

POST-PRIVATISATION PROTECTION OF EMPLOYMENT RIGHTS IN TANZANIA: A RETURN TO RHETORICS?

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Abstract

Privatisation¹ of public enterprises in Tanzania, wholly or partially, was propagated on the promise that it was the panacea to all economic ills, which was to include revival of public enterprises, most of which were limping or resurrecting from the tomb of Lazarus into which they had been laid. However, the promised miracles, including increased employment and improved working conditions have not happened. On the contrary, one net effect of privatisation was the reduction in employment, which prompted government intervention through a number of laws and policies to address the plight of employees,² particularly securing their employment and creating good working conditions. Subsequently, indigenous employees were given preference in employment where necessary, and their positions were secured. Moreover, even where the investor had employed some foreigners, the law made provision that such positions would eventually be taken over by indigenous employees. However, these restrictions were said to violate the so called international best labour practices embodied in various ILO Conventions to which Tanzania is a party.³ In this study, it is argued that the legislations which are said to restrict the employment of foreigners to give more opportunity to Tanzanians were necessary, despite the international treaties to which Tanzania is a signatory. Tanzania as a sovereign state, should be able to pass legislations which are beneficial to its people, without necessarily hurting the interests of the investors, which include conducive environment for doing their business and getting profits, without regard to who should be employed.

¹ There is no consensus on the definition of privatisation. But for a detailed discussion on the various interpretations, each with its shortfalls, See: Mutabaazi, J.L: Assessing the Contribution of the Legal and Regulatory Framework for Privatisation in Tanzania. PhD Thesis, Ruaha Catholic University, 2016(Unpublished); Mwandenga, A.M. The Socio-economic Impact of Privatisation: The Tanzania Experience. *Vol.9(1)African Journal of Finance and Management*, 1996; Busch, T.D. Privatisation in Sub-Saharan Africa: Some Lessons from Experience to Date. IFC, Washington, 2003; Nellis,J and Kikeri,S. Privatisation. Lessons Experience. World Bank, New York, 1992. Omoleke, I.I and Adeopo, J.J.Privatisation of Nigerian Public Enterprises. Its Practical Challenges as a Reformulated Policy of the Fourth Republic; *Vol.16(2) African Journal of Administration and Management*, July, 2005; Shitundu, J.M.L, et al.Tanzania's Experience with Privatisation Policies. A Case Study. AFRODAD, Harare, March, 2007; Boyco, et al. A Theory of Privatisation. *The Economic Journal*. Vol.106.

² These included The National Employment Promotion Services Act (NEPSA), [Act No. 9 of 1999] the Export Processing Zones Authority Act (EPZA) [Chapter 373] The Employment and Labour Relations Act (ELRA)[Act No.6 of 2004,] The Special Economic Zones Act (S.E.Z)[Act No.2 of 2006], Non-Citizens (Employment Regulations) Act (NCERA).[Act No. 1 of 2015].

³ Tanzania is an active member of ILO, having ratified 37 of its Conventions.

Keywords: Employment; unemployment; under-employment; labour best practices; privatization

1.0 Introduction

Prior to 1967, there were a few public enterprises in Tanzania that were created after independence to address the crises that affected the citizens. The main vehicle through which the government's hold on the economy, and thus espouse the national policy was the Public Corporations Act,⁴ which was to be amended from time to time to address the needs of the time. The other way was by the decrees issued by the president in his absolute discretion by notice published in the official gazette⁵. Through these powers, public enterprises were created indiscriminately so as to serve ideological and not commercial objectives.⁶

The centrality of employment is anchored in the Constitution of the United Republic of Tanzania.⁷ Within that constitutional framework, it was the duty of the state to create employment for its citizens through public enterprises. Public enterprises were scattered throughout the country, even where they were not economically viable, so long as there were people to be employed. Collier and Wangwe sarcastically called this over-employment and idle labour, as "disguised unemployment"⁸. Their argument was that there were too many employees who were rendered idle, for there was no work for them to do. At the beginning, the government took these criticisms as inconsequential and that it was a propaganda orchestrated in the interests of imperialists. The critics, however, saw this as a fast lane path to economic ruin, but they were ignored. It was resolved that the country was to achieve its ideological goals through public enterprises, and as such, lengthy and technical debates in the parliament were considered to be cumbersome; and would delay socialism. Bills were presented in the parliament to be endorsed, not for debate. Since decisions had already been made, when bills were presented, they were a *fait accompli*.

Complaints by some sections and even some parliamentarians were dealt with ruthlessly. All these notwithstanding, many people were employed and paid handsomely with so many fringe benefits; and with long-term employment contracts without fear of

⁴ Act No.17 of 1969. This was tabled in parliament under a "Certificate of Urgency" and was passed into law, on the same day, without much debate.

⁵ Per section 3(1) of Act No.17 of 1969. In addition to establishing a public corporation, the president had power to re-organise, to transfer assets from one public enterprise to another, to transfer an employee of one public corporation to another and to dissolve a public corporation.

⁶ The powers granted to the president to create public enterprises, and thus to avoid parliamentary debates, which could delay their creation, reflects a determination to get hold of the economy through public enterprises.

⁷ Articles 22(1)(2) & 23(1) and(2)

⁸ Collier, P, Wangwe, S, et al: *Labour and Poverty in Rural Tanzania: Ujamaa and Rural Development in the United Republic of Tanzania*. Clarendon Press, Oxford University Press, 1986, p.29

dismissal. Management and the general operation of public enterprises that ensued were left to inexperienced and incompetent managers, under the close eye of the ruling political party, TANU, and its successor, Chama cha Mapinduzi (CCM). Thus, employment did not emphasize professionalism on the one hand, and on the other, party cadres were employed in big numbers as a “thank-you” gesture, for their support of the party. However, these employment circumstances led to complacency which, in turn, bred poor performance and loss. For example, by 1990, public enterprises made losses amounting to US\$ 100m or 3.7% of the Gross National Product (GDP); and were indebted to the government to the tune of US\$ 352m/=. Consequently, about seventy percent of public enterprises halted production. By 1996, public enterprises owed the Treasury (excluding debts incurred from other sources)⁹ a colossal sum of Tshs. 600.142 bn/=¹⁰. Eventually, the government could not continue supporting a large number of public enterprises that were not producing as it did no longer have the financial resources to support them. This, as a corollary, made it difficult for new entrants into the labour market, universality and non-university graduates to secure employment. From colonial days, the education that was offered was meant to prepare recipients to be employed as clerks in the colonial government.¹¹ When the country adopted the quasi-socialist policy of *Ujamaa* in 1967, matters were not helped either. Government was there, and indeed, it had promised to all and sundry that creation of employment was one of the fruits of “*uhuru*” This made the nationalisation policies announced subsequent to the adoption of *ujamaa* in 1967 extremely popular. With the new dispensation, however, this line of thinking had no space.

2.0 Economic Adjustment

2.1 Trade Liberalisation

By the end of 1970s and the beginning of 1980s, public enterprises that had virtually permeated all walks of life were no longer viable as economic entities in Tanzania. The government was forced to contact International Financial Institutions (IFIs), with whom they had been strange-bedfellows a few years back, for advice on the way out. The IFIs suggested measures they termed “Structural Adjustment Programs” (SAPs). These were prescribed as necessary interventions in reviving the economy whereby the government was advised to let up the economy, remove its stronghold on businesses, and let the economy be determined by market forces. SAPs prescribed that the economy should be open for whoever wanted to do business to be allowed to do so. In other words, trade was liberalized. This advice saw the influx of foreign, more organized and better funded business interests in the economy, particularly in the financial and manufacturing sectors. A few public enterprises, particularly those considered to be strategic, remained in the hands of the government,

⁹ Other debts resulted from guarantees that government had provided in order for the public enterprises to borrow from non-government lenders. When these are also considered, the debt swell to a whooping Tshs.1.6trn/=.

¹⁰ Mbelle, A.V.Y. “Productivity Performance in Developing Countries. Case Study of Tanzania” UNIDO Working Paper November, 2005

¹¹ Ngugi wa Thiong’o. *Decolonising the Mind: The Politics of Language in African Literature*. Heinemann, 1981. Also see: Viswanath, G., *Currying Favour: The Politics of British Educational and Cultural Policy in India (1813-1854)*. Social Text, Vol. 19 No.20, 1988, pp.85-104.

but continued to operate in a business as usual fashion. Without additional funding and improvement in the management, they were incapable of competing in the new environment. Nonetheless, they retained all their employees, who continued to get salaries through government subsidies, although they were not producing. Employees remained without work, and a number of them, without salaries.¹² Although in these circumstances, government revenue increased, profiting mainly from taxes due to increased business volumes, the employees' welfare declined.¹³

2.2 Privatisation and its Effects on Employment

The continued deterioration of public enterprises made it apparent that the burden of the government to maintain them had become more enormous than it could handle. On a further re-think, IFIs suggested that the government should let go even the few public enterprises that it was still holding to give way to new economic realities. The government immediately took heed; some public enterprises were sold off to private interests¹⁴, but for some, the government offered them for sale but retained some shares that were to be offered to the public, particularly in the banking sector¹⁵; and some were offered to employees in a form of privatization known as Management, Employee Buy Out (MEBO)¹⁶.

In a privatised economy, maintaining a large number of employees who had been offered employment not on merit, but on ideological, and other non-commercial considerations, was unrealistic, hence the massive lay-offs. As pointed out earlier on, privatisation would involve some form of retrenchment or lay-offs.¹⁷ Partial data collected from a sample of privatised enterprises indicates that employment declined by between 30% and 50%. Fears that there would be job losses were thus vindicated.¹⁸ However, the government was not oblivious of this situation; it passed a number of laws and policies in an attempt to address the plight of employees.¹⁹ The legislations and policies acknowledged the plight of those who lost their jobs, but they also addressed the working conditions which, in theory, promised better emoluments and working conditions. But as we shall soon demonstrate, those concerns remain on paper.

The problems associated with employment and unemployment escalated, and the situation alarmed government once again. In 2008, the government pronounced the National Employment Policy. In its introduction, the problem of unemployment and

¹² . See. Footnotes 20, 21, 22 (*supra*).

¹³ Arnold, D. How Privatisation impacts Workers: Evidence from Brazil. Centre for Economic Research and Policy(CEPR), 19TH July, 2019. Available at <https://www.voxeu.org/article>, accessed on 10th of July, 2022.

¹⁴ Public enterprises like Bora Shoe Company, Mang'ula Machine Tools Manufacturing Company etc.

¹⁵ It retained 31% shares in the NMB, The CRDB.

¹⁶ In the Tanzania Legal Corporation (TLC) and Printpak.

¹⁷ For example, see: Diwan, I. "Public Sector Retrenchment and Severance Pay: Nine Propositions" in Chaudhry, S, et al (Eds). *Civil Service Reform in Latin America and the Caribbean*. World Bank Technical Paper, November.259, 1994.

¹⁸ Rutaiwa, J.L and Olayiwola, W.K. Trade Reform and Employment Performance of the Textile and Clothing Industry in Tanzania, 3 *International Business Research*, 2010, 47.

¹⁹See fn.5 (*supra*).

underemployment was recited as a matter of national concern²⁰. Policies are, however, mere political statements which reflect the political thinking of the day in a particular matter, but which have no force of law. The policy of 2008, therefore, could not be a substitute for the weak legislation that had been passed in 1999. The law that was passed in 1999²¹ to enhance employment, and the policy that was announced in 2008, did not satisfactorily address the problem of employment for the citizens. They appeared to make short-term arrangements which were not sustainable. While not many had been employed, the few that got employment had no guarantee about their security at their places of employment, nor of their career development.

3.0 Economic Development Zones and Indigenous Employment

Economic Processing Zones were established under the law passed in 2002²² and the Special Economic Zones Act of 2006²³. The objectives for which these two legislation were passed were, among others, to create and increase employment, to develop skilled labour and to attract and encourage the transfer of skilled labour.²⁴ Rugumamu and Jabba have argued that despite all the niceties and promises of increased employment and better working conditions in these special areas, all these have remained a dream pipe.²⁵ There have been neither improved working conditions nor has there been skills' transfer. After making comparisons from other studies²⁶ on the EPZs, they concluded that employees in the EPZ were subjected to prolonged hours of work, poor health and unsafe environment, low wages and gender discrimination. Labour laws were disregarded as if they did not exist²⁷ since employees could be hired and fired²⁸. Because there was no clear distinction between a "work permit" and a "residence permit", both the law and the policy did not yield the anticipated results. The law was so porous and the safeguards that had been created did not protect employment for indigenous employees as it had been envisaged. Many non-citizens still got access to employment in such nondescript areas as could be filled by indigenous employees, such as chefs, drivers, accounts, clerks etc. Although the law had provided for skills development and transfer of technology, employees in EDZs were tied to unskilled, and semi-skilled jobs,

²⁰ See the Preamble to the 2008 National Employment Policy.

²¹ NEPSA, op.cit, fn.1. Under the law, the Minister for Labour was mandated to declare, by notice in the official gazette, that certain jobs or class of jobs were reserved for citizens only. Breach of such declaration was an offence.

²² The Economic Processing Zones Act, Cap.373, R.E 2012.

²³ The Special Economic Zones Act No.2 of 2006.

²⁴ Sections 4(c) & (d) and Section 9(1) € of the EPZ and SEZ respectively.

²⁵ Rugumamu, V and Jabba, S. An Investigation of Adherence to and Enforcement of Labour Laws in the Economic Development Zones in Dar es Salaam- Tanzania. Vol.1(1) *Journal of Social Sciences and Business Studies*, Kampala International University in Tanzania, November, 2021, pp.158, 170ff.

²⁶ Gopalakrishan, R, Freedom of Association and Collective Bargaining in Export Processing Zones Role of ILO Supervisory Mechanisms. Working Paper No.1, ILO, Geneva, 2007, McCallum, J. Export Processing Zones. Comparative Data from China, Honduras, Nicaragua and South Africa, Working Paper No.21, ILO, Geneva, 2011.

²⁷ Rugumamu and Jabba, *supra*, p.172.

²⁸ Haskell, J and Syzmanski, S, Privatisation, Liberalisation, Wages and Employment. Theory and Evidence from the United Kingdom. *60 Economica*, (1993),166.

the so-called “dead-end” jobs, that were of little or no relevance, and which could not offer any possibility for promotion or professional development.²⁹

The study by Rugumamu and Jabba also revealed that in 75% of the surveyed industries in EDZs, most of the managerial and supervisory positions were occupied by foreigners, even where there were skilled and more qualified Tanzanians who could have held those positions. The indigenous employees were also underpaid, compared to the foreigners, even where they were doing similar jobs.³⁰ The attractive provisions of the law remained on the paper on which they were written. The aberrations are a violation of both the international law³¹ as well as domestic law³² on employment, which guarantee a number of rights to the workers.

4.0 Effects of Structural Adjustment Programs and Privatisation on Employment

To many employees who had been rendered redundant, the promise that privatisation would lead to increased employment opportunities made some sense. Privatisation, it was said, would revive the hundreds of public enterprises that had collapsed and these would necessarily need employees. In spite of the difficult times, some public enterprises had not yet completely closed down. Employees were still reporting to work, but there was nothing to pay them because there was nothing to generate funds from which payments would be derived, particularly in the manufacturing sub-sector. Between the early years of 1980s up to 1996, the number of manufacturing industries fell, as most of them closed shop. In particular, industries in the textile sub-sector, which was the biggest employer, dropped from 35 to 2.³³ This meant that a substantial number of personnel in the 35 industries became jobless, and even in those which were still functioning, production was so much below par, that they could also not pay salaries. In the agreement between the Government of Tanzania and the Indian Consortium known as RITES for the privatisation of the Tanzania Railways Corporation (TRC), it was agreed that 4000 out of 7000 or 57.142% employees were to be retrenched so that the remaining workers could get better employment terms. To facilitate the deal, the World Bank made available, for facilitating the privatisation, a colossal sum of US\$ 44m. In spite of all that, the retrenched workers did not get their terminal benefits, while those who remained went without any salaries or improvements in their work packages for months. Shortly after the deal, the government was forced to intervene, and paid salaries and other emoluments. To lessen its burden, several others were laid off, thereby signaling the demise of the privatisation deal which, like so many others before, crumbled like a pack of cards.³⁴

²⁹ Jauch, H. Export Processing Zones and the Quest for Sustainable Development: South African Perspective, Labour Resources and Research Institute (LaRRI), Namibia, 1999.

³⁰ Rugumamu and Jabba, *supra*.

³¹ Tanzania is a party to 37 ILO Conventions, most of whose signatories pledge to observe workers' rights and welfare. See fn.6 *supra*.

³² The Employment and Relations Act.

³³ Mkenda, B.K. “The Impact of Globalisation on Tanzania’s Labour Market: Evidence from the Manufacturing Sector” Prepared for A Policy Dialogue for Accelerating Growth and Poverty Reduction in Tanzania. ESRF, Dar es Salaam. 28 July, 2005.

³⁴ In *This Day*: “How Things Fell Apart”. Retrieved from www.thisday.co.tz/?!=10456.

5.0 Legislation and Policies to Promote and Protect Employment

5.1 The National Employment Promotion Services Act, [NEPSA] 1999

We have mentioned textile industries and the failed privatisation of TRC simply as mere *loci classici*. Similar fates affected literally all who were in employment in the public sector. Being out of employment, they could not even get their social retirement benefits since public enterprises had long stopped remitting workers' contributions to various social security funds. To alleviate this problem, in 1999, the parliament passed the National Employment Promotion Services Act (NEPSA)³⁵. The Act was passed to, among others, provide placement, vocational guidance and employment counseling, active labour market and occupation information and advisory services for lawful income generating undertakings and promotion of self-employment and coordination of training needs³⁶. It was expected that through gathering of information on the labour market and occupations, the Agency was to speed up the employment of the desperate citizens. Although it did not create employment, it was mandated to promote employment with a bias towards the indigenous job-seekers. The law made specific provisions which empowered the Minister responsible for labour matters to declare, by notice in the gazette, that certain types or class of jobs were a reserve of the indigenous Tanzania citizens. It is provided:

*No employer shall employ a foreigner as an employee in any employment or class of employment which the Minister may, from time to time by notice in the gazette, declare to be employment or class of employment in which citizens may be employed.*³⁷

It was also provided that contravention of that provision constituted a criminal offence and attracted penal consequences.³⁸ Under the same law, it was provided that it was also an offence to employ a foreigner who had no work permit. Both the foreigner and his/her employer committed an offence which also attracted penal consequences.³⁹ Interestingly, however, the entire Act did not contain a definition, neither in its definition part nor under any specific provision, of a "work permit". Because of this *lacuna*, several authorities could issue "permits" which would apply both as work and residence permits.⁴⁰

For example, under the Education Act⁴¹, the Commissioner for Education was empowered to issue a Certificate of Registration to "any teacher", after completing an approved period of probation⁴². A teacher included a foreign/non-citizen teacher. Under the Economic Processing Zones Act, (EPZA)⁴³ as part of incentives, an investor was entitled to a business visa at the point of entry, to their key technical, management and

³⁵ An was enacted by the parliament and assented to by the President on 2nd June 1999.

³⁶ Act No.1 of 1999, section 4(1).

³⁷ Ibid. Part VI. 25(1).

³⁸ Ibid. s.52 (2).

³⁹ Ibid. section 26(1) & (2).

⁴⁰ Rutabanzibwa, T. The Non-Citizens (Employment Regulations) Act. A Discussion. Retrieved from <https://www.hat-tz.org>, accessed on 10th June, 2022. Also see Rumboyo, T. T. *supra*, fn.9.

⁴¹ Cap.353.

⁴² Ibid. section 46.

⁴³ Cap.373.

training staff for a maximum of two months, after which they would be required to process residence permits for the above mentioned staff.⁴⁴ The Immigration Act⁴⁵ empowered the department to issue a single document which served both as a residence and a work permit. After an application was made, the same would only be taken to the Labour Director for review and recommendation, subsequent to which it would be sent back to the Commissioner General of Immigration for processing the “permit”. The review or any recommendation(s) concerning the application was not binding on the Commissioner. It was prohibited to take up employment or to employ a foreigner without a permit issued under the Immigration Act.⁴⁶

Another Act which would issue “permits” is the Special Economic Zones Act (SEZA)⁴⁷, which required an investor in the designated special zone to obtain residence permits from the Commissioner for Immigration just like an investor in the EPZA. As part of incentives, the investor in the SEZ was entitled to similar incentives like an investor in the EPZ⁴⁸. The provisions making the incentives in the two Acts are in *pari materiae*. The Tanzania Investment Act (TIA)⁴⁹, on its part, provided that an individual or a business granted incentives pursuant to that Act is entitled to an automatic immigration quota of up to five foreign employees during the start-up period. Such individual investor or business, however, could apply to the Tanzania Investment Centre, for an extra number of foreign employees, which after consultations with the immigration department, and having considered, among other things, the non-availability of Tanzanians with similar qualifications; authorize the engagement of such extra non-citizen employee(s)⁵⁰. The law provided in s.24 (1);

“No employer shall employ a foreigner as an employee in any employment or class of employment which the minister may, from time to time, by notice in the gazette, declare to be employment or class of employment in which citizens only may be employed”.

However, as a result of the multiplicity of organs dealing with engagement of non-citizens in employment, monitoring of foreign employees became difficult, thus affecting the reliability of information on the labour markets.

The good intentions of passing the legislation, however, were not backed up by any regulatory framework, and as such, it became very difficult to enforce its provisions. As if that was not all, the minister responsible for labour matters, as empowered by the law, did not specify which employment, or class of jobs was to be a specific reserve of the indigenous. As a consequence, the labour market continued to see the influx of foreigners, who did odd jobs that indigenous Tanzanians could easily execute. For example, the Mikocheni Industrial area in Dar es Salaam has a big number of Indian coolies and cheap Chinese labourers working in the steel manufacturing industries. Others sell dried flowers, groundnuts, operate cheap hotels and even brothels, and yet,

⁴⁴ Ibid. section 21.

⁴⁵ Cap.54.

⁴⁶ Ibid. Sections 16, 17, 19 & 20.

⁴⁷ Cap.420.

⁴⁸ Discussed *supra* fn.20.

⁴⁹ Cap.38.

⁵⁰ Ibid. section 24(1).

some more engage in low-jobs like car-washing, bus conductors and inspectors in bus companies operated by Chinese “investors”. These odd jobs, in our view, could easily qualify to be reserved for indigenous employees.

While the East African Community has not come up with a common stance on the free movement of labour, there are quite a sizeable number of persons from the region in the middle cadre jobs such as supervisors or managers in banks, hotels, security and in insurance companies, thanks to the lack of the will to implement the law as it then was. The agency did not, of itself, create any new employment. Thus, employment still remained a prerogative of the offices and institutions that could create any. Where employment opportunities are few, and with porous monitoring the NESPA did not attain its objectives. The problem it was set up to put in check, rather than decrease, escalated.

5.2 The National Employment Policy [NEP] 2008⁵¹

The implementation of the NESPA became difficult because, among other reasons, it was not guided by any national policy. The ILO defines employment policy as a “vision and a practical plan for achieving a country’s employment goals, by clearly seeing a country’s challenges and opportunities”.⁵² The policy merely sets the national objectives, and the enactment of the law is intended to give it a *legal imprimatur*, to what policy is already in place. A properly articulated policy sufficiently addressing the challenges and opportunities would definitely see the enactment of good laws that do not only address working conditions, but which would also address social protection.⁵³ Without the backing of a policy, the NESPA was bound to fail before it even had begun. Therefore, in 2008, the government announced a national employment policy, which accurately addressed the problem of unemployment as its *raison d’être*. The new policy acknowledged the enormity of the problem of unemployment and underemployment as matters of national concern. It provided;

The problem of unemployment and under-employment has now become so serious that it should be regarded as a major national development challenge, with ramifications for economic welfare, social stability and human dignity....the major objective of this policy is to take advantage of the foundation that has been laid, so as to effectively address the challenges of unemployment and underemployment. The need to create more and better jobs, enhance gender parity, improve access to employment opportunities for all, and generate more decent employment, is a major challenge to poverty eradication.....”

According to the policy, there were 18.8 million persons who were economically active in 2005/6, which was an increase of 3.3 million or 21.5% compared to the findings in 2000/1⁵⁴. The labour force grew at the rate of 4.1% annually or 800,000 entrants into the

⁵¹ Tanzania had had other measures that aimed at creating employment, including the National Employment Policy of 1997, the National Youth Development Policy and Action Plan, 2007, Comprehensive Employment Creation Programme 2011-2015 and the Youth Entrepreneurship Facility Programme.

⁵² ILO : National Employment Policies: A Guide for Workers’ Organisations, 2015, p.4.

⁵³ Ibid. P.4.

⁵⁴ According to the Integrated Labour Force Survey.

labour market each year⁵⁵ but only a fraction of these penetrated into formal employment. The various programmes that had been passed previously failed to adequately tackle this problem. The impressive increase in labour force comprised the population that was engaged in small-holding family agricultural plots, and not former employees who were laid-off from their jobs held in public enterprises sector, or the new entrants in the labour market. Schools and colleges churned out between 800,000-1,000,000 graduates into the labour market (2011/12)⁵⁶. In spite of all that, the employment situation did not improve. The employment policy, like its precursors, constituted what seemed like a list of wishful thinking. The government wished it could adequately deal with the problem of unemployment and underemployment but it did not succeed. Consequently, the problems associated with lack of employment, with its attendant vices, abject poverty and increase in crime rates increased manifolds.

The employment policies having failed, another strategy had to be conceived, hence the coming into force of a new legislation that was intended to reverse the trend. According to the international labour good practices, legislation or any internal arrangement which is deemed to be shutting employment opportunities, or restricts the right to engage in employment of one's choice, is considered to be discriminatory. Tanzania is a signatory to the ILO Convention against discrimination known as The Discrimination (Employment and Occupation) No.111 of 1958⁵⁷, and it is also signatory to the Vienna Convention on the Law of Treaties, 1969, through which every member is bound by the provisions of the treaty to which it becomes signatory⁵⁸. NESPA was considered to be discriminatory, and thus going against international labour practices. The employers, who were unhappy with such law, made their position very clear.

Way back in 2014 at its Annual General Meeting, the Association of Tanzania Employers (ATE)⁵⁹, NESPA was a subject of heated concerns. The Association, through its Executive Director, Dr. Aggrey Mlimuka, complained that the law was outdated and that it had been left behind economic development in that it did not address the dynamics of a private sector –driven economy. It was argued that there was urgent need for its revamp so as to match the pace occasioned by globalisation and the development that had taken place in the other parts of East Africa. The ATE argued that the law imposed unnecessary restrictions on the choice of employees that the investors may find as a disincentive. Employers further complained that because of the restrictions, they were forced to hire experts from other companies, thus increasing the costs of doing business. In a rejoinder, the then Minister for Labour, Gaudensia Kabaka, admitted that there was need to improve the law with regard to employment of foreigners, and assured

⁵⁵ Ibid.

⁵⁶ Nangole, G. "The Role of the State in Economic Development: Employment Challenges in East Africa. The Case of Tanzania". Paper presented at the Friedrich Ebert Stiftung (FES) Eastern Conference on Employment Policies, Nairobi, Kenya, 24-25 September, 2012.

⁵⁷ It came into force on 15th June 1960, and Tanzania ratified it on 26th February, 2002.

⁵⁸ Through the doctrine of *Pacta sunt servanda*.

⁵⁹ The theme of the meeting was "Outsourcing, Off-shoring and sub-contracting: International Best Labour Standards and State Practices and Lessons for Tanzania", was held in Dar es Salaam on 1st October 2014.

employers that the government was not averse to the complaints, and that it was in the process of reviewing the same. She said:

*“The Ministry (government) was determined to ensure that we come up with guidelines or policy that would accommodate the practice of outsourcing or sub-contracting, especially in this era of globalisation, where it is difficult to avoid international transactions”*⁶⁰

The admission by the Minister that legislation of this significance had been in existence without any regulatory framework to guide its implementation manifests a lack of will to enforce it. As the theme of the meeting aimed at influencing the government to relax the law on outsourcing and or sub-contracting, the Minister’s remarks were endorsing the concerns aired by employers, most of whom were foreign owners of the companies operating in the country. Shortly after, these ‘concerns’ were addressed through legislation; NESPA was repealed and replaced by another act. In the new law, the portion of the law that prohibited employment of non-citizens was scrapped from the law. Did this reaction portend doom for the possibility that, albeit in theory, the indigenous’ job security that the previous law had hitherto then promised was swept under the carpet? Acceptance of the employers’ concerns was a precursor to the enactment of another Act which, it was hoped, would adequately deal with the issues raised at the meeting.

5.3 The Non-Citizen (Employment Regulations) Act, (NCERA) 2015

In 2015, the government passed the Non-Citizens (Employment Regulations) Act.⁶¹ The grumblings that followed post-privatisation retrenchments were felt by the government. While it had to maintain and retain the confidence of investors, it could not abandon its own citizens and let them wallow in the hardships that attended to privatisation, particularly for those who lost jobs and the many more who could not secure employment. Contrary to the pressure from the investor community not to be interfered in its economic activities, the government made courageous attempts to ensure that even within the privatised economy, some jobs would be protected, and through legislation, investors were required to make sure that certain jobs were reserved for Tanzanians.⁶² We term the attempts as courageous because at the time, even under international arrangements, the question of indigenous employment appears to have been given a low profile, probably bowing to the pressure from employers, mostly multinational corporations, who felt that these conventions were too much pro-indigenous employees. Most conventions that related to the employment of the indigenous were to be abrogated shortly.⁶³ The Act repealed the part of the former law that required certain classes of jobs

⁶⁰ *The Citizen*, Thursday, 1st October, 2014.

⁶¹ Act No.1 of 2015.

⁶² Through the NCERA. Op. cit. fn.3.

⁶³ e.g Recruiting of Indigenous Workers Convention of 1936 was abrogated by the decision of the International Labour Conference of 2018. The abrogated law had provided, among others that the countries party to the convention were to ensure that, as far as possible, the political and social organisation of the populations concerned and their powers of adjustment of the populations concerned

to be reserved for the indigenous, but made several other provisions that placed an obligation, hitherto then non-existing, on the employers and streamlined and distinguished a work permit and a residence permit. The law was said to have been passed to make provision for efficient compliance of regional integration, bilateral agreements and international conventions to which Tanzania is a signatory.⁶⁴ To what extent have these efforts succeeded in protecting the employment for the indigenous?

The new legislation departed from the former Act in so far as restriction of employment of foreigners was concerned. It repealed the whole of Part VI of the previous Act, thus removing the possibility of shutting out employment for non-citizens. Restricting employment to non-citizens was said to be violative of the international labour best practices in the globalized world, and was taken in bad taste, hence the passionate appeal to amend it. The new law, NCERA, repealed the old law in its crucial parts, when employment for the indigenous is considered.⁶⁵ The government argues that the new law makes better and certain the circumstances that ensure even better protection of jobs for the indigenous.

NCERA found justification on a number of grounds; one is the streamlining of the issuance of work permits. Without a clear definition of what a work permit was, and who could issue it, the protection of the indigenous jobs became rather intricate. As observed previously, there was no coordination between the various authorities that could issue permits, and as such, it became difficult to enforce accountability on an institution or individual. There was no coordinated labour information, which would gauge, among others, the sufficiency, or otherwise, of the locally available expertise or how much foreigners were in employment. It would also assist in determining the need, if at all, of such foreign employees.

NCERA promised to ease the monitoring of foreigners employed in the country as it addressed the problem of uncoordinated issuance of permits. Under the new law, all matters relating to working permits were now under a single authority, the Labour Commissioner, who had the power to issue, extend, deny or even cancel a permit once it had been issued.⁶⁶ It also makes a clear distinction between a ‘work permit’ issued by the Labour Commissioner, and a ‘residence permit’ issued by the department of immigration.⁶⁷

The Act further provides:-

For effective discharge of his functions under this Act, the Labour Commissioner shall have the power to:-

- (a) issue, vary, renew, or cancel any work permit issued under the Act.
- (b) subject to the provisions of this Act, reject any application for work permit.

and their powers of adjustment to the changed economic conditions will not be endangered by the demand for labour. Art.4(b).

⁶⁴ Rumboyo, T.T., *The Non-Citizen (Employment Regulations) 2015. An Introduction.* Ministry of Labour and Employment, Dar es Salaam.

⁶⁵ PART VI, Ss.24-27 of NESPA (already discussed).

⁶⁶ Under s.5 (1), the Commissioner for Labour is responsible for the execution of the Act.

⁶⁷ Ibid. section 5(1).

From the provisions above, it is now certain that it is the Labour Commissioner, and not any other authority, who can issue any document allowing a foreigner to work in the country. Where under any other law, any other officer issues a work permit, in the event of conflict between that other Act and the present Act, to the extent of that conflict, that other Act shall be null and void.⁶⁸ However, under the Act, issuance of a work permit is not simple. The Labour Commissioner, to whom an application for a work permit has been submitted, will not issue it unless the same is accompanied by certified copies of documents provided under the second schedule to the Act.⁶⁹ These documents include a contract of employment, certification from a professional body that regulates the profession for which the work permit is sought, academic and professional certificates, a business license, TIN, VAT, Memoranda and Articles of Association of the company that is recruiting him/her, etc. These documents will also be submitted alongside a document detailing what is known as a “succession plan”. Any person who intends to recruit or engage a non-citizen in any employment or occupation is required to prepare a document showing how he/she intends to transfer the knowledge and expertise of the non-citizen to the citizens, referred to under the Act as a succession plan. The law provides:

7(1) Any person who intends to employ or engage a non-citizen in an employment or any other occupation, as the case may be, shall prepare a succession plan which shall, among others, set out:-

(a) a well-articulated plan for succession of the non-citizen knowledge or expertise to the citizen during his/her tenure of employment.

(b)

(2) Any person who employs or engages in employment or in any other occupation, a non-citizen, shall be required to establish an effective training programme to produce local employees to undertake duties of the non-citizen experts.

Under the law, the Labour Commissioner is enjoined to make sure that every possible effort has been explored to secure a local expert in the field, prior to approving an application for a work permit for a foreigner⁷⁰. For monitoring purposes, every employer on each 30th day of June and 31st of December of every year is required to submit a non-citizen employees’ report to the Commissioner⁷¹. These stringent requirements imposed on foreign employment, though do not mean that as a result, indigenous job-seekers will get automatic employment. It is to be borne in mind that in recent years, economic growth has been fueled by emerging sectors like telecommunications and financial services, professional services, IT and construction, which demand educated and skilled

⁶⁸ Ibid. section 24.

⁶⁹ Ibid. section 10(2).

⁷⁰ Kibuuka, P.” Hiring of Expatriates restricted by New Employment Regulations” available at http://www.allafrica.com/News_on_25th_September_2015, accessed on 16 April 2021. The BBC called the regulations “Anti-foreign” BBC News, at <http://www.bbc.com/news>, accessed on 16 April 2021.

⁷¹ Matsoenyane, S. Tanzania Immigration Update. New Legislation: The Non-Citizens (Employment Regulations) Act, 2015, posted on 19th October 2015, available at <http://www.santaferelo.com>, accessed on 16 April 2021.

workers. Giving the indigenous workforce the materials to access these jobs will be key to securing them.⁷² Nonetheless, these tough rules may help the government, with proper monitoring, to get and/or increase employment opportunities for the many young people churned out of higher learning institutions every year.

The new legislation has won accolades on another point. In that instance, NCERA is said to take cognizance of and it has endorsed regional and international labour best practices with regard to migrant workers. At the regional level, the new law has taken measures that conform to the East African Common Market Protocol.⁷³ The common market protocol makes provision for free movement of persons, workers, liberalisation of services and residences.⁷⁴ The protocol allows workers from one partner state to another and accepts any employment without being discriminated against on the basis of their nationality. Kenya and Uganda have since abolished work permits for citizens from the East African region.⁷⁵

The law also makes provisions which accord to several ILO Conventions. These include The Migration for Employment Convention⁷⁶ and The Migrant Workers (Supplementary Provisions) Convention.⁷⁷ Under the former convention, the state parties are enjoined to offer assistance, information, protection and equality of treatment for migrant workers, while under the latter, the convention undertakes to give equal opportunity and treatment to migrant workers and eliminate all forms of abuses. It is argued again that where immigrant/foreign workers are more skilled and with requisite exposure, talking of equal opportunity of employment is more or less sarcastic.

On the provisions of a succession plan, NCERA was not re-inventing the wheel; it took a leaf from the ILO Multi-National Enterprise Declaration (MNED) of 1977. Under the declaration, multi-national enterprises that venture into developing countries, where skills are in short supply, are required to provide training to their employees at all levels of employment to meet the needs of the enterprise as well as the development policies of the country where they operate. They are also required to evolve programmes that encourage skills formation and development, and after so doing, to give opportunities to employees to broaden their experience.

Having good provisions of the law is one thing and having them to work is quite another. In spite of the good intentions of the government, NCERA does not itself offer much of the employment, and logic concludes that this law was meant to appease the private sector employers. According to a report released recently by the National Bureau of Statistics (NBS), levels of employment rose from 2.194m in 2006 to 2.291m in 2014. Of these, only 1,065,767, or 46.516% were government employment and the remainder,

⁷² Mahjabeen, H. Youth Employment in Tanzania: Taking Stock of the Evidence and Knowledge Gaps. IDRC, Ontario Canada, 2015.

⁷³ Entered into force of 1st July, 2010.

⁷⁴ Ibid. Regulation 6.

⁷⁵ <http://www.commonmarket.eac.int/>

⁷⁶ No. 97 of 1949.

⁷⁷ No. 143 of 1975.

about 1, 225, 233 or 53.5%, were in the private sector.⁷⁸ In other words, there was more rapid growth in the private than in the government sector employment.

To investors, the law is understandably unpopular; the low skills of the indigenous job-seekers will mean that these multinational corporations will have to dig deeper in their coffers to train new recruits so as to comply with the law. One area where multi-national corporations have sought protection from investment contracts is to keep their investment contracts and their affairs generally, “confidential”. Recruiting and training locals, in addition to dipping into their coffers, would also invite the possible leakages of their “affairs” after the local graduates take over management, as the law envisages. This can be best seen in other legislations requiring investors to detail plans on how management will shift from non-citizens to citizens.

5.4 The Mining (Local Content) Regulations⁷⁹

These regulations were made in respect of mining activities, whereby all mining companies are required to prepare, and submit to the local government authorities in which they operate, detailed plans on how they will eventually hand over management from foreigners to citizens. For example, at the management levels, after 10 years, locals should be between 60-70% of management, 70-80% of technical staff and 100% of other staff.⁸⁰ Several years since the passing of these laws, their impact is not yet felt, and employment of foreigners still persists.

5.5 Amendment to the Non-Citizens (Employment Regulations) Act

Although NCERA was passed at the behest of employers/investors, still they were not yet satisfied. They kept on complaining about the new law, and that it was still restrictive, in violation of the international labour best practices. Their engagement with government led to its amendment in 2021.⁸¹ Under the amendments, significant changes were made in terms of the number of non-citizens that could be engaged, and the validity of work permit. For the investors registered under the Tanzania Investment Centre, an investor is now free to employ up to ten non-citizens without being subjected to any restrictions, subject only to the requirement to pay the prescribed fees⁸². Further to that, an investor was not precluded from employing more than 10 non-citizens, provided the ration is 1:10. This means in an investment with 300 employees, the investor is free to engage some 30 non-citizens.⁸³ Lastly, the amendment, the amendment extended the validity of the Work permit from the previous 5 years to 8years⁸⁴.

6.0 Does Local Legislation Violate International Labour Standards?

⁷⁸ Integrated Labour Survey Report. NBS, released on Thursday, 15th April 2016.

⁷⁹ No.3 of 2018.

⁸⁰ See 1st Schedule, to *ibid*;

⁸¹ Vide The Written Laws (Miscellaneous Amendments) Act, No.4 of 2021.

⁸² *Ibid.* s.19(2).

⁸³ *Ibid.*s.19(3).

⁸⁴ *Ibid.* S. 12(4).

To try and justify their reservations about the local labour legislation, particularly those that restrict free dealing in matters of employment, investors allege that they violate international labour practices. This stand was apparently adopted by the government. In spite of the Minister's prompt reaction to the complaints by the business community that the law was, and still is restrictive to free labour inflows, was the hue and cry justified? It was not. This is because the laws did not, at any time, make it an offence to outsource, but it insisted that this would only be the case where local expertise is lacking. Furthermore, the law provided for the means to request for additional experts where it was necessary to do so. The convention against discrimination does not provide for unregulated entry into the labour market, if a studious examination of its provision was to be undertaken. Article 2 of the Convention provides for the obligation of the state signatories to it as follows:

Each member, for whom this convention applies, undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practices, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

The phrase "by methods appropriate to national conditions and practices" is very crucial in that aspect. Methods and conditions differ from one country to another. Most definitely, national conditions and practices in the developed world (where most investors come from) would not be the same methods and practices as those obtaining in the developing countries (where the investors come and invest). Fortunately, in Tanzania, there have been no cases where the international labour standards were applied in determining discrimination. However, in other jurisdictions, the application of discriminatory labour conduct has been considered. In the European Court of Human Rights, the case of *Sidabras & Another vs. Lithuania, Applications No.55480 and 59330 of 2000*, the Court had to decide whether denying employment to the Appellants on the basis of their previous political activities constituted discrimination. The Appellants had once worked for the Russian State Agency, KGB, and they were denied employment on that account. The court considered the argument whether the ban to employ them was proportionate to the legitimacy for which that ban had been imposed, as was argued by the Lithuanian authorities. They had argued that during the occupation of Lithuania by Russia, members of the KGB had committed wanton acts of human rights violations, so that the ban on re-engaging them had a solid foundation. The Court was of the unanimous agreement that a country had the right to impose restrictions (without violating international law) if the reason for such discrimination could justifiably be defended. It decided, however, that the ban in this particular case was a "disproportionate measure, even having regard to the legitimacy of the aims pursued by the ban".

The above decision informs that to allow an unregulated entry into the labour market on the pretext that it violates international labour practices is a gross misconception. It is further submitted that the "methods" and "conditions" obtaining in Tanzania make it necessary that there should be some form of restriction on the employment of foreigners, as it is provided under our laws. While it may be prohibited to discriminate, it is also the duty of the state, an unmitigated one, to ensure economic and social well-being of its

citizens. One way of ensuring that is to make and/or create conditions where its citizens with the necessary qualifications are able to find employment.

7.0. Conclusion

The discussion in this paper is beyond an inquiry into whether the effort to secure employment for the indigenous, and development of their skills is good or not. There can be no rational argument that it is not. But it is only good in the intentions. Practically, however, it is difficult to implement them, so long as the government has not been able to create enough employment of its own. Private employers agreed that the law does not augur well for the development of their enterprises. Their grumblings are not to be ignored, so long as we look to the private sector to create the bulk of employment. For those who still want to employ foreigners, so long as the law is still in force, must comply with it. This calls for adequate regulatory and control mechanisms, which can be enforced, rather than being swayed every now and then, on the pretext of the so called “international labour best practices”.

We have demonstrated that our laws, *arguendo*, may seem to be violating international law, but they are not. Failure to implement them on any pretext, is to return to rhetorics, to the detriment of all, the employed and unemployed citizens. The government should make efforts to develop local skills by increasing funding to train and equip employees with the necessary skills to manage public entities; and to be able to run their own. Shutting out employment, or making it difficult to access for foreigners, particularly those from the East African Community region, may ultimately end up with awkward results; and the mischief that the law intended to cure may not be cured after all.