vol. 52, pp 173-195.

36 Dowd, K., and Hutchinson, M., "Bitcoin will bite the dust," *Cato Journal,* 2015, Vol. 35, pp 357-358 at pp 358-359. See also Erzurumlu, Y. O., Oygur, T., and Kirik, A., "One size does not fit all: External driver of the cryptocurrency world," *Studies in Economics and Finance*, 2020, Vol. 37, No. 3, pp 545-560 at p 545.

37 Vyas, C. A., and Lunagaria, M., "Security concerns and issues for Bitcoin," *International Journal of Computer Applications*, 2014, pp 10-12.

38 Ciaian, P., and Rajcaniova, M., "The digital agenda of virtual currencies: Can BitCoin become a global currency?," *Information Systems and e-Business Management*, 2016, Vol. 14, No. 4, pp 883-919.

BitShares, Ethereum (ETH), Dash, DogeCoin, LiteCoin (LTC), PeerCoin, Zcash (ZEC), Monero (XMR), and Ripple (XRP). It is said that there are thousands of altCoins.[39] The virtual currencies have gone from little-known digital money to rapidly proliferating financial instruments that have attracted public and regulators' interests.[40]

In terms of their schemes, virtual currencies can be classified in three categories.[41] First, the 'closed' virtual currency schemes which involve the digital currencies that do not have links to the real economy (for instance, virtual currencies which can be used only in digital games). Second, the virtual currency schemes with 'unidirectional flows' which have links to the real economy, since the virtual currencies may be bought with real money, but cannot be exchanged back to real money (for instance, frequent flyer programmes that cannot be redeemed back to real money). Third, the virtual currency schemes with 'bi-directional flows' which can be exchanged for real money and vice versa.

Besides the rapid development of the ICTs and FinTech particularly the blockchain and distributed ledger technologies that have been enabling virtual currency use and transactions, there several

39 Ciaian, P., and Rajcaniova, M., "Virtual relationships: Short-and long-run evidence from BitCoin and Altcoin markets," *Journal of International Financial Markets, Institutions and Money*, 2018, Vol. 52, pp 173-195. See also Spurr, A., and Ausloos, M., "Challenging practical features of Bitcoin by the main altcoins," *Quality and Quantity*, 2020, pp 1-19.

40 Luther, W. J., "Bitcoin and the future of digital payments," *Independent Review*, 2016, Vol. 20, No. 3, pp 397-404.

41 Cvetkova, I., "Cryptocurrencies legal regulation," *BRICS Law Journal*, 2018, Vol. 5, No. 2, pp 128-153. See also Reddy, E., and Minnaar, A., "Cryptocurrency: A tool and target for cybercrime," *Acta Criminologica: African Journal of Criminology and Victimology,* 2018, Vol. 31, No. 3, pp 71-92. See also Didenko, A. N., and Buckley, R. P., "The evolution of currency: Cash to cryptos to sovereign digital currencies," *Fordham International Law Journal*, 2019, Vol. 42, No. 4, pp 1041-1094 at p1076.

theoretical arguments have been advanced to rationalize the proliferation of virtual currencies around the world in the last few decades. These include the following:

- *The rising of public distrust of banks and monetary authorities following the global financial crisis that began in 2008:*[42] The emergence of the cryptocurrencies was an attempt to build digital currency-based payment systems in response to what was viewed as the deep-rooted problem of the conventional system revealed by the crisis.[43]The centralized monetary systems that existed were seen to be undemocratic and lacked transparency. It was believed that the blockchain and digital ledger technologies would give rise to decentralized and more transparent monetary systems.
- *The resentment against the fiat money system and interventions made by governments and their regulators particularly the central banks*:[44] This aversion to the state-backed monetary system was founded on the view that there was a need to come up with new systems that would promote the increased individual privacy and limited government. Propagators of this view were calling for the creation of the monetary order that would be free from banks and monetary authorities that had been responsible for fixing rules governing the money supply.

42 Corradi, F., and Höfner, P., "The disenchantment of Bitcoin: Unveiling the myth of a digital currency," *International Review of Sociology*, 2018, Vol. 28, No. 1, pp 193-207 at pp 194-195.

43 Weber, B., "Bitcoin and the legitimacy crisis of money," *Cambridge Journal of Economics*, 2016, Vol. 40, No. 1, pp 17-41 at p 18. See also Clements, R., "Assessing the evolution of cryptocurrency: Demand factors, latent value, and regulatory developments," *Michigan Business & Entrepreneurial Law Review,* 2018, Vol. 8, No.1, pp 73-100 at p 78.

44 Cunha, P. R., Melo, P., and Sebastião, H., "From Bitcoin to central bank digital currencies: Making sense of the digital money revolution," *Future Internet*, 2021, Vol. 13, No. 7, 165, <https://doi.org/10.3390/fi13070165> (accessed on 25 September 2021).

- *The need to put an end to the monopoly of banks and government agencies and establish new systems that would ensure, among other things, privatization and democratization of currency issuance, administration and management*:[45] The emergence of virtual currencies provided opportunities for the creation of 'private' currencies by non-public actors and this would lead to ending the government monopoly on the money supply. Not only would the virtual currency use and transactions enable the financial inclusion, but also they would make it possible for private actors to partake in issuing currencies, verifying transactions, and managing the digital currency systems.
- *The creation of 'parallel' currency systems that would be operating without being convertible into the fiat money*:[46] These currencies would compete with the fiat money as a means of payment. The supporters of this view were thinking about the creation of currencies, or money that would be of a private and decentralized nature, incorruptible and free from government manipulation.

Cryptocurrencies use computer software running across a network and rely on various established cryptographic procedures (such as hashing, digital signatures and cryptographic functions) to control access and authenticate transactions.[47]The technology

45 Tozzi, C., "Decentralizing democracy: Approaches to consensus within blockchain communities," *Teknokultura*, 2019, Vol. 16, No. 2, pp 181-195.

46 Carvalho, C. E., Pires, D. A., Artioli, M., and Oliveira, G. C. D., "Cryptocurrencies: Technology, initiatives of banks and central banks, and regulatory challenges," *Economia e Sociedade*, 2021, Vol. 30, pp 467-496 at pp 470-471.

47 Dark, C., Emery, D., Ma, J., and Noone, C., "Cryptocurrency: Ten years on," *Reserve Bank of Australia Bulletin*, 2019, pp 195-214. See also Härdle, W. K., Harvey, C. R., and Reule, R. C., "Understanding cryptocurrencies," International Research Training Group, 2019, <https://ies.keio.ac.jp/upload/20191125econo_Wolfbang_wp.pdf>pp 1-35 at p 4 (accessed on 25 September 2021).

underlying cryptocurrency usage and transactions is known as the distributed ledger technology (DLT).[48]DLT refers to the technology that enables a network of computers ('nodes') connected through the Internet to securely propose, validate and record changes or updates to a synchronized ledger that is distributed across such computer network. DLT enables participants in digital transactions, through the use of established procedures and protocols, to conduct transactions without relying on a central authority or intermediary.[49] The 'consensus mechanisms' are used to validate transactions which involve the procedures to achieve agreements across the network whether a particular transaction is authentic or not.

Block chain can be described as a decentralized, transactional data base that enables validated, tamper-resistant transactions across the nodes. From a business viewpoint, blockchain can be described as a peer-to-peer exchange network for transferring value, while, from a legal perspective, it refers to the technology applied to validate transactions.[50] The blockchain can be considered as a public digital ledger that comprises records of transactions made within its system.[51] 'Blocks' are digital records containing the transactions that are cryptographically signed and added to the

2019, <https://ies.keio.ac.jp/upload/20191125econo_Wolfbang_wp.pdf>pp 1-35 at p 4 (accessed on 25 September 2021).

48 See Bech, M. L., and Garratt, R., "Central bank cryptocurrencies," *BIS Quarterly Review,* 2017, pp 55-70 at p 58.

49 Berg, A., Berg, C., and Novak, M., "Blockchains and constitutional catallaxy," *Constitutional Political Economy*, 2020, Vol. 31, No. 2, pp 188-204. See also Workie, H., and Jain, K., "Distributed ledger technology: Implications of blockchain for the securities industry," *Journal of Securities Operations & Custody*, 2017, Vol. 9, No. 4, pp 347-355.

50 Rosati, P., and Čuk, T., "Blockchain beyond cryptocurrencies," in Lynn, T., Mooney, J. G., Rosati, P., and Cummins, M. (eds.), *Disrupting Finance: FinTech and Strategy in the 21st Century*, Palgrave, Cham, pp 149-170 at pp 151-152.

51 Kiviat, T. I., "Beyond Bitcoin: Issues in regulating blockchain transactions," *Duke Law Journal*, 2015, Vol. 65, pp 569-608.

blockchain in a special sequence, chronologically. Each block is chained to the preceding block and recorded across a peer-to-peer network, using cryptographic trust and assurance mechanisms.[52] Whenever a transaction occurs, anywhere in the network, certain participants in the system, who are known as 'miners' ,authenticate it and add it to the blockchain and this renders it impractical for the same digital currency to be 'double spent,' to be transacted to different addresses at the same time. The miners are agents who control the computational nodes validating transactions within the network. For Bitcoin, services these miners provide are guaranteed according to the system of incentives. The miners are rewarded newly created bitcoins.[53]

A 'wallet' is a digital facility that stores cryptocurrencies on behalf of owners of those currencies.[54] Owning cryptocurrencies involves having private keys that allow owners to transfer their currencies, for instance, to purchasers. Wallet providers hold private keys on behalf of their customers.[55] When owners hold cryptocurrencies in the wallets, they do not have access to their private keys. Instead, they must trust their wallet providers to hold cryptocurrencies on their behalf. Unlike wallets, cryptocurrency exchanges serve as marketplaces where users can trade one cryptocurrency for another digital currency, or for the government-issued fiat

52 Minor, A., "Cryptocurrency regulations wanted: Iterative, flexible and pro-competitive preferred," *Boston College Law Review,* 2020, Vol. 61, No. 3, pp 1149 – 1181.

53 Reijers, W., and Coeckelbergh, M., "The blockchain as a narrative technology: Investigating the social ontology and normative configurations of cryptocurrencies," *Philosophy and Technology*, 2018, Vol. 31, No. 1, pp 103-130. See also Bryans, D., "Bitcoin and money laundering: Mining for an effective solution," *Indiana Law Journal,* 2014, No. 89, No.1, pp 441-472 at pp 445-446.

54 Alcantara, C., and Dick, C., "Decolonization in a digital age: Cryptocurrencies and indigenous self-determination in Canada," *Canadian Journal of Law & Society,* 2017, Vol. 32, No. 1, pp.19-35 at p 25.

55 Chu, D., "Broker-dealers for virtual currency: Regulating cryptocurrency wallets and exchanges," *Columbia Law Review,* 2018, Vol. 118, pp 2323- 2360.

currency.[56] Exchanges purchase cryptocurrencies from vendors and then trade them to purchasers.[57] Normally, such fees include commissions for each trade and withdrawal fees for transferring cryptocurrencies out of the exchanges. Owing to the fact that the industry is still developing, cryptocurrency markets are quite fragmented and such exchanges are also situated in various jurisdictions.

Several ways can obtain virtual currencies. New cryptocurrency units may be arbitrarily created by the controller of the protocol and be sold via the initial coin offering, or given freely as the marketing strategy to broaden public awareness of the such digital currency, or generating them by acting as a miner, receiving them as a form of payment, or receiving them as a donation or gift.[58] The cryptocurrency exchanges facilitate selling and buying of the cryptocurrencies.[59] The new bitcoins are also created and paid out as a reward for participants of the system validating transactions through the process referred to as 'mining.'

56 Alkadri, S., "Defining and regulating cryptocurrency: Fake Internet money or legitimate medium of exchange?," *Duke Law and Technology Review,* 2018, Vol. 17, No. 1, pp 71-98.

57 DeVries, P. D., "An analysis of cryptocurrency, Bitcoin, and the future," *International Journal of Business Management and Commerce*, 2016, Vol. 1, No. 2, pp 1-9.

58 Thies, F., Wallbach, S., Wessel, M., Besler, M., and Benlian, A., "Initial coin offerings and the cryptocurrency hype-the moderating role of exogenous and endogenous signals," *Electronic Markets*, 2021, pp 1-15. See also Plassaras, N. A., "Regulating digital currencies: Bringing Bitcoin within the reach of IMF," *Chicago Journal of International,* 2013, Vol. 14, No. 1, pp 377-407 at pp 386-387. See also Dierksmeier, C., and Seele, P., "Cryptocurrencies and business ethics," *Journal of Business Ethics*, 2018, Vol. 152, No. 1, pp 1-14. See also Pittman, A., "The Evolution of giving: Considerations for regulation of cryptocurrency donation deductions," *Duke Law and Technology Review,* 2016, Vol. 14, No. 1, pp 48-68.

59 Dania, K., *Cryptocurrency Investing,* John Wiley & Sons, Hoboken, NJ, 2019, pp 77-84.

Cryptocurrency transactions are protected by the 'public/private key encryption.'[60] The encryption generates two keys: a public key and a private.[61] One key is retained by a payer (which can be equated to a private password or pin) while the other key is made public (which can be likened to the name of a bank and a branch where a bank account is held). The public key is used to receive cryptocurrencies, and such currencies can only be accessed through the use of the associated private key. The payee uses his/her private key to approve the payment to the recipient account. The public key is like an e-mail address (which is public and available to everyone), while the private is like the password required to authorize messages to come in or go out.[62] The public key allows a payee to receive cryptocurrency transactions. This key has a cryptographic code which is paired to a private key. While a payer can send transactions through the public key, a payee needs the private key to 'unlock' the transactions and prove that he/she is the owner of the cryptocurrency units received in the transaction.[63] Private keys allow their holders to 'sign' transactions to 'spend' the currencies, to authorize transactions of cryptocurrencies. Thus, the private key gives the recipients the ability to prove ownership or spend the funds associated with the public address. In brief, the above process involves the following

60 Hurlburt, G. F., and Bojanova, I., "Bitcoin: Benefit or curse?," *IT Professional*, 2014, Vol. 16, No. 3, pp 10-15. See also Godlove, N., "Regulatory overview of virtual currency," *Oklahoma Journal of Law and Technology,* 2014, Vol. 10, No. 1, pp 1-67.

61 Hinkes, A. M., "Throw away the key, or the key holder? Coercive contempt for lost or forgotten cryptocurrency private keys, or obstinate holders," *Northwestern Journal of Technology and Intellectual Property*, 2019, Vol. 16, No. 4, pp 225- 263.

62 Kaplanov, N. M., "Nerdy money: Bitcoin, the private digital currency, and the case against its regulation," *Loyola Consumer Law Review,* 2012, Vol. 25, No. 1, pp 111- 174 at p 117.

63 Pittman, A. "The evolution of giving: Considerations for regulation of cryptocurrency donation deductions," *Duke Law and Technology Review*, 2016, Vol. 14, No.1, pp 48-68.

steps: (i) a transaction is encrypted using a public key and such transaction can only be decrypted by accompanying private key; (ii) the transaction is signed using the private key which authenticates that the transaction has not been modified; and (iii) the transaction can be verified as authentic using the accompanying public key. The 'nodes' will verify and authenticate transactions automatically. Unauthenticated transactions will be rejected by the network and authentic, mined transactions on the blockchain will be unalterable.

Mining is the process applied to create the cryptographic proof on which decentralized trust is based. The process of mining produces virtual currencies and serves to add transactions to the blockchain in the form of 'blocks.'[64] Essentially, mining is the process of computers on the cryptocurrency network to solve complex mathematical puzzles in order to ensure the validity of the transactions. The process applied by miners to validate transactions depends on the type of consensus mechanism the cryptocurrency network uses.[65] There are various consensus mechanisms for validating transactions by miners. The most used ones are the 'proof-of-work' (PoW) and the 'proof-of-stake' (PoS) mechanisms. For example, Bitcoin uses the PoW mechanism, whereas other cryptocurrencies such as Peercoin, Dash, and Nexus use the PoS mechanism.[66] In the PoW system, miners compete to

64 Fanning, K. and Centers, D.P., "Blockchain and its coming impact on financial services," *Journal of Corporate Accounting & Finance*, 2016, Vol. 27, No. 5, pp.53-57 at p 55.

65 Bryans, D., "Bitcoin and money laundering: Mining for an effective solution," *Indiana Law Journal,* 2014, Vol.89, No. 1, pp 441-472 at p 446.

66 Vyas, C. A., and Lunagaria, M., "Security concerns and issues for bitcoin," *International Journal of Computer Application,* 2014,pp 10-12 at p 10. See also Ciaian, P., and Rajcaniova, M., Kancs, d'Artis, "Virtual relationships: Short-and long-run evidence from BitCoin and Altcoin markets," *Journal of International Financial Markets, Institutions and Money*, 2018, Vol. 52, pp 173-195 at pp 182-183.

solve computational puzzles. The first miner to solve the puzzle (and produce PoW) is responsible for validating a transaction and creates a new block which is added to the blockchain.[67] The Bitcoin nodes then transmit this information to the user. Mining is enormously memory-intensive activity that requires the power of multiple computers. Those who dedicate their time and their computers to this task, miners, get a reward that is paid in virtual currencies such as bitcoins.[68] The miners do, therefore, act as 'initial distributors' of coins who help to circulate coins on the network which has no central authority to issue such coins. Under the PoS system a miner can validate block transactions according to how many cryptocurrencies he/she holds. This implies that the more the cryptocurrencies a miner owns the more mining power he/she has. Thus, the miner with the greatest number of cryptocurrencies is responsible for validating a transaction and he/she can create new block or blocks.[69]

There are other consensus mechanisms that are used to validate blocks in virtual currency transactions. These include: the 'delegated proof of stake' (DPoS) mechanism, the 'proof of hold' (PoH) mechanism, the 'proof of use'(PoU) mechanism, the 'proof of stake/time'(PoST) mechanism, the 'proof of minimum-aged stake'(PoMAS), the 'proof of importance'(PoI) mechanism, and the 'proof of elapsed time' (PoET).[70]

67 Sedlmeir, J., Buhl, H. U., Fridgen, G., and Keller, R., "The energy consumption of blockchain technology: Beyond myth," *Business and Information Systems Engineering*, 2020, Vol. 62, No. 6, pp 599-608.

68 Brown, S. D., "Cryptocurrency and criminality: The Bitcoin opportunity," *Police Journal*, 2016, Vol. 89, No. 4, pp.327-339 at 332.

69 Nienhaus, V., "Blockchain technologies and the prospects of smart contracts in Iss lamic finance," in Oseni, U. A., and Ali, S. N., (eds), *Fintech in Islamic Finance: Theory and Practice*, Routledge, London, 2019, pp 183-210 at p 186.

70 For a discussion on these consensus validation mechanisms see Hammi, M. T., Hammi, B., Bellot, P., and Serhrouchni, A., "Bubbles of trust: A decentralized block-

It is widely viewed that virtual currencies do not have characteristics of money (also known as 'real currencies,' or 'national currencies,' or 'real money'). For instance, Solodan,[71] Kubát,[72] Alkadri,[73] and Prentis, [74]among others, argue that virtual currencies do not satisfy the conventional definition of money. According to this definition, money fulfils three basic functions: a means of payment; a unit of account; and a store of value.[75] Some commentators argue that virtual currencies serve as means of payment to a very limited extent because a very limited number of merchants accept them. As a result, the volumes of virtual transactions are lower than sovereign currencies. Moreover, virtual currencies cannot effectively serve as a store of value because they suffer from considerable volatility of their purchasing powers. Notwithstanding the above limitations, it is speculated that number of users and transactions will increase to the extent that virtual currencies will have the same status as sovereign currencies in the future.[76]

chain-based authentication system for IoT," *Computers & Security*, 2018, 78, 126-142. See also Srivastava, S., Kumar, A., Jha, S. K., Dixit, P., and Prakash, S., "Event-driven data alteration detection using block-chain," *Security and Privacy*, 2021, Vol. 4, No. 2, e146.

71 Solodan, K., "Legal regulation of cryptocurrency taxation in European countries," *European Journal of Law and Public Administration*, 2019, Vol. 6, No. 1, pp 64-74.

72 Kubát, M., "Virtual currency bitcoin in the scope of money definition and store of value," *Procedia Economics and Finance*, 2015, Vol. 30, pp 409-416.

73 Alkadri, S., "Defining and regulating cryptocurrency: Fake internet money or legitimate medium of exchange," *Duke Law and Technology Review,* 2018, Vol. 17, No. 1, pp 71-98 at p 76.

74 Prentis, M., "Digital metal: Regulating Bitcoin as a commodity," *Case Western Law Review,* 2015, Vol. 66, No. 2, pp 609-638.

75 Yuneline, M. H., "Analysis of cryptocurrency's characteristics in four perspectives," *Journal of Asian Business and Economic Studies*, 2019, Vol. 26, No. 2, pp 206-219.

76 Dabrowski, M., and Janikowski, L., "Virtual currencies and their potential impact on financial markets and monetary policy," Center for Social and Economic Research, CASE Reports, No 495/ 2018, at p 15, <https://www.econstor.eu/bitstream/10419/227640/1/1040791093.pdf> (accessed on 3 October 2021). See also Ciaian, P., and Rajcaniova, M., "The digital agenda of virtual currencies: Can BitCoin become a global currency?," *Information Systems and e-Business Management*, 2016, Vol.14, No. 4, pp 883-919. See also Yuneline, M. H., "Analysis of cryptocurrency's characteristics

3. Legal Status and Regulation of Virtual Currencies around the World

3.1. Legal status of virtual currencies

Different jurisdictions have accorded virtual currencies different legal status.[77] In June 2021, El Salvador became the first country in the world to adopt Bitcoin as the legal tender after the country's Congress approved the proposal to embrace the virtual currency to support El Salvador's financial inclusion initiatives, investment and economic development.[78] In many jurisdictions virtual currencies are not regarded as 'conventional' currencies or fiat money.[79] In some countries virtual currencies are regarded as 'property.' In other jurisdictions they are regarded as 'crypto-assets.' In other countries the virtual currencies are treated as 'value' or 'foreign currencies.'[80]

Considering the prominence and popularity of virtual currencies around the world, people in many countries use or conduct transactions using those currencies.[81] And considering this trend,

in four perspectives," *Journal of Asian Business and Economic Studies*, 2019, Vol. 26, No. 2, pp. 206-219.

77 Kirkpatrick, K., Savage, C., Johnston, R., and Hanson, M., "Virtual currency in sance tioned jurisdictions: Stepping outside of SWIFT," *Journal of Investment Compliance*, 2019, Vol. 20, No. 2, pp 39-44,

78 Sam Jones and Bryan Avelar, *El Salvador becomes first country to adopt bitcoin as legal tender, Guardian* (United Kingdom), 9 June 2021. See also Joe Tidy, *Fear and excitement in El Salvador as Bitcoin becomes legal tender, BBC* (United Kingdom), 7 September 2021.

79 Chang, S. E. "Legal status of cryptocurrency in Indonesia and legal analysis of the business activities in terms of cryptocurrency," *Brawijaya Law Journal*, 2019, Vol. 6, No.1, pp 76-93. See also Cherniei, V., Cherniavskyi, S., Babanina, V. and Tykho, □., "Criminal liability for cryptocurrency transactions: Global experience," *European Journal of Sustainable Development*, 2021, Vol. 10, No. 4, pp 304-316.

80 Kalbaugh, G. E., "Virtual currency, not a currency," *Journal of International Business and Law,* 2016, Vol. 16, No. 1, pp 26-35.

81 Doguet, J. J., "The nature of the form: Legal and regulatory issues surrounding the Bitcoin digital currency system," 2013, Vol. 73, pp 1119-1153 at pp 1136-1139.

some central banks have been studying or are in the process of creating central bank digital currencies (CBDCs).[82] It is expected that these CBDCs will be legal tenders in those countries.

Leckow,[83] Shovkhalov and Idrisov,[84] Gikay,[85] and Rasul,[86] among others, observe that virtual currencies have the potential of providing substantial benefits to financial systems, market participants, investors and users. The virtual currencies facilitate direct peer-to-peer transactions and eliminate the requirement for intermediaries. In this way, they enhance the efficiency of financial systems by enabling the making of payments–including cross-border payments–more speedily and inexpensively than before. Thus, the use of virtual currencies involves the acceleration, cost reduction, and significant simplification of settlements because of the absence of intermediaries. The use of virtual currencies can facilitate the financial inclusion, in particular, in developing countries by improving the opportunities for fast and low-cost cross-border remittances and by enabling the financial inclusion into the financial systems of the 'unbanked' persons in these nations. Moreover, the use of virtual currencies enables more actors including private actors to participate in the control and

82 Auer, R., and Böhme, R., "The technology of retail central bank digital currency," *BIS Quarterly Review,* 2020, pp 85-100.

83 Leckow, R., "Virtual currencies: The regulatory challenges," in *ESCB Legal Conference,* 2016, pp. 142-132,<http://ccl.yale.edu/sites/default/files/files/Leckow_Ross_Virtual%20currencies%20-%20the%20regulatory%20challenges.pdf>(accessed on 10 October 2021).

84 Shovkhalov, S., and Idrisov, H., "Economic and legal analysis of cryptocurrency: Scientific views from Russia and the Muslim world," *Laws*, 2021, Vol. 10, No. 2, 32,<http://doi.org/10.3390/laws10020032>

85 Gikay, A. A., "Regulating decentralized cryptocurrencies under payment service law: Lessons from European Union law," *Journal of Law, Technology & the Internet*, 2018, Vol. 9, pp 1-35.

86 Rasul, H., "Does Bitcoin need regulation? An analysis of Bitcoin's decentralized naa ture as a security and regulatory concern for governments?" *Political Analysis,* 2018, pp 93-107.

administration of currency systems, hence the democratization of the financial systems.

3.2. Regulation of virtual currencies

Despite the advantages of virtual currencies enumerated above, there are some risks and challenges involved in virtual currency use and transactions.[87] First, virtual currencies are highly volatile and susceptible to frequent fluctuations of their values. Second, the widespread use of virtual currencies can complicate the implementation of the monetary policy by national authorities particularly the central banks. Third, there is a risk that virtual currencies can be integrated to a country's financial system and this can pose risks to financial stability through, for instance, the failure of part of the virtual currency infrastructure or key participants within the system. Fourth, there is no central authority to enforce rules that govern transactions involving virtual currencies. Fifth, the decentralized virtual currency schemes do not have mechanisms for protecting consumers, nor do they guarantee fair trade practices among the participants. There is no person to warn consumers about risks involved in the virtual transactions. Sixth, there are no mechanisms for resolving disputes that may arise between or among intermediaries or users of the cryptocurrency systems.

87 Cox, M. D., Green, L., Borodako, K., Mikołajewicz-Woźniak, A., and Scheibe, A., "Virtual currency schemes –The future of financial services," *Foresight*, 2015, Vol. 17, No. 4, pp. 365-377.

The use of virtual currencies can be abused and foster criminality.[88]The virtual currency use presents opportunities for criminals to commit financial crimes such as frauds and theft.[89] Owing to the fact that the virtual currency markets are still at formative stages and the regulatory frameworks are underdeveloped, virtual currencies present opportunities for scams including theft of those currencies through fraud or hacking. For instance, in 2013 the United States authorities filed a complaint against a company engaging in a Bitcoin-denominated 'Ponzi' scheme pursuant to the securities legislation that prohibits fraudulent offers and sales of securities.[90] In 2014, one of the major Bitcoin exchanges in the world, Mt Gox, filed for bankruptcy in Japan after announcing that nearly half a billion dollars' worth of bitcoins held for customers had gone missing.[91]

88 Hamil, B., "EU crypto currency regulation: Creating a haven for businesses or for criminals?," *Georgia Journal of International and Comparative Law,* 2019, Vol. 48, pp 833-848. See also Kethineni, S., and Cao, Y., "The rise in popularity of cryptocurrency and associated criminal activity," *International Criminal Justice Review*, 2020, Vol. 30, No. 3, pp 325-344.

89 Simser, J., "Bitcoin and modern alchemy: In code we trust," *Journal of Financial Crime*, 2015, Vol. 22, No. 2, pp 156-169. See also Vasek, M., and Moore, T., "There's no free lunch, even using Bitcoin: Tracking the popularity and profits of virtual currency scams," in Böhme R., Okamoto T., (eds) *International Conference on Financial Cryptography and Data Security*, Springer, Berlin, Heidelberg, 2015, pp. 44-61. See also Chiluwa, I. M., and Chiluwa, I., "We are a mutual fund: How Ponzi scheme operators in Nigeria apply indexical markers to shield deception and fraud on their websites," *Social Semiotics*, 2020, pp 1-26.

90 Turpin, J. B., "Bitcoin: The economic case for a global, virtual currency operating in an unexplored legal framework," *Indiana Journal of Global Legal Studies,* 2014, Vol. 21, No. 1, pp 335 -368.

91 Trautman, L. J., "Virtual currencies: Bitcoin & what now after Liberty Reserve, Silk Road, and Mt. Gox?." *Richmond Journal of Law and Technology*, 2014, Vol. 20, No. 4, pp 1-108.

Virtual currencies can also be used to facilitate tax evasion.[92] As the participants in a cryptocurrency scheme do not have to fully disclose their identities and can engage in peer-to-peer transactions without an intermediary, cryptocurrencies enables market participants to hold and use funds without disclosing them to the authorities. Virtual currencies can circumvent exchange and capital controls. By facilitating the cross-border payments and transfers outside of the banking system, users of the virtual currencies can avoid the application of exchange or capital controls that banks, in some countries, are required to observe. Rather than purchasing foreign currencies and transmitting them abroad through authorized banks, traders can purchase virtual currencies and transfer them abroad on the peer-to-peer basis.

Furthermore, virtual currencies may facilitate money laundering and terrorist financing.[93] The pseudo-anonymity and peer-to-peer nature of the cryptocurrency schemes make them ideal vehicles for enabling money laundering and financing of terrorism. There have been several reported incidents of money laundering that involved virtual currency schemes. For instance, Bitcoin was the currency used in transactions in 'Silk Road,' a 'Dark Web' marketplace for illegal goods that was shut down by US law enforcement authorities in 2013.[94] Additionally, systemic issues

92 Marian, O., "Are cryptocurrencies super tax havens," *Michigan Law Review,* 2013, Vol. 112, pp38-48. See also Slattery, T., "Taking a bit out of crime: Bitcoin and cross-border tax evasion," *Brooklyn Journal of International Law,* 2014, Vol. 39, No. 2, pp 829 - 873.

93 Kethineni, S., Cao, Y., and Dodge, C., "Use of bitcoin in darknet markets: Examining facilitative factors on bitcoin-related crimes," *American Journal of Criminal Justice,* 2018, Vol. 43, No. 2, pp 141-157. See also Irwin, A. S. M., and Milad, G., "The use of crypto-currencies in funding violent jihad," *Journal of Money Laundering Control*, 2016, Vol. 19, No. 4, pp 407- 425. See also Albrecht, C., Duffin, K. M., Hawkins, S. and Rocha, V. M. M., "The use of cryptocurrencies in the money laundering process," *Journal of Money Laundering Control*, 2019, Vol. 22, No. 2, pp 210-216.

94 Weber, J., and Kruisbergen, E. W., "Criminal markets: The dark web, money laun-

can affect virtual currency use and transactions. These can be a result of, for instance, internal failures that can affect the operation of the virtual currency systems. Or it can be caused by external agents who intrude into or attack virtual currency systems. These comprise security of the systems.[95] For instance, in June 2011, a hacker compromised a user account containing about 400,000 Bitcoins, totaling approximately US$9 million.[96]

In summary, regulation of virtual currencies is necessary and intended: to provide safeguards against the virtual currency exchange volatility; to provide safeguards against the system failure; to deal with the abuses of virtual currency use and transactions to facilitate criminal activities; to protect consumers against harmful effects arising from virtual currency use, trading and transactions; and to prevent governments and central banks from losing controls over fiscal and monetary policies.[97]

There are disparities on how authorities in different jurisdictions have taken regulatory approaches on virtual currencies particularly

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dering and counterstrategies - An overview of the 10th Research Conference on Organized Crime," *Trends in Organized Crime*, 2019, Vol. 22, No. 3, pp 346-356. See also van Wegberg, R., Oerlemans, J. J., and van Deventer, O., "Bitcoin money laundering: Mixed results?," *Journal of Financial Crime*, 2018, Vol. 25, No. 2, pp 419-435. See also Minnaar, A., "Online 'underground' marketplaces for illicit drugs: The prototype case of the dark web website 'Silk Road,'" *Acta Criminologica: African Journal of Criminology and Victimology*, 2017, Vol. 30, No. 1, pp 23-47.

95 Naheem, M.A., "Exploring the links between AML, digital currencies and blockchain technology," *Journal of Money Laundering Control,* 2019, Vol. 22, No. 3, pp. 515-526.

96 Plassaras, N. A., "Regulating digital currencies: Bringing Bitcoin within the reach of the IMF," *Chicago Journal of International Law*, 2013, Vol. 14, No. 1, pp 377-407 at p 391.

97 Bagus, P., and de la Horra, L. P., "An ethical defence of cryptocurrencies," *Business Ethics: The Environment and Responsibility,* 2021,Vol. 30, pp 423-431. See also Belke, A., and Beretta, E., "From cash to central digital currencies and cryptocurrencies: A balancing act between modernity and monetary stability," *Journal of Economic Studies,* 2020, Vol. 47, No. 4, pp 911-937.

cryptocurrencies.[98] As noted previously, national authorities view virtual currencies differently: as a 'property,' a 'value,' or an 'asset,' or an 'investment,' or a 'foreign currency.'[99] Others see virtual currencies as 'clandestine,' or'black market' currencies. Johnson,[100] Mazambani and Mutambara,[101] and Lansky,[102] among others,[103] have described different approaches taken by national authorities to regulate cryptocurrencies. The main ones include:

- *Ignoring*: The authorities do not take any action towards cryptocurrency use and transactions. This may be due to limited significance in terms of the market capitalization attached by the authorities to cryptocurrencies,

98 Lansky, J., "Possible approaches to cryptocurrencies," *Journal of Systems Integration,* 2018, Vol. 9, No 1,pp 19-31. See also Edwards, F. R., Hanley, K., Litan, R., and Weil, R. L., "Crypto assets require better regulation: Statement of the financial economists roundtable on crypto assets," *Financial Analysts Journal*, 2019, Vol. 75, No. 2, pp 14-19. See also Pandya, S., Mittapalli, M., Gulla, S. V. T., and Landau, O., "Cryptocurrency: Adoption efforts and security challenges in different countries," *HOLISTICA: Journal of Business and Public Administration*, 2019, Vol. 10, No. 2, pp 167-186.

99 Prasolov, V. I., "Aspects of crypto currency's legislative regulation," *Utopía Y Praxis Latinoamericana*, 2018, Vol. 23, No. 82, pp 262-268.

100 Johnson, Z. B., "I Got 988 problems but Bitcoin ain't one: The current problems pree sented by the Internal Revenue Service's Guidance on virtual currency," *University of Memphis Law Review,* 2016, Vol. 47, pp 633-673.

101 Mazambani, L., and Mutambara, E., "Predicting FinTech innovation adoption in South Africa: The case of cryptocurrency," *African Journal of Economic and Management Studies*, 2019, Vol. 11, No. 1, pp 30-50.

102 Lansky, J., "Possible state approaches to cryptocurrencies," *Journal of Systems Integration*, 2018, Vol. 9, No. 1, pp19-31 at pp 22-24.

103 Lim, J. W., "A facilitative model for cryptocurrency regulation in Singapore," in Chuen, D. L. K., (ed), *Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments and Big Data,* Elsevier, London, 2015, pp 361-381. See also Inshyn, M., Mohilevskyi, L., and Drozd, O., "The issue of cryptocurrency legal regulation in Ukraine and all over the world: A comparative analysis," *Baltic Journal of Economic Studies*, 2018, Vol. 4, No. 1, pp 169-174. See also Cumming, D. J., Johan, S, and Pant, A., "Regulation of the crypto-economy: Managing risks, challenges, and regulatory uncertainty," *Journal of Risk and Financial Management*, 2019, Vol. 12, No. 3, pp 126. See also Tomić, N., Todorović, V., and Čakajac, B., "The potential effects of cryptocurrencies on monetary policy," *The European Journal of Applied Economics*, 2020, Vol. 17, No. 1, pp 37- 48.

- *Prohibiting*: The authorities prohibit the use of and transactions that involve cryptocurrencies. The prohibition is regularly accompanied by censoring the websites that provide cryptocurrency information and services,
- *Banning banking and financial institutions*: Banking and financial institutions are prohibited from supplying cryptocurrencies and providing cryptocurrency-related services particularly exchanging them for the fiat currencies.
- *Monitoring*: The authorities responsible for supervising banking and financial institutions issue statements to the effect that they are aware about the existence of cryptocurrencies and monitoring the situation, but they will deal with those currencies in the future.
- *Warning against risks*: The authorities responsible for supervising banking and financial institutions issue statements to warn members of the public about risks involved in virtual currency use and transactions. The warnings include the rapid fluctuations in cryptocurrency exchange rates and the irreversibility of the transactions made.
- *Regulating some aspects*: The provision of cryptocurrency-related services requires the authorization from the relevant authorities. The pre-defined conditions must be met to obtain such authorization.
- *Integrating*: The state will make a cryptocurrency as its national currency, thus making it the state-backed currency. The cryptocurrency can be used alongside the fiat currency of that country.

- *Legalizing*: The integration of the cryptocurrency as a national currency goes together with legalization of the digital currency and regulation of the transactions that involve those currencies.

The above narratives indicate that issues concerning regulation of virtual currencies around the world are unsettled.[104] The authorities and regulators around the world are struggling to explore and find appropriate regulatory regimes for regulating virtual currencies.[105] There are some complexities that are involved in finding the appropriate regulations. The next part looks at some complexities involved in regulating virtual currencies and some options that may be available to regulate those currencies.

4. Regulatory Complexities and Options

Issues concerning virtual currency trading, use and governance are cross-cutting matters that involve many fields. These fields include computer science, engineering, applied mathematics, economics, finance, law, political science, and international cooperation.[106] Finding the convergence or balance between and/or among the above disciplines in order to set up robust regulatory regimes is a challenging task. The virtual currencies are evolving and, presently, there have been no international consensus on regulation and

104 Morton, D. T., "The future of cryptocurrency: An unregulated instrument in an increasingly regulated global economy," *Loyola University Chicago International Law Review,* 2020, Vol.16, No. 1, pp 129-142 at p 131.

105 Tu, K. V., and Meredith, M. W., "Rethinking virtual currency regulation in the Bitcoin age," Washington Law Review, 2015, Vol. 90, pp 271- 347. See also Stratiev, O., "Cryptocurrency and blockchain: How to regulate something we do not understand," *Banking & Finance Law Review*, 2018, Vol. 33, No. 2, pp 173-212.

106 Berentsen, A., and Schär, F., "A short introduction to the world of cryptocurrencies," *Federal Reserve Bank of St. Louis Review,* 2018, pp 1-16. See also Plassaras, N., "Regulating digital currencies: Bringing Bitcoin within the reach of the IMF," *Chicago Journal of International Law*, 2013, Vol. 14, No. 1, pp 377- 407 at pp 396-405.

governance of those currencies.[107] Supranational agencies such as the FATF are searching for some international standards or guidelines for regulating virtual currencies specifically to tackle money laundering and financing of terrorism.[108] Authorities and regulators are struggling at the national level to find and set up regulatory mechanisms.

As noted above, virtual currencies and the associated FinTech have gained popularity to the extent that governments cannot ignore them or simply prohibit them.[109] The development of FinTech should not be stifled, but the virtual currencies should be regulated and supervised in order to tackle crime, shield the infrastructures, protect consumers, and safeguard the financial systems. The virtual currency use and the associated FinTech are presenting challenges to the conventional regulation of the financial systems. The national authorities and regulators are compelled find the appropriate balance between protecting interests of investors and users of virtual currencies, while allowing many benefits derived from the use of those currencies and associated technologies as part of FinTech. In other words, regulation of virtual currencies should not stifle the development of innovations and the creation

107 Morton, D., T., "The future of cryptocurrency: An unregulated instrument in an increasingly regulated global economy," *Loyola University Chicago International Law Review,* 2020,Vol. 16, No. 1, pp129- 142. See also Campbell-Verduyn, M., "Introduction: What are blockchains and how are they relevant to governance in the contemporary global political economy?," in Campbell-Verduyn, M. (ed), *Bitcoin and Beyond Cryptocurrencies, Blockchains, and Global Governance,* Routledge, London, 2018, pp 1-24. See also Jacobs, G., "Cryptocurrencies & the challenges of global governance," *Cadmus,* 2018, Vol. 3, No. 4, pp 109-123.

108 Pavlidis, G., "International regulation of virtual assets under FATF's new standards," *Journal of Investment Compliance*, 2020, Vol. 21 No. 1, pp 1-8. See also Heller, D., and Truman, E., "International financial regulatory cooperation and digital currencies," *Georgetown Journal of International Affairs*, 2017, Vol. 18, No. 3, pp 59-66.

109 Spithoven, A., "Theory and reality of cryptocurrency governance," *Journal of Economic Issues,* 2019, Vol. 53, No. 2, pp 385-393 at p 391.

of more effective financial markets. Balancing these two aspects is a challenging task for authorities and regulators in many jurisdictions.

As demonstrated earlier in this article, it is apparent that the virtual currency regulation around the world has not been settled. One may ask: what factors prevent the world from having a consensus for regulating virtual currencies? Is the world at a crossroads? Is it possible to have a 'one-size-fits-all' model of regulation that can be applicable to industrialized nations as well as developing countries? While many countries have prohibited virtual currencies, others have regulated or considering about regulating those digital currencies. Will approaches such as prohibition of the use of virtual currencies be sustainable? Won't the virtual currency use and transactions go underground if such prohibitions continue? Should virtual currencies remain unregulated considering the potential risks arising from the use of the virtual currencies highlighted earlier in this article?

For those countries that have been considering regulating virtual currencies, choosing the appropriate regulatory models will not be an easy task for national authorities. Several issues will have to be looked at carefully and these include the following: should the state enact the law as the 'command-and-control' regulation ('top-down' regulation)?[110] Should the financial service industry devise self-regulation for its members (self-regulation)?[111] Should

110 Finck, M., "Digital regulation: Designing a supranational legal framework for the platform economy," LSE Law, Society and Economy Working Papers 15/2017, 2017, <https://core.ac.uk/download/pdf/155777529.pdf> (accessed on 8 October 2021)

111 Self-regulation involves the regulated industry drafting and enforcing regulation. For a discussion about 'self-regulation' see Black, J., "Decentring regulation: Under-

regulation combine the government-formulated law and self-regulation created by the financial service industry (co-regulation)?[112] In other jurisdictions technology-based regulation (RegTech) is applied to regulate FinTech.[113] RegTech is a contraction of the terms 'regulation' and 'technology.' It comprises the use of technology to enable regulatory monitoring, reporting and compliance. RegTech can simply be described as technological solutions to regulatory process. The idea behind the use of RegTech[114] to regulate FinTech is to achieve the balance between enabling the innovative technologies and addressing negative impacts and risks emanating from the use of such technologies.[115] To achieve that, regulators apply the 'sandbox' regulatory approach.[116] In the digital world, regulatory sandboxes refer to the use of testing grounds for new business models that are not regulated by the existing regulation,

standing the role of regulation and self-regulation in a 'post-regulatory' world," *Current Legal Problems*, 2001, Vol. 54, No. 1, pp 103-146.

112 Co-regulation encompasses initiatives in which government and industry share responsibility for drafting and enforcing regulatory standards. For discussion on 'co-regulation' see Hirsch, D. D., "The law and policy of online privacy: Regulation, self-regulation, or co-regulation," *Seattle University Law Review,* 2010, Vol. 34, pp 439-480.

113 Arner, D. W., Barberis, J. and Buckey, R. P., "FinTech, RegTech, and the reconceptualization of financial regulation," *Northwestern Journal of International Law and Business,* 2016, Vol. 37, pp 371-413. See also Arner, D. W., Zetzsche, D. A., Buckley, R. P., and Barberis, J. N., "FinTech and RegTech: Enabling innovation while preserving financial stability," *Georgetown Journal of International Affairs*, 2017, pp 47-58. See also Anagnostopoulos, I., "Fintech and Regtech: Impact on regulators and banks," *Journal of Economics and Business*, 2018, Vol. 100, pp 7-25. See also Piri, M. M., "The changing landscapes of Fintech and Regtech: Why the United States should create a federal regulatory sandbox," *Business and Finance Law Review,* 2018, Vol. 2, No. 2, pp 233-255.

114 See, for instance, Arner, D. W., Barberis, J. and Buckey, R. P., "FinTech, RegTech, and the reconceptualization of financial regulation," *Northwestern Journal of International Law and Business,* 2016, Vol. 37, pp 371-413.

115 Chang, Y. and Hu, J., "Research on Fintech, Regtech and financial regulation in China—Taking the 'Regulatory Sandbox' of Beijing Fintech Pilot as the starting point," *Open Journal of Business and Management*, 2020, Vol. 8, No. 1, pp 369-377.

116 See for instance, Tsang, C. Y., "From industry sandbox to supervisory control box: Rethinking the role of regulators in the era of Fintech," *Journal of Law, Technology and Policy,* 2019, pp 355-404.

or supervised by the existing regulatory authorities. These testing grounds are particularly relevant in FinTech world where there is a growing need to build regulatory frameworks for emerging business models. The rationale for applying the sandbox regulatory approach is to enable the innovative technologies with financial regulations in a way that such compliance does not stifle FinTech. Regulatory sandboxes allow FinTech startups to conduct live tests in controlled environments under the supervision of regulators, thus minimizing potential risks behind the new technologies. In some jurisdictions regulators have to use what is also known as SupTech to supervise financial service industry. SupTech is a contraction of the terms 'supervision' and 'technology.' It involves the application of the emerging technologies to enable supervisory agencies conduct supervision. Simply stated SupTech refers to technologies applied by regulators to support supervisory activities.[117] To what extent can SupTech be applied to regulate virtual currencies in developing countries particularly those in Sub-Saharan Africa (SSA)? What is the capacity of the regulators in these developing countries to use SupTech to regulate virtual currencies? Should there be a new body of regulations or should the existing forms regulations be extended to cover the virtual currencies? It is evident from the above that devising and adopting regulatory models that will produce optimal results is a daunting task.

Having highlighted some complexities and options that available in regulating virtual currencies, the next part explores some lessons

117 Salami, I., "Cryptoassets regulation in Africa: RegTech and SupTech considerations," *The African Reinsurer*, 2020, Vol. 34, pp 26-33. See also Daldaban, I. I., "RegTech and SupTech for Robo-Advisers: Alternative regulatory methods for enhancing compliance," *Asper Review,* 2019, Vol.19, pp 59- 110.

that Tanzania can learn about regulation of virtual currencies. Authorities in Tanzania are pondering over normalizing and regulating virtual currency use and transactions.

5. Regulating Virtual Currencies: Some Lessons for Tanzania

Tanzania is one of the developing countries situated in Sub-Saharan Africa (SSA). FinTech and virtual currencies have been in use in many countries in the SSA over the last few years.[118] The use of these digital currencies has been documented in Nigeria,[119] South Africa,[120] Zimbabwe,[121] Kenya,[122] Ghana,[123] Malawi,[124] Tanzania[125] and many other SSA countries. The use of virtual currencies in

118 Asamoah, J, Y., and Owusu-Agyei, L., "The impact of ICT on sector policy reforms in post-financial crisis era in Ghana: An institutional theory perspective," *International Journal of Finance & Banking Studies,* 2020, Vol. 9, No. 2, pp 82-100. See also Coffie, C. P. K., Hongjian, Z., Mensah, I. A., Kiconco, R., and Simon, A., E., O., Determinants of FinTech payment services diffusion by SMEs in Sub-Saharan Africa: Evidence," *Information Technology for Development,* 2020, DOI: 10.1080/02681102.2020.1840324.

119 Nnabuife, S. O., and Jarrar, Y., "Online media coverage of BitCoin crypto-currency in Nigeria: A study of selected online version of leading mainstream newspapers in Nigeria," *Hermes. Journal of Communication*, 2018, Vol. 12, pp 141-172.

120 Reddy, E., and Lawack, V., "An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies," *SA Mercantile Law Journal*, 2019, Vol. 31, No, pp1-28. See also Jankeeparsad, R. W., and Tewari, "End-user adoption of bitcoin in South Africa," *Journal of Economics and Behavioral Studies*, 2018, Vol. 10, No. 5, pp 230-243.

121 Mazikana, A. T., "The impact of cryptocurrencies in Zimbabwe: An Analysis of Bitcoins," 2018, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376307> (accessed on 15 October 2021).

122 Naboulsi, N., and Neubert, M., "Impact of digital currencies on economic development in Kenya," Proceedings of the International Council of Business Schools and Programs, Annual Conference Paris, France November 15- 17, 2018, pp 368-387.

123 Gabor, G. T., "Uncharted waters: an exegetical exploration of Ghana's regulatory framework in relation to cryptocurrency: Ghana's regulatory framework in relation to cryptocurrency," *University of Cape Coast Law Journal*, 2021, Vol. 1, No. 1, pp 37-56.

124 Thangalimodzi, K., "The extent of cryptocurrencies in Malawi," 2019, <https://www.researchgate.net/profile/Kondwani-Thangalimodzi/publication/347523000_THE_EXTENT_OF_CRYPTOCURRENCIES_IN_MALAWI_Prepared_for_THE_2019_MONETARY_POLICY_CONFERENCE>(accessed on 15 October 2021).

125 Philemon, B. L., *Potentials and Threats of Cryptocurrency in the Financial System in Tanzania: A Case of Surveyed Financial Institutions*, unpublished Master of Business Administration in Corporate Management dissertation, Mzumbe University, Tanzania, 2020, <http://scholar.mzumbe.ac.tz/bitstream/handle/11192/4453/MBA-CM-DCC_Boniface%20Philemon_2020.pdf?sequence=1> (accessed on 15 October 2021).

these countries, which is at their infancy stages, has come with lots of enthusiasm among the users and investors. Information about the virtual currencies, for instance, their issuance, trading, exchanges, transactions involved and adverse effects is scanty, fragmented, or unavailable in these countries.

While perhaps virtual currencies are used legitimately, for instance, as means of payments or assets, some downsides involved in virtual currency transactions have been reported in these countries. Some users and investors in these countries have suffered negative effects of using or investing in virtual currencies. Several scams involving virtual currencies have been reported in some SSA countries. These include Bitcoin Wallet in 2019 (South Africa), Velox 10 Global in 2019 (Kenya), Bitcoin Global in 2018 (South Africa), Nigeria Calabar Company in 2018 (Nigeria), Mavrodi Mundial Moneybox–MMM between 2012 and 2017 (South Africa, Kenya and Nigeria). All of these have involved investing in virtual currencies and exit scams.[126] The occurrence of these scams and the possibility of the misuse of virtual currencies by criminals raise concerns about the need to regulate virtual currencies in these countries.

The possibility of virtual currencies being used to enable crimes such as tax evasion, financing of terrorism, and money laundering in these countries cannot be ruled out.[127] Virtual currency regulation

126 Salami, I., "Cryptoassets regulation in Africa: RegTech and SupTech considerations," African *Reinsurer,* 2020,Vol. 34, pp 26-33. See also Chiluwa, I. M., Kamalu, I, and Anurudu, S. "Deceptive transparency and masked discourses in Ponzi schemes: A critical discourse analysis of MMM Nigeria," *Critical Discourse Studies*, 2020, pp 1-18. See also Reddy, E., and Minnaar, A., "Cryptocurrency: A tool and target for cybercrime," *Acta Criminologica: African Journal of Criminology and Victimology*, 2018, Vol. 31, No. 3, pp 71-92.

127 Mbiyavanga, S., "Cryptolaundering: Anti-money laundering regulation of virtual currency exchanges," *Journal of Anti-corruption Law,* 2019, Vol. 3, No.1, pp 1-15.

is also needed to ensure fair trade practice; to protect consumers; to safeguard investors; to protect virtual currency infrastructures; and to provide for mechanisms for the resolution of disputes.

The laws in many SSA countries do not recognize virtual currencies as legal tenders. The virtual currencies are unregulated or some transactions involving virtual currencies are superficially regulated.[128] Many of these countries are facing challenges in regulating FinTech and virtual currencies.[129] Central Banks in these countries have issued notices to inform the general public that virtual currencies were not legal tenders and to warn the citizenry about risks involved in virtual currency use, trading and transactions.[130] Despite these notices, some people in these countries have been using or investing in virtual currencies.[131] Nigeria has become the first country in the SSA to introduce the CBDC as the country's legal tender. In October 2021, the Central Bank of Nigeria (CBN) rolled out the national digital currency

128 Masela, P. M. T., "Digital currency initiatives on the African continent," in Bilotta, N and Botti, F., *The (Near) Future of Central Bank Digital Currencies Risks and Opportunities for the Global Economy and Society*, Peter Lang Publishers, Bern, 2021, pp 131 – 144. See also Hamukuaya, N. H., "The development of cryptocurrencies as a payment method in South Africa," *Potchefstroom Electronic Law Journal,* 2021, Vol. 24, No. 1, pp 1-23. See also Onyeke, C. E., "crypto-currency and the Nigerian economy: Problems and prospects," *IAA Journal of Social Sciences*, 2020, Vol. 6, No. 1, pp 152-162.

129 Dideko, A., "Regulatory challenges underlying FinTech in Kenya and South Afrıca, Bingham Centre for the Rule of Law, 2017, <https://www.biicl.org/document/1814_regulation_of_fintech_in_kenya_and_south_africa_v_1.pdf> (accessed on 12 October 2021).

130 Agbo, E. I., and Nwadialor, E. O., "Cryptocurrency and the African economy," *Economics and Social Sciences Academic Journal*, 2020, Vol. 2, No. 6, pp 84-100. See also Ukwueze, D., "Cryptocurrency: Towards regulating the unruly enigma of Fintech in Nigeria and South Africa," *Potchefstroom Electronic Law Journal,* 2021, Vol. 24, pp 1-38. See also Kabwe, R., "The VAT treatment of cryptocurrencies in South Africa: Lessons from Australia," *Obiter*, 2020, Vol. 41, No. 4, pp 767-786.

131 Reddy, E., and Lawack, V., "An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies," *SA Mercantile Law Journal*, 2019, Vol. 31, No. 1, pp1-28.

called the eNaira.[132] The issuance of the digital currency came after the CBN had earlier prohibited banks and financial institutions from transacting in or operating in cryptocurrencies as they posed a threat to the financial system.

The authorities and non-state stakeholders in Tanzania - as well as in other SSA - countries need to learn several lessons. First, these countries should understand that many issues concerning virtual currencies that are still evolving. Thus, there is a need for these countries to study carefully about this evolution and understand them before normalizing the use or regulating virtual currencies. Second, issues concerning virtual currencies are cross-cutting and involve many areas or aspects. Therefore, before embarking upon any regulatory project it will be imperative for these countries to examine such matters from different perspectives. Personnel with different expertise, for instance, economists, financial specialists, engineers, ICTs experts, lawyers, bankers and other need to be involved in these matters. Third, virtual currencies and associated matters (issuance, use, trading, and transactions) operate in virtual environments. These matters involve actors located in different geographical localities (for instance, foreign countries).This makes international cooperation in devising and formulation regulation to deal with virtual currencies necessary. The SSA countries need to partake in international discussions to search for appropriate regulation of digital currencies. Fourth, there is a need to take participatory approaches in addressing issues concerning virtual currencies. Both governmental and non-state actors should be

132 Emele Onu, *Nigeria starts digital currency after banning crypto exchange, Bloomberg,* 25 October 2021, <https://www.bloomberg.com/news/articles/2021-10-25/nigeria-starts-digital-currency-after-banning-crypto-exchange>(accessed on 15 October 2021).

involved in the formulation, adoption, and implementation of policies and regulations on virtual currencies.

6. Conclusion

The Fourth Industrial Revolution, which has been sweeping across the world, was brought about by the advancement of the ICTs. It is through the ICTs there have been the digitalization of systems, processes and procedures. Interactions and transactions are facilitated or enabled by digital equipment and facilities. Digital currencies–including virtual currencies–have been invented and emerged as part of the Fourth Industrial Revolution. Virtual currencies are treated differently as 'means of payment,' or 'properties,' or 'assets,' or 'values,' or 'securities.'

The use of virtual currencies, which has gained popularity in both industrialized nations and developing countries, is a phenomenon that cannot be ignored. Like the 'conventional' currencies, virtual currency issuance, supply, use and trading need to be regulated. There is also a need to regulate actors involved in virtual currencies, platforms involves, users and investors of such currencies. There is a need for controlling the misuse of virtual currencies to enable or facilitate crimes such as tax evasion, frauds, financing of terrorism, and money laundering.

Regulating virtual currencies is a tricky matter. Authorities and regulators around the world are under pressure to find the appropriate frameworks for regulating virtual currencies. Regulation of virtual currencies in developing countries especially those in the SSA including Tanzania is more difficult owing to the infancy of virtual currency use and transactions and the absence of

the systems and infrastructures to administer the digital currency use and transactions.

The authorities and regulators can apply different approaches to regulate virtual currencies. The authorities and regulators may use laws (the law-based regulation). They may apply regulations devised by the financial industry (self-regulation). They can apply the combination of laws and regulations by the financial industry (co-regulation). They can apply technology based regulation (RegTech) to regulate virtual currencies. This demonstrates that regulation of virtual currencies–like regulation of other aspects of FinTech–is a challenging matter. For developing countries like Tanzania where the virtual currency use and transactions are at their infancy and the digital regulatory infrastructures are deficient, regulation of virtual currencies is a daunting task.

The authorities and regulators in Tanzania, like any other SSA countries, need to learn some lessons from developed countries on issues concerning virtual currency use, transactions and regulation. Tanzania has to study issues relating virtual currency use and transactions in other countries and the beneficial aspects and downsides of such use and transactions before normalizing the use of those digital currencies. Tanzania has to ponder over the complexities surrounding virtual currency regulation. The authorities in Tanzania should search for and set up frameworks to enable the regulators to regulate virtual currencies efficiently.

REGULATION OF VIRTUAL CURRENCIES IN TANZANIA: SOME COMPLEXITIES AND OPTIONS - THE LAW, SELF-REGULATION, CO-REGULATION OR REGTECH?

Mr. Eugene E. Mniwasa*

Abstract

The Government of Tanzania has recently underscored the need for the country to ready itself for the normalization of the use of virtual currencies. Regulation will be necessary to enable their efficient administration of the virtual currency use and transactions. This article explores the use and regulation of virtual currencies in Tanzania. The article demonstrates that the emerging evidence indicates that virtual currencies are in use in Tanzania. The extent of the use of these digital currencies is uncertain. It is possible that virtual currencies are used licitly. There is a potential risk that virtual currencies can be used as vehicles for the commission of financial crimes. The law in Tanzania does not recognize virtual currencies as the legal tender, securities, assets, or investments. The virtual currency use and transactions are outside the purview of Tanzania's law. There is neither state-based regulation nor self-regulation that specifically regulates virtual currencies in Tanzania. The authorities have issued notices to warn the public against the use and engaging in transactions that involve virtual currencies. Regulation of virtual currencies is a complex matter that requires authorities in Tanzania to explore several policy and regulatory options. The article recommends that the authorities are required to reform policy, legal and institutional frameworks in order to address gaps and limitations in the existing frameworks. The authorities should set up robust regime to regulate virtual currencies in Tanzania.

Key words: *Co-regulation, FinTech law, self-regulation, RegTech, virtual currencies, Tanzania.*

* LL.B (Hons) (Dar), Dip in Law (Zimbabwe), LL.M (Zimbabwe), Master of Policy Studies (Zimbabwe/Fort Hare), and PhD in Law (Kent, UK). Senior Lecturer, the Institute of Finance Management, Dar Es Salaam, Tanzania. The Advocate, Notary Public and Commissioner for Oaths. Contacts: eugene.mniwasa@ifm.ac.tz or mniwasa@gmail.com.

1. *Introduction*

Virtual currencies whose use has proliferated in many countries in the recent years form part of the innovative financial technologies (FinTech).[1] These technologies, which emerged during the 4th Industrial Revolution, have revolutionalized models, processes and procedures for providing financial services. While virtual currencies can be used legitimately as means of payments, the use of these currencies can be abused and be used as a vehicle for the commission of financial crimes. In most jurisdictions in the Sub-Saharan Africa (SSA) virtual currency use and transactions are unregulated or inadequately regulated.[2]The absence of such regulatory regimes makes the financial industry in many SSA countries vulnerable to instabilities and failures and creates opportunities for criminals to use the digital currencies to commit financial crimes including theft, frauds, tax evasion, financing of terrorism and money laundering.

While the law in Tanzania does not recognize virtual currencies as the country's legal tender, the emerging evidence indicates that some residents have been purchasing, selling and conducting

1 Mora, H., Pujol López, F. A., Tello, J. C. M., and. Morales, M. R., "Virtual currencies in modern societies: Challenges and opportunities," in Visvizi, A., and Lytra, M. D (eds), *Politics and Technology in the Post-Truth Era,* Emerald Publishing, London, 2019, pp 171- 185 at pp 171-172.

2 Aketch, S., Mwambia, F., and Baimwera, B., "Effects of blockchain technology on performance of financial markets in Kenya," *International Journal of Finance and Accounting,* 2021, Vol. 6, No. 1, pp 1-15. See also Mazikana, A. T., "The Impact of cryptocurrencies in Zimbabwe: An analysis of Bitcoin," 2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376307> (accessed on 23 September 2021). See also, Kesa, O. and Mahoro, V., "Rwandacoin: Prospects and challenges of developing a cryptocurrency for transactions in Rwanda," 2019, <https://arxiv.org/ftp/arxiv/papers/1901/1901.06249.pdf>(accessed on 23 September 2021). See also Kaponda, K., "An investigation into the state of cryptocurrencies and regulatory challenges in Zambia," 2019,<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433153>(-accessed on 23 September 2021). See also Didenko, A., "Regulating FinTech: Lessons from Africa," *San Diego International Law Journal,* 2017, Vol.19, pp 311-369.

transactions using those digital currencies. There is a potential risk that the use of virtual currencies can adversely affect the stability of the fiat currency and the country's monetary policy. The possibility of criminals - in Tanzania and abroad - of using virtual currencies to commit financial crimes such as theft, frauds, tax evasion, terrorist financing and money laundering cannot be ruled out. The authorities in Tanzania need to ponder over issues concerning virtual currency regulation to enable the oversight of digital currency transactions and address externalities that may arise from the use of those currencies.

The objectives of this article are: (i) to highlight on virtual currency use and transactions in Tanzania; (ii) to examine regulation of virtual currencies in Tanzania; and (iii) to explore possible challenges that may be encountered in regulating virtual currencies in Tanzania. In view of the above objectives, the article addresses the following main questions:

- What is the extent of virtual currency use and transactions in Tanzania?;
- How are virtual currencies regulated in Tanzania?; and
- What are the challenges that may be encountered in regulating virtual currencies in Tanzania?

In terms of the research design and methods, this article draws on a library-based qualitative research. The article employs the 'law-in-books' methodological approach to investigate into law applicable in Tanzania to regulate virtual currencies. This approach is employed to describe, examine and explain the law governing a phenomenon under investigation.[3] The examination

3 McConville, M., and Chui, W. H., "Introduction and overview," in McConville, M

of statutes from Tanzania and the analysis of case law from other jurisdictions were made. Also, the article applies the 'law-in-action' methodological approach to interrogate the law that regulates virtual currencies in Tanzania. This approach, which looks at non-law or extra-legal factors, examines how the law operates in certain politico-economic and social environments and how these factors impact on or militate against the application of the law.[4] The interactions between non-law aspects (computer science, finance, economics, politics and international cooperation) and law governing virtual currencies in Tanzania is explored.

The data were generated from the perusal and analysis of documentary materials: statutes, previous literature, and newspaper reports and commentaries. The materials that had information relevant to address research questions were selected. The selection of the materials was done using the purposive sampling techniques.[5] The qualitative data analysis was done, and this involved the following procedures: perusing materials thoroughly; transcribing the relevant information emerging from the materials; memoing the transcripts in order to understand their contents; coding the data giving short, descriptive words or phrases that assign meaning to such data; applying codes, developing categories and, ultimately, generating themes; and moving from the codes to the categories and the categories to the themes.[6] The themes generated were aligned with the objectives

and Chui, W. H., (eds), *Research Methods for Law,* 1st ed, Edinburgh University Press: Edinburgh, 2007, pp 1-17 at p 3-4.

4 Chynoweth, P., "Legal Research," in Knight, A., and Ruddock, L., (eds), *Advanced Research Methods in Built Environment,* Blackwell Publishing, Chichester, 2008, pp 28-38.

5 Bhardwaj, P., "Types of sampling in research," *Journal of the Practice of Cardiovascular Sciences*, 2019, Vol. 5, No. 3, pp 157-163.

6 Azungah, T., "Qualitative research: Deductive and inductive approaches to data

of the research and, accordingly, were formulated in line with the research questions. Excerpts from the data, the table and diagrams have been used to present the data and describe, illustrate, or summarize some concepts.

The rest of this article is structured as follows: Part 2 reviews some literature on financial technologies, blockchain technologies, and virtual currencies in Tanzania. Part 3 examines virtual currency use and regulation in Tanzania. Part 4 explores some complexities involved in regulating virtual currencies in Tanzania. Part 5 concludes the article and presents recommendations that can be implemented to address limitations and challenges identified in the article.

2. *Financial Technologies, Blockchain Technology and Virtual Currencies in Tanzania: A Review of Literature*

There is a body of literature in Tanzania that has explored issues relating to the Fourth Industrial Revolution (also known as FIR, or 4IR or 4.0) and emergent technologies. Luhanga[7] and Mwandosya and Luhanga[8] have examined the4th Industrial Revolution and disruptive and transformative technologies that enable the 4th Industrial Revolution. In particular, the authors explore the

analysis," *Qualitative Research Journal*, 2018, Vol. 18, No. 4, pp. 383-400. See also Bennett, D., Barrett, A., and Helmich, E., "How to… analyse qualitative data in different ways," *The Clinical Teacher*, 2019, Vol. 16, No. 1, pp 7-12. See also Cassell, C, and Bishop, V., "Qualitative data analysis: Exploring themes, metaphors and stories," *European Management Review*, 2019, Vol. 16, No. 1, pp 195-207. See also Davidson, E., Edwards, R., Jamieson, L., and Weller, S., "Big data, qualitative style: A breadth-and-depth method for working with large amounts of secondary qualitative data," *Quality & Quantity*, 2019, Vol. 53, No.1, pp 363-376.

7 Luhanga, M. L., "Should Mzumbe University be transformed into Mzumbe University 4.0?." *Uongozi Journal of Management and Development Dynamics*, 2019, Vol. 29, No. 2, pp 1-16.

8 Mwandosya, M. J., and Luhanga, M. L., "Blockchain: A disruptive and transformative technology of the Fourth Industrial Revolution," *Business Management Review*, 2021, Vol. 23, No. 2, pp16-31.

application of the blockchain technology and how this technology has enabled speedy transactions, reduced time of transactions, and lessened costs of transactions. The above authors further explore some advantages and disadvantages of the blockchain technology and challenges and risks involved in its application. The authors have not looked at how the blockchain technology is applied to virtual currencies in Tanzania. They have not looked at issues concerning regulation of virtual currencies in Tanzania.[9] Luhanga[10] observes that the technologies that emerged during the Fourth Industrial Revolution, driven by information and communication technologies (ICTs), have had radical impacts on many countries. Among the technologies that have been driving the 4th Industrial Revolution is the blockchain technology. The blockchain technology, which is one of the enablers of financial technologies (), is used in finance, banking and insurance. The author points out that the question is not whether service providers in these areas in Tanzania should use the blockchain technology, but when such providers should start using this technology. The author proposes that university business schools in Tanzania should revise their curricula to incorporate modules that cover the emerging technologies notably and blockchain technology in order to produce personnel with skills and competencies to drive the 4th Industrial Revolution.

9 *Ibid.*

10 Luhanga, M. L., "Why business schools in Tanzania should teach blockchain technology," *Uongozi Journal of Management and Development Dynamics*, 2020, Vol. 30, No. 1, pp 37-68.

Kombe *et al.*[11] and Nkwabi *et al.*[12] observe that blockchain technology has the potential of facilitating processes, procedures and activities in manufacturing, agriculture, trade and provision of services in many sectors. The authors note that the blockchain technology enables the enhancement of efficiency, the increase in transparency, the reduction of costs and paperwork, the enhancement of security, privacy and confidentiality of information, and the reduction of unlawful activities such as frauds and forgery.

The above authors observe that the use or application of the blockchain technology in Tanzania is at its infancy stage. The authors point out that the Ministry of Lands and Human Settlements applies the technology in the management of land issues such as land registration procedures, recording information, and storing data. Health service providers in Tanzania apply the technology in conducting and managing their activities. Some hospitals have introduced the use of the blockchain technology to enable recording information, keeping records, and sharing information between authorized personnel or units.

The aforementioned authors cite some challenges that impede the blockchain technology use in Tanzania. These include: the lack of efficient supporting infrastructures; the possibility of the systemic failures; the security threats that may be caused by unauthorized intrusions into the computer systems; limited integrity on the part of the personnel which may compromise the authenticity and

11 Kombe, C., Sam, A., Ally, M., and Finne, A., "Blockchain technology in Sub-Saharan Africa: Where does it fit in healthcare systems: A case of Tanzania," *Journal of Health Informatics in Developing Countries*, 2019, Vol. 13, No. 2, pp 1-19.

12 Nkwabi, J. M., "A review of the significance of block chain technology in Tanzania," *European Journal of Business and Management,* 2021, Vol. 13, No.16, pp 1-5.

security of the data; and high costs resulting from high broadband fees; and the unreliability of the Internet services.

John[13] examines briefly issues concerning the application of disruptive technologies in Tanzania. He cites the use of these technologies in enabling financial service delivery and transactions. The author describes several options available and models that can regulate those technologies. He observes that it is possible to regulate cryptocurrencies in Tanzania.

Ngowi[14] has looked briefly at some implications of the Fourth Industrial Revolution on taxation. He notes that the digital transformations that have come up with the Fourth Industrial Revolution has brought about, among other things, new systems, structures, products and business models that have implications on taxation. Digitalization of economic activities and business has brought about challenges such as how to monitor business activities conducted in virtual environments; to identify taxpayers in the digital space; to assess tax dues from digitalized business transactions; to set up new regulation of taxation of digitalized business; and how to enforce such regulation. The author notes superficially about the use of cryptocurrencies that has come about as part of emerging FinTech.

Financial service providers in Tanzania take advantage of the application of FinTech to create new financial products; to facilitate the provision of those products to their customers; to

13 John, U., "The Role of Legislative Techniques in Regulation of Disruptive Technoloɵ gies," A paper presented at the Commonwealth Association of Legislative Counsel's Conference held in Livingstone Zambia, 1-3 April 2019.

14 Ngowi, H. P., 2020. "Reflections on the implications of the Fourth Industrial Revoɵ lution (FIR) on taxation," *Financing for Development*, 2020, Vol.1, No. 2, pp 204-217.

modernize their interactions with such customers; and to enhance their efficiency to create financial products and provide services to their customers. The use of FinTech in Tanzania, by both financial and non-financial institutions, is at its formative stage.[15] The use of electronic money, the Internet-enabled banking, mobile banking, and digital transfers of funds in Tanzania are enabled by FinTech. The mobile phone companies in Tanzania are among the providers in the formal sector that have been providing financial services enabled by FinTech.[16]

The digitalized financial atmosphere and globalized provision of financial services have, undoubtedly, enabled the acquisition, use and trading in virtual currencies in Tanzania. Owing to the development of the ICTs and expansion of the access to the Internet, residents in Tanzania can access virtual currencies particularly cryptocurrencies traded in the online exchange platforms and conduct transactions using virtual currencies.[17] It is also possible for these people to carry out transactions with parties outside Tanzania using virtual currencies. These transactions may involve, for instance, the sale and purchase of goods or services.

15 Kato, C. I., "Legal framework challenges to e-banking in Tanzania," *PSU Research Review*. 2019, Vol. 3, No. 2, pp 101 – 110. See also Oreku, G. S., "A rule-based approach for resolving cybercrime in financial institutions: The Tanzania case," *Huria: Journal of the Open University of Tanzania,* 2020, Vol. 27, No. 1, pp 93-114.

16 Kihamba, J. S., "E-financing and the quest for financial inclusion in Tanzania," *Tanzania Journal for Population Studies and Development*, 2020, Vol. 26, No.1, pp 80-96. See also Masamila, B., "State of mobile banking in Tanzania and security issues," *International Journal of Network Security and Its Applications*, 2014, Vol. 6, No. 4, pp 53-64. See also Mandari, H. E., Koloseni, D. N., and Macha, J., "Continuance usage of mobile banking services among small and medium enterprises (SMEs) in Tanzania," *International Journal of ICT Research in Africa and the Middle East,* 2020, Vol. 9, No. 1, pp 50-66.

17 See for instance *Tanzania, Kenya lead the world in peer to peer crypto trade*, *Citizen* (Tanzania), 25 August 2021.

Philemon[18] has examined some beneficial aspects and threats of cryptocurrencies to the financial system in Tanzania. The author observes that anecdotal information indicates that virtual currencies particularly cryptocurrencies are in use in Tanzania. The author describes some positive aspects of cryptocurrencies. These include: (i) the absence of intermediaries such as banks in transactions that involve virtual currencies; (ii) the anonymity of parties who partake in virtual currency transactions; (iii) low transactional costs involved in virtual currency transactions; and (iv) high efficiency and minimal bureaucracy involved in virtual currency transactions. The author outlines some challenges that undermine the beneficial aspects of the digital currency use and transactions which include: (i) the security threats such as the intrusion of the virtual currency infrastructures by hackers and attacks though malicious computer programmes; (ii) the negative impact on demand and supply of money where trading and use of virtual currencies are connected to the monetary systems in the real world; (iii) fluctuations of values of virtual currencies; and (iv) the possibility of misuse of virtual currencies for the commission of crimes. The author observes further that there is no legal framework that governs virtual currencies in Tanzania.

Several factors can explain the dearth of research on regulation of virtual currencies in Tanzania. First, virtual currency use and transactions are new phenomena in Tanzania, hence the scarcity of research on virtual currencies. Second, the complexity and the evolving nature of the subject makes it difficult for many

18 Philemon, B. L., *Potentials and Threats of Cryptocurrency in the Financial System in Tanzania: A Case of Surveyed Financial Institutions*, unpublished Master of Business Administration in Corporate Management, Mzumbe University, Tanzania, 2020, <http://scholar.mzumbe.ac.tz/bitstream/handle/11192/4453/MBA-CM-DCC_Boniface%20Philemon_2020.pdf?sequence=1> (accessed on 10 July 2021).

researchers in Tanzania to study issues concerning virtual currency use, transactions and regulation. Third, virtual currency use and transactions are outside the purview of law, hence the statistics that describe the extent of the use and transactions involving virtual currencies are lacking. Fourth, owing to the virtual environment in which digital currencies are transacted, decentralized networks, anonymity and pseudonymity of such transactions, it is difficult for many researchers in Tanzania to gather information about virtual currency use and transactions.

3. *Virtual Currencies in Tanzania: Use and Regulation*

The use and conduct of transactions that involve virtual currencies in Tanzania are contemporary phenomena. Limited information on the use and trading of virtual currencies in Tanzania. Few reports, media commentaries and public warnings issued by Tanzania's central bank, the Bank of Tanzania (BoT) provide sketchy information about trading and transactions conducted using virtual currencies in Tanzania.

Based on information collated from Tanzania's central bank and several commercial banks in the country, a study conducted by Philemon[19] indicates that virtual currencies are used in Tanzania. A report made by McKenzie noted that: "…. Tanzania reportedly has a large cryptocurrency mining sector and [the country] is rated 120 out of 219 countries that are actively involved in bitcoin mining…."[20] This report is another proof of the virtual currency use in Tanzania

19 Philemon, *ibid.*

20 Baker McKenzie, *Blockchain and Cryptocurrency in Africa: A Comparative Summary of the Reception and Regulation of Blockchain and Cryptocurrency in Africa,* 2019, at p 13, <https://www.bakermckenzie.com/-/media/files/insight/publications/2019/02/report_blockchainandcryptocurrencyreg_feb2019.pdf> (accessed on 15 July 2021).

Over the last few years newspapers in Tanzania have reported about virtual currency use, trading and transactions.[21] In 2017 one local daily newspaper in Tanzania, quoting an online information portal, indicated that Tanzania had shown a surge in Bitcoin trading. The newspaper pointed out that:

> [The weekly local Bitcoin volume has been up in the second week of July as there was [shs] 83 million/- worth of trading [during] that week…. Tanzania moved around 14 BTC (Bitcoins) in the second week of July, which is almost a 33 percent increase from the week prior.[22]

In 2018, another local newspaper quoting Bitcoin Magazine reported that:

> Last week alone, Tanzania's peer-to-peer (P2P) markets witnessed roughly 295m/- (about US$ 130,000) worth of bitcoin change hands…. [The] Tanzanian markets also set a record for the number of bitcoins traded in a single week with more bitcoins being exchanged in seven days than the preceding four weeks. [23]

In 2018 another newspaper, quoting the former Governor of the BoT as stating that:

> We have also heard that there are some [persons] in [Tanzania] are engaging in the business, but my message for now is that they should understand that they are putting themselves at risk and we [the Bank of Tanzania will not] help in case anything bad happens.[24]

21 Alex Malanga, *What Tanzania's growing adoption of cryptocurrencies means, Citizen* (Tanzania), 2 October 2021. See also *Tanzania, Kenya lead the world in peer to peer crypto trade, Citizen* (Tanzania), 25 August 2021.

22 Getrude Mbago, *BoT governor issues warning in the face for new digital currency currencies, Citizen* (Tanzania), 9 October 2017.

23 Correspondent, *Over 290 m/- bitcoin traded locally last week, Guardian* (Tanzania), 19 April 2018.

24 *Bitcoins investors could end with nothing, expert warns, Citizen* (Tanzania), 21 May 2018.

In 2019, another local newspaper quoting an official of the BoT reported as follows:

> The [Bank of Tanzania] is … aware of [incidents] where these [virtual] are being traded with a perception of making them appear as if they were [the] legal tender in the country…. There are some individuals [who claim] to have been [authorized by] the Bank of Tanzania [to deal in those] the virtual currencies…[25]

Public notices issued by the BoT to warn Tanzanians about virtual currencies insinuate that some persons resident in Tanzania have been purchasing, selling and transacting using those currencies. In that in one notice issued in 2019 Tanzania's central bank noted that: "… [there has been] a growing trend among the members of the public engaging in activities related to the usage of the virtual currencies in the country"[26] With regard to the above notice, a daily newspaper observed that the BoT's warning was made "amid the growing use of the digital currencies"[27] in Tanzania. In its Press Release, the BoT implored members of the public in Tanzania: "to not trade, marketing or usage of any cryptocurrencies as doing so is violation of the law." [28]

The above narratives indicate the fact that virtual currencies are in use in Tanzania. And the most common virtual currency in Tanzania is Bitcon. The sale, purchase and transactions involving of the Bitcoin currency are done through online channels. The

25 See *BoT: Virtual currencies not authorized in Tanzania, Citizen* (Tanzania), 13 November 2019.

26 Bank of Tanzania, 2019a. *Public Notice on Cryptocurrencies,* November 12/2019, <https://www.bot.go.tz/Adverts/PressRelease/en/20200313072404242 08.pdf>

27 See *Bank of Tanzania warns public against use of cryptocurrencies for umpteenth time, Daily News* (Tanzania), 2 December 2019.

28 See also Bank of Tanzania, *Press Release; Bank of Tanzania Not Involved in Cryptocurrency,*<https://www.bot.go.tz/Adverts/PressRelease/en/20200313072404262 14.pdf> (accessed 15 August 2021).

survey of the several websites indicates that there are several online channels through which persons resident in Tanzania can purchase or sell Bitcoins.[29] While perhaps in Tanzania virtual currencies are used to facilitate payments, it is also possible that the digital currencies are acquired or traded as assets or investments.

The examination of several statutes reveals that the law in Tanzania does not have provisions that specifically regulate virtual currencies. This is evident when one analyzes provisions of the statutes that govern matters concerning 'currencies,' or 'means of payment,' or 'securities' in Tanzania.

The Bank of Tanzania Act 2006[30] has provisions that deal with the fiat currency issue and use in Tanzania. Tanzania's fiat currency comprises notes and coins issued by the BoT.[31] The law does not provide for the issue of virtual currencies by the BoT or any other authority or agency in Tanzania. The Banking and Financial Institutions Act 2006[32] provides for the permissible activities of banking and financial institutions in Tanzania. The issuance of virtual currencies is not one of those activities.[33] Additionally, the above legislation does not designate the 'intermediaries' or 'dealers' in virtual currencies in Tanzania as financial institutions, or intermediaries, or dealers.[34] Thus, the banking and financial institutions in Tanzania cannot deal in virtual currencies. There

29 These include: <https://paxful.com/buy/Tanzania>, <https://localbitcoins.com/country/TZ>, <https://coin.direct.com/tz>, <https://remitano.com/btc/tz>, <https://spectrocoin.com/en/bitcoin-in-Tanzania.html>, and <https://pursa.co/bitcoin/c/buy-sell-bitcoin-in-tanzania>, <https://bitpesa.co>, <https://coinmama.com> and <https://yellow.card.io/tanzania> (all accessed 15 October 2021).

30 Chapter 197.

31 Sections 24, 25 26 and 27 of the Bank of Tanzania Act 2006.

32 Chapter 342.

33 See Section 24 of the Banking and Financial Institutions Act 2006.

34 See for instance Section 3.

are no laws in Tanzania that allow any intermediaries or dealers to issue, or deal in those currencies.

Foreign currencies in Tanzania are traded by licensed financial institutions according to the provisions of the Foreign Exchange Act 1992.[35] The term 'foreign currency' includes any specified currency other than the currency of the United Republic of Tanzania.[36] The term 'specified currency' means any currency recognized by the BoT.[37] The above Act deals with the use and dealership in specified foreign currencies. The BoT has and exercises powers and discharges duties relating to the administration, control and management of dealings and transactions that involve foreign currencies. The Foreign Exchange Act does not contain provisions that regulate the use, trading or exchange of virtual currencies in Tanzania. The law in Tanzania does not recognize virtual currencies as 'foreign currencies.'

With regard to the instruments of payment, cash is the most commonly used instrument in Tanzania. Other non-cash payment instruments include 'paper-based' instruments (such as cheques, payment orders, and bills of exchange, and promissory notes), electronic funds transfers (EFTs), card payments (such as credit cards, debit cards, and pre-paid cards), and payment through the Internet banking, mobile banking, and the use of mobile money services.[38] The BoT is empowered under the Bank of Tanzania Act

35 Chapter 271.

36 Section 4 of the Foreign Exchange Act 1992.

37 *Ibid* Section 4.

38 Richard, E., and Mandari, E., "Factors influencing usage of mobile banking services: The case of Ilala District in Tanzania," *Orsea Journal*, 2018, Vol. 7, No. 1, pp 42-54. See also Nyamtiga, B. W., Sam, A., and Laizer, L. S., "Enhanced security model for mobile banking systems in Tanzania," *International Journal of Technology Enhancements and Emerging Engineering Research*, 2013, Vol. 1, No. 4, pp 4-20. See also Masamila, B., "State of mobile banking in Tanzania and security issues," *International Journal of*

2006 and the National Payment Systems Act 2015[39] to regulate and supervise the payment systems, services and products offered by both commercial banks and non-bank institutions in Tanzania.[40] The above statutes recognize virtual currencies as means of payment in Tanzania.

As regards securities, the Capital Markets and Securities Authority Act 1994,[41] does not include virtual currencies in its definition of the term 'security.'[42] One can, thus, state that virtual currencies are not 'securities' for purposes of the capital markets and securities legislation. Accordingly, the Capital Markets and Securities Authority Act does not have provisions that regulate virtual currency exchange or recognize dealers in those digital currencies.[43]

As noted earlier, the virtual currency use and transactions conducted online may involve criminal activities such as theft, frauds or sale or purchase of illicit merchandise, tax evasion, financing of terrorism and money laundering. The Cyber Crimes Act 2015,[44] which deals with electronic and computer-related crimes, does not have specific provisions that cover virtual currencies. Similarly, other statutes that deal with specific crimes such as theft, frauds, trading in contraband, tax evasion, money laundering or terrorist financing do not specifically address the commission of those crimes using virtual currencies.

Network Security and Its Applications, 2014, Vol. 6, No. 4, pp 53-64.

39 Act No. 4 of 2015.

40 See Section 6 of the Bank of Tanzania Act.

41 Chapter 79.

42 See Section 2 of the Capital Markets and Securities Authority Act.

43 *Ibid* Section 2.

44 Act No. 14 of 2015.

Based on the analysis of the provisions of the aforementioned legislation, it is apparent that the use, trading and conducting transactions using virtual currencies are not provided for under the law of Tanzania. One can safely state that virtual currency issuance, use, trading, purchase and transactions are not regulated by the law of Tanzania. Unlike in Kenya,[45] there are no court decisions in Tanzania on issues relating virtual currencies.

One cannot state with certainty the extent to which virtual currency use and transactions in Tanzania have been or are being used as vehicles for the commission of financial crimes such as theft, frauds, tax evasion, money laundering and financing of terrorism. Since the purchase, use and trading of virtual currencies are done outside the formal channels, one can hypothesize that the absence of the regulatory framework will cause making the above crimes 'underground.' Consequently, it will be difficult for the authorities in Tanzania to tackle those illicit activities. Similarly, it will be difficult for the authorities to ensure fair trade practices, protection of investors and consumers, and hard to have effective dispute resolution mechanisms. Perhaps once the above crimes are committed in transactions involving virtual currencies, the general criminal law will deal with those crimes.

Related to the above, the link between virtual currency use and transactions and the real economy in Tanzania are unknown. Statistics to describe the exchange between the country's fiat money and virtual currencies are not available. And owing to the fact that

45 See for instance, *Lipisha Consortium Limited and Bitpesa v. Safaricom Limited,* Petition No. 512 of 2015, High Court of Kenya, Constitutional & Human Rights Division at Nairobi. See also *Wiseman Talent Ventures v. Capital Markets Authority,* Civil Suit No. 08 of 2019, High Court of Kenya, Commercial & Tax Division at Nairobi.

volumes of trade or transactions involving virtual currencies are also unknown, no one can state with certainty how the trading or use of virtual currencies in Tanzania is affecting or has affected the formulation or implementation of the country's monetary policy by the central bank, the BoT. Similarly, information that describes the impact arising from virtual currency use and transactions on the stability of the financial sector in Tanzania is lacking.

Despite the lack or fragmentation of the law embodied in the statutory provisions, the authorities, particularly the BoT has taken certain approaches towards regulating virtual currencies. These approaches have been evolving over time. This evolution is summarized in **Table 1** below. The dominant approach has involved the issuance of notices containing 'public warnings'[46] to inform Tanzanians about 'risks involved' in virtual currency purchase, sale, use and transactions. Perhaps the BoT has been implementing what can be referred to as the 'wait-and-see' approach, perhaps, because the regulator is "still studying the matter"[47] to take the appropriate approach to regulate virtual currencies.

46 Reporter, *Bank of Tanzania warns public against use of cryptocurrencies for umpteenth time, Daily News* (Tanzania), 2 December 2019.

47 Getrude Mbago, *BoT governor issues warning in the face for new digital currency currencies, Citizen* (Tanzania), 9 October 2017.

Table 1: Evolution of regulatory approaches to virtual currencies in Tanzania

Regulatory approaches	Actions taken	Policy implications
Warning the public	▪ Alerting the public that virtual currencies are not recognized as the legal tender. ▪ Warning the public about risks involved in the virtual currency transactions. ▪ Cautioning the public that the central bank would not be involved in the virtual currency use and transactions.	▪ The virtual currency use and transactions are outside the oversight of the law. ▪ The inability of the authorities to address issues including the monetary policy, the virtual currency volatility, and the financial sector stability. ▪ The absence of specific authorities with the mandate to enforce regulations relating to the virtual currency trading, use and transactions. ▪ The failure of the authorities to set up mechanisms to deal with fair trade practices, consumer protection, and resolution of disputes. ▪ The potential of the virtual currency transactions going underground. ▪ The potential risks of virtual currency transactions being used as vehicles for the commission of financial crimes such as theft, frauds, tax evasion, financing of terrorism and money laundering.
Passive monitoring	▪ Not making the explicit enactment to prohibit the sale, purchase, use and transactions involving virtual currencies. ▪ Studying virtual currencies in the anticipation to take the appropriate action in the future.	

Preparing for normalization of virtual currency usage and transactions	▪ Setting up the national task force to study issues concerning virtual currency use and transactions. ▪ Searching for the appropriate regulatory mechanisms.	▪ The establishment of regulatory framework for better regulation and supervision of virtual currency use, trading, and transactions. ▪ The setting up mechanisms to deal with fair trade practices, consumer protection, and resolution of disputes. ▪ The establishment of regulatory mechanisms to deal with negative externalities arising from virtual currency use and transactions.

Regulatory approaches	Components	Effects

Issuance of public notices	▪ Alerting the public that virtual currencies are not recognized as legal tender. ▪ Warning risks involved in virtual currency transactions. ▪ Cautioning that virtual currencies were outside the purview of the law.	▪ The virtual currency transactions are outside the oversight of authorities. ▪ The inability of authorities to address issues such the monetary policy, the virtual currency volatility, and the financial sector stability. ▪ No authorities to enforce rules relating to virtual currency transactions. ▪ The failure of authorities to set up mechanisms to deal with fair trade practices, consumer protection, and resolution of disputes. ▪ The potential of the virtual currency transactions going underground. ▪ The possibility of virtual currency transactions being used as vehicles for commission of criminal offences.
Taking 'wait-and-see' perspective	▪ Taking passive approach towards the sale, purchase, use and transactions involving virtual currencies. ▪ Studying virtual currencies.	

Source: BoT's notices and author's construct.

Table 1 above indicates that Tanzania is possibly moving towards normalizing the use of virtual currencies. This comes in the wake of the call from the President of Tanzania, Samia Suluhu Hassan, who pointed out that the digital revolution has been sweeping across the world over the last few decades and beseeched Tanzanians to be ready for the transformations brought about by

such transformation. The President directed the country's central bank to begin the necessary preparations for normalizing the use of digital currencies. She is reported to have stated: "My call to the [Bank of Tanzania] is that you should start working on [this] development. The central bank should be ready for the changes, [lest we are] caught unprepared."[48]Subsequently, Tanzania's Information and Communication Technologies (ICTs) Minister, Faustine Ndugulile, was quoted as stating that the GoT had directed country's Information and Communication Technology Commission "to set up a task force to advise the government on blockchain technology…. [The] task force will also advise the government on policy, legislation and guidelines to enable the technology to be used effectively."[49]

The above narratives show how the politics in Tanzania is slowly involved in issues concerning virtual currency use and regulation. The politicians have been calling upon Tanzanians to get ready for the normalization of the use of virtual currencies. The politicians are also directing the process of setting up the frameworks for regulating virtual currencies. In the next part the article discusses some complexities the authorities might encounter in regulating virtual currencies in Tanzania.

4. The Rocky Road to Regulation of Virtual Currencies in Tanzania: Divergent Views, Problematic Issues and Possible Options

The virtual currency use and transactions in Tanzania seem to

48 Reporter, *President Samia gives cryptocurrency markets a boost, as Bitcoin closes on $40,000, Citizen* (Tanzania), 14 June 2021. See also Reporter, *Get prepared for new digital money, online business shift, Guardian* (Tanzania), 14 June 2021.

49 Elizabeth Edward, *Tanzania sets up crypto advisory team, Citizen* (Tanzania), 9 July 2021.

be at their formative stages. Despite this fact, the indications are that regulatory systems for governing the use and transactions are necessary. Like in other jurisdictions, the authorities in Tanzania are faced with complex questions about the nature of virtual currencies and regulation of those currencies owing to the fact that certain aspects of the ecosystem within which virtual currency use and transactions occur and risks involved are still unknown. Though various actors and stakeholders in Tanzania have had different views about the normalization of use of virtual currencies,[50] regulation of those currencies seems to be a phenomenon that cannot be avoided. The virtual currency use and transactions and regulation of those currencies are matters which the authorities, financial regulators and the general public in Tanzania cannot close the eyes to in the long run.

In many jurisdictions virtual currencies and their associated FinTech have gained popularity to the extent that governments cannot ignore them or simply prohibit them.[51] The use of innovative technologies including comply with regulation; the development of such technologies should not be stifled.[52] Similarly, virtual currencies should be regulated and supervised in order to tackle crimes, protect digital infrastructures, protect consumers, and safeguard financial systems. The virtual currency use and the associated FinTech are presenting challenges to the conventional

50 See, for instance, *Bitcoin investors could end with nothing, Citizen* (Tanzania), 21 May 2018.See also Beatrice Materu, *Experts: Why Tanzania is not ready for cryptocurrencies, Citizen* (Tanzania), 15 June 2021.

51 Spithoven, A., "Theory and reality of cryptocurrency governance," *Journal of Economic Issues,* 2019, Vol. 53, No. 2, pp 385-393 at p 391.

52 *Fáykiss*, P., Papp, D., Sajtos, P., and *Tõrös, Á.*, "Regulatory tools to encourage FinTech innovations: The innovation hub and regulatory sandbox in international practice," *Financial and Economic Review*, 2018, Vol. 17, issue 2, pp 43-67 at pp 51-54.

regulation of the financial systems in many jurisdictions.[53] The authorities in Tanzania are compelled find the appropriate balance between protecting interests of investors and users of virtual currencies, while allowing many benefits derived from the use of those currencies and associated technologies as part of FinTech. In other words, such regulation should not stifle the development of innovations and the creation of more effective financial systems. Balancing the two aspects is a challenging task.

As demonstrated earlier in this article, it is apparent that the debate about the normalization of virtual currency use in Tanzania has not been settled. Regulation of virtual currencies will be a complicated issue if the normalization of the use of those currencies is still a contestable issue. One may ask: is Tanzania at a crossroads? One school of thought, based on opinions of some experts, holds that Tanzania is not ready for the normalization of use and regulation of virtual currencies.[54] The other perspective, based on the views of digital currency enthusiasts, posits that it is the time for Tanzania to normalize the use of virtual currencies.[55] The other viewpoint is that the normalization of the use of virtual currencies should be handled cautiously. Many issues have to be sorted out and/or put in place before normalizing the use of virtual currencies in Tanzania. One commentator is quoted as stating that the normalization of virtual currency use should be

53 Comizio, V. G., "Virtual currencies: Growing regulatory framework and challenges in the emerging FinTech ecosystem," *North Carolina Banking Institute,* 2017, Vol. 21, pp 131-175.

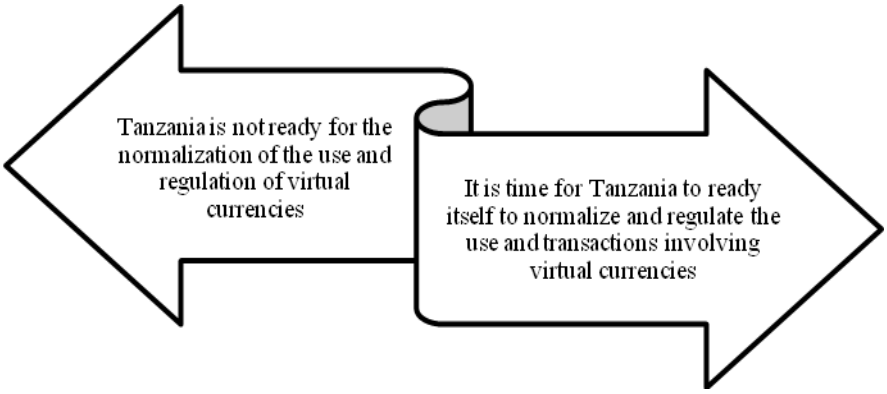
54 Beatrice Materu, *Experts: Why Tanzania is not ready for cryptocurrencies*, *Citizen* (Tanzania) 15 June 2021. See also James Kandoya, *Hold back virtual currency for now, Guardian* (Tanzania), 28 June 2021.

55 **Charles Makakala,** *Bitcoin doesn't make sense, but let's do it anyway*, *Citizen* (Tanzania), 17 June 2021.

undertaken circumspectly. He remarked that the starting will be to have "… vibrant, intelligent, sober, diverse and constructive free discussions about cryptocurrencies in Tanzanian context. Tapping the brains of experts - including practitioners… - is very important…. Learning from countries and individuals who are ahead of the learning curve in this game is a must…."[56]

Figure 1 below represents the divergent viewpoints on virtual currency use and regulation in Tanzania.

Figure1: The main divergent perspectives on virtual currency use and regulation in Tanzania



Source: The author's formulation

The authorities and regulators in Tanzania have to ponder over choice of virtual currencies to be regulated. This choice here can be between centralized and decentralized virtual currencies. The choice can also be between convertible or non-convertible virtual currencies. With regard to centralized virtual currencies, there is a central authority responsible for issuance and supply of

56 Honest Ngowi, *Cryptocurrencies: What should be the issue*, *Citizen* (Tanzania), 3 July 2021.

virtual currencies and the administration of the virtual currency system. In a decentralized system, there is no such authority. The virtual currencies are issued by decentralized private issuers. A convertible virtual currency is a digital currency that can be used as a substitute for real and legally recognized currency even though it does not have the status of legal tender. Convertible digital currencies can be exchanged for fiat currencies via virtual currency exchanges. A non-convertible virtual currency is a digital currency used as payment only within certain virtual communities. It has no connection to the real economy and cannot be converted to legal tender. Non-convertible virtual currencies are also known as closed virtual currencies.[57]Should the virtual currency be issued by the central bank which is commonly known as the central bank cryptocurrency (CBCC)? Several countries have begun the process of exploring the creation of national virtual currencies.[58] In Africa, Nigeria has inaugurated its central bank digital currency.[59] ACBCC is an electronic form of central bank money that can be exchanged in a decentralized manner known as peer-to peer transactions are conducted directly between a payer and a payee without the need of an intermediary.[60] Should the central bank provide the system whereby the CBCC is authenticated, stored, or transferred? Or should other non-state actors be responsible for creating the storage and transactions applications? Or should

57 Didenko, A. N., and Buckley, R. P. "The evolution of currency: Cash to cryptos to sovereign digital currencies, *Fordham International Law Journal,* Vol. 42, No. 4, 2019, pp 1041- 1095.

58 Kirkpatrick, K., Savage, C., Johnston, R, and Hanson, M., "Virtual currency in sanctioned jurisdictions: Stepping outside of SWIFT," *Journal of Investment Compliance*, 2019, Vol. 20, No. 2, pp 39-44.

59 See *Nigeria becomes first African country to roll out digital currency*, *Citizen* (Tanzania), 26 October 2021.

60 Bech, M. L., and Garratt, R. "Central bank cryptocurrencies," *BIS Quarterly Review,* 2017, pp 55-70 at p 57.

the cryptocurrency administered by the central bank operate in tandem with those administered by non-state actors? Should the central bank and private actors cooperate such that the central bank's role be limited to the creation of money and the non-state actors be responsible for the technical arrangements?

Choosing the regulatory model will not be an easy task for authorities in Tanzania. Several options will have to be carefully looked at. The choice here can involve the law (state-based regulation);[61] or the financial service industry-based regulation (self-regulation);[62] or the combination of the state-based regulation and self-regulation (co-regulation).[63]The authorities can think about technology-based regulation (RegTech). RegTech can simply be described as technological solutions to regulatory process.[64]The idea behind the use of RegTech to regulate FinTech is to achieve the balance between enabling the innovative technologies and addressing negative impacts and risks emanating from the use of such technologies.[65] To accomplish this, regulators apply the

61 This could be in the form of statutory instruments including Acts of Parliament.

62 For a definition of 'self-regulation' see Omarova, S. T., "Rethinking the future of self-regulation in the financial industry," *Brooklyn Journal of International Law,* 2010, Vol. 35, No.3, pp 665-706 at pp 693-697.

63 For a definition of 'co-regulation' see Ginosar, A., "Co-regulation: From lip-service to a genuine collaboration—The case of regulating broadcast advertising in Israel," *Journal of Information Policy*, 2013, Vol. 3, pp 104-122 at pp106-108.

64 Waye, V., "Regtech: A new frontier in legal scholarship," *Adelaide Law Review*, 2019, Vol. 40, pp 363-386 at p 364-365. See also von Solms, J., "Integrating regulatory technology (RegTech) into the digital transformation of a bank Treasury," *Journal of Banking Regulation*, 2021, Vol. 22, No. 2, 152-168 at pp 155-156.

65 RegTech is information technology (IT) that: (i) helps business to manage regulatory requirements and compliance imperatives by identifying the impacts of regulatory provisions on business models, products and services, functional activities, policies, operational procedures and controls; (ii) enables compliant business systems and data; (iii) helps control and manage regulatory, financial and non-financial risks; and (iv) performs regulatory compliance reporting. See Butler, T., and O'Brien, L., "Understanding RegTech for digital regulatory compliance," in Lynn, T., Mooney, J.G., Rosati, P., and · Cummins, M., (eds), *Disrupting Finance FinTech and Strategy in the 21st Century,* Palgrave MacMillan, Cham, 2019, pp 85-102 at p 86.

'sandbox' regulatory approach. Regulatory sandboxes refer to the use of testing grounds for new business models that are not regulated by the existing regulation, or supervised by the existing regulatory authorities.[66] The rationale for employing the sandbox regulatory approach is to make FinTech comply with financial regulations in a way that such compliance does not stifle FinTech. SupTech can enable authorities to supervise financial service industry. SupTech involves the application of emerging technologies to enable supervisory agencies conduct supervision.[67]

There are several issues that emerge from the above that need to be addressed. What is the capability of the financial service industry in devising and adopting self-regulation on virtual currencies? Self-regulation assumes that the actors that are regulated can be identified and are organized in self-regulatory organizations (SROs) for purposes of regulation. Are there any identifiable SROs in Tanzania for purposes of regulating virtual currencies? To what extent can RegTech or SupTech be applied to regulate virtual currencies in Tanzania? The acquisition and application of these technologies require resources (funds, equipment, and infrastructures and expertise) which may be difficult to get in Tanzania.

66 Ringe, W. G., and Ruof, C., "Regulating FinTech in the EU: The case for a guided sandbox," *European Journal of Risk Regulation*, 2020, Vol. 11, pp 604-629 at pp 606-608. See also Leckenby, E., Dawoud, D., Bouvy, J., and Jónsson, P., "The sandbox approach and its potential for use in health technology assessment: A literature review," *Applied Health Economics and Health Policy*, 2021, pp 1-13 at pp 861-682.

67 Giudici, P., "Fintech risk management: A research challenge for artificial intelligence in finance," *Frontiers in Artificial Intelligence*, 2018, Vol. 1, pp 1-6. See also de Koker, L., Morris, N., and Jaffer, S., "Regulating financial services in an era of technological disruption," *Law in Context*, 2019, Vol. 36, No. 2, pp 90-112.

Virtual currencies can be looked at differently. The digital currencies can be regarded as a 'means of payment,' or a 'security,' or an 'asset,' or an 'investment.' Will the regulators in Tanzania be able to devise and formulate an all-inclusive regulation to accommodate all the above aspects?

The virtual currency eco-system encompasses actors (such as creators, developers or inventors; issuers or administrators; users, miners; digital wallets and wallet providers, digital currency exchange platforms and exchange platform providers, merchants; software developers; the Internet Service Providers (ISPs); and operators and virtual currency automated teller machines (ATMs)).[68] Regulation and supervision of the use, trading and transactions involving virtual currencies in Tanzania should cover, among other aspects, registration, licensing and supervision of virtual currency service providers, actors and infrastructures. The service providers, actors, and infrastructure operators may be situated in different jurisdictions. Considering the fact that some of the actors or infrastructures that may be located outside Tanzania, their regulation and supervision can be challenging for authorities in Tanzania. Will the authorities be able to devise and formulate regulation that covers all these actors and infrastructures?

Regulation of virtual currencies is a cross-cutting phenomenon that deals with several issues. It involves the operations of the payment systems. It concerns issues relating to new technologies. It requires the promotion of fair trade practices among the actors and the protection of the rights of users. It involves issues relating to

68 Reddy, E., and Lawack, V., "An overview of the regulatory developments in South Africa regarding the use of cryptocurrencies," *SA Mercantile Law Journal*, 2019, Vol. 31, No, pp1-28 at p 9.

crime control. Accordingly, regulation of virtual currencies should integrate many issues and consider many aspects. This process will require the synchronization of several statutory instruments. It will need the coordination of activities of several regulators and agencies, for instance, the BoT, the Tanzania Police Force (Police), the Tanzania Communications Regulatory Authority (TCRA), the Capital Markets and Securities Authority (CMSA), the Tanzania Revenue Authority (TRA) and the anti-money laundering agencies such as the Financial Intelligence Unit (FIU). The authorities could make regulations for specific entities (for instance, those that enable interactions between virtual currencies and the 'conventional' payment instruments and the real economy). Additionally, the financial industry might be subjected to specific regulation of actors such as intermediaries that provide virtual currency-related services such as exchanges, merchant acceptance facilities and the digital wallet applications enabling users to store and transact their virtual currencies. Integrating all these issues will involve complex processes and procedures.

Transactions involving virtual currencies are conducted in a digital, transnational and globalized environment. The technologies applied to these currencies are modern, complex and evolving. These factors present challenges to authorities and regulators in Tanzania in terms of how to monitor virtual currency use and transactions; to address unlawful activities; and to deal with online offenders who are situated outside Tanzania. The capacity of the authorities, regulators, and law enforcement agencies in Tanzania to handle the above issues wants. Additionally, so far there is no international consensus on how to regulate virtual currencies. There are neither the global nor regional legal instruments–such

as treaties–that govern virtual currency use and transactions. National authorities are struggling, independently, to regulate digital currencies in their jurisdictions.[69] It is important for Tanzania, together with other countries, including the members of the East African Community (EAC), to have a common regulatory approach towards virtual currencies. Currently, the EAC is implementing the EAC Financial Sector Development and Regionalization Project which is intended, among other things, to regionalize and harmonize financial laws and regulations among the EAC member states.[70]The authorities in Tanzania should consider the fact that virtual currency use is a transnational, global phenomenon that cannot be addressed effectively by the national regulation alone.

Other issues have to be considered. Public awareness and knowledge is needed.[71] Knowledge on virtual currencies and their supporting technologies should be disseminated to the authorities, regulators and their personnel, intermediaries, users and the general public. Virtual currencies will also require stable power, accessible Internet connections, and smartphones to facilitate transactions conducted through virtual currency markets. Mining of cryptocurrencies requires considerable amounts of electrical energy that many Tanzanians cannot afford. The virtual currency trading is energy consumption, running cryptocurrency truncations require heavy computer calculations

69 Künnapas, K., "From Bitcoin to smart contracts: Legal revolution or evolution from the perspective of *de lege ferenda*?," in Kerikma¨e, T and Rull, A, (eds), *The Future of Law and eTechnologies*, Springer Publishing, Cham, 2016, pp 111-131 at pp 115-120.

70 East African Community, *EAC Financial Sector Development and Regionalization Project,*<https://www.eac.int/financial/financial-sector-development>

71 Beatrice Materu, *Experts: Why Tanzania is not ready for cryptocurrencies*, *Citizen* (Tanzania), 15 June, 2021.

to run them, hence considerable amounts of energy are required.[72] The application of the blockchain technology can sometimes be environmentally unfriendly.[73]Apart from consuming considerable amounts of energy, the application of the technology can result in the generation of e-waste that adversely affects environment. Thus, regulation of virtual currencies should take into account the protection of environment.

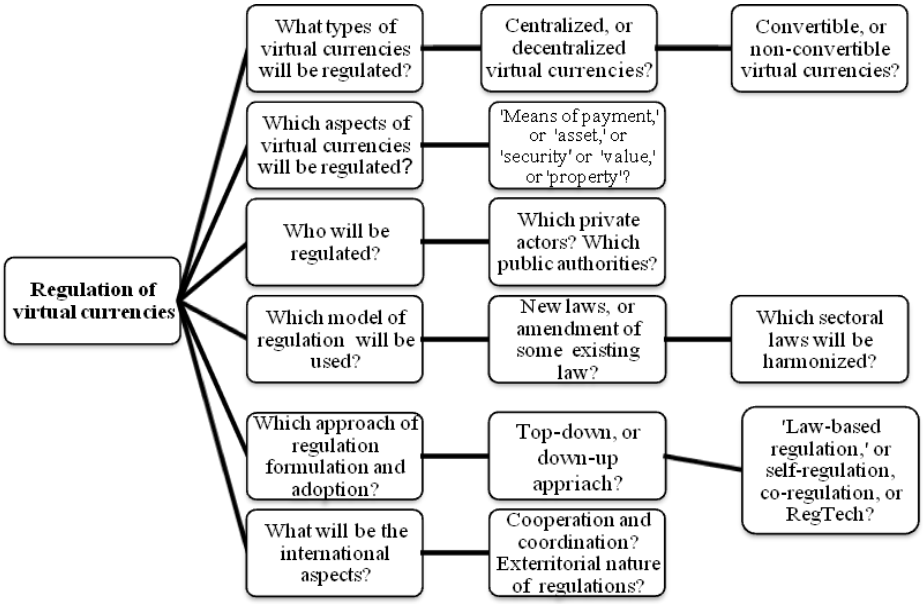
Several policy implications can be drawn from the above analysis. The important issue is that, before embarking on any regulatory project of virtual currencies in Tanzania, the authorities have to ponder over several matters. These include: the *operational issues* (for instance, the nature and the extent of virtual currency use and transactions conducted and beneficial aspects and downsides of such digital currencies); the *infrastructural issues* (for instance, the systems and structures to support the virtual currency sale, purchase, trading and regulation); the *governance issues* (for instance, the model of regulation to be invoked, the approaches to be applied in adopting the regulation, and the state actors and non-state stakeholders to involved); and *international issues* (for instance, the regional, continental and global authorities and agencies to be involved in the formulation of the regulation and the requisite expertise and capacity building to be acquired from the foreign partners).

72 Truby, J., "Decarbonizing Bitcoin: Law and policy choices for reducing the energy consumption of Blockchain technologies and digital currencies," *Energy Research & Social Science*, 2018, Vol. 44, pp399-410.

73 Chen, M., and Ogunseitan, O. A. "Zero E-waste: Regulatory impediments and block-chain imperatives," *Frontiers of Environmental Science & Engineering*, 2021, Vol. 15, No. 6, p 114, <https://doi.org/10.1007/s1183-021-1402-x>

The above discussion uncovers intricate issues that authorities in Tanzania should take into account before formulating or adopting regulation for virtual currencies. Some of the key questions that should be looked at are diagrammatically represented in **Figure 2** below:

Figure 2: Some questions concerning regulation of virtual currencies in Tanzania.



Source: Author's formulation

5. *Conclusion*

This article has shown that there is dearth of information on virtual currency use and transactions in Tanzania and the effects of trading and such currencies. The virtual currencies are purchased, sold and used through the informal or unauthorized channels.

The law in Tanzania deals with the fiat money and it does not, specifically, regulate virtual currencies. The possibility for criminals abusing the use of virtual currencies to commit financial crimes including theft, frauds, tax evasion and money laundering cannot be ruled out. The capacity of authorities and agencies in Tanzania to tackle criminal activities in virtual world is limited. This situation presents a challenge to the authorities and agencies in Tanzania. In view of the above limitations, some measures need to be implemented to regulate virtual currencies in Tanzania.

The Government of Tanzania (GoT) should conduct or commission the conduct of studies in order to investigate and describe the extent of the use and transactions involving virtual currencies in Tanzania. These studies should generate information about the potential threats posed through the use of virtual currencies to be vehicles for facilitating the commission of financial crimes. The studies should identify and analyze options that are available to tackle the problems and how the governmental authorities and non-state actors will work in partnership to address those challenges. Information should also be presented on how Tanzania in collaboration with authorities in other countries can use the international legal framework to address the problem. It is imperative for Tanzania to partake in international initiatives - regional, continental or global–to search for the regulatory frameworks to govern virtual currencies.

Notwithstanding the fact that the BoT has issued public notices and warnings on the use and transactions involving virtual currencies, there are indications that Tanzanians and other residents in Tanzania are increasingly purchasing, using, and trading in those

digital currencies. The GoT has intimated its intention to introduce the use of virtual currencies, and this will require their regulation. The GoT should have adequate information before deciding as to which regulatory option should be taken.

Effective regulation of virtual currencies in Tanzania requires, among other things, robust policy, legal and institutional frameworks. There should be national and sectoral policies and strategies that will enable the administration of virtual currency use and transactions in Tanzania. These policies and strategies should be harmonized. Specific legislation and guidelines should be enacted to govern the use of virtual currencies. The law should also address issues that are connected to virtual currency use or transactions such as control of monetary and fiscal policies, taxation, consumer protection, system security and the control of crimes including theft, frauds, money laundering and terrorist financing. This law should be comprehensive and be reformed regularly to address the evolving nature of virtual currency use and transactions. Since it is apparent that the use of law-based regulation will not adequately address issues concerning virtual currencies, it is imperative for the authorities in Tanzania to see the possibility of the law-based regulation being applied parallel with the emerging RegTech and SupTech.

As for the institutional frameworks, the GoT should set up authorities, directorates, departments or units within its agencies, to deal with issues related to the use and regulation of virtual currencies. These authorities and agencies should be allocated with adequate resources in terms of funds, equipment, and personnel in order to administer the use of virtual currencies and control

their misuse by criminals. The institutional capacity building is a matter of paramount importance. The resources are needed to develop and improve the capacity of law enforcement particularly in areas of digital forensics and analytics. This should involve training of police officers, prosecutors, judges, magistrates, and personnel from the regulatory authorities. The framework set up under the international law can be applied by the authorities in Tanzania to seek assistance from international and foreign agencies to deal with challenges arising from the use of virtual currencies in Tanzania.

THE TAX OMBUDSMAN SERVICES: THE PROSPECT FOR TAX JUSTICE IN TANZANIA

Dr. Talib Salum Zahor*

Abstract

The paper explores the influence of the tax ombudsman towards the promotion and protection of tax justice. The paper reviews the general concept of tax justice and tax ombudsman. The models of ombudsman are to a certain extent described. Hence, using the existing laws and rules or regulations that describe powers vested to tax ombudsman on resolving complaints the assessment is made to attest the contribution of the ombudsman in the promotion of tax justice.

The assessment is also made to evaluate the independency and impartiality of the ombudsman; this was done by observing the relationship of the ombudsman and the government. Generally, it is argued that, the parliamentary ombudsman is more independent and impartial than executive ombudsman; thus, they can promote effective tax justice. It is argued that most governments are not happy to be reviewed and monitored, thus governments may intervene the operations of the ombudsman. Therefore, it is easy to influence decisions made by executive ombudsman than those made by parliamentary ombudsman. However, this assertion does not mean that the executive ombudsmen are useless. The executive ombudsman has in several jurisdictions resulted into the amendment of several laws and procedures.

Tanzania has opted to establish the executive tax ombudsman. The office is under the supervision of the Ministry of Finance just like the tax authority and tax appeal machineries. It is argued that Tanzanian structure of tax ombudsman may raise doubt on the independency and impartiality of the ombudsman.

Key words; *Tax ombudsman; tax justice; dispute resolution; taxpayers' rights*

* PhD in Taxation, Lecture, at the Institute of Finance Management, Faculty of Economics and Management Sciences, Department of Economics and Tax Management. P.O.BOX 3918, Dar es Salaam. Email address: zahtalib@hotmail.com or talib.zahor@ifm.ac.tz Mob +255772111555.

1. *Introduction*

Tax justice has been one among the crucial factors towards setting the effective tax system. It indicates the quality of tax system.[1] The aspect of determining just tax system is profound from the process of determining correct taxable income based on the economic powers of taxpayers[2] where every taxpayers expect appropriate treatment from tax officers during the assessment, investigation or collection of tax to the ability and willingness of states to provide social services to citizens.[3] The more governments spent the amount of tax collected to socially development projects the more citizens strengthen their trust and support to the government.

The concept of justice can widely be described in several sectors or fields. Political philosophers have mainly described justice as a proper relationship between citizens and state.[4] The meaning of the word proper was not given, it can however be assumed that the proper relationship is a bond that eases the operations of governments. The governance without severe grudges from citizens this assumption has not deviate much from the assertion made by Sonnur. A. Guzel et.al[5] who believes that justice is a perception. The perception of fairness has however a direct and important ethical implication in social and economic aspects.[6]

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1 Andrzej Gomulowicz, Principle of Tax Justice and Tax System, Viesoji Politika IR Administravimas, No. 15, 2006.

2 Allison Christians, The Quest for Tax Reform: Drawing the Boundaries of Tax Jusstice, The Royal Commission on Taxation Fifty years later, 2012.

3 Nasser Abdel Karim, Tax Justice and Sustainable Development in the Arab Region: Lesson from tax systems in four countries, Commissioned by the Arab NGO Network for Development and Its Partner institutions, 2018.

4 Shu-Chien Jennifer Chen, Neutrality as Tax Justice: the case of Common Consolidatted Corporate Tax Base under the EU Law, paper presented at the Tax Policy Conference 25 April 2018, University. of Cambridge and at the Institute for Global Law and Policy Annual Conference 1-2 June 2018, Harvard University.

5 Sonnur Aktas Guzel, Gokhan Ozer, Murat Ozcan, The effect of the variables of tax justice perception and trust in government on tax compliance: The case of Turkey, Journal of Behavioural and Experimental Economics Vol. 78, 2019.

6 Jonathan M. Farrar, Maureen E. Donnelly, and Sonia B. Dhaliwal, Procedural Aspects of Tax Fairness: A Content Analysis of Canadian Tax Jurisprudence, The ATA

Citizens tend to cooperate and supportive to the government policies when they believe to have been fairly treated. On taxation aspects, when citizens believe that they are fairly and equitably treated, there is a greater possibility to increase compliance of tax laws and procedures. Citizen will ultimately pay tax within the due dates and follow the procedures and requirements for proper assessment of the taxable income. For them, the perception for justice has more influence on the taxpayers' compliance behaviour than the tax rates does.[7] Andrzej Gomulowicz links the concept of justice with the tax system that imposes tax obligation to citizens based on their ability to pay.[8] The principle of the ability to pay largely requires taxpayers who have more taxable income to pay more amount of tax; and those with less taxable income to pay less amount tax; it requires proportional treatment for all taxpayers. The principle for justice also requires an even treatment for taxpayers who have similar circumstances; meaning that there should no preferential treatments among taxpayers. The criteria of levying and imposition of tax should be clear and known to all stakeholders and they should be applied to all taxpayers equally. Similarly, the aspect for justice in taxation involves the principle that requires a taxpayer to pay no more or less than the amount of tax imposed by the law.[9] The taxpayer has to pay only correct amount of tax. When taxpayer pays the amount of tax higher than what ought to be paid, he should be refunded with the amount of tax that was overpaid; and if he paid less, he must top up to meet his tax obligation. In practice, in some tax jurisdictions the process of paying tax refund includes the payment of interest to taxpayers. A taxpayer whose money was taken more than what was required by the law should be refunded with interest. The practice is very common to a taxpayer who either pay less amount of tax or who delay to pay tax within the due date; he shall always be required to pay the amount of tax together with interest.

Journal of Legal Tax Research Volume 11, Issue 2, 2013.

7 Ibid.

8 Supra note 1.

9 Ibid.

In principle, the concept of tax justice is very broad. It involves the capacity of stakeholder to determine what is right and what is acceptable in a given context.[10] The concept of tax justice requires the balance between the need of powerful governments to levy and mobilize more revenue, and the rights of weak citizens; citizens irrespective of their economic ability are always deemed to be weak when they are compared with governments. Therefore, citizens are more concerned with the aspect of fairness and equity when they are dealing with governments. While the aspect of fairness is very subjective[11], a line should be drawn that a minimum criterion for the consideration of fairness involves treating taxpayers who have similar circumstances equally. One should not be favoured based on his economic or political status or any other ambiguous criteria that may result into double standards. The concept of equity focuses more on the ability of a taxpayer to pay the amount of imposed tax. Tax structure should be set to ensure that those with higher taxable revenue are expected to pay more amount of tax than those with less taxable revenue. In a same way, the equity is concerned with setting tax structure that imposes equal obligations to all entities. Entities with the same or similar economic condition should be evenly taxed.

While it is an unequivocal truth that, a justice is a precious phenomenon to citizens, however, it has never been a fundamental goal to most states while setting the tax system.[12] The imposition of tax is more attuned with the goal of enhancing revenue collection than instituting the justice. In principle, one among the criteria for the tax justice requires the imposition of tax obligation in conformity with constitutional requirements. Some constitutions are however silent on the modality of imposing tax; they can

10 Nasser Abdel Karim, Tax Justice and Sustainable Development in the Arab Region: Lesson from tax systems in four countries, Commissioned by the Arab NGO Network for Development and Its Partner institutions, 2018.

11 Fairness depends on the consequence of the act it has to a respective receiver. Generally the act by itself merely bears no harm. The act shall however be deemed to be bad or good act depends on the reaction of a person who was directly or indirectly affected by the act…..Tyler A. LeFevre *Vermont Law Review* Vol. 41:763 2017.

12 Ibid.

simply empower parliament to impose the tax obligation without explaining criteria for equity.

Therefore, to have a just tax system is a choice of a state. Justice does not come by an accident. It starts from the initial stages of designing tax system to the level of legalizing the designed tax.[13] The introduction or the improvement of tax justice requires the political will of a state.[14] States may profess justice but in reality may not provide or protect it; this shall always be true if the demand for justice came as a criterion to get loan or any other supports from developed nations or organisations. In practice, justice is commonly expected to be experienced and monitored in dispute resolution mechanisms; courts, tribunals or any other bodies that are responsible to resolve disputes are then obliged to ensure the availability of justice in the whole process of dispute resolution.

This paper intends to explore the influence of tax ombudsman in the promotion of tax justice. Through documentary review of laws, rules and regulations governing the powers and mandate of the ombudsman, the paper assesses the influence of ombudsman in the provision of justice.

2. Ombudsman

The term ombudsman is an English word originated in Sweden; in Swedish, the word "*umbuds man*" means "representative" or "proxy."[15] Even though the term ombudsman seems masculine, it is a gender neutral terminology.[16] In its origin, it was established in 1809[17] by the Parliament as a body to supervise the government operations; by then, it was intended to minimize the malpractices

13 Allison Christians, op.cit. (fn 2).

14 Ibid.

15 OECD, The Role of Ombudsman Institutions in Open Government, OECD Working paper on Public Governance No 29, 2018.

16 Ibid.

17 Fernando Serrano, Taxpayer's Rights and the Role of the Tax Ombudsman: An Anall ysis from a Spanish and Comparative Law Perspective, Kluwer Law International, 2007.

of government institutions.[18] It was the era of the institution rule of laws in most states. Thus, several countries opted to introduce the Office of the Ombudsman to control the powers of the governments and to ensure the provision of quality services.[19]

The principal function of ombudsman lies on dispute resolutions; the ombudsman handles complaints made by clients against services provided by government institutions.[20] The ombudsman are commonly established for the sake of protecting citizens against the abuse of government powers, violation of citizens' rights, omission and other malpractice of government institutions.

Ombudsman is considered being an easy and effective way of resolving disputes. It resolves disputes through mediation and conciliation; practically, in most tax ombudsman services, common matters that may result taxpayers to file complaint to ombudsman services include (but not limited with) the following

i) A taxpayer who feels to have waited too long for services,
ii) A taxpayer who feels to have been treated unfairly or impolitely by tax officer,
iii) A taxpayer who feels to have been discriminated on obtaining quality services or
iv) A taxpayer who has been encountered with any other administration malpractice can complain to the office of ombudsman.

Generally, there is a direct link between ombudsman and democracy. Therefore, the ombudsman can only be established in a democratic state.[21] It always works to regulate and control powers of a powerful state over its weak citizens; thus, ombudsman enhances the accountability of government

18 Supra note 15 above.

19 Larry B Hill, the ombudsman Revisited: Thirty Years of Hawaiian Experience, Public Administration Review, Vol.62, No. 1 2002.

20 Mary Donnelly, The Financial Services Ombudsman: Asking the 'Existential Quess tion, *Dublin University Law Journal, Vol. 35 2012, pp 229-260.*

21 Fernando Serrano, op.cit. (fn 15).

organs.[22] In practice, even though there are an increasing number of states who have established the office of ombudsman since the early 19th century when they were first introduced, few governments would prefer to be synchronized.[23] It is noticed that some states introduced ombudsman just because they have no options. The introduction of ombudsman must have been influenced as a precondition to a membership of an international organisation or as a criterion to acquire loan, grants or any assistance from donor countries.[24]

2.1. Accessibility of the Ombudsman

The experience from South Africa and the United Kingdom, a taxpayer is required to file a complaint by filling a complaint form. The forms are available in the websites of tax ombudsman services and the websites of tax authorities. Taxpayer may also complain through email; in some circumstances, taxpayers may complain even through a phone call.[25] That shows the extent of the accessibility of the ombudsman services.

2.2. Common models for Ombudsman

Generally, since the establishment of the ombudsman offices, the structure of the ombudsman office has been changing to reflect the need of effectiveness, efficiency and justice from these institutions.

The commonly known models for the ombudsman offices include the executive ombudsman and the parliamentary ombudsman. Even though there is a least common model of ombudsman which exists in Portugal where the ombudsman does not come from neither pillars of the states.[26]

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22 Evgeny Finkel, The Authoritarian Advantage of Horizontal Accountability: Ombudsmen in Poland and Russia, Comparative Politics, Vol. 44, No. 3, 2012.

23 Ibid.

24 Ibid.

25 Larry B Hill, the ombudsman Revisited: Thirty Years of Hawaiian Experience, Public Administration Review, Vol.62, No. 1 2002.

26 Ekaterina Zemskova, The Legal Status of The Ombudsman, Young Scientist, 2020.

i) Executive ombudsman

The executive ombudsman is an institution that is appointed by the head of executive. It is one among the earlier model of ombudsman.[27] The President is mandated to appoint and replace the ombudsman. However, on the appointment of the ombudsman, his appointment has to be brought before the Parliament and the Senate. This model exists in France.[28] In principle this model is deemed to be of less quality as the assurance of independency and impartiality is hardly obtained.[29] There is high possibility for executive to appoint person who is supposed to ensure the image of the executive. Therefore, a "*yes-man*" is usually appointed.[30]

ii) Parliamentary Ombudsman

The parliamentary ombudsman is an institution that is appointed by parliament to oversee and control the operation of government organs. In principle the parliamentary ombudsman is deemed more independent when it is compared with the executive ombudsman. Yet other scholars could not see the need of introducing the parliamentary ombudsman instead of enhancing the judiciary system to provide reliable legitimate ruling on judicial review.[31]

3. The influence of Ombudsman in tax justice and good governance

While tax is among the crucial aspect that assists governments to generate income for social welfare, the process of collecting tax is encountered with several obstacles that may in return result into disputes between tax authorities and taxpayers. The dispute may emerge as a result of the interpretation of tax laws or procedures. In some instance the disputes may occur on the use of powers during the enforcement of law. In reality,

27 Larry B Hill, the ombudsman Revisited: Thirty Years of Hawaiian Experience, Public Administration Review, Vol.62, No. 1 2002.

28 Ekaterina Zemskova, The Legal Status of The Ombudsman, Young Scientist, 2020.

29 Ibid.

30 Mary Donnelly op.cit. (fn 19).

31 Ibid.

tax authorities as a representative of governments are more powerful than taxpayers. The use of powers may lead taxpayers believe that a particular tax authority is unfair and unjust. In that circumstance therefore, there must be a mechanism to ensure the proper ways of correcting error and wrongdoing of tax stakeholders. The commonly applied mechanism is to let a taxpayer who is aggrieved by actions or decision of tax authorities to appeal. The right to appeal is a must; it is a key towards tax justice.[32]

Tax ombudsman offices irrespective of their models are commonly meant to control the states towards the use of excessive powers on exercising their duties.[33] They are always intended to increase transparency and fairness. Thus every tax ombudsman office is expected to protect citizen against violation of human rights, abuse of powers, errors, negligence, delay and unfair decisions or malpractice of tax administration.[34] Sometimes it has been proved that, the ombudsman office influenced the reduction of corrupt practices.[35]

Generally, the existence of ombudsman office enhances good governance; the governance that ensures the administrative accountability and the transparency.[36] The ombudsman influence on good governance can highly be visible if the office of ombudsman contains independent and competent staff who can handle complaints from taxpayers who are aggrieved by tax authorities.[37] The accountability and transparency of

32 Masud Sarker & Bayezid Alam, Ombudsman for Good Governance: Bangladesh Perspective, Journal of Management and Social Sciences, Vol. 6 No.1, 2010.

33 Supra note 15.

34 Fernando Serrano, Taxpayer's Rights and the Role of the Tax Ombudsman: An Anall ysis from a Spanish and Comparative Law Perspective, Kluwer Law International, 2007.

35 Mukul, G Asher, The Design of Tax System and Corruption, research gate, accessed through https://www.researchgate.net/publication/228543638 last visited 1 May 2021.

36 Masud Sarker & Bayezid Alam, Ombudsman for Good Governance: Bangladesh Perspective, Journal of Management and Social Sciences, Vol. 6 No.1, 2010.

37 Ibid.

ombudsman office may also influence a good culture of open government which may help to raise citizen trust to their government.[38]

The aspect of taxpayers' right cannot be undermined in the philosophy of creating the office of ombudsman. It should be remembered, constitutions of several states such as Tanzania, Kenya, USA contain Bill of Rights. The Bill of Rights provides list of citizens' rights and obligations one is entitled with. Some of the rights promoted through Bill of Rights may directly be applicable to taxpayers while others not. In other tax jurisdictions therefore taxpayers' rights are provided within tax status example Netherlands or through administrative promises kept in documents named Taxpayers Charters. Probably there are some taxpayers' rights which highly depend on the discretion of the tax officials. Other rights their promotion is very subjective; for example, the right of fair treatment. In principle, it is very hard to measure the fairness because it highly depends on the perception of a taxpayer. Thus, probably one act to different taxpayers may be interpreted differently by each of them. It is therefore the obligation of every taxpayer to prove his perception on the act. Tax ombudsman is commonly mandated to resolve disputes that are originated from malpractice of tax authorities' officials. Some of these malpractices may in either infringe the taxpayers' rights. Thus, the existence of tax ombudsman in a tax system is believed to have positive impacts on the promotion and protection of taxpayers' rights.[39]

There has been a direct impact on the establishment of the ombudsman and the increase of the social justice.[40] This is always true if the ombudsman resolves disputes independently.

38 OECD, The Role of Ombudsman Institutions in Open Government, OECD Working paper on Public Governance No 29, 2018.

39 Adrian J Sawyer, Enhancing taxpayers' rights in New Zealand- an opportunity missed? E journal of Tax Research Vol. 18 2020.

40 Richard Kirkham and Anita Stuhmcke, The common law theory and practice of the ombudsman/ judiciary relationship, Common Law World Review, Vol 49(1) 56–74, 2020

4. *The office of Tax Ombudsman in Tanzania; Status quo and prospect for tax justice*

The Finance Act of 2019 has introduced the Office of Tax Ombudsman in Tanzania. As of now, section 28A of the Tax Administration Act 2015 requires the establishment of the office of Tax Ombudsman. The Tanzanian tax ombudsman office that was established by the Finance Act of 2019, functionally, looks similar with other tax ombudsman around the world. The tax ombudsman is responsible to receive, review and address any complaint made by a taxpayer in respect of services, procedural or administrative matters in tax administration.[41] In addition to that, section 28C of the Tax Administration Act [RE 2019] has listed duties of the proposed tax ombudsman; the duties include

a) *" act independently and impartially in resolving complaints*

b) *Follow informal, fair and cost effective procedures in resolving complaints*

c) *Provide information, training and awareness to taxpayers on tax ombudsman service, functions and procedures for making complaints*

d) *Facilitate access by taxpayer to dispute resolution process within the authority…"*] emphasis added

The duties of tax ombudsman as provided in the above provision raise hope on the promotion of tax justice in dispute resolution mechanism. It should be remembered, even though the aspects of fairness have not been stipulated in the Act, that omission does not always mean that ombudsman may fail to determine them. The use of informal techniques and procedures for resolving complaints may lead to fairness. At the same time the requirements of being impartial and independent on resolving dispute plays a crucial part on the fairness, which influences tax justice.

41 Tax Administration Act 2015, s 28A.

Nevertheless, the tax ombudsman is required to inform taxpayers regarding the existence of the tax ombudsman and procedures for resolving complaints. It is not clear how the tax ombudsman will execute the duty of training taxpayers and the duty of raising the awareness. However, that duty may effectively be conducted if in the earlier stage taxpayer is clearly informed about his rights in the notice of assessment. Tax authorities should be obliged to inform taxpayers on the existence of the tax ombudsman and the procedures to file complaints there. On training, there should be sessions to be conducted by tax ombudsman through media or any other ways to ensure taxpayers understand the existence of the tax ombudsman and its usefulness towards resolving complaints.

In the same section, the law requires the tax ombudsman to ensure the accessibility of the dispute resolution mechanism within the tax authority. Regulations have not so been issued to attest the modality of achieving this requirement. However, it is expected that, tax authority should from the time the tax ombudsman is appointed, ensure in every notice a taxpayer is informed on his right to complain if he is not satisfied with the service or with the modality he was served. There should also be special page within the official website of tax authority that explains procedures to file complaints.

Tanzania has opted to establish the executive tax ombudsman rather than the parliamentary tax ombudsman. The tax ombudsman office shall be under the supervision of the Ministry of Finance. It is in short, kept in a similar basket with tax authority, and tax revenue appeal machineries (Tax Revenue Appeal Board and Tax Revenue Appeal Tribunal). The proposed structure is that, Minister of Finance is empowered to appoint a tax ombudsman who ultimately reports to the appointing authority.[42] In principle, currently, Tanzania Revenue Authority (TRA) is an agent of the Ministry of Finance for assessing, collecting and accounting for government revenue and Tax Revenue Appeal Board and Tribunals are the agents of the same ministry for resolving tax disputes between

42 Tax Administration Act 2015, s 28B (1).

aggrieved taxpayers and TRA. The proposed structure of the tax ombudsman office seems to me as if the government has established another agent of the Ministry of Finance to handle and address complaints from the tax administration procedures or practices. While we are not departing from the truth that the tax ombudsman is a crucial body towards the promotion of tax justice, the current proposed structure of the dispute resolutions mechanism in principle raises doubt. One can always interpret that the Ministry of Finance is in one hand a Judge of its own assessment, and in another hand a mediator of its own malpractice. We could have argued differently had the proposed structure required the tax ombudsman reports directly to the minister responsible for justice.

The Tax Administration Act 2015 read together with Finance Act 2019, has expressly stipulated that the office of tax ombudsman must function independently and impartially without the interference of any institution, agency or department of the Government.[43] Obviously, this provision may raise hope to citizens believing that the Ombudsman office shall be free from interference. However, the experience from other countries reveals that it is practically impossible for ombudsman office to work without the interference from central governments or agents of the governments.[44] This assertion should be taken as alarm to Tanzania. The government or its agents should ensure the requirement of the law that promises taxpayers a competent and impartial ombudsman is honoured; there should be no interference of the functions and duties of the tax ombudsman. Tax ombudsman should be left alone to discharge his obligations; that will obviously increase trust from taxpayers.

The legal status of the proposed tax ombudsman office in Tanzania is another matter of attention. The recommendations and decisions of the ombudsman are not binding to taxpayers

43 Tax Administration Act 2015, s 28B (2).

44 Evgeny Finkel, op.cit. (fn 23) & Benny L Kass, We Can, Indeed, Fight City Hall: The Office and Concept of Ombudsman, American Bar Association Journal, 1967.

who were involved in a dispute;[45] probably it shall be binding to tax authority. It is probably because the law is silent on the matter. It has not been expressly stipulated whether the tax authority shall be bound by the decision of the tax ombudsman. Of course this has been a common style for executive ombudsman. They can simply issue recommendations. They have no powers to issues orders that requires the reverse of the act that earlier initiated the complaints.[46] It is indeed, a weak structure towards the promotion of the justice. It has been reported that in some countries there are incidences tax authorities even ignored the decisions and recommendations of the ombudsman.[47]

Generally, it has been over two years since the Finance Act 2019 introduced the office of Tax Ombudsman. No staff have been appointed, and no rule governing the operations of the tax ombudsman has been made so far. If rules or staffs have been kept in place, the same have not been communicated to the public. Therefore, the proper assessment on the extent in which the office of tax ombudsman in Tanzania cannot effectively be made. The prospect can however be projected. The office of tax ombudsman is expected to minimize malpractices of tax officers hence improve service delivery. This has been experienced in other tax jurisdiction that has already introduced the tax ombudsman such as Kenya and South Africa. The introduction of tax ombudsman in Tanzania is an opportunity to taxpayers to get chance of being fairly treated. Also, it may be a way to materialize the TRA taxpayers' charter which is by itself a non-binding document. The establishment of tax ombudsman office does not mean to legalize the taxpayers' charter; it may however give institute a platform to use taxpayers' charter as a reference. Currently, taxpayers charter is not a law, neither can it be used in the court of law as a reference on claiming those

45 Tax Administration Act 2015, s 28(4).

46 Evgeny Finkel, The Authoritarian Advantage of Horizontal Accountability: Ombudsmen in Poland and Russia, Comparative Politics, Vol. 44, No. 3, 2012.

47 Ibid.

rights stipulated within the taxpayers charter. The introduction of the tax ombudsman can then be believed to create a platform where a taxpayer can claim rights against tax officers who fail to honour rights promoted in the taxpayers' charter.

One among the aspects of tax justice is the accessibility of machinery that works towards the promotion of justice. Therefore, the introduction of tax ombudsman by itself may not solve tax justice if there is no proper and effective ways that may influence the accessibility of this body. Therefore, rules and regulations to be introduced should focus to institute tax justice. Rules should ensure easy and quick accessibility of the office of the tax ombudsman. At the same time rules should make taxpayers confident with function of the office of tax ombudsman. Taxpayer should not doubt on the bias-ness and impartiality of the tax ombudsman.

Nevertheless, the competence of tax ombudsman and other staff play major role towards promotion of tax justice. Rules and regulation to be introduced should focus on setting criteria for the availability of competent office holders who will work to resolve complaints. The qualifications, expertise and experience of office holders should be clearly stipulated.

5. Conclusion

The influence of tax ombudsman on the promotion and protection of tax justice cannot be underestimated. In several tax jurisdictions, the offices of tax ombudsman have resulted into the improvement of tax legislations, promotion of taxpayers' rights and in general the improvement of services rendered by tax authorities.[48] The same can be expected in Tanzania. Irrespective of the model of the tax ombudsman one can expect the tax ombudsman to be effective mechanism to control, oversee and even to limit the powers of tax authorities towards taxpayers. Earlier there was no such organ in Tanzania. Tanzanian taxpayers were always promised with

48 Ekaterina Zemskova op.cit. (fn 26).

quality services, but there was no easy mechanism to ensure the attainment of the promise. A taxpayer was bound to seek tax justice in the courts of law if matters are not subject to appeal as provided in the Tax Administration Act 2015 or Tax Revenue Appeal Act 2001. The introduction of the tax ombudsman then should be considered as relief to taxpayers. What is most required is seriousness on setting the rules and regulations governing the operation of the tax ombudsman. Rules should direct and lead towards the promotion of tax justice; this can largely be experienced if the much attention is vested to ensure the availability of qualified and independent staff, easy and effective mechanism for the accessibility of the tax ombudsman, and the fair and impartial decisions on resolving complaints. In general, the tax ombudsman offices are not useless.

Nevertheless, the motive of establishing the office of tax ombudsman in Tanzania should be aligned with the structure or model of the office of ombudsman itself. If the motive was simply to have an office that can be deemed to be the tax ombudsman, the current proposed model suffices the need. However, if the motive was to have a strong mechanism that ensures the promotion of tax justice and the enhancement of the service, the parliamentary tax ombudsman was the better option when it is compared with the proposed model (executive ombudsman). The parliamentary ombudsman has proven to be more independent and impartial than executive ombudsman. Otherwise, if the government requires the executive ombudsman model; the module should have been improved. The main concern should have been made to ensure the independency of the tax ombudsman. This could be done by separating the tax authority from tax ombudsman; currently, they are both supervised by the minister of finance. Therefore, even though they may be independent from each other but doubt may always exist because of the experience shows that most governments are not happy to be corrected; hence, there may be an intervention.

TRANSFER PRICING IN TANZANIA: A STATE OF THE ART

Dr. Helen B. Kiunsi*

Abstract

In an era of liberalization of economy, globalization and emergence of e-commerce trade and investment is enhanced. The result is increase in the number of cross border transactions by related multinationals companies. It is generally believed that such multinational companies aim at maximizing profit and minimize tax as a cost via transfer pricing. To address this concern both international and domestic laws adopted arm's length principle. In the last past six years, Tanzania amended and replaced transfer pricing provisions and rules in effort to address these concerns. Despite this legislative development transfer pricing in Tanzania remains less understood and transfer pricing challenges persist. In addition, literature on transfer pricing in Tanzania remains comparatively scant. Guided by doctrinal method, this article intends to provide an insight and understanding of the transfer pricing by providing nature, theories, origin and role of arm's length principle and current situation of transfer pricing laws in Tanzania. The contribution of this article shall be useful to legislators, Tax administrator, tax advisers, and taxpayers.

Key words: *Transfer pricing theories, concepts, arm's length principle, law*

*Lecturer, Faculty of Law, The Open University of Tanzania, P.O Box 23409, Dar es Salaam. Email: helen.kiunsi@out.ac.tz United Republic of Tanzania, *Investment Promotion policy*, Dar es Salaam, Government Printer, 1990.

1. *Introduction*

Taxation is fundamental for country's development as it enables any government to fund social and economic activities in the country. Tanzania is no exception. Both the fifth and sixth governments of Tanzania echoed more on need to strengthen collection of tax revenue to fund government projects, improving social services and reduce independence from donor countries. For example, for the past six years, government of Tanzania is providing free basic education, improved water services, electricity in the villages and apparent improved infrastructures. The critical question for Tanzania on what echoed is how to make taxation sustainable for country's development. One of the landmark decisions made by the government of Tanzania to increase tax revenue was a liberalization of the economy via Zanzibar resolution of 1986. The decision led to introduction of free market economy and abolition of socialism ideology in Tanzania. The free market economy requires the law of supply and demand to regulate production and labour as opposed to the government. It encourages entrepreneurialism and protect private sector. To embrace free market economy, Tanzania formulated new policies and laws to encourage private sector and in particular foreign investment. In addition, presence of various investment opportunities such as natural resources, cheap labour and market has been important catalyst for foreign investors operations in Tanzania. Favourable tax laws and political stability have also contributed in attracting foreign investors operations in the country.[1]

1 Ahamad M Burhan., 'Analysis of Multinational Corporations (MNCs) Stock in Tanzaa nia' (2013) Scholarly Journal of Business Administration, Vol. 3(1):1,1.

Most of foreign investors investing in Tanzania are subsidiary companies of parent companies operating outside Tanzania. In this context, the supply of goods and services is commonly done between them at a particular set of prices not necessarily market price known as transfer pricing. Since the setting of prices is done between related companies have advantage of setting prices to ensure profit maximization while minimizing cost including tax. In this way, related multinational corporations (MNCs) are likely to benefit from internal transactions by taking advantage of differences of tax laws between countries. The result is manipulation of transfer prices leading to tax revenue loss to host countries. For example, Tanzania lost Tanzania shillings between 829,361,861/= billion and 1,438,760,551,512/= trillion from 1998 to 2017 from mining sector due to tax avoidance schemes beyond legal requirement.[2] The increase of MNCs' operations whereby transfer pricing is enhanced has brought about enormous challenges in curbing transfer pricing manipulations in the country. The response to this concern is introduction of arm's length principle to regulate transfer pricing between related parties.

In Tanzania, arm's length principle was introduced in 2004 under Income Tax.[3] It is important to note that the arm's length principle is crafted based on Article 9 of the Organization for Economic Cooperation and Development under Model Tax Convention on Income and Capital (OECD Model) of 1995. Essentially, the arm's length principle requires goods and services between related parties be transferred at market price. Although Tanzania in not a signatory of the OECD Model is required to comply with

2 United Republic of Tanzania, *Second Presidential Mineral Committee Report*, (2017), 12.
3 S. 33.

international transfer pricing standards when dealing with foreign transactions between related parties. This is partly because the international institution such as International Monetary Fund and World Bank required developing countries to follow international transfer pricing standards in reforming transfer pricing laws.[4]

2. *Understanding transfer pricing and transfer price concepts*

Transfer pricing concepts is generally deemed to be controversial in the discourse of international taxation of related parties across borders. Traditionally, transfer pricing is a setting of prices of goods, services and intangibles between associated MNCs.[5] However, transfer pricing is viewed from different perspectives. On one side, transfer pricing is viewed as proper means of associated MNCs to maximize profit through manipulation of prices. On the other side it is viewed as proper means of obtaining government right share of tax through arm's length principle. Somehow, there are mixed views about transfer pricing between MNCs and revenue authorities on what constitutes a real transfer pricing. At the same time, some scholars tend to demarcate from the realm of transfer pricing by giving both positions as to when is a profit maximizing tool while reducing tax burden and when it is an important source of income to the government through revenue authority.

For those who views transfer pricing as profit maximization tool argues that MNCs always sees tax as cost which should be minimized.[6] The purpose is to boost shareholders values and

4 Helen Kiunsi 'Transfer Pricing in East Africa; Tanzania and Kenya in Comparative Perspective' (PhD thesis the Open University of Tanzania 2017) 131.

5 Jammie Elliot 'Managing International Transfer Pricing Policies: A Grounded Theoo ry Study (PhD Thesis, University of Glasgow 1999) 5.

6 UN 'Transfer Pricing: History, State of the Art, Perspectives' (Ad Hoc Group of Exx

increase company dividends.[7] The minimization of tax is achieved through avoiding tax beyond legal requirement by manipulating various intercompany transactions prices. Since MNCs operates across countries can maximize profits by eroding revenues of the countries by making the use of opportunities they have had along with globalization.[8] In *Glaxo Smithline and United States Government*[9] the court stated that "transfer pricing is practice meant to minimize United States taxable profits by overpaying foreign subsidiaries for product supplies". Likewise, in Tanzania various studies show that transfer pricing manipulation is one of the causes to revenue loss.[10] This indicates that both developed and developing countries have the same perception that transfer pricing indeed is a tool for tax minimization.

Pagan in refuting this view argues that the term transfer pricing is incorrectly used to mean in derogatory sense as a means by MNCs to deliberately reduce tax liability.[11] It is in this context the revenue authority sees transfer pricing as soft target with potential of producing huge revenue arising out of MNCs

perts on International Cooperation in Tax Matters, Tenth Meeting, Geneva, 10-14 September 2000).

7 Prem Sikka and Hugh Willmott 'The Dark Side of Transfer Pricing: Its Role in Tax Avoidance and Wealth Retentiveness' (2010), Critical Perspectives on Accounting 21 (4) 342.

8 Seçkin Arslan,'Importance of Transfer Pricing in Multinational Enterprises' in Marcel Meciar, Kerem Gökten, Ahmet Arif Eren (eds) Economic and Business Issues Retrospect and Prospect, IJOPEC Publication Ltd, 615-7 Baltmore Whar 7 London United Kingdom. Publication No: 2019/03 (2019) 391.

9 117. T.C. No. 1, United States Tax Court.

10 Curtis Mark and Prosper Ngowi, *The one Billion dollar question Revisited, How much Tanzania is losing in Potential Tax Revenue*, (2nd edn, Mkuki na Nyoka 2017) iii.

11 Pagan J.C., *Indication Future Policy in the Latest OECD Tax Force Report*., (1993) Bullet in for international fiscal Documentation, Vol. 47(4), 181,181-182.

transactions.[12] Indeed, not all MNCs use transfer pricing as tool for tax minimization because it is expensive, and it attracts extra expenses. Scholars argue that most MNCs transfer pricing practices assessed on compliance bases as required by the law.[13] In this context countries are likely to obtain the required tax while MNCs right profit.

The above discussion reveals that the different perception of the transfer pricing lay in its ability to provide multiple results when applied. First, may give the countries involved right share of tax as required by country's tax laws. Second, may provide right profit on part of MNCs in context of companies' objectives. Third, deny country right share of tax and MNCs right profit by been overtaxed.[14] MNCs may be at risk of being double taxed or pay no tax at all. The controversial of the term is exacerbated by the fact that transfer pricing is not a legal term but mathematical accounting economic oriented. Proofing any of the results from legal point of view may be challenging as it requires clear interplay between the process of setting prices and the law. This is because the setting of prices between associated parties is not necessarily reflecting a market price.

Transfer price is another term under spectrum of transfer pricing. Traditionally, it refers to price of goods and services charged between associated companies. Like Transfer pricing, the term transfer price is not defined under the law and it is deemed to

12 PWC, 'International Transfer Pricing 2013/14,' www.pwc.co/internationaltp, Accessed 28 December 2021.

13 K Klassen and P Lisowsky and D Mescall, 'Transfer Pricing: Strategies, Practices and Tax Minimization' (2017) Contemporary Accounting Research. 34 No. 1 (Spring 2017) 455,456.

14 Kiunsi (n5) 38.

be not a legal term. From legal perspective however, it refers to price charged between related parties at a market price obtained by using arms' length principle as required by transfer pricing laws.[15] However, arriving at market price specific methods and long procedure must be followed.

3. Literature review

The multiple results of transfer pricing application and complexities of methods to arrive at arm' length price has influenced scholarly writing in addressing such concerns. There is a lot of literature on concerns of transfer pricing globally and Tanzania in particular. However, for purpose of this article, this part is confined to Tanzania scholarly writing in establishing extent of coverage of the transfer pricing. Generally, transfer pricing problems in Tanzania are connected with the weakness of the tax laws and administration of transfer pricing. Kiunsi for example analyses transfer pricing in Tanzania and Kenya in comparative perspective. She points out loopholes of exiting section 33 of the Income Tax Act[16] and its transfer pricing rules in curbing transfer pricing manipulations. Such loopholes are likely to lead loss of revenue by government.[17] She argues that the enabling Act contains very limited provision and substantial part is provided in the Transfer pricing Rules. In addition, some provisions are not well articulated to enhance transfer pricing handling. From administration point of view, lack of comparable and understaffed experienced transfer pricing experts in the Tanzania revenue authority (TRA) to handle

15 Income Tax Act, s 33.

16 Revised Edition 2019.

17 Kiunsi (n5).

transfer pricing audit is another challenge.[18] Subscribing to this view, Kilumba concerns failure of the TRA to track activities giving rise to transfer pricing between related MNCs.[19] The author argues that there is a problem in the flow of information as results the TRA cannot track MNCs transfer pricing related transactions. The problem being caused by inadequate provisions of law on transfer pricing documentation requirement to enable TRA to track transfer pricing activities. She posits that although transfer pricing laws regulate transparency of information between related parties there is no solid system to obtain controlled transactions information between related MNCs.[20] Likewise, Curtis and Ngowi argue that implementation of transfer pricing rules is affected by wide range of economic factors such as lack of pricing variables and expertise in handling transfer pricing audits to establish compliance of arm's length price.[21]

Readhead while investigates barriers to implementation of transfer pricing rules in the extractive sector in Tanzania found legal and administrative challenges in implementing Transfer Pricing rules.[22] To address these concerns, she provides practical guidelines and approach to improve transfer pricing enforcement in mining sector. This is sought to be achieved by amending the transfer pricing

18 Ibid.

19 Roselyne Kiluma, 'Transfer Pricing in Tanzania: Regulating Foreign investors' Transs parency Obligation,' (LL.M) dissertation, University of Pretoria 2017).

20 Ibid.

21 Mark and Ngowi, (n11).

22 Alexandra Readhead, 'Transfer Pricing in the extractive Sector in Tanzania' (2016) Natural Resource Governance Institute http://www.resourcegoernance.org/sites/default/files/documents/nirg_tanzania_transfer-pricing -study.pdf accessed 28December 2021.

laws and human resource capacity building.[23] Similarly, Ossoro while investigates revenue from extractive industry in Acacia saga argues that one of the reasons for loss of revenue is transfer pricing manipulation.[24] The report recommends amendment of transfer laws to fill in legal gap. In addition, the Natural resource government institute study summarizes transfer pricing in mining sector and prevention of loss on income tax revenue. It argues that MNCs use transfer pricing to reduce taxable income. The taxable income is reduced by unlimited interest deduction despite existence of the arm's length. The paper suggests limiting interest deductions related party loans help to protect the taxable base and simplifying implementation of the transfer pricing.[25]

Luhende studies legal framework for preventing tax revenue leakage in oil and gas industry in Tanzania while explaining concepts of revenue leakage. The author points out transfer pricing in oil and gas industry as one of the major sources of tax revenue linkage.[26] He identifies relevant transactions subject to transfer pricing to include financial arrangements, managerial fees and services among others. The author suggests transfer pricing impact can be mitigated by putting legal and institutional mechanisms in auditing and verifying all transactions undertaken by international

23 ibid.

24 United Republic of Tanzania, (n3).

25 The Natural resource Governance Institute, Transfer Pricing in the mining sector: Preventing loss of income Tax Revenue, (2017) nrgi_primer_transfer-pricing.pdf (resourcegovernance.org) accessed 28 December 2021.

26 Boniphace Luhende, Towards a Legal Framework for Preventing Tax Revenue Leakk age in the Upstream Oil and Gas Industry in Tanzania: Analysis of the Concepts, Methods and Options Available in a Public Trusteeship Model of Natural Resource Holding, (PhD Thesis, University of Cape Town, 2017) 79.

oil companies.[27] Building up in his thesis Luhende summarizes transfer pricing in extractive industries in Tanzania.[28] In the article, he discusses arm's length principle as enshrined under Income tax Act, 2019 and Transfer Pricing Regulations of 2019. The author further explains arm's length principle under extractive sectoral legislation and Mining Development Agreements and Production Sharing Agreements. He argues that some of the sectorial laws are silent on arm's length principle.[29] The author provides pitfall of transfer pricing regime in extractive industries in Tanzania. He recommends amendment of both tax and sectoral laws to address risk of losing tax revenue from extractive industries through transfer mis-pricing.

Controller and Auditor General (CAG) in auditing TRA's performance on control over transfer pricing in Tanzania finds out various administrative loopholes leading to improper control over transfer pricing issues. The report, points out that TRA corporate plan does not adequately address transfer pricing controls. As a result, specific strategy for controlling transfer pricing is not in place. Consequently, risk-based planning for implementation of transfer control is inadequate and its implementation is incomplete. Lack of interdepartmental coordination and reliable data for comparability purposes adds to the existing problems. Accordingly, imperfect international coordination through double tax agreements and exchange of information agreement, lack of reliable information database for comparability analysis provides

27 Ibid, 81.

28 Boniphace Luhende, An overview of Transfer Pricing in extractive in Tanzania, East African Law Review, Vol 47 (1) 2020.

29 Ibid, 60

minimum conform in controlling transfer pricing.[30] Furthermore, insufficient financial and human resources, inadequate tools, lack of key performance indicators for monitoring implementation of transfer pricing incapacitates TRA to monitor key sectors adequately.[31] Generally, the CAG report addresses transfer pricing from audit perspective and legal issues are not addressed.

An overview of literature discussed reveals that most of them focus on transfer pricing problems in general or specific sector and solution suggested follows that pattern. The main argument is that the existing transfer pricing laws are not sufficiently addressing concerns of revenue loss through transfer pricing. The general theme is that transfer pricing is a means of wealth retention by associated MNCs. Finding literature that provide thorough review of transfer pricing provisions and how can lead to the realization of right share of revenue from transactions between associated parties is missing. To suggest legal solution, one must understand politics of setting prices between associated parties. This is because setting of prices between associated parties is based on mathematical, accounting, marketing and economic. In the process there is often no direct link with the law.

Traditionally, principle of setting of prices between associated parties originates from transfer pricing theories which all along regards tax as a cost that need to be avoided.[32] The response to this concern is establishment of arm's length principle to address and

30 National Audit Office, *Performance Audit Report on Control Over Transfer Pricing in Tanzania's Business Sector as Performed by Tanzania Revenue Authority* (2021) 52, (CAG Report).

31 Ibid, 18.

32 Economic and accounting theories of transfer pricing.

mitigate any transfer pricing malpractices. However, mitigation of such challenges depends on effective of transfer pricing laws and efficient of tax administrator on one hand. On the other hand, it depends on an insight understanding of transfer pricing laws by both tax administrators and taxpayers. Notably, the manipulation of transfer pricing has serious adverse impact to developing countries like Tanzania because most of investment are from developed or emerging economies and Tanzania is missing sound capacity to reciprocate investments in partner countries.

4. Transfer Pricing theories

As noted above, setting of prices between related parties is not purely law or legal oriented but a multidiscipline involving accounting, marketing economics, mathematical and tax. For that reason, existing transfer pricing theories follow that pattern. However, principles developed from such theories form an important part in developing transfer price law regulating associated parties commonly known as arm's length principle. Thus, the literature on transfer pricing often focus on two main strands of theories; profit maximization and resource allocation tool.

Profit maximization-based theories namely economic and accounting presents a framework for associated MNCs incentive for corporate profit maximization. Both theories require prices between two divisions of the same company be market price only if perfectly competitive market exists.[33] In absence of the perfectly

33 Jack Hirshleifer, 'On the Economics of Transfer Pricing' [1956] The Journal of Busiiness, Vol.29 172, 172 See also Robert S Kaplan, 'Advanced Management Accounting' (1982) Journal of Accounting and Economics Vol 4, issue 3,229.

competitive market the goods and services between them are transferred at marginal cost price of producing such goods and services.[34] This means goods and services between two divisions of the same company are transferred at a specified price in order to attain profit as required by the parent corporation. Under this theory both market and marginal cost are set by parent company and imposed to its division. This is influenced by company's management discretion powers depending on objective clause of their companies. The imposition of prices depends on geographical areas of operation, external reporting mechanism and standards set up by respective accounting bodies.[35] Consequently, divisions Managers are evaluated in terms of their performance in generating profit of the company.[36] Where managers cannot perform as required tend to conceal some information.[37] The concealment of information on part of managers seems to be foundations of transfer pricing manipulation whereby tax is an obvious target to be concealed. This is because manipulation of transfer pricing originates from concealment of information on part of managers who are afraid of being evaluated on the basis of their profit performance.

The minimization of cost including tax is one of the reasons for existence of MNCs. The transaction cost theory provides that company expand or source activities outside their home country

34 Hirshleifer (n30) 179.

35 M Talha and S S Alam and A Sallehhuddin, 'Transfer pricing and Taxation Implicaa tions Disclosure in Segmental Reporting: Malaysian Evidence', (2005) International Business &Economics Research Journal, Vol 4, Number 7, 31,31.

36 Hirshleifer (n30)

37 Avoseh Oluwaseun Olanrewaju., 'An Empirical Evaluation of the Advance Pricing Agreement Process in UK,' (PhD Thesis, University of Glasgow 2014) 52.

to minimize cost.[38] In this context the company is required to carry its function at less cost within the company instead of outsourcing the activities in the market.[39] However, carrying company's activities within one country poses fewer problems because all related companies are regulated by the same law. To the contrary, company's business operating across borders is likely to face more challenges. This is because they are regulated by different laws of host countries hence facing different tax rates, currency, registration requirement, and work permit to mention few. From MNCs perspective, the handling such issues increases cost of operation which should be solved by price. Such price must be set by decision maker who can control business of the company.[40] This means that transfer price of goods and services between related companies are determined by managers and not necessarily reflecting market. Consequently, company's' internal policies and rules are made to reduce cost against the market. This is contrary to the legal requirement which requires price of good service between related companies be market price.

Resource allocation theories suggest that transfer pricing is essentially a mechanism that determines allocation of resources within organization.[41] The mathematical programming and organization strategy theories presents that where related

38 PJ Buckley and M Casson, 'the Internalization Theory of Multinational Enterprises: Past, Present and Future' (2020) British Journal of Management, 31 (2) 239, 240.

39 Ronald Coase, 'The Nature of the Firm.' (1937) Economica Vol4. Issue 16, 386,390 https://doi.org/10.1111/j.1468-0335.1937.tb00002.x accessed 30 December 2021.

40 Jean-François Hennart, *A Theory of Multinational Enterprise* (Alan A Rugman ed, 2nd edn, OUP 2009), 50.

41 Laurie McAulay and Cyril Tomkins 'A Review of the Contemporary Transfer Price ing Literature with Recommendations for Future Research,'(1992) British Journal of Management, 3 101,

companies face constraints transfer price should solve such constraints. To them the main constraints is maximization of profit. Others are solving performance evaluation problems of division managers[42] and allocation of resources. Thus, transfer pricing in a controlled transaction should provide solution in presence or absent of perfect competitive external market.[43] Like cost minimized theorists, the resource allocation theories aims at using transfer pricing to maximizing profit of a company and minimizing cost between related companies.

The discussion on transfer pricing theories suggests that essentially are developed from related MNCs perspective. For that reason, both profit maximization and resources allocation theories embedded in maximization of profit and minimization of cost of the company. In context of related MNCs paying tax is a cost that needs to be minimized. The theories also focus on solving company's problems such as evaluation performance and resource allocation within the company in which division managers are evaluated. In case division managers fail to meet the set company goals, temptations of concealing relevant information raises. This suggests potentials for price manipulations of goods and services transferred between divisions of the same company in maximizing profit. Hence, transfer pricing development all along seems to favour MNCs interests than countries where they operate. This probably explains why transfer pricing is deemed to be a tool for profit maximization.

42 David Solomans, *Divisional Performance Measurement and Control,* (*Richard* D. Irwin, inc 1965) 174.

43 Joan K Myers and Mary K Collins, 'Historical Review of Transfer Pricing: A dresss ing Goal Congruence within the Organization', (ASBBS Annual Conference, Vol.18 Number 1, Las Vegas February 2011), 6.

To the contrary, host countries where related MNCs operates would definitely wish to benefit from related MNCs operations. In this context, host countries would prefer prices be determined by market forces where related companies have no control. In this way host countries would be able to obtain right share of tax according to the tax laws of the host country on one hand. On the other hand, related MNCs would obtain their profit without necessarily manipulation of prices. From legal point of view, the transaction between related companies must be regulated by the law. It is in this context the arm's length principle came into play to regulated controlled transactions.

The arms' length principle is preferred because it takes in to account transfer pricing theories which requires goods be transferred at a market price when competitive perfect market exist and counteract it by regulating it. The competitive perfect market fits well with arms' length whereby price of goods and services between related companies made at market price are considered in compliance with the law.[44] The arm's length also considers separate entity principle as required by transfer pricing theories in which division managers are evaluated separately in generating profit. This requirement is fits well with arm's length principle which requires related entities be treated separately in process of arriving at market price.[45] Accordingly, the principle considers functional analysis and risk assumed in comparing different market situations. It is from this comparison procedures methods to arrive at arm's length price are established. In this way, the arms' length takes aboard interest of MNCs and counteract

44 Kiunsi (n5),57.

45 Income Tax Act, 2019, s33 and Article 9 of OECD and UN Models respectively.

by regulating their controlled transactions on one hand. On the other hand, host countries are assured of benefiting from MNCs operations by obtaining tax as required by the law. Moreover, in absence of perfect competitive market, the arm's length provides le way to be followed.

5. Transfer pricing legal framework in Tanzania

A view on the effect of transfer pricing focusing on maximizing profit and minimization of tax brought challenges in handling transfer pricing problems. For this reason, tax administration has potential role to detect transfer pricing malpractices. However, this requires insight understanding of transfer pricing regulations and its interaction with taxpayers. This part provides an insight of provision of the law governing transfer of goods and services between related parties. Historically, transfer pricing provision introduced in Tanzania in 2004 was due to two main reasons. First, attract foreign investors in order to increase tax revenue.[46] Second, is to give effect provision of the constitution requirement that all taxes be imposed in accordance with requirement of the law.[47] In Tanzania transfer pricing are governed by the Income tax Act, transfer pricing rules and Tax administration Act.

Principles of taxing related parties for transfer pricing purposed

The Income Tax Act 2019 (ITA) is principal legislation governing transfer pricing between associated parties. The ITA sets arm's length principle which states; -

46 Zanzibar resolution.

47 Constitution of United Republic of Tanzania 1977, Art. 138.

> In any arrangement between persons who are associates, the person shall quantify, apportion and allocate amounts to be included or deducted in calculating income between the persons as is necessary to reflect the total income or tax payable that would have arisen for them if the arrangement had been conducted at arm's length.[48]

Essentially, the principle requires price charged between associated parties commonly known as controlled price be the same as price charged between unrelated parties operating in a free market.[49] At first instance, the arms' length principle regulates transfer pricing in context of market price whereby controlled price is compared with markets price regulated by market forces under similar circumstances. Secondly, it provides separate entity rule whereby related parties are treated separately when determining transfer pricing. Thirdly, it takes in to account function analysis based on comparison of different situations in the market, function performed, and risk assumed. Forth, it lays special method in arriving at arm's length price. The policy behind arm's length is to counter any manipulation of prices between associates which are detrimental to tax base. It is in this context taxpayers must abide with arm's length principle. In case a taxpayer fails to comply with arms' length requirement upon audit, the law empowers the revenue authority to adjust prices to reflect arm's length.[50]

The arm's length principle applies to any arrangement between associates. The ITA defines arrangement to include action,

48 S. 33(1).

49 Transfer Ricing Rules 2018, Reg 3.

50 ITA, s33 (2).

agreement, course of conduct, dealing, promise, transaction, understanding or undertaking, whether express or implied whether enforceable by legal proceedings and whether unilateral or involving over one person.[51] However, this provision does not specifically govern transfer pricing but general arrangements in context of income tax and is relevant to transfer pricing arrangements. Notably, arrangements specifically in the context of transfer pricing is provided under rule 3 of the Transfer pricing Rules, 2018 to mean 'arrangement, understanding, agreement or practice including dealings between branch and another part of the person enforceable or not enforceable by the law'.

Arrangement for transfer pricing pre-supposes arrangement of parties to conduct business by buying or selling goods and services whether intangible or tangible in their daily dealings whether enforceable. This presuppose the products transacted out be clearly stated or interpreted in context of law to bring aboard the context of goods and services in transfer pricing in aligning with arm's length principle. However, neither s. 33 of the ITA or TP Rules define goods and services for transfer pricing purposes or clearly state transactions relevant for transfer pricing purposes.

Although the law does not provide harmonized provisions on relevant transactions for transfer pricing, the ITA provides Transactions in which arm's length principle is applicable. These are income splitting between associated parties,[52] mining arrangement between mining operators, mineral rights or processing, smelting, and renting.[53] Others are transactions between a separate

51 S. 3.

52 S.34.

53 S. 65 B (5).

petroleum rights and other activities as provided under s. 65K (5). Likewise, TP Rules also provides for intergroup services, financing and intangibles applicable to arms' length for transfer pricing purposes.[54] However, Transactions under TP rules are not provided in the enabling Act the ITA. Principally, TP Rules are subsidiary legislation and may not override substantive law. It is thus argued that transactions subject to arm's length under s.33 falls short in relevant arrangements for transfer pricing purposes. The relevant arrangement provided in the Act are scattered and it lacks safe harbour provision to cover any transactions between associated parties when transaction is not covered clearly under the ITA.

Associated parties

The scope of application for transfer pricing provisions are limited to taxation of associate parties both personal and legal entities. An entity is regarded associates if directly or through one or more interposed entities controls or may benefit from fifty percent or more of the rights to income or capital or voting power of the entity.[55] Under the ITA all parties are regarded associated unless the commissioner is satisfied that it is not reasonable to expect that either part will act in accordance with the intention of the other.[56] Apart from personal and entities, the permanent establishment and its headquarter are associated parties for transfer pricing purposes.[57]

54 TP Rules 2018, rr 10, 11, 12.

55 ITA 2019, s.3.

56 Ibid.

57 TP Rules 2018, rr 3 and 8(b).

The definition of the associated parties for transfer pricing as embedded under s.3 may bring interpretation and implementation problems. First, while entity is defined to include partnership, trust or corporation, associate aspect of partnership is defined alone as if it is separate from entity.[58] If associated parties is interpreted in context of definition of associates under s.3 (i) (bb) read together with definition of an entity is regard the person as associated for transfer pricing purposes. However, rules governing corporation and partnership are different and combining the two may bring challenges. Secondly, the law vests commissioner with discretion powers in deciding extent of relationship of associated parties without clear guidelines in establishing intention of the parties. Although the guidelines require the associates to document their intentions including agreements it is not clear whether what is reduced in writing under the agreements amounts to intention of the associates. Third, the fifty percent threshold control or voting power is high for transfer pricing purposes as it leaves out considerable percentage of rights to income, capital and voting power likely to affect transfer pricing.

Methods to arrive at arm's length price

Arriving at arm's length price requires special methods to be followed. Notably, the specific conditions of setting transfer price must be interpreted within the context of arm's length principle. The TP Rules provides six methods to arrive at arm length price.[59] These are comparable uncontrolled price, resale price, and cost-plus methods commonly known as traditional methods. Other methods are transactional net margin method and profit split.

58 ITA 2019 s.3 (b).

59 R. 5

These methods are applicable to all transactions unless the commissioner prescribes otherwise. Out of six methods, five are replica of OECD and UN guidelines 2017.[60] These five methods are not very exhaustive and have no ranking of methods used. Rule. 5(2) requires associated parties to apply first traditional transaction methods.

The first method is comparable uncontrolled price (CUP) commonly known as traditional method as provided under Rule 5(1) (a) of the TP Rules. Rule 3 defines CUP as, 'a method whereby the price charged in a controlled transaction is compared with price charged in a comparable uncontrolled transaction'. Under this method the price charged for goods, property or services transferred between associated entities to the price charged for property, goods or services transferred in a comparable uncontrolled transaction in analogous circumstances. Then a difference between the two prices may be a sign that the conditions of the commercial and financial relations of the associates' persons are not arm's length.[61] Essentially, the method requires a taxpayer first to identify all the differences between product and that of an independent person. Then determine whether the differences identified have material effect on the price. If there is material effect on the price, the associate parties are required adjust their prices to reflect market prices. The method is reliable only if the taxpayer has access to the quality of comparable data. In context of CUP the transaction is comparable if the differences between the transactions compared do not have effect on the material effect on

60 United Nations Practical Manual of Transfer Pricing for Developing Countries 2017 and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration 2017.

61 The TRA Transfer Pricing Guidelines, 2020, Para 7.3.

the price. Secondly, change can be made to eliminate the material effect of any differences. Hence, the price under CUP is said to be at arm's length is the same with the price or is within the range of prices of the uncontrolled transactions. However, the method is most reliable only on availability of the comparable data.

CUP is most appropriate for commodity transactions where the products are sold in the controlled and uncontrolled transactions of similar type, quality, quantity happening at almost same time under similar condition. However, the limitation of this method is that it is difficult to find comparable uncontrolled transactions that meet strict comparability criteria of the cup method. Making change can reduce the reliability and accuracy of taxpayer analysis using the CUP method.

The second method is resale price (RPM) as provided under Rule 5(1) h of the TP Rules. RPM is, 'a method compares resale margin of purchaser of property in controlled transaction earn from reselling the property in an uncontrolled transaction with the resale margin earned in comparable uncontrolled purchases and resale transactions'.[62] This method governs associated parties to determine transfer pricing by using margins. It places responsibility to taxpayer to first determine gross margin that is gross profit divided by net sales earned by distributor on the resale of product purchased from independent suppliers. To determine arm's length price resale price is reduced by resale profit margin after taking in to account function performed, asset used risk assumed.[63] The margin obtained is compared with margin earned by other independent enterprises performing similar functions

62 R. 3.

63 TRA Guidelines, 2020 (n60) para 7.12.

bearing risks and assets used.[64] Where the margin of associated parties found similar to that of the independent enterprises, margin is then added to initial price between associated parties to achieve the arm's length price. Under RPM, the margin is comparable if no differences in transactions which will materially affect the gross profit margin.

The third method warranting determination of transfer price is cost plus (CPM). The CPM is defined as:

> [A] Method which compares markups on the cost directly or indirectly incurred in the light of function performed, asset used and risk assumed in the supply of property or services in a controlled transaction with mark up of those costs directly or indirectly incurred in the supply of property or services in comparable controlled transaction.[65]

In determining arm's length mark up two approaches are used. First, mark up made by associated parties are compared with that of independent enterprises. Secondly, Comparison of markup earned by independent enterprises performed functions and risks incurred to performed functions similar to those of associated parties. For purpose of CPM the transaction is comparable to a controlled transaction if none of the difference between the transactions compared materially affect the cost plus markup in the open market. Likewise, transaction is comparable if reasonably accurate change can be made to eliminate the material effects of such differences.[66] The transfer price between associates is the cost of goods sold plus arm's length profit mark up.

64 Ibid para 7.13.

65 TP Rules 2020, r.3.

66 TRA Guidelines, para .7.18.

The CPM is more appropriate in semi-finished goods sold, services provided and in joint facility agreements of long-term supply arrangements between associated parties.[67] This is because comparable are always available because internal costs are readily available between associates. However, it focuses only on associated party's manufacturer giving no room to control manufacturer's cost. For that reason, there is weak link between the level of costs and market price which is likely to affect profit mark-ups.[68]

The fourth is transaction net margin method (TNMM) which compares net profit margin relative to the appropriate base including costs, sales or assets that a taxpayer from controlled transaction with the net profit margin earned in comparable uncontrolled transaction under similar conditions.[69] The comparison is made between net margin earned by one division of associated party with net margin earned between independent parties operating under similar circumstances. The method examines profit level indicator of the associated party compared with the profit level indicator of comparable independent enterprises.[70] The essential condition for this method to apply is that the structure of associated and independent enterprises must be similar.[71] Although the TNMM method does not employ complex analysis net margins are likely to be affected and it is difficult to get reliable information. This method is considered being used as a last resort.

67 Ibid para 7.16.
68 Kiunsi (n5) 109.
69 TP Rules, r.3
70 TRA Guidelines, para 7.20.
71 Ibid, para 7.23

The fifth method prescribe under the TP Rules is profit spilt method. This is a method which compares division of profit and loss achieved in controlled transaction with profit and loss independent enterprises of comparable uncontrolled transaction.[72] For this method to apply, it requires the associate parties to first identify earned aggregated profit and split among divisions based of relative value of each division contribution based on function performed, risk assumed and asset used by each associate. In determining the arm's length profit, two approaches are used namely residual and contribution analysis. The former entails each of the parties to the transaction is assigned a portion of profit according to the basic function performed. The residual profit is then divided between parties based on the basis of their economic contribution.[73] The latter entails combined operating profit before interest and tax divided between the parties based on the basis of the relative contribution of each party's combined gross profit.[74] The split profit of an associate is then compared with split profit of independent enterprise. If the split profit is equal to profit that would have been expected in independent transactions the profit is said to be at arm's length.

The sixth method not covered under OECD and UN guidelines requires a taxpayer to apply any other method as may be prescribed by the commissioner.[75] This method provides legal ground for associated parties to embark on any other method prescribed by the commissioner. However, condition for applying this method is only where traditional and profit transaction methods have

72 TP Rules. r.3

73 TRA Guidelines para7.31 (i).

74 Ibid, para 7.31 (ii).

75 R 5 (1) (f).

failed to yield arm's length results and that the taxpayer must first apply all other methods.[76]Unfortunately the law does not provide and further guidelines as to what constitute other methods. Discussion on transfer methods reveals that, these methods are not exactly science. The right arm's length price does not depend on specific price obtained but on range of prices complemented by reasonable adjustments. Deciding the right arm's length price interplay between the arm's length principle and accounting must be clearly portrayed to show compliance of the law.

Transfer pricing comparability Factors

The discussion above reveals that in selecting an appropriate method in determining transfer pricing, associated parties are required determine whether two or more transactions are economically comparable to yield arm's length results. In this context five factors must be considered of the TP Rules provides five factors to be considered. These are characteristics of the property or services, functions performed, contractual terms, economic circumstances, and business strategies.[77] Rule 2 (a-c) provides that uncontrolled and controlled transactions are sufficiently similar to provide a reliable measures of arm's length result. None of the differences in respect of comparability factors are likely to affect the price or cost of charged or paid or profit arising out of those transactions in an open market. Third, reasonably accurate change can be made to eliminate the material effect of such differences. The rules further require results of controlled transaction compared shall be based on year of income as provided under rule 6 (3).

76 R. 5(6).

77 TP Rules r. 6 (1) (a-e).

The rule empowers the commissioner upon review under rule 6 (4) to reject whole or party of the controlled analysis of the controlled transactions make change or make his own analysis where it seems fit to do so. In absence of domestic comparable data external comparable data may be used Rule 6(5). Where comparability is conducted on over four comparable data the arms' length shall be data point between thirty fifth and sixth percentage. However, where four or less comparable data used the average of the data shall be arm's length results. One of the shortcomings of the comparability analysis is that the law vests discretional powers to commissioner to reject wholly comparability analysis of controlled transaction and make its own analysis where deems fit. Such discretion powers sometimes depend on the will of the commissioner and sometimes are likely to injure justice in the tax. Transfer pricing comparability analysis is long based on mathematical accounting related methods without direct connection to tax law. This brings uncertainty on direct application of the law. The analysis by the commissioner is done by using data providers by taxpayers. Ordinarily, the taxpayer is in good position to determine the price than commissioner who relies on taxpayer's documentation. The role of commissioner should be verifying whether the law complied. In additional proper comparability for transfer pricing presuppose presence of support tools for transfer pricing unit. This is necessary in accessing reliable and verifiable information. This is sought to be achieved by putting in place mechanisms of obtains such information backed by the law.

Transfer pricing documentation

Transfer pricing documentation is a key in enhancing transparency for tax administrator in reducing administration costs on one hand. On the other hand, keeping transfer pricing documentation is important in reducing compliance costs to taxpayers. This thought to be achieved by having in place aggressive transfer pricing documentation requirement. The ITA is silent on mandatory transfer pricing documentation requirement.[78] The general documentation requirement for tax purposes are provided under the Tax administration Act,2019.[79] Specific documentation requirement is provided under Rule 7 (3)(i) (a- k) of the TP Rules which makes mandatory preparation of contemporaneous transfer pricing documentation.) In particular, the rules require a taxpayer whose threshold is above ten billion shillings to file such documents with tax return for the particular year of income. [80]

These documentation requirements under TP Rules presupposed to be compiled in a single document. The bulkiness of information contained likely to bring inconveniences on tax administration part in verifying compliance of the law in transfer pricing audit. This is contrary to international standards and guidance on documentation and information reporting which requires submission of three sets of files to tax administrator of the country. These are master file containing global business operations and transfer pricing policies, local file containing materials related to transactions and transfer pricing analysis among other things and country by country file containing information on pre-paid

78 S.33 (1).

79 Ss. 35 and 37.

80 R.7(3).

taxes, number of employees capital in each jurisdiction they operate.[81] Although the TP rules are interpreted consistently with international instruments eventually it is the domestic law to be applied.[82]

Transfer pricing in the e- commerce

The rapid and expansive of information and communication technology has had deep trade and investment impact resulting in significant changes in the business operations. The business implications include carrying out commercial activities through electronic means whereby sale or purchase of goods and services are done through electronic means by using internet in a cyber space with little or no physical activities without geographical borders commonly known as electronic commerce.[83] Consequently, the traditional ways of doing business profoundly changed by electronic commerce affected taxation among other things. The e-commerce implications in tax are broader affecting taxation, tax administration and policy issues.[84] Taxation of related companies is among the affected areas. For example, the portion of profit between related MNCs which taxed by arm's length is affected. The absence of geographical boundaries raises difficulties in the application of transfer pricing methods. This is because assumed

81 Base Erosion and Profit Shifting Project, 2013 Action 13.

82 TP Rules, r. 9.

83 Annet Wanyana Oguttu and Sebo Tladi, 'The Challenges E-Commerce Poses to the Determination of a Taxable Presence: The Permanent Establishment' Concept Analyzed from a South African Perspective' (2009) Journal of International Commercial Law and Technology, Vol. 4 (3), 213,216.

84 OECD, (2015), *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report*, OECD/G20
Base Erosion and Profit Shifting Project, OECD Publishing, Paris. P. 55 http://dx.doi.org/10.1787/9789264241046-en accessed 20 August 2021.

functions and risks may be deleted or altered by the data controller if wishes so making difficulty to obtain comparables data to arrive at market price.[85] Taxation of permanent establishment established online is another challenge. Tax jurisdiction on residence and sources principles are also challenged. Under e commerce, terms and conditions of the contract between related parties can be easily altered or deleted by data controller without being detected by the tax administrator.[86]

The technology has affected both developed and developing countries, and Tanzania is no exception. The main concern for Tanzania however is how the existing transfer pricing provisions can be applied in transfer pricing in a controlled transaction under e commerce on one hand. On the other hand, how the Tanzania Revenue Authority as tax administrator can administer e commerce based controlled transactions backed by the law. A highlight on transfer pricing provisions discussed above shows that for a great extent the existing transfer pricing provisions are based on traditional ways of doing business. Few amendments made do not suffice in addressing such concerns. Although Tanzania enacted various electronic related laws, they are not directly related to transfer pricing matters under e commerce.

TP dispute resolution mechanisms

Transfer pricing disputes are not exception to other tax disputes. They normally follow procedures and mechanisms prescribed by the tax laws of a particular country. In Tanzania any tax dispute is taken to the commissioner general in first instance. Where a

85 Annet Wanyana Oguttu , 'Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts, (PhD Thesis, University of South Africa, 2007) 48.

86 Ibid

taxpayer is aggrieved with the decision of commissioner general, the matter is taken to ombudsman, then to the revenue appeal Board, Revenue appeal Tribunal, High court and court of appeal for final decision.[87] All disputes passing through prescribed mechanisms are those which actually has had happened. The purpose therefore is to solve the existing dispute at hand. However, the complications involved in solving transfer pricing disputes including transfer pricing audit challenges is long period taken to solve such disputes.[88]

The problems of solving ex post transfer pricing disputes have affected both taxpayers and revenue authorities. To reduce such problems, advance pricing agreement (APA) came into play to address dispute before it actually happened. The APA is 'an arrangement that determines before controlled transaction an appropriate set of criteria for the determination of transfer pricing over a fixed period'.[89] It is a formal agreement between tax authority and MNCs in which both parties jointly agrees on the MNCs transfer pricing methods estimated tax income and payment for a fixed period.[90] The purpose is to reduce likelihood of tax dispute because it is designed as a neutral tax procedure meant to improve overall process of determining taxable income between related MNCs.[91] While APAs are likely to solve taxable income ex post they are likely to be misused by both parties in

87 Tax Administration Act, 2019 ss 50-53.

88 Lorain Eden and William Byrnes, 'Transfer Pricing and State Aid, the Unintended Consequences of Advance Pricing agreements', Transnational Corporations, (2018) Vol. 25, 9, 14.

89 TP Rules, r. 3.

90 Eden and Byrnes (n87), 9.

91 Ibid, 10.

favour of the MNCs. In European Union for example, it was established that law was stretched to provide a tax benefit to a specific MNC by artificially lowering its taxable profits and its tax payments.[92] One of the reasons is that negotiation are done one on one bargains between revenue authority and MNCs and no information made publicly available on agreement.[93] In this context, administration of APAs requires both revenue authority and taxpayer insight understanding of unintended results of APA and its interplay with law.

The interplay between APA and law is that APA entered must be made consistent with arms' length principle.[94] Although to date Tanzania has concluded none APA, it is likely one day it might conclude. In Tanzania APA are provided under TP rules the ITA is silence. The TP Rules basically provides procedures for taxpayer to follow. The MNC starts the process by requesting to the Tanzania revenue authority. The request describes activities of controlled transactions, proposed duration of the agreement, set comparable factors, appropriate transfer pricing methods and countries in which the company operates.[95] This preceded by several pre-filing meeting before both parties agrees to pursue the APA or not.[96] Where the TRA accept the application, the commissioner may agree with person either alone or with competent authorities of country or countries of associated companies.[97] The commissioner is also empowered to reject, or modify or accept the proposal as

92 Ibid.

93 Ibid, 11

94 ITA 2019, s.33 and TP Rules 2018, r.4.

95 TP Rules 2018, r.13.

96 TRA Guidelines paras 16.17

97 TP Rules 2018, r 13(6).

provided under r.4. Most importantly, transfer pricing change to controlled transaction covered under APA upon agreement is not allowed.[98] The agreed APA needs review after every five years. In case of default on part of taxpayers, the TRA reserves the right to terminate as provided under rule 9 and 11, respectively.

For TRA to Conclude APA with an MNC presuppose due diligence search of relevant information of expected future controlled transactions. The process includes review of documents submitted by taxpayer and additional documents and site visits where applicable. The TRA also will be required to develop its own functional analysis and comparable to compare with document submitted by the taxpayer. Such analysis ought to help the TRA to decide whether to accept, modify, or reject. This requires sufficient financial and human resource capacity to handle. Unfortunately, the TRA transfer pricing unit is understaffed with inadequate financial resources.[99] This probably explains why not any APA has been concluded in Tanzania seventeen years down the lane since introduction of APA. In context of TRA once the agreement is reached both parties will meet within 30 days details and implementation of the agreement. This presuppose an agreement on relevant facts and circumstances, application agreed transfer pricing methods for monitoring purposes. However, since there is no any APA concluded in Tanzania, it is difficult to establish its implementation.

6. Conclusion

98 Ibid, r.13(7).

99 CAG Report (n27), 18.

The increase of tax revenue via MNCs operations may be difficult without legal compliance. Although there is positive development on transfer pricing law under verifying the taxable income is still a challenge. This is because the clear interplay between the law and politics of setting prices of controlled transactions is still missing. The issues surrounding transfer pricing is compliance on one hand and on the other remains less understood. It is recommended that transfer pricing control should be tacked from legal, accounting, and administrative point of view. From legal point of view amendment of the law to address concerns raised may be considered. From administrative point of view, capacity building to TRA staff, human and financial resources should be improved. In this way, TRA may be able to reduce manipulation of pricing hence increase revenue from MNCs operations necessary for country's sustainable development.

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