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ABBREVIATIONS

ACCR - Alternative Criminal Charge Resolution

ADR - Alternative Dispute Resolution

AG - Attorney General

AAT - Administrative Appeals Tribunal

CCTV - .Closed Circuit Television

CPA - Criminal Procedure Act

DCI - Director of Criminal Investigation

DPP - Director of Public Prosecution

EMPL - Extra Mural Penal Labour

EAC - East African Community

HAT - Housing Appeals Tribunal

ICTR - International Criminal Tribunal for Rwanda

PCB - Prevention of Corruption Bureau

PGO - Police General Orders

PSO - Prison Standing Orders

TLR - Tanzania Law Reports

US - United States of America

LIST OF CASES.

LIST OF LEGISLATION

ADVOCATES ORDINANCE, 1955

ARBITRATION ORDINANCE,1931

CRIMINAL PROCEDURE ACT, 1985

MAGISTRATES COURTS ACT, 1984

MINIMUM SENTENCES ACT, 1972

POLICE GENERAL ORDERS

PRISONS ACT No.34 1967

PRISONS STANDING ORDERS

PREVENTION OF CORRUPTION ACT, NO 16, 1971

PROBATION OF OFFENDERS ORDINANCE ,CAP 247

REGIONAL HOUSING TRIBUNAL AND HOUSING APPEALS TRIBUNAL ACT NO 17/1984

THE POLICE FORCE ORDINANCE, CAP, 322

THE PAROLE BOARDS ACT, 1994

TANGANYIKA LAW SOCIETY ORDINANCE, CAP 344

THE PENAL CODE,CAP 16

WARD TRIBUNALS Act No. 1985

THE FLOW OF JUSTICE IN TANZANIA

CHAPTER ONE

1.0 INTRODUCTION

1.1 MANDATE

1.2 The Law Reform Commission of Tanzania was established by the Law Reform Commission Act, no.11 of 1980. Under this law the Commission is required to take and keep under review all Laws of the United Republic with a view to its systematic development and reform.[1] In order to undertake this gigantic task the Commission has in place a strategic plan, based mainly on the Public Service Mission and Vision as well as the Nation's Development Vision 2025. In the list of priorities for the Commission work the improvement of "the flow of justice" has been found to be a subject of immense importance since it encompasses the whole society of Tanzania. It is common knowledge that the various laws regulating lives of Tanzanians have not had much change. It is obvious, however, that all Justice Systems of the World cannot remain static. They have to change to suit the current circumstances for the better of the citizens of each country. It is with the above in mind that the Commission has found it fit to examine, among other things, the Justice System of Mainland Tanzania.

1.3 OBJECTIVE

1.3.1 On this topic of Flow of Justice, this is what the Hon. H. Bakari Mwapachu, Minister for Justice and Constitutional Affairs has said, "It is a cardinal principle of the Constitution of the United Republic of Tanzania to unflinchingly uphold the rule of law. In a developing state like ours, this can be secured only if there is established and maintained in the country an efficient, fair and transparent system for the administration of law and justice. Such a system is crucial for securing and perpetuating an enabling environment for the peaceful and dynamic, social and political development and prosperity of the nation. This is the main reason why the Government is unequivocally committed to institute and expeditiously execute the reform and development of the legal and judicial services in the country, and to rapidly enhance access of these services to all people without discrimination of any sort."[2]

[1] Section 4 of Act no. 11 of 1980

[2] A vision of Accessible and Timely Justice for All in the New Millennium.

1.4 Statement of the Problem

1.4.1 We are all aware of the many problems facing us in the legal and justice system. Among them are, "(a) inordinate delays in resolving disputes and dispensing justice, (b) limited access to justice and legal services and justice for the majority of our people, (c) corruption and other unethical conduct of officials in the legal system, (d) the system is, in significant ways outdated and not responsive to the emerging social, political, economic and technological developments, (e) limited public trust in the legal system, (f) low competence and morale of the public sector's legal personnel, (g) Inadequate numbers of professionally trained personnel and (h) poor provision and maintenance of the work environment for most public institutions in the legal sector."[3] The shared mission of all institutions in the legal sector is: The Development of social justice, equality and rule of law through quality and accessible legal services.[4]

1.5 Mission and Vision

1.5.1 The shared mission is underpinned by the following values and principles:[5]

1.5.2 Principles

1. Rule of Law
2. Fundamental Human Rights, Equality and Social Justice.
3. Equality of All before the Law

1.5.3 Values

1. Ethical and Fair conduct by Law Enforcement Officers.
2. Accessibility and Affordability of Legal Services for All citizens.
3. Efficient and timely resolution of disputes
4. Transparency and Accountability.

1.6 The vision that will inspire and sustain the reform and development of the legal and judicial system in the 21st Century and beyond will be: "Accessible and timely Justice for All." This vision is characterised by:

- Speedy dispensation of Justice;
- Affordability and access to justice for all social groups;
- Integrity and professionalism of legal officers.

[3] Ibid. 6.
[4] Op cit.
[5] Ibid

1.7 "Justice delayed is justice denied" is an age-old adage conceptually this saying is linked to the flow of justice in any country. It is the flow of justice that would determine the delayed resolution or otherwise of court cases. It is therefore imperative for law reformers to review the justice system in their respective countries after every now and then. The main objective for undertaking this mammoth project is to lay a strong framework for the improvement of the performance of institutions involved in the delivery of justice, and thereby promoting fairness, cost-effectiveness, accessibility and progressiveness in the Tanzania legal system. The guiding instruments in this task will be the mission and vision as described above. If we can provide for all that is contained in the mission we will have every reason to feel satisfied because then such a system of justice will be able to catapult, as it were, the whole nation forward towards happiness, prosperity and success.

1.8 Scope of the Study

1.8.1 The Commission had three goals to achieve by undertaking this project. One is identification of trends; that is to say, to identify the process of justice from the commission of a crime to the stage of sentencing and sanctions or acquittal. For civil matters it will be from the time a matter is brought to court to the stage of judgment and decree. Secondly, it is to identify the barriers that slow down or impede the flow of justice in criminal and civil matters. Finally the Commission will have to review the legal framework of the institutions involved and to come up with a remedy for success. The views expressed by the public during our visits to the regions will be of great assistance in giving us solutions to all three goals.

1.9 The expected outputs of this undertaking will in the long run be what are contained in the vision which is mentioned above namely, accessible and timely Justice for All. This is our vision. It may be difficult to get to it but any success which leads us near to our vision will be a great achievement for the Commission.

1.10 Methodology

1.10.1 The main activity areas will be covered in this project in the following order. First a review of the current state of the law in respect of the administration of law and the dispensation of justice will be carried out. Secondly we will look at comparative systems of justice to try and discover what is lacking in our system. Then the data collected by the Commission from the public on what is wrong with our system and how

to improve it will be analysed. This data will be useful in guiding the Commission on what ideas are practical and acceptable to the public. Finally proposals for improvement of the law and the dispensation of justice will be made. Such proposals will have to pass the test of practicability, acceptability and reasonableness.

CHAPTER TWO

2.0 CURRENT STATE OF THE LAW

2.1 **A review of the** current state of the law will have to touch on at least four areas which are:

1. The Criminal and Civil Justice System
2. The Police Force
3. The Prisons Department
4. Other bodies in the Justice System.

It is pertinent to note at the outset that since all these 4 areas are interwoven in the sense that they cannot be dealt with in isolation, a review of the current state of the law will entail a reference to two or more of these areas as the discussion proceeds in order to have a meaningful review of the current state of the law. The outlining of these areas is done only in order to ensure that every area is adequately covered in this review.

THE CRIMINAL JUSTICE SYSTEM

2.2 The system first begins to operate when an offence is committed and either the victim or the Police detect it or it is reported to the Police. There is no doubt that many offences go undetected and unreported and therefore unpunished. For serious offences, it does not matter for how long the offence remains undetected since, once detected and evidence unearthed, the offender could be taken to court and prosecuted. Once charged, the offender will be known as the accused person or simply the accused.

2.3 Once an offence has been committed and a report made to the Police Station, then the Police will undertake investigations which will determine if an arrest can be made or not. If investigations reveal a potential offender then the offender will normally be arrested, in case of a cognisable offence. Otherwise, the offender may be arrested only through an arrest warrant issued by the court or the offender may be summoned to appear in court at a particular time and date mentioned in the summons. The arrest may even be made by a private person who in his presence any of the offences in section 14 of the Criminal Procedure Act is committed by any person. Indeed, any magistrate may at any time arrest or issue a warrant directing the arrest of any person whom he reasonably believes to

have committed an offence within the local limits of his jurisdiction. If investigations do not disclose the offender, the case remains unresolved.

2.4 The investigation stage would reveal whether the offender is a juvenile or an adult. If the offender is a juvenile, the matter would appropriately be referred to a juvenile court. It is also at this stage that one may be released without prosecution if there is not enough evidence to prosecute. If the Police decide to prosecute then charges are filed and the accused makes his first appearance in court where a plea is taken and matters of bail resolved.

2.5 In Tanzania the investigation stage very often comes after the arresting stage. It is common for Police prosecutors to ask courts for adjournments on the grounds that investigations are not complete. The powers of arrest by Police Officers without a warrant are provided for in s. 14 of the CPA. It is very seldom that a Police Officer who takes an accused person to court will be ready for the hearing of the case, because in most cases investigations will follow after such court appearance.

2.6 The law applicable in criminal matters is mainly the Criminal Procedure Act, no. 9 of 1985. There are of course other laws with their procedures which complement and supplement the Criminal Procedure Act. However, the Act does not apply to Primary Courts which have their own procedures.[6] Furthermore, the Act does not apply to the High Court, a District Court, or a Resident Magistrate's Court in the exercise of their respective appellate, revisional, supervisory, or other jurisdiction and powers under Part III of the Magistrates' Courts Act, 1984 i.e. jurisdiction and powers of, and appeals etc. from Primary Courts.[7]

2.7 The Primary Courts apply the Code which is contained in the third Schedule to the Magistrates' Courts Act, 1984. The criminal justice system in the Primary Court starts with a complaint to a Primary Court Magistrate who may issue a summons or a warrant of arrest to compel the appearance of the offender. For serious offences the suspect may be arrested without a warrant and taken to the Primary Court to be charged. Criminal jurisdiction of the Primary Courts is mainly for offences appearing in the First Schedule to the Magistrates' Courts Act, 1984. In this schedule Part I contains offences under the Penal Code and Part II contains offences under other laws.

[6] The Primary Courts Criminal Procedure Code
[7] CPA s. 3

2.8 In all its court sessions the Primary Court sits with 2 assessors whose opinions of the case are binding on the Magistrate. Trials in the Primary Courts are prosecuted by the complainant mainly, except in urban areas where a Police Sergeant, a Corporal or even a Police Constable may do the prosecution. No lawyers are allowed in the Primary Courts. Just like in the District Court and the High Court the accused person may be released on bail during the trial or from the time when the accused appears in court. The case is normally finalized within a very short time and judgment delivered. It is always the judgment of the majority which carries the day. If convicted the sentence will range from imprisonment to a fine or to a lesser punishment.

2.9 In the District Court and the Court of the Resident Magistrate, the position is different as observed above. Almost invariably the Police will be involved in the prosecution of the offender. Normally a Police officer of the rank of Assistant inspector upwards would prosecute the case as a Public Prosecutor. But there are cases where Police Sergeants have appeared to prosecute as Public Prosecutors. There are no assessors or jury in the District Court or Resident Magistrates' Court. It is a single Magistrate who tries cases in these courts except where the Chief Justice assigns two or more Magistrate to try a particular case.

2.10 The District Court and the Resident Magistrate's Court are courts of more or less the same jurisdiction. In the court system in Tanzania there is at the bottom the Primary Court headed by a Primary Court Magistrate . Then you come to the District Court which, as the name suggests, is the Court of the District with jurisdiction over the whole district. It is headed by a district magistrate, a term which includes a Resident Magistrate. On more or less the same level there is the Resident Magistrate's Court which has jurisdiction in the whole region where it is established and is headed by a Resident Magistrate. The difference between a Resident Magistrate and a District Magistrate is now clear. Whereas a District Magistrate will have had some legal training but is not a graduate in law, the Resident Magistrate holds an LLB degree or equivalent qualifications. In the 1960s, graduates of the University of London (now University of Dar es Salaam) began working as District Magistrates although they were holders of LLB degrees.

2.11 The next ladder is the High Court where Judges sit to conduct trials. The last ladder is the Court of Appeal where Justices of Appeal sit. Trials in the High Court cannot commence before a Preliminary Inquiry (P.I) is held in the District Court or Court of a Resident Magistrate. The Judge

sits with assessors in the High Court whose opinions are not binding. In the case of Economic Crimes Offences, the Judge sits with two members whose opinions as to the guilt of the accused are not binding to the Judge. Their opinions are binding as to sentence and other orders. Only State Attorneys may appear as prosecutors in the High Court.

2.12 Trial in the District Court is conducted by a single Magistrate or a panel of Magistrates as the case may be. It is possible to have a State Attorney prosecute a case in the District Court. Judgment would be prepared and delivered at the conclusion of the trial and a sentence passed in case of conviction. If there is an acquittal then the accused will be discharged and set free.

2.13 In the High Court, for serious offences such as murder and treason, the accused must have legal representation. But even in other offences which are tried in the High Court, some legal representation is necessary. At the conclusion of the trial sentence is passed. Sentences in the High Court range from capital punishment for murder and treason to absolute discharge if the situation so warrants.

2.14 CRIMINAL JUSTICE SYSTEM – APPEALS:

2.14.1 The set-up of criminal appeals is as follows:-
Appeals from Primary Court go to the District Court but appeals from the District Court go to the High Court. Similarly, appeals from a Court of the Resident Magistrate go to the High Court. Appeals from the High Court go to the Court of Appeal.

2.15 THE CIVIL JUSTICE SYSTEM:

2.15.1 Civil cases in the Primary Court commence with the plaintiff going to the Court and stating his claim orally which is then reduced into writing by the Magistrate. The 4th Schedule to the Magistrates' Courts Act, 1984 contains Provisions relating to the Civil Jurisdiction of Primary Courts. The fifth schedule contains Powers of Primary Courts in Administration of deceased's' estates' cases. In case of admission of the claim, judgment will be for the plaintiff with costs. Otherwise there will normally be a trial. Again assessors have to sit with the Magistrate whose views are binding.

2.15.2 Once there is judgment entered either for the plaintiff or defendant, execution process may be commenced in case of

judgment debtor failing to pay the decretal amount. The execution process may involve the attachment of the judgment debtor's property to be sold later on to satisfy the decree.

2.15.3 In the District Court and Court of Resident Magistrate the procedure is more elaborate than in the Primary Court. Proceedings are commenced by filing a plaint or some other pleading. This will cause summons to be issued. Summons for orders or summons for disposal of suit may be issued. That is when the defendant will appear in court and file his defence. Of course the defendant may appear and admit the claim, in which case judgment will be entered for the plaintiff. After the pleadings, a trial follows and judgment given at the end of it.

2.15.4 The High Court has a more elaborate procedure than the lower courts dealt with above. Like in the District Court and Resident Magistrates' Court it is the Civil Procedure Code, which governs proceedings in the High Court. Likewise in the Commercial court assessors termed as experts of certain professionalism they can sit with the judges to assist in the determination of matters.

2.15.5 Cases may of course be disposed of without trial. There are in the Civil procedure amendments of the Rules in the first schedule to the code. Immediately after Order VII, Orders VIIIA, VIIIB and VIIIC have been added. The requirement of Order VIIIA is for a First Pre-trial Settlement and Scheduling Conference to be held unless a court is exempted from the application of any rule in this Order. Then there is a final Pre-trial Settlement and Scheduling Conference in Order VIIIB. In Order VIIIC you have Arbitration negotiations and Mediation procedure. This is what is known as Alternative Dispute Resolution (ADR).

2.15.6 This process of ADR only operates in the District Court, Resident Magistrates' Court and the High Court. It does not operate in the Primary Court and indeed the Civil Procedure Code does not apply to Primary Courts.

2.16 Appeals:

2.16.1 Just like in the case of the criminal law system appeals lie to the next higher court. An appeal from the Primary Court will go to

the District Court and if necessary all the way up to the Court of Appeal. Similarly an appeal from the District Court or Resident Magistrate's court will go to the High Court and possibly to the Court of Appeal. An appeal from the High Court will go to the Court of Appeal. There are of course elaborate rules of how to file an appeal and when to do so and what the appeal document is supposed to contain. Also there are statutory provisions setting out what may be appealed against.

2.16.2 An appeal from the Primary Court to the District Court has no restrictions on the points to be appealed against. But if there is a further appeal to the High Court, it will not be entertained unless it is on points of law or mixed law and facts. Finally if there is a third appeal to the Court of Appeal, the High Court is required to certify to the Court of Appeal points of law of public importance before the Court of Appeal would entertain such an appeal. Similarly an appeal from the District Court to the High Court has no restrictions but a second appeal to the Court of Appeal can only be on points of law or mixed law and fact. An appeal from the High Court to the Court of Appeal has no restrictions on the matters appealed against.

2.16.3 The process in the criminal justice system is long and a cause of delays in determining cases. A case will not be ready for hearing until after some time has gone by due to the fact that the Police after arrest have to do investigation on the case. The case may remain pending for some time until the Police say that they are ready to proceed with the trial or until they withdraw the case for lack of evidence.

Furthermore, the case might go on appeal after the trial is completed. This is also a long process because there are requirements which have to be satisfied first before the appeals can be heard. There is the requirement of a copy of judgment to be available, notice of intention to appeal to be served on the other party and the petition of appeal and then the appeal itself.

2.16.4 Investigation of cases could be done before arrests in some cases where there is no danger of the accused disappearing. It may not be feasible to delay the arrest of someone in a homicide case but there may not be any harm to investigate on theft of public funds by an official before eventually arresting him/her and charging

him/her accordingly. In such a case, there would not be any delay because investigation would have been completed.

2.16.5 Appeals are delayed by technicalities such as a copy of judgment notice of intention to appeal and the format of the petition of appeal. Solutions to such problems should be found as such technicalities are barriers to justice

2.16.6 In the civil system there are also unnecessary technicalities which tend to delay the dispensation of justice. There is a lot of emphasis on procedural law than the substantive law. This study should enable us to find solutions to such barriers to justice in civil matters.

2.17 FUNCTIONS OF THE POLICE AND CRIMINAL PROCEDURE

2.17.1 The Police Force as mentioned above has the main function of keeping law and order. This function is executed by force where necessary which is in the majority of cases. Suspects are arrested by the Police and taken to Police Stations and charged if necessary or as the Police deem fit. Police bail is there normally for minor offences and for persons with known fixed abodes. Sometimes a surety to bail someone out may be required. The Criminal Procedure Act and the Police Force Ordinance are the main Acts which regulate what the Police may do. There is of course also the Penal Code which has some sections of procedural law. Then you have the Evidence Act which also regulates matters in relation to evidence. Police may hold investigations which entitle them to examine persons orally or in writing. Arrests are also done by the Police with or without a warrant depending on the offence committed. Police may enter into any building or place in order to effect arrest. Police may break out of any place for purposes of liberation. The person arrested is to be informed of the reasons for his arrest and he may be searched. Police have power to detain and search vehicles and seize offensive weapons. They may arrest vagabonds and habitual offenders. Those arrested are supposed to give their names and residence and may be released or detained[8]. The Police are supposed to report apprehensions to the nearest Magistrate within 24 hours or

as soon as practicable. They may recapture anyone escaping. A Police Officer in Charge of a Police Station may issue a search warrant. Sometimes a search may be done without a warrant. Property seized may be detained.

2.17.2 Police may during investigation require any person to furnish his name and address for purposes of inquiries. Police may intervene to prevent breaches of the peace or commission of an arrestable offence. Police may interview a suspect i.e. they may ask him questions or take other investigative action. Periods available for interviewing the suspect is only 4 hours but the period may be extended to a further 8 hours. The periods spent doing something else are excluded from the interview time of 4 hours and 8 hours respectively. Police are supposed to inform persons under restraint of their rights which include the right not to answer any question, the right to have a lawyer or to see a relative.[9]

2.17.3 Treatment of a person under restraint is also provided in the CPA, namely treatment with humanity, respect and dignity. Police have special duties while interviewing children, namely to inform the parents that the child is under restraint[10]

2.17.4 The records of the interview must be there. When there is a confession it must also be recorded in a prescribed manner and signed by the interviewee and the Police Officer who certifies as to what has taken place. An interviewee may want to make a statement. In that case he will be furnished with paper and pen. The suspect is also asked if he has been cautioned in accordance with s. 53 of the CPA. If the suspect refuses to read any statement or sign it, the Police Officer conducting the interview will certify as to what has taken place and sign accordingly. Similarly if the suspect complies with the request the Police officer will certify accordingly[11]

2.17.5 Other investigative actions include power to take fingerprints, photos etc. of suspects, and identification parades where these are necessary. A medical officer may examine or take for analysis any specimen taken from a suspect for the purpose of

[9] ibid. s.46-53
[10] ibid.s.55-56
[11] ibid s.57-58

further evidence. Such report however would be taken to the court.[12]

2.17.6 Police must release a person on bail if there is belief that he did not commit the offence or in the case of mistaken identity or after twenty four hours if no formal charge has been preferred against him unless the Police Officer believes that it is a serious offence. Even after being charged the suspect may be released on bail after executing a bond with or without sureties. There are some criteria for granting bail which are essentially that he will in all probability appear in court in respect of the offence. There are also conditions for Police bail. But Police may refuse to grant bail on reasons to be recorded. Even after bail has been given it can be revoked for a variety of reasons.[13]

2.17.7 The Director of Public Prosecutions appoints Public Prosecutors such as wildlife,forestry,customs,immigrations and Police Officers of a particular rank. Such Police Officers will normally prosecute any case before a magistrate unless a State Attorney is appearing. In this process of trials, witnesses have to be served with summonses and it is the Police Officers who serve such summonses on any person or company. Indeed even when a warrant of arrest has been issued it is executed by the Police. Such warrant may be issued after a summons has been disobeyed. Police will also charge an accused person unless the State Attorney does prepare information in very serious cases. Then after conviction the Police would examine their records to see if the convict has previous convictions. The Police will then give more previous convictions to the court before sentence.[14]

2.18 The Police Force Ordinance, Cap. 322:

2.18.1 The police generally perform duties which have been conferred upon them by law and also follow directives issued to them by their superior officers. They are also expected to collect and forward to their superior officers intelligence affecting public peace, to detect and bring offenders to justice. The police officers may also without warrant enter any premises at any hour of day or night when they suspect that illegal drinking and gambling are taking place, (s.27).

[12] ibid s.59-61
[13] ibid s.64-68
[14] ibid. s.95 & 96

2.18.2 The provisions of s. 28 of the law allow police officers to carry out the duties of the prison officers and confer upon them the same powers, protections and privileges as those conferred upon the prison officers.

2.18.3 The police officers are also authorized by law to use arms to stop from escaping or attempting from escaping every person in lawful custody charged with or convicted of a felony. Moreover, the police may use arms to stop any person who wants to rescue or attempts to rescue by force any person in lawful custody or any person who uses force to prevent or attempts to prevent the lawful arrest of any person, (s.29).

2.18.4 The law also empowers the police officer to lay any lawful complaint or information before a magistrate and to apply for summons, warrant, search warrant or any other process to be issued against any person, (s. 30).

2.18.5 S.32 authorizes a police officer to interrogate a person whom he suspects may have committed a serious offence or he believes that information has been received by the police which may implicate a person in the commission of a serious offence. Before the police officer questions the suspect, he should warn him that he may refuse to answer any question asked by the police and thereafter sign or thumbprint the acknowledgment in a prescribed form, indicating the time when he was so informed. If during the interrogation, the police believe that there is sufficient evidence to charge the person with an offence, he shall charge him but caution him in writing or orally that an adverse inference may be drawn against him if he fails or refuses to disclose at that stage any matter which is material to the charge.

2.18.6 The police officer may interview orally or in writing any person to ascertain whether he has committed an offence and where the person makes a confession, the police officer may during the interview or as soon as practicable after the completion of the interview record in writing statement s made by the person orally, whether he wrote any statement, the time he commenced to write the statement and the time he completed and whether he was cautioned before he made the confession.

2.18.7 The police officer shall ask the interviewed person to read the record and make any alterations, corrections or addition and

then to sign the certificate. If the person refuses to sign the certificate, the police officer who conducted the interview will certify, stating what had taken place and sign accordingly. In case a person being interviewed cannot read the record or refuses to read, the police officer shall read or cause it to be read to him and request him if he wants to make any corrections, alterations or additions to the record and then to sign a certificate. The police would also certify what he had done, (s.32A).

2.18.8 The law empowers the police officer who may require the attendance of a person under s. 32 and also to require that person to execute a bond to appear and give evidence before a magistrate and if he fails to comply with such requirement he shall be guilty of an offence, (s.33).

2.18.9 S. 34 provides that a police officer in-charge of a station may search or issue a written authority to any police officer to search any building, vessel, carriage box, receptacle or place in which he suspects an offence has been committed or in which there is any thing intended to be used for purposes of committing any offence and thereafter report the result to the magistrate. But no prosecution will be commenced without the leave of the DPP.

2.18.10 The law allows the police to take fingerprints, measurements of prints of the hand, feet or toes or recordings of the voice or photographs or samples of the handwriting of the accused. The police may use reasonable force against the accused that refuses to comply in order to secure such specimens, (s. 35).

2.18.11 Under s. 35A a magistrate may authorize a medical officer to examine a person in lawful custody or allow him to analyze any specimen taken from the accused as extra evidence. The report prepared by the doctor would be forwarded to the court. The law provides also for the medical examination of any person who is a party to or witness in any court proceedings and the medical doctor is required to send the report to the court, which ordered the examination.

2.18.12 The police have powers to hold a parade to identify a suspect. The police may order the attendance of the suspect to attend and participate in the parade. No person who is required under subsection (2) to attend and participate in an identification parade shall be entitled to refuse or object to attend and

participate in an identification parade or where a person without just cause or unreasonably refuses to attend the identification parade such person shall be punished. (s. 35B).

2.18.13 A police officer is authorised by the law to detain any person who is performing any act or who is in possession of anything for which a licence is required under the law and request him to produce such licence. The law also empowers a police officer to stop a motor vehicle he suspects to be used in committing an offence and impound it at the police station, (s. 36).

2.18.14 The police officers have also been given power to regulate and control traffic along the public roads, streets and thorough fares. They can direct all or any particular kind of traffic when it is deemed to be in public interest to do so, and also to keep order and prevent obstruction on public roads, streets and thorough fares, (s. 37).

2.18.15 The provisions of s. 38 empower the superintendent or any officer in-charge of police to erect or place a barrier in or across any road and street to maintain law and order or for the detection of crime. Any person who does not stop at the road barrier when commanded to do so by the police officer would be arrested without a warrant and the police would not be liable for any damage to any vehicle or injury to the driver or any other occupant of the vehicle.

2.18.16 Any person wishing to hold a public assembly or procession is required to inform the police where and when he would like to hold such assembly or procession so that the police officer may provide officers to keep peace at such assembly or procession.

2.18.17 The provisions of s. 41 authorise the police officers or the magistrate to stop or prevent any assembly or procession in any place if in the opinion of such officer or magistrate the holding or continuance of such assembly or procession is likely to cause a breach of peace, prejudice public safety or the maintenance of public order or is for unlawful purposes.

2.19 Police General Orders (PGO):

2.19.1 The procedure used for the recruitment of the police officers is prescribed in PGO No. 54 and reference is made to the age, education, physical fitness and criminal record.

2.19.2 PGO No. 103 provides for the procedure or mode of dealing with complaints against the police officers.

2.19.3 PGO No. 104 deals with corruption in the Force. It provides among other things that the police officers who are aware of the corrupt officers but do not report them should be related as accessories to corruption. Any victimization of persons who assist in the detection of the corruption would result in instant dismissal from the Force.

2.19.4 The police officer whether on or off duty is required to be courteous to the public, therefore if a police officer is discourteous or rude to any member of the public, his leaders are expected to take immediate action against such an officer once the incident is reported to them. Moreover, the witnesses or members of public who visit the police station should be attended as soon as possible or else they should be requested to go back later if the officers are busy at that particular time, (PGO No. 107).

2.19.5 The provisions of PGO No. 354, deal with the question relating to the escort of prisoners. The police escorting prisoners are expected to carry guns and they are also responsible for conveying the prisoners by police transport. Disciplinary action would be taken against any police officer who by carelessness or lack of vigilance permits a prisoner to escape.

2.20 PRISONS ACT 1967

2.20.1 The Prisons Department is part and parcel of any Justice system of a country. In some Jurisdictions the Police and Prisons Departments are under the Ministry of Justice. In Tanzania it is the Judiciary which is under the Ministry of Justice together with a few other departments. But in those jurisdictions where the Police and Prisons are under the Ministry of Justice the Judiciary is left as an independent organ which does not fall under any

Ministry because the three organs of any government are the Executive, the Legislature and the Judiciary.

2.20.2 The Prisons Department is responsible for the keeping of prisoners whether convicted or not. It is headed by the Principal Commissioner of Prisons. The Prisons Act, 1967[15] was enacted with the purpose of consolidating and amending the law relating to Prisons, and to provide for the Organization, Discipline, Powers and Duties of Prison Officers, and for matters incidental thereto and connected therewith.[16] The Act classifies prisoners into various categories. There is the "adult prisoner" who is a prisoner of the apparent age of twenty one years or more and the "young prisoner" who is a prisoner between the apparent ages of sixteen and twenty-one years. You have also the "civil prisoner" who is a debtor, or a lunatic or a detainee under the Preventive Detention Act. On the other hand there is the "criminal prisoner" who is under sentence of a court or court-martial or other bodies with similar authority.

2.20.3 The Prisons Department is known in the Act[17] as the Tanganyika Prisons Service which consists of the members of the service appointed under the Act. These members have different ranks ranging from senior to subordinate prison officers.[18] The Act permits the use of police officers to do prison duties where there is insufficient prison staff.[19] Prison officers are vested with powers and privileges of Police Officers in some cases.[20]

2.20.4 Gratuities are payable to non-pensionable prison officers of or below the rank of Prison Officer Grade I who have served for twelve years or more at the rate of two-thirds of a monthly pay for a maximum period of twenty years. But proportional gratuities are also payable in certain circumstances even when the period of service is less than twelve years.[21]

2.20.5 There is a provision for a medical officer responsible for every prison that shall be responsible for the health of all prisoners in a prison who shall be medically examined regularly but in

[15] Act no.34 of 1967
[16] Prisons Act, 1967 heading
[17] Act 34/1967
[18] Ibid. s.3(1) and (2)
[19] Ibid. s.4(3)
[20] Ibid. s.10
[21] Ibid. s.18

particular on admission and prior to discharge such prisoner has to be examined. Also every prisoner in solitary confinement and sick prisoners have to be examined daily.[22]

2.20.6 Prisoners are admitted accompanied by a remand warrant, certificate, warrant or other order of detention or warrant of conviction or of committal. Also an infant child of a female prisoner may be received into prison with its mother.[23] Any prisoner may be detained in a police lock-up in an area where there is no prison for not more than 7 days. Convicted prisoners are classified by the officer in charge.[24]

2.20.7 The Act also makes provision for offences by prisoners both minor and major offences and their punishment.[25] Such offences are known as prison offences. There is a right to apply for review of a prisoner's case by the Principal Commissioner. There is also the right to take a persistent offender to a Magistrate to be arraigned and charged for those prison offences and the Magistrate may impose up to 6 months imprisonment.

2.21 There are certain privileges to prisoners and remission of sentence in some cases. Each prisoner is given the right to worship according to his religion. Prisoners may also receive and send letters and received visitors. Prisoners may talk to visiting justices. Furthermore convicted criminal prisoners sentenced to imprisonment may by industry and good conduct earn a remission of one-third of their sentence(s).[26]
Such remission may be lost due to misconduct. There may be additional special remission. The Principal Commissioner is required to submit a report to the President on the general condition and conduct of young prisoners, adult prisoners who have served 4 years of their sentences and those with indeterminate sentences. Furthermore prisoners may be removed from one prison and taken to another for a variety of reasons.[27]

2.22 The Act makes provision for training and treatment of prisoners.
Prisoners are supposed to be employed, trained and treated in prison as determined by the Principal Commissioner. Prisoners may even be paid gratuities. There are provisions for women prisoners to be kept at prisons

[22] Ibid. ss.20 and 21
[23] Ibid. s.25
[24] ibid s.27
[25] Ibid. s. 32 & 33
[26] Ibid. s. 44 to 49
[27] Ibid. s.49 to 60

for female prisoners, employment of prisoners and training, clothing, bedding and dietary scales. Then there are isolation cells for solitary confinement where the need arises. There are cells or wards for prisoners sentenced to death.[28]

Prisoners sentenced to short term may opt for extra mural penal labour in lieu of imprisonment. All they have to do is to declare to the court or to the officer in charge of the prison that they desire to undertake public work outside the prison.[29]

2.23 The Act also provides for the detention and treatment of unconvicted and civil prisoners. Such unconvicted persons are to be delivered to such court of competent authority at the time named and according to the terms of the remand warrant. Civil and unconvicted prisoners should not be kept with other classes of prisoners if conditions allow such separation. An unconvicted prisoner may be permitted to maintain himself and purchase or receive from private sources at proper hours, food, bedding, clothing, or other necessities but subject to examination and to such other conditions as the Principal Commissioner may direct. No civil or unconvicted prisoner shall be given or be compelled to wear prison clothing unless certain conditions exist. Employment of civil and unconvicted prisoners may be given at their request.[30]

2.24 There is provision for the release and discharge of prisoners whenever they become entitled. In some cases they may be released before expiration of sentence. The prisoners are supposed to be supplied with a travel warrant to their home and subsistence allowance for the period of the journey.[31]

2.25 There is provision for offences in relation to prisons and prisoners and penalties for certain specific offences. Penalty for unauthorized wearing of uniforms, aiding escapes, loitering in the vicinity of a prison, trafficking, prohibited articles, unlawful possession of prison articles, incitement and abetting of desertion, mutiny and sedition, desertion, receiving or demanding money or other consideration from a prisoner, selling or supplying articles to prisoners, issuing unauthorised testimonial, giving unauthorised information and general penalty is provided under the Act.[32]

[28] Ibid. s. 61 to 71
[29] Ibid. s.72
[30] Ibid. s. 74 - 77.
[31] Ibid. S. 78 - 80
[32] Ibid. s. 81 - 93

2.26 Finally the Act provides for General Provisions such as treatment and conduct of prisoners to be made available to prisoners, Evidence of age, limitation of actions, rewards for apprehension of escaped prisoners, prison officers, Rewards and Fines Fund, Appointment and powers of visiting justices, disposal of deceased's estate, and powers of Minister to make regulations.[33]

2.27 Probation Of Offenders Ordinance:

2.28 The law provides that where a primary court, District Court or Resident Magistrate's Court which tries an offender is satisfied that the charge has been proved, it may before it convicts him or even after having convicted him, when it is of the opinion that having regard to the existence of the conditions prescribed in the law, release the offender on probation provided that he is willing to comply with the provisions of the order. The High Court has similar powers under the law to release an offender on probation. But the court can not make any probation order in respect of any person who has been charged with or convicted of any offence under the Minimum Sentence Act, 1972. The law also provides that the probation order will remain in force for not less than a year and not more than three years from the date it is made. The probationer would be required during that time to report and to be under the supervision of a probation officer who is named in the probation order. The court may also include in the order provisions which it deems necessary to secure the supervision of the offender so as to prevent a repetition of the same offence or the commission of other offences, (s. 3).

2.29 The law also requires the court to sentence the probationer for the offence he committed in respect of which a probation order was made when he commits an offence while the probation order is still in force, (s. 6).

2.30 The law also empowers the court to sentence the probationer when he fails to comply with the conditions of a probation order. Once a probationer is sentenced for the offence in respect of which a probation order was made then the probation order would cease to have effect (s.8).

2.31 Tribunals:

2.31.1 **The Ward Tribunal Act no. 7/1985** established Ward Tribunals and provided for their jurisdiction, powers, practice and

[33] Ibid. s. 97 - 104

procedure, and other related matters.[34] In every ward a tribunal was established. The Minister is however empowered to establish two tribunals in a single ward.[35] The composition of each tribunal is at least 4 but not more than 8 members elected by the Ward Committee plus the Chairman and a Secretary appointed by the appropriate authority and the local government respectively. Members and Chairman of the Tribunal must be residents of the ward in question but that is not so for the Secretary. The quorum is half of the total number of members and the decision of the majority shall be the decision of the Tribunal and in the event of an equality of votes the Chairman shall have a casting vote in addition to his original vote.[36]

2.31.2 S.5 (1) sets out the qualifications of members and s.5 (2) provides for the qualifications of the Secretary. S. 6 provides for the tenure of office of members to be 3 years but eligible for re-election.

2.31.3 The primary function of the Tribunal is to secure peace and harmony by mediating and endeavouring to obtain just and amicable settlement of disputes. The exercise of the Tribunal's compulsive jurisdiction shall be only after attempting to reach a settlement. The jurisdiction of the Tribunal shall be in relation to all matters and disputes arising under all laws and directives passed by the appropriate authority, and laws and orders for the time being in force in relation to or affecting the business and affairs of the ward made or passed by a local government authority or any competent legislative authority within the area of the Tribunal's jurisdiction.[37] "Appropriate authority" has been defined in s. 2 of the Act to mean the district council or the urban authority within whose area the Tribunal is established, and includes any person appointed by the appropriate authority to perform any of its functions under the Act.

2.31.4 Besides the jurisdiction under s. 8, the Tribunal shall have jurisdiction to enquire into and determine disputes relating to the offences and civil disputes specified in the schedule to this Act. The schedule under the Act contains minor offences under the Penal Code and the maximum penalty is provided. Also in Part

[34] Title of Act, No. 7/1985
[35] ibid. s. 3
[36] ibid. s. 4
[37] ibid. s.8

II of the schedule the civil jurisdiction of the Tribunal is provided.[38]

2.31.5 An order of a Tribunal for imprisonment shall be in the prescribed form but it shall have no force of law or effect unless endorsed by the Primary Court Magistrate. The Primary Court Magistrate is require to endorse such order without delay unless he has reason to believe that the Tribunal acted without jurisdiction or in excess of its powers, in which case he shall revise the order. If the order is endorsed, it shall have the same effect as any sentence of imprisonment imposed by the Primary Court. If the order remitted to the Primary Court is beyond the pecuniary jurisdiction of the Primary Court, the Magistrate shall refer the same to a higher court of appropriate jurisdiction.[39]

2.31.6 Appeals may be made within a certain period to the Primary Court. But where the amount of fine or award is not too big (500/= fine in criminal cases and 800/= award in civil cases) leave of the Primary Court to appeal would be required. Decisions of the Primary Court shall be final and conclusive except on points of law where the final appeal lies to the district Court.[40]

2.32 MAGISTRATES' COURTS ACT, 1984

2.32.1 Under Part II, provisions are made for the establishment of different kinds (types) of courts, their area of jurisdiction, and their mode of operation. The provisions also prescribe the procedure to be used in courts, the language to be used in courts and the appointment of such magistrates including the appointment of resident magistrate in-charge to perform supervisory administrative and all functions of such office. (Sections 3, 4, 5, 10, and 15).

2.32.2 Moreover s. 8 prescribes the age of assessors and the category of

people who should be excluded or exempted to serve as assessors in the Primary Courts or the High Court in cases which require the services of assessors. The provisions of s. 9 empowers the making

[38] ibid. s. 9
[39] ibid. s. 19
[40] ibid. s. 20

of regulations to prescribe among other things procedure to form the panels of assessors, the appointment of members of panels of assessors and the remuneration of the assessors.

2.32.3 S. 16 empowers the Minister after consultation with the Chief Justice, to appoint any suitable person to act as an honorary magistrate, who may from time to time be requested to try specific cases or perform any other judicial function.

2.32.4 The Minister is also empowered under the provisions of s. 17 after consultation with the Chief Justice, to establish a special traffic court in specified places to deal with traffic cases.

2.32.5 Section 21 prescribes the powers of the District Court, including the appellate jurisdiction, such as taking additional evidence, questioning any proceedings or ordering the case to be heard de novo. Under the provisions of s. 22 District Courts have also been invested with powers of revisionary jurisdiction and they may call for and examine the record of any proceedings of a primary court situated within its area of jurisdiction in order to satisfy itself of the correctness, legality or propriety of any decision. The District Court under its revesionary jurisdiction is empowered to exercise powers conferred upon it in its exercise of the appellate jurisdiction so that it can substitute a conviction or a conviction and sentence for an acquittal. However, where the District Court intends in its revisionary jurisdiction and in matters of civil nature, to increase any sum awarded or to alter the rights of any party to his/her detriment (other than quashing proceedings of the lower court or an order reducing any award in excess of the jurisdiction or powers of the lower court to make it to conform with its powers) shall not do so unless it first gives such a person an opportunity to be heard. But no proceedings shall be revised after the expiration of twelve months from the termination of the proceedings in the primary court.

2.32.6 S. 25 provides that appeals in the High Court should be heard by one judge unless the Chief Justice directs that an appeal should be heard by more than one judge but it is also provided that where two or more judges hearing an appeal are equally divided then the appeal shall be dismissed.

2.32.7 The High Court may summarily dismiss an appeal if it is against sentence and is brought on grounds that it is excessive but there is no material evidence to persuade the court to consider that the sentence should be reduced; or against conviction if there is no reasonable doubt as to the accused's guilt (s.28). Where the appeal is against conviction and sentence, and it appears that the evidence before the lower court leaves no doubt as to the accused's guilt and there are also no mitigating circumstances to persuade the court to consider that the sentence should be reduced, the High Court will summarily dismiss that appeal.

2.32.8 The High Court is empowered under the provisions of s. 29 to take or order another court to take and certify additional evidence, to confirm, reverse, amend or vary in any manner the decision or order appealed against as long as that decision or order as altered shall not be in excess of the jurisdiction of the court which originally made it. But the court shall not enhance the sentence unless the convicted person is first given an opportunity of being heard. Sometimes where the court quashes proceedings it may order the case to be heard de novo.

2.32.9 S. 30 empowers the High Court to supervise the work of the Primary Courts and the District Courts by calling for and inspecting the records of any proceedings or register. The High Court may revise any proceedings from a District Court or direct the District Court to revise any proceedings from the Primary Court. Where the High Court exercises its appellate jurisdiction with regard to proceedings which originate from the Primary Court between or against parties and where some of the parties have not appealed against the decision or order, may itself revise such proceedings from the primary court.

2.32.10 The provisions of s. 30 empower a resident magistrate in-charge to call for and inspect the record of any proceedings from resident magistrates' court, district court and primary court as well as examine their records and registers in order to satisfy himself of the correctness, legality or propriety of any decision, order or regularity of such proceedings. Where s/he considers that any decision or order of a Magistrates' Court or District Court is illegal or improper or that any proceedings are irregular, he may forward the record accompanied with a report to the High Court, which may consider whether or not to exercise its powers of revision; but if a case comes from a Primary Court, he

may revise such a decision or order whenever he considers it appropriate to do so. S. 30 also the resident magistrate in-charge is also empowered under that section (s.30) to forward any record to the High Court and pending the decision of such court, for reasons which he may record in writing, order that the execution of the decision or order of the district court or primary court should be suspended but in criminal proceedings, where the convicted person is in confinement he may order such a person to be released on bail with or without sureties.

2.32.11 Part IV of the Act, provides for original jurisdiction and powers of and appeals from district courts or a resident magistrates' court. S. 40 provides that district courts can exercise original jurisdiction in all criminal proceedings which have been conferred upon them by law or other proceedings under any other written law, which confers jurisdiction on a district court. This section provides also for proceedings of civil nature, limited to the recovery of possession of immovable property and any proceedings in which the value of the property does not exceed one hundred and twenty million shillings or in which the value of the subject matter is estimated not to exceed one hundred million shillings.

2.32.12 S.41 provides that a court of a resident magistrate shall be empowered to exercise jurisdiction in all proceedings where jurisdiction is conferred to it by the Second Schedule to the Act or any other law for the time being in force and confers on a court of resident magistrate or a district court or a district court presided over by a resident magistrate or civil magistrate the exercise of original jurisdiction.

2.32.13 Section 44 confers upon the High Court powers of supervision over district courts and courts of the resident magistrate to call for and inspect or direct the inspection of records of such court or give directions which it considers necessary in the interest of justice and all courts are required to comply with such directions promptly. The High Court may also of its own motion or on application made on behalf of plaintiff involving injustice in proceedings of a civil nature determined by a district court or a court or a resident magistrate, make any decision or order as it thinks fit.

2.32.14 The provisions of s. 52 empower the judicial authority within the district to appoint and to assign a justice to a primary court or district court house.

2.32.15 S. 53 empowers the justice to arrest or order any person to arrest, any person who commits a cognizable offence in his presence.

2.32.16 The provision of s. 57 empower the justice assigned to a district court house to hear, take and record the confession of any person in custody of a police officer in the same manner as the magistrate does. He may also exercise powers, functions and duties conferred upon him by any other written law.

2.32.17 S. 58 enables a Primary Court Magistrate to be a justice of peace in the district within which her/his court is established and in such capacity he is assigned to every district court house within the district.

2.32.18 When a person in the custody of a police officer makes a confession in the presence of a justice assigned to a Court House such confession may be proved in evidence in the same manner as a confession made in the immediate presence of the magistrate may be proved.

2.33 THE PAROLE BOARDS ACT, 1994

2.33.1 The parole system is the letting out of prisoners from prison before the legal period of their imprisonment has ended. The parole system is expected to reduce the overcrowding of prisoners in prisons. Since independence the crime rate has gone up thus increasing the numbers of inmates in prisons. One way of dealing with such a situation was to enact the Parole Boards Act, 1994, to provide a system for releasing prisoners before their terms of imprisonment ended. The National Parole Board and the Regional Parole Boards were established under the provisions of s. 3.

2.33.2 The proceedings for parole begin with the officer in-charge of a prison who proposes the name of a prisoner who meets the conditions for parole and forwards it to the regional Prison

Officer for necessary compilation of the documents, which thereafter are forwarded to the Regional Parole board. The law also allows a prisoner who meets the conditions of s.4 of the Act, to send his application for release on parole to the Regional Parole "Board. The Regional Parole Board may after perusing, scrutinizing and considering the particulars and records of the prisoner and if it is satisfied that the prisoner is eligible for parole, forward the prisoner's documents to the national Parole Board. Once the National Parole Board receives such documents and scrutinizes them and forwards the recommendations to the Minister for Home Affairs for his consideration and evaluation of the recommendations forwarded to him and if he is satisfied, he may grant or refuse to grant to the prisoner the release on parole (s.6).

2.33.3 Also the prisoner is no longer eligible for parole if he commits an offence by failing to comply with the conditions laid down under the Regulations made under s. 9 of the Act, or if he commits an offence under any other written law and if he is convicted he will be required to go back to prison to serve the remainder of his sentence for which he was released on parole. He would also be required to serve the sentence for the offence which caused him to forfeit his parole, (s. 5).

2.34 ADVOCATES ORDINANCE,1955

2.34.1 This Ordinance regulates the business of advocates on mainland Tanzania. S. 3 makes some exemptions of certain officers of the Government and Parastatal Organizations from the provisions of the Advocates Ordinance and they may practise in court as advocates by virtue of their employment. Such officers are, according to s. 3(2), the Attorney-General and all legally qualified persons in the Attorney General's Chambers, duly qualified persons holding office in any municipality or township, Legal Secretary and Senior Assistant Legal Secretary and Assistant Secretary to the Common Services Organisation (later known as the East African Community) and any person duly qualified holding office in the Legal Secretary's Department or in the East African Income Tax Department, and the Registrar-General, the Administrator-General, Public Trustee, Official Receiver, Commissioner for Lands and any person duly qualified and holding office in the office of the Registrar-General, Administrator-General, the Official Receiver or the Land Office.

All these officers are not bound by the provisions of the Advocates Ordinance but may appear in court as advocates.

2.34.2 S. 4 establishes the Advocates Committee which consists of a Judge of the High Court nominated by the Chief Justice, the Attorney General or the Deputy Attorney General or Director of Public Prosecution and a practicing advocate nominated by the Executive Council of the Law Society.

2.34.3 The High Court Judge shall be the Chairman of the Committee and shall preside at all meetings. In case the Judge is absent then the Attorney-General or the Deputy Attorney General or the Director of Public Prosecution shall be the Chairman of the meeting.

2.34.4 S. 5 has been repealed. S. 5A establishes the Council for Legal Education which consists of :

i. the Chief Justice or his representative who shall be the Chairman of the Council;
ii. the Attorney General or his representative;
iii. the Dean of the Faculty of Law of the University of Dar es Salaam or his representative and
iv. two practising lawyers elected by the Law Society.

2.34.5 The function of the Council shall be to exercise the functions conferred upon it by or under this or any other law and to exercise general supervision and control over legal education in Tanganyika for the purpose of this Ordinance and to advise the Government in relation thereto.

2.34.6 In s. 6 the Registrar of the High Court is required to keep in accordance with the provisions of this Ordinance a Roll of all advocates. He is required in s. 7 to enter upon the Roll the name of every person who was qualified to practise as an advocate in Tanganyika immediately prior to commencement of the Ordinance according to seniority.

2.34.7 Section 8 provides for the admission and enrolment of advocates. The procedure is to apply to the Chief Justice to be admitted as an advocate. Those who apply must be holders of a degree of law granted after an examination by the University of

Dar es Salaam or by such other University or other institution as may be recognized by the Council or if a person is a legal practitioner by whatever name called and thereby has a right of audience before any court having unlimited jurisdiction in civil and criminal matters in any Commonwealth country or in any other country designated by the Minister; a Solicitor of the Supreme Court of England, Northern Ireland or the Republic of Ireland or a Writer to the Signet, a Solicitor in the Supreme Court of Scotland, or a person admitted as a Solicitor under the Solicitors (Scotland) Act, 1933, of the United Kingdom, or if he is a holder of any similar qualification which is accepted by the Council as a professional qualification for the purpose of this sub-paragraph and if either he has complied with the requirements as to the acquisition of professional experience as may be specified by regulations or he has been inn continuous practice as an advocate in Kenya, Uganda or Zanzibar during the five years immediately preceding his application. But the Council may exempt any person from all or any of the requirements specified under sub-paragraph (i) of paragraph (b) of subsection (1) of section 9.

2.34.8 S. 9 talks of precedence of advocates. S. 10 talks of meetings of the Advocates Committee which are convened by the Attorney General for the purpose of enquiring into any allegation of misconduct made against an advocate. This may be due to information brought to his notice in any manner (s. 11). The Attorney General may, instead of or in addition to summoning before the Committee any person who makes such allegations of misconduct, require him to support such allegations by an affidavit (s. 12).

2.34.9 An advocate aggrieved by the decision of the Committee may appeal to the full bench of the High Court.

2.35 Arbitration

2.35.1 The Ordinance makes provision for settlement of disputes by arbitration. It applies to disputes triable by the High Court only. The President (then Governor) may with the concurrence of the Chief Justice however extend such application to subordinate court cases (s.3 and proviso).

2.35.2 When a party submits to arbitration such submission shall be irrevocable unless by leave of the court (s.4).

2.35.3 Parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a designated person (s. 5).

2.35.4 The court has power to stay proceedings where there is a submission. But the party who wants a reference to arbitration should apply to the court before filing a written statement or taking other steps in the proceedings for such stay (s. 6).

2.35.5 The court may extend the time for commencing arbitration proceedings (s.6A). Also the court has power in certain cases to appoint an arbitrator, umpire or third arbitrator (s. 7) in certain cases.

2.35.6 S. 9 gives power to appoint arbitrators to the parties and the court. S. 10 provides for the power of an arbitrator or umpire which is to administer oaths to parties and witnesses, to state a special case for the opinion of the court, on any question of law involved and to correct in an award any clerical mistake or error arising from accidental slip or omission.

2.36 **The Commission for Human Rights and Good Governance**.

2.36.1 This Act applies to mainland Tanzania as well as to Tanzania Zanzibar by virtue of Section 3 and it is to be read together with the Constitution.The functions of the Commission according to section 6 include:

a) to promote within the country the protection and the preservation of human rights and of duties to the society in accordance with the Constitution and the laws of the land,

b) to receive allegations and complaints in the violation of human rights,

c) to conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice,

d) to conduct research into human rights, administrative justice and good governance issues and to educate the public about such issues,
e) to visit prisons and places of detention
f) to promote ratification of or accession of treaties or conventions on human rights, harmonization of national legislation and monitor and assess compliance, within the United Republic
g) by the government and other persons, with human rights standards provided for in treaties or conventions or under customary international law to which the United Republic has obligations.

The functions are enumerated in section 6 (1) and they run from (a) to (0)

2.36.2 The composition of the Commission is:

a) a Chairman who shall be a person qualified for appointment as Judge of the High Court or Court of Appeal;
b) a Vice-Chairman who shall be appointed on the basis of the principle that where the Chairman hails from one part of the United Republic then the Vice-Chairman shall be a person who hails from the other part of the Union;
c) not more than five other Commissioners
d) Assistant commissioners.

2.36.3 Commissioners hold office for 3 years and are eligible for reappointment for no more than a second term (section 8). They may be removed from office only for inability to perform the functions of office due to illness or any other reason, or for misbehavior inconsistent with the ethics of office or any law concerning ethics of public leaders (S.10)

2.36.4 The Executive Secretary to the Commission is provided for in section 11. Section 14 provides for the independence of the Commission and section 15 provides for powers of the Commission to investigate any human rights abuses or administration except that the Commission has no power to investigate or institute proceedings against the President or the president of Zanzibar. There are other matters which the Commission cannot investigate such as a matter pending before a court, or a matter relating to the prerogative of mercy (S.16)

Representation by advocate is allowed or by any suitable person when a matter is before the Commission (S,23)

The Commission has power:

a) to issue summons requiring the attendance of any person before it and to produce any document etc. relevant to the inquiry;
b) to examine on oath any person in respect of any matter under investigation,
c) to require any person to provide information relevant to the investigation
d) to make interim orders to maintain the status quo
e) to enter upon and inspect any premises relevant to an investigation and to seize any relevant document, record or anything.
f) To cause, any person contemptuous of its proceedings or orders to be prosecuted before a competent court (S.25)

The procedure after investigations is provided for in section 28. It is this that where after making an investigation the the Commission is of the view that the decision, recommendation, act or omission-

a) amounts to a breach of any of the fundamental rights and freedoms provided in the Constitution or in any international instrument to which the United Republic is a party;
b) appears to have been contrary to law; or
c) was unreasonable, unjust, oppressive, discriminatory or was in accordance with a rule of law or a provision of any Act or a practice that is unreasonable unjust, oppressive, or discriminatory or
d) Was based wholly or partly on a mistake of law or fact; or
e) was based on irrelevant grounds or made for an improper purpose, or
f) was made in the exercise of a discretionary power and reasons should have been given for the decision; the Commission shall report its decision, recommendation and reasons for it to the appropriate authority concerned.

The appropriate authority is required to take the necessary steps within 3 months, otherwise the Commission may bring an action before any court or recommend to any competent authority to bring an action and seek such remedy as may be appropriate for the enforcement of the recommendation of the Commission.

Finances, Audit and Reports of the commission are in Part IV of the Act (ss 29 – 35) offences and penalties are in part VI (i.e ss 37).

CHAPTER THREE

"The tide of history has not only produced a system. It has resulted in a culture, which affects all those working within the system: Judges, lawyers, and administrators. Any attempt to reform the justice system must take that culture into account, not as an inseparable obstacle to reform but as something that is deep seated and changing which is a long term process"

Source: Consultation Drafts on the Review of the Criminal and Civil system in Western Australia p. 6.

INTRODUCTION:

3.0 The Justice System - Comparative Study

3.1 In order to clearly understand the kind of change that the Tanzania legal system needs for its improvement one must look at other successful legal systems for guidance in terms of best practice. In this study we have chosen Western Australia, Canada Scotland, The USA, and the UK. We have also looked at the East African Countries and South Africa for purposes of close comparison. For this comparison to be more uniform let us have a uniform understanding of what is a justice system? The Western Australia Law Reform Commission in its report defined a justice system in the following words:

> "The justice system comprises the courts and tribunals, other forms of dispute resolution, the legal profession, public and private, and investigative bodies, principally the Police Force".[5]

3.2 In the common law this definition of a justice system would apply. It would also apply in civil as well as criminal justice systems. Again the Western Australian law Commission had this to say on the uniformity of rules:

> "While maintaining the distinction between civil and criminal matters and in so far as possible, uniformity of rules for different courts and plain English should be implemented, when revising or drafting new legislative and procedural provisions in response to recommendations in this report"[6]

3.3 In Tanzania the use of plain language and Kiswahili in courts has yet to attain the levels ideally required. The English language is still the language of the courts with the exception of the primary court. Furthermore the English used in courts is the "lawyers English" which needs interpretation even for lawyers themselves. Certainly this is inimical to the interest of justice, the courts or the people themselves. There is need for courts to use plain language of the language of the majority of the population. In the case of Tanzania the use of Kiswahili must be encouraged in legal matters beginning with our legislators who must legislate in Kiswahili and thus forcing the courts to adhere to the use of Kiswahili. After all the Parliament is legislating for Tanzanians whose majority can hardly stammer the English language. It is an irony that in a country where less than 5% of its people speak English that its Parliament should legislate in English!

3.4 The justice system obtaining in Tanzania in both civil litigation and criminal matters is the adversarial system, which is based in the common law system. A trial under this system does involve the pursuit for truth, but rather the best presentation of arguments, facts, evidence and the law with the magistrate or judge sitting as an umpire occasionally ruling on disputed points of procedure and evidence. The magistrate does not take an active part in the proceedings. It can be strongly argued that in a country like Tanzania where the majority of litigants are ignorant of the law, there is greater need to depart from the passive stance of the court especially where self-represented litigants appear so that justice is not defeated. It is of course desirable for a judge or magistrate to take a more active role when either none or one only of the parties is represented. But it does not help justice for a judge to sit passively waiting to rule as to who has more forceful arguments.

3.5 A publicly funded justice system should be, in the words of Lord Wolfe "…..just fair, comprehensible, certain and reasonably expeditious."[7] As is the case in Western Australia, it is also in Tanzania. The long-term vision of the justice sector and indeed the

[5] Report on the review of the criminal and civil justice system in Western Australia.. p.3
[6] ibid
[7] Consultation drafts vol. I Law reform Commission of WA.

Law reform Commission of Tanzania is "to have a timely, fair, cost effective and accessible justice to all." The legal system must therefore provide just results as between the parties to litigation, civil and criminal, and socially just in terms of community values. It is not easy to ensure the above. The difficulty lies in reforming the system namely the adversarial system. But if nothing is done towards that end then there is no point in having an accessible system.

3.6 There are many types of justice social, political, economic, moral or legal. We are familiar with the justice according to law – predetermined and publicly known principles and rules. Nevertheless, it is not only the principles and rules however defined which matter; it is the exercise of discretion by a decision maker and the facts of the particular case that will determine whether the results are just. Certainly, the procedure and process of the legal system is the driving force to how the legal system will address issues or wrongs and resolve disputes. It is the procedure of the legal system that is the focus of everything.

3.7 The procedure will determine whether and how soon a matter is disposed of. However, you cannot sacrifice justice for efficiency by say, removing the right of appeal. Certainly, the system would be more efficient in that it would save money and time but litigants would be denied justice. Furthermore, a system cannot be described as "just" if it is too expensive, but a system that is not properly funded cannot be said to be satisfactory. Therefore, one has to balance between public funds to support a court system and the kind of cases being brought to the court for adjudication. It would not be worthwhile to fund a court system that is dealing with petty litigation best left to other bodies. What is important is that not only the wealthy get access to the court system but also the poor.

3.8 The Role of lawyers in a justice system is well known. However, not everyone can afford a lawyer – a good lawyer. If an individual cannot get the assistance of a lawyer while another can easily do so, this may be described as impeding or denying access. The poor litigant in our adversarial system may find that he is unable to present all the relevant evidence of his case leading to his or her losing the case more so because of the passivity on the part of the judges and the heightened role of lawyers.

3.9 The presence of self-represented litigants has the potential of increasing costs for all court users in that -

- You get more pre-trial procedures
- You get poor issue definition and clarification
- Greater time and expense may be spent to respond to unclear or irrelevant evidence; and
- Excessive time spent in hearing sessions.

3.10 Indeed self-represented litigants have the capacity to unbalance or take off the track the adversarial nature of the justice system and in the process to undermine efforts at impartiality by judges and magistrates. Judges and Magistrates would then have to intervene in many cases in order to address the shortcomings and lack of familiarity of self-represented litigants in pre-trial and trial procedures. The judge or magistrate inadvertently becomes a manager while continuing to be the adjudicator. This may make him lose neutrality and be required to make decisions before all facts are known. This so-called judicial activism would not be for the benefit of the adversarial system.

3.11 There is also the problem of vexatious proceedings. There is no definite legislation to counter such proceedings. A person may file a civil suit or get a criminal charge filed against another with the sole purpose of annoying, embarrassing or putting the other party to shame or ridicule. We are aware of the sanctions that exist but we think they are not enough more so because they only appear at the end after the damage has been done.

3.12 The criminal justice system of Sri Lanka, formerly Ceylon is based on the Indian system, which in turn the Indian system is based on the British system. The justice systems in the East African Countries are based on the British system and some of the laws like the penal code emanated from the Indian legal system. If there are any differences these will be based purely on adaptation. While the Sri Lankan system has a fully-fledged juvenile justice system Tanzania does not have such a system. Instead the juvenile processing is integrated within the normal justice system. Apart from this aspect the legal systems in almost all commonwealth countries, which include Canada, UK India and South Africa, are similar with minor local adaptations of the same principles.

3.13 The American legal system is based on the power of the people through their constitution. In the USA only the people have rights under the constitution. Entities such as an organization like a business or government agencies have no rights. Titles have no rights. A person who has been given a title has been given responsibilities. It is not a grant of superior right over others. Only individuals have rights. It is on this basis that the American legal system has been developed. All laws made in a state are subordinate to the state constitution. The state constitution is subordinate to the federal constitution, which in turn is based on the rights and duties of the individual. These are written. In America the law is nothing but written words of common meaning that all can understand. They are words that if not enforced mean nothing. Law is not a person of title. Law is not a policeman, a government agency a judge or even a panel of judges. Anything other than the written word is arbitrary, and discriminatory. It is contrary to the American constitution, which is the foundation of the American nation.

3.14 The decision making process through the American legal system is based on superiority of the law making organ. It is simply the matter of giving recognition and honour to the hierarchy of laws and it goes as follows. Step one: what does the constitution say regarding the matter i.e. what are the rights of the individual involved? Step two: asks what the state constitution says regarding the matter further reiterating the rights f the individual. If the state constitution conflicts with the federal constitution then the dictates of the federal constitution must be followed. Step three: the adherence to federal laws and

if they conflict with the US Constitution then it should be disregarded and the plain words of the constitution take precedence. If the state constitution infringes on the rights of the individual then it must be declared unconstitutional. The fourth step is to look at the state statutes and the same hierarchy is followed. The same procedure is followed when dealing with lesser laws created by Federal agencies, State Agencies, Counties or cities. The final part of the decision making process in the American legal system is to look to court rules of procedure as a policy that the court may request the parties follow and sanction the parties if they do not follow the procedures of the court. Rules of the court are not law. They are procedural policies for which a party to litigation can be held in contempt and can be punished by a fine. It is objectionable to jail people for contempt in America. It is considered abusive!

3.15 The courts in America may look to *stare decisis*, i.e. precedent set by other courts in similar cases and circumstances for guidance in making a ruling. *Stare decisis* is not law but merely a source of reference and guide. This then is the flow of decision-making, the flow of justice in the American legal system.

3.16 In Tanzania the state as an institution has rights that do sometimes conflict with the rights of the individual. This has historical background emanating from the Ujamaa era where the state acquired a prominence above the individual. Instead of merely having duties the state actually had rights against an individual. The right to detain an individual without having to explain to anyone why the state has acted so. The State in the form of the President could declare war without consulting the people through Parliament. The declaration of war could easily be inimical to the rights of an individual. The American system and the Tanzanian system however coincide in their hierarchical recognition of the law. Superior courts always override the lesser courts. Likewise superior laws always subordinate inferior ones made at district or lower levels.

3.17 The Commission is hopeful that with the recognition of international Human rights, Tanzania will eventually put the rights of the individual at the center of all law making.

3.18 Having given a brief background to the legal systems of Tanzania and compared it to systems of a few other countries let us now systematically examine each step in the flow of justice and see where Tanzania could effectively exchange best practices with the more successful legal systems.

The rule of law is the glue that strengthens and holds firm the justice system of a democratic country. It is an ideal, which all countries can strive. It is often compromised and undermined, frequently with the best of intentions. Without rule of law delicately balancing the rights of individuals and the demands of the state, though all would be lost

Source: Criminal Justice Center- Crime and Justice International 2003

3.19 Investigation:

This is the very first step in the flow of justice and it normally starts when a crime has been committed and either discovered by the Police or a complaint has been filed with the Police Authorities. The Police would normally conduct investigations and decide whether or not to make an arrest. If they make an arrest then they also have to decide whether to charge, who to charge, and what to charge the person/s with. The question of Police bail or judicial bail also is decided at this stage.

3.20 The process described above applies to most judicial systems including those of Western Australia, the USA, the UK, most commonwealth countries and those countries that are within the practice of common law. In Singapore, as a rule, the police deal with the investigation of offences. Besides the police officers, there are also customer officers, immigration officers and narcotic officers who are empowered to investigate limited offences in contravention of customs, immigration and narcostic laws. The police operate under the supervision of the Ministry of Home Affairs.

3.21 In Tanzania the above process is theoretically applicable although the practice is far from the theory. In many instances arrests are made before any meaningful investigation is conducted. It is standard practice to conduct investigations after arrests no matter how petty the supposed crime or flimsy the complaint. This bad practice has led to prisons and remand jails and homes for juveniles to be highly congested.

3.22 The Commission therefore recommends that no arrest should be made if it is merely based on a complaint that prima facie does not have any concrete evidence or if the police have not detected the crime. Arrests to be made only after thorough investigations have been conducted and evidence gathered. Arrests may be made where the police have detected the crime or potential commission or omission of the crime is detected.

Arrest:

Law, absent enforcement, is nothing but words. The ability to enforce law gives it authority.

Source: http:/www.informed.org/flow%20%Authority.htm

3.23 A policeman or even a civilian may make an arrest if he sees a crime being committed. This circumstance applies to almost all legal systems. It is different however, for arrests that are made upon receipt of a complaint or upon completion of investigations. The procedures in this case vary from country to country. Arrests take place when the law is breached. An arrest is the first step to giving law its authority and as such, it must be carried out with the utmost care as it involves the basic right of an individual to free movement. An individual should not be restrained without a just cause.

3.24 In Japan, before a policeman can arrest a person suspected of committing a crime, that policeman must first obtain an arrest warrant issued by a judge. However, it is possible in some occasions, to arrest a suspect if he is caught doing the criminal act, or, as the law provides, on special circumstances.

There are mainly three reasons a judge must consider when deciding to detain a suspect, these are, first, the person must be suspected with commission of an offence, second, to prevent a suspect from escaping and third to prevent him from destroying evidence.

When arresting a suspect, the arresting officer is required to inform the suspect of the essential facts justifying the arrest and the right of the suspect to select a defence.

3.25 After arresting a person suspecting him of committing an offence, the policeman has 48 hours to detain the suspect after which he must transfer the arrested suspect to the prosecutor. The prosecutor has 24 hours within which to decide whether to detain the suspect. Further, the public prosecutor receiving the suspect again informs the suspect of the essential facts justifying the arrest and the right of the suspect to select a defence. The prosecutor shall then hear the suspect's explanation and examine the evidence sent from the police. If the prosecutor will find it necessary to detain the suspect, he must ask the judge for detention. The Judge will then hear explanations from the suspect and evidence from the police and decide whether to detain the suspect or not. The detention of the suspect from a decision of the Judge can last for not more than 10 days.

3.26 Suspects are prosecuted within the detention period of not longer than 20 days. The public prosecutor must release suspect when prosecution has not been initiated within the detention period. A defendant under prosecution may be allowed release on bail if he fulfils specified conditions.

3.27 A suspect may be detained either in a detention house or police custodial facility. In most cases police custodial facilities are selected until prosecution is instituted. The Judge, at his discretion, may chose whether a suspect is to be detained at the police custodial facilities or the detention house. The Judge must consider the capacity and location of the facility, convenience for speedy and appropriate investigation, convenience for detainees, defence counsels, family members, etc. for visits and other circumstances. Of course, all the time the assumption is that the suspect is innocent until proven guilty in a court of law.

3.28 The process described above is similar to that being practised in most American states. The process is markedly different from the one practised in Tanzania. In Tanzania, a policeman may arrest a suspect if he detects him in the process of committing an offence. He may also arrest a suspect upon securing a warrant of arrest from a court of law. Once a policeman has made an arrest, he is required to take the suspect in front of a magistrate within twenty-four hours of the arrest being made, however if this not practicable then he shall cause him to appear before a magistrate “as soon as practicable - (section 32 of CPA). In cases of murder, the time is said to be “as soon as practicable,”

which can vary from twenty-four hours to one week! This is also the situation in the other two East African States of Kenya and Uganda.

3.29 The practice in Tanzania is very different from the requirements of the law. One may be held in Police custody for as long as the police take to be ready to prosecute or even to drop the charges. Admittedly section 32 and section 14 (3) *sic* of the CPA allows a policeman to continue to keep under restraint a suspect he has arrested without warrant for as long as he believes on reasonable grounds that it is necessary to do so while investigations on a crime he has not yet been charged with are going on.

3.30 These powers of the police are obviously too vast and without accountability lead to corruption on a grand scale. The Commission is of the view that such powers should be reduced and controlled by law. Policemen must be made accountable not to their reason but by and to the law. The law must state in no uncertain terms how long a person should be held under restraint and under what conditions that person should be released. It should also be criminal for a policeman to hold under restraint a suspect without proffering charges against him in a specified period.

3.31 Charging:

The issues of charging as referred to above is decided at the stage preceded by investigation and the police who have already decided on an arrest will decide on whether or not to proffer charges against a suspect. Depending on the nature of the suspect the police will decide on the appropriate court. Juveniles will be charged in juvenile courts and adults will be charged in normal courts of law.

In Tanzania individual may charge each other in primary courts where the state does not play any role in terms of prosecution. The complainant charges the accused and carries out prosecution to the end whereupon the magistrate assisted by assessors enters a verdict and metes out an appropriate sentence.

3.32 In western Australia Police commence prosecution by either issuing complaint and summons or after arresting the suspect. At this stage the western Australian police will then decide to charge or not to charge and if they decide to charge then they will decide who is charged and what the charge should be. They will also decide on matters of bail i.e. whether it should be police bail or judicial bail. The charging will normally take lace in what they call Court of Petty Sessions (CPS). These are equivalent to Tanzania's courts at district level. In the USA this process will differ from state to state, while in most commonwealth countries this process will be more or less similar.

3.33 Initial Appearance In Court:

In Western Australia as is the case in the UK and the USA, the first appearance is done in the junior most court and depending on the crime it will then be moved gradually into the higher courts. This is also the situation in most commonwealth countries.

Subsequent appearances in Western Australia as in most commonwealth countries including the UK will very much depend on the seriousness of the crime. In Tanzania depending on the pecuniary value involved in the crime a suspect may be charged in the district court or resident magistrates court. At this stage a charge will be read out to him and pleas taken and depending on the nature and gravity of the crime subsequent court appearances will be determined. In western Australia pleas may be taken often after legal advice has been taken. This is not the case in Tanzania. In Tanzania only pleas to charges such as those involving murder are taken after seeking legal advice and in the high court only; in all other cases pleas are taken without any legal advice being offered.

3.34 Criminal prosecution in Singapore is instituted by the state which is represented by the Attorney General's Department, with some exceptions like private summons which are brought by individuals for certain minor offences or nuisances. The Attorney General's Department is headed by the Attorney General, assisted by the Solicitor General and a staff of deputy public prosecutors, all of whom are legally qualified and recruited through the Legal Service Commission. The Attorney General is appointed by the President on the advice of the Prime Minister from among persons qualified as Supreme Court judges.

3.35 The prosecuting department of each investigative agency mentioned above is also empowered to prosecute only minor cases not involving points of law or complex legal issues under its jurisdiction. The Attorney General, who is also the Public Prosecutor, controls and directs prosecutions in Singapore, with the assistance of several Deputy Public Prosecutors. The Attorney General initiates proceedings and can also terminate proceedings at pre-prosecution stage and even during the trial, if for good reasons, he deems it unnecessary to proceed further with the case. Proceedings can also be terminated or discontinued by the Attorney General even though the proceedings were not initiated by him in the first instance.

3.36 The Commission is of a very strong view that ideally pleas must be taken after legal advice has been sought or offered by the state where the accused is not a person of substance. Too often we have had innocent people convicted on their own pleas of guilt when in fact they did not understand the charges they face. Obviously the question of language contributes to this lack of understanding of charges. Even Kiswahili may be difficult to understand for some people in Tanzania and thus the need for legal advice being offered before the plea is taken.

3.37 Bail

Once an individual has been arrested he is not yet guilty and therefore his rights must continue to be respected. When being arrested the suspect will be read his rights and particularly the right for representation by a lawyer, a friend or a relative. Depending very much on the nature of the offence, the suspect may be granted police bail or will have to wait until he is presented to a court where he can get judicial bail. Bail is a right to all persons. This principle holds sway in almost all democratic entities within the commonwealth and the USA.

3.38 In Tanzania as in Britain and most other Commonwealth countries, murder is not bailable. One cannot get bail of any type for the offence of murder, because of the seriousness of the offence. When bail is granted there are many conditions attached to it. According to the CPA Section 64, an arrested individual may be released on police bail if the offence he is suspected of having committed is not a serious one. Further when a formal charge has been proffered against a suspect who is under police restraint, he may be released on bail if his arrest was done without a warrant of arrest. Whenever a police bail is granted, the suspect must execute a bond with or without sureties to appear before a magistrate on the appointed day and time. The most important aspect worth noting in this process is that the arresting police officer is also the prosecutor. This is also the position in Kenya and Uganda.

3.39 The American system has de-linked the function of prosecution from the police and public prosecutors who are civilians do it. This is a major departure from the Common law system and it may be worth our while to examine the American system in this regard and see what can be learnt.

After an arrest, law enforcement agencies present information about the case and about the accused to the prosecutor, who will decide if formal charges will be filed with the court. If no charges are filed, the accused must be released. The prosecutor can also drop charges after making efforts to prosecute (nolle prosequi).

3.40 A suspect charged with a crime must be taken before a judge or magistrate without unnecessary delay. At the initial appearance, the judge or magistrate informs the accused of the charges and decides whether there is probable cause to detain the accused person. If the offence is not very serious, the determination of guilt and assessment of a penalty may also occur at this stage.

3.41 Often, the defence counsel is also assigned at the initial appearance. All suspects prosecuted for serious crimes have a right to be represented by an attorney. If the court determines the suspect is indigent and cannot afford such representation, the court will assign counsel at the public's expense.

3.42 A pre-trial-release decision may be made at the initial appearance, but may occur at other hearings or may be changed at another time during the process. Pre-trial release and bail were traditionally intended to ensure appearance at trial. However, many jurisdictions permit pre-trial detention of defendants accused of serious offences and deemed to be dangerous to prevent them from committing crimes prior to trial.

3.43 The court often bases its pre-trial decision on information about the defendant's drug use, as well as residence, employment, and family ties. The court may decide to release the accused on his/her own recognizance or into the custody of a third party after the posting of a financial bond or on the promise of satisfying certain conditions such as taking periodic drug tests to ensure drug abstinence.

3.44 In many jurisdictions, a preliminary hearing may follow the initial appearance. The main function of this hearing is to discover if there is probable cause to believe that the accused committed a known crime within the jurisdiction of the court. If the judge does not find probable cause, the case is dismissed; however, if the judge or magistrate finds probable cause for such a belief, or the accused waives his or her right to a preliminary hearing, the case may be bound over to a grand jury.

3.45 A grand jury hears evidence against the accused presented by the prosecutor and decides if there is sufficient evidence to cause the accused to be brought to trial. If the grand jury finds sufficient evidence, it submits to the court an indictment, a written statement of the essential facts of the offence charged against the accused.

3.46 Where the grand jury system is used, the grand jury may also investigate criminal activity generally and issue indictments called grand jury originals that initiate criminal cases. These investigations and indictments are often used in drug and conspiracy cases that involve complex organizations. After such an indictment, law enforcement tries to apprehend and arrest the suspects named in the indictment.

3.47 Misdemeanour cases and some felony cases proceed by the issuance of information, a formal, written accusation submitted to the court by a prosecutor. In some jurisdictions, indictments may be required in felony cases. However, the accused may choose to waive a grand jury indictment and, instead, accept service of information for the crime.
In some jurisdictions, defendants, often those without prior criminal records may be eligible for diversion from prosecution subject to the completion of specific conditions such as drug treatment. Successful completion of the conditions may result in the dropping of charges or the expunging of the criminal record where the defendant is required to plead guilty prior to the diversion.

3.48 From the above it is clear that the American system is no different to the Tanzania system in that the issuance of bail exists as long as there is adequate bondage and depends on the nature of the offence committed. Bail indeed becomes the right of the suspect only if he has money or good family connections. Tanzania can learn from the American system by making bail a right in all offences. After all when he is charged the suspect is exactly that, a suspect. He is not guilty of any offence and is entitled to his constitutional right of freedom of movement. One should not be restrained merely because he is suspected of having committed a crime.

Prosecution:
3.49 In Tanzania Police prosecutors on the whole undertake prosecution, although the Director of Public Prosecutions also undertakes prosecution depending on the nature of the offence. All appeals are handled by the DPP through state Attorneys. The danger of policemen prosecuting is that they may arrest a suspect in the evening and in the morning prosecuting the individual in court. In such a situation justice will not be seen to have been done at all.
Criminal prosecution in Singapore is instituted by the state, which is represented by the Attorney General's Department; with some exceptions like private summons that are

brought by individuals for certain minor offences or nuisances. The Attorney General's Department is headed by the Attorney General, assisted by the Solicitor General and a staff of deputy public prosecutors, all of whom are legally qualified and recruited through the Legal Service Commission. The Attorney General is appointed by the President on the advice of the Prime Minister from among persons qualified as Supreme Court judges.

3.50 The prosecuting department of each investigative agency mentioned above is also empowered to prosecute only minor cases not involving points of law or complex legal issues under its jurisdiction. The Attorney General, who is also the Public Prosecutor, controls and directs prosecutions in Singapore, with the assistance of several Deputy Public Prosecutors. The Attorney General initiates proceedings and can also terminate proceedings at pre-prosecution stage and even during the trial, if for good reasons, he deems it unnecessary to proceed further with the case. Proceedings can also be terminated or discontinued by the Attorney General even though he did not initiate the proceedings in the first instance.

3.51 In this regard Tanzania can learn from the legal system of the USA and Singapore where the police do not undertake the prosecution task. The Commission strongly recommends that the function of prosecution be de-linked from the Police and instead a public prosecutor who is not a policeman should undertake prosecution.

3.52 During the course of hearing there are many processes involved such as presenting witnesses, tendering evidence, Examination and cross-examination. Let us now turn to these processes and examine what other legal systems do. We may be able to borrow a leaf..

3.53 An essential feature of our legal system is the right of a defendant, whether in criminal or civil proceedings, to challenge the opposing party's case. However, excessive or abusive examination and cross-examination clearly should be prevented wherever possible. It increases the time and expense of litigation without assisting justice to be done in the particular case. It also affects each trial participant, other litigants, and the general interest of the community in having legal proceedings resolved fairly and as less expensively and expeditiously as possible. The key to curbing abuse is to determine what is excessive and what is appropriate examination and cross-examination (p. 177 of Final Report, para 21.1)

3.54 Reasons for excessive examination may be incompetence or ill preparedness on the part of counsels. Counsel may be afraid to stop cross-examination or examination because of the danger of leaving an issue uncovered. Therefore, greater judicial intervention may hold the key to limiting excessive or abusive questioning of witnesses.

Also self-represented litigants may or may not question witnesses excessively because:

- They do not appreciate what is considered relevant at law.
- They are unaware of evidentiary rules.
- They are less constrained by any duty to the court; and

- They may use the opportunity to vent frustrations or engage in personal attacks.

3.55 In criminal proceedings, the situation is even worse for self-represented defendants or accused. When alleged offenders are not legally represented, they are entitled to personally cross-examine witnesses, including victims of the crime. Where the victim is a child especially in sexual offences the judge or magistrate should exercise more control of the situation in the interest of justice but at the same time ensuring that justice is done in the questioning process by giving the accused a fair chance of putting his or her case across s.

One way of cutting down questioning of witnesses is to have witness statements in a written form. Then there could be exchange of witness statements that would reduce trial time in a variety of ways:

- The statement may be ordered to stand in place of examination-in-Chief so that only a small number of questions would be permitted when necessary to meet new and unanticipated issues or in the interest of justice generally;
- Objection to the admissibility of evidence-in-chief could be dealt with prior to trial; and
- The exchange of witness statement also could enable better preparation for cross-examination[8]

The only snag with this arrangement of exchanging witness statement is the right to silence. There are three headings here:

- A suspect's right to silence in the police station;
- The limits on the pre-trial process of disclosure enjoyed by both the prosecution and the defendant in criminal cases; and
- A defendant's right to silence at trial.

Alternative Criminal Charge Resolution

3.56 Alternative resolution to criminal charges may involve a defendant being given an opportunity to take part in formal diversionary scheme rather than the usual process of adjudication and/or sentence[9] The diversionary scheme based on family group conferencing should cover juvenile offenders as well as young adults who are not recidivists and first offenders of any age for appropriate offences. In Western Australia the pre-con viction diversion process is a type of family group conferencing known as the juvenile Justice Team. The offender attends together with a supporter and/or members of his or her family, victim and support person, a police officer and a member of the Ministry of Justice, all of whom must agree to the implementation of a proposed

[8] Ibid p.179 of Report para 21.7.
[9] ibid Para 25.1 page 209 of Final Report.

diversionary program. The plan of action may include an apology, reparation, community work and so on. Offenders may be referred directly by police or by children's court provided the offender accepts his or her responsibility for the offence and agrees to make amends. If the agreed plan is carried out the charges are withdrawn. The children's court also has discretion to refer offenders after they have been convicted. There does not appear to be any reason why the availability of such a scheme needs to be confined to young offenders. (P.10 and Recommendation 256 of the Final Report).

3.57 Pre-trial negotiations between prosecution and defense should be formalized into a process known as Alternative Criminal Charge Resolution (ACCR) resolution 257).

The purpose of ACCR should be to reach agreement between parties about:

(1) Which charges will continue to hearing and in which jurisdiction
(2) Whether these charges can be heard concurrently.
(3) Evidentiary issues, including disclosure of copies of statements of non-expert witnesses whom the defence proposes to call, if the defence wishes to do so.
(4) Notice of which prosecution witnesses will be required to be present, if the defence wishes to do so; and
(5) The possibility of other admissions. (Resolution 259 of Final Report)

3.58 Victims of crime the subject of charges to be negotiated, if any, should be informed of the pre-trial negotiation process and be entitled to provide a written statement for consideration by the parties. Irrespective whether victims submit statements or wish to be consulted about the negotiations they should be notified of the outcome and the reasons for the outcome (Resolution 263).

ACCR negotiations and any information available only because of the process, including victim statements and advice of outcomes and reasons, should be 'without prejudice' (Rec. 264)

3.59 All parties involved in the ACCR process should be made aware of their obligations to maintain confidentiality and the reasons for those obligations, and be required to sign an undertaking to that effect. Signed undertaking to maintain confidentiality should not have 'without prejudice" status. Confidentiality should be clearly stated to apply so long as the charges subject of negotiation may be tried or retried (Rec. 2656)

The media should be prohibited from publishing the contents of any ACCR negotiations or any information available because of that process so long as there remains a risk that it may prejudice the trial or retrial of any of the charges subject to negotiation (Rec. 266).

3.60 In the United States of America, the stage after first appearance in court is as follows. Once an indictment or information has been filed with the trial court, the accused is scheduled for arraignment. At the arraignment, the accused is informed of the charges, advised of the rights of criminal defendants, and asked to enter a plea to the

charges. Sometimes, a plea of guilty is the result of negotiations between the prosecutor and the defendant.

3.61 If the accused pleads guilty or pleads nolo contendere (accepts penalty without admitting guilt), the judge may accept or reject the plea. If the plea is accepted, no trial is held and the offender is sentenced at this proceeding or at a later date. The plea may be rejected and proceed to trial if, for example, the judge believes that the accused may have been coerced.

3.62 If the accused pleads not guilty or not guilty by reason of insanity, a date is set for the trial. A person accused of a serious crime is guaranteed a trial by jury. However, the accused may ask for a bench trial where the judge, rather than a jury, serves as the finder of fact. In both instances the prosecution and defence present evidence by questioning witnesses while the judge decides on issues of law. The trial results in acquittal or conviction on the original charges or on lesser included offences.

3.63 After the trial a defendant may request appellate review of the conviction or sentence. In some cases, appeals of convictions are a matter of right; all States with the death penalty provide for automatic appeal of cases involving a death sentence. Appeals may be subject to the discretion of the appellate court and may be granted only on acceptance of a defendant's petition for a writ of certiorari. Prisoners may also appeal their sentences through civil rights petitions and writs of habeas corpus where they claim unlawful detention.

3.64 Through this process, Tanzania could cut down on the number of court cases and possibly the number of remandees and prisoners thus alleviating the chronic problem of congestion in prisons and remand centres.

3.65 COURT PROCESSES AND PRACTICE

In-Court Protection Of Privacy And Identity:
In some jurisdictions, courts have established ways and means of providing protection to witnesses or even accused persons on the basis of their age or for security reasons. Provisions have been made for the exclusion of the press or pubic from the courtroom to protect identification of witnesses. In terms of identification by the defendant, measures such as screen, blurring or voice distortion have been used.

3.66 The European Convention on Human Rights (under Article 6(1)) allows discretion to individual jurisdictions to exclude members of the public (including the press) from courts where this is seen to be necessary for, for example, moral, public order or security reasons, or to protect the interests of juveniles or the private life of a "victim" or witness. There is also a more general assumption that the public can be excluded where publicity would compromise the interests of justice. Reid (1998), however, notes that these measures have not yet been the subject of much scrutiny by the European Court.

3.67 In the USA, courts work on the principle of openness, but the courts can be closed to the press and public, with decisions made on a case by case basis. (In a paper by the New Zealand Law Commission, however, it is suggested that there is a need for a threat to life in the US before the courts will allow anonymity.) As is set out later, there are substantial difficulties in the US in terms of protecting the privacy of witnesses in both court proceedings and in terms of wider publicity in the face of the 1st Amendment.

3.68 In Canada, members of the public can be excluded from the court on the basis of interference with "the proper administration of justice". In 1993, it was specifically added that the judge (in taking a decision about whether to exclude the public) must safeguard the interests of witnesses under the age of fourteen. In the Criminal Code, S486 (3), it is also stated that publication or broadcast can be prohibited where the case relates to a sexual offence or violence, and S442 (3) can also provide for anonymity (Chinkin, 1996). An application for anonymity must be made to the court in each case.

3.69 In Australia, the same principle applies, and the court can be closed when children or other "special witnesses" give their evidence. MacFarlane and Keating (1999) suggest that there has been an increasing recognition of the importance of taking account of "victims'" concerns. The opportunity for closure is not provided, however, in all jurisdictions or in all courts (e.g. in the Northern Territories there can be closure at committal proceedings, but not in trials in the Supreme Court, while in Tasmania it depends on the circumstances of the case).

3.70 The New Zealand Law Commission (1997) notes that there has been no common law jurisdiction which has definitive legislation on the issue of anonymity, with most practice based on case law. In New Zealand, however, the Evidence (Witness Anonymity) Amendment Act 1997 (NZ) allows orders to be made to permit witnesses to give evidence anonymously. This has been experimental and unique legislation, stemming from the intimidation of witnesses in some cases (particularly by organised gangs) and the decision that the law to permit anonymous evidence could only be given by Parliament.

3.71 New Zealand courts generally operate on the principle of open justice, but the new Act allowed judges to permit anonymous evidence. Applications are heard in chambers for pre-trial orders and there is a detailed test which must be applied. A similar test is conducted for an anonymity order for witnesses at trial, relating to the safety of the witness or property, the credibility of the witness and the balance with the right of the accused to a fair trial. The judge can ask for the view of independent counsel in determining these issues. The witness anonymity order can also be supplemented by additional provisions such as the use of screens or CCTV and the clearing of the court. The judge must advise the jury not to draw any inference from the anonymity order.

3.72 There are also restrictions on naming the "victims" of sex crimes. The Criminal Justice Act (1954) (NZ) allows the suppression of names, and the Crimes Act (1961) (NZ) allows the court the power to clear the public to allow the complainant to give evidence in sexual crimes. The Criminal Justice Act of 1985 also allowed the publication of names of witnesses to be forbidden in the interests of justice or "reputation of the victim" (New Zealand Law Commission 1997). Other provisions include that the names

and addresses of witnesses can be withheld where there is a need for their protection. A prosecutor or defendant can apply for a witness anonymity order and this can be granted in a number of circumstances, including if the safety of the witness or another is likely to be endangered. There must, however, be no reason to believe that the witness will not be truthful and their credibility can be tested without knowing their identity, and the making of the order must not deprive the accused of a fair trial.

3.73 In Poland, the Provincial Prosecutor's Office has been able to request witness anonymity since 1995. There is also provision to protect witnesses in the former Yugoslavia under Article 22 of the Statute of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia. Chinkin (1996) notes that, in these cases, there is also provision for the removal of witnesses' names from the court record to avoid reprisals.

3.74 Beijer et al (1995) note that, since 1980, courts in the Netherlands have had wide ranging powers to protect the anonymity of witnesses. For example, they note that hearings can be entirely in camera if required, witnesses can be granted anonymity and, where it is viewed as necessary by the court, the defendant can be removed from the court and will be provided with a summary of the evidence presented. As is noted later, there have been challenges to the use of these powers under Article 6 of the European Convention.

In South Africa, non-disclosure can be allowed under the Criminal Procedure Act No. 51/1977 where it seems that harm will come from the testimony. The courtroom can also be closed during testimony relating to sexual assault.

3.75 In Switzerland, in relation to sex crimes, the law states that the identity of the "victim" cannot be publicised if the "victim" requests this or if it is necessary for the prosecution. While the "victim" is testifying, the court can be closed. Similarly, in Denmark, if a "victim" of incest or rape requests this, there will be no publicity and the trial will take place in camera. The Greek constitution also allows exclusion in rape cases. In Germany, there are provisions which allow the police to give the testimony on behalf of a "victim" (which is, in effect a variation of the hearsay principle), with cross-examination questions also being handled in this way. In this case, the defence has no opportunity even to meet or to view the witness (Chinkin, 1996).

3.76 In Scotland, a judge has discretion to clear the court and in England and Wales, the judge also has a general power at common law to clear the court when a witness is giving evidence and now has a statutory power under the Youth Justice and Criminal Evidence Act to do this when it is:

"likely to improve the quality of the evidence given by the witness".

This does not, however, enable the judge to exclude the press, and applies only in sexual cases and cases involving intimidation. There are also provisions for the non-disclosure of identifying information in sexual assault cases. Chinkin (1996) notes that *R vs Taylor* (in 1994) set the following tests for anonymity in England and Wales:

- real grounds to fear consequences
- unfair to make the crown proceed without anonymity being granted
- no *undue* prejudice to the accused (although some may be inevitable)
- the court must be satisfied that the witness is credible.

Comment in the Cambridge Law journal (1999) suggested that continental jurisdictions are much more favourable to allowing privacy for witnesses to give evidence.

3.77 The application and effectiveness of the measures

There is some information in relation to the use of measures to protect anonymity, both in terms of the level of use and the impact of the measures.

3.78 The use of closure

It seems that there is an overall reluctance to use measures to protect anonymity which involve the removal of the public or the press from the court in many jurisdictions, given the importance of a public trial. Bala (1999), for example, suggests that:

"Canadian judges are reluctant to clear the court because of the constitutional presumption in favour of public trial ... there is an onus on the Crown to satisfy the Court that it will be more difficult for a witness to testify in the presence of members of the public or that the presence of too many persons may cause the witness to be unable to testify".

3.79 The same issues have been raised in other jurisdictions. In the US, there are some examples of closure or partial closure being allowed (noted in the "Decision on the Prosecutor's Motion" in relation to protective measures in the International Tribunal) in some sexual assault and narcotics cases, but Myers (1996) notes that open trials are "the norm" and closure "the exception".

3.80 Where there is to be closure, however, the Supreme Court has ruled that "sensitivities" are not enough and MacFarlane and Keating (1999) report that:

the burden of displacing the general rule of openness lies on the party making the application, usually the [Crown]".

The variation in the use of measures has also been identified, for example in Australia, where there are differences between states in how far they will use these.

3.81 In terms of the publication of identifying information in cases in the press, this has been the subject of much debate in the United States. O'Brien (2001) notes that it is difficult to develop workable schemes to protect the anonymity of "victims" and witnesses in the face of 1st Amendment freedoms of the press. The author notes that courts have taken the view that, providing information was obtained legally (from a police report or court record, or even from another report of a case), and does not

represent a contempt of court, then the media has freedom to publish information of this kind. This issue is discussed further in Section 5.

3.82 The use of full anonymity

In terms of actually keeping the identity of the witness anonymous (rather than using measures to prevent face-to-face identification), the New Zealand Law Commission (1997) found only two cases in the Australian state courts where there had been consideration of keeping the identity of the witness from the defense. In one case, this had not been allowed and in the other an undercover police witness was allowed to remain anonymous.

3.83 The Canadian Supreme Court has not directly considered the issue, although it was reported that there have been some examples in England and Northern Ireland of fully protecting the identity of intimidated witnesses by granting them anonymity.

The New Zealand Law Commission reports that, in Poland, courts do not have the equipment to enable witness anonymity, but may locate the witness in a separate room. In South Africa, the issue of protection has often been in relation to former ANC members, where there have been variations in whether or not anonymity has been allowed.

3.84 In New Zealand, the Law Commission (1997) suggest that there has not been consistency in the ways in which the applications which have been made to allow witnesses to remain anonymous have been dealt with. It is also suggested that most jurisdictions tend only to allow this in "serious criminal offences".

3.85 The discussion paper relating to the "Decision on the Prosecutor's Motion" in relation to protective measures in the International Tribunal noted a growing acceptance of the need to allow some witnesses to remain anonymous, but there is still clearly variation in the use of these measures.

3.86 The Types Of Questions And The Conduct Of Staff

The impact of the nature of questioning and the conduct of staff in court has also been identified in Section 1 as having a major impact on evidence-giving by "vulnerable" witnesses and there are a number of ways in which accommodations can be made to this process for "vulnerable" witnesses giving evidence. These provisions may be particularly relevant to children, people who have experienced sexual abuse and people with intellectual disabilities, as well as people using interpreters. Davies, Henderson and Seymour (1997) express the view that, while substantial resources are being deployed to set up for example, CCTV and pre-trial video taping, the "real" issue, in their view, is the absence of effective safeguards to protect children from defense solicitors. This is compounded, in their view; by the fact that many prosecutors and judges are inexperienced in working with children and often do not appear to understand the ways in which a child may experience trauma in a court situation.

3.87 The nature of provision

Support of this type may include the provision of guidance about how questioning should be carried out and the type of questioning which is permitted. In most jurisdictions, the judge has some control in the courtroom over the ways in which questions are asked and the authority to intervene and to control cross-examination. Richards (2000) notes that the court can take steps to protect witnesses in relation to the conduct of the staff and can make sure that the questions used are delivered in an appropriate way and that the use of jargon is avoided. Staff training can also be an important part of this process in terms of increasing their understanding of the issues facing witnesses who have been identified as "vulnerable" in order to allow them to identify the appropriate measures that should be provided.

3.88 In addition to this discretion, some US states have laws that forbid or allow particular forms of questioning of children. In California, for example, the court has to protect the child from harassment and embarrassment, and in order to do so must ensure that the questions asked are age appropriate and understood, as well as restrict unnecessary repetition. Myers (1996) notes that in New York State, statute requires that:

"the judge presiding should be sensitive to the psychological and emotional stress that a child witness may undergo when testifying"

While Californian law states that in sex abuse cases:

"the court shall consider the needs of the child victim and shall do whatever necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim"

Californian law also specifies that children can only be in court during school hours and must have regular breaks. In Connecticut, attorneys have to remain seated while questioning children, and must make objections in a "non-threatening" way (Myers, 1996).

3.89 In New Zealand, Davies and Seymour (1997) note that the Evidence Amendment Act 1989 (NZ) S23 (5) requires the judge to make sure that none of the questions are "intimidating or overbearing" when the age of the witness is considered. Section 21b (1) of the Evidence Act of the Northern Territories (Australia) allows courts to disallow questions which are:

"confusing, misleading or phrased in an inappropriate language",

not only in relation to the age of the witness, but also to their levels of understanding and culture. In Australia, similar provisions exist, for example, in New South Wales (Evidence Act 1995), which also disallows:

"unduly annoying, repetitive, intimidating, offensive, oppressive or repetitive questions".

3.90 There is also very specific restrictions on the types of questions which can be asked in rape cases and these are discussed separately later.

Not only are there ways in which questions can be excluded, there are also examples of amendment to the types of questions which can be asked to accommodate particular witnesses. In the US, for example, Richards (2000) identifies that Alabama allows leading questions to be asked of a child under the age of 10 where this is seen to "further the interests of justice", based upon an acknowledgement that, without such questions, it will not be possible to identify all of the information.

3.91 There may also be controls on who can ask the questions, and the Criminal Justice Act of 1988 in England and Wales specified particular types of offence (sexual abuse, violence, cruelty) where the defendant's right to conduct their own defence was limited and they could not examine child witnesses in person. The more recent Youth Justice and Criminal Evidence Act 1999 extend this provision to additional offences (including kidnapping) and to adult witnesses in certain cases (including those who have been raped).

3.92 Similarly, in Canada, Bill C-126 made it impossible for an unrepresented defendant to cross-examine a child under 14. In 1999 this was extended to those under 18. In New Zealand, defendants in sexual abuse cases are prohibited from questioning children aged 17 or under. In this case, questions must be delivered by a person appointed by the court (and the court has the power to disallow any questions it thinks are inappropriate). A similar provision applies in Western Australia (although the age here is 16). In New South Wales, as well as provisions to prevent defendants questioning children, the judge can, at their discretion, disallow the entire cross-examination in the interests of justice. There are variations between jurisdictions in terms of who is covered by such legislation, and in some cases (e.g. New Zealand) it is only "victims", whereas in New South Wales and Western Australia, this extends to any child witness (Queensland Law Reform Commission, 2000). In most jurisdictions, these provisions cover only sexual abuse cases, although in Western Australia, *all* cases are covered.

3.93 Ellison (1998) notes that, in general terms, judges in non-adversarial systems (such as Germany and the Netherlands) have substantially more scope to protect witnesses. She notes that, in these jurisdictions, it is the judge, rather than prosecutor, who undertakes the primary questioning role, and, where lawyers do ask supplementary questions, the judge has greater freedom to intervene to restrict lines of questioning. One benefit of this, noted by Ellison, is that the number of irrelevant or improper questions is likely to be reduced. Spencer and Flin (1993) note that, even although children in Germany generally have to attend court and give evidence orally, this "seems to be much less harrowing" for the child than in the UK.

3.94 The application and effectiveness of the measures

A general point to arise consistently in the literature in relation to the nature of questioning is that many legal professionals are relatively poor, and often untrained in questioning children and other "vulnerable" witnesses. Fuhrinan (2000), in setting out examples of this, makes the point that poor questioning transcends and potentially undermines all of the available forms of special measures, making attention to questioning an essential component of support to witnesses. The author also notes that many legal professionals assume unwisely that they understand why a child has done or

said something, and that this leads to both misunderstanding and potential miscarriages of justice. The New South Wales Law Commission (1994), referring in this case to people with intellectual disabilities, notes:

"A lack of training may lead to inadequate representation, misapplication of (or non-application of) relevant legislation, and discriminatory treatment at all stages in the criminal justice process".

3.95 ***The use of inappropriate questions***

Evidence from Australia (Leippe et al, 1989) suggests that some lawyers use language and cross-examination which will undermine children who are witnesses, and this has been the experience of some children who have reported their own court experiences in other jurisdictions.

3.96 Cooke (1999) points to "poor compliance" by judges in the UK with the Bar Council recommendation of good practice in relation to disallowing aggressive and repetitive cross-examination of witnesses with an intellectual disability. Cooke suggests that there have, as a consequence, been examples of witnesses who have been too distressed to continue with their evidence giving.

3.97 In Bala et al's study (2001), victim-witness workers reported few attempts to respond to children of different ages and abilities. When Bala et al surveyed judges in Ontario, almost half of these suggested that the defense counsel would often or always ask questions that a child would not be able to answer and a further 41% said that they sometimes did. A fifth believed that prosecutors also often or always ask questions that children cannot understand. They also reported apparent deliberate attempts to confuse children (and 65% of victim-witness workers believed that defense counsel expected accurate answers about dates, times and the nature of multiple instances of abuse from children aged 7-9). They also reported children being asked embarrassing or humiliating questions, in a manner which is repetitive and intrusive, even during sexual abuse trials.

Bala et al suggest that these findings are supported in work by Park and Renner (1998) and Walker (1999). Sas (1997) also points to the inappropriate nature of some questions and cross-examination which can be used with children who experience sexual abuse:

"despite our current knowledge of the power balance that exists between an adult abuser and a child victim, the level of fear and intimidation that can be used to secure compliance and secrecy and the nature of psychological entrapment".

3.98 There are also arguments (e.g. from New Zealand in Davies, Henderson and Seymour, 1997) that lawyers knowingly breach their own codes of ethics (as well as, for example, the UN Convention on the Rights of the Child) in relying on myths and stereotypes (e.g. in relation to child abuse and rape) and in placing witnesses under undue pressure in order to secure a collapsed trial or a not guilty verdict. Davies (1991) reports a celebrated case where a leading QC employed the tactic of repeatedly intimidating an abused 8-year-old girl to secure the acquittal of a TV actor, who subsequently admitted his guilt to a national newspaper. Gyles and McNamara (1996) note that, in a survey of

attorneys in Ohio, although they found a low level of apparent acceptance of what they describe as "myths" about rape, this was not reflected in improvements in court practice.

3.99 Milne et al (1999) indicate that both defense and prosecution lawyers rarely understand enough about intellectual disabilities to be able to ask appropriate questions. They note that there is "very little" literature available on interviewing both adults and children with intellectual disabilities. Sanders et al (1996) note that, in England and Wales, both lawyers and police officers appeared to rarely ask for the advice of experts in terms of framing appropriate questions. They also note that responses (verbal and non-verbal) can be misinterpreted by those with little or no experience in working with adults with intellectual disabilities (citing the example of types of questioning, for example, persistent repetition, being perceived as aggressive and threatening, leading to particular responses in some witnesses).

3.100 Judicial interventions

Where these issues have arisen, there has also been found to be some variation in the use of judicial interventions, and Cashmore and Bussey, for example, in their 1996 Australian study, found variation in whether or not judges were willing to ensure that children understood questions and to prevent their intimidation. Sas (1991) also identified variation between judges in terms of how they treated child witnesses. Meyer (1996) also notes that judges in the USA are not keen to intervene to protect child witnesses, preferring to leave the attorney to carry out their questioning as they wish.

3.101 Similar findings emerge from New Zealand, where Pipe and Henaghan (1996) note that judges have tended to allow cross-examination (in this case along with videotaped evidence) in pursuit of a fair trial. It is up to the trial judge to decide if and when a question is "intimidating or overbearing with respect to the age of the child" and when the authors examined 26 trial transcripts of cross-examinations, they found that the judges involved did not intervene on any occasion.

3.102 Effects on testimony

In terms of the effect of questions on children's testimony, it has been suggested (e.g. Graffam Walker, 1999) that:

"the child's testimony will be more reliable, complete and effective if the attorney understands the fundamentals of child development and follows age-appropriate guidelines in formulating questions".

Davies, Tarrant and Flin (1989) also found that the style of questioning used with children has an important impact, echoing work from other North American jurisdictions. Brennan (1993) notes that the effect of inappropriate approaches is that children's credibility is undermined by the inequalities in the use of language and the specific expertise of those in the legal system.

3.103 Staff training

There is some literature providing evidence of training provision to relevant staff (e.g. in Canada) particularly in relation to child abuse which can also have an impact on their approach to questioning. Sas et al (1996) note that the National Judicial Institute developed training for judges on child sexual abuse. Bala et al (2001) also suggest that staff now have better training and a "more victim-oriented approach".

3.104 Richards (2000) also points out that training has taken place in some parts of the US and that in Illinois, for example, state attorneys, assistant attorneys, law enforcement officers have received some specific training in relation to ways of reducing or removing trauma. In Canada, the Ministry of the Attorney General also noted that there had been a criminal harassment training conference for the police, Crown Counsel and victim workers.

In South Africa, Louw and Olivier (1996) note that the Law Commission report of 1991 led to specialist training courses being offered to prosecutors to help them to deal more effectively with child witnesses.

3.105 A survey undertaken by Hafemeister (1996) showed that attending educational programmes appeared to influence judges' use of approaches to special measures. In 2000, the French government introduced guidelines for training for judges who would have specialist skills in dealing with children and who can collect evidence before the hearing away from the court (Scotsman, August 2001). In the US, Warren and McGough (1996) have also found that the provision of training to those carrying out interviewing with children can improve fact finding, reduce stress for the children and help to ensure that the children who require services can be given the opportunity to get these.

3.106 The lack of training, however, is seen to undermine the effectiveness of measures to protect children generally. There are arguments (from a range of jurisdictions) that prosecution teams and the judiciary are not yet sufficiently knowledgeable about issues facing "vulnerable" witnesses to provide proper protection to them. There remain a range of instances of protection and support measures being undermined where the measures require the use of discretion and where there are examples of the failure to address the combative or confrontational approach of defense lawyers, or the use of inaccurate or outdated stereotypes and myths. Similarly, Kebbell and Hatton (1999) also note that a lack of training in effective questioning techniques may be undermining the work which is being done to make it easier for "victims" with an intellectual disability to testify.

3.107 In Tanzania commendable efforts at the protection of the identity of the witnesses and of the complainant particularly under the Sexual Offences Special Provisions Act no. 4 of 1998 where cases involving rape are heard in camera. Likewise, in politically sensitive cases such as treason, the names and identities of state security personnel are not disclosed. In all cases, involving children magistrates may empty the court of all people with the exception of the key parties. It is the Commission's belief that given adequate means and technological advancement Tanzania could be at the same level as those developed countries discussed above.

3.108 Sentencing and Sanctions

After a conviction, sentence is imposed. In most cases, the judge decides on the sentence, but in some jurisdictions, the jury, particularly for capital offences, decides the sentence. In arriving at an appropriate sentence, a sentencing hearing may be held at which evidence of aggravating or mitigating circumstances is considered. In assessing the circumstances surrounding a convicted person's criminal behaviour, courts often rely on pre-sentence investigations by probation agencies or other designated authorities. Courts may also consider victim impact statements.

The sentencing choices that may be available to judges and juries include one or more of the following:

- the death penalty
- incarceration in a prison, jail, or other confinement facility
- probation - allowing the convicted person to remain at liberty but subject to certain conditions and restrictions such as drug testing or drug treatment
- fines - primarily applied as penalties in minor offences
- restitution - requiring the offender to pay compensation to the victim.

3.109 In some jurisdictions, offenders may be sentenced to alternatives to incarceration that are considered more severe than straight probation but less severe than a prison term. Examples of such sanctions include boot camps, intense supervision often with drug treatment and testing, house arrest and electronic monitoring, denial of Federal benefits, and community service. In many jurisdictions, the law mandates that persons convicted of certain types of offences serve a prison term. Most jurisdictions permit the judge to set the sentence length within certain limits, but some have determinate sentencing laws that stipulate a specific sentence length that must be served and cannot be altered by a Parole board.

3.110 Corrections

Offenders sentenced to incarceration usually serve time in a local jail or a State prison. Offenders sentenced to less than 1 year generally go to jail; those sentenced to more than 1 year go to prison. Persons admitted to the Federal system or a State prison system may be held in prisons with varying levels of custody or in a community correctional facility.

3.111 A prisoner may become eligible for parole after serving a specific part of his or her sentence. Parole is the conditional release of a prisoner before the prisoner's full sentence has been served. The decision to grant parole is made by an authority such as a parole board, which has power to grant or revoke parole or to discharge a parolee altogether. The way parole decisions are made varies widely among jurisdictions.

3.112 Offenders may also be required to serve out their full sentences prior to release (expiration of term). Those sentenced under determinate sentencing laws can be released only after they have served their full sentence (mandatory release) less any "goodtime" received while in prison. Inmates get goodtime credits against their sentences automatically or by earning them through participation in programs.

3.113 If released by a parole board decision or by mandatory release, the releasee will be under the supervision of a parole officer in the community for the balance of his or her unexpired sentence. This supervision is governed by specific conditions of release, and the releasee may be returned to prison for violations of such conditions.

3.114 Recidivism

Once the suspects, defendants, or offenders are released from the jurisdiction of a criminal justice agency, they may be processed through the criminal justice system again for a new crime. Long term studies show that many suspects who are arrested have prior criminal histories and those with a greater number of prior arrests were more likely to be arrested again. As the courts take prior criminal history into account at sentencing, most prison inmates have a prior criminal history and many have been incarcerated before. Nationally, about half the inmates released from State prison will return to prison.

3.115 The juvenile justice system

Juvenile courts usually have jurisdiction over matters concerning children, including delinquency, neglect, and adoption. They also handle "status offences" such as truancy and running away, which are not applicable to adults. State statutes define which persons are under the original jurisdiction of the juvenile court. The upper age of juvenile court jurisdiction in delinquency matters is 17 in most States.

3.116 The processing of juvenile offenders is not entirely dissimilar to adult criminal processing, but there are crucial differences. Many juveniles are referred to juvenile courts by law enforcement officers, but many others are referred by school officials, social services agencies, neighbours, and even parents, for behaviour or conditions that are determined to require intervention by the formal system for social control.
At arrest, a decision is made either to send the matter further into the justice system or to divert the case out of the system, often to alternative programs. Examples of alternative programs include drug treatment, individual or group counselling, or referral to educational and recreational programs.

3.117 When juveniles are referred to the juvenile courts, the court's intake department or the prosecuting attorney determines whether sufficient grounds exist to warrant filing a petition that requests an adjudicatory hearing or a request to transfer jurisdiction to criminal court. At this point, many juveniles are released or diverted to alternative programs.

3.118 All States allow juveniles to be tried as adults in criminal court under certain circumstances. In many States, the legislature statutorily excludes certain (usually serious) offences from the jurisdiction of the juvenile court regardless of the age of the accused. In some States and at the Federal level under certain circumstances, prosecutors have the discretion to either file criminal charges against juveniles directly in criminal courts or proceed through the juvenile justice process. The juvenile court's intake department or the prosecutor may petition the juvenile court to waive jurisdiction to criminal court. The juvenile court also may order referral to criminal court for trial as adults. In some

jurisdictions, juveniles processed as adults may upon conviction be sentenced to either an adult or a juvenile facility in those cases where the juvenile court retains jurisdiction, the case may be handled formally by filing a delinquency petition or informally by diverting the juvenile to other agencies or programs in lieu of further court processing.

3.119 If a petition for an adjudicatory hearing is accepted, the juvenile may be brought before a court quite unlike the court with jurisdiction over adult offenders. Despite the considerable discretion associated with juvenile court proceedings, juveniles are afforded many of the due-process safeguards associated with adult criminal trials. Several States permit the use of juries in juvenile courts; however, in light of the U.S. Supreme Court holding that juries are not essential to juvenile hearings, most States do not make provisions for juries in juvenile courts.

3.120 In disposing of cases, juvenile courts usually have far more discretion than adult courts. In addition to such options as probation, commitment to a residential facility, restitution, or fines, State laws grant juvenile courts the power to order removal of children from their homes to foster homes or treatment facilities. Juvenile courts also may order participation in special programs aimed at shoplifting prevention, drug counselling, or driver education. Once a juvenile is under juvenile court disposition, the court may retain jurisdiction until the juvenile legally becomes an adult (at age 21 in most States). In some jurisdictions, juvenile offenders may be classified as youthful offenders that can lead to extended sentences.

3.121 Following release from an institution, juveniles are often ordered to a period of aftercare, which is similar to parole supervision for adult offenders. Juvenile offenders who violate the conditions of aftercare may have their aftercare revoked, resulting in being recommitted to a facility. Juveniles who are classified as youthful offenders and violate the conditions of aftercare may be subject to adult sanctions.

3.122 In Tanzania at the conclusion of the hearing process the magistrate or judge would then convict or acquit. Apart form a magistrate in a primary court who is bound by assessors' verdict; the magistrate or judge will reach his verdict on the basis of the arguments, facts and the law as presented by the two parties. After a conviction sentence would be imposed. Depending on the severity of the offence the punishment will vary from conditional discharge, corporal punishment, fine, imprisonment, to capital punishment. This process is similar in most democratic and Commonwealth countries including western Australia, the USA and Canada. Once sentence has been imposed, an individual is then handed over to the prison services if the sentence involves corporal punishment or a jail term or capital punishment.

3.123 The individual has a right of appeal. The appeal is made to a higher court or organ depending on the institution that has meted out the sentence. The appeal is normally made to next higher level of the court or tribunal. It is not acceptable to jump the next level and proceed to a higher level than the next one. The appeal may be against conviction,or sentence or both . While the appeal is pending, a convict may apply for bail pending appeal.

In Tanzania, it is rare for this kind of bail to be given. The basis for success in this kind of application is that the appeal has a very big chance of succeeding otherwise it is indeed very rarely granted.

3.124 The flow of justice in Tanzania ends with the prison and other corrective institutions such as juvenile homes for those underage convicts. The parole system has been introduced and is now undergoing teething problems. It would therefore be premature to comment on it in this paper. The situation in Tanzania's jails and other remand institutions is a subject of another Commission report on Police and Prisons. We have therefore limited this report to the actual flow of justice. Generally, this flow could be improved by adding speed to investigations, and hearings. Further, it could be improved by reducing the powers of the police in making arrests. The police in Tanzania have too much powers of arrest that enable them to misuse them since they are not accountable to anybody. Improvement in these two areas and curtailment of police powers of arrest and detention will make the flow of justice swifter.

CHAPTER FOUR

RESEARCH FINDINGS

A good legal system is that which reflects the aspiration of the people. Therefore in gathering views of the public, the Commission visited a total of nine (9) regions of Tanzania Mainland and Zanzibar. The areas that have to do with the flow of justice were itemized to be (a) the Police Force, (b) the Prisons Service, (c) the Courts, Tribunals (d) Advocates, PCB and DPP's office or State Attorneys.

4.1 CRIMINAL JUSTICE:

The Police Force:

The triple functions of the police:

4.2. In respect of the triple functions of police, the question was whether it is

proper for the same authority to have the power of arrest, investigation and prosecution. It was observed that in many cases suspects in criminal cases are arrested by the police who then keep them in custody and eventually charge them and take them to court. In all the regions and places that were visited there were complaints about such powers which the public saw as creating enough room for the Police to frame up harass, torture and humiliate suspects, and amazing enough, get faster promotions as a reward. However, when such a situation was brought before the Court, in *Petro s/o Salilo Vs Republic, High Court Criminal appeal No. 145 of 1996, Lugakingira, J (as he then was)*, held

> *'' … Learned counsel for the Republic also wondered whether it is proper for the arresting officer to prosecute the case, but I see no difficulty in this. There is no rule really against this, and in view of the prompt and unequivocal pleas in this case, I think there was no failure of justice. This Court has in fact had the occasion to say that there was no bar for a prosecutor to be a witness in the case he prosecutes…"*

Despite the decision of the Court on the matter, the public still sees the importance and necessity of separating those powers. It is also the view of the Commission that for the purpose of ensuring that justice is done, police have to remain with only two functions (i.e Arrest and investigation)

Investigation:

4.3 In the field research it was strongly argued against delay of investigation. Even where a person is caught red-handed committing an offence, Police do not take the case to court to be heard forthwith on the mere reason that investigation in incomplete. In case the accused is in custody he has to remain there for a long time, which in turn leads to overcrowding in the prisons. It was pointed out that there is a need for a time limit to investigate any offence so as to get rid of the unwarranted delays which may lead to corruption.

4.4 The Police on their part pointed out that delay in investigation is the result of inadequacies on staffing, funds, working tools and training at times. There are many cases that need be investigated while the investigators are few. In the old days there was a Criminal Investigation Fund (CIF) for investigation purposes but it is no longer

there. The Police further mentioned the system of taking a Police case file to the State Attorney before prosecution to be a source of delay. Furthermore the police have to take some exhibits to the government chemist that take a very long time to come back.

4.5 The Commission is of the view that delay of investigation has a lot of negative impact to justice. It is therefore important to equip with all necessary tools the Criminal investigation institution for the purpose of speeding up hearing of cases.

4.6 Branches of the government chemist in every region were said to improve the speed of investigations by way of analysis of exhibits by the government chemist. Even the Post mortem examination forms are not found. The Commission finds that examination of the exhibits is taking too long for there is no time limit to investigate some of the offences such as murder. As for the past mortem examination report forms, it is necessary to make them available in every police station.

Abuse of police powers:

4.7 Police are also blamed for re-arresting the accused persons after having been discharged under section 225 of the Criminal Procedure Act. A person ought to be re-arrested when the prosecution side is able to proceed with the trial. It is understood by the Commission that some times a person discharged may be facing other charges against him, however in the processes of arresting him, the aspect of human rights should be complied with. The police should not just re-arrest the person for the purpose of harassing him.

4.8 Another area where the powers of the police are abused is where police hide their inefficiency in unbailable offences whereby they charge a person with murder or armed robbery and do nothing about the case for a very long time. The Commission's view is that, these offences have no time limit for investigation and as such the accused persons remain in custody/remand for too long. It is important in the eyes of the commission for these offences to have a time limit for investigation.

4.9 Complaints were also made against police for taking action against someone reported to have committed an offence without proper investigation. A person may be the offender but if he gets to the Police Station first before the person against whom he has committed the offence, the Police will arrest and take steps against the innocent person. It is therefore important to make a proper preliminary

investigation before making an arrest so as to avoid prosecuting innocent persons.

4.10 Police are vested with too many powers for they are allowed to arrest with or without a warrant and with or without reasonable cause. As an elaboration of such immense powers, it was found from the field study that police arrest youths and charge them as rogues and vagabonds who are thereafter discharged by the court for no case to answer. The conditions for the case on rogues and vagabonds to succeed were clearly explained in *Juma Bakari versus Republic, Criminal Appeal No. 20 of 1980, High Court of Tanzania (Sisya, J).* The trial court convicted the accused. But on appeal allowing the same the High Court stated that:

> *" For a conviction to stand for the offence of being a rogue and vagabond contrary to section 177(2) of the Penal Code it must be established , beyond all peradventure, that the convict was going about as gatherer or collector of alms, or endeavoring to procure charitable contributions of any nature or kind, under false or fraudulent pretence. Not even a grain of evidence was adduced towards this end in the instant matter…"*

From this finding of the High Court, it is clear that, just going about the streets does not constitute the offence, contrary to what the police force or some of its officers are doing.

4.11 Allegation were made that police do lock up virtually anyone they get hold of, however minor the offence may be. In connection therewith some Police prosecutors give false previous record of a person so that he gets convicted just because he did not offer a bribe. This is not only unnecessarily causing congestion in prisons, but also it is inhuman.

4.12 Another complaint was that the Police would not let a person write his/her statement instead they make one and make the person sign. The Commission is of the position that since a big number if not the majority of Tanzanians can read and write, it is therefore proper in the eyes of justice to allow persons who wish to write statements on their own to do so. This is because a person can write freely on his/her own rather than a police officer writing for him/her. Also he/she cannot further deny his/her statement that easily.

4.13 There were also blames thrown on the Police for keeping a person in custody for a long time and then releasing him without any trial.

Furthermore, there were complaints against Police notifications which are higher than what one would pay as a fine if taken to court.

4.14 Blames were made against the police for denying the PF3 to persons whom they have injured. This allegation reflects the aspect of human rights, and the Commission finds that access to medical treatment for the protection of whichever life is a matter of right. Therefore training of police on issues of human rights is essential. There is also a need for sanctions on a police officer who denies Pf3 to the injured person.

4.15 Some members of the public cried for the national identity cards so as to avoid harassment without good cause by the Police who arrest some people whose features resemble those of immigrants even if such people are citizens in fact.

4.16 Sometimes in some areas police do require a complainant to bring the suspect to the Police Station instead of the Police going to arrest the accused. It was also pointed out that Police notification was a source of corruption because of the big fine imposed on notification.

4.17 Concern was raised on searches conducted by the Police in the absence of the local leader in that area and the plight of arrested women who are sometimes raped by the Police. It is the view of the Commission that in every search activity there must be a local leader to witness the search unless it is impractical to get such leader.

4.18 Police are blamed to be less than serious in their work. For example a person will go to report a theft at a Police Station and instead of the Police taking the matter seriously they ask annoying questions. The Commission observes that such a tendency does not only discourage people to report matters to police but it also encourages mob-justice.

4.19 There was hue and cry at the way the Police are recruited. The process is not transparent hence attracting corruption and recruitment of unqualified persons. It is therefore important to establish a board that will be dealing with recruitment processes.

4.20 There is the question of issuance of a certificate for the property of a person to be detained. The law requires this but the Police sometimes choose not to issue one. Then when a murder occurs, the Police should take all the evidence as fast as possible. Any delay will lead to loss of evidence, as people will not be keen anymore to make any statement.

Problems facing the police:

4.21 The Police lamented that where the Police have to use force to arrest hard-core criminals, they cannot arrest an escapee by shooting him because they would have a case. It is as if the policeman should instead die in the course of the arrest so that no one is then charged. The Police were therefore demanding immunity in their work. They further proposed that whoever is found with a SMG or SAR should be taken as bandit.

4.22 Some Policemen lamented at the fact that when they are dismissed they are not given travel allowances and that some are transferred but not paid even transport money let alone other allowances. The Police also complained of retirement procedure, which takes a long time before one realizes the benefits of his retirement.

Junior Police Officers found themselves alone whenever something goes wrong in the course of execution of their duties. The Senior Police officers would not be of any use to them, in case they have to face charges.

4.23 Whenever the Police are suspected of an offence, they are court-martialled and then dismissed and later charged again in the ordinary courts where they could be punished again, and even if they won their cases, they would not be returned into service. This is double punishment which is against the principle of natural justice which forbids a person to be charged twice for the same 'crime' committed, they complained.

4.24 The Police were not encouraged to give Police bail because if the accused (suspect) escapes there are no sanction or remedy against him apart from re-arresting him if at all that can be managed. Nolle prosequi' that may be issued by a State Attorney without giving reasons for such move discouraged Police in their work especially where evidence has been gathered.

4.25 A Police Officer doing his work properly could be victimized by his boss who prefers things to be done differently for his benefit.

4.26 The government was blamed for not giving the Police adequate working tools for their work, thus rendering their duties to be very difficulty effecting to unnecessary delays when performing their duties.

4.27 Another complaint by the police was on the period of 24 hours within which to take the accused to court because it was considered to be too short for serious offences which may need more time, for example, where the accused wants to take the Police to the place where he has hidden a gun in fire arm cases.

The Judiciary:

Congestion of pending cases in courts:

4.28 Many views were expressed concerning the Judiciary about pending cases. However it was pointed out that the said congestion of pending cases is the result of inadequacy of the Judiciary personnel let alone that some do not perform well. Their proposal was that more magistrates should be employed, and that they should receive regular training to make them more competent.

4.29 The delay is also caused by the bottlenecks at the court, especially where an accused is taken for trial. The court might fail to hear the case although there are witnesses and exhibits. Sometimes the accused may come up with an idea of getting an advocate. This is a constitutional right for an accused person to be represented in a court of law, however there is no right without limitation. It is the view of the Commission that after having given reasonable time and directives for the accused person to get a lawyer, the court may proceed to hear the case. It was further suggested that ADR should henceforth be introduced in all regions instead of being only in pilot stations of Dar es Salaam, Arusha and Mwanza so as to speed up cases.

Magistrates Conduct:

4.30 Some magistrates are alleged to give an oral judgment hence no copy of judgment would be available. The other type of Magistrates does not take down correctly the evidence of the parties and a judgment is written at the end of the trial that would be the reverse of what was adduced. They do not follow the staff code of conduct.

Procedure:

4.31 Cumbersome court procedure appears to be a source of problems that cause inconvenience to parties. For example the use of excessive injunctions in civil cases may be injurious to parties. It was stated in one case……that procedure is a handmaiden of justice and not the

master of it. In other words, the procedure is made to facilitate the flow of justice and not to defeat it. However the abuse of it can lead to miscarriage of justice. It is the duty of the presiding judge to see in a particular case whether the procedure is abused or not.

Another area pointed out was on transfer of cases from Primary Courts to the District Court whether criminal or civil, which is alleged to be problematic because it requires an application to be made to the High Court, which would then agree or refuse such transfer. In criminal matters such transfer would necessitate the involvement of the OCCID District because the OCD would have to file a charge and then make investigations before the matter could be tried by the District Court.

To simplify the procedure it was started that a notice to transfer should be made to the presiding Magistrate and then application for the same is be lodged with the Resident Magistrate In charge.

4.32 Again the requirement by the courts of presenting a plaint and a written Statement of defence (wsd) in English is said to cause serious problem to an ordinary person who does not understand the language and the law. The law requires that pleadings in all courts save the primary courts to be in English although parties can argue their cases in Kiswahili, this is an acceptable phenomenon, and perhaps it can change in the future.

Therefore the commission prefers more consultation of lawyers and paralegals in drafting pleadings. In some jurisdiction like India the court prepares the charges and that in India the court receives reports concerning the reports made to the Police station but in which the Police are reluctant to take any action.

4.33 It was pointed out that "notice of intention to appeal" should not be required by law because an accused person once convicted may be confused so much that he cannot think of appealing until later in which case he will be time-barred. They suggested that there should be an automatic extension of time to appeal in such a case. Furthermore it was intimated that copies of judgment should be typed to enable the appellate court to read more easily. Proceedings and judgment should be typed.

4.34 There were further complaints against the courts for delaying appeals and revisions under the pretext of no copy of judgment. The case of Dibagula which was finalized fast was given as example of how a

matter can move fast if there is pressure from some circles. There is no systematic way of dealing with appeals on first come first served basis. Not only was it difficult enough to get a copy of judgment but even if one got it and prepared the appeal grounds, there was no guarantee of when the case would be heard.

4.35 Rather than the wife or husband be asked whether they want to give evidence, it was argued that the accused should be asked whether he or she allows his/her spouse to give evidence. This was for the purpose of maintaining the marriage that might otherwise be damaged by such evidence of non-compellable but competent spouse. They also argued for restoration of the corroboration evidence in sexual offences on the reason that somebody could be wrongly convicted (Section 130 of the Law of Evidence Act).

4.36 In civil matters, there would be need of preparing and filing a plaint which is in English and which is written in a legal language. This is a great bother. Primary Courts should be open to lawyers so that lawyers can appear in Primary Courts because some cases starting in the Primary Courts were messed up so much that it was difficult to manage them when they came to higher courts on appeal. In addition thereto the Judiciary is making some reforms where the Primary Court will be manned by the magistrate holding a diploma in Law, therefore making it possible for a lawyer to appear in Primary Court. Participants argued along these lines.

4.37 The proceedings and Judgment from District Courts upwards are recorded in English whereas Magistrates and Judges know Swahili very well. This was pointed out to be a problem to non-lawyers and especially villagers. Also Primary Court Magistrates who do not read the law and want parties to look for the law for them were the subject of attack. Complaint was raised against the court in cases of divorce whereby the wife would be busy getting a copy of the judgment and the husband would be selling the matrimonial property without any restraint from the court. It was suggested that Swahili should be used. Another point raised with regard to procedures was that appeal grounds should be sent to the High Court without the copy of judgment, which takes too long to be provided.

4.38 Concern was raised in regard to procedural laws. Some of which were said to be ultra vires. For example an accused person charged

with murder case cannot come before a Judge for trial unless PI is conducted even if he is ready to plead guilty. The suggestion was that there is no need of PIs and that the P.H. was enough.

It is the view of the Commission that murder cases should be taken straight to the Judge on the reason that it takes too long to finish the PI's which have no meaning at all, because whether there is a case to prosecute or not is decided by the State Attorney and not the Court conducting the P.I.

Facilities;

4.40 Lack of funds to run the courts was pointed out to be a source of injustice to the public. It was said that sometimes courts couldn't pay witnesses' expenses due to inadequate funds. Another issue was that Case flow management committees were found to be not working so well because of lack of funds. Also there is delay of the process because summonses cannot be served due to lack of funds. Sometimes the Magistrates are unable to proceed because he has no paper. There was concern over the lack of motor vehicles for the courts whereas there are plenty for the politicians. Magistrates cannot do supervisory work because they have only defective vehicles like the case in Tabora and Songea.

Judiciary officers' Misconduct:

4.41 Again magistrates are blamed of using abusive language to witnesses and other people. Furthermore, there was a suggestion of restoring the supervisory magistrate cadre as it was before the present structure wherein the RM in charge also acts as a supervisory magistrate. Supervision was a full time job and a supervisory magistrate was just supervising and not hearing cases as well. Another complaint was that sometimes misconduct of Magistrates was caused by a long stay in one station without a transfer.

4.42 Court clerks came under fire from the public for demanding bribes before giving out forms for bail purposes. They charged that there were too many clerks in the courts, most of whom were just going for bribes and only a few doing the office work. The result of the magistrates and clerks misconduct is that people who are well off are not convicted, they said. A suggestion was made that instead of leaving it to the clerks, the Magistrates themselves should process the bail forms and get them filled in.

The Assessors:

4.43 Assessors in the Primary Courts seem to be powerful because they have equal votes with the magistrate. It was proposed that if one assessor cannot attend one should suffice for the purpose of quorum. In a civil case in Ujiji Primary Court of *Mwanaidi d/o Rashid and Ally s/o Nyembwe* The Primary Court Magistrate differed in opinion with two sitting assessors and, entered a judgment contrary to Assessors views. The judgment of the Primary Court Magistrate was later quashed by The High Court, (Chipeta, J) on grounds that the trial Magistrate:

> *"… erred in overruling the unanimous opinions of the assessors…",*

and further that;

"… the error was such a fundamental breach of statutory provisions…"

Honourable Judge concluded that *"… the learned primary court magistrate, therefore, had no authority to overrule the unanimous opinions of the two gentlemen assessors* ***<u>however perverse</u>*** *their opinions might have appeared to him…."*

In another situation, In Mkumbi Primary Court, Mbinga District, the case was between Alexanda Killian and Linus Kinunda. In the course of the hearing, one of the two assessors who previously sat with the magistrate was replaced by another assessor, after the applicant had closed his case. The respondent, aggrieved by the order, appealed. Kazimoto, J commented:

"…As a matter of practice assessors during trial should not be changed…."[10]
He went further to say,
"… the issue is whether there has been failure of justice."
But before reaching his conclusion, Honourable Judge cited the case of *Arobogast Fundi v. Masudi Zaidi (1980) TLR 125 … where the facts of the case were exactly the same…"* In the former case, the High Court, (Lugakingira, J) decided that *"…there was no failure of justice in the change of assessors…"* Kazimoto, J however, disagreed with Lugakingira, J's reasoning, when he said:

"… I have some difficulties in agreeing with that decision. Wandela in this case as the other assessor in the case cited above never heard the evidence of any witness. He did not know the case for both the parties in the case. After the summing up he could not give any meaningful and independent opinion…. In my

[10] Alexanda Killian vs Linus Kinunda, [1988], TLR 71

considered view I find that the irregularity in this case has in fact occasioned a failure of justice and I , with greatest respect, dissent from the decision in Arobogast Fundi v. Masudi Zaidi (supra)…"

It can be seen from the above cases that issues concerning presence of assessors in primary courts and technicalities of their functions, among others, are matters still to be considered. The Court of Appeal held concerning change of assessors thus[11]:

"…Neither the old Criminal Procedure Code nor the current Criminal Procedure Act allows a new assessor to be recruited after the hearing of the case has started."
"… We respectfully agree with both the learned Counsel that the proceedings should be quashed. The appeal is thus allowed and the proceedings are accordingly quashed. We order a new trial…"

4.44 The issue of assessors was said to be a source of delays and corruption for they are lowly paid. Assessors could be used may be where there are issues of local customs, or Islamic law. Otherwise they should not be there. Indeed sometimes a matter on Islamic religion is being dealt with but none of the assessors is Moslem.

Time limit for hearing a case:

4.45 The time taken for the hearing of a case to the time of decision is too long in many cases and at the moment it seems there is no limit. However this problem can be solved if there is adequate staffing and other facilities. Other voices stated that the 60 days as provided by s. 225 of the Criminal Procedure Act is too short. It was suggested that the period should be 4 months in all cases. The genera suggestion was that the case should be finalized within 4 months.

4.46 Another suggestion was that the case should not be taken to court before investigation is completed. It was also emphasized that the complainant should be present even in cases in the District Court so that the matter can be heard instead of only the Public Prosecutor being present

Independence of the Judiciary:

4.47 Section 219 of the CPA, is concerned with the powers of the Minister to end the matter in respect of cases involving a person with a mental disease instead of the court. It was suggested that the matter should end with the Court only. Then there was the issue of implementation of decisions of the courts, especially when the other party was the

[11] Nyahese Cheru v Republic (1988) TLR 140

government and it has lost the case. In many occasions, the government does not seem to respect such decisions. This appears to defeat the independence of the judiciary.

4.48 RC and DC are sometimes made members of the judicial boards. These are part of executive and sometimes they chair these Boards, which normally discipline magistrates. Moreover if the DC is a member of the Executive Committee of CCM, and if a CCM Secretary complained against a PCM to the DC the PCM would surely be disciplined. This also defeats the principle of separation of powers and the independence of the Judiciary.

4.49 Generally the Regional and Districts Judiciary Boards were said to be problematic. The public do not know how to use these boards. There should be a way of managing them properly. In most cases these boards cannot meet due to lack of funds.

Investigation follow-ups by courts.

4.50 It was urged that courts should have power to inquire into the state of investigation of a case and take action rather than waiting for the Police to complete their investigation.

4.51 As to court fees someone lamented that they were too high because you could pay up to 120,000/= fees for filing documents only. Also complaint was raised against the deposit of 5 million shillings before filing an election petition because such condition amounted to denial of justice. However the said Law was amended where one can deposit even less than 5million depending on the discretion of the Court.

4.52 **Trials:**

The trial of economic crimes in the High Court only was challenged and it was suggested that trials should be even in Magistrates' Courts so as to reduce congestion of cases in the High Court.

Corruption:

4.53 On corruption, it was suggested that the government should scrutinize each magistrate. It was highly recommended that there should be a retention scheme for the Judiciary of the fees and fines collected so that the same can be ploughed back for official use by the courts.

4.54 There was also the issue of unstamped documents i.e. documents not bearing the seal of the court. It was submitted that since this would be the fault or inadvertence of the court and a party had no control over

the court which stamps the document, such document should be admitted in any transaction or proceeding.

Bail.

4.55 Someone thought that there was no reason why a person charged with murder should be denied bail more so because it took so long before a murder case could be tried. Injustice was also found to be there in a case where someone who has traveled to a place is arrested and taken to court because such person cannot easily get bail since he knows no one in that area. Courts were urged to exercise power over bail issues instead of leaving it to the Police to derail the bail process. The public complained that a police prosecutor would bring a suspect to the Court of law and make demands to the Magistrate that the suspect should be denied bail, and the Magistrate would follow the wishes of the Prosecutor.

On this issue the public who are among others NGOs,Judiciary ,ordinary citizen i.e. business person, petty traders,farmers ,lawyers e.t.c were of the view that preference of cash bail in such situation may be useful for the purpose of protecting the accused right to bail and assurance of the accused to appear in court.

4.56 Bail conditions were attacked as being too harsh for poor Tanzanians. It was suggested that a surety with a proper address was enough.

Level of Education of Magistrates.

4.57 It was advocated for the removal of Primary Court Magistrates on the reason that there are enough lawyers who can work as magistrates. The Public further said that , there is a need of training the primary court magistrates to the level of diploma. Again the use of paralegals in primary courts could be of beneficial to poor persons who cannot hire an advocate for representation.

It was said that due to low level of education PCMs abuse their powers where he might lock up somebody's husband so that he can take the woman because she has attracted him.

Sentencing;

4.58 Some concern was expressed on the rather absurd situation of fining Shs.50, 000/= a person who has failed to pay development levy of 5000/=.

4.59 There was a complaint against the courts for awarding small sums of money by way of damages in adultery cases when a spouse could have been infected with HIV in the process. Amounts of 4000/= to a

maximum 16,000/= were often awarded against the adulterer who could have caused more serious damage such as an HIV infection to another's spouse.

ADVOCATES AND STATE ATTORNEYS

ADVOCATES;

Advocates are persons enrolled to practice law in accordance with the provisions of the Advocates Ordinance. They have a vital role of providing legal services to others to ensure that justice is done. However according to the research it was found that these important persons are very few compared to the Tanzanian population. The advocates have become very expensive and most people cannot afford to hire them. Most stakeholders contended that the advocates do charge un affordable fees.

The scarcity of advocates is said to result from the system of enrolment, which is cumbersome. Another reason pointed out in the field was that many graduates do not bother to go for the said cumbersome procedures, hence they become civil servants.

It was proposed that graduates in law should go to a law school and then get admitted to practise.

The scarcity of advocates has resulted to one-advocate contracting too many cases, which he/she eventually fails to handle hence leading to delay of justice.

Being very expensive, only few people who are well off enjoy the right of representation for they can easily hire a lawyer at any cost.

It is the view of the stake holders and of the Commission that the Government should consider legal aid as a human rights issue especially to the ordinary person who would find it hard to defend or prosecute.

According to the law, the advocates are not allowed to appear in the primary courts hence representation in the said court is nil. It was proposed by the stakeholders that Advocates should be allowed to appear in primary courts.

However the Commission is of the view that there is a need of establishing a new cadre of paralegals that will assist people in primary courts.

Delay of cases caused by Advocates:

Apart from delay that results from one advocate having too many cases, advocates do use technicalities to delay and prolong cases which eventually would lead to delay in justice.
Some of the counsels would keep on dilly-dallying in a case if he has not been paid and would try to mislead the court so that their clients are released even by using delaying techniques.

It is the view of the Commission that the institution responsible for disciplining Advocates should promptly do the same and in addition thereto conduct regular training on advocates' code of conducts.

STATE ATTORNEYS.
These are Civil Servants normally performing legal activities for and on behalf of the Government There were complaints from State Attorneys that they are given an instrument to enable them to appear on behalf of the Attorney General but only in criminal cases.

There was need for such instrument even in civil cases.

Delay of cases by State Attorneys;
There are some cases such as Economic Crimes in which the State Attorney cannot proceed until the DPP consents. From the field it was argued that the said consent is unnecessary.

State Attorneys are poorly paid and they are not enough. Due to the number of cases it becomes impossible for a state Attorney to handle all such cases, hence delay. It is therefore important for the Government to improve the state Attorneys' package so that it becomes an attractive post.

WARD TRIBUNALS AND HOUSING TRIBUNALS

WARD TRIBUNAL

4.61 According to the research when a person is brought before a Ward Tribunal once found guilty he can be fined and if the amount of fine exceeds Shs 1,000/- the matter is referred to the Primary Court Magistrate for endorsement. The complaint of the majority was that once the matter is taken by the Primary Court Magistrate it begins afresh.

Moreover, it was revealed that many cases, which could be finalized in Ward Tribunals are taken up by the Police for their own interest.

4.62 There were also comments that Ward Executive Officers should not do legal work nor should they be Secretary to the tribunal and that they should not write judgment.

Another complaint was that the tribunals do not follow the Law, and they proposed that somebody should supervise them. Most of the members on the tribunal do not know the law.

4.63 It was shown further that ward tribunals do not sit because of the problem of funds. As such even matrimonial cases, which need conciliation certificates would not be entertained.

4.64 The tribunal were said to be very important in assisting the Primary Courts to entertain some cases. The absence of the same would necessitate all cases to go to Primary Courts. It was argued for revival of the said tribunals. It was proposed that working tools such as stationery should be provided to the tribunals.

4.65 In order to make the tribunals efficient, members of the tribunal should go for short courses on top of that the fine imposed should remain in the tribunal and members should receive allowances from the fine.

4.66 With regard to the laws used in the Ward Tribunals they were said to be very old some of which give fines of only 100.00. It was further proposed that the clerks employed to assist the Tribunal should be trained in some laws.

4.67 Further more it was pointed out that there may be a case against a member of the ward tribunal and it would be likely that he would be favored. There was an allegation that the ward tribunals do not allow parties to say anything especially when they are the accused. It was proposed that the tribunal be manned by a lawyers.

HOUSING TRIBUNAL

4.68 There was a complaint that only one Magistrate was dealing with housing tribunal cases in a region, which was on part-time basis since he had other cases and matters to attend to. Cases are many and they

normally take too long to be completed. Whenever the term of one chairman of the Housing Tribunal ends it takes time to get another one appointed. This is also a problem even in the appointment of members of the Tribunal.

4.69 The proposal is that there should be a better procedure. The Regional Housing Tribunals were at the regional headquarters only. This is another problem particularly to persons living far from the same. *The suggestion was that such tribunals should be in every district*.

4.70The execution of the decree of the tribunal is made in the Residents Magistrate's Court.

It was proposed that since the Chairman of the tribunal is a Resident Magistrate the same should be executed by the tribunal it self

PRISONS

Overcrowding;

4.71 According to the research findings the main problem that faces the Prisons is overcrowding. The causes of the problem are that remandees are kept in prison for a longer period than the sentence they would get after conviction; convicts of minor offences are taken to Prison and the size of the Prison buildings. It was found that most of the Prisons were built a long time ago and were not intended to accommodate prisoners with long sentences.

As a solution to the problem it was proposed that the construction of more prison buildings to cater for the great number of Prisoners as a result of the present population growth in the Country would alleviate the problem.

4.72 Another proposal is on the use for the extramural penal labour and the other traditional ways of dispute settlement. Furthermore it was observed that where there is an option of a fine the Court should resort to the fine. However from the field it was observed that Primary Courts do not impose fines, because they are too small. i.e 5 shillings up to 400/=. It was proposed that amendments should be made in this area.

4.73 It was also suggested that remand homes for prisoners committed for trial after a Preliminary Inquiry should be in every region, so as to reduce the problem of overcrowding.

4.74 It was further found that it would take a very long time before confirmation for execution of corporal punishment. This was also a cause of congestion.

4.75 Parole law would have assisted to reduce overcrowding; however the research reveals that since the law came into operation not more than 5 prisoners have benefited from it. Therefore there is a need to revisit the conditions laid in the law so that it can meet its goal. Fortunately there has now been an amendment to the Parole Law for the better.

Long Sentences

4.76 Apart from being a source of overcrowding, long sentences are said to be a source of indiscipline among prisoners, because a prisoner would lose all hope; and it becomes difficult to rehabilitate them. It is the view of the prison authorities that prisoners serving long sentence should be made to work.

4.77 Conditions in Prisons;

Prison conditions in the country are not in a good standard for instance there are poor health conditions, insufficienct food, which attracts struggles and shelter, is also poor.

4.78 As mentioned above some of the problems i.e poor diet and poor shelter result from small amount of money allocated to the prisons.

Participants were of the view that the food problems can be solved by prisons producing their own food. With regard to harassment, the prisons officers should treat prisoners in accordance with the law.

In other words the rights of prisoners should be respected, he/she should receive all necessities of life as a human being (food, shelter, clothing and health care).

Capital sentence.

4.79 There is also the problem of execution of death sentences which takes too long before any action is taken. This trend not only causes overcrowding but also it causes psychological torture to the convict.

The Law Reform Commission considers that taking of a human right is morally and ethically wrong, the intentional killing by the state of its own citizens is barbaric and blameworthy.
The death penalty has no legitimate place in the penal system of modern civilized societies, and that its application may well be compared with torture and be seen as inhuman degrading punishment.
The following is among the reasons that makes the punishment to be not favoured.

- **CRUEL**

No execution can be carried out painlessly and all available methods; for instance electrocution, lethal injection, hanging etc can make many minutes for the person to die.
For instance ;
John Lewis Evans was electrocuted in Alabama in April 1983 after being convicted of murder in 1977. According to the eye –witness accounts, it required three separate jolts of 1.900 volts over a 14 minute period before he was officially pronounced dead. During the first electrical charge, the electrode in his leg burned through and fell off.
Prison guards repaired it after doctor said he was not dead. During the second charge, smoke and flame erupted from his left temple and leg. The third was given after doctor put a stethoscope to his chest and said there were still not certain he was dead ***.(http.canada online,about.com/library /weekly)**

- **DISCRIMINATORY**

The poor and member of minority groups suffers disapopriationately from the death penalty. Evidence of racial discrimination has been revealed in SA,USA and Jamaica. Statistics conducted by United States Bureau of research from the 1980's shows that in California 42% of blue collar workers charged with first degree murder were sentenced to death, whereas only 5% of white collar workers so charged received a death sentence.

''because I have no money ,I get no justice and I am executed just because of that.''
(Neville carter, shortly before he was hanged In Jamaica 1987)

- **IRREVOCABLE**

Execution is an irrevocable act and can be inflicted on the innocent person. There have been many established cases of conviction of innocent persons.
The good example is one of Timothy Evans who was hanged in 1950 for murder of the death of his daughter ,the murder was probably done by John Christie who was hanged in 1952 for the murder of seven people. In the house he shared with Timothy Evans .Since both have been executed it can never be proved whether there has been miscarriage of justice. There it remains the enormous likelihood. The queens posthumously pardoned Evans in 1966,and an announcement was made in the house of commons*****.(**http//members.magnate.ai/dornbirn/cp.sum.htm)**

It is the firm stand of the commission that there should be no death sentence in the penal system of our country

4.80 Problems facing prisoners.
The system of depositing all the money with the Treasury appears to cause a lot of problems especially when a prisoner had been transferred a couple of times. It has been revealed that many released prisoner fail to get their money back. It is therefore necessary to devise better ways of dealing with prisoners money.

4.81 Likewise some remand prisoners when released fail to go home because of lack of funds to transport them. There is a need for providing the prisons with fund for such purposes. Again due to delay in availing copies of judgments, it becomes a hard task to appeal particularly to the Court of Appeal whose procedures appear to be complicated.

We are of the view that this problem will be reduced if courts are provided with modern working facilities such as Computers etc.

4.82 Problems facing prison officers.
On their part prisons officers complained that they buy their own shoes for official use. This is against prison standing orders because it is the duty of the government to provide for them.

Mean while prisons Officers guarding prisoners are in a dilemma when the prisoners decide to escape, because if they shoot them to death, the prison officer will be charged personally, it was argued that they should have immunity like Magistrates.

4.83 Prison Officers commented that it is a very hard task to have good governance if there are inadequate funds to service the police, prisons and courts. It was argued that the Government should put in more money not only to run the Prisons department but also to provide some training to Prisoners.

CIVIL JUSTICE

4.84 According to the field research four issues were discussed with regard to the civil justice system namely; delay in the proceedings, probate issue, execution of decrees, and the Alternative Dispute Resolution issue.

4.85 It has been found that civil matters can take very long due to various reasons, such as interventions by way of objections, preliminary points or applications. These kinds of interventions are normally used by the advocates as some of the delaying tactics. Again the plaintiff (s) may cause delay by failure in giving money for service of summons to the defendants(s).

Rules of procedure are intended to smoothen the path of justice, and not to defeat the same. Using procedural rules as delaying tactics is an abuse of the court process. It was argued that counsel who abuses such rules, should be stopped from the practice for he is an enemy of justice. Again plaintiffs who appear to be unable to bear costs of the case should be assisted.

4.86 With regard to probate and administration cases it was found that they are normally filed when the deceased had some assets. As a matter of fact the deceased's wife is often not made the administrator of the husband's estate and instead the relative of the deceased may be appointed. Such relative will consider himself to be an heir. The Law gives room for any person whether relative or spouse of the deceased to be appointed to administer the estate. It appears that such room is overtaken by customs where the relative of the deceased husband would elect a male relative to administer the estate.

4.87 Probate matters are dealt with the High Court, but a District delegate can also handle such matters. However not every Resident Magistrate is a District delegate unless so appointed by the Chief Justice. It was argued that due to the increase in probate cases it is proper for every Resident Magistrate to be a District delegate automatically.

4.88 It was proposed that Moslems should go to courts for probate matters .

With regard to this view the Commission is of the firm view that in civil suit the parties should go to the court to get justice.

4.89 Again in Primary Courts Notice of Probate Proceedings is usually 90 days but the law (GN 46/71 does not provide so.

On execution of decrees, it was said that its procedures are long and cumbersome. For instance there are 14 days of notice before seizure of the property, then 30 days after seizure. The proclamation of sale takes another 30 days. Meanwhile in between there might be application for stay of execution.

4.90 Again execution Warrant from the Primary Court which is normally referred to the DC, should go to the Court broker. This is because the D.C's Officer might not even know what to do after seizing property.

4.91 On ADR it was said that Advocates were the stumbling block in the success of ADR. It was suggested that if parties did not want ADR there should not be a scheduling order because such order would be a waste of time.

4.92 Someone decried the system of attachment of properties by TRA or other body without having recourse to the courts. He suggested that there should be no attachments, which do not go through the Courts.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 The flow of justice in any country requires that the administration of justice is put on a high priority in state affairs. No country can get things moving without the necessary commitment from the executive to do whatever it takes for a proper, well functioning and well-coordinated instruments of the justice machinery. As mentioned elsewhere in this report, the Judiciary system, the Police force and the Prisons service of any country cannot be run haphazardly if what is aimed at is a smooth flow of justice. The attitude of the executive towards these organs of the State has to change for the better. In many countries where there has been any degree of success in the country's justice system, great efforts in funds, manpower training and general supervision have been made towards realizing a system of justice that can be respected and admired. It was once said that democracy is expensive but it is cheaper then civil wars and it can now be said that justice is expensive and it is available only to the one who is willing to pay. The government must be willing to pay and pay heavily if it is going to provide a justice system to the citizens which are worth the name.

5.2 Throughout this research the question of funds has dominated our discussions. Funds will ensure proper training for all involved in the justice system. Funds will ensure that adequate numbers of law enforcers are recruited and funds will ensure that there is provision for working tools, buildings and even the invisible matters such as morale, hard work, good conduct and tolerance will be in place. In short, the key to any meaningful improvement of the justice system lies in the government's commitment to

provide adequate funds to run the justice administration in the country. The rest will take care of itself. With funds you can devise a system wherein advocates toe the line, witnesses are managed and logistics are also managed.

5.3 It may be appropriate at this juncture to list recommendations, which emanate from this study.

1. The government should provide adequate funds to enable the process of administration of justice to take off. Since it is a process, results can only be discernible after some time. Without the necessary funds it is unlikely that there will be any meaningful improvement of flow of justice.

2. A comprehensive strategic plan must be in place to embrace all areas, which are involved in any justice system of a country.

3. Since lack of motivation is the root cause of inefficiency, corruption and laissez faire, it must be addressed immediately and a proper scheme of service put in place for the benefit of all law enforcers. Better terms to ensure more money and benefits should be in place.

4. Laws, which impede proper administration of justice, must be identified, amended or repealed and/or replaced. These laws are the Civil procedure code, Evidence Act, Criminal Procedure Act Economic and organized Crime Control Act.

5. Disciplinary machinery must be revived and made to work to ensure success of the system.

6. Adequate and competent staff must be recruited to manage the administration of justice. To this end attractive terms of service must be created to attract good lawyers to do the work

7. Instances of corruption, negligence and general malaise must be punished severely once proved in order to instill in the minds of the staff a sense of justice and to give the message that the government is serious in its endeavours.

8. Reform measures in the law enforcing institutions must be implemented fully in order to establish credibility and seriousness on the part of the government.

9. Human rights of persons in custody must be respected and all impediments to must be removed. To that end more funds must be provided to improve the standards of the Prisons and Police station detention centers (remands)

10. Advocates who are considered to be a source of delays in court cases can be managed by amending the relevant laws such as civil procedure code which regulate representations and filing of legal documents by advocates together with Criminal procedure Act which regulates court proceedings.

11. Legal awareness on the part of the public is a necessary step for the success of any justice system. The need to educate the public cannot be overemphasized. More efforts must be made to make the public aware of their rights and basic laws.

12. The Law Reform Commission Act no. 11 0f 1980 which establishes the law Reform commission must be strengthened or amended to enable it to work faster on the laws. It must be made a centre for law reform. More competent staff must be recruited and in order this to happen better terms of service must be created.

13. Legal education must be taught in schools to make everyone aware of the important laws of the country, which affect their daily lives.

14. Modern technology must be employed towards better and faster services in the administration of justice. Computers must be used for better and faster services in law enforcing institutions.

15. The Judiciary being one of the organs of State should not be under any ministry and it should get its budget approved, by the Chief justice presenting the budget to the President who in turn passes it over to the Parliament for approval as is the case with Uganda, Japan and Ghana.

16. All measures, which have been employed in other countries in the administration of justice with good results, should be employed in our system. In particular we are referring to measures taken by courts in disposing of cases faster in other jurisdictions. Eg. ADR, plea bargaining, more summary trials and arbitration.

17. The government must be made aware of the pathetic state of the justice system in order to remove from it any sense of complacency. Since the current state of the justice system is discouraging, it can only be left as it is at our peril. It is better to advice the government to restructure court system.

18. The problem of the English language being used in our court system should not derail any efforts to simplify our procedural law for the benefit of the ordinary person. The procedural aspect of the law is there to simplify subsequent proceedings in the actual trial of a case. Important laws touching on the population should be translated into Kiswahili for use of the non-English speaking population.

19. Although the government has been shelving the paralegal scheme it will be necessary to get involved in it again in order to assist the ordinary person.

20. The government must tackle the question of National Identity cards forthwith in order to be able to administer the justice system better.

21. After judgment, trial court should produce a copy of judgment within 2 weeks.

22. Powers of detention of the Regional Commissioner and District Commissioner should be removed.

23. Public Prosecutors should be detached from the Police Force and attached to the DPP's office for everything while in service. They should be delinked from the Police Force and their terms and conditions of service should be managed by the DPP Office.

24. Generally, Magistrates should not stay in one station for more than 5 years.

25. Assessors' views should not be binding on the Magistrate and in case one or both assessors are absent in the course of the trial the magistrate should be able to finalize the case.

26. Police training school and the Faculties of Law in the various universities should make human rights and good governance compulsory subjects in their syllabuses.

27. Property of the convict should be distrained in order to realize funds for compensation and it should not await the release of the convict from prison.

28. New laws being drafted should take into consideration the needs of people with incapacities and in accordance with the UN standards on differently abled People.

29. Exhibits in courts and Police stations should be kept in a proper and safe place to avoid thefts.

30. More Approved Schools should be established for both genders.

31. Probation services should be revived and strengthened to assist in the rehabilitation of offenders.

32. It should be a criminal offence for any Police Officer to disclose the identity of an informer.

33. Section 225 of CPA – once a person is released he should not be rearrested and charged again without the permission of the court and under conditions that investigations should be completed before such a person is arrested and taken to court again so that the case can be heard immediately.

34. In cases involving drugs the punishment should be meted out according to the quantity of drugs.

35. With regard to condemned prisoners the process leading to commutation of sentences takes unduly long time and it should be streamlined.

36. The Regional Housing Tribunal should be enabled to execute its decress without having to send them to the Resident Magistrates' Courts because the Chairman of the Tribunal is a Resident Magistrate. The law should be amended accordingly to accommodate the recommended changes.

37. The law reform Act should be amended to include the duty of ensuring that all laws are revised and consolidated and that they reach the intended users as soon as they have been revised.

38. Matrimonial cases should be taken to mediation through ADR instead of the Marriage Conciliation Boards, which are not working in most areas.

39. The law at the moment does not allow every Resident Magistrate to become a District delegate except the one appointed by the Chief Justice. In order to be able to handle probate matters in more Districts the law should be amended accordingly to allow such a change.

40. Primary Courts prefer imprisonment of the accused persons to fining them because the fines are too low e.g. 50/= to 400/=. In order to deal with the problem of overcrowding the law should be amended to enhance the fines so that the courts will impose fines which are considered to be adequate sentences meted out to the convicted offenders.

41. In criminal cases the rights of the victim should elaborated in law , be respected and protected by the court.

42. In order to reduce controversy, which sometimes appears over the correctness of a court record, there should be independent means of recording whatever is given as evidence in court.

43. The law should provide that the widow has to be the administrator or one of the administrators of her deceased husband's estate.

44. The criminal and civil procedures have inherent elements of delays. Both procedures should be simplified without

compromising justice. For example, the execution of decrees is delayed unnecessarily in most cases. The trial Magistrate or Judge should regard a particular case as his still until execution has taken place.

45. Adultery in this age of HIV/AIDS should be visited with punitive damages since the dangers of such acts are quite alarming to the faithful spouse in the marriage.

46. There should be limited use of remand in prisons, increased use of release on personal bond, modification of penal sanctions, and active use of alternatives such as probation and community service as countermeasures against prison overcrowding. A task force to supervise the use of alternatives to imprisonment should be formed and made to work towards that end.

47. Community involvement is a necessary crime prevention ingredient. Voluntary organisations, societies, clubs and associations should be encouraged to participate in crime prevention. Vigilante groups and Neighborhood Watch Group Sungusungu and people's militia should be employed to assist the Police Force.

48. The issue of child offenders is not taken seriously enough especially when it comes to their detention before trial and the length of time used to complete their cases. Generally child offenders should not be kept in prison and in any case their cases should be completed within a time limit or dismissed once the time limit is reached before conclusion of the case.

49. Ward Tribunals and other traditional means of solving disputes should be used more often in less serious cases both criminal and civil.

50. ADR should be introduced in all courts all over the country and even in appeals.

51. Courts should have realistic cause lists for Magistrates and Judges in order for them to handle the cases of the day adequately.

52. Sexual Offences Special Provisions Act should be re-examined to remove the anomaly of age with regard to age of marriage or marriageable age and age of rape.

53. A valid document issued from a court which requires the court seal but does not bear one is incomplete and invalid. There should be sanctions on the officer responsible for issuing such a document but the parties should not suffer because of such an omission because they have no power to order the court to stamp the document(deliberate commission).

- There should be a system of punishing a court officer who made such omission.

54. It is time economic crimes were made ordinary crimes triable by the District Court and only where necessary by the High Court.

55. The Mandate of the State Attorney should be clearly specified in his instrument of appointment both for civil and criminal matters.

56. Since the law is very wide and it is difficult for most magistrates and Judges to have adequate knowledge in all the branches of the law, magistrates and Judges should specialize in one or more areas.

57. Since Visiting Justices are often of great assistance to prisoners and their guards, those selected to be Visiting Justices should be required to make the visits regularly and there should be incentive measures to make the visits more attractive.

58. Funds must be made available to improve the conditions of our prisons in all respects i.e. space, sanitation, clothing, food, rehabilitation and other human rights aspects.

59. There should be time limit to investigations of any kind, especially when there is a detained suspect, and in any case it should not exceed 2 year

60. Police who prefer false charges against individuals should be punished and the victim compensated.

61. Customary law in the villages should be made to function well in order to reduce congestion in prison instead of taking every case to the courts where imprisonment is the order of the day, and the programme of settlement for prisoners should be revived.

62. Child offenders should be removed from the prison where possible and kept in a foster home or a school for orphans or for those with mothers in prison. Also people vested with authority to visit remand prisoners and convicts should be able to receive the complaints.

63. Petitions of appeal should be filed without the need to attach copies of judgment to enable the cases to be heard on appeal. After all the Judge would call for the file and get the original judgment in the case file.

Other recommendations were to the effect that;

65 Protection of witnesses and victims of crime is important and a necessary component in the administration of justice.

66 . Treatment of juvenile offenders should be examined with the purpose for improvement and introduction of juvenile court system.

67. There is need for alternative criminal charge resolution (ACCR) in order to cut down on the delays for disposal of simple cases.

68. Protection of witnesses and especially victims of crime together with proper handling of them is equally important .

69. Many appeals are pending in the Court of Appeal. The Court of Appeal has become another cause of delays in the finalization of cases. This has been caused due to scarcity of Appeal judges.

70. In rape cases and sexual offences cases, the evidence Act should disallow unduly annoying, intimidating, offensive, oppressive and repetitive questions for the purpose of protecting the victim and making it easier for the victim to report such offences to the Police. The Court should not hesitate to stop such questions and to punish the person who keeps on asking similar questions after such an order of the Court.

72. Confusing, misleading or questions phrased in inappropriate language should be disallowed by the Court and the Evidence Act should state as much.

73. The Criminal Procedure Act should contain provisions to restrict the naming of victims of sex crimes whether young or adults. This is done in may Countries such as Switzerland, Denmark, the Netherlands and Australia.

74. In New Zealand the Evidence (witness anonymity) Amendment Act 1997 (NZ) allows orders to be made to permit witnesses to give evidence anonymously. Such legislation could be useful to Tanzania because of the intimidation of witnesses in some cases. Such legislation does exist also in Poland and former Yugoslavia.