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THE POLICE FORCE AND HUMAN RIGHTS IN TANZANIA

Wilbert B.L. Kapinga*

Introduction

This paper examines the practice of executive power in the Tanzanian police force, and the attendant consequences for human rights. Auxiliary police and other para-military personnel such as the people's militia are treated in this paper as part of the police force on account of their "law and order" functions. Legislative as well as judicial control of that power will be appraised. It is part of my argument that the protection of human rights should rest not merely on the entrenchment of formal guarantees in bills of rights or state ratification of international conventions on human rights; rather, the citizenry should have the institutional capacity to monitor and facilitate the realization of fundamental rights and to expose abuses of the same. In the same vein, the governance and accountability of the police force as an institution for the administration of justice should be treated on a more realistic and rational plane. It will be illustrated that, notwithstanding the entrenchment of fundamental rights in the Constitution and the ratification of and subscription to United Nations Conventions on basic human rights, state violation of rights has been increasing.

The legal norm for securing human rights in a given country has universally been embodied in a bill of rights in a constitution, the means for an aggrieved citizen to obtain protection in the ordinary courts of law. The protection being sought by the citizenry is in reality protection against interference by the state with the individual human rights. The bill of rights normally includes recognition of equality of persons and their inherent dignity; freedoms of expression, movement, religion, and

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association; rights to life, personal security, and privacy; and the rights to acquire, own and dispose of property.

The history of the Bill of Rights in Tanzania has been an ironic one. At the time of the negotiations which culminated in Tanzania's (then Tanganyika, which did not include Zanzibar) self-government in 1960, the issue of the Bill of Rights was raised by the very colonial powers that suppressed it for years. This was the pattern in the late 1950s and early 1960s, when colonies were demanding political independence in Africa. It will be recalled that it is universally acknowledged to be the responsibility of courts of law to interpret the guarantees enacted by the bills of rights. In discharging that obligation courts may disallow any executive or legislative act which they find to be in conflict with the provisions of the fundamental law enshrined in the bill of rights. As just noted, no colonial government was prepared to accept such a restriction on its powers. Yet bills of rights became very popular with the British Colonial Office during the era of political independence in Africa. One remarkably probable reason has been advanced, namely, that bills of rights in independence constitutions fit the general pattern of denying, as far as possible, effective executive power to the post-colonial governments.[1]

Colonizers were compelled to relinquish authority and the colonized were ascending to power. Thus, the property acquired during the colonial era by nationals and corporate bodies of colonial powers had to be protected. Hence the issue of absolute guarantees for individual human rights, particularly the right to acquire, own and dispose of private property and the assurance of state protection of the same, occupied a central place in the negotiations for independence. In the independence constitutions which were finally adopted by former British colonies the right to ownership of private property is one of the most comprehensively entrenched provision of the Bill of Rights. Indeed, it appears to be more comprehensively provided for than the right to life.[2]

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1. ROBERT MARTIN, PERSONAL FREEDOM AND THE LAW IN TANZANIA 39 (1974).

2. See, for example, how the following provisions of the Tanzania Bill of Rights are couched:

The right to life

Article 14. Every person has a right to live and subject to law, to protection of his life by society.

The right to property

Article 24. (1) Subject to the relevant laws of the land, every person has the right to own or hold any property lawfully acquired.

(2) Subject to the provisions of sub-section (1), a person shall not be arbitrarily deprived of his property for the purpose of acquisition or any other purpose without the authority of law which

The new leadership in the emergent Third World states were generally opposed to entrenching absolute rights in the constitutions of their countries. They were of the view that what was of paramount urgency was the construction of their countries, whose economies had been devastated by the many years of colonial exploitation. They were not prepared to allow restraints on the so-called development and welfare of their people, not even through the traditionally protective provisions of bills of rights. One can surmise that, for a people who struggled against colonialism to attain freedom, it was the worst of ironies that their freedom should be curtailed by their own leaders and after the departure of the colonizers. The bill of rights should have been an important institution for the people in consolidating the freedom they had won from the colonizers.

At the time of attaining political independence, the government in Tanzania argued, that a Bill of Rights in the Constitution would limit, in advance of events, the measures which government may take to protect the "young and fragile" nation from the threat of subversion and disorder. Furthermore, the government of the day thought that the Bill of Rights would invite conflicts between the executive and the judiciary, for it asserted that the judiciary, which was then largely manned by expatriates, would use the Bill to frustrate the new government in her so-called endeavors to pursue dynamic plans for economic development and social progress.[3] In 1962, the government stated that it believed that the rule of law was best preserved not by the formal guarantees in a Bill of Rights that invited conflict between the executive and the judiciary, but by independent judges administering justice free from political pressure. Thus on two occasions, that is, immediately prior to independence and when the Constitution for the Republic was under discussion, the idea of the Bill of Rights was rejected in Tanzania.

When the Presidential Commission on the Establishment of a (so-called) Democratic One-Party State was holding hearings prior to making its report, it received a brief from the Tanganyika Law Society, which urged the inclusion of a Bill of Rights in the Constitution. The brief noted, among other things, that "it is by incorporating a guarantee of these rights (i.e. fundamental rights of men) in the Constitution that we

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shall set out conditions for fair and adequate compensation.

Section 75 of the Constitution of the Republic of Kenya is similar to Article 24(2) of the Tanzania Bill of Rights. The Kenyan provision was presumably enacted to guarantee settler property rights at the time Kenya attained political independence.

3. *See* R. MARTIN, *supra* note 1, at 40.

can ensure it of universal respect." Among the fundamental rights enumerated were the right to property. This suggestion was rejected. The Interim Constitution of Tanzania of 1965 that was finally promulgated contained no Bill of Rights. There were several very general rights which were stated in the Preamble to that Constitution. The style of enumerating certain fundamental rights in the Preamble was repeated in the 1977 Permanent Constitution of the United Republic of Tanzania. It need hardly be pointed out that the provisions of a Preamble to any legislation are neither enforceable nor justiciable in the British tradition.

Following intense public debates during 1983 and presumably a bold initiative by Zanzibar, Tanzania (Mainland) was compelled to promulgate the Fifth Constitutional Amendment in 1984 and a Bill of Rights was entrenched in the Constitution of the United Republic of Tanzania. (Although part of the United Republic, Zanzibar has its own legislature, state constitution and legal system; it had tabled proposals before its legislature to incorporate a Bill of Rights in its 1984 Constitution.) It is significant to note that the debate on the country's Constitution followed proposals for constitutional amendments by the National Executive Committee (NEC) of "Chama cha Mapinduzi" (CCM), the sole and ruling political party in Tanzania. Although that was not the tenor of the terms of reference of the NEC proposals, the thrust of the debate was overwhelmingly a demand for greater democratization of politics, including a Bill of Rights. In the end, the NEC was compelled to accept the proposition that both the Union and Zanzibar Constitutions should include a Bill of Rights.

Besides the limitations stipulated in the relevant articles themselves, the Bill of Rights in Tanzania has been made subject to the cumulative limitations of the general derogation clauses in Articles 29 and 30 of the Constitution. Academics have already subjected Article 30 to severe criticism for its very ambiguous formulation.[4] The plain reading of this derogation could easily be used to justify almost any breach of the fundamental rights and freedoms. Professor Shivji makes reference to the view of the Tanzanian Attorney General (who was then also the Minister for Justice) who asserted that the majority of the "offending" legislation on the statute books could be validated under Article 30 of the Constitution.[5]

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4. *See, e.g.*, L.X. Mbunda, *Limitation Clauses and the Bill of Rights in Tanzania*, 4 LESOTHO L. J. 153 (1988).

5. ISSA G. SHIVJI, STATE COERCION AND FREEDOM IN TANZANIA 10 (Southern African Studies, 1989).

Early in 1989, the same Attorney General made use of Article 30 to support the reintroduction of mandatory corporal punishment. He argued that the imposition of such punishment for specified offenses — which included robbery, assault with intent to steal, and cattle rustling — was in the interest of the community at large.[6] It is remarkable how the state can so confidently and shamelessly reintroduce such a dehumanizing punishment as flogging in its sentencing laws within hardly a year of the coming into justiciable force of the Bill of Rights, which prohibits inhuman and degrading punishment.

As stated earlier, the subject under review is the practice of executive power through the agency of the police force and how it relates to the protection of human rights in Tanzania. The exercise of police power sometimes interferes with the individual rights to liberty. Strong views have been expressed in certain quarters that the rights to life and liberty are basic or core rights around which other rights revolve.[7] The right to life essentially refers to the right to exist and the right to be treated humanely, free of cruel, inhuman or degrading punishment or treatment.

The Police Force

The police are essentially an armed and usually uniformed contingent of people who operate one of the repressive apparatuses of the state. Despite these "uncivil" characteristics, the police force is part of the civil service in Tanzania. In any country in the contemporary world, the state is the managing institution for the rulers. It has both ideological and repressive functions. Within its territory, the state has to maintain what is called "law and order" according to the outlook of the powers that be. All forms of violence are formally monopolized by the state, and its commands, generally known as laws, are backed by threats of violence. Thus the men and women who are equipped to maintain internal order are known in the contemporary order as the police.

The police normally discharge their functions through real force or the demonstration effect of a show of force. The latter method is largely ideological and serves the object of frightening populations. The army, on the other hand, comprises armed men and women who are maintained primarily for external defense. It may be pointed out that, in Africa and

6. Radio Tanzania report over the National Assembly Debate on the Written Laws (Miscellaneous Amendments) Bill, 1989 (now Act No. 2 of 1989) aired on Apr. 24, 1989. *See also* the government newspaper, DAILY NEWS, Apr. 25, 1989.

7. I.G. SHIVJI, *supra* note 5, at 7.

other Third World countries, armies are largely used for internal suppression rather than for external security. This characterization of the uniformed forces also describes the Tanzanian regime.

The immediate genealogy of the Tanzanian police force is in the country's colonial history. The German colonial power introduced the force in (the then) Tanganyika in the 1890s. The notorious "Askari" (meaning "soldier") and "Tarishi" (meaning "messenger") served both the functions of soldier and policeman. The Germans did not establish too formalized a force. After the defeat of the Germans in the (so-called) First World War a formal police force was established by the British colonial administration in Tanganyika. Interestingly, the nucleus of the first thirty-one troopers in the force came from the South African Mounted Rifles under the command of Major S.T. Davies, who had been seconded from the South African Armed Forces.[8] This contingent of troopers was stationed at Wilhemstal (now known as Lushoto in Tanga Region of Tanzania), where it is recorded that the Germans had carried out massive land alienations. The presence of the force in the location was presumably intended to have a steadying effect on the dispossessed peasants.

At the time of independence, Tanzania inherited the police force as it was and removed only the racial bias in its content. The motorized company of the force, then styled the Field Force Unit (F.F.U.), was retained. In the account of Dr. Tenga referred to above, this feature is illustrated as utterly paradoxical, given the fact that F.F.U. had been used by the colonial administration mainly against the organizational potential of the social classes that supported the nationalist movement. The nationalist leaders themselves are known to have suffered from the attentions of the motorized company of the force. It can be argued that the unit has been retained by the new leadership to serve a similar repression, of the so-called recalcitrant elements or against any possible political opposition or civil protest.

Organization of the Police Force

At the level of government structure, the police force in Tanzania is under the civilian control of the Ministry of Home Affairs. As intimated earlier, the force is regarded as part of the civil service. It is subject largely to the same control and disciplinary mechanisms as the civil service.

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8. R.W. Tenga, *Policing Tanzania: The Role of F.F.U. (Field Force Unit)*, 2 AFR. EVENTS 43 (Sept. 1986).

Organizationally, the Criminal Investigation Department, usually known by its acronym, C.I.D., and "Interpol," the international crime fighting/investigating department organized with the help of the British Commonwealth, are also under the Ministry of Home Affairs. The Ministry of Home Affairs also controls the Fire Brigade Department and the Directorate of Immigration.

Tanzania also has a considerable force of auxiliary police and paramilitary personnel — the people's militia, which supplements the formal police force in its duties. These are usually assigned to guard public installations, and they have similar police powers of arrest. While on duty, the militia would normally be armed — with either the standard police truncheon, an ugly looking semi-automatic rifle, or even a stun gun! The budgetary needs of these various departments of the Ministry of Home Affairs require the usual approval of the Parliament on an annual basis. Parliament has general censure powers over the Ministry of Home Affairs, and thus in theory excesses in the police force may not escape its scrutiny.

It is appropriate to say a word about another armed contingent of the state, namely, the intelligence or state security personnel. This unit is, by and large, clandestine and it is directly under the President's Office. Unlike the Ministry of Home Affairs, the budgetary needs of the intelligence unit of the state security personnel are disbursed from the Consolidated Fund, which never meets the strict expenditure scrutiny of the Parliament. It follows that, under such arrangements, if this unit of government breaches its implied trust to the people of Tanzania, the people would not have the opportunity to censure the government through Parliament.

Recruitment and Training

The system of recruitment into the police force provides for equal access without discrimination based on gender, race, color, ethnicity or religion. There is, however, the glaring political anomaly of making membership in CCM, the sole political party in Tanzania, a condition for admission into the police force. This obvious discrimination, based on political affiliation, is an affront to the International Covenant on Civil and Political Rights[9] as well as similar provisions in the African Charter

9. 999 U.N.Treaty Series 171, 6 Int'l Legal Materials 368 (1967). *See* Article 25(c).

on Human and Peoples' Rights,[10] which enjoin the right of equal access by the citizenry to public service in their respective countries.

It should be pointed out, however, that the police force created by the colonial administration discriminated against Africans' occupying the officer cadre of the force. Only persons of European and Asian origin could take positions in that cadre. Even among Africans, women, presumably for reasons of many historical and traditional prejudices, were excluded from joining the police force. In addition, the African men who were eligible were those who were six feet tall and above and who had sturdy features. In Tanzania, people with such characteristics were largely to be found in the northern parts of the country. This clearly introduced ethnic discrimination into recruitment for the police force. All these forms of discrimination were done away with by the post-colonial government. But when these strictures were removed and women were allowed to join the police force, they were already outnumbered by men and thus the present gender imbalance in the police force remains an anomaly inherited from history.

With regard to training, the police force and other formal law enforcement personnel (i.e., excluding the auxiliary police and the militia) do in general receive the kind of training which sensitizes them to the needs of victims of crime and to guidelines which ensure proper and prompt aid. Thus the Tanzanian training practice does in theory comport with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[11] which deals with the training of police and related law enforcement personnel.

Apart from the routine physical drills, the content of the training of the police force and of other categories of law enforcement personnel such as immigration officials does emphasize due process and the prohibitions of torture and inhumane and degrading treatment of suspects of crime. These aspects feature in courses, such as public law and order, evidence and procedure, and criminal law, which are taken by police officers, ordinarily at the elementary level. Increasingly, however, the officer cadre of the police force and immigration department are receiving university education within the country, and specialized police courses outside the country, particularly in the United Kingdom. A considerable number of high-ranking police officers have undertaken law degree courses. The present Inspector General of Police, the Director of C.I.D., the Chief

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10. 21 INT'L LEGAL MATERIALS 58 (1982). *See* Article 13(2).

11. G.A. Res. 34, U.N. GAOR, 40th Sess., Annex, art. 16, at 29, U.N. Doc. A/40/881 (1985).

of the Fire Brigade and the Principal of the Police College are all law graduates.

Police Powers

The police have myriad powers under law. These include the powers of arrest, search, restraint and the power to investigate the commission of crime. In Tanzania, the law which vests these powers on the police is the Criminal Procedure Act.[12] While investigating crimes, the police are empowered under the Act to proceed to any place where they have reasonable suspicion that a crime has been committed, and then to conduct investigations. If the commission of an offense is detected, the police have power to arrest suspects. However, the police have no power to arrest without warrant unless the offense is one of the "scheduled offenses." The scheduled offenses are usually the grave ones like murder and treason, and those which relate to or are imminently involved in breach of the peace.

Police powers to arrest with warrant are provided for under the Criminal Procedure Act.[13] Under this provision, magistrates/judges, ward secretaries and village secretaries have power to issue warrants for the arrest of persons suspected of having committed a crime. An arrest warrant is issued only under oath taken by the person who claims that an offense has been committed, and there must be reasonable grounds for issuing the warrant.[14] An arrest warrant would only be issued if the suspect is not already under lawful custody. The warrant has to be accompanied by an order that the suspect be brought before a court of law, to be dealt with in accordance with the law. The appearance before the magistrate has to be made within twenty-four hours if the arrest is made on a working day, or within reasonable time if made on a non-working day. It should be borne in mind that it is not mandatory for the relevant authority to issue an arrest warrant. The law permits the issuing authority to issue a summons instead, requiring the suspect to appear before a court of law for interrogation.

Do the police have power to place a criminal suspect under detention? This is a controversial question. To be arrested by the police on suspicion of having committed a criminal offense is not in itself proof of guilt. Many people who are arrested by the police are good and law-abiding

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12. Act No. 9 of 1985.
13. *See* § 13(1) of the Act.
14. Judges, magistrates, ward/village secretaries have authority to administer oaths.

citizens. Few among them may have committed offenses. Though a person may be suspected of having committed an offense, the law also protects suspects by virtue of the doctrine that a person is innocent until the contrary is proved through due process of law. Because of this legal doctrine, to place a person in detention without lawful cause is unacceptable before the law.

It is common in Tanzania for a person to be stopped by the roadside by the police or militia, and to be asked, often rudely, to produce an identity card. The police or the militia may also demand to search a person's luggage or a vehicle in which he may be travelling. Sometimes the police or militia may visit a person's house and demand that the same be searched. These acts may cause enormous inconvenience to a person, particularly if he or she is travelling on some matter of urgency or, if it is at his or her home, where the search may interfere with his right to privacy. There is no law which empowers the police or the militia to demand an identity card from any person. The Registration and Identification of Citizens Act, 1986 does not compel any citizen to have an identity card, let alone to carry one on his person. The only thing which the police are permitted to do under the Criminal Procedure Act is to ask for the name and address of a person who is unknown to them and who may be of assistance in the investigation of an offense which has been committed or may be about to be committed. It is mandatory in such circumstances for the person who has been asked to furnish his name and address to do so correctly. Such a person is also entitled to demand from the police their names, ranks and stations of work. The police have a duty to respond to such a demand.

Lawful police powers of search are extended to the search of the person who has been duly arrested. They are also empowered to search motor vehicles and vessels, aeroplanes, houses and any other place where there is suspicion that property, weapons or other articles connected with a criminal offense may have been hidden. It is important to note that, before the police officer can effect any such search, he or she is required to possess and produce a search warrant. A search warrant is issuable either by a court of law or by a police officer in charge of a station.

Police Powers and Rights of Citizens

It should be understood that, although the state enacts the law, state institutions themselves are obliged to comply with the law. A state which acts in disregard of this invites social unrest and breaches of peace. While the duty of the police force is to ensure that citizens comply with the law

in discharging their duties, the police themselves have to abide by the law. For instance, where a police officer arrests a person or searches his property, he or she has to comply with the law relating to arrest and search. If the police do not do this, a person is entitled to take legal action.

To rule without law is to invite unfairness, arbitrariness and dictatorship. Such a state of affairs would bring civil strife, for the people would resort to their own means of protecting themselves against the arbitrariness of such a state. If the police discharge their duties in accordance with the law, the law will protect them. It is often the case, however, that the police exceed their legal limits. For example, the police may arrest an otherwise good and law-abiding citizen without justification and even place him in detention beyond the prescribed limit and without bringing him before a court of law. The police may do this out of negligence or with the intention of harassing the person. Such acts are unlawful and the citizen is entitled to sue a police officer who acts in disregard of the law and to the detriment of the aggrieved person.

But how would a citizen know that a particular police officer has exceeded his legal authority? The answer to that question is not a simple one. It is necessary for the citizen to know his or her rights under the law to ascertain whether such rights have been interfered with. Under the Criminal Procedure Act,[15] the police are empowered to summon a person to the police station for interrogation or to assist in the investigation of any breach of law which might have occurred. During interrogation, such a person is entitled to have read to him or her any statement made by him or her and recorded by the police. He or she is also entitled to see the statement and add or deduct any matter therein, before endorsing the same before another witness. It is the duty of the police to inform the person being interrogated that he or she has an obligation to answer the questions truthfully, even at the risk of self-incrimination. He or she has the right to refuse to answer any such questions on account of "due process protection." The police are also duty bound to warn the person being interrogated that any averments made by him or her may be used in evidence in any criminal charge that may later be brought against him or her. It should be clearly understood that the police have no right or power to beat up, torture or intimidate, the person being interrogated or promises him or her a favor, so as to elicit a self-incriminating statement.

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15. *See* § 10(2).

The act of arresting a person has been associated with a variety of disturbing forms of conduct. There are times when the police use excessive force when effecting an arrest, even when the suspect has clearly expressed willingness to go to the police station without being handcuffed. It seems ingrained in the minds of the police that the first step in dealing with a suspect is to degrade and humiliate him or her before relatives and friends. The law does not direct the police to behave in such an unruly manner. The first step that the law directs is merely the arrest of the suspect. More often than not, once a person is told that he or she is under arrest and informed of the probable reasons therefor, he or she would promptly oblige. It is only in cases where the suspect does not oblige that the police are permitted to touch the body of the person or handcuff him. If the suspect refuses to be arrested, then the police are allowed to use reasonable force to effect the arrest. It must be emphasized that a suspect is entitled to be informed of the offense of which he or she is suspected and for which he or she is being arrested.

Whenever a suspect is placed under police custody, his or her first right is to be formally charged and brought before a court of law as promptly as may be reasonably practicable. The rule, as stated earlier, is that the court appearance must be made within twenty-four hours of the arrest or reasonably promptly if the arrest is made on a weekend or other non-working day. A person who has been placed under police custody is entitled to consult an advocate. If the police apply to the court for an extension of time to hold the suspect in custody, the advocate is entitled to be informed so that he may make objections if he desires to do so. When in custody, the suspect is not compelled to answer any questions unless he or she is formally told of the breach of law which he or she is believed to have committed and has been informed of his or her right not to answer questions. As noted above, he or she is, however, obliged to give his or her correct name and address.

The other rights of a suspect in custody include the respect of his or her dignity and the right to be accorded humane treatment. It is against statutory law and the Constitution to subject a suspect to cruel, inhumane or degrading treatment. The person in custody is also entitled to access to a doctor and to obtain medical treatment if he or she feels unwell and has sustained injuries. If the suspect is under the age of majority, the police have a legal obligation to contact his or her parents or guardians, inform them of the offense he or she is believed to have committed, and grant them access to the suspect in custody to facilitate arrangements for provision of legal counsel if the same is desired.

The existing statutory safeguards for persons in police detention comply with the rules under the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment adopted by the United Nations General Assembly in 1988.[16] The pertinent part of the Principle provides that there shall be duly recorded: (a) the reasons for the arrest; (b) the time of arrest and that of the taking of the arrested person to a place of custody, as well as that of his first appearance before a judicial or other authority; (c) the identity of the law enforcement officials concerned; and (d) precise information concerning the place of custody. It is also provided that such records should be communicated to the detained person or his counsel.

A person is entitled to refuse to be searched if he or she is not under arrest. This right lapses as soon as the police inform the suspect that he or she is under arrest. A male police officer is not allowed to search the person of a woman suspect (and presumably vice versa). If he attempts to do so, a woman is deemed to have a right to prevent the search of her person and to use force if necessary. A person being searched has a right to demand a receipt for all of the items seized or found on him or her during the search. The person conducting the search should place his or her signature on the receipt to make it valid. If the search was carried out before witnesses, their names and signatures should also be appended to the receipt. Prior to arrest, a person has no obligation to submit to a search unless the police officer produces a search warrant with an express authority of the court of law that the search should be carried out.

Control of Police Malpractice

The term "police malpractice" is used here to denote the extra-legal and illegal use of police powers. Extra-legal and illegal use of police powers refer to the use of coercion, or the deprivation of a person's right to life and liberty, by members of the police force beyond the authority

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16. G.A. Res. 173, U.N. GAOR, 43d Sess., Agenda Item 138, Dec. 9, 1988, U.N. Doc. A/RES/43/173 (1989). *See* in particular Principle 12 for the present purpose:

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law. U.N. Doc. A/RES/43/173/Annex (1989)

of law. The control of the police which is envisaged is through legislative and judicial machinery. While the former can be achieved through political pressure, through group activism, the latter is dependent on the initiative of the victim (perhaps with the support of relatives or sympathizers) to protest and petition for redress through due process of the law. The structure of the legal system, for understandable reasons of separation of powers (and because the Ombudsman is largely ineffective), does not avail the judiciary of an independent mechanism to probe into allegations of police malpractice in the absence of a formal petition before it. There is, however, no necessary contradiction between the principle of separation of powers and the principle whereby judicial authority should be capable of initiating on its own an enquiry into causes of death or disappearances of persons occurring during their detention or imprisonment. Because the judiciary still commands remarkable respect, giving it that role may enhance the credibility of the legal system.

Incidents of police malpractice have been noted to occur at two levels: first, where the police come into contact with citizens, particularly when on patrol duties, at road blocks or when searching and arresting on suspicion. At this level there are numerous reported and unreported cases of beating (in some cases leading to death of the victim), harassment and molestation. The police on patrol are heavily armed, trigger-happy and reckless with their arms. For example, in the case of **R. v. Abdallah Bakari Lugendo,**[17] the accused militiaman on patrol shot dead an alleged hooligan who had attempted to escape. The bullet struck the deceased in the stomach. No warning shot was fired first, nor was there an attempt to demobilize the suspect in any way. In another case, **John Nyamhanga Bisare v. R.,**[18] where the militiaman was convicted of manslaughter, the court observed **obiter** that the reckless use of firearms by militiamen had become common.

The second level of police malpractice is where a person has been arrested and held in custody for interrogation or for some other reason, and is subjected to torture, beating and harassment. There are frequent incidents of this kind but reports rarely come to light. Furthermore, it is apparent that the violators are rarely prosecuted by the state. Thus, the police routinely "soften up" suspected criminals just after apprehension, in order to obtain quick confessions. Beating and torture continue if the suspect does not break down.

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17. Criminal Session Case No. 6 of 1986, High Court of Tanzania at Tanga (unreported).
18. (1980) T.L.R. 6.

In the latter part of 1989, there were reported three major incidents of torture committed by state agents. In August of that year K.L. Bazigiza, a student leader at the University of Dar es Salaam, was arrested, together with another student leader named J. Mkenda, after the former publicly criticized the composition of a Tanzanian delegation to a world youth festival in North Korea and the manner in which the delegation's funds were allocated. Both the arrest and detention, which were carried out by state security personnel, were unsupported by lawful orders. Bazigiza was kept in such unlawful custody for nearly three weeks, while Mkenda was wrongfully detained for about seven days. According to Bazigiza himself, he was tortured and humiliated by being photographed naked. Until they were released later in August, Amnesty International adopted them as prisoners of conscience.[19]

After their release, Bazigiza and Mkenda filed a suit for false imprisonment against the Government. A committee appointed by the University Council to conduct an investigation found that the arrest and detention were unjustified and illegal. The committee recommended that the Government institute an official investigation and take appropriate disciplinary and legal action against those responsible for the breaches of the students' liberty. No action has ever been taken. Privately, the then-Prime Minister, J.S. Warioba, who had initially tried to ignore the issue, placed equal blame on Bazigiza and the state agencies but asked everyone "to forgive and forget."[20]

The second incident came to light in September, 1989 when the Dar es Salaam press reported extensively on the death during torture of a suspect whom policemen of the Oyster Bay Police Station in the City had arrested. The suspect, Teredid David Nkunda, an employee of a parastatal company, the Mwananchi Engineering and Contracting Company, was arrested in connection with the theft of spare parts from the company. Nkunda was so badly maimed by electric cables wrapped around his body like bullwhips, which pulled off chunks of flesh when the cables were jerked off, that he had to be hospitalized. He later died at Muhimbili Medical Center in the City.

Six police officers were charged with unlawfully assaulting three suspects connected with a theft and, as already pointed out, one of them subsequently died. The six men (one inspector, one sergeant, two corporals

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19. AMNESTY INTERNATIONAL, USA, AMNESTY INTERNATIONAL REPORT 232 (1990).

20. Issa G. Shivji, Law, Democracy and the Rights Struggle: Preliminary Reflections at the University of Dar es Salaam 11 (unpublished 1990).

and two constables) were summoned to court on September 18, 1989, but they refused to answer the summons and the magistrate had to order that they be arrested and brought before the court. They finally appeared in court on September 20, and all pleaded "not guilty" to the charge. Until the time this paper was written, in December 1990 — more than a year after the incident — the accused were all out on bail and remained in their normal police duties!

Police violence is becoming a more frequent occurrence in Tanzania, even in the face of the entrenchment of the Bill of Rights in the Constitution that is supposed to ensure the protection of the citizens against such inhumane and degrading treatment. In this regard, the Constitution of Tanzania provides that:

> For the purposes of ensuring equality before the law, the state shall make provisions that every person is entitled to respect for the dignity of his personal liberty and he shall not be deprived of such liberty save in accordance with the procedure permitted by law in execution of the sentence or order of a court in respect of a criminal offense of which he has been found guilty; [and further] that no person shall be subjected to torture or to inhuman or degrading treatment.[21]

Indeed, acts by the state in abrogation of fundamental human rights are also against United Nations conventions, which Tanzania has ratified.[22]

The Tanzanian media, which seldom publish a word in such cases, reported during September 1989, that thirty people had been beaten up by the "sungusungu," a traditional semi-official police force. The phenomenal growth of the so-called traditional, semi-official police force (the "sungusungu" or "wasalama," which are local names given to rural peasant defense and security groups) beginning in the early 1980s in the cattle-breeding regions of Northern Tanzania, seems to be a consequence of the failure of the regular police force to protect the rural population against armed robbery and cattle rustling.

The Oyster Bay torture trial is being followed closely, as it is one of the first where the victim's family has dared to file a complaint against

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21. *See* Article 13(6)(d) and (e) of the Constitution of the United Republic of Tanzania (1977) as modified by the Fifth Constitutional Amendment Act No. 15 (1984).

22. *See, e.g.*, Articles 2 and 4 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., U.N. Doc. A/39/708 (1984), 23 INT'L LEGAL MATERIALS 1027 (1984), as modified, 24 INT'L LEGAL MATERIALS 535 (1985) which enjoin ratifying states by prohibiting, and criminalizing, acts of torture.

the police. The advocate[23] for the victim's family had an interesting legal and psychological ordeal in connection with the case. His application to have the case prosecuted privately, as it concerned police officers whose mates would have been responsible for the criminal prosecution, was overturned on appeal to the High Court, on the apparent ground that the Director of Public Prosecutions had absolute control over all criminal prosecution and, in sensitive cases like this one, an "interference" by private individuals offers no benefit. The advocate also received anonymous threats on his person and family for allegedly defending "known" core criminals.

Twenty-eight incidents of the illegal use of force by individual agents of state organs of force have been documented for the years 1981-1987.[24] The known incidents included twelve deaths, six beatings and torture, eight cases of harassment, and two cases of injury through negligence. In those reported cases, twenty-five involved agents of state organs of force in the purported discharge of their police duties. In the majority of cases, these incidents were picked up by the press because the culprits were actually prosecuted in the High Court. There are numerous other cases which do not get reported and many others which never see the corridors of a courthouse.

The brutalizing of the citizenry in Tanzania by police purportedly discharging some "official duty," notably became a country-wide phenomenon during the 1980s. In the rural areas, operations to net peasants who have not cultivated prescribed acreage have often evoked brutalities leading to death. In the case of *R. v. Abdu*,[25] the accused, instead of attending to his security guard duties, confronted the deceased, who was selling pineapples at a stall. The deceased took to his heels when he saw the militiaman. The accused eventually caught up with him and severely beat him with a police truncheon. After a couple of hours, he died.

There are many other accounts of torture of suspects by the police during interrogation in custody. In December 1981, Scarion Bruno was arrested on suspicion of having cashed a cheque fraudulently. He was placed on police remand for three days, which is clearly beyond the legal limit of twenty-four hours, before being sent to court. During interrogation

23. Dr. Masumbuko Lamwai was the advocate of the family of the victim. He is also a Lecturer in the Law of Civil Procedure at the Faculty of Law of the University of Dar es Salaam, Tanzania.

24. I.G. SHIVJI, *supra* note 5, at 54.

25. Criminal Sessions Case No. 40 of 1984, High Court of Tanzania at Dar es Salaam (unreported).

in custody, one of his interrogators severely hit him with a pistol butt, hurting his eye. The cornea of his right eye was ulcerated, and when it healed he could only perceive light with that eye. Three years later he developed a corneal opacity of leucoma and he lost vision in that eye.[26]

Meanwhile, in 1984 Scarion Bruno sought assistance from the Legal Aid Committee of the Faculty of Law of the University of Dar es Salaam, for damages against the Attorney General. The suit had to be against the Attorney General because the law requires this where a government department is the defendant: In this case, it was the police department of the Ministry of Home Affairs, which was joined with the accused police officer. A plaint was subsequently filed in the High Court, but it had to await the consent of the Minister for Justice (who was then also the Attorney General) before the case could proceed.[27] Much correspondence ensued between the Legal Aid Committee, as counsel on behalf of Scarion Bruno, and the Minister for Justice. Consent for the suit had still not been granted in September 1987, when Scarion Bruno died.

Another act of wanton killing by state agencies in recent history is that of the Kilombero sugar cane cutters in 1986. The killings were apparently precipitated by the refusal of some 500 sugar cane cutters to go to the fields at the Kilombero Sugar Cane Plantations in Morogoro Region; they demanded, and legitimately so, an explanation of deductions from their wages. A contingent of ten fully armed F.F.U. police was promptly dispatched to the scene to deal with the labor protest. The evidence showed that the police first fired some tear gas bombs, which dispersed the crowds. But the police immediately followed up by firing live bullets indiscriminately and by pursuing the protestors to their residences. Four people were killed and sixteen others were severely maimed; it is reported that one of the deceased workers was shot inside a public bathroom where he was hiding to avoid the skirmishes.

A judicial tribunal was set up to inquire into the killings. Its proceedings were conducted behind closed doors. Its report and recommendations had not yet been published by late 1990, although its findings have found their way into the hands of researchers. The tribunal found that the killings were not in self-defense, as claimed by the police. Rather, the

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26. University of Dar es Salaam, Faculty of Law Legal Aid Brief No. 5F/LAB/84/3. All these details were obtained from the applicant's application letter for legal aid.

27. It is the requirement of the law that before a suit can be commenced against the Government the fiat of the Minister for Justice must be obtained. See Government Proceedings Act No. 16 of 1967 as amended by Act No. 40 of 1974.

firing was reckless and utterly indiscriminate. Some 728 bullets were fired and twelve tear gas bombs were used. The majority of those who suffered bullet wounds were injured in the upper part of the body, clearly indicating that bullets were *fired to kill*, in complete disregard of normal riot police procedures for dealing with unarmed civilian protestors.

Despite the grave irresponsibility of the state authorities in this incident, none of those responsible have been prosecuted to date. In fact, the Regional Commissioner, Mr. Mzindakaya, was merely transferred to another region; the Regional Development Director, Mr. Shirima, was soon thereafter moved to the capital city and made a Principal Secretary in one of the government ministries. The leader of the contingent of F.F.U. police who carried out the shootings, Mr. Mbwezeleni, who incidentally was a trained lawyer, went to private practice for a while, then became the corporation secretary of a prestigious parastatal organization.

The Tanzanian countryside has not escaped the wrath of police harassment and molestation. The situation which the rural peasant population faces has been well encapsuled in a letter to the Kiswahili daily, Uhuru, on December 5, 1987. Professor I.G. Shivji's free translation follows:

> Brother Editor,
> The police and militia here in Duga Maforoni — on the border between Tanzania and Kenya — are oppressing us, citizens. For example, we are forced to go to bed before 8:00 p.m. and they ensure that water in the village is available only to the police station [after that time].
> Travellers through Duga Maforoni are also harassed a lot by the beastly behavior of the police. For instance in October 14, 1987 four baskets full of lemons were confiscated from a certain person allegedly because they were supposedly from Kenya. He was whipped and forced to trim grass at the police station.
> On October 20, 1987, Brother Tembo was deprived of his one and a half sack of second hand clothing while he was travelling in the Kidato bus which plies between Dar es Salaam and Mombasa. This happened in Mbuluni village. He was accused of exporting the goods to Kenya but then the distance from the place where his goods were confiscated to the border is some ten kilometers. And he does his business within five kilometers of the village where he lives. Now if it is illegal to sell second hand clothing within a village how come such business is being done everywhere in Dar es Salaam?
> Then, one day one girl (Mwanaidi) was thrown into a cell for two whole days and forced to scrub the floor with her bare hands and to trim the grass in the police station compound. She was subjected to this punishment apparently she had asked to be paid for her fried fish consumed by the policeman.

> On August 15, 1987 a Masai from Tanga was picked up because he was found with 25,000/= Tanzanian shillings. He was brought to the police station, whipped and subjected to other torture. Before being set free he was deprived of 15,000/= shillings.
> A similar incident happened to a trader of Duga Maforoni, Brother Chikobe, on November 8, 1987. He was found with 30,000/= shillings on his way to Tanga to buy merchandise. He was told that there was no law in Tanzania permitting any person, except the Bank, to move around with that much money. He too was whipped and forced to cut grass in the station compound. And before he was set free a sum of 17,000/= shillings was confiscated from him.[28]

Conclusion

This paper set out to investigate the practice of executive power in the police force and related law-enforcing organs, and its effect on the protection of human rights in Tanzania. It also endeavored to appraise legislative as well as judicial control of police powers. It has been shown that the state has never hesitated to resort to the use of force against the population either in times of "crisis," presumably occasioned by the country's economic depression of the 1980s and the resultant social unrest, or in what would otherwise be an ordinary enforcement of "law and order." Professor Shivji correctly concludes that, while the proportion of the force and the extent of violations of basic rights may not be comparable to situations under the murderous dictators of Africa, it has nevertheless been fairly widespread although often subtle and undocumented.[29]

In legislative terms, there is fairly comprehensive provision for the control of executive power in the agency of the police force. Inhumane and degrading treatment and torture are clearly prohibited by the Constitution and the general law, and the police are enjoined to refrain from the same in the discharge of their duties. It has, nonetheless, been illustrated that the police have wantonly and illegally deprived people of life and subjected them to torture and inhumane and degrading treatment. This has been in total breach of the provisions of the Bill of Rights in the Constitution, as well as relevant United Nations conventions, to which Tanzania has subscribed.

Judicial control of the exigencies of police power is tendentially effective save for the constraint of the judiciary's place and function in

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28. I.G. SHIVJI, *supra* note 5, at 59.
29. *Id.* at 64.

the legal system; unless the victims of police excesses invoke the judicial process, control will not be forthcoming. It has been noted that it may be worthwhile legally to empower judicial authority to initiate on its own motion an inquiry into causes of deaths or disappearances of persons occurring during their detention or imprisonment.

The burning question is whether the citizenry has the institutional capacity through which basic rights can be realized effectively and abuses can be exposed. It is rare that private persons are aware that the excesses by state organs of force can be challenged in the courts. On a small scale, the Legal Aid Committee of the Faculty of Law of the University of Dar es Salaam has embarked on a program of legal literacy and dissemination of information about basic rights, including the right of the ordinary citizen to sue the government. The Legal Aid Committee has, in 1987-1990, conducted programs in eight of the twenty-three regions of Tanzania, and about 30,000 people have benefitted from the legal literacy programs. The Committee plans to carry out three more regional programs in the coming year. This initiative ought to be vigorously enlarged by all interested parties, if human rights are to be protected effectively