

T The Tanganyika Law Society

FOR IMMEDIATE RELEASE

9th April, 2011
DAR ES SALAAM

Establishment and Mandate of the Tanganyika Law Society

The Tanganyika Law Society (“TLS”) is the national Bar Association for Mainland Tanzania, which was established under The Tanganyika Law Society Act, Chapter 307 R.E. of 2002. Under the said Act, the TLS has the mandate to, among other things, assist the Government in matters affecting legislation and the administration and practice of law, as well as to protect and assist the public in all matters touching, ancillary or incidental to the law.

The TLS issues this Press Release under the above statutory authority.

Background on the Bill for the Constitutional Review Act, 2011

On 11th March, the Bill for the Constitutional Review Act, 2011 (“the Bill”) was published in the Gazette of the United Republic of Tanzania No.1 Volume 2. The TLS gained access to the Bill on Wednesday, 30th March and shared it widely with its members on Thursday, 31st March for comments. On Saturday, 2nd April, the University of Dar es Salaam Staff Association (UDASA) conducted a live public debate on the Bill, which received wide coverage through the media. On Tuesday, 5th April, the TLS was invited – through the Directorate of Parliamentary Committees (“Directorate”) – to participate in the hearings on the Bill, which were to be conducted by the Constitutional, Legal and Public Administration Committee of the Parliament of Tanzania (“the Committee”) on 7th April in Dodoma, as was then communicated. Towards the end of the same day, the TLS put in an inquiry for developments on the schedule for public hearings and was informed that there were now three (3) newly designated venues for the public hearings, that is to say: Dodoma, Dar es Salaam and Zanzibar; furthermore, the information provided was that the hearings would be conducted on 7th and 8th April and, if need be, 9th April. Based on this information, the TLS confirmed its participation in Dar es Salaam.

On Tuesday, 5th April, the Bill was presented before the Parliament of Tanzania under a **Certificate of Urgency** for its first reading. On 7th April, the TLS President submitted – in writing – the recommendations and proposals made by TLS members on the Bill to the Committee. On 8th April, the TLS President presented the recommendations orally.

Following its participation in the public hearings, the TLS hosted a debate on the Bill for its members with a view to ensure that as many member views were collected to ensure that the position of the TLS is representative of the majority of its members.

Issues, Observations & Recommendations

Firmly committed to strengthening and upholding the Rule of Law in Tanzania, knowing that when properly upheld, the Rule of Law protects people from the arbitrary powers of the State; ascribing to the notion that all legislation must be made with a view to upholding the Rule of Law, good governance and democratic values, which are firmly entrenched within our country's jurisprudence and are in line with international standards and best practices; believing strongly that the outcome and all processes related to the review or formulation of a new Constitution must gain the required legitimacy through a wide and consultative process; and emphasizing that justice must not only be done but must be seen to be done;

The TLS presents its position on the Bill as follows:

1. **On the language of the Bill:** the TLS strongly recommends that the Bill should be published in Kiswahili, in keeping with principles of access to justice (which call for physical access and layman understanding) for all (rural and urban-based, common, middle-income and elite) Tanzanians, and in line with the language of the officially recognized version of the Constitution of the United Republic of Tanzania, 1977 ("the Constitution");
2. **On the title of the Bill:** the TLS strongly advises that the title of the Bill should be The New Constitution Act, 2011 to accurately reflect the will of the people (that of wanting a new and not a revised Constitution) throughout the process;
3. **On the opening statement of the Bill:** the TLS recommends that the opening statement be amended to clearly express what is intended: **A BILL** for an Act to provide a framework for enactment/adoption of a new constitution that is in line with internationally recognized principles of democracy and good governance;
4. **On the abatement of the Constitution and enactment of a new Constitution:** the TLS cautions that the Constitution is silent on the issue of abatement and enactment of a new constitution; under Article 98, it only speaks to the procedure for amendment of its provisions. The absence of such provisions would, therefore, render unconstitutional any attempts to formulate a new Constitution.

So as a matter of necessity, the TLS strongly recommends that there should be an amendment to the Constitution in favour of inserting provisions, which speak to a procedure for abatement of the Constitution and enactment of a new Constitution.

5. **On Section 5 of the Bill - Establishment of a Commission:** the TLS strongly advises that the Commission should directly and expressly be established by this Act. The present language in the Bill vests authority for establishment of a

Commission with the President of the United Republic of Tanzania (“the President”) who may exercise discretionary powers in so doing. Furthermore, the President is mandated to establish the Commission after 1 June 2011 (commencement of the Act) and that reference is made without a stated timeframe of work.

To overcome these anomalies, this section should read, **“There is hereby established the Constitution Commission.”**

6. **On Section 6 - Appointment of members of the Commission:** the TLS makes the following observations and recommendations:
 - **Representation on the Commission:** the Bill recommends that the Commission have representation from Mainland Tanzania and Tanzania Zanzibar in equal numbers. However, this section wholly ignores the disparity in the sizes of the population and the fact that the Union Constitution relates to Zanzibar insofar as when reference is made to Union matters alone. Therefore, to ensure that there is proper representation on the Commission, the number of members from Mainland Tanzania and Tanzania Zanzibar should be proportionate to the population ratio.
 - **Composition of the Commission:** the Commission should consist of a Panel of Experts, pooled from various professional, organizational and social cadres with due regard given to gender, religion and level of expertise. Furthermore, s. 6(2)(e) provides the President with discretionary powers to appoint members of the Commission who do not fit in the specified categories contained in (a) through (d) – this gives room for abuse of powers and should, therefore, be removed.
7. **On Section 8 - Terms of Reference (“TORs”) of the Commission:** for transparency and accountability purposes, the TLS recommends that the TORs should be drafted by an independent body and approved by the Parliament of Tanzania, instead of the President.
8. **On Section 14 - Expenses of the Commission** – the Bill informs that the will of the Government is to charge the expenses of the Commission on the Consolidated Fund. The TLS would strongly recommend that there be an open, transparent and accountable process in approving and reporting on expenditures.
9. **On Section 16 - Submission of the Commission’s Report:** for the sake of an open and transparent process, the TLS recommends that the Commission’s Report be made available to the public and people should be allowed to comment on it, even if the report is submitted directly to the President.
10. **On Section 17 - Mode of Operation:** to ensure that Tanzanians are not disenfranchised from this process, the TLS urges that the Commission’s work should – as a matter of course - cover all 26 regions of Tanzania and not select regions, as has been the case during the public hearings held by the Parliamentary Committee.

11. On the Inviolability Clauses – s.9(2) and 20(1): the Bill renders inviolable key matters, which touch on the fundamental provisions of the Constitution. For example, s. 9(2) renders inviolable the mere consideration of any issues relating to Union matters and the Office of the President (among others), all of which are created under the Constitution and should be left open to debate.

S. 20(1) runs contrary to Article 26(2) of the Constitution, which preserves the right of an individual to challenge the constitutionality of the laws of the land.

These sections should be removed altogether. Furthermore, in the event that the sections are allowed to stand, they contravene the Rule of Law.

12. On observed typographical errors: the TLS raises concern over the soundness of the Bill, which depends on its making proper references. For example, S. 19 should make reference to s. 18 not s. 19; and S. 20(3) should refer to Section 20(2) and not 20(1). The effect of the latter, for example, is to impose criminal liability on any person who chooses to institute proceedings in a court of law challenging the Act – this is clearly unconstitutional and a violation of basic rights and duties;

13. On Section 21 – Proclamation of Constituent Assembly: the Bill provides that the President has the powers to constitute the Constituent Assembly and may proclaim the National Assembly to resolve itself into a Constituent Assembly.

The TLS recommends that the President should not have the powers to turn the National Assembly into the Constituent Assembly and that the composition of the Constituent Assembly should be mandated by the citizens to be chosen from different cadres (i.e. professions and expertise, organizations, religious groups and constituencies);

14. On Section 26 – Conduct of referendum: it is observed that the National Electoral Commission is wrongly placed to oversee the validation of the Constitution.

The TLS proposes that civil society organizations, religious organizations, political parties and other individuals and groups should be allowed to participate in openly educating and sensitizing the public on the referendum question. Ultimately, the Commission should be in control over the conduct of the referendum.

15. On Part VI – Validation of the Constitution: the TLS recommends that the validation process should be driven by the Commission and not the National Electoral Commission, as it is created by the Constitution and therefore, its establishment, functions and procedures should be open to debate.

TLS Planned Way Forward:

- a. The TLS strongly advises the President of the United Republic of Tanzania, His Excellency, Dr. Jakaya Mrisho Kikwete, to remove the Certificate of Urgency attached to the Bill in Parliament. The TLS strongly advises that this Bill follows the normal process so that members of the Parliament and the public at large get adequate time to discuss and comment on the Bill.

The TLS Council has resolved to pay a courtesy call on His Excellency to communicate this matter to him in person.

- b. The TLS urges the Government not to re-invent the wheel during this process, especially if unnecessary – the Government should, wherever possible, learn from the experience of other jurisdictions e.g. Kenya and Uganda.
- c. The TLS is in the process of forming a Committee on the Constitution, which will – among other things – advise the TLS Council on the progress of the Government-led process, provide technical and advisory support and make the necessary recommendations to the TLS Council, the public and constitution-making organs.

Where necessary, the TLS Council will expand the mandate of this Committee to be able to advocate on its behalf on issues, which might require further steps/actions.

Submitted by and on behalf of the Tanganyika Law Society

Francis K. Stolla
PRESIDENT