

HUMAN RIGHTS IN TANZANIA

The Role of the Judiciary

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Abstract

This thesis examines the performance of the Tanzanian judiciary in enforcing human rights both during the colonial period and after independence. The study focuses on the period after the enshrinement of the Bill of Rights in the Constitution, in 1985. The aim of this work is to appraise both the present attitude of the judiciary and the reaction of the government to court decisions relating to human rights issues. In order to achieve this I conducted a six months field study in Tanzania during which I examined more than a hundred cases (the majority unreported) and interviewed a large number of people involved with the administration of justice.

The conclusion we draw from this research is that the government's reluctance to amend its laws to bring them into conformity with the Bill of Rights, underscores the need for judicial activism in Tanzania. It is a disservice to human rights for the majority of Tanzanian judges to adopt a positivist approach which prevents meaningful developments of human rights. Paradoxically, despite this conservatism, the government's attitude towards court decisions remains distrustful. Without a change in the attitude of both the courts and the government towards human rights, the Bill of Rights in the Constitution may not serve any meaningful purpose. Thus this thesis serves to remind both the Tanzanian judiciary, and the executive, of their obligation to protect individual fundamental rights.

After four chapters dealing with the administration of justice prior to the enshrinement of the Bill of Rights in the Constitution, chapters five and six examine respectively, the relevant courts decisions in criminal and civil matters. Chapter seven considers the government's response to these judicial decisions and chapter eight contains our conclusions and also makes recommendations as to the way forward.

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Abbreviations

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|----------|--|
| A.C. | Appeal Cases |
| A.I.R. | All India Report |
| A.I.R.E | Advice on Individual Rights in Europe |
| Ag.J. | Acting Judge |
| All E.R. | All England Reports |
| AMNUT | All Muslim National Union of Tanganyika |
| ANC | African National Congress |
| ASP | Afro Shiraz Party |
| BAWATA | Baraza la Wanawake Tanzania (Tanzania Women's Council) |
| Cap. | Chapter (used in relation to citing of laws, for example, Cap. 40 means Chapter 40 of the Revised Laws of Tanzania Mainland) |
| CCM | <i>Chama Cha Mapinduzi</i> |
| CHRLD | Commonwealth Human Rights Law Digest |
| CHADEMA | <i>Chama cha Demokrasia na Maendeleo</i> |
| C. J. | Chief Justice |
| Commd. | Command Paper |
| CODESRIA | Council for the Development of Economic and Social Research in Africa |
| Co. Ltd. | Company Limited |
| CPA | Criminal Procedure Act (1985) |
| CUSO | Canadian Universities for Overseas |
| D.P.P. | Director of Public Prosecutions |
| etc. | et cetera (and all others) |
| ed(s). | Editor(s) |
| Edn. | Edition |
| FFU | Field Force Unit (Police) |

| | |
|----------------|---|
| GN. | Government Notice |
| H.C. | High Court |
| H.L.C. | House of Lords Cases |
| HCD | High Court Digest |
| Ibid. | <i>Ibidem</i> (same place) |
| ICCPR | International Covenant on Civil and Political Rights |
| IDM | Institute of Development Management |
| i.e. | <i>id est</i> (that is) |
| I.R. | Irish Reports (1838-Present) |
| J. | Judge |
| J.A. | Justice of Appeal |
| J.K. | <i>Jaji Kiongozi</i> (Principal Judge of the High Court) |
| LEGCO | Legislative Council |
| KMC | Kahama Mining Corporation |
| L.R.C. | Law Reports of the Commonwealth |
| LL.B. | Bachelor of Laws Degree |
| LL.M. | Master of Laws Degree |
| L R.C.(Const.) | Law Reports of the Commonwealth (Constitution and Administrative Law) |
| MP | Member of Parliament |
| NAFCO | National Agricultural and Food Corporation |
| NEC | National Executive Committee |
| NEP | Nationalist Enterprise Party |
| NGO | Non Governmental Organisation |
| No. | Number |
| NUTA | National Union of Tanganyika Workers |
| n. | Reported Case Number (commonly used in High Court Digest-Reports) |
| O. A. U. | Organisation of African Unity |

| | |
|--------------|--|
| O. C. D | Officer Commanding the District (Police) |
| op. cit. | <i>opere citato</i> (in the work cited) |
| p. | page |
| PCE | Permanent Commission of Enquiry |
| PCP | Peoples Convention Party |
| PDP | Peoples Democratic Party |
| pp. | pages |
| R. | The Republic |
| Rev. | Reverend |
| RM | Resident Magistrate |
| SC | Supreme Court |
| SA | South Africa |
| TAMWA | Tanzania Media Women Association |
| TANLET | Tanzania Legal Education Trust |
| TANU | Tanganyika African National Union |
| TAWLA | Tanzania Women Lawyers Association |
| T. F. L | Tanganyika Federation of Labour |
| T. L. R. (R) | Tanganyika Law Reports (Revised) |
| U. K | United Kingdom |
| U.N. | United Nations |
| U.S. | United States (Law Reports) |
| UTP | United Tanganyika Party |
| v. | Versus (Against) |
| Vol. | Volume (Book) |
| ZSC | Zimbabwe Supreme Court |

Glossary

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|----------------------------|--|
| <i>ab initio:</i> | from inception. |
| <i>akida(s):</i> | lower grade administrators in the German colony of Tanganyika at the District level. |
| <i>askari:</i> | African gun men, police. |
| <i>bona fide:</i> | in good faith. |
| <i>certiorari:</i> | An order of a superior court used to review and to quash decision of tribunals. |
| <i>cum:</i> | with, and. |
| <i>dies non juridicus:</i> | Not-working day(s). |
| <i>ex parte:</i> | on behalf of; one sided. |
| <i>extenso:</i> | at length, in full. |
| <i>habeas corpus:</i> | a prerogative writ that commands a person or authority to produce before the court the body of a person detained in custody. |
| <i>in camera:</i> | in private, not open to public. |
| <i>inter alia:</i> | among other things. |
| <i>kadhi:</i> | Muslim leader with power to determine matters according to Islamic law. |
| <i>lango la jiji:</i> | main gate to the city. |
| <i>liwali(s):</i> | Chief(s) appointed by the colonial government in sensitive areas or where chiefs loyal to the government could not be easily obtained. |
| <i>locus standi:</i> | capacity to challenge some decision, or a right to be heard. |
| <i>machinga(s):</i> | Street vendor(s). |
| <i>manamba:</i> | immigrant labourers identifiable at work each by his number. |
| <i>mandamus:</i> | a writ of the High Court ordering (commanding) performance of a public duty. |

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|-------------------------|---|
| <i>McKenzie Friend:</i> | one (other than qualified lawyer) who is allowed to accompany and assist a litigant in his case. |
| <i>mischief:</i> | the object or purpose of the statute. |
| <i>nolle prosequi:</i> | no intention to prosecute. |
| <i>obiter dictum:</i> | mention by the way, not basis of decision. |
| <i>onus:</i> | burden, duty or responsibility for doing something difficult. |
| <i>prohibition:</i> | an order of the High Court prohibiting or preventing a body from acting in a certain way. |
| <i>quasi judicial:</i> | As the court but not actually so. A term used with reference to bodies, other than the court of law, empowered to discharge judicial functions. |
| <i>shamba:</i> | plantation. |
| <i>sine qua non</i> | An essential condition or requirement; without which not. |
| <i>status quo</i> | The situation at the given moment, usually before a significant event. |
| <i>stare decisis:</i> | Stand by previous decision. |
| <i>sub judice:</i> | under judicial consideration; not yet determined. |
| <i>sui generis:</i> | of his own kind; peculiar to himself. |
| <i>sungusungu:</i> | vigilante group. |
| <i>suo motu:</i> | on its own. |
| <i>supra:</i> | above; further up the page or earlier in the book. |
| <i>ujamaa:</i> | socialism. |
| <i>ultravires:</i> | beyond the legal limits, in contravention of. |
| <i>Vijiji:</i> | Villages. |
| <i>vis-a-vis:</i> | compared with; with regard to; in relation to. |

Introduction

Aims and Objectives

This study seeks to examine the role of the Tanzanian judiciary in protecting human rights, traced from the colonial period to the present day. A major focus is on the period after 1988 when the Bill of Rights became justiciable. We attempt to examine whether or not the judiciary in Tanzania is prepared to protect human rights as expected both by its citizens and by the international community. A survey of the Court of Appeal and High Court decisions suggests that there is room for optimism but more has to be done by the courts in terms of attitude to enable the effective realisation of individual fundamental rights in Tanzania. It is argued that human rights in Tanzania cannot be meaningfully realised unless the judiciary abandons the outmoded positivist and self-restraint tendencies and takes a more liberal and activist approach.

By nature and set-up the colonial government in Tanganyika was oppressive and most of its laws were designed to support a repressive state. Therefore the people expected the nationalist leaders to fulfil their promise for change and give respect to human rights on attaining independence. Instead, contrary to common expectations, the inclusion of the Bill of Rights in the Independence Constitution was successfully resisted by the nationalist leaders and infringements of individual fundamental rights by the executive unjustifiably increased after independence. It was after three decades since independence that the Tanzanian government allowed the enshrinement of the Bill of Rights¹ in the Constitution in 1984. Today the Tanzanian Constitution guarantees basic rights which include equality before the law, the right to a fair

¹See Appendix.

hearing, the presumption of innocence, the right to due process, prohibition of torture or inhuman or degrading treatment, and personal freedom.

The absence of a Bill of Rights in the Constitution provided a fertile ground for authoritarianism and enabled the government to take a number of unwarranted measures as part of the “fight” for “development” without court intervention. In some instances the courts appeared to be more executive than the executive itself and people could achieve little of significance when the government was taken to court for its actions. Thus, most of the executive and legislative actions which disregarded individual fundamental rights remained unchallenged. In 1988 the Bill of Rights became justiciable but, paradoxically, laws inconsistent with the Constitution continue to operate in so far as the government has not amended or repealed them. It should be noted that the Bill of Rights’ justiciability was suspended for a period of three years² and the government was supposed to have used that period to amend or repeal all laws which were inconsistent with the Constitution, but nothing was done. The responsibility is now on the judiciary to declare such laws unconstitutional and to protect the rights and freedoms of individual. Otherwise the people may fall victim to unrestricted executive powers. Such responsibility can only be taken by a bold and activist judiciary. How the Tanzanian judiciary has taken up this responsibility, is the purpose of this study.

A number of laws appear to be inconsistent with the Constitution and many key international conventions and covenants on human rights that Tanzania has acceded to. For example, the Criminal Procedure Act, 1985 restricts the right to bail for persons charged with a wide range of offences, some of them trivial, notwithstanding the presumption of innocence. The Corporal Punishment Ordinance, 1930³ allows the administration of corporal punishment to adults and juveniles notwithstanding that this is arguably in

²See The Constitution (Consequential, Transitional and Temporary Provisions) Act No. 16 of 1984.

³Cap. 17.

violation of Article 13 (6) (e) of the Constitution which prohibits cruel, inhuman and degrading punishment. Some of these laws have been challenged and tested in court but the outcome tends to demonstrate a judicial failure to protect individual fundamental rights.

It can be argued that judges in Tanzania are not accustomed to measuring the constitutionality of Tanzania's law by the provisions of the Bill of Rights. This argument raises many other questions like, why is this mainly the problem of the Court of Appeal, and why shouldn't the judges learn from other Commonwealth jurisdictions? This study provides answers for these questions by looking into possible reasons.

Since, the provisions of the Constitution are supreme, any other law which is inconsistent with those provisions, *ipso facto*, must be unconstitutional to the extent of its inconsistency. It follows that any law inconsistent with the enshrined rights guaranteed by the Constitution must be unconstitutional. However, in practice, this appears not to be the case. The Constitution has several provisions which save potentially unconstitutional provisions from being void. For example, it is stipulated that the right to personal freedom may not be violated save in certain circumstances, and subject to a procedure, prescribed by law.⁴ Also the provisions of Article 30 (2) of the Constitution appear to be so general that if improperly applied they can save virtually every law no matter how much it infringes upon guaranteed rights and freedoms. Here is the problem. The Constitution itself takes away with one hand that which it has given with the other. The existence of these saving clauses has caused controversies where a law has been challenged before the court and the state has maintained that it is constitutional. It is at this stage the attitude of the judiciary in interpreting the provisions of the Constitution to give them the meaning of human rights protection has to be assessed. The statements and tests on derogation and claw-back clauses laid

⁴The Constitution of the United Republic of Tanzania, 1977, Article 15 (2) (a).

down by the Court of Appeal⁵ are not themselves free from ambiguity. At best they are statements which require jurisprudential development in subsequent cases as well as analysis and comment by academic scholars.

Literature review

Scholarship on human rights is as old as the concept of human rights itself. There is so much literature about human rights ranging from global, regional to national levels. Tanzania has not been ignored in the literature. Many people have written about human rights in Tanzania especially after independence. Few of these works are in form of books or PhD theses but most of such literature consists of articles in different journals.⁶ The vast majority of writers have concentrated their attention on constitutionalism. It was KABUDI, P. J., (1995 A) that attempted to compare the relationship between the major organs (executive, legislature and judiciary) of the three East African states and human rights. He did not specifically focus on the judiciary of any of these countries and his examination covers the period between independence and 1995. Also he did not discuss the right to participate in public affairs, the area that has been significantly developed by the Tanzanian judiciary. Since that work was published Tanzania has undergone considerable changes in the development of its human rights jurisprudence

Regarding the performance of the Tanzanian judiciary after the Bill of Rights became justiciable, the earliest scholarly work is that of Peter.⁷ That work endeavoured to compare the performance of the government on the one side and that of the High Court and the Court of Appeal on the other side during a period of five years since the Bill of Rights became justiciable. However, that brief review like many other articles did not address itself to

⁵In *D.P.P. v. Daudi Pete*, *infra.*, and in *Kukutia Ole Pumbun and Another v. Attorney-General*, *infra.*

⁶See also MWAKYEMBE, H. G., (1995) and MWAUKUSA, J. T., (1995).

⁷PETER, C. M., (1992).

possible causes for such unsatisfactory performance, nor did it suggest some measures for reform.

The article by Mwalusanya, J.,⁸ attempted to criticise the Tanzanian judges' positivist attitude towards issues of human rights nature. However, Mwalusanya, J., does not suggest the solution for the existing problems nor is he concerned with the cause. By addressing issues such as the causes for the unsatisfactory state of judicial performance and making recommendations thereof this work makes an important contribution to the existing knowledge.

The latest publication about human rights in Tanzania is a case book by Peter.⁹ This work deals with various aspects of human rights in Tanzania as supported by relevant selected court decisions. However, some of the Court of Appeal decisions about certain rights have been left out, especially if, in the author's view, their reasoning does not assist in the development of human rights jurisprudence. This makes the author look obsessed with positive developments of human rights, for according to him, any court decision frustrating the development of human rights is not worth consideration. Peter's work does not analyse the decisions of the courts but leaves it to the readers to make their own assessment. In future the work can be used as a supplement to the law reports for it is the only publication containing wide coverage of human rights cases in Tanzania.

Most of the works by Issa Shivji¹⁰ have largely been an exposition of the use of unlimited powers by the state in Tanzania to restrain individuals and organisations from exercising their rights and freedoms, and in the process he analyses the judiciary. Thus as regards the Tanzanian judiciary's special role in protecting human rights, that area remains virtually untouched. The above stated literature and many other writings;¹¹ most of them having been written

⁸MWALUSANYA, J. L.

⁹PETER, C. M., (1997).

¹⁰See the Selected Bibliography.

¹¹Ibid.

before the Bill of Rights became justiciable, have prepared the ground for this study.

The Tanzanian judiciary therefore as one of the arms of the state, has not been given the attention it deserved. The reason for this can be assumed to stem from the fact that for about thirty years after independence there was no clear recourse for any infringement of human rights by the executive or other organs of the state. Perhaps before the Bill of Rights was enshrined in the Constitution people thought there was no justification for criticising the judiciary whenever it exhibited passiveness on matters related to infringement of human rights. Secondly, it is only ten years since the Bill of Rights became justiciable and people have not been sufficiently able to appraise judicial effectiveness in protecting human rights save for few academicians. Thirdly, many decisions of the court remain unknown to the people for no law reports have been published since 1983. These three factors have contributed to the dearth of literature particularly about the judiciary vis-à-vis human rights in Tanzania.

Methodology

This work is based on the material gathered through library research, field research and participation in seminars. We first conducted a library research and reviewed various literature about human rights that laid a foundation for this study. The SOAS library was very useful in providing the background information from different books, periodicals and journals. Journals and other materials which could not be found in the SOAS library were obtained from a specialised library of the Institute of Advanced and Legal Studies. The library of the Institute of Commonwealth Studies and the library of the University of London (Senate House) removed the possibility of missing any important material and information. The University of Dar Es

Salaam library (East Africana and Law Collection) provided us with some materials that could not be found in the above mentioned libraries.¹²

The library research strengthened our six-months field research in Tanzania. The field research involved interviews and a physical search of court records. A wide range of people including senior judges, magistrates, leading advocates, senior police officers and top government officials were interviewed. Among those interviewed was the Minister of State in the Prime Minister's Office responsible for government policy and information, Kingunge Ngombare Mwiru (MP).

Since law reports in Tanzania have not been published since 1983, and due to the fact that cases decided by subordinate courts are not reported, the only reliable means to get access to relevant information was to read the original court records and other sources available in the various libraries of the High Court. In order to achieve this we visited eight High Court centres in the country (Dar Es Salaam, Arusha, Mwanza, Tabora, Mbeya, Dodoma, Tanga and Mtwara) in the course of which many relevant and interesting cases were unearthed.

A seminar on Good Governance organised by the British Institute for International and Comparative law in April 1996 placed us in contact with groups of people whose literature have significantly contributed to the human rights discourse. Issues of human rights were discussed and participants from various Commonwealth countries shared ideas which provided this work with more comparative materials. While in London we also established a resource link with the AIRE Centre and used this link to gain access to the very best and committed human rights personnel.

¹²For example the Tanzanian parliamentary debates (Hansard) and a number of statutes.

Scope and structure

The United Republic of Tanzania is the result of the union between Tanganyika and Zanzibar. Following the said union Tanganyika was known as Tanzania mainland covering the area of about 363,000 square miles. Since then the islands of Pemba and Unguja that covered the area of 1,020 square miles were collectively identified as Zanzibar. These two countries practise different legal systems and Zanzibar enjoys full autonomy in all matters that are not classified by the Constitution as union matters. The judiciary or the administration of justice in general is specifically stated as a non-union matter and the Constitution establishes one such independent institution in every country.¹³ However, appeals from the High Court of Zanzibar lie to the Court of Appeal of the United Republic, the only union court.¹⁴ In order to control the size and the scope of our work we confine this study to Tanzania mainland (Tanganyika) from colonial period to date.

This work is divided into four chronologically arranged parts namely : the introductory part, the post-independence period covering the years 1961-1988, the post-1988 period and the conclusion. Each part is divided into relevant chapters. Chapter one is about the administration of justice during the colonial period. The discussion in this chapter lays down a foundation for full understanding of the development of human rights in Tanzania, and provides good ground for a comparative study with the post independence situation. This particular chapter is concerned with the set-up of the colonial judiciary and how it addressed the human rights related issues. Here we deal with the racial element of the colonial court system, and how colour (whites, coloureds, natives) formed the basis for the colonial legal system.

The post-independence policy covering the whole of pre-bill of rights period is discussed in the two chapters of part two. It covers the period 1961-

¹³Article 4 (2).

¹⁴Item number 20 of the First Schedule to the Constitution.

1988 during which the Bill of Rights was successfully resisted by the independence government and when it was enshrined in the constitution its justiciability was suspended for three years. In this part we endeavour to see if there was any shift by the independence government from authoritarianism to a more democratic government governed by rule of law as people expected.

The discussion in chapter two examines the early Constitutions and what the Tanzanian government considered alternatives to the Bill of Rights, and assesses whether they effectively worked or qualified to take such a place. It is concluded in chapter two that the government's refusal to enshrine a Bill of Rights in the Constitution was a disservice to the world-wide campaign to promote a universal respect for the observance of human rights, and that it provided fertile ground for violations of human rights in Tanzania under the cover of African socialism and national ideology. An examination on the judicial set-up, background of the judicial officers in terms of training and the procedure leading to their appointment is made in order to assess their performance as judges or magistrates.

The behaviour of the three organs of the state (the executive, the legislature and the judiciary) vis-à-vis human rights during the pre-Bill of Rights period is discussed in chapter three. Adoption of colonial legislation, the enactment of new authoritarian laws, one-party policy and villagisation sharply demonstrate the state's infringements of individual fundamental rights. While discussing and expanding on these measures special attention is paid to the reaction of the judiciary and how the background of judges affected their decisions.

Part three of this study covers the post-Bill period from 1988. In the light of the problems pointed out in parts one and two, part three visits and explores at length whether or not after the Bill of Rights became justiciable there has been any meaningful realisation of individual fundamental rights in Tanzania.

Any account of the post-Bill period must include a full understanding of the background to the Bill of Rights. In other words we have to show in chapter four the circumstances which led to the previously resisted Bill of Rights being enshrined in the constitution. Was the government willing to include it in the Constitution? The answer to this fundamental question, perhaps to be deduced from the contents of the Bill of Rights, throws more light about the government's general attitude towards the individual fundamental rights.

Because the duty to protect individual fundamental rights has been vested in the judiciary, we examine in chapters five and six the judicial decisions in criminal and civil cases of a human rights nature especially when the state was a party or had an interest to a particular case. This includes an examination of the judicial attitude when called upon to review the legislative as well as executive actions challenged for infringing the individual fundamental rights. Inevitably we have to analyse the individual judge's decisions.

In chapter seven we look closely at the government's reaction to various decisions of the court. Then we make our assessment of the way the amendment of laws was carried out following the court decisions and the effect of such reaction on the future of individual fundamental rights in Tanzania.

Part four is made up of chapter eight that represents our observations, conclusions and recommendations. In the conclusion we make an account of what this work set out to do and proceed to make an appraisal of the problems highlighted earlier as affecting the protection of individual fundamental rights by the judiciary in Tanzania. We rely on the analysis made in the preceding chapters to answer the questions whether or not the judiciary has effectively protected human rights in Tanzania and whether the Constitution has provided sufficient safeguards for human rights. Finally, we develop general proposals

for reform and make specific recommendations to the judiciary as to its role to interpret laws which potentially appear to violate the provisions of the Bill of Rights. Decisions from the European Court of Human Rights and Commonwealth jurisprudence have buttressed our recommendations in this chapter.

PART ONE: THE COLONIAL PERIOD

CHAPTER ONE

THE JUDICIARY AND COLONIAL ADMINISTRATION OF JUSTICE

This chapter examines the ways in which the two successive colonial powers ignored human rights in Tanganyika, despite the fact that it would have been hard for a government either in Germany or Britain to survive without giving respect to human rights. We pay more attention to the British colonial administration than the German one because the former provided the ground upon which the territory's future administration of justice was based. In Tanganyika, human rights were not important in determining relationships with the colonised. On the contrary, of particular importance was the role of the judiciary in furthering colonial aims. That is to say, courts were one of the main mechanisms through which the colonial government exercised its domination.¹⁵

Because of the strong resistance by many African chiefs to the colonial conquest, the new rulers designed a 'divide and rule' type of administration. This was also extended to the administration of justice and it minimised the room for further resistance.

1:1 The Colonial State

1:1:1 The German conquest

Tanganyika experienced two successive colonial regimes during the period 1885-1961. It was under German rule up to 1918 when the British took over the colony as 'Mandate' of the League of Nations. Together with other

¹⁵JAMES, R. W., and KASSAM, F. M., p. 26.

European powers like Britain, France and Belgium, Germany joined the 'scramble for Africa' but in an exceptional style. Initially it did not involve itself with the direct colonisation of East Africa but assisted the German companies, to administer the colonies on behalf of the government. This is because according to Bismarck, 'colonies would be expensive to govern and defend and would bring international complications threatening German's security.'¹⁶

Thus Carl Peters toured round Tanganyika in 1884 to lure the traditional leaders (chiefs) into signing agreements whose consequences they could not fully understand. Through this method the German merchants in East Africa colonised Tanganyika. However, increased awareness helped to stir up hostility between the Germans and the chiefs which culminated in resistance, riots and attacks throughout the colony.

As native resistance increased, Bismarck authorised German military operations which resulted in the mass slaughter of Tanganyikans. The Germans were then committed to 'full scale colonial rule'.¹⁷

1:1:1:1 The German administration and justice

The Germans started their colonial administration with land alienation by which all land in the colony was placed under the control of the Governor. Since then 'areas for cultivation and stock raising could only be acquired by leasing from the state.'¹⁸ This created a conducive environment for colonial extraction of necessary labour. However, natives were not prepared to provide the colonialists with surplus labour in the required amounts and this culminated in confrontation between the 'colonisers and the colonised.'¹⁹ Because of this confrontation the Germans sought a solution in taxation. Land

¹⁶ILIFFE, J., p. 89.

¹⁷Ibid., p. 97.

¹⁸COPONEN, J., p. 290.

¹⁹Ibid., p. 321.

alienation and taxation subjected the Africans to economic compulsion in that lack of money and higher needs compelled them to offer their labour to the German settlers' plantations. They were strictly supervised 'in a military style'²⁰ and flogging was a general rule.

The early German regime used soldiers to maintain authority over the native population and any protest was suppressed by force. Eventually they found solution in indirect rule. Under indirect rule it was easier to control the masses because they were placed under the supervision of local traditional chiefs who had already pledged their loyalty to the German government. These chiefs were like school prefects and they were answerable to the colonial government through the supervision of the *Akidas* and they could suffer the consequences for failing to enforce colonial directives. In those areas where chiefs loyal to the colonial regime could not be easily obtained or in sensitive areas like the coastal area, *Liwalis* were appointed to look after the interests of their masters. Administratively, the country was divided into Districts under the District Officers and the Governor, usually a soldier, at the top.

The District Officers apart from being administrators they exercised full jurisdiction over the indigenous people, by using their own wisdom and discretion and the Governor, who was also a commander in chief of the armed forces, was practically, above the law. It was a brutal military colonial government manifested by injustices as can be deduced from an account by one African teacher.

“...they are forcing everyone to work without pay, neither wages nor food...Poor us! The people have no way to escape, they fear to be beaten ... Truly this is not justice.”²¹

²⁰COPONEN, J., p. 325.

²¹Ibid., p. 135.

Monetarisation and the imposition of taxes were the most important German innovations in the colony. People were forced by these policies to grow cash crops like coffee, cotton or to offer their labour in the settlers' plantations in order to obtain the cash payment necessary for the settlement of tax liability and to survive in the new money economy. To some extent it helped to divert the people from resisting the government.

The people's refusal to work on the government plantations sparked the Maji-Maji rebellion which resulted in the slaughter of many local people.²² After the Maji-Maji war an enquiry was made into its cause. This led to the appointment of a new Governor²³ and the forced labour in the settlers' farms was stopped.

The German colonial government and the German settlers were racist in that they regarded the local people as descendants of wild animals and therefore deserving no respect whatsoever. According to them:

"The African is a born slave, who needs his despot like an opium addict needs his pipe. Only compulsion made such creatures work".²⁴

This attitude of the German government towards Africans justified the flogging of Africans by the settlers and the authorities.²⁵ It caused fear, anger and hatred among the people. Racial groups in the colony were officially created and colour was an important factor which determined one's value and treatment. *Coloured persons* included indigenous Africans, Arabs, Indians and Baluchis but excluded Goans. They were considered insufficiently advanced to come under German law. This particular group of people had its own court system manned by the colonial administrators who applied native customary

²²Soldiers were specially brought from Germany and South Africa to destroy crops and starve the rebels.

²³For the first time the Governor was not a soldier.

²⁴ILIFFE, J., p. 150.

²⁵It is estimated that between 1901-1913 the government sentenced 64,652 Africans to corporal punishment. For details see ILIFFE, J., pp. 149-150.

law provided it was not, 'from the point of view of a civilised nation, contrary to healthy common sense and good morals.'²⁶ It was substantially distinct from the normal court system which was staffed by trained magistrates and judges who applied German laws to Europeans and other *non-natives*.²⁷

Cases involving *coloured persons* were heard by a *Liwali, Kadhi* or *Akida* who exercised both executive and judicial functions at the lower level of the administration hierarchy. Only more serious cases were taken to the District Officers, or officers in charge of military stations, and appeals lay direct to the Governor who could make orders referring such cases to a superior judge²⁸ but he rarely did so. It was the Germans' deliberate policy to equip the administrators also with judicial powers, to enable them preserve law and order in their respective areas. They were also armed with powers to inflict punishment, especially corporal punishment, which was regarded by the people as an instrument of terror.

The group of *non-natives* included Europeans, Goans and Parsees²⁹ and were subject to German laws within a court system manned by lawyers, magistrates and judges. No matter how rich an Asian merchant was, to the Germans he was a *native* since he could not observe German civil law.³⁰

1:1:2 The British colonial government

After the First World War ended with the German defeat, Tanganyika was officially taken over in 1918 by Britain as a 'Mandated Territory' under the supervision of the League of Nations which had just been established. Britain undertook to develop the country's infrastructure which had collapsed during the German regime and agreed to make a report to the League of Nations every year about the mandate territory.

²⁶German Foreign Office Decree of 15th January 1907.

²⁷COPONEN, J., p. 361.

²⁸MOFFET, J. P., p. 18.

²⁹Section 2 of the Imperial Decree of 9th November 1900.

³⁰ILIFFE, J., p. 140.

The Germans were rightly accused of mismanagement that left little space for law-making in the administration of the colony.³¹ Horace Byatt, the first Governor, was required to destroy the Germans' presence, and indeed he ruthlessly deported the German settlers. His second assignment was to discourage new settlers from coming into the territory because there was insufficient African labour. Third he was to re-establish order which the German regime had helped to erode.

Immediately after taking over from the autocratic German regime the British established formal institutions of government. Guidelines in the form of proclamations provided for temporary measures in the war-torn colony until 1920 when the Tanganyika Order in Council came into force providing a framework for British administration in Tanganyika. At the apex was the Governor who was given extensive powers and was above the law.³² Under him were the Provincial Commissioners and District Commissioners who had full control over their respective provinces and districts

1:1:2:1: Law making

The Legislative Council (LEGCO) was created in 1926³³ charged with the making of laws in the territory, a function which was previously discharged by the Governor alone between 1920-1926. Because of the structure of the colonial regime and the powers which the Governor retained over the appointment of members of the LEGCO, it is valid to say that legislative authority over the territory was still in the hands of the Governor. Members of the LEGCO, official and non-official³⁴ including the Speaker,

³¹ COLE, J. R., and DENISON, W. N., p. 6.

³²Tanganyika Order in Council, 1920, section 28 .

³³See Tanganyika (Legislative Council) Order in Council, 1926.

³⁴Non-Official members were persons not holding office of emolument under the Crown in the territory as the Governor might from time to time appoint. Official members included such persons in the service of the Crown in Tanganyika nominated from the Executive Council or outside the Executive Council.

were appointed by the Governor.³⁵ He retained the power to terminate their membership³⁶ since they held their seats during the pleasure of His Majesty.³⁷ The appointment of the LEGCO members by the Governor was not necessarily done with the best interests of the people in mind, nor did they officially represent any particular section of the population at the beginning. For quite a long time the non-official minority in the LEGCO was drawn from the immigrant communities and no African secured a seat in there.³⁸ Even when the situation changed to give the members of the Legislative Council a racially representative character there was no significant change as to their effectiveness in the Council nor were they elected by the people of the races they purported to represent. They were all appointed by the Governor to *advise* him on matters related to the enactment of laws in the colony. Arguably such an institution could not be objective in performing its duties because its members could not risk offending the Governor if they wanted to retain their positions.

Furthermore, official members of the LEGCO, most of them being members of the Executive Council, always outnumbered non-official members.³⁹ This enabled the government to table any Bill confidently as it could obtain a majority of votes guaranteed by the official members. Also, under the Tanganyika (Legislative Council) Order in Council 1926 no laws could take effect until assented to by the Governor who did so in his discretion.⁴⁰ More interesting was the inferiority of the LEGCO in the law-making process whereby its role was merely advisory to the Governor.⁴¹

³⁵Article V.

³⁶Article VII C (3) and (4).

³⁷Article VII A.

³⁸MORRIS, H. F., and READ, J. S., p. 7.

³⁹See Article V and also the Statutory Rules and Orders, 1945, No. 1371.

⁴⁰Articles XV and XVI.

⁴¹Article XIV.

Since most of the LEGCO official members were administrators in the colonial government, the British could conveniently use the LEGCO as its administrative institution.⁴²

1:1:2:2: The court system.

The British attitude towards the administration of justice in Tanganyika did not differ very much from that of the Germans.⁴³ Under British rule the two parallel court systems were maintained with a slight modification. On the one side were the magistrates' courts subordinate to the High Court and on the other side were the native courts.

1:1:2:2:1 Native courts/Local courts

These courts catered for natives only and were presided over by administrative officers including chiefs at the lower level. As Morris and Read argue, these were vehicles through which the proponents of indirect rule implemented their policies.⁴⁴ Initially native courts were linked to the High Court with power to revise any of the proceedings of such courts.⁴⁵ This system did not last long and was changed by Sir Donald Cameron, Byatt's successor. According to Cameron this system conflicted with indirect rule which he wanted to promote through native authorities under the local chiefs. By preferring indirect rule Cameron had no intention to adopt chieftainships, but he simply wanted to utilise the existing institutions as a foundation on which he could easily build his political structure.

He started by tracing the chiefs whose powers had previously been taken away by the German regime. In some areas where it proved difficult to trace such chiefs the Governor would appoint one, usually from the largest

⁴²For a discussion about District Commissioners as administrators *cum* legislators see MORRIS, H. F., and READ, J. S., p. 18.

⁴³MOFFET, J. P., p. 18.

⁴⁴MORRIS, H. F., and READ, J. S., p. 21.

⁴⁵See the 1925 Proclamation made under the Court's Ordinance No. 6 of 1920.

tribe in a particular area. The German system of administration relied upon appointed Arabs and African officials who were inevitably alien to the tribes they governed. This resulted in the failure to create a harmonious atmosphere in the colony. Having realised the many weaknesses of the German form of indirect rule, Cameron insisted on the restoration of the chiefs with their powers and gave them autonomous legislative authority over their areas.⁴⁶ The Governor's reasoning on breaking up the link between the High Court and the native courts and on establishing two distinct court systems was *inter alia* that:

“The judges of the High Court know nothing of the language, customs, the modes of life and thought of natives, whereas, on the other hand, the natives know nothing of the High Court and do not understand its intervention between themselves and their administrative officers.”⁴⁷

According to Cameron, placing the native court under the High Court supervision would ‘shake a native administration to its foundation’⁴⁸ because the chiefs would consider themselves as having no power if their decisions could be scrutinised and later revised by the High Court. This would be contrary to the Governor's plan of giving autonomy and powers to local chiefs in order to use the traditional respect they commanded to exert colonial dominion without alarming the colonised people. The basic assumption of indirect rule was that traditional political systems existed prior to the advent of colonialism. These systems were on a ‘scale and in a form reasonably adaptable to their incorporation into a modern colonial system’.⁴⁹

The Governor's views were vehemently opposed by the then Chief Justice, Sir Alison Russell who cited the way in which the native courts in Uganda operated effectively under the supervision of the High Court. He did

⁴⁶See the Native Authority Ordinance of 1926.

⁴⁷MOFFET, J. P., p. 19.

⁴⁸RALPH, A., p. 589.

⁴⁹BEIDELMAN, T. O., p. 119.

not see why the same should not work in Tanganyika. His argument was essentially against the colonial desire to make justice for Africans a matter of executive discretion. He argued:

“Native courts should be trained in the standing principle of British administration - that justice should be done according to the law. The law is the only sure foundation upon which a British administration can take its stand; and ... it is my duty to express my respectful and earnest protest against a proposal to supersede the reign of law by that capricious executive discretion which often causes discontent and sometimes leads to disaster.”⁵⁰

The Chief Justice was supported in this regard by most of the non-official members of the LEGCO but nevertheless in 1929 a Bill was passed⁵¹ giving birth to the Native Courts Ordinance of 1929. It was virtually impossible for the Governor’s proposals to be rejected by the LEGCO given its weaknesses. Thus the native court system was placed under the Governor at the apex.

⁵⁰MOFFET, J. P., p. 20.

⁵¹After Sir Joseph Sheridan took over from Sir Alison Russell as Chief Justice.

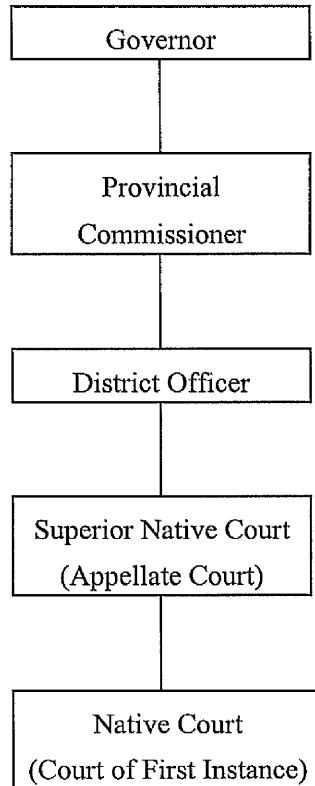


Table 1: The Native Court System

The Governor's main concern in this court system was the political substance rather than the legal form which the Chief Justice was emphasising.

In his endeavour to prevent executive abuse of power while discharging judicial functions, Cameron prepared a guide in the form of a memorandum.⁵² It contained instructions for the supervision of the courts, the prevention of abuses, and the inculcation of the principles of British justice.⁵³ However, the Provincial Commissioner under whom control of native courts was placed had power to suspend or dismiss any native court officers who, in his view, were unfit or unable to exercise their powers.

⁵²The Native Administration Memorandum No. 2: Native Courts.

⁵³MOFFET, J. P., p. 21.

After the enactment of the Tanganyika Local Courts Ordinance, 1951 native courts were renamed Local Courts⁵⁴ but remained under the untrained government appointees. Also the chiefs' judicial functions were gradually minimised and it was planned that in future they would retain only executive functions. Nevertheless, the District Officers and the Provincial Commissioners continued to discharge both judicial and executive functions. The system consisted of Local Courts of First Instance, from which appeals lay to a Local Court of Appeal, and then to the District Commissioner and finally to the Central Court of Appeal after obtaining leave of the Provincial Commissioner.

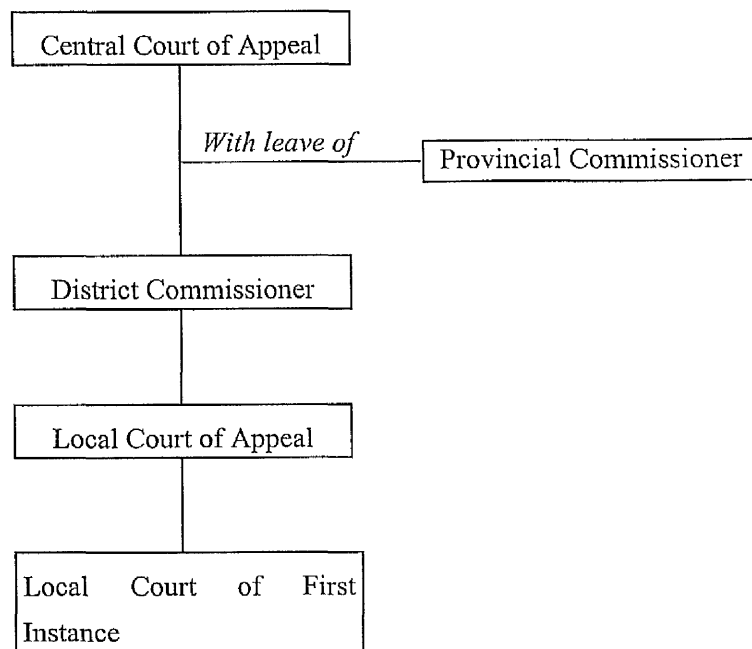


Table 2: The Local court system

Central Court of Appeal was composed of a High Court judge, the Local Court Adviser and one nominated member. This composition was

⁵⁴By The Tanganyika Local Courts Ordinance No. 14 of 1951.

allegedly designed to improve the standards of justice in the native courts, albeit only at the highest appellate level. The whole native court system was tainted with injustices expressed by its racist outlook, the deliberate non-separation of powers between the judiciary and the executive, and by the fact that there was no legal representation allowed in the native courts except in the Central Court of Appeal after 1951.

It is hard to see how the mere inclusion of a High Court judge in the apex court could improve the standards of justice if the rest of the system remained intact, for injustices were more likely to occur in the lower courts rather than in the upper court. Provided they decided cases in a manner which facilitated colonial control, native courts operated without intervention from above, no matter what injustices were done to the natives they were supposed to serve.⁵⁵

Very few cases reached the Central Court of Appeal since access was only possible with the leave of the Provincial Commissioner, a senior colonial administrator. Moreover, judicial officials, and in particular the chiefs, were in possession of administrative sanctions which they could sometimes use against those who disputed decisions by lodging appeals.

Although the original proponents of indirect rule might have intended the native courts to be a school for political ideas and training but they became a private closet of political cynicism and tribalism and 'an arena for seizing personal profit and power'.⁵⁶

1:1:2:2:2 Subordinate courts and High Court

All non-natives were covered by this distinct court system. Subordinate courts were divided into various classes of magistrates under the direct supervision of the High Court to which all appeals lay.⁵⁷

⁵⁵For specific incidents see BEIDELMAN, T. O., p. 31.

⁵⁶Ibid., p. 40.

⁵⁷See the Subordinate Courts Ordinance, 1941 (Cap. 3), section 17.

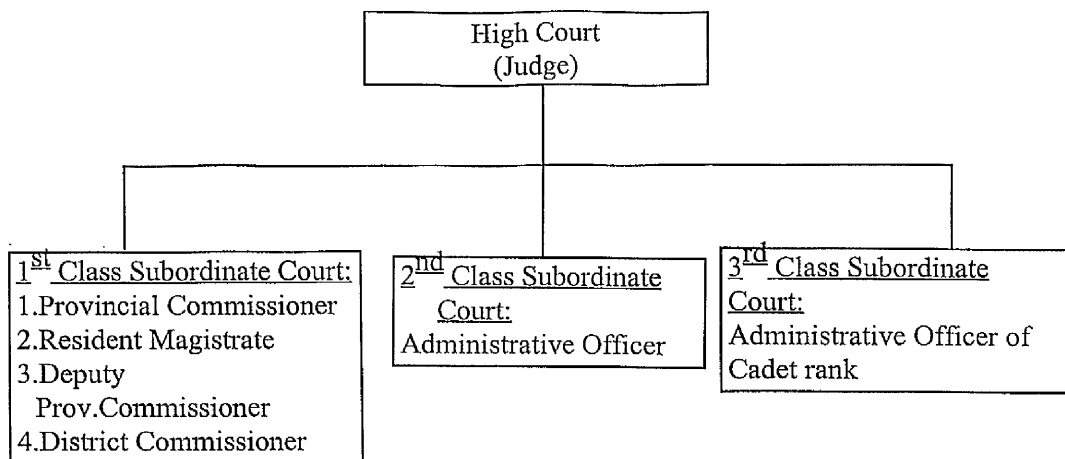


Table 3: Subordinate courts system.

Trained judges presided over the High Court proceedings whereas subordinate courts were presided over by trained magistrates and some administrative officers. The only trained magistrates in the subordinate courts were Resident Magistrates found in the first class subordinate courts. The Provincial Commissioner, Deputy Provincial Commissioner and the District Commissioner were also regarded as first class magistrates. The administrative officer of cadet rank presided over the third class subordinate court while an administrative officer other than those mentioned above would preside over the subordinate court of second class.⁵⁸

The High Court judges were appointed by the Governor in accordance with such instructions as the Crown could direct. Magistrates and other principal officers of the High Court were appointed by Governor or the Chief Secretary. Both judges and magistrates held their offices during the pleasure of

⁵⁸Ibid., sections 3 and 17.

His Majesty.⁵⁹ This helps to explain how difficult it was to think of an independent judiciary during the colonial period.

1:1:2:3: The law applicable.

The law applicable in the subordinate courts and the High Court was the statute law enacted either by the LEGCO or by the Governor as well as the received law. According to the 'reception clause', courts were to apply the law in conformity with the substance of common law, doctrines of equity and the statutes of general application in force in England in 1920.⁶⁰ Furthermore, courts in the territory were bound by the decisions of the English courts up to 1920 when the Tanganyika Order in Council came in force. The law of the land also included written laws from British India, where they had been tested and proved effective. Thus, the Criminal Procedure, Civil Procedure and Penal Codes and many others were imported wholesale from India to Tanganyika.

Customary law, otherwise known as native law, was recognised but its application by the court was subject to conditions. It applied only in cases, civil and criminal, to which natives were parties. Courts were guided by customary law so far as it was applicable and it was not repugnant to justice and morality or inconsistent with any Order in Council or any Ordinance or any Regulation or rule made under any Order in Council or Ordinance.⁶¹ With all these limitations native law was seldom used in Subordinate Courts and the High Court, in the colonial Tanganyika.

Native/local courts which were staffed by untrained colonial administrators applied customary law and bye-laws made by chiefs. The received laws (Statutes of General Application or other laws as provided for under the reception clause) could not be applied for the reason that native

⁵⁹Tanganyika Order in Council, sections 19 and 23.

⁶⁰Ibid., section 17(2).

⁶¹Ibid., section 24.

courts were not part of the ordinary judicial machinery of the territory but mere representatives of the executive. Also, native courts staff who were often illiterate were completely ignorant of the procedure and practice observed by courts of justice in England.

The reception clause, did not allow the British colonial government to import into the territory anything other than the law and substance of common law and equity applicable in England before 1920. Paradoxically, the fundamental democratic rights in the English law were simply excised during its transportation to the colonies and a number of authoritarian laws were enacted. In his attempt to explain the reasons behind this, Professor Seidman points out:

“In East Africa and West, the imperatives of Empire as perceived by the colonial rulers required authoritarian government in order to maintain the control of ‘a few dominant civilised men’ over ‘a multitude of the semi-barbarous’. In East Africa in addition, the small but insatiable demands of settler enterprises for cheap African labour required the invocation of a whole set of compulsions, applied through state power guided by law.”⁶²

Actually it was for the few English men and other foreigners that English law had to be imported for the rule had developed among the settlers that an English man carried with him English law and liberties into any *unoccupied* country where he settled.⁶³ What readily catches the eye is the extent to which the British colonial government ‘was willing to pervert its own “civilised” standards in order to achieve its political aims.’⁶⁴

⁶²Ibid., p. 78.

⁶³SEIDMAN, R. B., p. 49.

⁶⁴MARTIN, R., p. 10.

1:2 The colonial legislation.

The British colonial regime was characterised by oppressive legislation aimed at subjecting the indigenous population to continued colonial rule. Laws reflected the colonial policy and courts were used to enforce them for they were predominantly designed to make the administrative process easy for the colonialists. This common characteristic of the colonial courts made people view them as 'one of the mechanisms through which the metropolitan power exercised its dominion'⁶⁵ and as such they could not be depended upon to protect individual rights against the government of the day. Furthermore the decisions of the Privy Council⁶⁶ 'resulted in a set of rules that employed the awesome power of the colonial state to achieve the exploitative objectives of British imperial policy'.⁶⁷

Apart from the received law the colonial government in Tanganyika enacted many authoritarian laws through the Governor and the Legislative Council. It is said that between 1920-1926 the Governor by the power vested in him under the Tanganyika Order in Council 1920 enacted about 180 Ordinances.⁶⁸

1:2:1 Land ownership and peasantry

With the colonialists' strategy of creating a money economy in order to provide labour for the settlers' plantations, African social formations changed. In addition, the introduction of cash-crops cultivation caused land shortages. Land as well as labour power were given both economic and commodity value capable of being marketed and this altered the existing traditional land tenure. Above all, the Governor enacted the Land Tenure Ordinance⁶⁹, later renamed

⁶⁵Ibid., p. 79.

⁶⁶A private advisory council of His Majesty in matters that related to his overseas dominions, having its head office in England. The Council's Judicial Committee was the highest appellate tribunal that dealt with appeals from all British colonies.

⁶⁷SEIDMAN, R. B., p. 48.

⁶⁸COLE, J. R., and DENISON, W. N., p. 39.

⁶⁹No. 3 of 1923.

the Land Ordinance.⁷⁰ By this Ordinance the Governor 'nationalised all lands, except for those alienated by the German administration, by declaring the whole of the lands in mandated territory, whether occupied or unoccupied, public lands'⁷¹ under his control.

Later on the land held under native law and custom was regarded as held under a 'deemed right of occupancy,'⁷² the title not subject to payment of rent or to compliance with specific development conditions which are the distinctive features of the 'granted right of occupancy.'⁷³ Africans were not secure in their customary rights of occupancy because under the Land Ordinance the Governor could at any time alienate any land in what he considered to be the public interest and compensation in terms of money would be made to those affected. In this way Africans were deprived of fertile land, and food production decreased. On one occasion the Director of Lands and Mines issued instructions to all Provincial Commissioners that on matters of land 'European claims took precedence and that if land alienation involved the disturbance of Africans, they should be forced to move and compensation would be paid'.⁷⁴ The culmination of this policy was the famous *Meru Land Case* where people in Meru area challenged the alienation of their land in favour of colonial settlers. The case was highly contested and publicised in the United Nations.⁷⁵ However, international publicity of this land dispute did not prevent the colonial authorities from carrying out the eviction of 3,000 Meru people in order to make way for some settlers⁷⁶. Actually the Land Ordinance infringed the indigenous people's land rights and restricted their

⁷⁰Cap. 113.

⁷¹LOUISE, C. S., p. 66.

⁷²Following the 1928 amendment of the Land Ordinance 'right of occupancy' was re-defined to include the title of an individual African or native community lawfully occupying the land in accordance with customary law.

⁷³Specific grant of land by the Governor with conditions a breach of which attracted revocation of the right.

⁷⁴LOUISE, C. S., pp. 70-71.

⁷⁵See SEATON, E. E., and KIRILO, J.

⁷⁶WILLIAMS, D., (1973), p. 113.

free expansion. It is said that in Morogoro, for example, many Africans were left landless, and many clan members were left to exist on precipitous rocky hillsides which became more barren by erosion every year despite the precautions taken by the cultivators to hold up the soil.⁷⁷

The colonialists wanted the natives to provide cheap labour for the settlers' plantations but at the same time to grow food crops for subsistence and cash crops for export.⁷⁸ In a bid to promote commodity production in the various sectors of the peasant economy the colonial state introduced a large number of rules.⁷⁹ These rules, orders and directives were important to the colonial regime, especially after a significant number of able-bodied Africans had opted to work for wages in towns and plantations rather than growing the introduced cash crops. Those who opted to stick to the land and grow cash crops, resented the new regulations and sanctions by carrying out acts of sabotage. Thus colonial legislation 'gave extensive powers to government boards to subject recalcitrant growers to criminal sanctions for failure to comply with government seed growing, marketing and other policies.'⁸⁰

1:2:2 Freedom of movement and vagrancy laws

Inevitably people started drifting to settlers' plantations and towns to work for money. This was precipitated among other factors by the Africans' search for means which would enable them enter the newly introduced cash economy. Also, following the introduction of European goods life in the towns was very attractive and much better compared to rural life in terms of infrastructure like electricity, running water, roads and leisure activities. The drift of Africans from the countryside to the towns was very alarming and it raised the colonial officials' concern, since towns were not developed enough

⁷⁷LOUISE, C. S., p. 73.

⁷⁸SHIVJI, I. G., (1982), pp. 41-43.

⁷⁹For example, Cotton Ordinance 1920 (Cap. 362), Native Coffee (Control and Marketing) Ordinance 1937, Native Tobacco (Control and Marketing) Ordinance 1940.

⁸⁰WILLIAMS, D., (1973), p. 109.

to offer sufficient opportunities for the big number of job seekers from rural areas. As a result there developed a crisis of urban unemployment in major Tanganyika townships beyond the expectations of the colonial government. Again the British used the law to alleviate a problem which they had created for themselves.

The early British colonial state found a solution for these problems by enacting the Destitute Persons Ordinance, 1923.⁸¹ Interesting is the definition of a destitute person as defined under the Ordinance. Any person who lived in the township 'without employment' and was unable to show that he had 'visible and sufficient means of subsistence'⁸² was a destitute. The law gave discretion to the magistrates to order the detention of such people in police custody as remandees while work was being found for them, or to return them to their place of origin.⁸³ This was not a solution to the crisis as young men vacated the rural areas and flocked into the towns in large numbers. It was difficult to move freely in the territory without being harassed by the police and in some places like Dar Es Salaam barriers were fixed at every main entrance to the city where everyone from the hinterland was required to present a movement permit issued by his local authority. Failure by the natives to produce these necessary credentials on demand at the check points, enabled the inspectors to refuse them entry to the city and the people nicknamed the check points *Lango la Jiji*.⁸⁴

Because of joblessness many of the young men in townships engaged themselves in crimes like stealing, drinking liquor and different kinds of hooliganism, hence the Townships (Removal of Undesirable Persons) Ordinance, 1944.⁸⁵ Under this legislation the Area Commissioner was given power to order any undesirable person to leave the town or any other area and

⁸¹Cap. 41.

⁸²section 2.

⁸³Section 3.

⁸⁴Swahili phrase meaning 'Main gate to the city'.

⁸⁵Cap. 104.

proceed to such place as the order might require him.⁸⁶ Such an order could be issued where a person had no regular employment or other reputable means of a livelihood or where he had been convicted of an offence against property (theft) or liquor intoxication. Thus scores of unemployed were rounded up and some taken to work in the settlers' plantations. What is interesting is the way the Ordinance allowed arrests without warrant and the detention of suspects for a month pending inquiries by the Area Commissioner⁸⁷

The colonial government considered repatriation the best way of dealing with the influx into towns of uneducated young men.⁸⁸ The critics describe it as 'a great folly and an act of desperation to believe that social and economic problems like unemployment could be solved by criminalising them.'⁸⁹ Both pieces of legislation⁹⁰ famously known as 'vagrancy laws' interfered with the freedom of movement and residence of the individuals and they allowed the detention of suspects without trial.

1:2:3 Inhuman and degrading treatment

Although they were harsh, punishments like imprisonment and the payment of fines were considered by the colonial government as inadequate to discipline the native. Thus the Corporal Punishment Ordinance, 1930⁹¹ was enacted. This was a most oppressive piece of legislation and it reminded the people of the bad German days when a man could be flogged for anything. Under the Ordinance anybody, excluding females and adult males more than forty-five years old,⁹² could be flogged on his bare buttocks in execution of the punishment pronounced by the court. It was institutionalised violence whereby one man was authorised by law to inflict physical violence on another and it

⁸⁶Ibid., section 3.

⁸⁷Ibid., section 7 (1).

⁸⁸LUGALLA, J. L., p. 136.

⁸⁹LEGAL AID COMMITTEE, p. 74.

⁹⁰Cap. 41 and Cap. 104.

⁹¹Cap. 17.

⁹²Ibid., section 8.

was aimed at instilling fear among the natives. Since then courts have frequently sentenced convicts to suffer a number of strokes over and above other retributive punishments⁹³.

1:2:4 Detention and deportation without trial

The Governor passed laws giving himself enormous powers to deal with anybody whom he considered to threaten the security of his regime. Under the Deportation Ordinance, 1921,⁹⁴ the Governor could deport any person, whom he considered to conduct himself in a manner that endangered peace and good order, from one place to another within the territory.⁹⁵ This legislation attempted to silence the would-be dissidents. Most interesting was the ouster clause that any order made under that Ordinance could not be subject of inquiry or challenge in any court of law and that the person awaiting deportation would be detained in custody or prison until a fit opportunity for his deportation occurred.⁹⁶ Similar powers were vested in the Governor by the Expulsion of Undesirables Ordinance, 1930⁹⁷ which contained similar ouster clauses as to the court's jurisdiction over any order made under that Ordinance.⁹⁸ The Governor could use that piece of legislation to expel, with similar consequences as in Cap. 38, a person who prejudiced public morals.

1:2:5 Arbitrary punishments

Perhaps one of the most unreasonable and authoritarian pieces of colonial legislation was the Collective Punishment Ordinance, 1921⁹⁹ which gave power to the Governor to hold responsible and punish the whole village, tribe or sub-tribe for a crime committed within the boundaries of their

⁹³In chapter five we examine corporal punishment against the Tanzanian Bill of Rights.

⁹⁴Cap. 38.

⁹⁵Section 2.

⁹⁶Section 5.

⁹⁷Cap. 39.

⁹⁸Section 20.

⁹⁹Cap. 74.

village.¹⁰⁰ Here the Governor was given power to hold every villager responsible for a crime whose perpetrator could not be discovered. It was against two well-established principles of criminal justice that ones' guilt has to be established beyond reasonable doubt before he can be made to suffer for it; and that the punishment should be directed to the offender only since a man should only 'suffer or be punished directly either in person or in property for some wrong which he has done himself.'¹⁰¹ To make matters worse such punishment under the Ordinance was not appealable.¹⁰²

1:2:6 Government revenue and forced labour

Another example of oppressive legislation was the Hut and Poll Tax Ordinance, 1922¹⁰³ that applied to natives. The system was introduced by the Germans¹⁰⁴ and because it was also in conformity with the British colonial state's interests they carried it forward and developed it when they took over. Any owner or occupier of 'any building, or structure of a description commonly used by natives as dwelling'¹⁰⁵ was required under the Ordinance to pay tax to His Majesty. As for polygamous men, they were under obligation to pay tax for every hut occupied by each of their wives and they were inevitably forced to put together all their wives in one hut in order to avoid hut tax. However, this was responded to by the colonial state through amending the law and putting a tax on each wife even if all lived in one house.¹⁰⁶ Following these amendments the hut tax assumed a different character and began to look more like a "women's tax" than anything else.

¹⁰⁰Section 2.

¹⁰¹See *Gwao Bin Kilimo v. Kisunda Bin Ifuti* (1921-1952) 1 T.L.R. (R) 403 at p. 405.

¹⁰²Cap. 74, section 7.

¹⁰³No. 22 of 1922.

¹⁰⁴By the Taxation Ordinance, 1897.

¹⁰⁵Definition of a 'hut', vide the Hut and Poll Tax Ordinance 1922, section 2.

¹⁰⁶*Ibid.*, section 3.

Any failure to comply with this piece of legislation attracted a sentence of three months in jail.¹⁰⁷ The mandatory legal obligation imposed on polygamous households and every able-bodied native of sixteen years or more who owned no hut¹⁰⁸ shows that taxation of the native by the colonial government was essentially aimed at something else other than raising government revenue. The motive behind hut tax can be found in a comment by one of the East African Protectorate Governors, Sir Percy Girouard who was quoted saying:

‘We consider that taxation is the only possible method of compelling the native to leave his reserve for the purpose of seeking work. Only in this way can the cost of living be increased for the native...and it is on this that the supply of labour and the price of labour depends.’¹⁰⁹

In these circumstances, migrant labour or *Manamba*¹¹⁰ became an inevitable result of the Hut and Poll Tax. For example, it is argued that because of the Hut and Poll Tax the proportion of Bena tax payers absent from home rose between 1926 and 1945 from 20 to 40 percent.¹¹¹ The migration was traumatic and accompanied by all kinds of difficulties, as Shivji amply explains:

“They travelled on foot or packed like cattle in railway wagons or motor lorries, braving the harsh climate and hostile environment, rarely with full stomachs and often without shelter. On the way some would work a few days for food, others would spend a few days either in the tick-infested huts of the rest camps or in dispensaries convalescing and finally

¹⁰⁷Ibid., section 9 (1).

¹⁰⁸The Hut and Poll Tax Ordinance, section 4.

¹⁰⁹SHIVJI, I. G., (1982), p. 43. See also SHIVJI, I. G., (1975), at p. 32.

¹¹⁰Common Swahili word for migrants meaning 'number' in that immigrant labourers were identified at work by their respective numbers.

¹¹¹ILIFFE, J., p. 305.

arrive at their destination starving, emaciated and most probably disease-ridden.”¹¹²

Indeed as Coldham observed ‘it was, perhaps, the introduction of taxation more than any other measure, that ultimately dictated the ways in which African societies would develop.’¹¹³ However, there was a general reluctance to move permanently into cash-crop production or into wage employment. Even with the introduction of taxation, people went to the plantations just to earn enough to meet the states’ demands and then they returned home.

The colonial courts were very much relied on by the government to implement the policy laid down under the provisions of the Hut and Poll Tax Ordinance by sending defaulters to jail or ordering them to effect payment by offering labour to any authorised public works projects in lieu.¹¹⁴ Tax defaulters had to engage in this kind of forced labour for a number of days at the current rate of wages in order to discharge their tax obligation.¹¹⁵ It is said that in Tanganyika in 1948 some 3,423 natives discharged their tax dues in this way.¹¹⁶ Usually courts operate within the specified limits of territorial jurisdiction but in all matters connected with the payment or non-payment of tax there were no territorial limitations on the jurisdiction of the court. Thus arrears of tax were recoverable with costs in the Magistrates courts which were vested with power to try such cases whether they were within or outside their local limits of jurisdiction.¹¹⁷ In the case of a delay over six months in discharging tax liability the court had the discretion to increase the sum by 10 per cent of the arrears.¹¹⁸ The court behaved as an instrument of terror and it

¹¹²SHIVJI, I. G., (1982), p. 45.

¹¹³COLDHAM, S., (1972), p. 10. Quoted also in LOUISE, C. S., pp. 64-65.

¹¹⁴For 1935 statistics on labour in lieu of tax see SHIVJI, I. G., (1982), p. 46.

¹¹⁵It is said that each tax defaulter providing labour in lieu of cash worked an average of thirty six days.

¹¹⁶THE AFRICAN STUDIES BRANCH, p. 34.

¹¹⁷Ibid.

¹¹⁸Usually such arrears would be recovered by distress on property through the court order.

was very much feared by the natives because of the severity of punishments imposed for non-payment of tax.

Non-natives and natives who worked as agents of indirect rule like chiefs and *Liwalis* together with members of the police and armed forces were exempted from the application of this Ordinance. These were salaried employees used by the government to collect tax by forceful means. The exemption to pay tax accorded to them reinforced the view that the Ordinance was a legal mechanism designed to obtain cheap labour for the colonial state.

Most interesting was the government's reliance in the use of penal sanctions to control the otherwise civil contractual relationship between master and servant and the positivist application of such law by the court. In many cases the court proved to be one of the key institutions in the administration of the colonial state since it enforced all colonial legislation without looking into its oppressive character. The Master and Native Servant Ordinance, 1923 regulated the relationship between master and servant and it applied only to natives¹¹⁹ as a targeted group. The Ordinance is remembered for its catalogue of penal sanctions against any native labourer who in any way behaved in a manner likely to frustrate the colonial ambition for cheap labour. Quite a large number of natives suffered the consequences.¹²⁰

It should be noted that although the Master and Native Servant Ordinance provided for punishment for offences committed by employers in their relationship with servants, very few were penalised by the court. The penalties attached were very lenient and ranged between small fines and several months of imprisonment in default. The High Court would always search for means to exonerate the otherwise guilty employer. In *Drossopoulos v. Rex*¹²¹ the High Court relied on simple technicality to release the employer. The Greek employer was charged and convicted by the lower court of an

¹¹⁹Master and Native Servant Ordinance, No. 23 of 1923, section 2.

¹²⁰For statistics of convictions under the Ordinance see SHIVJI, I. G., (1982), p. 53.

¹²¹(1921-1952) T.L.R. (R) 175.

offence of withholding wages of his labourers.¹²² In his defence the accused person alleged that he had no money to pay those labourers at that time but he expected shortly to get some money as a result of the sale of his cotton. The trial magistrate was not convinced by the accused person's promise to pay his labourers out of prospective proceeds. On appeal against conviction the High Court allowed the appeal on grounds that if the employer had no funds to pay his labourers he could not be said to have 'withheld' wages.

Such leniency could not be experienced whenever a native promised to pay his tax liability after selling his crops or obtaining money from his debtor. This interpretation shocked even the colonial government itself. As a result the law was amended to penalise the employer who failed to pay wages to his labourers, by replacing the phrase 'withholding wages' with 'failure to pay wages.'¹²³ The Ordinance remained in operation from 1923 until 1957 when the Employment Ordinance, 1955¹²⁴ came into force to deal with the increase in workers' collective actions like strikes and demonstrations.

1:2:6 Freedom of association and trade unionism

In order to control all political activities which were increasingly becoming widespread after the Second World War, the colonial government enacted the Societies Ordinance, 1954.¹²⁵ Under the Ordinance all local societies were required to be registered¹²⁶ and the Governor in his absolute discretion could declare any such societies unlawful if he considered it essential in the public interest.¹²⁷ A society so declared unlawful by the Governor suffered de-registration as it was stripped of its legal personality. This was one of the colonial government's method of silencing the political

¹²²Under section 47 (a) of the Ordinance.

¹²³See Ordinance No. 35 of 1931.

¹²⁴Cap. 333.

¹²⁵Cap. 337.

¹²⁶Ibid., section 7.

¹²⁷Ibid., section 6.

parties that demanded self-determination. Also, the colonial government used its discretion under the Societies Ordinance to reject any application for registration¹²⁸ thereby making it impossible for a particular society or political party to carry out its activities. Similarly trade unionism was curtailed by the enactment of the Trade Union Ordinance¹²⁹ whose restrictive prerequisites were not different from those imposed by the Societies Ordinance. In this environment, the formation and survival of trade unions were made very difficult.

1:3 Interpretation of the law by the colonial judiciary

Over and above the positivist judicial interpretation of the laws most of such laws enacted in the period under study contained an ouster clause of one form or another.¹³⁰ This could potentially deny even a progressive judge a place in the process. It all depended on the attitude of the judge to such ouster clauses.

The courts adopted a passive attitude towards oppressive and authoritarian pieces of legislation. They found refuge in conservatism and self-restraint for fear of encroaching on the legislative domain. The colonial judiciary therefore was excessively positivist in its adherence to the deeply-embedded tradition of the English judiciary that judges do not make the law but they merely apply it. Robert Seidman points this out while assessing the colonial judges' performance:

“Judges trained from their professional infancy that courts not only do not, but ought not to make policy judgements - even when in fact they cannot avoid so doing - will snatch at any pre-existing rule available in

¹²⁸Cap. 337, sections 6 and 8.

¹²⁹Cap. 381.

¹³⁰For example the Deportation Ordinance, section 5; the Collective Punishment Ordinance, section 7; the Expulsion of Undesirables Ordinance, section 20. They provided that any order made under the Ordinances could not be subject to inquiry in any court of law.

preference to violating their most deeply-held professional commitment. It was but to be expected that judges so trained would find a refuge in the current English decisions, which they could safely follow upon the ground that they were binding upon them.”¹³¹

It was in this context that Wilson, J., in the case of *Mohammed Juma v. Rex*¹³² gave a warning to magistrates who attempted to go beyond what the statute itself stated.¹³³ Such magistrates in the judgement of Wilson, J., were unjustifiably questioning the wisdom of the legislature. In his own words:

“The magistrate may not agree with the wisdom of that, but his duty is to administer the law as he finds it and not attempt to override the clearly expressed intention of the legislature...”¹³⁴

Whether the law was oppressive, or in violation of cherished English principles of administration of justice, the court was under instructions to apply the law as it was and leave it for the law-making bodies to repeal or amend. Because of judicial restraint people’s rights as well as justice itself were at stake and the most oppressive colonial legislation remained unchallenged.

In *Rajabali Ganda v. Township Authority of Dar es Salaam*¹³⁵ the appeal was dismissed simply because the law stated it clearly that no appeal should lie in such circumstances. The appellant was aggrieved by the Resident Magistrate's order prohibiting him to use the premises as a dwelling house

¹³¹SEIDMAN, R. B., p. 62.

¹³²(1921-1952) 1 T.L.R. (R) 257.

¹³³The magistrate had sentenced the appellant to pay Shs. 250/= or serve imprisonment for three months for having illegally tapped the palm trees contrary to section 32 (1) and 41 of the Native Liquor Ordinance, 1924 (Cap. 77). The fine penalty was too big for the appellant to pay and the trial magistrate was aware of it but he issued such a severe sentence to deter further commission of such offence. This is what the judge regarded as questioning the wisdom of the legislature which had provided that substantive imprisonment should only be awarded for subsequent offence of that kind. The fine was reduced to Shs. 75/= or two months imprisonment

¹³⁴*Mohammed Juma v. Rex*, op cit., at p. 258.

¹³⁵(1921-1952) 1 T.L.R. (R) 189.

since they lacked sanitary facilities. The magistrate had acted upon a letter sent to him by the Township Authority and, without giving chance to the applicant to defend himself, proceeded to grant the order as requested by the Township Authority. The appellant challenged the magistrate's order for being made without giving him an opportunity to show cause.

Indeed it was contrary to the principles of natural justice as undoubtedly was well known to the judge, for the Resident Magistrate to condemn the appellant unheard. After carefully selecting two English decisions¹³⁶ to support his findings, Gower, J., dismissed the appeal simply because the law did not allow any appeal against the decision of the Township Authority. He forgot that he was presiding over a court of justice and not only the court of law when he remarked thus:

“It is well settled that a right of appeal from any tribunal must be given by statute or similar authority”¹³⁷

A similar positivist approach was taken by the judge in the case of *Bhag Singh v. Rex*¹³⁸ when he defended the practice by District Commissioners functioning as magistrates and at the same time being officers in charge of Police in the Districts. The accused person applied to the High Court for transfer of his case from Loliondo Subordinate Court that was presided over by a District Officer to the Resident Magistrate Court in Arusha. The main ground in his application was that the same District Officer who had taken part in the investigation of the case in his capacity as a person in charge of the police in the district could not fairly and impartially try the accused person. Wilson, J., referred to a particular section of the Police Ordinance,

¹³⁶In *Sandbank Charity Trustees v. North Staffordshire Railway Company* 3 Q.B.D. 1 at p. 4, Bramwell, L. J., held that an appeal does not exist in the nature of things; a right of appeal from any decision of any tribunal must be given by express enactment. See also *Attorney-General v. Sillem*, 10 H.L.C; 138 E.R. 382.

¹³⁷*Rajabali Ganda v. Township Authority of Dar Es Salaam* (1921-1952) 1 T.L.R. (R) 189 at p. 190.

¹³⁸(1921-1952) 1 T.L.R. (R) 133.

1937 that made the District Officer in charge of police in the district and picked the proviso to that section which spelled that nothing in the Police Ordinance should be deemed to render such an officer a police. He concluded that:

“While section 7 (3) makes a District Commissioner an officer in charge of Police it does not make him a Police Officer”¹³⁹

The judge could not take trouble to examine the validity and effect of the enabling provision of law but he simply took the plain meaning of the proviso to the section and dismissed the application.

Adherence to some of the English principles governing the administration of justice was found at the High Court which was the only judicial institution entirely constituted of trained judges. The white administrative officers and cadet officers who discharged judicial functions as magistrates in subordinate courts were ignorant of even the basic principles of justice. They were usually motivated by the desire to promote the state interests rather than to do justice.

Occasionally the High Court revised the subordinate courts' decisions, quashing and setting them aside for having attached too much emphasis to government policy at the expense of justice. For example in *Rex v. Sokoni Bin Chinyanga and Others*¹⁴⁰ the accused persons were convicted by the subordinate court for having deserted work when the employer cut off food supply unless they completed the work. The High Court had to quash the decision of the lower court on the ground that, among others, it was practically impossible for the labourers to perform work while hungry. It was the decision of the District Commissioner in his capacity as the first class magistrate that was quashed by the High Court. The District Commissioner's decision came in

¹³⁹Ibid., at p. 135.

¹⁴⁰(1921-1952) 1 T.L.R. (R) 3.

the wake of desertions from work and strikes following the workers' mistreatment by their employers. Desertion had adversely affected the settlers' agricultural industry which entirely depended on natives' cheap labour. In order to check such desertions and provide a lesson to the rest the District Officer used his judicial powers to convict the natives.

In some instances the subordinate courts' officers confused judicial functions to administrative functions in their districts. The confusion developed to the extent that some officers conducted court sessions on Sundays,¹⁴¹ the *dies non juridicus*. Such decisions were quashed by the High Court. This is clear evidence of the injustices occasioned by a system of non-separation of powers in subordinate courts and the importance of High Court supervision. We can now imagine the injustices in the native courts which were also presided over by administrative officers but were not under High Court supervision.

1:4 Conclusions

This chapter sought to analyse the administration of justice during the colonial period. We saw how the unprecedented opposition the colonialists experienced from the colonised posed a big challenge to the administration of the colony. Use of force and discriminatory harsh laws were resorted to so as to enable the governments achieve their objectives regardless of their adverse effects on the people.

The foregoing examination of colonial administration and the entire justice process shows that human rights were not part of the colonial agenda. Everything was done to make sure that the judiciary was protecting the colonialist interests. Interesting is how the judiciary interpreted the oppressive colonial laws. Nevertheless in some instances the High Court through its supervisory role over subordinate courts acted as a check to the injustices

¹⁴¹See *Bhag Singh* case.

occasioned by the double functions of the colonial administrative officers *cum* judicial officers. However, wide use of ouster clauses by the colonial government precluded the court from taking an active role, and a great number of judges took a conservative attitude to interpretation of legislation. Many injustices remained unchecked in the native courts since these courts functioned as administrative institutions responsible for enforcing indirect rule and not as ordinary courts of law.

The absence of trained judicial staff, the non-separation of powers between the judiciary and the executive, and the importance of political considerations in the judicial process contributed enormously to the unsatisfactory nature of the lower courts. Thus given the court structure, the nature of the colonial state, the motive behind colonialism it was virtually impossible for the courts to protect human rights.

The development of colonial legislation as illustrated above indicates how authoritarian and oppressive the colonial state was. The methods used by the colonial government formed part of the colonial legacy and have significantly influenced the post-independence government.¹⁴²

¹⁴²See the discussion in chapters two and three.

PART TWO: POST-INDEPENDENCE PERIOD (1961-1985)

CHAPTER TWO

CONSTITUTIONAL DEVELOPMENT

This chapter examines the performance of the post-colonial government in relation to human rights and how the Constitution was manipulated to restrict popular attempts to limit the power of the executive. For almost thirty years since independence the idea of having a Bill of Rights enshrined in the Constitution was successfully resisted by the government. Official arrogance, authoritarianism, and the unrestricted violations of fundamental rights and freedoms were defended by reference to economic progress¹⁴³ or 'developmentalism.'¹⁴⁴ It is intended in this chapter to illustrate how the government dealt with the issue of fundamental rights by providing ineffective alternatives to the Bill of Rights.

We shall examine the extent this policy was supported by the post-independence judiciary that was staffed with judges whose majority, like their colonial predecessors, were positivist and conservative. It is our argument that apart from structural changes and the removal of racial tendencies in the set-up of the court system, the post-independence judiciary remained ineffective when confronted by common infringements of human rights by the executive.

2:1 The Independence Constitution.

The Independence Constitution was preceded by two important pieces of legislation. The first one was the Tanganyika Independence Act, 1961 by

¹⁴³KIBWANA, K., pp. 43-57. See also McCHESNEY, A., pp. 163-205 and MWAIKUSA, J. T., (1990), pp. 75-105.

¹⁴⁴A term referred in SHIVJI, I. G., (1985) and McCHESNEY, A., p. 175, to represent desire for urgent economic development at the expense of individual rights.

which the United Kingdom Parliament abrogated its previous rights to legislate for Tanganyika. All legislative powers were vested in the independent Tanganyika Parliament. However, the Act imposed on the legislature a requirement not to repeal, amend or modify the new Constitution, 'otherwise than as might be permitted under the Constitution itself.'¹⁴⁵ To some extent, the power to amend or modify the Constitution was limited by the Act in order to bring about certainty, the basic character of any Constitution.

A few days after the enactment of the Independence Act, 1961 there followed the Tanganyika (Constitution) Order in Council, 1961 making provision for a new Constitution for the independent Tanganyika. This particular Order in Council 'revoked all existing Constitutional Orders in Council'¹⁴⁶ and prescribed in their place the various matters set out in the second schedule which bore the title "The Constitution of Tanganyika"¹⁴⁷ otherwise known as the Independence Constitution or Dominion Constitution.

It should be noted that upon attaining independence, the nationalist governments which acceded to power in all British colonies in Africa were to operate within a framework provided by the Constitutions, agreed upon by both sides. This meant that the independence of any particular British colony, Tanganyika not being an exception, was always preceded by constitutional negotiations between nationalist leaders on the one side and the departing colonial master on the other. The British made it compulsory for the majority of its colonies at independence to include in their Independence Constitutions provisions limiting the powers of the government and introducing an enforceable Bill of Rights which safeguarded human rights and freedoms.¹⁴⁸ These Constitutions were drafted in England but unlike other British colonies, the Tanganyika Independence Constitution had no Bill of Rights.¹⁴⁹

¹⁴⁵See paragraph 5 of Schedule One to the Independence Act, 1961.

¹⁴⁶See Tanganyika (Constitution) Order in Council, 1961, section 2.

¹⁴⁷COLE, J. R., and DENISON, W. N., p. 14.

¹⁴⁸READ, J. S., (1979 B), p. 160.

¹⁴⁹READ, J. S., (1973 A), p. 41.

In most unusual circumstances the nationalist leaders persuaded the British government not to include a Bill of Rights in the Tanganyika Independence Constitution. Actually 'through all the major amendments of the constitution, the ruling Party and government leadership doggedly maintained its stand until 1984.'¹⁵⁰ There were two main reasons behind this refusal. First, that a Bill of Rights would have hindered the government's 'dynamic plans for economic development' whose implementation needed revolutionary changes in the social structure. Second that the judiciary was still staffed by expatriates - mainly whites engaged by the former colonial government.¹⁵¹ Judges were suspected of taking advantage of the Bill of Rights, should it be enshrined in the Constitution, to frustrate the new government by declaring many of its actions illegal.

We can rightly conclude that the absence of a Bill of Rights in the Constitution was not an accident, but, in fact, was the actual policy of the independence government. This is supported by Rashid Kawawa of TANU who told the National Assembly that a Bill of Rights would invite conflicts which the leaders could hardly entertain.¹⁵² Instead of a Bill of Rights there was a token reference to rights in the Constitution's preamble.

Under the Independence Constitution the chief executive was the Governor-General appointed by Her Majesty the Queen as her representative in Tanganyika.¹⁵³ The Constitution established a cabinet of ministers charged with a duty to advise the Governor-General.¹⁵⁴ The said Governor-General was bound by the advice given to him by the Cabinet, or a minister acting under the general authority of the Cabinet.¹⁵⁵ This was a very important

¹⁵⁰SHIVJI, I. G., (1987), p. 130.

¹⁵¹See MARTIN, R., pp. 40-41. See also *Proposals of the Tanganyika Government for a Republic*, Government Paper No. 1 of 1962 which is partly reproduced in FRANCK, T. M., p. 96; *Report of the Presidential Commission on the Establishment of a Democratic One-Party State*, Dar Es Salaam: Government Printer, 1965, pp. 30-31; COLE, J. R., and DENISON, W. N., p. 113.

¹⁵²See Parliamentary Debates, *Hansard*, 1962, p. 1088.

¹⁵³Section 11.

¹⁵⁴Section 43.

¹⁵⁵Section 46.

safeguard and limitation on the Governor-General's powers under the Constitution. He was, in effect, a 'symbolic head of state'.

A Parliament was established consisting of Her Majesty through her representative and a National Assembly to discharge legislative functions.¹⁵⁶ It was vested with power 'to make laws for the peace, order and good government of Tanganyika.'¹⁵⁷ Members of the National Assembly were to be elected or nominated. For the first time the Legislature was given a semblance of popular representation, unlike during the colonial period when members of the Legislative Council were appointed by the Governor in a racially-exclusive manner. However, there was one unsatisfactory requirement regarding elected members of the National Assembly. This was in relation to the candidates' qualification. Only citizens of Tanganyika who were twenty-one years old or above and who were 'able to speak, and to read the English language with a degree of proficiency sufficient to enable them to take an active part in the proceedings'¹⁵⁸ qualified for election to the National Assembly. Naturally, most of the indigenous population were denied the opportunity to contest these positions because of the language barrier. Most of those who qualified therefore, were Tanganyikans of Asian and European origin.

Under the terms of the Independence Constitution the High Court ceased to be Her Majesty's High Court¹⁵⁹ and by their appointment judges were no longer Her Majesty's Judges.¹⁶⁰ Apart from puisne judges appointed by the Governor-General acting in accordance with the advice of the Judicial Service Commission,¹⁶¹ for the first time the Independence Constitution provided security of tenure for all judges.¹⁶² This aimed at promoting the independence of the judiciary which had been previously curtailed by the fact

¹⁵⁶Section 14.

¹⁵⁷Section 29.

¹⁵⁸Section 18. See also section 19 for a list of those who were disqualified.

¹⁵⁹Tanganyika (Constitution) Order in Council, 1961 section 8.

¹⁶⁰Independence Constitution, sections 58 and 59.

¹⁶¹Ibid., section 59 (2).

¹⁶²Ibid., section 60.

that judges during colonial period held their office at the pleasure of the Crown. During the colonial period judicial office was as insecure as that of other servants of the Crown whose employment could be terminated any time.

In a bid to increase judicial confidence and the promotion of justice, the Independence Constitution fixed the retirement age at sixty-two, but with the possibility of extension to sixty-five. However, a judge could be removed from office if he was unable to perform his functions either because of bodily infirmity or due to misbehaviour. A strict procedure for the removal of a judge from office was also laid down.¹⁶³ The Constitution placed the initiative to remove a judge from office upon the Prime Minister, the only person who could set the legal machinery in motion by representing to the Governor-General that the possible removal of a judge from office should be investigated.¹⁶⁴ The Governor-General would then appoint a tribunal consisting of judges from the Commonwealth to investigate the matter and recommend to him whether it should be referred by Her Majesty to the Judicial Committee of the Privy Council. If after such reference the Judicial Committee was of the opinion that the judge should be removed because of inability or misbehaviour then the Governor-General had to remove the judge from office.

It should be noted that in the whole process of removal of a judge from office the Prime Minister played a major role in that neither the Governor-General nor the Chief Justice could take steps to have a judge removed from office.

The Independence Constitution established a Judicial Service Commission consisting of the Chief Justice, the Chairman of the Public Service Commission and one puisne judge charged with the appointment, removal and discipline of the holders of certain judicial or quasi-judicial posts below the level of a puisne judge.¹⁶⁵ Previously, this function could only

¹⁶³Ibid., section 60 (4) - (7).

¹⁶⁴Ibid., section 60 (5)

¹⁶⁵COLE, J. R., and DENISON, W. N., p. 23. See also section 65.



be discharged by the Governor. Therefore, the Independence Constitution removed the injustices perpetrated by the colonial legal system which had never been based on the doctrine of separation of powers and the independence of the judiciary.

The nationalist leaders were not comfortable with this Westminster-style Constitution. They described it as the Dominion Constitution because it preserved, for the most part, the influence of the Crown over the otherwise independent state of Tanganyika. It was the nationalist government's proposal for a Republican Constitution which marked a dramatic separation from the British power and provided for the complete independence of Tanganyika. The people of Tanganyika expected the independence government to provide better general administration, better justice and the restoration of long-lost rights and freedoms.

Essentially, the Republican Constitution transferred the sovereignty from the Crown and permanently vested the power of the government in the elected head of state, the President. After substituting a President for the Governor-General and Queen the Republican Constitution went on to vest enormous powers in the President. It was later acknowledged by President Nyerere during an interview with a BBC correspondent that these powers were sufficient to provide for a dictatorship.¹⁶⁶ Indeed, the Republican Constitution of 1962 created a very strong President with wide executive powers. As head of state and commander of the Armed Forces, in exercising his powers the President was not obliged to follow the advice of any person or body.¹⁶⁷ This was in sharp contrast with the Independence Constitution,¹⁶⁸ which, as a safeguard against authoritarianism, made it mandatory for the Governor-General to act in accordance with the advice of the Cabinet. With regard to the

¹⁶⁶MWAKYEMBE, H. G., and RUSEMA, T. K., p. 73. See also SHIVJI, I. G., (1981), p. 20.

¹⁶⁷Republican Constitution, 1962, section 3.

¹⁶⁸Section 46 (1).

appointment and control of judicial officers there were no significant changes under the new Constitution.

Again, in the Republican Constitution a Bill of Rights was not included. Some of the reasons advanced for the exclusion of such a Bill in the Independence Constitution were repeated and that it was enough to preserve rule of law by providing for security of judges' tenure.¹⁶⁹ The government proposed some more other changes in the Republican Constitution regarding the appointment of judicial officers that:

*"In future, judges of the High Court should be appointed by the President... after consultation with the Chief Justice. The power to appoint Resident Magistrates and other judicial officers working under the jurisdiction of the High Court should also be vested in the President. In the case of these appointments, the Judicial Service Commission should act in advisory capacity to the President unless the President, in respect of any appointment or class of appointment, has delegated his function to the Commission."*¹⁷⁰

Arguably the Government misconceived the idea of an independent judiciary. In their minds, security of tenure was enough to preserve the independence of the judiciary. The Government could not appreciate the fact that an independent judiciary must be placed in an environment suitable for it to dispense justice without fear or favour and free from pressure or influence of any kind. A judiciary without these attributes may open up the law to ridicule.

Also, the mechanism for judicial appointments has a great impact on attempting to provide for an independent judiciary. Vesting these powers in the executive makes it difficult for the judiciary to be independent. It should be

¹⁶⁹See the Government Paper No. 1 of 1962, Government Printer, Dar Es Salaam, 1962, p. 6. See also COLE, J. R., and DENISON, W. N., pp. 113-114.

¹⁷⁰*Ibid.*

noted that the Governor-General was required to act in accordance with the advice of the Judicial Service Commission when appointing puisne judges. This was not the case under the Republican Constitution that vested in the President the power to appoint judges after consultation with the Chief Justice. However, under this Constitution the President was not necessarily required to act in accordance with the advice of the Chief Justice. No wonder that in some instances the Chief Justice was not consulted at all when the President appointed judges. Although the judges seemed to enjoy security of tenure, they were likely to act in a manner which would not offend the appointing authority and this defeated the idea of an independent judiciary.

Even this security of tenure, which is a common feature in modern constitutions, has not guaranteed retention of office in Tanzania whenever the powerful executive decided to remove a judge. There have been a number of attempts by the executive in Tanzania to interfere with judges' security of tenure by way of assigning them to new administrative duties not related to adjudication.¹⁷¹ Fimbo warns that such practices have the effect of seriously undermining the independence of a judge if they are made without full consultation and the consent of the judge in question.¹⁷² It is our submission that whether or not such practices are done with consent of the responsible judge the effect of undermining the independence of the judiciary remain intact.

Two more Constitutions followed: the Interim Constitution of Tanzania, 1965 after the formation of Tanzania,¹⁷³ and the Constitution of the United Republic of Tanzania, 1977. Most interesting is the period during which Tanzania remained under the Interim Constitution and which made

¹⁷¹For example Justice Julie Manning was given Ambassadorial duties abroad and in another incident the late Justice of Appeal Mwakasendo was appointed Chief Corporation Counsel of the Tanzania Legal Corporation. Also Justice Patel was assigned to the Tanzanian High Commission in India.

¹⁷²FIMBO, G. M., (1989), p 237.

¹⁷³The union between Tanganyika and Zanzibar in 1964, formed Tanzania.

some critics question whether it was a permanent Constitution.¹⁷⁴ During that period the constitution was amended so much that it looked like a dress with patches of different colours. The amendment exercise continued haphazardly even after 1977. Indeed, it was during that period that infringements of individual rights by the government were the order of the day.

To the State, the High Court was the only court which deserved a conducive environment for the operation and promotion of the independence of the judiciary. By 'conducive environment' we refer to, among other factors, security of personal emoluments which was accorded to only High Court Judges by placing their salaries, allowances, pension and gratuity in the Consolidated Fund of the United Republic.¹⁷⁵ Furthermore, under the Constitution the judge's salary could not be altered anyhow to his disadvantage.¹⁷⁶ The junior judicial officers such as magistrates who worked in the courts subordinate to the High Court were not, and have never been, similarly treated although they are the ones who are closer and more easily accessible to the people and, therefore, attending to more cases than the High Court judges. Furthermore, these were the courts where miscarriages of justice as well as executive abuses were most likely to appear¹⁷⁷ if a conducive environment was not provided. That to some extent explains the incidents of injustices and complaints against the performance of these lower courts. It is in this context that Mwakymbe observes that 'subordinate judicial officers are denied of the facilities and benefits commensurate to their heavy and sensitive job, and end up being effective administrators of corruption and not justice'.¹⁷⁸

¹⁷⁴Tanzania was under the Interim Constitution from 1965-1977.

¹⁷⁵Interim Constitution of Tanzania, 1965, section 77.

¹⁷⁶Ibid., section 77 (3).

¹⁷⁷See for example *James Bitu v. Idd Kambi*, 1979 L.R.T. No. 9. For a discussion about the executive manipulation of justice and their influence to Subordinate Courts, see PETER, C. M., (1977).

¹⁷⁸MWAKYEMBE, H. G., (1995), pp. 137-138.

2:2 The Presidential Commission on the Establishment of a Democratic One Party-State.

At independence Tanganyika was a multi-party state with a supreme Parliament. The dominance of TANU in Tanganyika was significantly felt but still there were other political parties though they were young and weak. These included: the ANC, the UTP, and others such as the PDP, the PCP, the NEP, and the AMNUT. Some of these were formed immediately after independence.¹⁷⁹ All these political parties came to be proscribed by the government of TANU and under pressure they disintegrated leaving TANU as the single political party in the country.¹⁸⁰

As a result, TANU developed into a state party, and the sole political party in the country. Other political parties were suffocated through the intimidation of their respective leaders, some of whom were detained and deported, and their rights to register and to hold meetings were curtailed.¹⁸¹

In this way the path was paved for the declaration of a one-party political system. It all started with the National Executive Committee of TANU the ruling party. While conducting its proceedings *in camera*, the NEC passed a decision that Tanganyika should be a one-party state and authorised the President who was also TANU chairman to form a Commission to that effect.¹⁸² It is said that Nyerere was always the initiator and engineer of decisions which were passed by the NEC and this decision must have been Nyerere's own strategy to stifle the political opposition in Tanzania. The Commission was charged with responsibility to seek views from the people and what the pre-determined policy of a one-party state should look like in a democratic state. Actually, the Commission members and the public at large had been forewarned by Nyerere that the decision to become a one-party state

¹⁷⁹PETER, C. M., (1987), p. 243. See also MLIMUKA, A. K., and KABUDI, P. J., p. 62, and the Nyalali Commission Report, Vol. 1, pp. 15-30.

¹⁸⁰About the Tanzanian government's infringements of the right to associate and to form political parties see WELCH, C. E., pp. 639-656.

¹⁸¹PRATT, C., p. 187.

¹⁸²MSEKWA, P., p. 20.

had already been taken by the Party. Their duty was to comment on what type of one-party democratic state they would like for Nyerere had forewarned:

“I think I should emphasise that it is not the task of the Commission to consider whether Tanganyika should be a one-party state. The decision has already been taken. Their task is to say what kind of one-party state we should have in the context of our own national ethic and in accordance with the principles I have entrusted the Commission to observe.”¹⁸³

Debate was therefore restricted. People had no say on what type of government they would like, one party or multi-party. The Commission came out with a report containing recommendations which marked the inauguration of authoritarianism by the state in Tanzania. Among the Commission's recommendations which gained governmental support were alternatives to an enforceable Bill of Rights namely: placing a statement of ethical principles in the Interim Constitution in the form of a preamble, establishing the Permanent Commission of Enquiry and introducing the Leadership Code.

Arguably a Bill of Rights in the Constitution would have prevented a One-Party State from emerging, because that would have amounted to an infringement of the people's right to form associations. Actually it is not easy to draw a line between the philosophies of one-party rule and authoritarianism since both practices impose restrictions on human liberty.

2:2:1 The Preamble to the Constitution.

As the Commission was asked by the President to recommend the best way of observing individual rights and the rule of law in a one-party state, the idea of human rights was reconsidered by the Commission. However, this was a mere formality.

¹⁸³See the *Report of the Presidential Commission on the Establishment of a Democratic One-Party State*, p. 2. See also NYERERE, J. K., p. 261.

In its recommendations the Commission did not differ much from previous thinking in rejecting the idea of constitutional guarantees for the protection of individual fundamental rights by way of a Bill of Rights. The arguments against a Bill of Rights as contained in the recommendations of the Commission were not new. First, the Commission believed that a Bill of Rights would invite conflict between the Judiciary and the Executive and Legislature for the Bill would have overriding legislative effect. Second, it was feared that the government's dynamic plans for economic development would be held up by the courts declaring such means of bringing about national economic development as unconstitutional. Thirdly it was also the Commission's belief that the rights of the individual in any society depend more on the ethical sense of the people than in formal guarantees in the law.¹⁸⁴ However, it is notable, as Shivji observes, that the "sensitive" government and national ethics to which the Commission attached emphasis as the best means for protecting rights in lieu of an enforceable Bill of Rights did not exist in Tanzania.¹⁸⁵

The Commission's report raised more problems than it could solve. It is not clear why a government committed to act reasonably was resentful of the Bill of Rights. For a third time the Bill of Rights failed to secure a place in the country's Constitution despite popular demands.¹⁸⁶ Instead the Commission recommended that 'a statement of the ethical principles which bind together leaders and people should be included in the new Constitution in the form of a preamble.'¹⁸⁷ Indeed, the recommended statement of the ethical principles was included as the preamble to the Interim Constitution.¹⁸⁸

¹⁸⁴See the *Report of the Presidential Commission on the Establishment of a Democratic One-Party State*, pp. 30-32.

¹⁸⁵SHIVJI, I. G., (1987), p. 130.

¹⁸⁶Tanganyika Law Society proposed to the Commission that a Bill of Rights be included in the Constitution but the proposal was conveniently shelved.

¹⁸⁷*Report of the Presidential Commission on the Establishment of A Democratic One-Party State*, op cit., p. 32.

¹⁸⁸Act No. 43 of 1965.

Today some people criticise the Commission for having allegedly misunderstood the terms of reference or invented its own, since it failed to appreciate the President's primary concern over democratic governance.¹⁸⁹ These criticisms are directed at a wrong target. From the outset the Commission was warned by the President that it should operate within the confines of the terms of reference which embraced one-party policy as the founding principle. Already, individual rights had been infringed and yet the Commission was assigned to seek public opinion and recommend how individual fundamental rights could be respected under the One-Party policy. This was a contradiction in terms because One-Party policy was, in itself, enough to express the government's position in relation to individual fundamental rights. Furthermore, the Commission's recommendations were what the appointing authority wanted to hear; although the government was free to reject them (since they were not binding on it), it never did so.

The One-party policy was followed by 'Party Supremacy', the concept which replaced Parliamentary Supremacy. Ten years later after making Tanzania a One-Party State,¹⁹⁰ all political activities were to be conducted under the auspices of the party¹⁹¹ and the Parliament became effectively a committee of the ruling party. Policies were decided by the NEC and brought to Parliament for rubber stamping. The importance of the Party was demonstrated by the inclusion of the Party's Constitution as a schedule to the Interim Constitution.¹⁹² TANU's constitution articulated the protection of basic rights. It seems that those who suggested the inclusion of the Constitution of TANU in the first schedule to the Interim Constitution, did not know that unlike the Preamble, the Schedule to any legislation is also part of that particular legislation. Beyond their expectation, the 'conflict' which the

¹⁸⁹MWAKYEMBE, H. G., (1995), p. 59. For similar views see ZIMBA, L., p. 133.

¹⁹⁰Interim Constitution, section 3 (1).

¹⁹¹Ibid, section 3 (3). See also Act No. 8 of 1975.

¹⁹²Ibid., section 4.

Commission sought to avoid, by recommending that Bill of Rights should not be included in the Constitution, could be caused by the Constitution of TANU in the Interim Constitution.¹⁹³

2:2:2 Permanent Commission of Enquiry.

Instead of a justiciable Bill of Rights the Commission also recommended the establishment of the Permanent Commission of Enquiry.¹⁹⁴ The PCE (Tanzania *Ombudsman*) was consequently recognised by the Interim Constitution.¹⁹⁵ It was endowed with a special power to decide on the arbitrary action or abuse of power by members of the ruling party and civil servants.¹⁹⁶ However, the PCE could not be an effective substitute for the Bill of Rights for among other weaknesses it lacked real independence.¹⁹⁷ It was subject to complex bureaucratic rules requiring it to report the proceedings of every enquiry, and its conclusions and recommendations thereon, to the President, instead of being answerable to the Parliament.¹⁹⁸ The President was at liberty to accept or to reject the Commission's recommendations.¹⁹⁹ Indeed it was more of a presidential instrument than an independent quasi-judicial tribunal capable of protecting individual fundamental rights. The President's 'own attitude' to the Commission's report 'remained decisive'²⁰⁰ and he could not be

¹⁹³See the case of *Thabit Ngaka v. Regional Fisheries Officer* [1973] E. A. 341 and 1973 L.R.T. No. 24.

¹⁹⁴See *Report of the Presidential Commission on the Establishment of A Democratic One-Party State*, op cit., p. 32.

¹⁹⁵See Article 67.

¹⁹⁶See Interim Constitution, section 67 (1). See also *Proceedings of the International Seminar on Ombudsman Idea and System in Africa* held from the 3rd - 7th December, 1990 in Arusha Tanzania, pp. 28-29.

¹⁹⁷This fact is also admitted by the Commissioners themselves. About the Commission's ineffectiveness see MJEMMAS, G. J., pp. 53-55.

¹⁹⁸Under the Permanent Commission of Enquiry Act, 1966 (Act No. 25 of 1966), section 17, the Commission's report could in a form of government report be read to the National Assembly as a matter of information. It usually contained the bare outline of how the Commission did its work but its investigations and recommendations remained strictly confidential.

¹⁹⁹Interim Constitution, section 67 (3).

²⁰⁰GHAI, Y. P., p. 35.

compelled to take measures against any of those whom the Commission's enquiry had revealed to have abused their authority.

Records have shown that there were many abuses of power and violations of individual rights by those in authority in Tanzania such that people 'looked at the Commission as their last hope.'²⁰¹ We cannot forget that the President was the appointing and disciplining authority of the members of the Commission,²⁰² a fact which subjected its independence and impartiality to question.

In addition there were limitations too as to whom the PCE could investigate. For instance it could not investigate the President of Zanzibar. Also the President could stop any investigation at any time and could also refuse the PCE access to any information when he so desired. It should be noted that the PCE was born and bound to operate in an environment which was already polluted by the undemocratic policies of TANU the ruling party. As such, the PCE being a part of the state machinery could not operate contrary to an appointing authority.

Therefore, the PCE could not check government actions or legislative measures which were violative of individual rights in the way the courts could have done if there had been a justiciable Bill of Rights in the Constitution. The Commission was a watchdog of government policies and laws and it could not examine their validity nor could it be critical of them even if such policies and laws were the cause of the abuse being complained against. This can be seen in the words of the State Attorney and Legal Officer to the Permanent Commission of Enquiry:

“...where an investigation has been carried out and it is found out that the act or omission complained against was rightly done according to law, Regulation

²⁰¹MJEMMAS, G. J., p. 43.

²⁰²Interim Constitution, section 68.

or Government policy, it ought to be counted as a success on the work of the Commission even if the complainant did not get what he wanted.²⁰³

The PCE never considered as wrong any act which was supported by the law even if that law was passed by the Parliament to 'justify dictatorship based on tyrannical but perfectly legal principle.'²⁰⁴ It is therefore a gross misconception of the idea of human rights for the government to think that the PCE could be an alternative to the Bill of Rights whereas the two concepts differ in terms of functions and operation. Whereas the Ombudsman, being an organ of the state, would like to mediate between the oppressed and their oppressors while the 'oppression continues unabated,'²⁰⁵ the Bill of Rights would be against such mediation or compromise of the individuals' fundamental rights. In fact neither of them can substitute for the other and perhaps that is why the Zambian One-Party State Constitution gave recognition to both institutions.²⁰⁶ This argument is also confirmed by the fifth constitutional amendment of 1984 whereby both the PCE²⁰⁷ and Bill of Rights²⁰⁸ were provided for with clear and distinct functions. As Zimba argues, to speak of the PCE in Tanzania as an alternative to a Bill of Rights is nothing but a mere paradox and a move calculated to leave the government free from the inhibitive effects of a legally enforceable Bill of Rights.²⁰⁹

2:2:3 The Leadership Code.

The establishment of the Leadership Code was intended to be another way, of instilling discipline and controlling the leaders from abusing their

²⁰³MJEMMAS, G. J., pp. 44-45.

²⁰⁴WADE, H. W. R., p. 37.

²⁰⁵See the *Proceedings of the International Seminar on Ombudsman Idea and System in Africa*, op. cit., p. 192.

²⁰⁶For protection of fundamental rights and freedoms of the individual see the Constitution of Zambia sections 13-31, as amended by Act No. 29 of 1972; and for the Commission for Investigation (*Ombudsman*) see the Constitution of Zambia, section 117.

²⁰⁷Tanzanian Constitution, Articles 129-131, as amended by Act No. 15 of 1984.

²⁰⁸See *Ibid.*, Articles 12-33.

²⁰⁹ZIMBA, L., p. 134.

powers. The move was more political, stemming from TANU's desire to promote *African Socialism*. Socialism and self reliance were regarded as the only ways of building a society of free and equal citizens. It was believed that if Party leaders as well as government leaders could abide by the established rules of conduct, the new ideology of African socialism could successfully lead the nation to economic development. On 5th February 1967 TANU formulated and announced what came to be known as *The Arusha Declaration*, a blue-print of socialism and self-reliance. Among other things the Arusha Declaration did set out the conditions of leadership which every leader had to fulfil. These conditions as stipulated under the Declaration²¹⁰ constituted what is known as the Leadership Code:

- (i) Every TANU and Government leader must be either a peasant or a worker, and should in no way be associated with the practices of capitalism or feudalism.
- (ii) No TANU or Government leader should hold shares in any Company.
- (iii) No TANU or Government leader should hold Directorships in any privately-owned enterprises.
- (iv) No TANU or Government leader should receive two or more salaries.
- (v) No TANU or Government leader should own house/houses which he rents to others.
- (vi) For the purpose of this resolution the term 'leader' should include the following people:-

Members of the TANU National Executive Committee; Ministers, Members of Parliament; Senior officials of Parastatal Organisations; all those appointed or elected under any clause of the TANU Constitution; all those appointed or elected under the provisions of a Constitution of any Organisation affiliated to TANU; Councillors

²¹⁰See also the Second Schedule to the Civil Service Regulation, 1970 (GN. No. 228 of 1970).

and Civil Servants in high and middle cadres. In this context, 'leader' means a man or a man and his wife; a woman or a woman with her husband.

Once again political interests and ambitions took precedence over individual fundamental rights. The right to own private property was regarded as capitalist ideology and therefore in conflict with the already chosen socialist path of development. Under the Arusha Declaration, businessmen, apart from being considered capitalists, were categorically excluded from participating in the affairs of their country for they could not pass the test of the Leadership Code. Only peasants and workers having no association with the practices of capitalism or feudalism could stand for election. It is interesting to note that a person would not qualify to stand for constituency election if his/her spouse practised capitalism.²¹¹

Most interesting was the extended effect of the Code on the otherwise innocent spouse merely because his or her partner was bound by the said Leadership Code. The most important aspect of the Declaration was 'to ensure that leaders are not contaminated by the practices of capitalism'²¹² without due regard to their fundamental rights which the policy attempted to infringe. When the Leadership Code was promulgated, most Party and government leaders were engaged in businesses and they were therefore required to dispose of them²¹³ or 'rearrange their affairs'²¹⁴ within a specified time²¹⁵ or be disqualified from leadership. In a bid to make sure that traces of capitalism were removed among the leaders, every member of Parliament was required to submit an annual statement of his affairs to the Speaker specifying all the

²¹¹See the Interim Constitution, section 27 (2) (h)-(l).

²¹²READ, J. S., (1967), p. 163.

²¹³This included also the share or house vesting in an individual by inheritance. The leader was supposed to lodge a formal undertaking to dispose of it early.

²¹⁴READ, J. S., (1967), p. 167.

²¹⁵Between March 1967 and March 1968.

property he owned.²¹⁶ Most of them developed different ways of owning private property and still complied with the direct stringent requirements of the Code.²¹⁷ This prompted the government to establish the Commission for Enforcement of the Leadership Code²¹⁸ to enquire into the behaviour and conduct of any leader for the purposes of ensuring compliance with the requirements of the Leadership Code. Undoubtedly, the Commission for Enforcement of the Leadership Code was 'specifically established to protect socialism, the political ideology of the country'²¹⁹ and had nothing to do with the protection of individual rights.

Like the PCE, the Commission for Enforcement of the Leadership Code, after investigating the leaders who were suspected of violating the conditions of the Code, presented its confidential report and recommendations to the President.²²⁰ It had no power to sanction those found in breach of the Code. The Commission Chairman had the power to sign a warrant of arrest 'for the apprehension of a recalcitrant witness'²²¹ and bring him before the Commission within twenty-four hours. Again, the President was not bound by the report nor was he 'obliged to accept the Commission's recommendations.'²²² For example, out of 83 leaders investigated by the Commission and reported to the President between 1974 and 1986, 41 leaders received *stern warning*, 14 were *summarily dismissed* from leadership, 16 received *simple warning* and *transfers*, 2 were demoted with reduction in ranks and salaries, and 10 leaders were referred to the Party Disciplinary Committee for necessary action.²²³

²¹⁶For details about the effect of the Leadership Code see READ, J. S., (1967), pp. 162-166.

²¹⁷They registered their houses, shares and other private property in their children's names some of them being too young to own such property.

²¹⁸See the Commission for the Enforcement of Leadership Code Act, 1973 (Act No. 6 of 1973), and the Tanzanian Constitution, Article 132.

²¹⁹MWINYIGOGO, A. M., p. 272.

²²⁰Act No. 6 of 1973, section 8.

²²¹READ, J. S., (1973 B), p. 139. See also *Ibid.*, section 5 (4).

²²²MWINYIGOGO, A. M., p. 271. See also *Ibid.* section 10.

²²³*Ibid.*, p. 273.

The measures taken by the President upon receiving the Commission's report suggest that the Commission was the President's organ responsible for the examination of the leaders' loyalty to him. This is corroborated by President's unique control of the Commission which gave him the right to certify that certain information be withheld from the Commission on various grounds. The President was the only one with access to the inquiry report²²⁴ and he could warn or transfer the person reported of violating the Code; only the most unfortunate leaders were summarily dismissed. We are not told the criteria used by the President to determine who should get what punishment. All remained subject to his discretion.

Today, the Leadership Code is in a shambles after the dramatic change in the country's policy regarding the private ownership of property, which came about after Nyerere's retirement from the Presidency and Party Chairmanship. The change in the national policy was received with relief by the leaders who secretly owned property contrary to the prescription of the Leadership Code. This is a clear indication that the Leadership Code was disliked by the rest of the leaders and was bound to fail; very few complied with the Arusha Declaration's requirements. The provisions of the Leadership Code appear to be too ambitious, unrealistic and stringent for people, living in a country whose economy is very weak. Those who complied like Chief Adam Sapi Mkwawa, the former Speaker, found themselves unable to cope at the time of retirement. The Parliament had to consider him particularly in relation to housing. He was given usufructuary rights to the Government House on condition that it reverts to the government upon his death. His family was not considered as also having been a "victim" of the Speaker's commitment to the leadership Code. Leaders who supplement their incomes through acquisition of shares in private companies or renting houses, are no longer disqualified from being leaders in Tanzania. Instead, now the practice is to declare their

²²⁴Act No. 6 of 1973, section 9.

property interests when they are appointed leaders.²²⁵ The President and all members of Parliament established this practice before it was codified. The Commission for Enforcement of Leadership Code was replaced by the Secretariat for Public Leaders Ethics now charged with the power to investigate on the conduct of public leaders. In fact today it is more of a rule that in order to become a leader one has first to violate the Leadership Code as announced under the Arusha Declaration. This can be clearly explained by the large amounts of property owned by the leaders.

All this demonstrates the independence government's rigid desire to 'liberate' itself from the patterns of colonial economic policy while sacrificing individual fundamental rights. Institutions expected to act as a substitute for a justiciable Bill of Rights turned out to be ineffective and to a large extent this contributed to the growth of state authoritarianism and corruption among leaders who needed to supplement their low income.

2:3 The judiciary at independence.

At the time of independence the judiciary was staffed by foreigners, particularly British judges, as there were no Tanganyikans qualified for such professional office. The lack of trained Africans in Tanganyika necessitated the continuance of British nationals and Africans from other countries, trained in Britain, in the higher posts of the judiciary and Ministry of Justice.²²⁶ This was one of the situations which placed the new government in a dilemma, for it was thought that among the indicators of true independence was the taking over of all offices which were previously manned by foreigners. In order to achieve this goal Nyerere called for Africanization of the civil service, a move which was unsuccessfully criticised and challenged in the court for its

²²⁵See Article 132 (5) (b).

²²⁶See CASTELNUOVO, S., p. 68.

discriminatory character.²²⁷ As for the judiciary it was difficult to bring such move into immediate effect.

For a long time since independence the TANU leadership was harbouring the unjustified belief that the expatriate judicial officers would take advantage of the presence of a Bill of Rights to frustrate the new government by declaring many of its actions illegal.²²⁸ The government's suspicion of the judiciary actually continued even after the judiciary had been Africanised. It was manifested by the creation of tribunals and other *quasi-judicial* bodies to discharge the functions of the court. Most of the tribunals' decisions were made final and non-appealable.²²⁹ This will be discussed in *extenso* in the following chapter.

Parallel with this suspicion was the government's desire to create a new judiciary that would function as an appropriate institution for the enforcement of development policies. The government had to train its own judges as well as magistrates, while in the meantime it relied upon foreign judges from other Commonwealth countries like Nigeria and Trinidad.²³⁰ It was not by accident therefore that when the University College of Dar Es Salaam, the country's first university, was opened, the Faculty of Law was the first to be established. It was purposely opened to provide training for lawyers who were urgently needed to take over from the expatriates.

2:3:1 The judicial system.

Some changes to the judicial system of the country were effected immediately after independence. The most important of these changes related to the total integration of the courts and the abolition of appeals to the Privy

²²⁷See *Hatimali Adamji v. East Africa Posts and Telecommunication Corporation*, 1973 L.R.T. No. 6.

²²⁸PETER, C. M., (1987), p. 250.

²²⁹See our discussion in chapter three pp. 95-100.

²³⁰For example Georges, C. J., came from Trinidad.

Council after the High Court was made the highest appellate court in the country.

In 1961 the local courts, like subordinate courts were integrated and placed under the supervision of the High Court.²³¹ Nevertheless two racially based court systems were maintained only that the Central Court of Appeal which was the highest court under the Local Courts system was abolished and replaced by the High Court. The District Commissioners continued to discharge both judicial²³² and administrative functions but the Provincial Commissioner whose leave was mandatory for an appeal to lie to the Central Court of Appeal, was replaced by the Local Courts Appeals Officer²³³ acting under the directions and control of the Chief Justice. The continued existence of a “dual” court system of justice based largely on race, is illustrated by the following diagram:

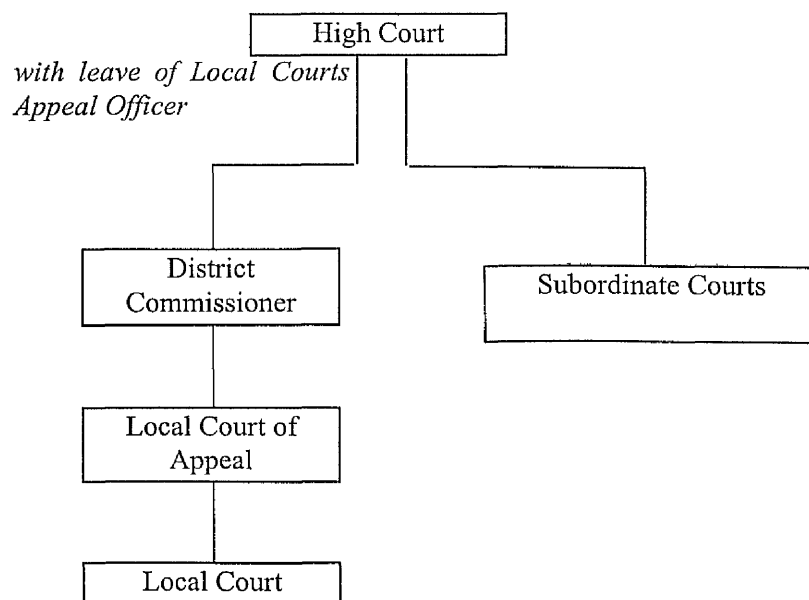


Table 4: The Court System immediately after independence

²³¹ See Local Courts (Amendment) Ordinance, 1961. (No. 38 of 1961).

²³² Ibid., section 38 (3) (b).

²³³ Ibid., section 38 (3) (c).

Essentially the Independence Constitution had not changed anything as far as appeals were concerned.²³⁴ Appeals would still lie from the Tanganyika High Court to the Court of Appeal for Eastern Africa and then to the Judicial Committee of the Privy Council in some instances. This was not favoured by the independence government which was determined to break the connection between Tanganyika and Britain.²³⁵

It was the Magistrates Court Act, 1963²³⁶ which completely removed the colonial “dual” and parallel court system that was based on racial discrimination. Instead, a unified and integrated three-tier court system was established for all people in the country irrespective of their race, religion, colour or origin.²³⁷ With the abolition of the former parallel court systems all courts were amalgamated into a single hierarchy of courts. Replacing the Native Local Court at the lowest level was the Primary Court, from which appeals lay to the District Court which was on the same level with the Resident Magistrate Court, and thence to the High Court which was the highest appellate court in the country. Unlike the Native Local Court the Primary Court was vested with jurisdiction over all persons and it was not restricted to customary law. It was no longer lawful for the executive to exercise judicial functions which were exclusively vested upon the judges and magistrates only. All courts were to be presided over by ‘full-time stipendiary’ who ‘replaced the dual functioning executive of local authorities.’²³⁸ However, these rapid changes brought about by the Magistrate’s Court Act, 1963 faced one significant problem; the unavailability of appropriately trained personnel.

At one time, Rashid Kawawa (a senior government official) suggested that a solution to such a problem was to recruit as many magistrates as

²³⁴The provisions for appeals remained as contained in the Appellate Jurisdiction Ordinance, 1961 (No. 55 of 1961).

²³⁵See the proposals as contained in the Government Paper No. 1 of 1962.

²³⁶Act No. 55 of 1963.

²³⁷PETER, C. M., and BIERWAGEN, R. M., p. 400. See also SAWYERR, G. F., p. 226.

²³⁸CASTELNUOVO, S., p. 84.

possible by simply picking from the jobless Africans in the country and handing them the office after a short briefing. The idea to appoint judicial officers haphazardly was objected to by the Chief Justice. This problem together with the inadequacy in the number of courts enormously affected the administration of justice in the country. Cases took too long to be determined and because of the lack of office-space, most of the court sessions were conducted in the ruling Party's buildings. This practice gave room for interference by the party in the court's decisions, and sometimes it was difficult for the court to decide impartially when the ruling party had an interest in the case. In fact it had reached a stage where it was practically impossible, especially in rural areas, to distinguish between the court's decision and the party's decision following the strengthening of the party, as we shall see in the following chapter.²³⁹

Another development alongside the Magistrates Courts Act, 1963 was the application of codified customary law. It should be noted that during the colonial period every Local Court (Native Court) applied the indigenous customary law of the African tribe where the parties came from. It means therefore that the customary law applicable was not codified and it differed from one tribe to another. Since 1st January, 1964 when the Magistrates Court Act, 1963 came into force the customary law applicable in court was unified under the guidance of Mr. Hans Cory, the government sociologist in Tanganyika.²⁴⁰ After considering Cory's unified version of the customary law the government codified it to be known as the Local Customary Law (Declaration) (No. 4) Order, 1963.²⁴¹ Consequently, customary criminal law was abolished. As we shall see in chapter six, some of the rules set out under

²³⁹For an account of the early problems in the judicial process caused by the sharing of buildings between executive/party leaders and judicial officers see JAMES, R. W., and KASSAM, F. M., pp. 18-19.

²⁴⁰Hans Cory was in Tanganyika from the colonial period recording customary law. He wrote and published his works on the Haya, Sukuma, Nyamwezi, Gogo, Hangaza, Zinza, Kuria and Sambia customary laws.

²⁴¹GN. No. 436 of 1963.

the said Order, as the result of the unification of customary laws, were discriminatory and indeed in gross violation of human rights.²⁴²

It seems the unification of customary laws was done for political rather than legal reasons, and as Twining observed, 'the motivating force behind the scheme was the desire to cement national unity'²⁴³ and eradicate division among societies which tend to 'threaten the independent state with conflict or dissolution.'²⁴⁴ No other country except Tanganyika had attempted to unify the customary law of various tribal groups within the country.²⁴⁵ All this related to Nyerere's ambitions to make Tanganyika a secular socialist state by removing anything that tended to promote tribal loyalty against common and collective identity.

2:3:2 The magistrates: appointment and terms of service.

The Republican Constitution conferred on the President the power to appoint the Registrar of the High Court and his deputy, all Resident Magistrates and all other Magistrates.²⁴⁶ Under the Constitution all judicial officers were presidential appointees but the said president could not exercise direct disciplinary control over them nor could he terminate their appointments. This power was vested in the Judicial Service Commission²⁴⁷ which was also constituted of presidential appointees. The position hitherto has not changed. It reduced the likelihood of judicial officers making decisions in favour of the appointing authority at the expense of people's justice, in order to remain in office. Nevertheless, it is contended that it was not

²⁴²See *Peter Byabato v. Pastory Rugaimukamu*, High Court of Tanzania at Mwanza, Civil Appeal No. 252 of 1986, unreported ; *Gabriel Valery v. Birungi Balilemwa*, High Court of Tanzania at Mwanza, Civil Appeal No. 49 of 1988, unreported ; *Bernardo Ephrahim v. Holaria Pastory and Another*, *infra*.

²⁴³TWINING, W., p. 225. For similar views see CASTELNUOVO, S., p. 69.

²⁴⁴KUPER, H., and KUPER, L., p. 21.

²⁴⁵COTRAN, E., p. 26.

²⁴⁶Republican Constitution, section 53.

²⁴⁷See the Judicial Service Act, 1962 (Cap. 508). See also the Interim Constitution, section 61; and the 1977 Constitution, Article 113.

necessary to vest in the President the power to appoint these officers. Under the Independence Constitution, 1961 the power to appoint such judicial officers was vested in the Judicial Service Commission, including the power to control, discipline and to remove from office.²⁴⁸ As a means of maintaining independence of the judiciary, this was better than the latter attempt which vested in the President also the power to confirm appointments and to promote his appointees.²⁴⁹ In appreciation of such appointments and in order to have their appointments and promotion approved, chances for judicial officers being partisan were very high; thereby increasing the possibility of the erosion of the independence of the judiciary. However, the President has delegated the power to appoint Magistrates to the Judicial Service Commission.²⁵⁰

With regards to security of tenure, the President could not exercise his power to abolish any office in the service of the United Republic²⁵¹ in respect of any office of a magistrate while there was a substantive holder of that office, unless the Judicial Service Commission concurred in such abolition.²⁵² Furthermore, a judicial officer cannot be dismissed by the Commission unless a disciplinary charge has been preferred against him and he has had an opportunity to answer the charge and there has been an inquiry into the charge. The terms of service and security of tenure provided under the Constitution are not enough to make the judicial officers independent in their function of dispensing justice. Also, the question of remuneration has to be considered if the rule of law and the independence of the judiciary are to be seriously protected.

As for primary court magistrates, a very long process leading to their appointment was devised allegedly with the intention of bringing their office

²⁴⁸Independence Constitution, section 65. See also the Judicial Service (Appointments and other Presidential Functions) Regulations, 1964 (GN. No. 665 of 1964).

²⁴⁹See the Interim Constitution, section 61 (1) (a) and the 1977 Constitution, Article 113 (1) (a).

²⁵⁰See the Judicial Service Act, 1962.

²⁵¹Section 18 of the Republican Constitution. See also the Interim Constitution, section 21 (a).

²⁵²Interim Constitution, section 61 (3).

closer to the ideal of the independence of the judiciary. Although it is argued in some quarters that primary court magistrates were also appointed by the Judicial Service Special Commission,²⁵³ the cumbersome procedural conditions through which the appointment had to be channelled does not support this hypothesis. First of all it was the minister responsible for legal affairs in whom the power to appoint Primary Court Magistrates was vested.²⁵⁴ The role played by the Judicial Service Commission in the process was to write a recommendation to the said minister about the names selected by the Regional Boards. It is therefore obvious that the selection was being done by the Regional Boards under the chairmanship of Regional Commissioners. It is the recommendation report of the Regional Board that the Judicial Service Commission has to act upon before preparing the final recommendation for submission to the Minister, who makes the appointment. In actual fact it was the minister, the political figure, who finally made the appointment since he could object to the Commission's recommendations as to the selection. It should be noted that to date that continues to be the procedure followed in appointing Primary Court Magistrates, where the Judicial Service Commission remains the disciplining authority.

The appointment procedure for Primary Court Magistrates had many loopholes which allowed political considerations to be taken account of. The chair of the District Board which interviewed the applicants was the District Commissioner (a politician) who forwarded the recommendation to the Regional Board under the chairmanship of the Regional Commissioner. Finally, the person who had final appointing power was the minister, also a political figure. To be appointed a Primary Court Magistrate one had to show support for the ruling party's policies, and it was the duty of the interviewing team to scrutinise the applicants so as to avoid appointing those who could

²⁵³See the ideas of the Chief Justice P. T. Georges in JAMES, R. W., and KASSAM, F. M., at p. 54.

²⁵⁴See the Magistrates Court Act, 1963, Sixth Schedule, Part IV.

turn *hostile* to the ruling party and still remain protected by the doctrine of the independence of the judiciary.

As a safeguard against the threat posed by magistrates who were suspected of turning hostile, assessors were made part of the Primary Court in deciding cases. They were given judicial powers to sit with magistrates in court and the decision of the court was by the majority (whereby already the assessors were the majority for they were two and the magistrate was one). The magistrate was bound by the decision of the majority of assessors who were not judicial officers but mere lay persons and members of the ruling party. Assessors were nominated by the TANU Branch Executive Committee and selected by the TANU District Executive Committee without security of tenure to exercise such power over magistrates. They could be removed at any time for any cause²⁵⁵ when it was deemed necessary according to the party's wishes, possibly when they failed to protect the party's interests in the court. This has contributed to the bad performance of Primary Courts and perhaps encouraged the corruption which is being complained of. As Fimbo observes, majority decisions in Primary Courts do cost the nation heavily in terms of unmerited acquittals and unjust convictions.²⁵⁶

Undoubtedly the appointment procedure and terms of service for magistrates were very far from building a free and impartial court in Tanzania. They left too much space for the party leaders who also exercised executive powers to interfere with the administration of justice. This threatened the very foundation of rule of law and independence of the judiciary.

3:3:3 The judges: background, appointment and tenure.

We discussed earlier about the appointment of puisne judges at the time of independence and also the changes brought about by the Republican

²⁵⁵See the Primary Courts (Assessors) Regulations, 1972 (GN. No. 233 of 1972).

²⁵⁶See FIMBO, G. M., (1990), p. 24.

Constitution.²⁵⁷ The effectiveness of the new mechanism under the Republican Constitution depended on the weight which the President attached to the requirement to consult the Chief Justice. The President under normal circumstances took into account political considerations in appointing judges for he knew that once appointed a judge, matters of discipline and determination rested with another body which he had little influence. He was therefore careful in this sensitive exercise to appoint those people whose background he already knew. Such judges were trained outside and most of them had been on the bench in their countries of origin. Being mindful of the shortage of suitably qualified Tanganyikans, the Constitution provided for the appointment of judges from outside the country that a person should not be qualified for appointment as a judge of the High Court unless:

- (i) he is, or has been, *a judge of a court* having unlimited jurisdiction in civil and criminal matters in some part of the *Commonwealth* that may be prescribed by Act of Parliament, or a court having jurisdiction in appeals from any such court; or
- (ii) he holds one of the specified qualifications and has held one or other of those qualifications for a total period of not less than five years.²⁵⁸ (Emphasis added).

The term ‘specified qualifications’ referred to above meant the professional qualifications specified by the Advocates Ordinance and to be held by any person before he could apply for admission as an advocate in Tanganyika.²⁵⁹ It was one of the specified qualifications and indeed a condition *sine qua non* over and above working experience that one had to

²⁵⁷See footnotes 167 and 168.

²⁵⁸Independence Constitution, section 59 (3) (a) (i) and (ii). See also the Interim Constitution, section 57 (3) (a) (i) and (ii).

²⁵⁹See the Interim Constitution, section 57 (3) (b).

hold a degree in law in order to qualify being appointed judge. The condition of five years working experience in a legal profession, would if applied strictly, have prevented indigenous people from qualifying and this would have contradicted the President's campaign to Africanise the judiciary. In order to remove these contradictions the President was given power to dispense with the requirement of five years working experience, if he was satisfied that by reason of special circumstances such person was worthy, capable and suitable to be appointed a judge of the High Court.²⁶⁰ It was under this saving provision that indigenous law graduates could be appointed judges despite the fact that they had not been working as legal practitioners for five years. In fact some of them became judges, through promises by the government, before starting undergraduate studies at the University. They were encouraged to study law at the University so that they might be appointed judges on completing their studies. There is evidence that some students who were selected to take other degree courses abandoned them in the process following the government promise to make law graduates judges on successfully completing the studies.²⁶¹ Others who graduated in other subjects were sent to the United Kingdom for the Bar course in order to be introduced to law and practice. On going back home they could be considered for a judgeship post. It is tempting to say that the appointments procedure and the desire to Africanise the judiciary meant that the strict scrutiny of candidates was often ignored and this threatened the very foundation of the independence of the judiciary.

Following the changes brought about by the Independence Constitution, the tenure of judges was constitutionally secured except on misbehaviour or inability to perform duties which allegations were to be established to the

²⁶⁰Ibid., section 57 (4)

²⁶¹For example Hon. Kwikima, former judge of the High Court, during the interview in 1994, admitted having changed his admission at the University and studied law following the government's promise to consider him for a judicial post on completing his studies.

satisfaction of a tribunal of judges from Commonwealth countries.²⁶² Furthermore, security of judges' personal emoluments was provided for under the Constitution such that it was out of the Consolidated Fund their salaries, allowances, pensions and gratuity were to be paid, nor could the salary be altered to the disadvantage of the judge.²⁶³ These were safeguards extended to all judges including the expatriate judges with a view of equipping them with confidence to act fearlessly and impartially. This was not enough taking into account other factors which were in sharp contrast to the intended objective. Like other judges, expatriate judges could be removed from office for bad behaviour or failure to perform their duties. Also the threats posed by the campaign to Africanise²⁶⁴ civil service offices never excluded the judges. In fact all expatriate judges could any time be given a six months notice by the President if there was any indigenous Tanganyikan to take up the office. The expatriate judges as well could give the same notice to the government if they needed to vacate the office.²⁶⁵ Arguably the overseas judges felt a threat of their appointments being terminated any time albeit by six months notice. It was difficult for such judges to be independent in their performance as they would be careful not to offend the appointing authority .

2:4 Conclusions

The main thrust of the argument of this chapter, has been that the post-independence government used the Constitution to create a very strong executive, reminiscent of an authoritarian government. In the process, a weak judiciary staffed by insecure officers was brought into being.

²⁶²Interim Constitution, sections 60 and 58.

²⁶³See footnotes 175 and 176.

²⁶⁴Under the Tanganyika (Compensation and Retiring Benefits) Order in Council, 1961 (GN. No. 398 of 1961); and the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962 (Cap. 500), section 17.

²⁶⁵Interestingly the government never terminated the services of any foreign judge.

It has been shown that from the beginning the post-independence government was not prepared to translate respect for human rights into action by giving it a place in its municipal legislation. All efforts were made to frustrate the people's desire for an enforceable Bill of Rights and reasons were given to that effect. We pointed out that what the government considered as an alternative to the Bill of Rights was rather ineffective. By merely making reference to human rights in the Preamble to the Constitution and establishing a Permanent Commission of Enquiry or the Leadership Code, the government did not create a proper substitute for an enforceable Bill of Rights.

The major changes brought about by the post-independence government in the judiciary related to the creation of one court system for all people under the supervision of the High Court. However, the judiciary was treated with suspicion by the nationalist leaders. As a result a deliberate move was made by the government to create an environment propitious for executive interference thereby eroding the concept of the independence of the judiciary. The effect of all this will be revealed in chapter three when we shall examine the performance of the judiciary during the period when the Bill of Rights was not part of the Constitution.

CHAPTER THREE

HUMAN RIGHTS IN PRACTICE AFTER INDEPENDENCE

After successfully rejecting the demands for a justiciable Bill of Rights in the Constitution the government felt uninhibited in the implementation of its development policies. In this chapter we examine the various measures used by the post-independence government to bring about development and their consequential disregard to fundamental individual rights. Here again, our focus is on the role and reaction of the judiciary in the wake of such government policies which potentially contravened fundamental rights and freedoms.

3:1 The Position of the government on human rights

To a considerable extent the government of Tanzania has responded *positively* to the United Nations call which requires all member states to accede to or ratify the international instruments for the protection of human rights. In attempting to comply with this requirement, Tanzania became a signatory to the United Nations Universal Declaration of Human Rights. Not only that, up to 1995 Tanzania had acceded and became signatory to many other key international conventions and covenants as well as regional instruments covering human rights, such as: The International Convention for Economic, Social and Cultural Rights, 1966; The International Convention for Civil and Political Rights, 1966; The Convention for the Elimination of All Forms of Racial Discrimination, 1965; The Convention on the Rights of the Child, 1989; The Convention on the Prevention and Punishment of the Crime of Genocide, 1948; The Convention on the Elimination of Discrimination

against Women, 1979; The Convention on the Political Rights of Women, 1953; The Convention on the Nationality of Married Women, 1957; and The African Charter on Human and Peoples' Rights.²⁶⁶

From this commitment to protect human rights as exhibited by ratification of international and regional instruments, one would be tempted to argue that the government's practice also accorded with these conventions. We would expect the government to incorporate these international norms into domestic law, since the tradition had been to incorporate international instruments into municipal law before they could be domestically applied.²⁶⁷ In addition to its commitment to observe and respect human rights, each United Nations member state accepting these obligations was expected to employ the basic legislative method showing recognition of human rights, by adopting enforceable bills of rights in the Constitution. Despite its commitment on paper, Tanzania simply offered lip service to human rights when it came to practice.

Right from the time of independence the government expressed blunt unwillingness in its administration to incorporate the world wide cherished principles of human rights. The leaders described the enshrinement of the Bill of Rights as being 'neither prudent nor effective'²⁶⁸ and individual freedoms appeared somewhat luxurious in the socio-economic context of Tanzania²⁶⁹ for they were suspected of delaying economic development.²⁷⁰

Many institutions of democracy in the country were destroyed. This state of affairs, observes Ong'wamuhana, was a 'fertile ground for breeding government arrogance'²⁷¹ and subsequent infringement of individual

²⁶⁶HATCHARD, J., (1992), pp. 186-192; and HATCHARD, J., (1995 A), p. 239. See also UNESCO, 1996.

²⁶⁷See *R. v. East African Community*. [1970] E. A. 457. For an account of the application of international instruments by municipal court in East Africa see SHIVJI, I. G., (1990 A), pp. 2-14.

See also SEATON, E. E., and MALITI, S. T., p. 99.

²⁶⁸READ, J. S., (1979 B), p. 161.

²⁶⁹READ, J. S., (1973 A), p. 29.

²⁷⁰See our discussion in chapter two.

²⁷¹ONG'WAMUHANA, K., (1981).

fundamental rights and freedoms. A similar view is expressed by Mwaikusa while summing up his assessment of the independence government's position in relation to human rights when he observes:

“The regime was not prepared to tolerate resistance to its actions, irrespective of whether or not such actions would amount to violation or infringement of individual rights. ...the executive in Tanzania was keen to establish itself as an institution whose power and authority had no lines of circumscription other than those conceded by itself.”²⁷²

The accuracy of Mwaikusa's observation can be clearly found in the government's policies and the manner in which they were implemented during that period when the Bill of Rights was yet to be enshrined in the Constitution as illustrated by the following discussion.

3:1:1 Adoption of colonial legislation

During the struggle for independence the nationalist leaders were very critical of the draconian colonial laws. To many people's surprise, after coming to power the same leaders were to adopt and preserve the same laws which were designed to serve a repressive state.²⁷³ They were saved and adopted through a piece of legislation which stated:

“Without prejudice to the repeal and revocation of existing law with effect from the date which this Act comes into operation, the existing law shall continue to be the law of Tanganyika after commencement of the Republican Constitution”.²⁷⁴

²⁷²MWAIKUSA, J. T., (1991), p. 685.

²⁷³For a discussion about the inheritance of the colonial repressive laws by the independence government see WAMBALI, M. K., (1990), p. 35.

²⁷⁴Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962, section 5 (5).

By adopting colonial laws the independence government expressed its determined desire to step into the shoes of its predecessor, giving no respect to human rights. It was indeed a “return to the autocratic system of government which existed during colonial era.”²⁷⁵ Most of these laws are still in force today despite their gross infringement of human rights.²⁷⁶ In many instances the independence government used these laws in the same way as they were used during the colonial period. For example, in 1984 the President used his powers under the Collective Punishment Ordinance, 1921²⁷⁷ to penalise the *Watauru* tribe on allegations that they were responsible for the deaths of 49 persons and the theft of a large number of heads of cattle, goats, sheep and donkeys. The President ordered every family in the village to pay such number of cattle, goats, sheep or donkeys as would realise the stolen animals.²⁷⁸ The actual culprit could not be traced and the President resorted to punishing the whole tribe collectively contrary to the principles of trial and sentencing. Actually the executive became stronger while the judiciary and the legislature 'grew weaker and eclipsed.'²⁷⁹

3:1:2 Enacting new authoritarian laws

Further to the wholesale adoption of colonial laws, the state at the early period of independence, enacted new laws to suit its interests. The new laws included the Preventive Detention Act, 1962, Regions and Regional Commissioners Act, 1962, and the Area Commissioners Act, 1962. The government justified their enactment but the people in the opposition, such as Kasanga Tumbo, opposed them for they almost amounted to a “declaration of

²⁷⁵MARTIN, R., p. 9.

²⁷⁶For example: Deportation Ordinance as amended by Act No. 3 of 1991; Witchcraft Ordinance, 1928 (Cap. 18); Expulsion of Undesirables Ordinance, 1930; Corporal Punishment Ordinance, 1930; Collective Punishment Ordinance, 1921; Destitute Persons Ordinance, 1923; Township (Removal of Undesirable Persons) Ordinance, 1944, .

²⁷⁷ Cap. 74.

²⁷⁸ See GN. No. 163 of 1984.

²⁷⁹SRIVASTAVA, P. B., pp. 20-24

state of emergency” on the peaceful people of Tanganyika. The legislative process continued and gave birth to other more objectionable laws, like the Government Proceedings Act, 1967²⁸⁰, the Economic Sabotage (Special Provisions) Act, 1983²⁸¹ and many others that we illustrate in the following discussion.

3:1:2:1 Detention without trial

The first post-independence authoritarian law was the Preventive Detention Act, 1962.²⁸² This is a piece of legislation which gave unfettered discretion to the President to detain any one without trial while at the same time denying the affected party or any one right to challenge the President in a court of law whenever he exercised this power.²⁸³ The court had no power to entertain any action which sought to challenge or question the legality of such detention. Detainees were governed by severe regulations²⁸⁴ restricting them from receiving visitors, writing or receiving letters or any other written communications unless prior written authority from the Minister for Home Affairs was obtained.²⁸⁵

Dr. Kwame Nkrumah of Ghana was the architect of the preventive detention law in the post-independence Africa. It was deliberately designed to deal with any attempt to overthrow his government and interference with state security.²⁸⁶ After independence Dr. Nyerere of Tanganyika also copied it for the same reasons.²⁸⁷ The law stated that:

Where:

²⁸⁰ Act No. 16 of 1967.

²⁸¹ Act No. 9 of 1983.

²⁸² Act No. 60 of 1962.

²⁸³ *Ibid.*, section 3.

²⁸⁴ Made under, section 4 (2) of the Act.

²⁸⁵ See The Preventive Detention (Communications with Detainees) Regulations, 1963 (GN. No. 203 of 1963), section 3.

²⁸⁶ BENNION, F. A., p. 222.

²⁸⁷ KALUNGA, L. T., p. 284. For a detailed discussion see HOWARD, R. E., pp. 157-158.

- (a) it is shown to the satisfaction of the President that any person is conducting himself so as to be dangerous to peace and good order in any part of Tanganyika or the security of the State; or
- (b) the President is satisfied that an order under this section is necessary to prevent any person acting in a manner prejudicial to peace and good order in any part of Tanganyika or to the defence of Tanganyika or the security of the state, the President may by order under his hand and the Public seal direct the detention of that person.²⁸⁸

It was enough to be suspected of conducting oneself in a manner dangerous to peace and good order for one to be caught by this section. It was the President alone who could assess and determine the individual's conduct, whether it was dangerous to peace and good order or the State security. The President relied upon the information given to him by his agents or subordinates about the person to be detained²⁸⁹ such that he ended up detaining people most of whom were suspected of committing petty crimes notably bribery, stealing, cattle rustling, vagrancy and drinking illicit liquor.²⁹⁰ Undoubtedly this law was abused, especially by Regional and District Commissioners and the Police.²⁹¹ At one time the chairman of the Permanent Commission of Enquiry expressed his concern over such abuses when he spoke publicly that, 'many persons were being held in preventive detention who should properly have been either brought to trial for criminal offences or released.'²⁹²

²⁸⁸Preventive Detention Act, 1962, section 2 (1).

²⁸⁹Section 2 (2) of the Act requires that the information leading to detention of a person be given on oath unless it is not feasible to do so.

²⁹⁰See LUGAKINGIRA, K. S. K., (1990), p. 109; MARTIN, R., pp. 92-93; McAUSLAN, J. P. W. B., (1964), pp. 564-566 and KABUDI, P. J., (1995 A), pp. 227-229.

²⁹¹See the Nyalali Commission Report, 1991, Volume Three, p. 3.

²⁹²READ, J. S., (1973 B), p. 138.

According to Dr. Nyerere, the existing criminal laws did not give him power to detain without trial since they required evidence of the offence alleged to have been committed by the accused person. Arguably this law was designed to punish those people who were merely suspected of having committed crimes, there being insufficient evidence to bring them to trial. Under normal circumstances this situation would lead to acquittals if the suspects were taken to court for trial.²⁹³ This comes out clearly in his words:

“The principles of individual freedom and the rule of law require that no person is arrested and held without quickly being convicted of illegal actions. But we know that we cannot always get the proof necessary for conviction, especially in cases of subversion, corruption and intrigue.”²⁹⁴

By the Preventive Detention Act, the presumption of innocence on the part of suspects was completely ignored. Many people fell victim to this law.²⁹⁵ They were just *imprisoned* by the President for an unspecified period without trial and without a hearing. It is contrary to the principles of natural justice to condemn someone unheard and to disregard the rule of law which is a fundamental principle of any democratic state.

The normal convict serving a jail sentence received better treatment than the detainee. Whereas a convict could receive visitors on specified days with freedom to communicate in writing with those outside prison, the detainee was kept incommunicado unless the Minister's written permit was obtained first. The convict knew the specific period within which he was to serve his sentence, but the detainee was held at the President's wishes. The

²⁹³For example, in 1968 Joseph Kassela Bantu after speaking in his constituency against Nyerere's policies, was immediately tried for incitement to murder. On being acquitted by the court he was detained under the Preventive Detention Act.

²⁹⁴NYERERE, J. K., p. 6.

²⁹⁵It is said that in 1977 there were about 1,000 people detained without charge in Tanzania while in Kenya there were 15 only. For details see *The Times*, 29th May 1978 and *The Economist*, 7th June 1980.

President could any time vary the status and treatment that the detainee should receive. Besides all the legislation required 'no publication of detainees' names.²⁹⁶ It was such loophole that state functionaries took advantage of and practised torture of the detainees.

This law was regarded as essential for the protection of the government since it could be used to detain dissidents or any one suspected of being a potential threat to the government in power. It is our submission that, using the Preventive Detention Act as a 'legal ammunition for the protection of power'²⁹⁷ at the expense of individual fundamental rights and freedoms lowers the reputation of its users.

In 1985 the Preventive Detention Act, 1962 was amended by Act No. 2 of 1985²⁹⁸ following the continued public criticism and the enshrinement of the Bill of Rights in the Constitution.²⁹⁹

Detention without trial is also allowed under the Regions and Regional Commissioners Act, 1962³⁰⁰ and the Area Commissioners Act, 1962³⁰¹. The Regional Commissioners and District Commissioners were allowed since independence to arrest and detain any person for forty-eight hours if they had reason to believe such a person was likely to commit a breach of the peace or disturb the public tranquillity. The legality of such detention and arrest could not be challenged in a court of law since the jurisdiction of the court was ousted.

As a result the Regional and Area Commissioners extensively abused this power by detaining suspected criminals, persons who resisted self-help projects, political 'detractors' and even those who refused monetary contributions to the ruling party.³⁰² Dr. Nyerere, encouraged the

²⁹⁶HOWARD, R. E., p. 157.

²⁹⁷LUGAKINGIRA, K. S. K., (1990), p. 109.

²⁹⁸The Preventive Detention (Amendment) Act, 1985.

²⁹⁹See the discussion in chapter seven.

³⁰⁰Cap. 461.

³⁰¹Cap. 466.

³⁰²See the Nyalali Commission Report, op. cit., p. 6.

Commissioners to extensively use their powers of detention to detain political trouble makers. This could be done by renewing the forty eight-hour detention periods as often as they could and where necessary to seek presidential approval to hold the culprit for longer periods.³⁰³

The case of *Hamisi Masisi and 6 Others v. R*³⁰⁴ illustrates the abuse of power under the Act by the Regional Commissioner. In that case the Resident Magistrate released the accused persons on bail on various terms. The order aggrieved the Region Commissioner of Mara one Joseph Wassira who in return made an order that the accused persons be re-arrested and detained should the court reject the prosecution's application for cancellation of bail order. Unjustifiably the Resident Magistrate cancelled his earlier order. According to him, he decided so in order to avoid a conflict between the executive and the judiciary. The High Court found that the Resident Magistrate was wrong to succumb to executive pressures and vary or cancel his previous order for bail. Mfarila, J., warned the Regional Commissioner that re-arresting the accused persons was illegal and abusive of the powers vested in him under the Act. The learned judge seriously remarked:

“...the Regional Commissioner could not have re-arrested the accused persons again for the simple reason that he would have no powers to do so. Section 7 (2) of the Regional and Area Commissioners Acts (Amendment) Act, 1963 is relevant. The Regional Commissioner could only do so if he wished to add to his list of illegal and high handed actions. In that event appropriate action would be taken against him.”

Continued application of these laws violates the right of appeal which is a component of fair hearing as guaranteed by the Constitution.³⁰⁵ It is also violation of various international and regional instruments to detain people

³⁰³Ibid.

³⁰⁴High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 54 of 1978, unreported.

³⁰⁵Article 13 (6) (a).

without trial. It should be noted that the International Covenant on Civil and Political Rights is against arbitrary arrests or detention³⁰⁶ and where a person has been deprived of his liberty on criminal charge the Covenant requires prompt trial by a judicial authority.³⁰⁷ Further, it specifically demands treatment with humanity and respect any body deprived of his liberty by arrest or detention.³⁰⁸ Similarly the African Charter on Human and Peoples' Rights, 1981 prohibits arbitrary arrests and requires a quick trial of the arrested person by an impartial court.³⁰⁹

3:1:2:2 Curtailment of freedom of movement and arbitrary arrest

In 1969 after the Arusha Declaration the Resettlement of Offenders Act, 1969³¹⁰ was enacted as a means of eradicating crimes from society. Its main objective was 'to resettle "habitual offenders" and rehabilitate and re-integrate them in society'.³¹¹

It empowered the minister responsible for prisons to make a resettlement order in respect of any person convicted of a scheduled offence by a court.³¹² A scheduled offence meant any offence under the Witchcraft Ordinance, 1928 and any offence covered by the Minimum Sentences Act, 1963.³¹³ The resettlement orders, made by the minister under this Act, were not subject to review by any court.³¹⁴

This Act subjected the convict to double punishment in that it gave power to the minister to punish a person within thirty days, after serving the court sentence, by issuing a resettlement order requiring him to leave a place of residence of his choice and settle in the designated area popularly known as

³⁰⁶Article 9 (1).

³⁰⁷Article 9 (3).

³⁰⁸Article 10 (1).

³⁰⁹Articles 6 and 7.

³¹⁰Act No. 8 of 1969.

³¹¹See the Nyalali Commission Report, op. cit., p. 14.

³¹²Section 4.

³¹³Act No 29 of 1963.

³¹⁴Ibid., section 16.

the *settlement centre*. The government used this Act to resettle political dissidents although the objective of the Act was to rehabilitate and reintegrate *habitual offenders* as a means of reducing the crime rate. Unfortunately the Act did not give a definition of *habitual offender*, and anybody could qualify on the simple allegation of being *dangerous*.

Among the early victims of this piece of legislation were thirty Wanyambunda of Mbeya who were detained and finally resettled on the allegation of using witchcraft to influence people not to join Ujamaa Villages.³¹⁵ Also the police used this Act to obtain the detention of people whom they believed had committed offences but against whom they had insufficient evidence to secure a conviction in court.³¹⁶ It is an offence attracting twelve months imprisonment sentence, not to comply with the resettlement order.³¹⁷ The order for resettlement was not affected by the imprisonment sentence following the offender's non-compliance but it could be carried out on completion of such sentence.

Although the *settlers* were supposed to be free, the settlement centres resembled a minimum security prison.³¹⁸ Their movements were restricted. They could be released and set free by order of the minister³¹⁹ or when pardoned by the President especially during the national holidays.³²⁰

Mroso, J., in *Samwel Kubeja v. R.*,³²¹ underscored the requirement that the *settlers* should be free when living at the centres. He outlawed the attempt by the Minister and officers in charge of centres to detain the *settlers* in custody or in prison. The applicant in this case was a person who was served with a settlement order. On arrival at Songwe Settlement Centre he was

³¹⁵ WILLIAMS, D., (1973), p. 196.

³¹⁶ See the Nyalali Commission Report, op. cit., p. 15.

³¹⁷ Section 13.

³¹⁸ See the case of *Samuel Kubeja v. R.*, High Court of Tanzania at Mbeya, Miscellaneous Criminal Application No 15 of 1981, unreported.

³¹⁹ Act No. 8 of 1969, section 15.

³²⁰ WILLIAMS, D., (1982), p. 97.

³²¹ [1981] T.L.R. 72.

confined and kept under close guard by armed prison officers. He considered that confinement as tantamount to unlawful detention and contrary to the letter and spirit of the Resettlement of Offenders Act, 1969. Hence an application for the removal of such restrictions. In granting the application Mroso, J., remarked:

“It would appear that once a settler is at his centre, he should only be subject to the usual conditions of residence,...I am of the firm view that the confinement in a securely fenced area of the resettlement centre to which the applicant has been placed and where he is constantly guarded by armed prison wardens is unlawful.”

This is an example of a judge standing up for human rights before the Bill of Rights was enshrined in the Tanzanian Constitution.

In a bid to lead the country to fast economic development, the government found itself taking part in massive violations of individual fundamental rights. The enactment of the Human Resources Deployment Act, 1983³²² subjected the people to unwarranted arrests and forced labour. It made provisions for the establishment of a machinery to regulate and facilitate the utilisation of the human resources available within Tanzania in the best economic interest of the nation. The Act aimed at engaging all able-bodied persons in productive work following the country's 'worst economic performance since independence.'³²³ In the early eighties the country was faced with scarcity of locally manufactured and imported goods and food rationing was inevitable. In order to ensure production the government resorted to various means including legislation and use of force especially in agricultural sector.

³²²Act No. 6 of 1983.

³²³SHAIDI, L. P., p. 82.

Under the Act the minister was required to work out a scheme 'for the purpose of ensuring that all residents who are capable of working, work more skilfully and productively.'³²⁴ Furthermore, the minister was also required to promote 'full deployment of available human resources' and to establish 'organs devoted to that purpose'.³²⁵ To cap it all, very wide powers were vested in the minister to make arrangements for transfer or any other measure which would provide for 'rehabilitation and full deployment of persons charged with or previously convicted of being idle and disorderly'³²⁶ or 'a rogue and vagabond.'³²⁷ He had the power to take similar measures against anybody whom he could identify as 'an unemployed resident'³²⁸ especially in the towns. In implementing the directives under the Act, local authorities were given power to enact bye-laws to that effect and the Regional and Area Commissioners supervised the exercise.³²⁹

Gross violations of human rights by the authorities under the Act were experienced at the implementation level. Many urban dwellers were rounded up and randomly detained by the police pending repatriation to their villages of origin after spending a number of days in police custody. Self-employed people such as tailors, shoe-shiners and other unlicensed informal sector petty traders were the main victims of this law. It is said that a considerable number of those arrested were later found to be house-wives and students who were trying to supplement their income by doing part-time jobs.³³⁰ What remained unclear was the criterion for distinguishing a 'loiterer' from a self-reliant hard-working person who instead of being harassed deserved support and assistance from the government.³³¹ As a result innocent individuals and most of the

³²⁴Section 4(1).

³²⁵Section 5(1).

³²⁶Section 26.

³²⁷Section 27.

³²⁸Section 17.

³²⁹LUGALLA, J. L., p. 144.

³³⁰On the catastrophes caused by implementation of the Act see SHAIDI, L., p. 86.

³³¹For classification of what was legal and illegal activities in town see LUGALLA, J. L., p. 151.

unemployed went into hiding to avoid detention, harassment and subsequent repatriation.

The colonial government used similar laws to remove the destitute and the unemployed from the cities and towns.³³² Surprisingly, besides adopting colonial authoritarian laws, the independence government enacted another similar law giving the State further powers to remove the unemployed after criminalising them as 'idle and disorderly persons.' It was declared an offence which attracted a custodial sentence or fine³³³ for any unemployed person to reside in the town or the city since the government had chosen rural areas for all such people. Although the government incurred expense in repatriating unemployed town dwellers to their home villages, most of them returned to the city immediately after receiving their food rations and some cash from the government to begin a new life. The whole operation and the enabling law violated a person's right to choose where to live. Since independence, the government of Tanzania has taken individual freedom of choice of employment as a luxury which the nation cannot afford.³³⁴

It is improper to hold someone criminally liable for his state of unemployment in a country like Tanzania where right to work is still a nightmare. People are increasingly becoming victims of redundancy and graduates are not guaranteed employment after completing their studies. The education system is geared towards passing examinations without considering any acceptable programme for those who may not perform well. Further, the fact that less attention is paid by the government to rural economic structures, does not encourage youths to stay in the villages for a living. Indeed the urban-based wage employees enjoy a better life than village peasants,³³⁵ a factor

³³²See the Townships (Removal of Undesirable Persons) Ordinance, 1944 and the Destitute Persons Ordinance, 1923.

³³³See the Penal Code (Cap. 16), section 176 as amended by the Written Laws (Miscellaneous Amendments) Act, 1983 (Act No. 2 of 1983).

³³⁴McCHESNEY, A., p. 182.

³³⁵LWOGA, C. M. F., p. 64.

which even today contributes to the inevitable migration of young people from rural to urban areas.

Hitherto the police and people's militia in the post-Bill of Rights era arrest people suspected of being idle and disorderly in towns under this law. Despite the Nyalali Commission's³³⁶ call for its immediate repeal, this Act has not been challenged in court and it has given rise to abuse and corruption. The street vendors popularly known as *Machingas* are being harassed, rounded-up and their business stalls demolished by local authority special paramilitary squads. Threats to repatriate them by force to their home villages are repeatedly aired but the government of the day hesitates to do this so as not to provide political capital for the opposition parties.

3:1:3 Abolition of political parties and trade unions

It has been mentioned earlier in this work that Tanganyika was a multi-party state at the time of independence. Initially TANU coexisted with other opposition parties, some of whom had been formed immediately after independence. These parties appeared strong enough and politically determined to compete with TANU the then ruling party. As a result TANU used the advantage of being the government in power to suffocate the opposition groups in the same way as it had been suppressed by the colonialists.³³⁷ Eventually the government in power was successful in abolishing all opposition parties by officially declaring Tanzania a One-Party State³³⁸ and TANU was the political party under which all political activities were to be conducted. It was a decision of TANU in its annual conference in January 1963 that Tanzania should be a one-party State. Dr. Nyerere the then

³³⁶The Commission was named after the Chairman Francis Nyalali, C. J. It was appointed by the President in 1992 to report on the desirability of Tanzania opting for the multi-party democracy, to make recommendations on constitutional changes and on other laws in order to promote democracy.

³³⁷See MAGUIRE, G., pp. 338-360; PRATT, C., p. 187-188; MLIMUKA, A. K., and KABUDI, P. J., pp. 37-39; MWAUKUSA, J. T., (1990), p. 80.

³³⁸Interim Constitution, section 3.

President and Chairman of the ruling party believed that a one-party policy was a better basis for democracy. He also believed that by establishing one-party policy he could safeguard the nation from disruptive and divisive politics which were suspected of being detrimental to the country's unity and of being an obstacle to quick development.³³⁹

It was a very big contradiction to think of democracy in terms of one-party policy in whose founding no democracy was involved. Such a decision was very sensitive in that it marked a turning point from democracy to authoritarianism and it affected the rights of the citizens to associate and form political parties. Even as a matter of prudence the idea ought to have been tested by the people through public debates and discussion before it was made law. The people were not consulted nor were other political parties involved in making Tanzania a one-party state. It is indeed a distortion of the concept of democracy to use undemocratic means in a bid to establish democracy.³⁴⁰ This was followed by authoritarian rule and the suppression of dissent, as is common in one-party states.³⁴¹ As Lobulu observed, the very prohibition of other political parties was a negation of the right to organise oneself, of the freedom of association and it constituted a serious inroad into the freedom of expression.³⁴²

Not only were the opposition political parties suppressed but also trade unionism was curtailed. Following the army mutiny in 1964, Tanganyika Federation of Labour (TFL) the autonomous trade union, was banned, for it was suspected of having engineered the mutiny. However the truth was that the trade union leaders were repeatedly opposed to the policies of TANU against workers. As a result Kassanga Tumbo, Victor Mkello and many other trade union leaders were detained. While the trade union leaders were in

³³⁹KUMAR, U., p. 123.

³⁴⁰ONG'WAMUHANA, K., (1989), p. 72.

³⁴¹LUGAKINGIRA, K. S. K., (1990), p. 108.

³⁴²LOBULU, B. R., p. 82.

detention, the government hastily introduced a Bill establishing NUTA as the sole trade union.³⁴³ NUTA was not a trade union in the normal sense but the state trade union since it was not autonomous³⁴⁴ and senior officials were appointed by the President. Indeed by affiliating the newly formed trade union with the ruling party, the state managed to control the working class through labour legislation.³⁴⁵ This shows how the government was determined to suppress not only opposition political parties but also all forms of opposition or dissent.

3:1:4 Arusha declaration and nationalisation

The Arusha Declaration spelt out TANU's policy of socialism and self-reliance rooted in equality among people. It preached against the exploitation of one person by another and the accumulation of wealth, tendencies that would be inconsistent with the aspirations of building a classless society. By this declaration of intent, war was waged against poverty with a view to building a state of prosperity. Nyerere found it impossible to achieve the declaration's objectives without first removing what he considered to be 'elements of feudalism and capitalism'³⁴⁶ in the country. According to the declaration development in Tanzania could be achieved if the major means of production were controlled and owned by the people through their government and co-operatives. Following this declaration therefore, all major means of production³⁴⁷ were nationalised so that the national wealth might be evenly distributed.

From the beginning of his career President Nyerere was against private property. The justiciable Bill of Rights, as understood by Nyerere, was

³⁴³See National Union of Tanganyika Workers (Establishment) Act, 1964. Act No. 18 of 1964.

³⁴⁴WELCH, C. E., (1978), pp. 650-652

³⁴⁵KAPINGA, W. B., (1985 A), p. 90.

³⁴⁶NYERERE, J. K., p. 16.

³⁴⁷For example banks, import and export trade, land, mineral resources, communication, electricity, industries, and other private firms.

essentially meant to protect private property in a capitalist framework. To him it was simply meaningless to extend the concept of human rights in a society for which he had already chosen socialism.

The nationalisation policies were carried out without any legal backing but they were validated by Parliament later³⁴⁸ when specific pieces of legislation were enacted establishing public corporations such as the National Bank of Commerce³⁴⁹, the National Insurance Corporation,³⁵⁰ and the State Trading Corporation.³⁵¹

The absence of a legal framework within which the Arusha Declaration was to operate coupled with the conflict it posed with the existing laws caused enormous implementation problems. Land owned under the deemed right of occupancy and other private property such as houses and machinery were taken by the government and given to the newly established Ujamaa villages without compensating the owner. It was impossible for aggrieved parties to obtain redress in the courts. Compensation was not made presumably because politicians believed that peasants would use the compensatory money to develop other areas of their own thereby 'making the goal of villagisation more difficult.'³⁵² The government shielded itself against possible actions arising out of nationalisation and many others by enacting the Government Proceedings Act, 1967.³⁵³ Under that Act a ministerial fiat had to be sought before any one could institute a suit against the government or government official. So the Minister held his fiat until the matter was time barred or the person lost interest or died. There was an extensive use of this law by the government to cover those involved in nationalisation whenever they were

³⁴⁸See MWAUKUSA, J. T., (1991), p. 688.

³⁴⁹The National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act, 1967 (Act No. 1 of 1967).

³⁵⁰The National Insurance Corporation (Vesting of Interests and Regulations) Act, 1967 (Act No. 4 of 1967).

³⁵¹The State Trading Corporation (Establishment and Vesting of Assets and Liabilities) Act, 1967 (Act No. 2 of 1967).

³⁵²JAMES, R. W., p. 4.

³⁵³ Act No 16 of 1967.

sued in their personal capacity. The case of *Patrick Maziku v. G. A. Sebabili and 8 Others*³⁵⁴ illustrates this behaviour. The plaintiff in this case sued the Tabora Region Government officials who were involved in the nationalisation of his milling machines. In the course of the proceeding the Attorney-General applied to be joined as a defendant on the ground that the defendants had acted in the course of their duties as government officials. Despite the plaintiff's objection and fear that if the Attorney-General was joined consent would have to be sought and there was no guarantee that it would be forth-coming, the court granted the application. In the words of Chipeta, J.,:

“...it is not for this court to say whether or not consent would be forthcoming. The court confines itself to the legal procedures in the matter before it. It is not open for this court to inquire into the mind of the Attorney-General and surmise or direct as to what he will , or ought to do”

The suit died naturally, for the plaintiff had to seek ministerial fiat first and the same was never granted.

For unexhausted improvements made on a land owned under the granted right of occupancy compensation would be made. Despite the government's commitment to pay full and fair compensation in respect of the net value of the assets taken over,³⁵⁵ no compensation was promptly made. The government expected to effect compensation by 'instalments'³⁵⁶ out of the profits that the nationalized properties would make.³⁵⁷ These injustices pose more questions as to the way the Arusha Declaration was implemented especially in rural areas. However, Nyerere the founder of this ideology seemed to be against the tendencies which denied compensation when he observed:

³⁵⁴ High Court of Tanzania at Tabora, Civil Case No. 3 of 1982, unreported.

³⁵⁵ See for example Act No. 1 of 1967, section 10.

³⁵⁶ See the Acquisition of Buildings Act, 1971 (Act No. 13 of 1971), section 8 (4).

³⁵⁷ NSEREKO, D. D., pp. 15-16.

“By clearing the ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.”³⁵⁸

From the above seemingly firm position taken by Nyerere in relation to compensation we would expect him to have supervised the implementation of the Arusha Declaration and make sure that ‘fair and equitable compensation was given’³⁵⁹ to those whose property was nationalised. By denying the people compensation for their nationalized property, nationalisation assumed a character of confiscation which is a punitive and retaliatory measure against the victims.

3:1:5 Land reform.

After independence the new government retained the colonial Land Ordinance, 1923³⁶⁰ together with its concept of ‘public land.’³⁶¹ All public lands and rights over it were placed under the control of the President ‘for the use and common benefit of the natives of Tanganyika.’³⁶² Existing rights over land were saved but freehold titles were converted into government leases³⁶³ ‘for a term, at a rent and subject to development condition.’³⁶⁴ Later, government leases were converted into rights of occupancy³⁶⁵ following the Arusha Declaration. Conversion of titles was accompanied by definite and elaborate provisions about rights over the land in modern sector.

³⁵⁸NYERERE, J. K., pp. 53-54.

³⁵⁹SINGH, C., p. 88.

³⁶⁰Cap. 113.

³⁶¹Ibid., section 3 declared the whole of the lands of Tanganyika to be ‘public land’.

³⁶²Section 4.

³⁶³See Freehold Titles (Conversion to Government Leases) Act, 1963. (Cap. 523).

³⁶⁴COLDHAM, S., (1995), p. 228.

³⁶⁵See Government Leaseholds (Conversion to Rights of Occupancy) Act, 1969 (Act No. 44 of 1969).

However, the law gave to the President a wide range of powers including power to revoke any right of occupancy if in his opinion it was in the public interest³⁶⁶ and to refuse compensation if the occupier was 'not ordinarily resident in the United Republic,'³⁶⁷ and to acquire any building where in his opinion 'it is in the public interest so to do.'³⁶⁸ In this way many houses in urban areas were acquired by the government and little compensation was made to the owners.

There was no similar attention by way of legislation paid to customary land rights in rural areas except for the Customary Leasehold (Enfranchisement) Act, 1968³⁶⁹ which enforced the principle of "land to the tiller" by enfranchising certain lands held under customary land tenure and granting such lands to the tenants. Such omission was not an oversight but an intentional move for the independence government like 'the colonial state did not want its hands bound by law in relation to the land rights of customary land holders. These would be treated administratively.'³⁷⁰ In this kind of situation the government was able to deal with such land according to the policy that was adopted at any particular time. As Shivji observed:

"The lack of commitment on the part of the state to secure and guarantee customary rights subjected them to the expediency of administrative policy and action."³⁷¹

Villagisation policy and the way it was carried out stands as an example in support of Shivji's finding. This policy followed the Arusha Declaration and sought to promote socialism and self reliance by resettling all the rural

³⁶⁶Land Ordinance, Cap. 113, section 10 (2), as amended by Land Laws (Miscellaneous Amendments) Act, 1970 (Act No. 28 of 1970) section 7.

³⁶⁷Ibid., section 14C.

³⁶⁸The Acquisition of Buildings Act, 1971 (Act No. 13 of 1971).

³⁶⁹Act No. 47 of 1968.

³⁷⁰See the report of the Presidential Commission on Land Policy (the Land Commission Report) chaired by Professor Issa Shivji, Vol. 1, p. 13.

³⁷¹SHIVJI, I. G., (1994), p. 5.

population in planned villages. It was considered as the best way to bring about rural development in a socialist manner since people would be living together in *Ujamaa Villages*, making it easy for the government to provide them with the necessary infrastructure. Again, there was no legal framework to provide guidance during implementation of the policy. The assistance of legal mechanisms in the implementation was rejected by Nyerere when he issued a policy paper *Socialism and Rural Development* in September 1967, to guide the rural development programme of villagisation.³⁷² This opened room for abuse of power and violation of human rights by the party and other State functionaries which were involved in the implementation.

People were rounded up and sometimes forced against their will to leave their traditional fertile places to join the infertile dry Ujamaa villages whose sites were unsuitable for agriculture and human habitation.³⁷³ In fact some of the land allocated for such villages were confiscated from their original occupiers without compensation.³⁷⁴ This happened because the land policy never protected the occupier of land under customary rights and no sufficient research was conducted before a particular site was chosen for settlement. It was no longer optional but compulsory for people to live in the government villages³⁷⁵ as clearly illustrated by the magnitude of the force used during implementation.³⁷⁶ In this operation the special armed police force (FFU), was used to destroy and burn houses that belonged to those people who were reluctant to move to the government planned villages. It is said that a significant number of people lost their lives in the operation.³⁷⁷

³⁷²WILLIAMS, D., (1973), p. 193.

³⁷³See MAPOLU, H., p. 120; McCHESNEY, A., p. 186.

³⁷⁴See MVUNGI, S., and MWAKYEMBE, H. G., p. 333.

³⁷⁵See the editorial comments in *Daily News*, 8th November 1973.

³⁷⁶On state violence to enforce agricultural change see WILLIAMS, D., (1973), pp. 193-213.

³⁷⁷WILLIAMS, D., (1982), p. 115.

Nyerere wanted to see the policy being implemented immediately, before educating the people about Ujamaa villages since it was crucial and urgently needed for rural development. He was quoted saying:

“Full socialism and its full appreciation by the peasants will come later, but their enrolment into Ujamaa villages must start now as a matter of necessity and urgency.”³⁷⁸

Those who attempted to question his decision were branded as *trouble makers* and were often severely dealt with since they opposed ‘the nation’s chosen path of development and impede the development of the people.’³⁷⁹ This mass policy of compulsory villagisation to promote rural development was the ‘most notable instance of Tanzanian reaction to the divergent strains of liberty and authority.’³⁸⁰ In fact even after 1975³⁸¹ the law remained vague about the rights of villagers.

3:2 Side-stepping the judiciary

Since the government suspected the courts of undermining the efforts for quick development, different methods were worked out as devices to get rid of possible court actions against the interests of the State. The use of the ouster clauses and the establishment of extra-judicial tribunals were the government’s favoured methods of avoiding the judiciary.

3:2:1 Use of Ouster clauses and restricting the court’s discretion

An ouster clause in this context is a phrase in a statute which excludes or restricts the jurisdiction of the court over a particular matter. The

³⁷⁸See *Daily News*, 3rd November 1973 as quoted in WILLIAMS, D., 1973, p. 194.

³⁷⁹See *The Nationalist*, 23rd October 1968 as quoted in MARTIN, R., p. 32.

³⁸⁰READ, J. S., (1973 B), p. 138.

³⁸¹Following the enactment of Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975 (Act No. 21 of 1975).

government through parliament removed from the court the power to entertain certain matters of state interest. This method consolidated the wide powers of the executive and protected it from court action in cases of alleged abuse.³⁸²

Earlier in this chapter we illustrated the authoritarian nature of the Preventive Detention Act, 1962. The President was permitted by this law to detain any one without being questioned since the legality of any order made under this Act could not be challenged in a court of law.³⁸³ Indeed the President was given very wide executive powers which enabled him to infringe individual fundamental rights with impunity.

Also the court's jurisdiction was ousted whenever the minister made a resettlement order in respect of a person convicted of scheduled offence by a court.³⁸⁴ Similarly, when Regional and Area Commissioners detained people without trial under the Regions and Regional Commissioners Act, 1962 and the Area Commissioners Act, 1962, no court of law could review, quash, reverse or interfere with such exercise of their powers. It is interesting to note that the court's jurisdiction was always ousted whenever the executive was vested with very wide powers over the people, the exercise of which was likely to abuse if not controlled.³⁸⁵ By ousting the jurisdiction of the court in certain matters, it meant the affected parties were left at the mercy of the person exercising such powers. It is against the rule of law to treat certain matters as special and beyond the court's jurisdiction or intervention.

The court's jurisdiction was also ousted by imposing statutory restrictions on the traditional discretion of the court especially when considering matters of bail and when sentencing offenders. The Minimum Sentences Act, 1963³⁸⁶ restricted the discretion previously enjoyed by judges

³⁸²For a discussion on the use of ouster clauses by the government to side-step the judiciary, see WAMBALL, M. K., and PETER, C. M., pp. 139 - 141.

³⁸³Act No. 60 of 1962, section 3.

³⁸⁴Act No. 8 of 1969, op. cit., section 16.

³⁸⁵Other such laws include: the Economic Sabotage (Special Provisions) Act, 1983, op. cit.; the Emergency Powers Act, 1986, op. cit.

³⁸⁶Op cit.

and magistrates when sentencing convicted persons. The Act made the infliction of corporal punishment mandatory for those convicted of scheduled offences.³⁸⁷ Although this law was repealed and replaced by the Minimum Sentences Act, 1972³⁸⁸ the restrictions on the courts powers were not removed. The latter simply removed mandatory corporal punishment for scheduled offences and replaced it with increased minimum penalties for property offences. The court therefore had no discretion to pronounce lesser punishment than the one provided under the Act.

In determining the convict's appropriate sentence, the courts usually considered, *inter alia*, the needs of the offender and how he could 'best be re-integrated into the community.'³⁸⁹ Individualisation in sentencing the offender was removed and the court in certain offences could no longer assess the offenders' needs before sentencing him.

There has increasingly been a tendency to deny the courts the jurisdiction to grant bail at its own discretion. Matters of bail consideration are removed from the court's jurisdiction just by a statutory provision, specifying certain offences as non-bailable.³⁹⁰ Also the court's discretion to grant bail to the accused person is completely ousted if the Director of Public Prosecutions certifies in writing that the safety or interests of the United Republic would be prejudiced if the accused person was released on bail.³⁹¹ Indeed, the right to bail seems to depend on the discretion of the Director of Public Prosecutions rather than the courts, even where such right is not completely removed by the statute.

By fixing the minimum sentences and putting restrictions on bail, the government seem to have little trust in judges and magistrates in their judicial

³⁸⁷Sections 5 and 11.

³⁸⁸Act No. 1 of 1972.

³⁸⁹WILLIAMS, D., (1974), p. 89.

³⁹⁰For example the Criminal Procedure Act, 1985 (Act No. 9 of 1985), section 148 (5); and the Economic and Organized Crime Control Act, 1984 (Act No. 13 of 1984), section 35 (3).

³⁹¹See The National Security Act, 1970 (Act No. 3 of 1970), section 19.

functions. It is not clear whether this is a reflection of the government's feelings that the judiciary is undermining its efforts or it is simply an indirect way of exercising judicial powers by the executive. It seems the early suspicion by the post-independence government is still there even when there are no longer foreign judges in the Tanzanian judiciary.

3:2:2 Establishment of extra-judicial tribunals

Unlike the courts of law administrative tribunals have lay composition, do not follow strict legal procedures nor are they concerned with legal "technicalities". This has been the main argument advanced by the government and advocates of *quick justice*. Perhaps the only clear reasons for establishing such tribunals were the government's distrust of the courts and hence the desire to preclude the courts in certain cases of state interest. This can be deduced from the words of President Nyerere during the crackdown on racketeers and economic saboteurs in 1983 when he addressed the nation thus:

“...I ask magistrates to forgive us if we hesitate to take culprits to court of law. At times racketeers have been taken to courts where they either receive light sentences or have been set free...In the courts racketeers could use their ill-gotten money to engage lawyers or use that money to twist the law in their favour”³⁹²

The government thought that persons who were suspected of committing certain crimes that affected the national economy were protected by the law more than it was necessary, especially during trial. Thus, such accused persons' right to secure protection of the law was taken away by the

³⁹²See *Daily News*, 6th April 1983. Also quoted in WAMBALI, M. K., and PETER, C. M., pp. 139-140.

most controversial piece of legislation, the Economic Sabotage (Special Provisions) Act, 1983.³⁹³

This law was enacted for purposes of controlling and eradicating corruption, racketeering, and many other culpable acts not covered by criminal law. It was preceded by the government's declaration of a crackdown against suspected economic saboteurs. Following this crackdown which started on 25th March 1983, people were arrested and detained for months, many for no good reason.³⁹⁴ While the suspects were in custody the Bill was hurriedly drafted but designed to cover the suspects in custody and it was tabled before the National Assembly in April 1983. On the very day it was tabled, there were no debate or discussions about it but within minutes it was passed as law and assented to by the President on 4th May, 1983 having retrospect effect from 25th March, 1983 when the crackdown had started. The whole crackdown was tainted with lots of serious irregularities likely to occasion injustices if not very closely controlled. In any case, these irregularities would not have passed the court's scrutiny. Many offences, which were covered by other laws, were included in the schedule to the Act as "Economic Offences", and were consequently removed from the jurisdiction of the ordinary courts of the land.

All offences under that Act were exclusively triable in a special tribunal known as the Anti-Economic Sabotage Tribunal³⁹⁵ consisting of a chairman (judge of the High Court), and not more than twelve other presidential appointees. The decision of the tribunal was final and conclusive and could not be subject to review by any court or person.³⁹⁶ Any person in respect of whom proceedings were instituted before the tribunal could not be released out on

³⁹³Op cit.

³⁹⁴Some people were detained for being found in possession of drugs obtained through medical prescription.

³⁹⁵Section 5 (1).

³⁹⁶Section 20. Initially the section stated that anybody aggrieved by the decision of the tribunal could appeal to the President whose decision was final and conclusive. Two months later the section was amended by Act No. 10 of 1983 making the tribunal's decision final and conclusive.

bail until the proceedings were concluded.³⁹⁷ Under the Act no advocate could appear before the tribunal to defend the accused person unless he went as a defence witness.³⁹⁸

For the purpose of hearing and determining any matter brought before it, the tribunal consisted of three members under the chairmanship of the High Court judge and the decisions were based on the majority³⁹⁹ whereby the two lay-members could overrule the judge. This happened in the case of *R. v. Nurumohamed Gulamrasul*.⁴⁰⁰ In this case the accused person was charged with the unlawful possession of a elephant's tusks. The lay-members' verdict was that he was not guilty and the judge was bound even though he found the accused guilty. However, he wrote a comprehensive judgment expressing reasons for holding different view from that of the assessors and this led to changing the law to the effect that the judge should not be bound by the assessors' verdict in such cases.

The Economic Sabotage (Special Provisions) Act was unique in many respects and its retrospective effect was a mockery of the process of criminal justice. The persons most affected were the business-men in Kagera Region who were detained and their properties especially motor vehicles⁴⁰¹ acquired by the government. In consequence of the implementation of the Economic Sabotage Act many vehicles and other articles related to transport were placed in police custody resulting in the stoppage of transport activities in the region. In order to alleviate transport problems in the region the government found a solution by acquiring the motor vehicles and sending them back on the road. They were so acquired through an Act of Parliament and were re-granted to

³⁹⁷Section 4 (4).

³⁹⁸Section 13.

³⁹⁹Section 5 (3).

⁴⁰⁰ Reported in *Daily News*, 13th February 1988.

⁴⁰¹Most of them being buses, lorries, trucks and tankers.

the Kagera Region Transport Company which was established following the acquisition.⁴⁰²

Others who were unjustifiably arrested and detained by the Regional Commissioner in implementation of the law, could be released by the special tribunal after trial but the problem was the restoration of their seized property. This can be illustrated by the case of *John Mwombeki Byombalirwa v. The Regional Commissioner and the Regional Police Commander*.⁴⁰³ The applicant in this case was arrested and a substantial amount of his property worth millions of shillings was seized. He was charged with hoarding property before a special tribunal and acquitted. The tribunal ordered immediate restoration of the property seized or the money realised from the sale of such property in case they were already sold. The order was made on 27/08/1984, but until 1986 he had received nothing and he filed an application for *mandamus*. During the hearing of the application the State Attorney admitted before the High Court that the property was seized but:

“They cannot tell if all the seized property was sold and if it was sold they cannot tell how much was realised and if there is any money they cannot tell where it is lying”

Mwalusanya, J., granted the application for *mandamus* after holding that the injustice already done to the applicant were substantial and unwarranted.

The Economic Sabotage (Special Provisions) Act came under fire and was criticised by the international community for its abuse of the due process of law and failure to conform with conventional principles of the administration of criminal justice. It was after eighteen months from the

⁴⁰²See the Kagera Transport Assets (Acquisition and Regrant) Act, 1984 (Act No. 1 of 1984).

⁴⁰³High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 22 of 1986, unreported (reproduced in PETER, C. M., (1997), p. 254).

effective date that the Act was repealed and replaced by the Economic and Organized Crime Control Act, 1984.⁴⁰⁴ This new law brought about fundamental changes in the administration of criminal justice for the suspects of economic crimes. However, the Act still contains a catalogue of "economic offences", most of them being ordinary criminal offences⁴⁰⁵ which were adequately covered by the Penal Code before they were made economic offences.

The National Economic Sabotage Tribunal was replaced by the High Court sitting as an Economic Crimes Court and it was presided over by a High Court judge with two assessors whose decisions were no longer binding on the judge.

Also, the Resident Magistrates Court can now (with the consent of the Director of Public Prosecutions) try such offences as an Economic Crimes Court.⁴⁰⁶ Having restored the jurisdiction of the courts the new legislation restored also the right of an accused person to have legal representation and the right to bail for some offences. Also, convicted persons can appeal, as of right, to the High Court and the Court of Appeal.

Other tribunals determined matters of civil nature. Following the enfranchisement of customary leaseholds, the government gave power to the minister to establish the Customary Land Tribunals for purposes of hearing disputes arising out of such enfranchisement.⁴⁰⁷ The tribunals regarded themselves as special organs in enforcing socialism. As a result they overturned the court decisions that were made before the tribunals came in force⁴⁰⁸ and the new orders of the tribunal were referred to the court for

⁴⁰⁴Act No. 13 of 1984.

⁴⁰⁵For example: hoarding commodities, conveying or having possession of goods suspected of having been stolen or unlawfully acquired, cattle theft and stock theft.

⁴⁰⁶Act No. 13 of 1984, section 12.

⁴⁰⁷Act No. 47 of 1968, section 8.

⁴⁰⁸JAMES, R. W., pp. 12-13

enforcement.⁴⁰⁹As James argues, this embarrassed the judiciary in that the court was asked 'to proceed against a party in whose favour it had decided.'⁴¹⁰

Labour disputes were removed from the jurisdiction of the court and placed under either the Conciliation Board and the Minister⁴¹¹ or the Labour Tribunal established under the Permanent Labour Tribunal Act, 1967.⁴¹² The minister's decision was final and conclusive with regard to any dispute arising out of summary dismissal⁴¹³ and could not be reviewed by any court. Further, all trade disputes were subject to compulsory arbitration proceedings at the Labour Tribunal whose decision was final.⁴¹⁴

The Acquisition of Buildings Act, 1971 gave power to the President to establish and appoint members of the Appeals Tribunal where anybody aggrieved by the acquisition of his building or the amount of compensation might lodge his appeal.⁴¹⁵ However, the decision of the Appeals Tribunal was final and conclusive, not 'subject to review by any court.'⁴¹⁶ The Rent Restriction Act also established the Housing Tribunal and the Housing Appeals Tribunal to take care of the landlord/ tenant disputes.⁴¹⁷ Also the decision of the Housing Appeals Tribunal is final and conclusive.⁴¹⁸

Arguably the pattern of quasi-judicial tribunals tends to suggest that the government ousted the jurisdiction of the court by establishing special tribunals in those areas it considered sensitive or 'likely to cause political and social instability'.⁴¹⁹ All was engineered by the government's desire to have

⁴⁰⁹See Act No. 47 of 1968, section 12.

⁴¹⁰JAMES, R. W., p. 13.

⁴¹¹See the Security of Employment Act, 1964 (Act No. 62 of 1964).

⁴¹²Act No. 41 of 1967. For a detailed discussion see RUTINWA, B., pp. 1-12

⁴¹³Act No. 62 of 1964, sections 27 and 28.

⁴¹⁴The Labour Tribunal became an Industrial Court under the chairmanship of the High Court judge following the enactment of the Permanent Labour Tribunal (Amendment) Act, 1990 (Act No. 3 of 1990).

⁴¹⁵Act No. 13 of 1971, section 10 (1) and (3).

⁴¹⁶Ibid., section 10 (4) and (5).

⁴¹⁷Rent Restriction Act, 1984 (Act No. 17 of 1984), section 6 (1).

⁴¹⁸Section 43 (1).

⁴¹⁹WAMBALI, M. K. and PETER, C. M., p. 140.

institutions which could be easily controlled in avoiding embarrassments caused by the court decisions.

3:3 The reaction of the judiciary

In the wake of these government policies the judiciary found itself working in difficult environment. It was not easy for judicial officers to dispense justice without fear or favour. To certain extent the judiciary was divided in its reaction to the government's way of implementing its development policy. Some judicial officers considered themselves part of the institutions through which the government was to achieve its development objectives. This section of judicial officers supported the government in all ways and could find nothing wrong with most of the policies which obviously attempted to erode the independence of the judiciary. It is very unfortunate that all three Chief Justices in the post-independence government subscribed to this school of thought as reflected in most of their speeches.

3:3:1 The Chief Justices.

Since 1965 the Tanzanian judiciary has been headed by three black Chief Justices: Honourable Philip T. Georges from the Caribbean,⁴²⁰ Honourable Augustine Said⁴²¹ and Honourable Francis Nyalali⁴²² the Tanzanians.

Georges, C. J., turned out to be one of the great supporters of the decision to make Tanzania a one-party state and he conducted his campaign in public. He approved the argument favoured by the leaders of TANU that Tanganyika was a one-party state at the time of independence simply because TANU had a landslide win in the early elections. This view comes out clearly in his speech:

⁴²⁰March 1965-April 1971.

⁴²¹May 1971-February 1977.

⁴²²1977 to date.

“Long before that date, of course, Tanganyika had been in fact a one-party state. Certainly from September 1958 it was clear that no other political party could challenge TANU for mass African support. By November 1960, 58 out of 71 TANU candidates were returned unopposed at an election. TANU won all the contested seats except one.”⁴²³

Although he was quite sure that the idea of one party rule cannot be easily separated from authoritarianism, he still considered the Tanganyika one-party state to be “unique” and markedly different. According to him, the ‘freedom to promote political ideas by the formation of political parties’ in Tanganyika was ‘unnecessary’ and could well be harmful to national unity and national betterment.⁴²⁴ It was in this understanding that he urged the judicial officers to become members of the ruling party when he said:

“...it seems to me that the judicial officer should, if he wishes to, become a member of TANU, and that at this stage this is perhaps desirable.”⁴²⁵

Arguably for a judicial officer, being a member of TANU, meant taking up another oath of allegiance to the ruling party and promoting its policies. Here, the judiciary found itself at a cross road since the ruling party was increasingly substituting political expediency for legality in running its affairs. This conduct, undoubtedly, affected the citizens and the judicial officers were required by their judicial oath to do justice according to law. Independence of the judiciary was indeed threatened by this practice since some judicial officers turned to be excessively enthusiastic about TANU and

⁴²³JAMES, R. W., and KASSAM, F. M., p. 10.

⁴²⁴JAMES, R. W., and KASSAM, F. M., pp. 10-11.

⁴²⁵Ibid., p. 28.

its policies. Later on one had to be a member of the ruling party in order to be appointed judicial officer.⁴²⁶

Said, C. J., also happened to be indoctrinated by the policies of TANU especially that of *Ujamaa*. He regarded himself as a person to look after the interest of the ruling party's policy of socialism in the judiciary. In order to achieve this he assigned to himself, by issuing a circular to all courts in the country, exclusive powers in trying all cases, of civil and criminal nature, involving *Ujamaa* Villages. That circular which required magistrates and judges to send to the Chief Justice for trial all case files involving *Ujamaa* villages, was not well received by judges for it subjected the judicial officers to political considerations. Mwakasendo, J., (as he then was) asked his colleagues to ignore the circular since it was not law at all and Parliament had not enacted any law governing the establishment of *Ujamaa* villages.⁴²⁷ However, many subordinate courts complied with the requirement of the circular by sending the relevant files to the Chief Justice.

As if this was not enough, the Chief Justice was quoted asking the judicial officers to identify themselves with the ruling party by passing decisions which did not oppose the party's progressive idea of *Ujamaa*. In his own words the Chief Justice said:

“Since Tanzania believed in *Ujamaa* then, the interest of many people in land cases should override those of some few individuals. The judiciary could not be used as a tool to oppose *Ujamaa*...as *citizens and TANU members*, the courts are bound to further *Ujamaa*.”⁴²⁸
(Emphasis added).

⁴²⁶It reached a stage where without being a member of the ruling party one could not get a University education.

⁴²⁷For a detailed discussion see WAMBALI, M. K., and PETER, C. M., pp. 135-136. See also PETER, C. M., (1987), p. 238.

⁴²⁸See *Daily News*, 26th September 1972, “Put *Ujamaa* First”, and discussed in WAMBALI, M. K., and PETER, C. M., p. 136.

In 1978 there was another unfortunate concession to political factors by Nyalali, C. J., whereby government policy overrode legality. This is illustrated by the case of *Ally Juuyawatu v. Loselian Mollel and Landanai Co-operative Society Ltd.*⁴²⁹ The plaintiff's mining licence was unjustifiably withdrawn and given with all his equipment to the respondent Co-operative Society in order to promote socialism. When the matter was *sub judice* the Regional Security Committee under the chairmanship of the Regional Commissioner unsuccessfully attempted to have the suit withdrawn from the court and transferred to be heard by the Committee. Following the failure to transfer the file to the Regional Security Committee, pressure came from the Chief Justice who wanted the file to be taken to him immediately. The file was urgently needed 'for action to be immediately taken on it by the Honourable Chief Justice *on instructions of His Excellency the President of the United Republic of Tanzania.*'⁴³⁰ The judge's chambers were invaded and searched, while he was in open court, until the file was found and sent to the Chief Justice. When the file was returned to the judge for hearing, he disqualified himself from further handling of the case for he felt threatened and prejudiced.

The foregoing account illustrates the response of the three Chief Justices to government policy and desire for quick development at the expense of individual fundamental rights.⁴³¹

3:3:2 The courts' reaction

The impact of the approach of the Chief Justices on the rest of the judges and magistrates cannot be over-emphasised. Nevertheless, some of the judicial officers went on looking for every possible way of doing justice to

⁴²⁹1979 L.R.T. No. 6.

⁴³⁰*Ibid.*

⁴³¹We note an apparent change of heart by Nyalali, C. J., since the Bill of Rights became part of the Constitution. However, as we shall see this has largely not been the case when he is attending to matters of state interest. See for example, his interpretation of "freedom of association" in the context of the right to form political parties in Tanzania (footnote 708).

people amidst limitations imposed by the government. To a large extent, the judiciary was positivist in attitude and worked within the confines of the little space that was left by the law. In other words, the judiciary respected what the law stated even if such law happened to be oppressive or violative of individual fundamental rights and freedoms.

3:3:2:1 Reaction to ouster clauses and restrictions

Since the jurisdiction of the court in cases of detention without trial was increasingly ousted, courts of law contented themselves with examining the procedural aspects, authenticity and propriety of the detention orders or warrants without questioning the legality and circumstances which led to the issuance of such orders. This is illustrated by the case of *Ahmed Janmohamed Dhirani v. R.*⁴³² The applicant was challenging, by way of *habeas corpus*, his detention without trial. As usual, the persons concerned were served with the court's summons requiring them to produce a valid detention order before the applicant could be released on bail. After dilly-dallying the Officer in Charge Butimba Prison managed to produce a copy of the detention order. Maganga, J., (as he then was), after satisfying himself as to the existence of the detention order dismissed the application. According to him, although the court was not precluded from inquiring into the genuineness of the order but:

“...once it is established that an order purporting to have been made under the Act is a genuine order, then the courts are stopped from further inquiring into the circumstances under which the order has been made.”⁴³³

⁴³²1979 L.R.T. No. 1.

⁴³³For similar views see *Hanif Ali Ladak's* case, *infra*; *R. v. James Mapalala and Mwinyijuma Athmani Upindo*, High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 30 of 1986, unreported.

This means a court could enquire into the procedural aspects pertaining to the order itself without enquiring into the substance. Formal matters (for example, names, dates, signatures, public seals, place of deportation, etc.) were examined by the court when hearing applications for orders of *habeas corpus* and *mandamus*. If the detention order or warrant lacked the appropriate signature or public seal, or if it mentioned a name other than that of the detainee, then it could be held defective. For example in *Hanif Ali Ladak and Another v. Regional Prisons Officer*⁴³⁴ the judge was prepared to hear the substance of the application for a writ of *habeas corpus* involving a deportation order. We saw in chapter two that any order made under the Deportation Ordinance, Cap 38 is not appellable to the Court. However, because the second applicant claimed that he had never been known by the name which was on the order the court felt bound to examine the merit of that contention and if it could be found true then he would be released. After conducting an enquiry it was established that the name on the order was also the second applicant's name and Mnzavas, J., (as he then was) remarked:

“It is therefore clear in so far as the law is concerned that had it not been for the uncertainty regarding the identification of the second application the court would have no hesitation in dismissing second applicant's application in the same manner it did in respect of the first applicant”

If the order did not state the specific place or resettlement centre where the detainee was to be deported to, then under normal circumstances it would be defective and ineffective in the eyes of the Court. This happened in the case of *In Re: Winfred Ngonyani*.⁴³⁵ In that case the deportation order and detention warrant both were found defective by the court for they failed to specify the place where the detainee was to be deported to. Thus Biron, J., (as he then

⁴³⁴[1981] T.L.R. 68.

⁴³⁵[1982] T.L.R. 272.

was) considered such defect as a 'material irregularity' sufficient to declare the detention unlawful.

Also in the absence of any lawful detention order signed by the President the court always ordered immediate release of the detainee from custody as occurred in the case of *George Washington Maeda v. Regional Prisons Officer Arusha*.⁴³⁶The applicant was arrested and detained in Arusha Remand Prison until his wife filed the application for a writ of *habeas corpus*. The detainee was not told the reason for being detained nor was he taken to court to answer any charge. In the course of the proceeding the State Attorney conceded that there was no any lawful order signed by the President under any of his powers so as to entitle the prison authorities to detain the detainee. The Court made an order for his immediate release.

The absence of specific legislation to act as a framework in the enforcement of Ujamaa villages and villagisation policy did lead the judiciary to repeated intervention. The major problem in the implementation of Ujamaa villages policy was the absence of specific body responsible for the task. There was no legally created body charged with powers to supervise and take responsibility for the exercise in general. Since Ujamaa villages were initially not legal personalities, no suit could be maintained against them. The respondent in *Mbarika Ujamaa Village v. Nyanda Malimi*,⁴³⁷ lost the case on this ground. He had filed a suit against the Ujamaa Village whose cattle had destroyed his crops. The Primary Court awarded him compensation and the appeal to the District Court was dismissed. However, on appeal to the High Court, Maganga. Ag. J., (as he then was) allowed the appeal among other reasons on the ground that:

“...there was no evidence adduced in the trial court that Mbarika Ujamaa Village was a legal entity which

⁴³⁶High Court of Tanzania at Arusha, Miscellaneous Criminal Cause No. 36 of 1979, unreported.

⁴³⁷1975 L.R.T. No. 63.

could sue and be sued. In the absence of such proof a suit could not be maintained against the village.”

That was the situation until 1975 when the Villages and Ujamaa Villages (Registration, Designation and Administration) Act⁴³⁸ was enacted. However, the court entertained suits involving Ujamaa villages through the village chairmen, secretaries or the ruling party in order to redress the aggrieved parties.

Whereas the new idea of socialism was very much opposed to private property, paradoxically the laws which protected private property in Tanzania remained unchanged. As a result, some attempts by the ruling party to interfere with private property in order to promote socialism could not be tolerated by courts especially when such interference was oppressive and unjust. In the case of *Lalata Msangawale v. Henry Mwamlima*⁴³⁹ the appellant's *shamba* and all that was planted in it were confiscated to form part of the Ujamaa village by order of the District TANU Office without compensation. The court held that the appellant was entitled in law to be compensated for his efforts invested on that *shamba*. In his judgment Mwesiumo, J., (as he then was), had this to say:

“In this country we still respect the law on individual ownership of property and since the appellant had invested his labour on that piece of land those other people who took it over should have paid him compensation...”

The same view was taken by Mnzavas, J., (as he then was), in *Laiton Kigala v. Mussa Bariti*⁴⁴⁰ when the plaintiff was expelled from an Ujamaa village without being compensated for his energy used to clear about 60 acres of the village's plantation. Initially the District Administration declined to

⁴³⁸Act No. 21 of 1975.

⁴³⁹1979 L.R.T. No. 3.

⁴⁴⁰1975 L.R.T. No. 40.

execute the compensation decree since such compensation would have a negative 'political implication' amounting to opposing the policy of Ujamaa. However, the High Court rejected the political expediency as substitute for legality and it ordered immediate compliance with the District Court's order for compensation.

3:3:2:2 Interpretation of harsh legislation

It is clear from some of the decisions of the court that due to the authoritarian nature of the Acts which empowered the executive to detain, sometimes without trial, strict interpretation was required. It was also apparent that there was a great need to restrict application of such harsh laws. In line with this thinking was the finding of Mnzavas, J. K, (as he then was), in *D.P.P. v. Simon Marwa and Abdurahman Seif*.⁴⁴¹ The accused persons were charged with possession of a pistol and several rounds of ammunition. Before and during the trial the accused persons were detained under the Preventive Detention Act, 1962. The Subordinate Court found them guilty and referred the case to the High Court for sentencing given the gravity of the offence. The accused persons also appealed against conviction but the appeal was dismissed. However, the learned judge believed that sentencing such accused persons would amount to punishing them twice for the same offence. He was of the opinion that in strict terms the preventive detention amounted to a custodial punishment. Having arrived at this conclusion, the judge refrained from sentencing them. This finding was quashed by the Court of Appeal on the ground that the Preventive Detention Act, 1962 did not create any specific offence.⁴⁴²

What the High Court did in this particular case was to express by way of interpretation the injustices occasioned by such law which tend to remove

⁴⁴¹High Court of Tanzania at Dar Es Salaam, Criminal Appeals Nos. 17 and 18 of 1984, unreported.

⁴⁴²See *D.P.P. v. Simon Marwa and Abdurahman Seif*, Court of Appeal of Tanzania, Criminal Appeal No. 46 of 1984, unreported.

the presumption of innocence to the suspect and as a consequence infringing the individual fundamental rights and freedom. Unfortunately this approach was not followed by the conservative Court of Appeal which did not see the obvious punitive nature of the Act.

Other judges could not see any injustice that was likely to be occasioned by irregularities in the detention orders and as such found that there was no justification for the court's intervention or for the strict interpretation of such harsh laws. The case of *Ahmed Janmohamed Dhirani v. R*⁴⁴³ is an example. The judge, in an application for *habeas corpus*, was simply shown a photocopy of the detention order signed by the Second Vice President and bearing no public seal. In spite of such serious irregularities on the alleged detention order, like the absence of a public seal, signed by someone else other than the President and the failure to produce the original order, the judge was satisfied that the detention order was a genuine one. To him the absence of the public seal on the order was an irregularity which would not invalidate it. In bringing this idea home, the judge said:

“...the order was meant to bear the Public Seal and as such the absence of the Public Seal impression can be attributed to an oversight...”

Although the Act did not empower any other person but the President to make detention orders, the judge presumed that since many laws empowered the President to delegate his powers, he must have exercised that power and delegated to the Second Vice President the power to issue detention orders under the Preventive Detention Act, 1962. Here the judge's assumption of the authenticity of the obviously defective detention order, made him look more executive-minded than legal. The Court of Appeal in the same year provided a

⁴⁴³Op cit.

guidance in the case of *Attorney-General v. Lesinai Ndeinai and Others*⁴⁴⁴ in relation to the circumstances when the detention order signed by the Vice President could be genuine. The High Court ordered immediate release from prison all applicants after the respondents had produced a photostat copy of a detention order made under the Preventive Detention Act, signed by the Vice President but bearing no Public Seal. The High Court found the order to be defective. On appeal, the Court of Appeal held that the absence of a public seal on the detention order was a fatal irregularity making the order invalid, because strict compliance with law and procedure was very important before one's freedom could be taken away.

Also, in the case of *R. v. The Principal Commissioner of Prisons Ex Parte Saidi Hilari*⁴⁴⁵ the judge accepted as genuine a deportation order which did not specify the place of deportation and was signed three weeks after the detention. Although the court held as illegal the detention of the applicant before the detention order was signed by the President, it did not order his immediate release since the irregularity was cured by the belated lawful deportation order. Undoubtedly the judge failed in his duty here as also happened in the case of *Ally Yusuf Mpore v. R*⁴⁴⁶ where the judge, instead of ordering immediate release of the detainee, adjourned the case so that the proper detention order signed by the President could be obtained and get produced in court after the whole detention had been declared a nullity. The applicant was arrested and detained in an intensive campaign to break up the syndicate responsible for a fraud transaction in the army involving 60 million shillings. It was the President who issued the instructions and signed relevant orders for those involved. However, there was no such order in respect of the applicant even during the hearing of the application. As the Court delivered the

⁴⁴⁴[1980] T.L.R. 214.

⁴⁴⁵High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 44 of 1979, unreported.

⁴⁴⁶High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 2 of 1977, unreported (reproduced in PETER, C. M., (1997), p. 619).

ruling letting the applicant at liberty, the respondent asked the court for time to produce within hours the detention order signed by the President. In a rather bizarre way, the court granted them leave and a few hours later, the order was produced. The learned judge rescinded his previous order and the applicant remained in detention.

There was a serious failure by the court to perform its duty in *James Bitu v. Idd Kambi*⁴⁴⁷ when the District Magistrate complied with the District Party Secretary's restrictive note requiring him to refer the case to the party since the dispute was of a political nature. The appellant was dispossessed of his plot of land by the Village Council in dubious circumstances and the same was reallocated to someone else. He successfully instituted a suit in the Primary Court claiming back his land. When the matter reached the District Court on appeal, the magistrate was asked by the District Party Secretary to consult the District Party authority before deciding the case. He complied and let the Party leadership uphold the Village Council's decision dispossessing the plaintiff. The magistrate after receiving the Party's decision, adopted it and wrote a routine judgment but complained against the unfairness of the decision of the Party by which he felt bound. The District Court's decision was quashed by the High Court since Tanzania was not a Banana Republic 'where judges can be dismissed at whims and where judgments are written by rulers.'⁴⁴⁸ The District Court was ordered to hear the appeal on merits.

Another example of the subservient attitude of some of the judiciary is provided in *Mohammed Ahmed v. R*⁴⁴⁹ where Maganga, J. (as he then was), refused to hear an application for *habeas corpus* filed by a person detained during the national crackdown on economic saboteurs. The applicant wanted to know why he was arrested and detained. The judge simply appealed to

⁴⁴⁷Op cit.

⁴⁴⁸See *Re: An Application by Paul Massawe*, High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 21 of 1977, unreported.

⁴⁴⁹High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 16 of 1983, unreported.

intuition and dismissed the application on the ground that any “fool” knew that there was a nation-wide crackdown on economic saboteurs and the court had no jurisdiction. At that time there was no law as yet, which ousted the jurisdiction of the court to entertain such matters. In fact the judge simply relied on the President’s address to the nation that those who were arrested during the crackdown would not be taken to court but their cases would be heard by a special tribunal. Actually that was the time for the court to question the legality of the crackdown and the manner it was carried out and possibly to make a ruling on the president’s intention to pass a law which violated human rights.

3:3:2:3 Abuse of power

By and large, the court played a very important role through its prerogative power to review various excessive administrative actions by the executive. It was in this particular area that a number of judges made a significant contribution. Review of administrative actions required a very strong and independent judge to redress the injured person since the executive was increasingly powerful and in some ways considered itself above the law. The police force and prison officers as State functionaries were often used by the Regional and District Commissioners in exercise of their powers to detain without trial. Sometimes this power was grossly abused and inevitably attracted the court’s intervention as illustrated by the case of *Abdi Athumani and Nine Others v. District Commissioner of Tunduru District and Three Others*.⁴⁵⁰ The businessmen of Somali origin and applicants in this case were refused renewal of their business licences on suspicion of taking part in illegal

⁴⁵⁰High Court of Tanzania at Mtwara, Miscellaneous Civil Cause Nos. 2 and 3 of 1987, unreported. See also *Ally Lilakwa v. Regional Police Commander and Regional Prisons Officer*, infra; *Ramadhani Ally Salum v. R.*, High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 52 of 1980, unreported; *Edward Mlaki and Another v. The Regional Police Commander Kilimanjaro Region and the Secretary Regional Security Committee Kilimanjaro Region*, High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 38 of 1979, unreported (reproduced in PETER, C. M., (1997), p. 265).

dealings in government trophies. As a result, they were served with removal orders issued by the District Commissioners under the Townships (Removal of Undesirable Persons) Ordinance, 1944. The District Commissioners' orders were quashed by the court since the Commissioners had acted beyond their powers by ordering the removal of innocent citizens from their established places in order to satisfy political convenience.

Sometimes the court awarded damages against the executive particularly the Ward Executive Officers for arbitrary arrests and abuse of their powers. For example in *Ernest Masola v. Charamba Ngerengere*,⁴⁵¹ the appellant (Ward Executive Officer) was sued for keeping the respondent under false imprisonment for seven days. The appellant handed over the respondent to the Primary Court messenger who locked him up until when the magistrate came from another station after seven days. As the appellant left no reason behind the respondent's detention the magistrate discharged the respondent on condition that he reported (regularly) at the court should some complaint be made against him. However, the appellant never turned up to make any complaint against him. The court awarded him damages. The appeal was dismissed by the High Court. Awarding damages was not enough such that Lugakingira, J., considered it important to sound a general warning to other state functionaries for such unprecedented abuse of power that:

“...even a police officer who arrests and detains any person for no reasonable cause does so at his own risk.”

Given the extent to which abuse of power by the executive was increasing, criminal sanctions were also meted out by the court against the executive for wrongful confinement. For example in *Mzee Selemani v. R*⁴⁵² the

⁴⁵¹1979 L.R.T. No. 24.

⁴⁵²[1968] H.C.D. No. 364.

Divisional Executive Officer was convicted of wrongful confinement and abuse of office after arresting and detaining the complainant who went to seek a permit to hold a traditional dancing ceremony.⁴⁵³ The Divisional Executive Officer considered the complainant's act to seek a permit as an interruption to his business and he ordered his clerk to arrest the complainant. The Primary Court sentenced him to nine months imprisonment. On appeal the sentence was reduced to three months; otherwise the appeal was dismissed.

It is interesting to note that most of those who suffered penal sanctions for abuse of powers were from the villages executives while the District and Regional Commissioners survived criminal actions. This could possibly be attributed to the protection provided to the latter by a number of laws, which protection was not availed to micro-level executives like the Ward Secretaries.

3:4 Executive attitude towards judicial review

The court's orders and judicial review of administrative actions were not well received by the executive since they were interpreted as making the executive look powerless. Because the executive considered itself very powerful, many court orders which challenged or attempted to limit the executive's powers were avoided or disobeyed with impunity. For example, in *Ahmed Janmohamed Dhirani v. R*,⁴⁵⁴ the Regional Prison Officer who was required to appear in court and produce the detention order or the body of the detainee, in an application for *a habeas corpus*, refused to honour the court's summons on the ground that his title was wrongly addressed. When the court made necessary alterations on the summons, again service could not be effected since he avoided it by not staying in the office and creating a long trip outside the region. The trial judge simply condemned the attitude of the Regional Prison Officer which he described as 'disrespectful to the court'.

⁴⁵³For another conviction see also *Josephat Patrick v. R*, 1979 L.R.T. No. 22.

⁴⁵⁴Op. cit. See also *Edward Mlaki's case*.

Also, in *Re: An Application by Paul Massawe*⁴⁵⁵ the applicant and his driver were acquitted by a District Court of a charge of an attempt to export restricted goods. The court ordered that all goods be returned to them. However, the police acting under the instructions of the Regional Commissioner refused to return the goods to the owners and went on selling them as 'nationalized' goods of a smuggler. This perversity and disregard of established procedures under the law by the Regional Commissioner were attacked by the High Court and monetary compensation equivalent to the value of the goods illegally sold by the Commissioner was ordered.

In some instances the executive used the top police and prison officers to defy the court's orders by issuing instructions that under no circumstances should a particular detainee be released. In *Ally Lilakwa v. Regional Police Commander and Regional Prisons Officer*,⁴⁵⁶ the detainee and others were transferred from Arusha Prison to Dodoma by the orders of Prison and Police Headquarters in Dar Es Salaam, following an application in court to challenge their detention. In fact, according to the submission by the State Attorney there was no lawful detention order against the applicant. Also the police officer (OCD) told the court that they were under instructions from the Inspector General not to release any of the detainees. The detainees were suspected bandits and a campaign had been launched in Arusha to combat banditry. From the observation of Mnzavas, J., (as he then was), the executive in Arusha was repeatedly defying court orders by re-arresting those people whom the court released. The court in all this defiance simply lamented and expressed its disappointment without taking action, like contempt of court, against the executive.⁴⁵⁷ The law existed under which criminal proceedings could be

⁴⁵⁵Op cit.

⁴⁵⁶High Court of Tanzania at Arusha, Miscellaneous Criminal Cause No. 29 of 1979, unreported (reproduced in PETER, C. M., (1997), p. 506).

⁴⁵⁷See for example, *R. v. The Principal Commissioner of Prisons Ex Parte Saidi Hilari*, op cit. The applicant was granted bail by the District Court and while out on bail he was arrested and detained in prison pending deportation to the unknown. He was detained without any valid detention order until after one month when the order signed by President was obtained.

instituted against such officers but nobody 'activated' it. This can be found in the words of Mnzavas J. K. (as he then was) in the case of *Ramadhani Ally Salum v. R*⁴⁵⁸ where he puts it clearly that:

“...at a later stage it may be necessary to activate the law and institute criminal proceedings against any prison officer who aids in the offence of unlawfully confining an innocent person”.

The warning followed the complaint made by the detainee in court and subsequent failure by the Officer in charge Ukonga Prison to produce any legal detention or deportation order duly signed by the President. The detainee spent more than six months in detention simply on the instructions of a certain government official to the Prison officers that he be detained pending legal orders to be signed by the President .

The attitude of the courts towards the executive who defied the courts' orders, show how ineffective the judiciary was in protecting the peoples' rights against infringement by the state.

3:5 Conclusions

Generally speaking, individual fundamental rights and freedoms had small room in the post-independence period. It has been emphasized that the post-independence government used the adopted colonial laws in the same ways they were used by the colonial regime. In fact the post-independence government mixed the use of colonial and new laws depending on the objective that was to be achieved. For example following the army mutiny Kasanga Tumbo was detained under the Preventive Detention Act, 1962 (new law); whereas his colleagues in the labour movement, Victor Mkello and

⁴⁵⁸Op cit.

Sheshe Amiri were deported to Sumbawanga (using the Colonial Deportation Ordinance). In some instances specific laws were enacted to accompany the adopted colonial legislation so as to provide support for the repressive government policies.

We saw how the country's desire for quick development was used to justify the government's authoritarian policies, which to a large extent lacked voluntariness, persuasion or participation. It is interesting to note that government claimed to respect people's ideas and participation in making decisions about development plans. However, in practice things were totally different, since the implementation of government policies was dominated by the use of force. Courts of law were required in difficult conditions to do justice according to law and their power was very much limited. It only remained for a very few bold-spirited judges to give strict construction of the statutes which gave wide powers to the executive when the exercise of such powers was the subject of complaint in court. Human rights in practice after independence and perhaps even today, finds better expression in the words of Lugakingira, J., who states that:

“Theoretically as well as constitutionally the liberty of the subject is regarded as sacrosanct but executive behaviour, aided by an authoritarian political structure and enabling repressive laws, has not lived up to the ideal. The attitude of the courts has been characterised by an ambivalence which reflects the idiosyncrasies of the individual actors.”⁴⁵⁹

It is also worth noting here that applications for prerogative orders were filed in court by those few who had access to the extremely limited legal services in the country. It was particularly in the prosperous areas of Arusha and Kilimanjaro that executive actions were mostly challenged in the courts by

⁴⁵⁹LUGAKINGIRA, K. S. K., (1990), p. 211.

the financially able businessmen. Sometimes matters assumed character of a row between the court and the executive.⁴⁶⁰ Indeed the general trend of government's behaviour was highly objectionable and it increased the need to incorporate the Bill of Rights in the Constitution.

⁴⁶⁰See for example *Ally Lilakwa's* case.

PART THREE: THE POST BILL OF RIGHTS ERA

CHAPTER FOUR

THE INTRODUCTION OF THE BILL OF RIGHTS IN THE CONSTITUTION

Despite the government's refusal, the public continued to demand an enforceable Bill of Rights and eventually in 1984 it was enshrined in the Constitution. In this chapter we examine the circumstances under which the government adopted an enforceable Bill of Rights. We look at the government's decision to suspend the justiciability of the Bill of Rights and also the attempts to make the enforceability of those rights very difficult. Finally, we discuss the contents of the Bill of Rights in the light of what people anticipated.

4:1 Background to the introduction of the Bill of Rights in the Constitution

Although for a long time the idea to include the Bill of Rights in the Constitution was repeatedly rejected by the government, there were developments within the country which forced the government to cede to popular demands. In 1983 the National Executive Committee (NEC) of the ruling party CCM⁴⁶¹ initiated the constitutional debates in the country. Following the amalgamation of TANU and ASP, the existing Constitution was amended to conform with developments that brought into being one political party for Tanzania mainland and Zanzibar. Many matters regarding the union were unclear and had been subject of severe public criticism, given the fact that people of both sides had not been given the opportunity to discuss the

⁴⁶¹TANU and ASP of Tanzania mainland and Zanzibar respectively, amalgamated in 1977 to form CCM.

anticipated union before it came in force. The ruling party therefore, considered these constitutional debates a means of saving face.

However, the ruling party (CCM) was determined to control the constitutional debates. The NEC provided the terms of reference by publishing a manual which proposed the areas in the Union Constitution and the Zanzibar Revolutionary Government Constitution on which the debate should focus. The said areas were basically five, namely: (a) the President's powers under the Constitution, (b) the strengthening of Parliament, (c) the consolidation of the union, (d) the representative character of the National Assembly, and (e) the strengthening of the people's power.⁴⁶² The enshrinement of a Bill of Rights in the Constitution was not one of the terms of reference proposed to govern the debate on the intended constitutional amendments.⁴⁶³ This was a deliberate omission since history had shown that the government was against the idea of having a justiciable Bill of Rights.⁴⁶⁴

However, popular debate was not confined within the parameters provided by the NEC. In the course of the debate, the people themselves initiated a discussion on the need to incorporate a Bill of Rights in both Constitutions. Going by the Tanzanian government's tradition, one would have expected objections to be made to the introduction of a new area of discussion, which was not covered by the terms of reference but that was not the case.

Also, within the NEC itself there were some people who had narrowly escaped the national crackdown against so-called economic saboteurs, and who were keen to ensure that the abuses of power committed during that campaign did not recur. Many of them supported the idea of human rights in furtherance of their own economic interests and advanced the argument that foreign investors needed property guarantees before they would decide to invest in the country. It should be noted that this argument sounded more

⁴⁶²CHAMA CHA MAPINDUZI.

⁴⁶³KABUDI, P. J., (1991), p. 272.

⁴⁶⁴ See the discussion in chapter three.

convincing since it carried with it the economic substance which was in line with the government's strategy for economic reform and trade liberalisation.⁴⁶⁵

The people were continually demanding the Bill of Rights through newspapers, radio and seminars, the incorporation of a Bill of Rights in the Constitution. However, others, especially the executive, opposed the idea by advancing the same reasons which the government had always used to reject such demands.⁴⁶⁶

In Zanzibar the debate was intense and the public vigorously demanded a Bill of Rights in the Zanzibar Constitution. To the Zanzibaris a Bill of Rights in the Constitution would end the prolonged historical oppression imposed by the Arab land owners,⁴⁶⁷ and protect them from the tyranny they had suffered under the revolutionary government.⁴⁶⁸ They felt that they would lose their autonomy and be in a danger of being absorbed by mainland Tanzania unless their Constitution was amended to incorporate a Bill of Rights. Also experience had shown them that it was wrong to bank on the assumption that the leader in whose hands people's rights were placed would always restrain himself from abuse of his powers.⁴⁶⁹

Shivji argues that, taking the Tanzanian tradition, the idea to have a Bill of Rights in the Constitution might have been ignored had it not been for the Zanzibaris insistence on including a Bill of Rights in their Constitution regardless of whether or not one was included in the Union Constitution.⁴⁷⁰ It would have been ridiculous to include a Bill of Rights in the Zanzibar Constitution and leave the Union Constitution without any such provisions.

⁴⁶⁵About other factors that contributed to the government's back-down, see MWAIKUSA, J. T., (1991), pp. 690-691.

⁴⁶⁶See chapter two.

⁴⁶⁷PETER, C. M., (1990), p. 5.

⁴⁶⁸The Zanzibar's first Constitution after independence contained a Bill of Rights but it was cancelled by the 1964 revolution. Harsh decrees were then promulgated providing for detention without trial and confiscation of private property.

⁴⁶⁹KABUDI, P. J., (1995 B), p. 274.

⁴⁷⁰SHIVJI, I. G., (1987), p. 132.

The government, therefore, found itself in a difficult situation to reject further the idea of including the Bill of Rights in the Constitution.

Although Tanzania is one of the countries which adopted the African Charter on Human and Peoples' Rights in 1981, the government had not contemplated seriously the idea of incorporating a Bill of Rights in the Constitution until it was caught unaware by the course the debate had taken. Since the government had not prepared itself to hit back with the same vigour against these demands it had to make some sort of a 'concession'⁴⁷¹ and include a Bill of Rights in the Constitution.

4:2 Suspension of the justiciability of the Bill of Rights

Since time was too short to amend all potentially violative laws before the Bill of Rights was incorporated in the Constitution, the government proposed that its justiciability be suspended. Thus the legislature enacted the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 to the effect that:

“No existing law or any provision in any existing law may, until after three years from the date of the commencement of the Act, be construed by any court in the United Republic as being unconstitutional or otherwise inconsistent with any provision of the Constitution.”⁴⁷²

The foregoing is a tacit admission by the government that there were many laws which infringed fundamental rights and freedoms, and that the immediate application of the Bill of Rights would lead to many laws being declared unconstitutional or inconsistent with the Constitution. Initially no reasons were given to the people as to why the justiciability of their

⁴⁷¹PETER, C. M., (1990), p. 5; SHIVJI, I. G., (1987), p. 132.

⁴⁷²Section 5 (2).

constitutional rights was suspended. However, most of them got the impression that the government needed sufficient time to put its house in order before the Bill of Rights could be enforced. Although the Act could be criticised for delaying the enforceability of the people's long-awaited rights and freedoms, on the other side it could be taken to reflect the government's seriousness and commitment to protect individual fundamental rights and freedoms. Thus some people could not see any thing wrong with the Act which gave to the government sufficient time for taking appropriate action and bringing all existing laws into conformity with the enshrined basic rights.

The Chief Justice Francis Nyalali was among the optimists in support of the three-year period of grace which the government granted to itself. In the view of the Chief Justice, it was imperative for the government to suspend the justiciability of the Bill of Rights for a certain length of time, 'in order to avoid chaos and promote constructive change in the legal sector'.⁴⁷³ This also was the explanation and the only justification given by the Minister for Justice and Attorney-General a few months before the Bill of Rights became justiciable.⁴⁷⁴

However, the period of three years passed without the government making any significant reform of its laws. It was only the Preventive Detention Act, 1962⁴⁷⁵ which was amended.⁴⁷⁶ The amendments to the Preventive Detention Act introduced some changes.⁴⁷⁷

Perhaps what many people found most objectionable was the government's behaviour during the three years when the justiciability of the Bill of Rights was suspended. The government behaved as if respecting fundamental rights had also been suspended. During that period the government issued an order by way of Subsidiary Legislation, the Extinction

⁴⁷³NYALALI, F., p. 4.

⁴⁷⁴LUBUVA, D, Z., p. 853.

⁴⁷⁵Cap. 490.

⁴⁷⁶See Preventive Detention (Amendment) Act, 1985, (Act No. 2 of 1985).

⁴⁷⁷We discuss these changes in chapter seven, see footnotes 828 and 829.

of Customary Land Rights Order, 1987⁴⁷⁸ which was in total conflict with the right to private property as enshrined in the Bill of Rights. The Order extinguished pre-villagisation customary rights of occupancy in the lands confiscated by the government in Arusha region during a country-wide operation in the rural areas.⁴⁷⁹ Later, as the order was challenged in court it was incorporated in a statute.⁴⁸⁰ It was disturbing to see such measures being taken by a government which had already expressed commitment to create an environment of respect for human rights.

Most disturbing was the Attorney-General's statement, a few months before the expiry of the said three years period of grace. He said that the government was not ready to amend or repeal the laws which were inconsistent with the Constitution since such repeals or amendments would lead to chaos and disruption of the legal system.⁴⁸¹ This conflicted with the spirit of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984.

Everything was left in the hands of the judiciary to declare such laws unconstitutional whenever the time allowed. The power of the judiciary to declare any law unconstitutional was also weakened and made difficult by the Basic Rights and duties Enforcement Act, 1994⁴⁸² and also by the Constitution itself through the derogation clauses and claw back clauses. The people felt betrayed by their own government to which they had put much trust and fundamental basic rights remained simply rights on paper if they could not be effectively enforced.

Unlike Tanzania the justiciability of fundamental rights in India was not suspended⁴⁸³ although some existing laws were inconsistent with the

⁴⁷⁸GN. No. 88 of 1987.

⁴⁷⁹See a discussion in chapter four about villagisation.

⁴⁸⁰We discuss about this order in chapter seven.

⁴⁸¹LUBUVA, D, Z., p. 853. Damian Lubuva the Attorney-General was later appointed Justice of Appeal.

⁴⁸²Act No. 33 of 1994. See for example section 13.

⁴⁸³See The Constitution of India, 1950, Article 32 (4).

Constitution. The Constitution itself declared void any provision of law that was inconsistent with fundamental rights immediately before the commencement of the Constitution.⁴⁸⁴ Also it barred the state from taking away or abridging the rights conferred and any future laws made in contravention of this clause would be 'void to the extent of the contravention'.⁴⁸⁵ It is not clear why such an idea was not imported by the Tanzanian government.

4:3 Contents of the Bill of Rights.⁴⁸⁶

The government's unwillingness to allow the meaningful realisation of the basic rights and freedoms by the citizenry can also be found in the contents of the Bill of Rights. By this we are referring to Part Three of Chapter One of the Constitution which is about basic rights and duties.

The provisions of Part Two of Chapter One of the Constitution which provides for the fundamental objectives and directive principles of state policy, otherwise known as the guiding principles, are not 'enforceable by any court'⁴⁸⁷ but they are fundamental in the governance of the country. The government, all its organs and all persons exercising executive, legislative or judicial functions have a duty and responsibility to 'to take cognisance of, observe and apply' them.⁴⁸⁸ The guiding principles therefore, 'lay down the path of the country's progress towards the allied objectives and aims stated in the preamble'⁴⁸⁹ to the Constitution. They express the rule of law, equality, self reliance, democracy and prevention of exploitation as key objectives of the government.⁴⁹⁰ These represent a clear ambition to create a system in which

⁴⁸⁴Article 13 (1).

⁴⁸⁵Article 13 (2).

⁴⁸⁶See appendix.

⁴⁸⁷Article 7 (2).

⁴⁸⁸Article 7 (1).

⁴⁸⁹ SING, D. K., p. 181.

⁴⁹⁰See Articles 8 and 9.

the government takes responsibility for the well-being of its citizens.⁴⁹¹ It is this particular part of the Constitution which in addition to declaring the national policy, also puts an emphasis on the need to maintain 'the dignity of man through full compliance with the provisions of the Universal Declaration of Human Rights.'⁴⁹²

A number of human rights as contained in the Universal Declaration of Human Rights, 1948 were adopted by the Tanzanian Bill of Rights albeit some were left to be included in the non-justiciable part of the Constitution. It was once argued by the present Chief Justice that if the entire Universal Declaration of Human Rights was included in the Bill of Rights and be justiciable, the country would be thrown into 'frequent conflicts which could undermine national stability'⁴⁹³ because of weak and inexperienced institutions to contain constitutional conflicts. This is a common argument used by the authoritarian governments in developing countries. To avoid these possible conflicts a provision was made such that failure to comply with the guiding principles by any state authority or agencies could not constitute a cause of action.

Other Commonwealth countries like India⁴⁹⁴ and Nigeria⁴⁹⁵, also included the fundamental objectives and directive principles of state policy in their respective Constitutions providing for specific policy goals or long term national ideals⁴⁹⁶ 'which are expected to be realised by the government.'⁴⁹⁷ Tanzania must have adopted this style from the Indian Constitution. It is Part Four of the Indian Constitution that provides for the directive principles of state policy. Like in Tanzania, the directive principles under the Indian

⁴⁹¹See Article 11.

⁴⁹²Article 9 (1) (f).

⁴⁹³NYALALI, F., p. 2.

⁴⁹⁴See the Constitution of India, 1950, Part IV.

⁴⁹⁵See the Constitution of the Federal Republic of Nigeria, 1979, Chapter II. See also a discussion in READ, J. S., (1979 A), pp. 131-169.

⁴⁹⁶KABUDI, P. J., (1995 A), pp. 84-95.

⁴⁹⁷EHINDERO, S. G., p. 46.

Constitution are not enforceable by any court but the state is under duty 'to apply these principles in making laws.'⁴⁹⁸ We note a different position with the Nigerian Constitution which is silent about the enforceability of such directive principles. Because the Constitution does not categorically provide for their non-enforceability we can rightly conclude that in Nigeria they are enforceable like any other provision of the Constitution. As for Tanzania and India it is our submission that, although they are not enforceable the courts may not entirely ignore them 'but should adopt the principle of harmonious construction and should attempt to give effect to both as much as possible'.⁴⁹⁹

4:3:1 Basic Rights.

These are the fundamental rights and freedoms enforceable in the High Court by any person who thinks that his constitutional rights have been violated or are about to be violated.⁵⁰⁰ They include the rights of equality,⁵⁰¹ the right to life,⁵⁰² freedom of conscience,⁵⁰³ and freedom of work.⁵⁰⁴ The rights of equality covers a wide range of things including equality before the law and provisions against: discrimination, torture or inhuman or degrading treatment, and retrospective legislation. However, unlike the Indian Constitution⁵⁰⁵ the Tanzanian Bill of Rights does not take into account discrimination on grounds of sex. Thus discrimination on grounds of sex is not included in the attributes of 'discriminatory' treatment as defined by the Constitution.⁵⁰⁶

This part also provides for a fair trial, the right to be heard, and the presumption of innocence. The right to life contains articles which provide for

⁴⁹⁸The Constitution of India, 1950, Article 37.

⁴⁹⁹SING, D. K., pp. 179-180.

⁵⁰⁰Article 30 (3).

⁵⁰¹Articles 12 and 13.

⁵⁰²Articles 14-17.

⁵⁰³Articles 18-21.

⁵⁰⁴Articles 21-24.

⁵⁰⁵Article 15 (1).

⁵⁰⁶See Article 13 (5).

the guarantee of the right to live, the right to personal freedom, the right to privacy and personal security, and the right to freedom of movement. However, the right to personal freedom can be taken away in certain specified circumstances.⁵⁰⁷

It is very interesting to note that although the Indian Constitution provides for protection of life and liberty, yet it accepts prevention detention for not more than three months unless the Advisory Board 'has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention'.⁵⁰⁸

The right of freedom of conscience contains articles that guarantee the right to freedom of expression, the right to freedom of religion whereby worship and propagation of religion are regarded as private affairs of an individual, subject to the relevant laws of the land. Right to freedom of association is also guaranteed under this group but subject to the laws of land and it includes:

"The right to assemble freely and peaceably, to associate with other persons and, in particular to form or belong to organisations or associations formed for the purposes of protecting or furthering his or any other interests."⁵⁰⁹

The right of freedom to work has been provided guaranteeing the right to work and the right to fair remuneration according to the quality and quantity of the work done. It can be argued that the right of freedom to work is a unique and significant step taken by Tanzanian government as an attempt to guarantee the people that they have the right to work in order to live. This is 'unfamiliar to traditional Bills of Rights in the Western European tradition.'⁵¹⁰ However,

⁵⁰⁷See Article 15.

⁵⁰⁸The Constitution of India, 1950, Article 22 (3) (b) and (4).

⁵⁰⁹Article 20 (1).

⁵¹⁰KABUDI, P. J., (1995 A), p. 87.

the right to work has to be read with the constitutional duty of an individual to participate in work⁵¹¹.

More significant is the constitutional recognition of the right to acquire and own private property. Immediately after independence Tanzania modelled itself along socialist concepts of collective ownership of property. That is why, as we saw in chapter three, the government nationalised all the commanding heights of economy which were formerly privately owned. Ownership of private property like houses and motor vehicles was regarded as contrary to socialism. Actually those buildings whose value exceeded a certain amount of money were nationalised⁵¹² and their owners were not adequately compensated. The Bill of Rights included the right to acquire and own private property thereby preventing a repeat of 1967 when people lost their property because of nationalisation. Thus:

“...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 shall set out conditions for fair and adequate compensation.”⁵¹³

4:3:2 Duties to the society.

Unlike many other bills of rights, the Tanzanian one has another unique feature whereby people are subjected to a catalogue of duties and obligations to the society while they enjoy the fundamental rights under the Constitution.⁵¹⁴ The Indian Constitution also has a chapter on the duties of the individual to the society.⁵¹⁵ In Nigeria the duties of the citizens were introduced by the 1989 Constitution and formed part of the fundamental

⁵¹¹ Article 25.

⁵¹² See the Acquisition of Buildings Act, 1971, section 6 (1) (a).

⁵¹³ Article 24 (2).

⁵¹⁴ Articles 25-28.

⁵¹⁵ For a discussion on the Indian Constitution and Tanzanian Constitution with relation to the duties of an individual to the society, see *D.P.P. v. Daudi Pete*, *infra*.

objectives and directive principles of state policy.⁵¹⁶ Thus Part II of the Constitution of Nigeria encompasses the duties of the state and the duties of citizens. The duties of an individual to the society under the Tanzanian Constitution include the duty to participate in work, the duty to abide by laws, and the duty to safeguard public property.

Following what is contained in the Preamble to the African Charter on Human and Peoples' Rights it can be argued that the framers of the Tanzanian Bill of Rights drew inspiration from the Charter. The Charter was guided by the fact that 'the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone.'⁵¹⁷ Since an individual lives in a community, he owes certain duties to the society in which he belongs. The duty of an individual to the society is also reflected in the limitations imposed by the Constitution for the better enjoyment of the rights and freedoms by all people. That is to say, every one is enjoined to enjoy his rights and freedoms in such a way that the rights and freedoms of others or the public interest are not prejudiced.⁵¹⁸ Tanzania adopted this guidance for its Constitution.

The Bill of Rights provides for the right to work and right to fair remuneration but on the other hand it imposes a duty to work. The right to fair remuneration for example is a constitutional right but cannot be enjoyed if one does not fulfil his duty to participate in lawful and productive work.⁵¹⁹ Everyone is under obligation to participate in work and to observe labour discipline. Although forced labour is prohibited,⁵²⁰ certain types of labour are cleared of being forced labour including compulsory national service and labour required of any person in the event of any emergency or calamity.⁵²¹

⁵¹⁶Constitution of the Federal Republic of Nigeria, 1989, section 24.

⁵¹⁷ The African Charter on Human and Peoples' Rights, 1981, Preamble.

⁵¹⁸See Articles 29 (5) and 30 (1).

⁵¹⁹ Article 25 (1) (a).

⁵²⁰ Article 25 (2).

⁵²¹ Article 25 (3).

It is the duty of every person to abide by laws,⁵²² to safeguard state and communal property and to respect another person's property.⁵²³

4:3:3 Limitations.

4:3:3:1 Derogation and clawback clauses

According to Karl Marx, the limitation clauses in all bourgeois constitutions tend to destroy the liberty clauses in the same constitutions.⁵²⁴ As an amplification to this, Shivji pointed out two basic types of such clauses often used by the state as a legal technique to limit the scope within which people can enjoy their rights and freedoms. These are 'clawback' and derogation clauses, serving the following situations:

“Clawback clauses permit restriction of granted rights *ab initio* according to domestic law without specifying the circumstances or criteria for such limitation. Derogation clauses, on the other hand, permit limitation of rights only on the occurrence of certain events and then too for a specified period.”⁵²⁵

The Tanzanian Bill of Rights is fraught with limitation clauses. Many rights are qualified by phrases like “in accordance with law”, “subject to the laws of the land”, “subject to a procedure prescribed by law”, and “without prejudice to law.”⁵²⁶ Also derogation from basic rights and freedoms is permissible under the Constitution especially during periods of emergency or when state security is at stake.⁵²⁷

Article 30 (2) of the Constitution also contains the substance of a clawback clause for it validates the laws and acts which violate individual

⁵²² Article 26.

⁵²³ Article 27.

⁵²⁴ MARX, C., and ENGELS, F., pp. 235-237.

⁵²⁵ SHIVJI, I. G., (1987), pp. 136-137.

⁵²⁶ See Articles 14, 15 (2) (a), 16 (2), 17 (2), 18 (1), 19 (1), 20 (2), 21 (1), 24 (1), 26 (2).

⁵²⁷ Articles 31 and 32.

fundamental rights where such laws or acts protect the public interest, or ensure 'the execution of the judgment or order of the court.'

Articles 31 and 32, the derogation clauses, give extraordinary powers to the state to detract, in certain circumstances, from its duty to observe and respect the individual's right to life or to personal freedom. This is more so during periods of emergency or in ordinary times in relation to those who conduct themselves in a manner that endangers national security. However, the derogation clause does not allow or authorize the deprivation of any body's right to live unless such death is 'caused as a result of acts of war.'⁵²⁸

Arguably, the limitation clauses are not unique to Tanzania but do form a common feature in most instruments which provide for human rights. For example, the European Convention of Human Rights also has limitation clauses in relation to the right to respect for private and family life,⁵²⁹ the right to freedom of thought⁵³⁰ and the right to freedom of peaceful assembly.⁵³¹ However, unlike the Tanzanian limitations, the European ones state clearly that such limitations can be imposed as prescribed by law and should be '*necessary in a democratic society*'. For example Article 20 of the European Convention of Human Rights restricts the right to freedom of expression as follows:

- (1) Everyone has the right to freedom of expression...
- (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and *are necessary in a democratic society*, in the interests of national security, territorial integrity or public safety,...(Emphasis added).

⁵²⁸Article 31 (3).

⁵²⁹ The European Convention on Human Rights, Article 8.

⁵³⁰ Article 9.

⁵³¹Article 11.

Under the European Convention therefore the restrictions to the fundamental rights and freedoms should not only be as a certain law may prescribe but also such restriction should be necessary in a democratic society. These are the measurements which the courts has to apply when determining whether or not a certain right ought to be restricted by law or acts. In Nigeria derogation from fundamental rights by law is permissible if the limitation or such law is 'reasonable and justifiable in a democratic society.'⁵³²

Likewise the Indian Constitution allows restrictions to basic rights by law so far as such restrictions are reasonable. See for example Article 19 (2) of the Indian Constitution which provides:

"Nothing in sub-clause (a) of clause 1 shall affect the operation of any existing law, in so far as such law imposes *reasonable restrictions* on the exercise of the right conferred by the said sub-clause in the interest of the security of the state..." (Emphasis added).

Thus it is the duty of the court to determine whether or not the restrictions imposed by certain laws are reasonable or justifiable in a democratic society. However, both the Nigerian Constitution⁵³³ and the Indian Constitution contain provisions which save and validate the laws that potentially take away or abridge the rights conferred. For example, in India Article 31A saves any law that provides for acquisition of estates by the state, and Article 31B validates 83 Acts and Regulations specified in the 9th Schedule to the Constitution from being held inconsistent with the Constitution. Also, following the 1971 constitutional amendments a provision was added saving the laws that give effect to certain directive principles of state policy.⁵³⁴

⁵³²Constitution of the Federal Republic of Nigeria, 1979, section 41 (1) and (2); or the 1989 Constitution, section 43 (1) and (2).

⁵³³The 1979 Constitution, section 40 (2); or the 1989 Constitution section 42 (2).

⁵³⁴The Constitution of India, 1950, Article 31C.

The Tanzanian Bill of Rights simply restricts the rights by 'fairly vaguely drafted phrases'⁵³⁵ like "in accordance with the law" and "public interest". The courts of law sometimes find themselves in a situation where they are forced to speculate the particular public interest that Parliament had in mind when passing a particular legislation.⁵³⁶ More interesting, as we shall see in chapters five and six, was the Attorney-General's constant reference to the clawback and derogation clauses whenever he was asked to show the constitutionality of some offensive laws which happened to be the subject of litigation in court.⁵³⁷ To him, laws which were challenged for violating the fundamental rights and freedoms, were saved by the clawback and derogation clauses and therefore constitutionally valid.

The derogation from basic rights permissible under Articles 30 (2) and 31 of the Constitution appear to be very wide and general. Taking into account all these weaknesses, it has been argued that the Tanzanian Constitution itself takes away with one hand that which it has given with the other. Some critics have regarded the clawback and derogation clauses in the Tanzanian Constitution as rendering the whole Bill of Rights "an empty shell."⁵³⁸ However, Mwalusanya, J., did not agree with this conclusion which he considered to have been arrived at, after "superficial reading of the limitations and restrictions on the Bill of Rights."⁵³⁹ Mwalusanya, J., believes that if the court plays its anticipated role of protecting the liberty of the individual, even the limitation clauses will be construed in such a way that they do not take away the rights guaranteed under the Constitution. Others have taken the limitation clauses in the Tanzanian Bill of Rights, to reflect the "government's stiff reluctance towards entrenchment of rights and freedoms."⁵⁴⁰

⁵³⁵SHIVJI, I. G., (1987), p. 137.

⁵³⁶MWALUSANYA, J. L., p. 32.

⁵³⁷ See for example the submission by Mr. Muna State Attorney in *Daudi Pete v. R.*, and that by Mr. Masaba Principal State Attorney in *D.P.P. v. Daudi Pete*, *infra*.

⁵³⁸MWAKYEMBE, H. G., (1986 B), p. 22.

⁵³⁹ See *Chumchua Marwa's* case, *infra*.

⁵⁴⁰MBUNDA, L. X., p. 156.

As we shall see in chapter five the Court of Appeal in *D.P.P. v. Daudi Pete*⁵⁴¹ laid down strict conditions whereby a law violative of basic rights of the individual could be saved by Articles 30 or 31 of the Constitution.

4:3:3:2 Individual rights vis a vis majority rights

The individual rights under the Tanzanian Constitution are limited to the extent that they do not prejudice the rights of the majority. This can be reflected by the restrictions imposed on grounds of “public interest”, “public safety”, “public order”, “right and freedom of others”, “public morality” and “interests of defence”. It means that the rights of the majority is a competing right when balanced against that of the individual. The rights of the majority override the individual rights according to what the limitation clauses attempt to suggest. To some academic scholars, this should not be encouraged for it may result into “total destruction of the concept of individual rights,”⁵⁴² and courts should make sure that in their interpretation of the limitation clauses “rights of minorities are not subjected to the threat of tyranny of the majority.”⁵⁴³ While the rights of groups should not be ignored, care must be taken so that group interests do not devalue individual interests. The legal system therefore has to harmonize the two sets of rights. In order to achieve this harmony 'the court has to take into account and strike a balance between the interests of the individual and those of the society of which the individual is a component.'⁵⁴⁴

However, a quick survey suggests that the Court of Appeal in *Daudi Pete's* case and Nyalali, C. J's personal views have to a certain extent supported the idea that majority rights outrank individual rights. Arguably, no matter how widely-worded derogation clauses may be, they cannot be

⁵⁴¹Court of Appeal of Tanzania at Dar Es Salaam, Criminal Appeal No. 28 of 1990, reported in [1991] L.R.C. (Const.) 553.

⁵⁴²MBUNDA, L. X., p. 157.

⁵⁴³Ibid.

⁵⁴⁴ *Kukutia Ole Pumbun and Another v. Attorney-General*, infra.

invalidated in so far as they protect the rights of the society vis a vis those of the individual.⁵⁴⁵

Before the Bill of Rights became justiciable, the Chief Justice expressed what would be his interpretation of the limitation clauses in case the individual rights conflicted with the majority rights. According to him whenever there is a conflict between the basic rights or duties of the individual on the one hand, and the rights or duties of the community on the other, the latter should prevail.⁵⁴⁶ His reasoning for the paramountcy of rights and duties of the community over rights and duties of the individual was that:

“...a community in danger or need puts everybody in danger or need, whereas an individual in danger or need is alone in danger or need.”⁵⁴⁷

4:3:3:3 Jurisdiction and enforcement of rights

The Constitution confers exclusive original jurisdiction on the High Court in all matters that relate to the enforcement of individual fundamental rights and freedoms.⁵⁴⁸ This is another limitation on the enforcement of individual fundamental rights and freedoms and it “defeats the principle of easy access to justice”⁵⁴⁹ for there are very few High Court centres as compared to subordinate courts.

As if that was not enough the government went on to limit the enforcement of fundamental rights by enacting the Basic Rights and Duties Enforcement Act, 1994.⁵⁵⁰ This is an Act providing for the procedure for enforcement of constitutional basic rights and duties. The government was required under the Constitution, to make provision with respect to institution

⁵⁴⁵ See *Daudi Pete's* case.

⁵⁴⁶ NYALALI, F., p. 1.

⁵⁴⁷ Ibid.

⁵⁴⁸ Article 30 (3).

⁵⁴⁹ MBUNDA, L. X., p. 158.

⁵⁵⁰ Op cit.

of proceedings, the powers, practice and procedure of the High Court in relation to the hearing of proceedings for enforcement of fundamental rights and freedoms.⁵⁵¹ However, since the Bill of Rights became part of the Constitution in 1984 no such law was enacted until 1995 when the controversial Act No. 33 of 1994 came in force. It is controversial in the sense that it makes the whole procedure of enforcing fundamental rights and freedoms more difficult. It also attempts to make some unusual suggestions as to what the court should do instead of nullifying a statute that may be found to contravene the Bill of Rights.

The constitution of the High Court for the purposes of hearing and determining a petition for the enforcement of fundamental rights and freedoms has been set at a quorum of three judges.⁵⁵² Much as this could be a good idea and a reflection of the seriousness attached to constitutional matters, we find that it potentially defeats the principles of speedy trial and access to justice. Research has revealed that out of eleven High Court centres only Dar Es Salaam, Mwanza, and Arusha have more than two judges. This means that for the rest of the centres a third judge has to be imported in every petition for the enforcement of fundamental rights and freedoms. Given the weak state of the country's economy and the chronic marginalisation of the judiciary in terms of funding, such delays are likely to lead to a denial of justice. This is more so because extra funding will be necessary to keep such additional judges in hotels and paying them allowances. Judges admit that panel cases take a long time to finish and experience has shown that it is very difficult to find a time that would be convenient to all three judges. It is only a preliminary question whether an application is 'frivolous or vexatious' that a single judge can

⁵⁵¹Article 30 (4).

⁵⁵²Section 10 (1).

determine.⁵⁵³ Actually a petition can be dismissed at the preliminary hearing level if found to be 'frivolous or vexatious'.⁵⁵⁴

The decision is by 'the majority of the judges hearing the petition.'⁵⁵⁵ For many people the quorum of three judges and the decision to be based on the opinion of the majority of judges hearing the petition is regarded as a retaliation by the government to Mwalusanya, J's activism and that of a few other judges. The limitation clauses which the government hoped to rely on as restricting the powers of the court in nullifying various pieces of legislation, had proved inadequate. The courts had interpreted those limitation clauses in such a way that they could no longer serve the purpose intended. Thus the government enacted Act No. 33 of 1994 among other reasons as a device to limit the court's power and an attempt to take away its power to declare any law unconstitutional. Section 13 (2) (a) provides:

"the High Court *shall*, instead of declaring the law or action to be invalid or unconstitutional, have the power and the discretion in an appropriate case to allow Parliament or other legislative authority, or the government or other authorities concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court, whichever be the shorter, be deemed to be valid."

Before the draft Bill was tabled in Parliament, it was first presented to the judges of the High Court and Court of Appeal for their opinion. The judges opposed this provision and they suggested, among other things, that it should be deleted since it interfered with the doctrine of separation of powers and it restricted the power of the judiciary by making it play an advisory role to the

⁵⁵³Ibid.

⁵⁵⁴Section 8 (2).

⁵⁵⁵Section 10 (2).

government. However, their views and suggestions were ignored. It would be unusual for the court to give Parliament time to amend the statute which the court has held unconstitutional. In the same vein we find it objectionable for the court to allow government undo the wrongs that were subject of litigation instead of redressing the petitioner by granting the orders sought. Justice cannot be done where court decisions are reduced to mere advisory opinion whenever the government is taken to court. Act No. 33 of 1994 is therefore a hindrance to the enforcement of individual rights and freedoms for it complicates the process of seeking redress in a court of law.

In sharp contrast is the position in India where jurisdiction for the enforcement of fundamental rights is vested in the Supreme Court but where Parliament may by law empower any other court to exercise the same function within its local jurisdiction.⁵⁵⁶ Further the Supreme Court and other courts empowered by Parliament can enforce fundamental rights by issuing 'directions or orders, or writs in the nature of *habeas corpus*, *certiorari*, *mandamus* or prohibition whichever may be appropriate'.⁵⁵⁷ There is no strict form of enforcing basic rights.⁵⁵⁸

In general the fundamental rights under the Indian Constitution are articulate and elaborate as compared to the Tanzanian Bill of Rights. They encompass international standards of human rights as set by various documents of the United Nations Organisations. In addition they were carefully drafted to take care of specific social problems in India like child labour,⁵⁵⁹ the minorities⁵⁶⁰ and the issue of "untouchability"⁵⁶¹ where certain people because of epidemic contagious disease or for various other discriminatory reasons were regarded as untouchables.

⁵⁵⁶The Constitution of India, 1950, Article 32 (3).

⁵⁵⁷Article 32 (1).

⁵⁵⁸In Tanzania any application for enforcement of fundamental rights has to be by way of a petition.

See Act No. 33 of 1994, sections 5 and 6.

⁵⁵⁹The Constitution of India, 1950, Article 24

⁵⁶⁰Article 29.

⁵⁶¹Article 17.

It is also true that the Bills of Rights in most independence Constitutions of Commonwealth Africa were based on the European Convention on Human Rights, 1950 as they provided for basic rights.⁵⁶² In fact during negotiations for independence, the minorities in Nigeria successfully demanded for comprehensive provisions of fundamental rights into the Constitution 'along the same lines as the European Convention.'⁵⁶³ Some countries effected changes on these rights after independence to suit particular objectives and policies. The amendment made to the Nigerian Constitution in 1979 bringing about fundamental objectives and directive principles of state policy, and also to the 1989 Constitution that introduced the duties of citizens provide an example of such countries. It can be argued therefore, that a Bill of Rights in the Tanzanian Constitution drew inspiration from India and Nigeria.

4:4 Conclusions

The above discussion has shown how the Bill of Rights finally traced its way into the Constitution after being resisted for about three decades since independence. It has been emphasized that the government was not willing to enshrine the basic rights in the Constitution, but it was overwhelmed and forced by the circumstances which were created through popular demands during the debates on the amendments of the Constitution. However, the provisions discussed above reveal that the government used the Constitution itself to take away what the same Constitution had already given as a right. The limitation clauses and, in particular, the claw-back and derogation clauses in the Constitution, appear to be an obstacle to the enforcement of fundamental rights.

Although individual rights and freedoms were solely left in the hands of the judiciary as their last hope, some people doubted whether Tanzanian

⁵⁶²See for example the Nigeria Independence Constitution, 1960, sections 17-32.

⁵⁶³ODUMOSO, O, I., p. 123.

judges would be bold enough to deviate from the positivist tradition and give purposive construction to those provisions relating to basic rights and freedoms.⁵⁶⁴ There was a plea by the public urging the courts 'not to pay lip services to fundamental rights and freedoms'⁵⁶⁵ but be bold to hold 'the bull by the horns by inquiring as to whether draconian law is really constitutional'⁵⁶⁶ and 'feel free to raise their voices against such undesirable statutes.'⁵⁶⁷ We have attempted to show that, 'whether the limitation clauses will foster or restrict liberty will depend upon the attitude of the judiciary.'⁵⁶⁸ This introduced us to the idea of having a strong and active judiciary.

Although there were traces of activist judges in the period under study the majority was still harbouring the positivist belief that 'it is the function of the courts to be conservative, so as to ensure that the rights and duties of the individual are determined by the rule of law.'⁵⁶⁹ In the following two chapters we examine whether the performance of the Tanzanian judiciary after the Bill of Rights became justiciable demonstrate any change of attitude among the judges. We should stress that not all 'rights' have been litigated and therefore not all rights are discussed here.

⁵⁶⁴SHIVJI, I. G., (1987), pp. 137-138; MBUNDA, L. X., p. 159.

⁵⁶⁵MBUNDA, L. X., p. 160.

⁵⁶⁶*Daudi Pete v. R*, *infra*.

⁵⁶⁷AGUDA, A, T., p. 157.

⁵⁶⁸MBUNDA, L. X., p. 164.

⁵⁶⁹NEWBOLD, C., p. 131.

CHAPTER FIVE

CRIMINAL JUSTICE PROCESS AND HUMAN RIGHTS

Historically, human rights is a concept which developed 'to protect the citizen from arbitrary and oppressive treatment by the State.'⁵⁷⁰ Unlike most other legal rights, human rights are of a high degree of abstraction and, because they are so broadly conceived, the manner in which they are interpreted, especially by the courts, becomes particularly important.

There are more complaints of human rights violations by the State than are levelled against any other individual or organization. The State's need to control its subjects in order to survive, makes it use a variety of mechanisms including legislation to limit the extent to which people can exercise their rights and freedoms. Tanzania is no exception. The State can, for example, use retrospective legislation to make any act a criminal offence, to restrict the right to bail, to give powers of arrest, detention, deportation and interrogation which are inconsistent with the Constitution. In fact, it is the criminal justice process which is affected most when the State takes refuge in legislation as means for its survival. The court has to be on the alert and make sure that guaranteed rights are not infringed or removed by the State without justification.

This chapter therefore, seeks to examine the judicial responses to human rights infringements in the criminal justice process in Tanzania, especially in those cases where the State has a particular interest. The Tanzanian judicial decisions will be discussed in the light of decisions from other Commonwealth jurisdictions and decisions of the European Court of Human Rights.

⁵⁷⁰BENNETT, T. W., p. 29. For similar argument see SING, D. K., pp. 17-18.

5:1 Torture, inhuman or degrading treatment or punishment

In setting standards concerning human rights, the United Nations Organization has drafted a number of legal documents containing detailed provisions. The first one was the Universal Declaration of Human Rights, 1948, a document which sets out elementary considerations of humanity which should guide the member states. It is clearly stated by the Declaration that:

“No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.”⁵⁷¹

This was followed by the International Covenant on Civil and Political Rights, 1966 which repeated the language of the Declaration but went a step further to deal with a specific instance. It prohibits medical or scientific experimentation without free consent of the person concerned.⁵⁷² Tanzania is a party to the Covenant but has not acceded to optional protocols sequel to the Covenant.⁵⁷³

Further, the United Nations Organization has, through the Declaration on Protection from Torture, 1975, declared any act of torture or other cruel, inhuman or degrading treatment or punishment to be an offence to human dignity.⁵⁷⁴ The prohibition of torture was enhanced by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984. Although every member state is under an obligation to take effective measures to prevent such practice within its jurisdiction,⁵⁷⁵ Tanzania is not a party to this Convention.

⁵⁷¹ Universal Declaration of Human Rights, 1948, Article 5.

⁵⁷² International Covenant on Civil and Political Rights, 1966, Article 7.

⁵⁷³ Optional Protocol to the ICCPR establishes the Human Rights Committee to receive and consider complaints from individual victims of violations of the rights under the Covenant. Second Optional Protocol to the Covenant aims at the abolition of the death penalty.

⁵⁷⁴ UN Declaration on Protection from Torture, 1975, Article 2.

⁵⁷⁵ Ibid., Article 4. See also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 2.

At the regional level, the African Charter on Human and Peoples' Rights, 1981 prohibits all forms of exploitation and degradation of man. The Charter regards slavery and slave trade as forms of both exploitation and degradation of man. It provides that, as a respect of the dignity inherent in a human being:

“All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”⁵⁷⁶

Tanzania is a member of the United Nations Organization and also a signatory to the African Charter on Human and Peoples' Rights and therefore under an obligation to protect human rights at domestic level. The Tanzanian Constitution has tried to prohibit torture or inhuman or degrading treatment on the lines different from Article 7 of the ICCPR by providing:

13 (6) For the purposes of ensuring equality before the law, the state shall make provisions to the effect that:

(e) no person shall be subjected to torture or to inhuman or degrading treatment.

In general there is no law in Tanzania which overtly allows torture of a person by any individual or state functionary. The Police are by law enjoined to treat the suspect with humanity and with respect for human dignity, and to refrain from cruel, inhuman or degrading treatment.⁵⁷⁷ However, there have been remarkable incidents of torture of suspects during interrogation at the Police Stations. On some occasions, deaths of suspects at the Police Stations

⁵⁷⁶The African Charter on Human and Peoples' Rights, 1981, Article 5.

⁵⁷⁷See Criminal Procedure Act, 1985, section 55.

have followed the events.⁵⁷⁸ On a very few occasions the court has been called upon to interpret the law in the context of specific violations of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

5:1:1 Corporal punishment and minimum prison sentence.

The Minimum Sentences Act, 1963⁵⁷⁹ one of the early post-independence pieces of legislation, made flogging mandatory for certain specified offences until it was abolished by the Minimum Sentences Act, 1972.⁵⁸⁰ However, corporal punishment was re-introduced in 1989 by Act No. 10 of 1989⁵⁸¹ following the increase in violent crimes. Alongside mandatory corporal punishment, the Act also introduced the minimum prison sentence for anybody convicted of violent crime. In fact both corporal punishment and minimum prison sentence go together in specified offences. The Bill which reintroduced corporal punishment, was supported by the overwhelming majority of the Members of Parliament. They expected that it would deter youngsters from engaging in serious criminal acts. Some legislators suggested that corporal punishment should be administered in public if positive results were to be realized and that female offenders should not be exempted.⁵⁸² All this simply signified how disturbing the problem of violent crime was in the country. Members of Parliament like members of the public believed that the solution for such problems could be found in the deterrent effect of a severe sentencing policy.

It is interesting to note that at least one Member of Parliament warned the House about the danger of passing a law which contravened the Bill of

⁵⁷⁸For such incidents see PETER, C. M., (1992), pp. 150-151 and PETER, C. M., (1997), pp. 91-95. See also *Elias Kigadye and Others v. R.*, Court of Appeal of Tanzania, Criminal Appeal No. 13 of 1981, unreported and also footnotes 856 and 857.

⁵⁷⁹Op cit.

⁵⁸⁰Act No. 1 of 1972.

⁵⁸¹Written Laws (Miscellaneous Amendments) Act, 1989.

⁵⁸²See *Daily News*, 25 April 1989.

Rights as guaranteed under the Constitution. However, the Minister for Justice and Attorney-General assured the house that corporal punishment would be saved by the derogation clauses, Articles 30 and 31, for it was in the interest of the public to reintroduce such a punishment so as to curb banditry and robbery. Later, the said Minister for Justice and Attorney-General was appointed a judge of the Court of Appeal.

The possibility, raised in Parliament, of the Act being held unconstitutional materialized in *Thomas Mjengi v. R.*⁵⁸³ The two appellants in this case were charged and convicted of robbery with violence under sections 285 and 286 of the Penal Code (Cap. 16). They were each sentenced by the District Court, to the prescribed minimum sentence of thirty years imprisonment and ten strokes of corporal punishment. Aggrieved by both conviction and sentence, they appealed to the High Court challenging, among other things, the constitutionality of the minimum sentence of thirty years imprisonment and corporal punishment. It was the appellants' advocate's argument that these punishments were inhuman and degrading and therefore unconstitutional.

In determining whether a minimum sentence was inhuman and degrading, Mwalusanya, J., applied the proportionality test. He had to answer the question whether the said sentence was arbitrary, unusual or disproportionate to the offence. The proportionality test was the creation of the Supreme Court of the United States of America,⁵⁸⁴ and it was adopted by many jurisdictions including the Supreme Court of Papua New Guinea in *Morobe v. Provincial Government*,⁵⁸⁵ the Zimbabwe Supreme Court when determining also the constitutionality of corporal punishment in *Ncube and Others v. The*

⁵⁸³High Court of Tanzania at Dodoma, Criminal Appeal No. 28 of 1991, unreported (reproduced in PETER, C. M., (1997), p. 115).

⁵⁸⁴See the cases of *Weems v. United States* (1910) 217 U.S. 349; *Tropp v. Dulles* (1958) 356 U.S. 86, 1. Ed. 630; *Furman v. Georgia* (1973) 403 U.S. 238.

⁵⁸⁵[1985] L.R.C. (Const.) 642.

State,⁵⁸⁶ and the Court of Appeal of Botswana in *The State v. Petrus*.⁵⁸⁷ It was from those decisions that Mwalusanya, J., drew inspiration. After being satisfied that the disproportionate test was ‘universally recognized and accepted’, the learned judge adopted it for use in Tanzania.

The minimum sentences fixed by Act No. 10 of 1989 could not pass the proportionality test for they were found to be arbitrary. They made it difficult for the court to take into account the factors like the age of the offender, the offender’s previous good record, his remorse and the prevalence of the offence. Mwalusanya, J., summed up his argument:

“If the courts in Tanzania were allowed to pass a lesser sentence *if special reasons are adduced*, then that would have been alright and the legislation would have been constitutional...”.

Further, the minimum sentence of 30 years imprisonment was found disproportionate because in the opinion of the learned judge it was excessive or unconscionable even for the offence of armed robbery. It was excessive in the sense that it defeated the government’s rehabilitation policy by incarcerating the prisoner for a period which amounted to life imprisonment. As such it went beyond legitimate penal objectives and did not ‘bear rational relationship to the accomplishment of penological goals’ to justify its severity. The judge opposed the idea that harsh sentences were the only way of fighting crime in the absence of other measures such as mass education and good policing.

It was also the first case on the constitutionality of corporal punishment to come before the courts. As such the judge found it appropriate to make regular reference to decisions of other courts in Commonwealth countries in Africa, United States of America and also the experience of the European

⁵⁸⁶[1988] L.R.C. (Const.) 442.

⁵⁸⁷[1985] L.R.C. (Const.) 699.

Court of Human Rights in interpreting similar provisions. After being persuaded by decisions of the Court of Appeal of Botswana,⁵⁸⁸ the Supreme Court of the United States of America,⁵⁸⁹ the Eastern District Court of South Africa,⁵⁹⁰ the Supreme Court of Zimbabwe,⁵⁹¹ and the European Court of Human Rights,⁵⁹² Mwalusanya, J., arrived at the firm conclusion that corporal punishment inescapably fell within the definition of inhuman and degrading punishment. He considered these decisions as inspiring and worthy of adoption if Tanzania was to keep pace with other countries in the promotion of human rights. The learned judge observed:

“Those decisions on the unconstitutionality of corporal punishment are examples of the prudent application of international human rights norms to domestic human rights law. They identify with evolving standards of decency and humanity. Tanzania cannot be left behind in that boat.”⁵⁹³

The European Court of Human Rights in the case of *Tyrer v. U. K*⁵⁹⁴ back in 1978 had declared corporal punishment inhuman, and degrading punishment and hence in violation of Article 3 of the European Convention.⁵⁹⁵ This interpretation by the European Court of Human Rights has influenced the decisions of courts in certain Commonwealth countries to which Mwalusanya, J., also referred. All accepted the reasoning of the European Court of Human Rights and arrived at the conclusion that corporal punishment was inhuman and degrading punishment. The European Court of Human Rights pointed out the circumstances which made such punishment degrading:

⁵⁸⁸*The State v. Petrus and Another*, [1985] L.R.C. (Const.) 699.

⁵⁸⁹*Jackson and Others v. Bishop* (1968) 404 F. 2d. 571.

⁵⁹⁰*Queen v. Nortje* (1880) 1 E.D.C. 231 and *Queen v. Hans Windvoged and Another* (1881) 2 E.D.C. 98.

⁵⁹¹In *Ncube v. The State* [1988] L.R.C. (Const.) 442.

⁵⁹²In the case of *Tyrer v. U. K.* (1978) 2 E.H.R.R. 1.

⁵⁹³See *Thomas Mjengi v. R.*, op. cit.

⁵⁹⁴(1978) 2 E.H.R.R. 1

⁵⁹⁵This Article is identical to Article 13 (6) (e) of the Tanzanian Constitution

“The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalized violence, that is... violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State... Neither can it be excluded that the punishment may have had adverse psychological effects.”⁵⁹⁶

In conclusion Mwalusanya, J., had this to say:

“...corporal punishment not only is inherently inhuman and degrading, and so unconstitutional; but in addition international statements of human rights indicate that such type of punishment has become simply unacceptable in a civilized and democratic society. The weight of international opinion is against corporal punishment. It is up to us to remain an island on ourselves.”⁵⁹⁷

On the strength of the foregoing, the mandatory 12 strokes of corporal punishment and the minimum sentence of thirty years imprisonment⁵⁹⁸ were declared unconstitutional and void, as they are inhuman and degrading punishments prohibited by Article 13 (6) (e) of the Constitution.⁵⁹⁹

However, some judges are opposed to Mwalusanya, J’s progressive findings as regards the constitutionality of the law prescribing the minimum sentence of thirty years for the offence of armed robbery. The same issue was raised in the case of *Ismail Mgendi Mkurya v. R.*⁶⁰⁰ when the accused person challenged the constitutionality of thirty years imprisonment sentence imposed on him, for the offence of armed robbery. The judge admitted that such

⁵⁹⁶*Tyler v. U. K*, op cit., para. 33

⁵⁹⁷See *Thomas Mjengi v. R.*, op. cit.

⁵⁹⁸Under the Minimum Sentences Act, 1972, as amended by Act No. 10 of 1989.

⁵⁹⁹Actually the trial magistrate had wrongly sentenced the accused persons to ten strokes each instead of twelve strokes as prescribed by law.

⁶⁰⁰High Court of Tanzania at Dar Es Salaam, Criminal Appeal No. 34 of 1991, unreported.

sentence was severe but it was a reaction to the realities of the day when armed bandits had made life unbearable for the law abiding people.⁶⁰¹ He therefore thought that the law was constitutional and was saved by the derogation clauses, Articles 30 and 31 of the Constitution. In other words, the judge was authorizing the infringement of human rights by way of legislation as a reaction to certain pressing social problems, like armed robbery. This decision is in conflict with the implementation of the norm against inhuman treatment or punishment. As a principle of international human rights, even for the highest reasons of public interest, ill-treatment is not allowed. That is why the European Court of Human Rights in the case of *Thomassi v. France*⁶⁰² held that the need to fight terrorism cannot justify violations of physical integrity. The court stated:

“...the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals.”⁶⁰³

The fight against crime should take into consideration respect for individual fundamental rights. The court of law has to ensure that the national desire to combat crime does not override the need to respect human rights. It is unfortunate that in *Ismail Mgendi's* case the court failed to appreciate the length of the term of imprisonment as a factor in determining whether or not the punishment is inhuman and degrading. The discussion of the European Court of Human Rights in the case of *Ireland v. United Kingdom*⁶⁰⁴ associates inhuman treatment and degrading treatment with long duration imprisonment.

⁶⁰¹There was an increase in armed robbery incidents such as holding up of buses and breaking into dwelling houses when this Act was passed by the Parliament.

⁶⁰²15 E.H.R.R. 1.

⁶⁰³*Ibid.*, see para 115.

⁶⁰⁴2 E.H.R.R. 25.

While one might focus more on 'physical pain in considering a punishment's inhuman character, and on emotional or dignitary injury when determining whether it is degrading, the three categories still clearly show a considerable overlap.'⁶⁰⁵ Perhaps, if the learned judge in *Mgendi's* case had taken the trouble to read also the *Ireland* case he would have arrived at a different conclusion.

With these two conflicting decisions of the High Court the position of the law is not clear as regards the constitutionality of corporal punishment and long imprisonment sentence prescribed by the Minimum Sentence Act. Although the Republic appealed to the Court of Appeal against the decision of Mwalusanya, J., in *Mjengi's case*, to date the appeal has never been heard because the respondent cannot be traced.

5:1:2 Death penalty

The death penalty is mandatory for anyone convicted of murder under sections 196 and 197 of the Penal Code. The High Court in Tanzania in the case of *R. v. Mbushuu Dominic Mnyaroje and Another*,⁶⁰⁶ considered its power to interfere with the right to life in this way in the light of the Constitutional guarantees. In that case counsel for the accused persons who were convicted of murder, challenged the constitutionality of the death penalty.

Mwalusanya, J., guided by a 'generous and purposive construction' that he generally gave to the constitutional provisions which protect fundamental rights and freedoms, arrived at the conclusion that the death penalty was inherently a cruel, inhuman and degrading punishment and so was the manner it was carried out. He took into account among other things, the appalling conditions under which the people on death row were kept and the prolonged

⁶⁰⁵JANIS, M. W., KAY, R. S., and BRADLEY, A. W., p. 132.

⁶⁰⁶High Court of Tanzania at Dodoma, Criminal Sessions Case No. 44 of 1991, reported in (1994) 2 L.R.C. 335.

mental torture that was caused to them by delays in carrying out executions. His attention and concern were drawn also to the mode of carrying out the death penalty in a tortuous and cruel manner when he observed:

"There are few cases in which hangings have messed up and the prison guards have had to pull on the prisoners legs to speed up his death or use a hammer to hit his head."

All these factors coupled with the possibility of there being erroneous convictions, ineffectiveness of the death penalty in curbing violent crimes, and the fact that 'the act of killing in itself is offensive' made the learned judge find that such sentence was not in the public interest and therefore not saved by Article 30 (2) of the Constitution.⁶⁰⁷ Further, he considered the views of the public about the death penalty:

"I concede that there may be a majority of Tanzanians who support the death penalty blindly, and these are not enlightened and are not initiated or aware of the ugly aspect of the death penalty. Apparently it is so because the death penalty is carried out in secrecy."

In his judgment, Mwalusanya, J., was persuaded by the need to implement international human rights instruments, and he was influenced by court decisions from other jurisdictions which had opportunity to examine the constitutionality of death penalty with view of promoting human rights.⁶⁰⁸ The death penalty was then found to be cruel, inhuman and degrading punishment and therefore void 'to the extent of the inconsistency.'⁶⁰⁹

⁶⁰⁷The contents of Article 30 (2) are discussed in chapter four.

⁶⁰⁸For example U. S. A in *Furman v. Georgia* (1972) 408 U.S. 28; India in *Javed Ahmed v. The State of Maharashtra* (1985) S.C. 231; West Indies in *De Freitas v. Benny* [1976] A.C. 239; Zimbabwe in *Ndlovu v. The State* [1988] L.R.C. (Const.) 442; Botswana in *The State v. Petrus* [1985] L.R.C. (Const.) 699.

⁶⁰⁹See Article 64 (5) of the Constitution.

However, this judgment did not last long for it was overturned by the Court of Appeal in *Mbushuu Dominic Mnyaroje and Kalai Sangula v. R.*⁶¹⁰ on appeal by the Republic against sentence and cross appeal by the accused persons against conviction. The Court of Appeal was in agreement with Mwalusanya, J's finding that the death penalty itself was inherently inhuman, cruel and degrading punishment and so was the mode of its execution, and that it offended Article 13 (6) (e) of the Constitution. However, in the opinion of the Court of Appeal, the death penalty was saved by Article 30 (2) of the Constitution because it passed the arbitrariness and proportionality test⁶¹¹ as laid down in the cases of *D.P.P. v. Daudi Pete*⁶¹² and *Kukutia Ole Pumbun and Another v. Attorney-General*.⁶¹³ Mwalusanya, J., had also considered this test before arriving at his conclusion, but the Court of Appeal was of the view that 'the learned judge seems not to have fully grasped' the import of the principles laid down by the test that:

"Whether or not a legislation which derogates from a basic right of an individual is in public interest depends on first, its lawfulness, that is, it should not be arbitrary and second, on the proportionality test, that is, the limitation imposed should not be more than reasonably necessary."

In his judgment Mwalusanya, J., expressed the view that there was no safeguard against the arbitrary exercise of power of clemency by the President. The Court of Appeal considered the death penalty to be free from arbitrariness, on the grounds that it is the court which makes a decision in a murder case by following the rules and that the Presidential prerogative of

⁶¹⁰ Court of Appeal of Tanzania at Dar Es Salaam, Criminal Appeal No. 142 of 1994, reported in (1995) 1 L.R.C. 216.

⁶¹¹ See our early discussion about this rule in this chapter and also chapter seven.

⁶¹² Op cit.

⁶¹³ Court of Appeal of Tanzania at Arusha, Civil Appeal No. 32 of 1992, reported in (1993) 2 L.R.C. 317.

mercy is outside the court process.⁶¹⁴ Further, that the law introduces safeguards by providing mandatory appeal against death sentence and by exempting pregnant women and juveniles.⁶¹⁵ However, it admitted that the President is not bound by the recommendations of the trial judge or his advisory committee when exercising his prerogative of mercy as Mwalusanya, J., rightly queried. Arguably the fact that President's discretion cannot make matters worse for the condemned prisoner, does not mean that he cannot exercise that power arbitrarily. After all there is always very little information as to the way or the criteria on which the President exercises his prerogative of mercy.⁶¹⁶ Perhaps what remains unclear is the time when due process of law for any one charged with murder can be said to have been completed? The Court of Appeal also admitted that an innocent person might be executed in error, but that would not be arbitrary because it would be a proper decision of both trial and appeal courts.

The rules which the Court of Appeal laid down in the cases cited above to determine whether a particular law could be saved by derogation and clawback clauses, were not free from ambiguity nor could they be applied in every case. This is the problem which Mwalusanya, J., encountered in the case under discussion. He realised that it was very hard to rely on these rules in order to do away with death penalty. Nevertheless he attempted, with difficulty, to associate death penalty with arbitrariness and excessiveness, the necessary elements to be taken into account before any law could be removed from the shelter of Articles 30 and 31 of the Constitution, as laid down by the Court of Appeal.

⁶¹⁴Mwalusanya, J., had expressed possibility of there being arbitrary exercise of power by President when pardoning those serving imprisonment court sentence or death sentence.

⁶¹⁵It is argued in HATCHARD, J., and COLDHAM, S., pp. 165-166 that there is a big possibility of executing juveniles because of difficulty on the part of the court to establish the age of the accused person. Arguably this possibility is greater in a country like Tanzania where registration of births is basically done in urban areas only.

⁶¹⁶HATCHARD, J., and COLDHAM, S., p. 169.

Also, the Court of Appeal considered the aspect of proportionality, whether the limitation imposed by the death penalty was more than was reasonably necessary to achieve the legitimate object of protecting society from wanton killing. The answer was in the affirmative given the gravity of the offence as perceived by the Tanzanian society that:

“The society can only discharge its duty of protecting the right to life by deterring persons from killing others. Tanzania, like many other societies, has decided to do so through death penalty.”

As such the court was satisfied that the overwhelming majority of the public was in favour of retaining death penalty and that it had been an effective deterrent punishment against violent crimes. Here, the Court of Appeal did not give conclusive proof that death penalty was a more effective punishment than life imprisonment.⁶¹⁷ Indeed the decision of the Court of Appeal joined hand with the majority of the public whose opinion favoured death penalty. The Court of Appeal was not prepared to offend the public by deciding against its wishes. This can be deduced from the remarks of Ramadhani, J. A., about the reasonableness of the death penalty when he said:

“But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is the society which decides.”

In contrast with this attitude is the Constitutional Court of South Africa in *State v. Makwanyane and Mchumu*⁶¹⁸ when considering the constitutionality of the death penalty. In his judgment, Chaskalson, P., clearly stated:

⁶¹⁷For a detailed discussion on this see HATCHARD, J., (1995 B), p. 192.

⁶¹⁸(1995) 1 L.R.C. 269.

“This Court cannot allow itself to be diverted from its duty to act as an independent arbiter of the Constitution by making choices on the basis that they will find favour with the public”⁶¹⁹

The above statement was made in response to the Attorney-General’s submission that what is cruel, inhuman or degrading depends upon contemporary attitudes within society, and that South African society did not regard the death sentence for cases of murder as cruel, inhuman or degrading form of punishment.

Other judges agreed with the views expressed in the judgment of Chaskalson, P., particularly on the aspect of public opinion. However, some of them were not comfortable with his attitude towards public opinion. They felt it was unnecessary to say anything at all about it,⁶²⁰ as it would lead to criticisms against the court, possibly from the public which for a long time had experienced too much savagery and wanton killing.⁶²¹ Kentridge, J., also pointed out that if public opinion on the issue was clear then it could not be entirely ignored. What followed was the campaign, by the retentionists, against the abolition of death penalty by the Constitutional Court.⁶²²

In principle, the Constitutional Court of South Africa considered the judgment of the Court of Appeal of Tanzania but it totally disagreed with its attitude of leaving it for Parliament or society to decide whether the death penalty was justifiable.⁶²³ Here we note the difference in the language of the relevant constitutional provisions of the two countries and its effect on the interpretation by the court. Whereas the South African Constitution provided that it was for the court, and not society or Parliament to decide on the justifiability of death sentence by examining the limitations, the Tanzanian

⁶¹⁹Ibid., at p. 311.

⁶²⁰See the judgment of Ackermann, J., pp. 338-339.

⁶²¹See the judgment of Didcott, J., at p. 348.

⁶²²See HATCHARD, J., and COLDHAM, S., pp. 161-162.

⁶²³HATCHARD, J., (1995 B), p. 195.

Constitution had no similar provision. Furthermore, the Tanzanian Constitution by the derogation clause, vindicates the laws which offend the Bill of Rights if they serve the public interest. The Court of Appeal was satisfied that the death penalty had passed the test as contained in those rules which were developed in *Daudi Pete* and *Kukutia Ole Pumbun* and it could not be declared unconstitutional.

Another interesting thing in the judgment of the Court of Appeal is the warning that it gave to the High Court judge for making references to decisions of courts from other countries:

“...when it comes to what is reasonably necessary to protect the society we have to be extra careful with judicial decisions of other jurisdictions...In societies where owning a firearm is almost as simple as owning a penknife, death penalty might not be necessary to protect the public. But societies, like ours, where people go to the extent of sacrificing their sleep to join vigilante groups popularly known as *Sungusungu*, in order to protect life and property, death penalty may still be reasonably necessary”.

Arguably, the statement of the Court of Appeal could be in conflict with the previous directive that it issued in the case of *Attorney-General v. Lesinai Ndeinai and Others*.⁶²⁴ In that case the Court of Appeal directed that in matters of interpretation of the Constitution and fundamental rights, courts should always see what courts in other countries have said about same issue. Nyalali, C. J., said:

“On a matter of this nature it is always very helpful to consider what solution to the problems other courts in other countries have found, since basically human beings are the same though they may live under different conditions.”⁶²⁵

⁶²⁴ Op cit.

⁶²⁵Ibid., at p. 222.

It can also be argued that by sounding the necessary warning the Court of Appeal did not conflict with its previous proposition but it was duty bound to clarify its directive which was capable of being misapplied. The implication of such warning is that the court should not forget to take local circumstances into account also when interpreting constitutional provisions.

5:2 Presumption of innocence and liberty

Under the Constitution every person charged with a criminal offence is presumed to be innocent until he is proved guilty.⁶²⁶ Also, the Constitution provides for the right to personal freedom and protects an individual from arbitrary arrest, restriction, detention, exile or deprivation of liberty except in a manner prescribed by law or 'in the execution of the sentence or order of a court.'⁶²⁷ The courts in Tanzania have in a number of ways succeeded in protecting the said constitutional rights and their infringements have occasionally been declared unconstitutional. However, there have been conflicting judgments of the court on this issue.

5:2:1 Bail.

5:2:1:1 Statutory denial of bail.

It was the celebrated High Court decision of Mwalusanya, J., in *Daudi Pete v. R*⁶²⁸ that marked the beginning of judicial activism since the Bill of Rights became justiciable. An Act of Parliament was found by the court to contain a provision which was in conflict with the presumption of innocence of an accused person, guaranteed under Article 13 (6) (b) of the Constitution and therefore void. In that case, the accused person was denied bail by the

⁶²⁶Article 13 (6) (b).

⁶²⁷Article 15.

⁶²⁸High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 80 of 1989, unreported (reproduced in PETER, C. M., (1997), p. 532).

District Court under section 148 (5) (e) of the Criminal Procedure Act, 1985 on the ground that the offence he was charged with, (robbery with violence) was not bailable. It was alleged that the applicant and three others robbed a head of cattle from the complainant by using a gun to threaten violence. Daudi Pete, one of the accused persons, being aggrieved by the District Court's finding, lodged with the High Court his application for bail pending trial. The court had to consider whether bail for an accused person in Tanzania, is a right or a privilege. Section 148 of the Criminal Procedure Act, 1985 provides:

- (5) A police officer in charge of a police station, or a court before whom an accused person is brought or appears shall not admit that person to bail if:
 - (a) that person is accused of murder or treason;
 - (b) it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years;
 - (c) it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded;
 - (d) the accused person is charged with an offence alleged to have been committed while he was released on bail by a court of law;
 - (e) the act or any of the acts constituting the offence with which the accused person is charged consists of a serious assault causing grievous harm or threat of violence to other persons, or of having a firearm or an explosive.
 - (f) it appears to the court that it is necessary that the accused person be kept in custody for his protection or safety;
 - (g) the offence for which the person is charged involves property whose value exceeds ten million shillings, unless that

- person pays cash deposit equivalent to half the value of the property, and the rest is secured by execution of a bond;
- (h) if he is charged with an offence under the Dangerous Drugs Ordinance.

The learned judge traced the attitude of the courts during the British Colonial era and found that bail was regarded as a right, not a privilege. This attitude continued even after independence for the accused person was presumed innocent until the contrary was proved. Bail would be refused only where there was evidence that to grant such bail would result in a failure of justice. After visiting the provisions of the Constitution, decisions of courts in other countries and various international and regional instruments on human rights, Mwalusanya, J., was of the opinion that the law restricting bail put the liberty of citizen at stake and infringed his right to liberty. According to the learned judge the law was 'draconian'.

Counsel for the Republic had submitted that once a particular law has been passed by Parliament, it should not be questioned, no matter how harsh or severe it might be. In his opinion:

“...nobody would disagree with this that the role of the Parliament is to make law. They are the representatives of the people in their respective constituencies... They are thus bound to enact any law irrespective of whether or not the same appears to be tyrannical or dictatorial in nature. In short the powers of the Parliament in making laws are unlimited and can't be questioned by anybody let alone the judiciary... Parliament can pass any law irrespective of whether or not the same appears to contravene the provisions of the Bill of Rights”

In responding to this submission by the State Attorney, the learned judge referred to various works by renowned academic scholars like Issa

Shivji, Sol Piciotto, Huaraka, Wilbert Kapinga, and Luitfield Mbunda. He then arrived at the conclusion that 'a dense ideological fog' covered the submission and prevented the learned State Attorney from being able to differentiate between laws that serve the masses, and laws which serve the immediate interests of the state. It was a mistake to argue that every law legitimately enacted by the Parliament could not be questioned. As Coldham observed, (quoting Lord Diplock), 'it would be a mockery to regard "law" as simply meaning whatever Parliament enacts'.⁶²⁹

Mwalusanya, J., took the opportunity to send a special message to other judges in the country:

"Decisions taken now on the rights of the citizens prescribed in the Bill of Rights will have a critical effect on the continuing relevance of this institution in the future... The judiciary of late may have been receiving a bad image of a shady villain and never a fearless champion of truth and justice. That image ought to be corrected now. If the judges had hitherto taken a restrained approach instead of the activist approach, they should now change. For the judges to be able to capture confidence from the community, a whole new package of legal outlook should be cultivated which does not abandon standards but emphasizes judicial creativity with a social objective in mind."

Having considered the above factors, the learned judge found that the whole of section 148 (4) and (5) of the Criminal Procedure Act was discriminatory and unconstitutional, that it offended the doctrine of separation of powers by taking away judicial discretion in cases of bail and conflicted with the presumption of innocence guaranteed under Article 13 (6) (b) of the Constitution.

⁶²⁹COLDHAM, S., (1991), p. 208.

It was discriminatory in the sense that accused persons were treated differently for the same offences when it came to bail consideration, depending on the court where the charge was preferred. The fact that there were no restrictions on the granting of bail in the Primary Court⁶³⁰ meant that the court could grant bail to an accused person charged with an offence which involved the threat of violence or serious assault. Such a person could not be admitted to bail if his case was to be tried by the District Court or High Court. Thus Mwalusanya, J., was of the opinion that the 'different treatment rested upon no reasonable basis but it was essentially arbitrary and so discriminatory.'

In this case and also in subsequent similar applications the reason of the state including the clawback clauses in the Bill of Rights became clear. The State Attorney submitted that section 148 (5) of the CPA, was saved by Article 30 of the Constitution, and therefore lawful for being in the public interest and on national security grounds.⁶³¹ However, the court restricted the application of such clawback clause to the effect that:

“...where in the Constitution it is stated that a fundamental right may be restricted ‘*in accordance with the law*’ it is not enough for the party supporting the legislation to be able to point a ‘*law*’ in the sense simply of an Act duly passed by the legislature. If the Act relied on should itself be declared inoperative as violating a fundamental constitutional right, it is not ‘*law*.’”

Such a well-researched judgment is fascinating to read not only because of the author’s creative mind or liberal approach towards human rights provisions but also for its educative role. The courts subordinate to the High

⁶³⁰See section 16 of the Primary Courts Criminal Procedure Code (3rd Schedule to the Magistrates’ Court Act, 1984 (Act No. 2 of 1984)).

⁶³¹Similar view was taken by the court when examining the constitutionality of the Deportation Ordinance in *Chumchua Marwa's* case, *infra*.

Court started citing this binding authority when granting bail to accused persons charged with so-called unbailable offences. This decision received a warm welcome from the victims of section 148 and the Prison Officers who had started complaining of congestion in prisons.

It should be noted that the High Court is not, and never has been bound by its own decisions. It is even true to say that individual judges are not bound by their own decisions.⁶³² As a result, the progressive ideas of Mwalusanya, J., in the case of *Daudi Pete* did not bind other judges when called upon to pronounce on the constitutionality of the law that restricted the right to bail. They could conveniently ignore his findings and proceed to make decisions which conflicted with his decision.

Other judges who had been 'nurtured heavily in the positivist tradition,'⁶³³ could not see how human rights could be infringed by a law which restricted the traditional powers of the court to grant bail to accused persons. The case of *R. v. Peregrin Mrope*⁶³⁴ illustrates this view. In this case, the accused person was charged with an offence of causing grievous harm contrary to section 225 of the Penal Code. This offence involves the use of violence and under the provisions of section 148 (5) (e) of the CPA, 1985 the accused person was disqualified from being considered for bail. The District Court referred to the High Court the accused person's application for bail where an argument that section 148 (5) (e) violated human rights was raised. The High Court dismissed the application and found section 148 (5) (e) of the Criminal Procedure Act, 1985, constitutional and not contravening the presumption of innocence. Msumi, J., stated, *inter alia*:

“On the question of unconstitutionality, I am of the view that section 148 (5) (e) does not contravene the provision of Article 13 (6) (b),... Denying bail to

⁶³²LYALL, A., p. 54.

⁶³³SHIVJI, I. G., (1987), p. 137.

⁶³⁴High Court of Tanzania at Dar Es salaam, Criminal Cause No. 43 of 1989, unreported.

accused person does not necessarily amount to treating such a person like a convicted criminal”.

The reasoning of Msumi, J., was that the right of an accused person to be released on bail was not absolute but could only be enjoyed with necessary qualifications. It was in the light of these qualifications that the court in certain circumstances refused bail to accused persons. Msumi, J., was of the opinion that Parliament, like the courts, could properly deny bail to accused persons by way of legislation:

“Both public interest and rational administration of justice call for necessary inference that the right of accused person to be released on bail must be qualified. These qualifications may be statutory or in the form of court decisions. Provided these qualifications do not purport to abolish completely the basic right by indiscriminate ban on grant of bail for all types of offences, I am of the view that they cannot be held *ultra vires* the provisions of the Constitution”

As we shall see the finding by Msumi, J., that denying bail to an accused person did not necessarily amount to treating such a person like a convicted criminal, was approved by the Court of Appeal in *Daudi Pete*.

Even Mkwawa, Ag. J., while considering an application for bail in the case of *R. v. Iddi Salum*⁶³⁵ where the accused person was facing robbery charges, associated himself with the views of Msumi, J., and adopted his reasoning. In addition, Mkwawa Ag. J., emphasized the need to respect the intention of the Parliament when it enacted such a provision which restricted the right to bail:

“This section of the Act does not conflict with any provision of the Republican Constitution. It is a valid law made by the legislature to the exercise of the

⁶³⁵High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 55 of 1990, unreported.

legislative power vested in it by the Republican Constitution. It is my conviction that a court charged with the judicial duty of giving effect to Parliament's intention...ought to construe the law as incorporating by necessary implication, words which would give effect to such inferred intention and to fail to do so would defeat Parliament's intention."

According to Mkwawa, Ag. J., there was nothing in the Constitution which invalidated the law that imposed 'a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence'.

The situation was chaotic especially in the subordinate courts on whom the two conflicting High Court decisions/views were binding. It was therefore left upon the discretion of the magistrate to choose one of the conflicting decisions of the High Court, to grant or to deny bail to accused persons.⁶³⁶ Whatever side the magistrate opted for, there were High Court decisions to support his decision until three years later when the Court of Appeal resolved the controversy following government's appeal against the finding of Mwalusanya, J., in *Daudi Pete's* case.

The Court of Appeal of Tanzania in *D.P.P. v. Daudi Pete*,⁶³⁷ endorsed the holding of the High Court but for different reasons, and it was to the extent of section 148 (5) (e) only. That particular sub-sub section, according to the Court of Appeal, was unconstitutional because it violated the right to personal liberty guaranteed under Article 15 (2) of the Constitution and the unnecessary restrictions it put on liberty could not enable it to pass a proportionality test. The Court of Appeal formulated the rules which provide for a situation where a law that violates the rights guaranteed under the Constitution can be saved by a derogation clause. This includes a condition that:

⁶³⁶This was confirmed by Mapigano, J., in *R. v. Francis Haule and Others*, High Court of Tanzania at Dar Es salaam, Economic Criminal Revision No. 2 of 1990, unreported. The District Court had relied on the High Court decision in *Daudi Pete* and rejected other authorities before granting bail to the accused persons who were charged with an offence of illegal possession of guns, one of the unailable offences under the Criminal Procedure Act, 1985.

⁶³⁷Op cit.

“Any statute which is so broad as to fall partly within and partly outside the parameters of the Article would not be validated”.

As we shall see in chapter six these rules were elaborated by the same court in *Kukutia Ole Pumbun's* case.

Section 148 (5) raises serious matters of infringement of human rights. However, the Court of Appeal found that the High Court judge erred in law to frame a wide range of issues which resulted into nullification of the entire section. The finding of the Court of Appeal was based on the fact that only sub-sub section (5) (e) was properly before the court. Arguably, at that time the Court of Appeal's criticisms were justified in that Mwalusanya, J., decision had covered also persons charged with very serious offences like murder and treason.

Although the matter before the High Court was specifically connected with sub-sub section (5) (e) of section 148, the whole of section 148 (5) related to denying accused persons bail by a mere charge. We think it was proper for the High Court to consider it as a whole, since the entire section violated individual right to liberty and removed the presumption of innocence. Further more, in a poor country like Tanzania where legal literacy is very low and only a very few can afford the services of advocates, the court should use the few occasions it has, as Mwalusanya, J., did, to clarify matters of human rights instead of taking a narrow view of the issues before it.

It is interesting to note that since then, there have been a series of applications in the High Court challenging the constitutionality of various sub-sub sections of section 148 (5) of the CPA, 1985 as amended by Act No. 13 Of 1988 which deny bail to accused persons. As a result almost the entire section has now been declared unconstitutional. As we shall see later, even the law which made the charges of murder and treason unbailable has been declared

unconstitutional by the Court.⁶³⁸ However, the question remains, how many could afford to challenge the constitutionality of those laws restricting liberty?

Mwalusanya, J's decision had restored the court's power to consider bail applications in all cases. In considering bail applications the court hears both sides and finally grants or rejects the application after weighing the submissions. It means bail could be refused by the court but after the accused person had been given chance to reply to the prosecution's objections. All in all such objections by the prosecution should be strong enough to warrant the court's early pronouncement restricting the liberty of the accused person.

The subsequent cases we discuss later, that sought to challenge the constitutionality of other sub-sub sections would not have occurred if the Court of Appeal had approved the reasoning of Mwalusanya, J. The Court of Appeal seems to have adopted the approach favoured by the government, that all laws in violation of the Constitution should be left to operate until specifically and successfully challenged in a court of law. As we shall see in chapter eight, the government took advantage of the loopholes in the judgment and brought back into statute book, the sub-sub section whose immediate deletion had been ordered by the Court of Appeal.

Another disturbing aspect of the judgment of the Court of Appeal in *Daudi Pete's* case is the court's unqualified acceptance of Article 30 which is widely worded, as a legitimate means of protecting rights of the majority or community as opposed to rights and freedoms of the individual. This could easily be misapplied to justify abuses of rights and freedoms by State Organs.⁶³⁹ Modern human rights activists as well as progressive judicatures have always looked at these derogation clauses with a suspicious eye. There is an apparent need for the Court of Appeal to look over and correct some of its pronouncements and arguments in *Daudi Pete* in the interests of human rights.

⁶³⁸See footnote 644.

⁶³⁹SHIVJI, I. G., (1991 A), p. 125.

Sub-sub section (5) (e) was deleted by the legislature, following the decision of the Court of Appeal, but its substance was shifted to sub-sub section (5) (a) placing the offence of armed robbery in the same category with murder and treason and therefore still unbailable.⁶⁴⁰

However, five years later Mroso, J., in *Ngereza Masai and Loreu Masai v. R.*,⁶⁴¹ declared also unconstitutional the sub-sub section which made the offence of armed robbery unbailable. The appellant in that case was initially charged with the offence of robbery with violence and was granted bail. Later the charge was substituted to include the particulars of armed robbery and his bail was cancelled by the District Court on the strength of section 148 (5) (a) of the CPA, 1985 as amended by Act No 21 of 1991. This was challenged in the High Court by the applicant's advocate for being unconstitutional. The learned judge relied on the rules established by the Court of Appeal in *Daudi Pete's* case and found that sub-sub section (5) (a) as far as armed robbery was concerned was not saved by the derogation clause because it contained no safeguards against potential abuse. Mroso, J., observed:

“...the provisions of section 148 (5) (a) regarding armed robbery...are capable of including both the persons envisaged, that is those who employ arms in the commission of robbery and those who the police simply want to deny bail. The provisions do not contain any safeguards against such abuse, thus leaving it upon for unscrupulous police personnel to easily succeed to have accused persons deprived bail by merely alleging that they committed armed robbery.”

Following the above reasoning, the learned judge struck out the words “armed robbery” from section 148 (5) (a) and declared the offence of armed robbery as bailable. According to Mroso, J., he confined himself to armed

⁶⁴⁰See Act No. 27 of 1991.

⁶⁴¹High Court of Tanzania at Arusha, Criminal Appeal No. 1 of 1996, unreported .

robbery only, because no arguments were advanced before him regarding murder and treason.

In *Masai's* case two more important things are noted in the jurisprudence of human rights in Tanzania. The first one is the purposive interpretation that has to be given to the provisions of the Basic Rights and Duties Enforcement Act, 1994. As we saw in chapter five, the Act lays down a complex procedure for the enforcement of basic rights. It requires a formal petition to be heard by a panel of three judges after one judge has examined the issues as to frivolous or vexatious motives. However, Mroso, J., interpreted the phrase “without prejudice to any other action...” in section 4 of the Act to mean that:

“...a petition is only one procedure for obtaining redress and that an appeal against cancellation of bail is such “other action” with respect to the same remedy being sought by the appellants.”

By this interpretation therefore, redress for the violation of basic rights and duties need not necessarily be by way of petition nor is such redress restricted to the procedure as laid down under Act No. 33 of 1994.

The second point is the bold way in which the judge departed from his previous interpretation of Act No. 33 of 1994. In *D.P.P. v. Richard Marco Shara and 3 Others*.⁶⁴² Mroso, J., had expressed his doubts whether in view of the amendments to the Constitution and the provisions of Act No. 33 of 1994, a single judge could competently declare any law unconstitutional and strike it out. He believed that a full bench of three judges was mandatory and that such power had been removed from a single High Court judge⁶⁴³. However, when confronted later with similar issue in *Masai's* case, Mroso, J., referred to his previous proposition and had this to say:

⁶⁴²High Court of Tanzania at Arusha, Criminal Revision No. 4 of 1995, unreported.

⁶⁴³ See the Tanzanian Constitution, Article 30 (5) as amended by section 5 of Act No. 34 of 1994.

“On revisiting that ruling I have had serious second thoughts and I am now of the firm view that I erred...I therefore depart from that ruling”.

What was left by Mroso, J., in *Masai's* case did not survive the scrutiny by Nchalla, J., in *D.P.P. v. Angeline Ojare*⁶⁴⁴ whereby the provisions of section 148 (5) (a) which removed the right to bail in respect of the offences of murder and treason were declared unconstitutional. The accused person, wife of an advocate, was charged with the offence of murder under section 196 of the Penal Code and was granted bail by the District Court pending committal proceedings and trial. The Magistrate found himself bound to observe the Constitution and grant bail instead of following section 148 (5) (a) which was at variance with the Constitution. Being aggrieved by this attempt the prosecution side preferred an appeal to the High Court. After settling the position that Subordinate Courts can grant bail in offences which are triable by the High Court, Nchalla, J., went on to examine the constitutionality of the impugned provision.

The learned judge applied the rules as laid down by the Court of Appeal in *Daudi Pete's* case that a law which violates individual fundamental rights should contain sufficient safeguards in order to be saved by the derogation clause. He found that sub-sub section (5) (a) had no such safeguards as exhibited by the police's practice of planting fictitious murder charges against people. In a somewhat emotional observation, Nchalla, J., commented:

“...I pause here for a while and remind myself of the complaints one often hears from remand prisoners on visits to prisons, that they have been arrested by the police and charged with ‘*Mauaji ya kupandikiza*’ (meaning trumped up murder charges).

⁶⁴⁴ High Court of Tanzania at Arusha, Criminal Appeal No. 31 of 1996, unreported (reproduced in PETER, C. M., (1997), p. 557).

It is interesting to note that before the accused person was brought to court she was arrested by the police in connection with murder of a house girl and released out on police bail for about two months. This explained to the judge the double standard treatment accused persons charged with murder were likely to face under the law in question.

Furthermore, the fact that a charge of murder could be reduced by the court to manslaughter, infanticide, mere wounding or assault and that in some cases the D.P.P could enter *nolle prosequi*, militated for the judge's finding that the sub-sub section violated Articles 13 (6) (b) and 15 (2) (a) of the Constitution by denying bail to an accused person on the basis of a mere charge. Nchalla, J., invalidated the whole of sub-section (5) and went on to state the position of the law thus:

“...the entire section 148 (5) of the Criminal Procedure Act, 1985 does not prescribe the requisite procedure to enable the courts to reach a judicial decision of bail to an accused person in the offences and circumstances mentioned in that section... In the wake of this protracted non action and silence on the part of the law-making bodies in prescribing the requisite procedure in question, the courts have given decisions which have mutilated the section to such an extent that the same is now invalid law incapable of application. I so find.”

However, in July 1998 the High Court decision was quashed by the Court of Appeal in *D.P.P. v. Angeline Ojare*⁶⁴⁵ on ground that 'it was based on a nullity.' In their judgement Kisanga, J. A., Lubuva, J. A., and Samatta, J. A., criticised Nchalla, J., for affirming the decision of the District Court instead of setting it aside.

Giving reasons for their judgment, the Justices of Appeal argued that 'the trial magistrate had no competence or jurisdiction to hear and decide on

⁶⁴⁵Court of Appeal of Tanzania at Dar Es Salaam, Criminal Appeal No. 21 of 1997, unreported.

the constitutionality of section 148 (5) (a) of the Criminal Procedure Act which was raised before him.' The learned judges observed:

"When the issue of constitutionality of section 148 (5) was raised in the district court, the trial magistrate should have proceeded in accordance with the procedure laid down under section 9 (1) of the Basic Rights and Duties Enforcement Act...Under that procedure the magistrate had a duty to refer that issue to the High Court for decision."

To the extent of such omission, the Court of Appeal was of the firm view that the proceedings in the District Court were null and void and that the High Court erred in failing to hold so and instead proceeded 'to uphold a decision which was no decision at all.' In their opinion it was 'not necessary' to consider the substantive reasoning of the High Court and other grounds of appeal for the matter was capable of being disposed of on ground of procedural irregularity. It is our submission that this conduct of the Court of Appeal is a negative contribution to the young Tanzanian human rights jurisprudence in that it makes many issues of human rights remain uncertain.

It is interesting to note that while the appeal was still pending in the Court of Appeal, the D.P.P withdrew the charges against Angeline Ojare the accused person. This conduct confirms the reasoning of the High Court that the impugned provision was wide enough to cover the innocent and therefore not protected by Article 30 of the Constitution. It can also be argued that the Court of Appeal decision was based on a nullity for already the D.P.P had withdrawn the charges against the accused person. Actually there was no case at all.

In effect, the Court of Appeal decision quashes the progressive interpretation given by Mrosso, J., in *Masai's* case to the expression "without prejudice to any other action...." as used in section 4 of Act No. 33 of 1994.

According to Mroso, J., an appeal to the High Court is one such other action a person may take to enforce his/her infringed constitutional rights. In responding to this interpretation which was adopted by Nchalla, J., in *Ojare's* case the Justices of Appeal provided their narrow interpretation of the expression that it applies:

"...to situations where an alleged wrong, though capable of being redressed as a violation of a basic right under the Constitution, the victim of it, nevertheless, opts to seek redress under the ordinary law. Take for instance, the wrong of unlawful confinement. A person who complains of it may, in terms of section 4 apply to the High Court for redress or institute criminal or civil proceedings under the ordinary law."

5:2:1:2 Statutory requirement for cash deposit.

Following instances of corruption involving the embezzlement of public money by those entrusted to run the day-to-day activities of public institutions, and the investment of such money abroad, the government devised a way of keeping money within the country while the suspects faced criminal charges. It was made a condition of bail for anybody who was charged with offences relating to property whose value exceeded ten million shillings, to pay a cash deposit equivalent to half the value of that property. This is a condition under section 148 (5) (g) of the CPA, 1985 as amended by Act No. 13 of 1988 and under section 35 (3) (f) of the Organized Crime Control Act as amended by Act No. 10 of 1989. The policy was based on the premise that the suspects before the court would have actually stolen the money and it would not therefore be a problem for them to deposit half of it.

The High Court has on a number of occasions declared such a condition for bail unconstitutional. In *Saidi Ally Kazembe and Another v. R.*⁶⁴⁶ the accused persons were charged under the Penal Code with the offence of breaking into a house and stealing various items valued at shillings 15,000,000/=. The District Court admitted the accused persons to bail under section 148 (5) (g) of the CPA, 1985 on condition that they effected cash deposit of half the value of the property alleged to have been stolen.

They appealed to the High Court against that condition and challenged the constitutionality of that law. In examining the constitutionality of that condition Mapigano, J., considered its discriminatory aspect and the effect it had on the doctrine of separation of powers. He finally arrived at a conclusion that section 148 (5) (g) was unconstitutional for violating the principle of separation of powers and being discriminatory. It violated the principle of separation of powers for 'it seeks to command the court in the manner it should exercise its power and how it should decide the matter'. In his view the provision 'virtually passes judicial power to the executive' and this 'violates the spirit and intent as well as the words of Article 4.'⁶⁴⁷

The judge described it as 'a manifestly stringent provision' hedged with discriminatory tendencies which are rooted in 'affording different treatment to different persons on grounds of their station in life' and therefore in contravention of Article 13 (2) of the Constitution. It was not saved by Article 30 of the Constitution because it imposed unreasonable restrictions. In conclusion Mapigano, J., remarked:

"I simply find it hard to conceive of a reasonable restriction necessary or desirable in the interests of others, the general public or the nation which is at the

⁶⁴⁶High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 41 of 1989, unreported.

⁶⁴⁷Article 4 of the Constitution provides for the separation of powers between the executive, legislature and the judiciary.

same inherently discriminatory on the measure of one's station in life"

In *Philemon Chatanda v. R.*,⁶⁴⁸ the accused person was charged under the Economic and Organised Crime Control Act, 1984 with occasioning the loss of shillings 32,900,000/= to National Milling Corporation an authority specified by the Act. He was required under section 35 (3) (f) of the Economic and Organised Crime Control Act to deposit in cash half that amount in order to qualify for bail. This condition was vehemently challenged by his advocate on grounds of being discriminatory and removing the presumption of innocence.

Chua, J., held the provision unconstitutional for discriminating between the poor from the rich. To elaborate his findings the learned judge took the example of a poor peasant and rich business-man both facing same charge. In his views 'it is almost a foregone conclusion that the peasant will fail to deposit' the money and end up on remand 'while the one from the rich class will in all probability manage to raise' the required sum.

Also the provision attempted to displace the legal presumption of innocence for it created the impression that the accused person 'should have benefited and therefore have the ability to deposit millions of shillings in court.' However, it should be noted that at that stage the court had heard no evidence to establish whether or not the accused person had such benefit. Having considered this situation Chua, J., emphasized:

"The court has therefore no moral justification to impose what is virtually a punishment on a person who may eventually be proved innocent."

The provision was found *ultra vires* the Constitution and therefore null and void.

⁶⁴⁸High Court of Tanzania at Mbeya , Miscellaneous Economic Criminal Application No. 11 of 1990, unreported (reproduced in PETER, C. M., (1997), p. 441).

In *R. v. Ahmed Salehe*⁶⁴⁹ the accused person was charged with unlawful possession of government trophies worth shillings 32,256,000/= under the Economic and Organised Crime Control Act, 1984, and required to deposit half that amount as condition for bail. Kyando, J., drawing inspiration from the decision of the Court of Appeal in *Daudi Pete's* case found the provision unconstitutional. The learned judge argued:

"Deprivation of liberty can be properly effected in the case of certain circumstances, and subject to a procedure prescribed by law...There is no such procedure as required by the Constitution in section 148 (5) (e) Criminal Procedure Act 'or elsewhere' I do not see it in section 35 (3) (f) of the Economic and Organised Crime Control Act. It follows then, on the authority of and principles of the decision in *Daudi Pete's* case that the provisions of section 35 (3) (f)...are also violative of article 15 (2) of the Constitution."

In general the above discussion shows that the court found the provision unconstitutional because it offended a person's right to equality before the law.

However, Mwaikasu, J., in the case of *Nkandi Nangale v. R.*,⁶⁵⁰ took a totally different view about the constitutionality of the law under discussion. He was unable to find in it anything discriminatory or anything which interfered with the judicial power of the court, or which displaced the presumption of innocence. His attention concentrated on the mischief which this particular law came to cure. Finally he found it in line with the provisions of the Constitution.

"Courts have always to bear in mind that the same was enacted as a continuing serious campaign against

⁶⁴⁹High Court of Tanzania at Dar Es Salaam, Miscellaneous Economic Sessions Case No. 5 of 1991, unreported.

⁶⁵⁰High Court of Tanzania at Mbeya, Miscellaneous Economic Crimes Application No. 1 of 1991, unreported.

economic sabotage, coming in the wake of increasing embezzlements of public funds and property, smuggling, valued no longer in thousands but in millions of shillings. Yet detection has not been so easy... and at times, suspects have disappeared into neighbouring countries . It is therefore the combined desire to secure the attendance of the suspects to stand trial and also to serve as a deterrent to others from engaging into such malpractice that such *stiff*, but not impossible, bail conditions have been imposed. They are therefore, in my view, not discriminatory”.

The same judge was appointed Chairman of the Law Reform Commission a few years later. What is interesting in this case is the conflicting decisions about two co-accused persons. Nkandi Nangale was jointly charged together with one Phillemon Chatanda. He was joined to the charge after Chatanda’s bail application⁶⁵¹ had been successfully considered on the basis of the unconstitutionality of the law that required him to deposit cash. However, Nkandi’s application for bail was placed before a different judge who did not find any difficulty in writing a conflicting decision from that of his predecessor even though the two accused persons were facing the same charges. Nkandi’s bail conditions were different from the conditions which were imposed on Phillemon Chatanda but the two were jointly charged in the same case as co-accused. There is no doubt that public confidence in the judiciary is reduced where judges reach conflicting decisions on the same issue.

5:2:2 Deportation

The Deportation Ordinance, 1921,⁶⁵² one of the colonial statutes that were retained by the post-independence government, gives power to the President to deport any person, whom he considers dangerous to peace and

⁶⁵¹This case is mentioned above, see footnote 648.

⁶⁵²Cap. 38.

good order, from one place to another within the country.⁶⁵³ The President is also empowered to detain the deportee in custody or in prison, for any length of time until a fit opportunity for his deportation occurs.⁶⁵⁴ The exercise of these powers could not be questioned or appealed against in any court of law.⁶⁵⁵

Freedom of movement is naturally curtailed by detentions, arrests and other restrictions which result into deprivation of one's liberty. The court has strictly construed the provisions of law which tend to interfere with this freedom by giving extensive powers to the executive. In *Chumchua Marwa v. Officer In Charge of Musoma Prison and the Attorney-General*⁶⁵⁶ the President issued a deportation order against one Marwa and 155 others that they be deported to Lindi region because their continued residence in Mara region was dangerous to peace and good order. However, because of the non-availability of suitable transport the deportees remained in prison for more than five months. This prompted Chumchua, the son of one deportee, to apply for a writ of *habeas corpus* challenging the detention of his father Marwa Magori.

Mwalusanya, J., reasoned that although deportation is different from detention, it is true that before a person can be deported to a specified place of settlement he or she must first be arrested and detained. This interfered with individual liberty and placed such deportees within the range of remedies provided under the writ of *habeas corpus*.

The learned judge took the opportunity also to examine the constitutionality of that law which appeared to offend the fundamental rights and freedoms guaranteed by the Constitution. To him it was not enough that the detention order had been duly signed by the President and bore the

⁶⁵³Ibid., section 2.

⁶⁵⁴Ibid., section 5.

⁶⁵⁵Ibid., section 3.

⁶⁵⁶High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988, unreported (reproduced in PETER, C. M., (1997), p. 635).

required official seal. Although, traditionally the courts could not go beyond the formal requirements of the executive order,⁶⁵⁷ Mwalusanya, J., resisted the temptation to opt in favour of a restrictive approach which would undermine the Bill of Rights. He was of the view that because the President was deporting the deportees 'on grounds of public peace and order' and not 'on national security grounds', the provision was not saved by Article 31 of the Constitution.

In his assessment the Deportation Ordinance violated the fundamental right of equal protection of the law by not containing a provision of a right to be heard. It is hard to accept the judge's reasoning on what constitutes equal protection of law. Here, the learned judge appears to confuse the right to equal protection of law⁶⁵⁸ and the right to fair hearing.⁶⁵⁹ Whereas the former is directed against discriminatory tendencies by the law in affording privileges or advantages to a certain class of people but denying them to others, the latter refers to the observance of principles of natural justice during trial and right of appeal as integral parts of fair hearing. There was no evidence that the Deportation Ordinance accorded any privilege to the detainees by virtue of their status, place of origin or occupation.

Thus the Deportation Ordinance which gave powers to the President to issue a deportation order while it denied the victim of that order the right to challenge it in the court of law,⁶⁶⁰ was declared unconstitutional by the court, for violating the right to a fair hearing by the court of law.⁶⁶¹ The situation would have been different if the said statute 'provided a mechanism for review'. Mwalusanya, J., was of the view that because the Ordinance allowed

⁶⁵⁷For example in the case of *Sekeni Sanga v. The Commissioner of Prisons*, High Court of Tanzania at Dar Es Salaam, Miscellaneous Criminal Cause No. 8 of 1984, unreported, after examining the propriety of the detention order the learned judge held, that there was no basis upon which the court could entertain a complaint that the liberty of the appellant had been restricted unlawfully.

⁶⁵⁸Article 29 (2).

⁶⁵⁹Article 13 (6) (a).

⁶⁶⁰Section 3.

⁶⁶¹See Article 13 (6) (a).

'arbitrary action' against an individual it did not qualify as a statute that aims at ensuring that 'the rights and freedoms of the general public are not encroached upon by misuse of the rights and freedoms of the individual', so as to be saved by Article 30 (2) (a) of the Constitution.

5:3 The Right to a fair trial.

In the Tanzanian Constitution the right to a fair trial both in criminal and civil cases is covered under the rights of equality before the law.⁶⁶² The Tanzanian Constitution declares that 'all people are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.'⁶⁶³ The government, for the purpose of ensuring equality before the law, is under obligation to make provisions to the effect that:

"every person shall, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law... and be guaranteed the right of appeal or to another legal remedy against the decisions of courts of law and other bodies which decide on his rights or interests..."⁶⁶⁴

The Tanzanian Constitution, unlike the regional and international conventions,⁶⁶⁵ does not specifically mention issues like "reasonable time" and the "minimum rights of everyone charged with a criminal offence", as important aspects of a fair hearing. However, the courts in Tanzania have drawn on the experience of other jurisdictions when dealing with cases which required them to interpret the right to a fair trial. The right to a fair trial therefore, includes the hearing of a case within reasonable time by an independent and impartial tribunal established by law, the presumption of

⁶⁶²Article 13.

⁶⁶³Ibid., Article 13 (1).

⁶⁶⁴Article 13 (6) (a).

⁶⁶⁵See the European Convention on Human Rights, Article 6; The African Charter on Human and Peoples' Rights, Article 7; The International Covenant on Civil and Political Rights, Article 9 (3).

innocence, adequate time and facilities for the preparation of defence by the accused person, and legal representation of the accused person's own choosing.

The High Court in Tanzania has tried to show, through its decisions, the importance of the right to a fair trial, if democracy and equality before the law are to be promoted among the people. In order to achieve this, the court has given purposive interpretation to the statutes and the provisions of the Constitution which relate to fair trial.

5:3:1 Trial of an accused person within reasonable time.

One year before the Bill of Rights became justiciable, Mwalusanya, J., stated categorically in the case of *Benedict Mashibe and Another v. Attorney-General and Another*⁶⁶⁶ that inordinate delays to prosecute criminal cases would not pass the constitutionality test after the Bill of Rights became justiciable. The learned judge remarked:

“Under Article 15 we have the right to liberty and that imports that any protracted and unreasonable delay in deciding the fate of an accused person is unconstitutional and so this court may order the D.P.P., by way of *Mandamus* to release the accused person in default of proceeding with the trial immediately.”

These remarks were made by the judge in an application for leave to apply for an order of *mandamus* against the D.P.P. The applicants sought the court's order directing the D.P.P., to comply with his own instructions not to prosecute the applicants who were facing a criminal charge. The D.P.P., had written a letter to his subordinate to the effect that two applicants appeared not to be implicated and that the trial should proceed in respect of the other

⁶⁶⁶High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 10 of 1987, unreported.

accused persons. His subordinates did not comply. The application could not be granted by the court because the applicants failed to show a particular duty which the D.P.P., had failed to perform. However, the court was satisfied that where there were protracted and unreasonable delays by the D.P.P., in prosecuting an accused person, the court could order him by way of *mandamus* to do so within a specified time, or on default the court might release the accused person from further prosecution.

In 1990 the case of *Paschal Makombanya Rufutu v. D.P.P.*⁶⁶⁷ demonstrated Mwalusanya, J's determination to protect an accused person's rights to a fair trial. In that case the accused applied to the court for orders of *certiorari* and prohibition against the D.P.P. He challenged the decision by the D.P.P., of 24/ 8/ 1989 to apply to the Economic Crimes Court for adjournment of the case to the next session instead of deciding not to offer evidence and enable the accused person be acquitted. The D.P.P., applied for adjournment of the case for hearing because he had no witnesses on that day. The applicant argued that four years had lapsed since he was charged with the offence but his trial has always been postponed due to lack of witnesses. He applied to the court to quash the decision of the D.P.P., to continue to prosecute him since his trial had been delayed for so long such that it amounted to persecution. The court held that the decision of the D.P.P., to apply to adjourn the case on 24. 8. 1989 was unreasonable and an abuse of the discretion vested in him. Mwalusanya, J., observed that it was one of those cases where there had been protracted and unreasonable delay so as to lead to the conclusion that the due process of law had virtually broken down and the accused had been left to languish without any proper determination of his case. The learned judge emphasised that the right to liberty embraces the right to be tried within reasonable time. The application was granted and the D.P.P., was

⁶⁶⁷High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 3 of 1990, unreported.

prohibited from continuing to prosecute the applicant on the charges he was facing.

In this case Mwalusanya, J., made two important contributions to the development of human rights jurisprudence in Tanzania. First, he introduced the right to have a case tried within reasonable time, something that was not expressly covered by the Bill of Rights in the Constitution. Since the Tanzanian Constitution has no express provision to that effect, the learned judge extended the construction of the scope of "the right to liberty" under Article 15 of the Constitution, to be in conformity with the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights which provide for the right of an accused person to be tried within a reasonable time. He assumed that Parliament in enacting the Bill of Rights would do nothing that was in conflict with these conventions which Tanzania had ratified.

Second, the learned judge shed more light on the possibility of taking a civil action to dispose of a criminal case whose general trend infringes on individual fundamental rights, even where other remedies were available under the criminal law.⁶⁶⁸ Here, the court was able to quash and prohibit further prosecution of the accused person since his right to be tried within a reasonable time had been violated.

Of course, the length of the delay and what amounts to unreasonable time would differ from one case to another depending on the peculiar circumstances of each case, and very much on the attitude of the presiding judge. In this particular case the judge believed that where rights are infringed or 'where fundamental principles are overthrown and where the general system of the law is departed from, the judges should be on the side of the down-trodden'. According to him, 'it is a disgrace to the lawyers if the human

⁶⁶⁸For example, dismissal of the charge and discharging the accused. However, this would not be a bar to further prosecution against the accused person so discharged by the court.

rights are being swept under Tanzania's democratic carpet in front of their eyes'.

5:3:2 Legal representation

The Tanzanian Constitution does not provide a specific guarantee of the right of a person to be legally represented and to be granted legal aid where appropriate in criminal or civil cases. However, there is a specific law which empowers the "certifying authority"⁶⁶⁹ to certify that 'in the interests of justice' an accused person should have legal aid in the preparation and conduct of his defence or appeal.⁶⁷⁰ This law does not give the accused person a right to legal representation but allows the Registrar, 'where it is practicable so to do', to assign to the accused an advocate 'for the purpose of the preparation and conduct of his defence or appeal' when the certifying authority so requires. Only those accused persons facing serious charges⁶⁷¹ which are triable by the High Court have been enjoying these services as a matter of right.⁶⁷² Another observation is that these advocates are not of the accused persons' choice but are just assigned by the Registrar to offer legal assistance to them.

The High Court stated it clearly in the case of *Khasim Hamisi Manywele v. R.*,⁶⁷³ that an accused person facing a serious criminal charge has a right to free legal representation, whether in the High Court or in the subordinate courts, if he cannot afford to hire such representation.⁶⁷⁴ In this case the accused was convicted of robbery with violence by the District Court and was sentenced to thirty years imprisonment and twelve strokes of corporal punishment. At the trial the accused person was not legally represented. On

⁶⁶⁹For proceedings in the High Court the certifying authority is the Chief Justice or the judge of the High Court conducting such proceedings and for proceedings before subordinate courts, the certifying authority is the Chief Justice.

⁶⁷⁰See Legal Aid (Criminal Proceedings) Act, 1969, Act No. 21 of 1969, Section 3 (1).

⁶⁷¹Like murder, manslaughter and treason.

⁶⁷²For example the Court of Appeal in *Laurent Joseph v. R.* [1981] T.L.R. 351 nullified the proceedings in the High Court and ordered a retrial because the accused person had not been legally represented during his trial for murder.

⁶⁷³High Court of Tanzania at Dodoma, Criminal Appeal No. 39 of 1990, unreported (reproduced in PETER, C. M., (1997), p. 349).

⁶⁷⁴The same views were reiterated by the court in *Thomas Mjengi's* case.

appeal, Mwalusanya, J., who was conducting the proceedings, granted free legal aid to the appellant for he believed that it is really the poor, who need most the court's protection for securing to themselves the enjoyment of human rights. In his opinion, justice should not be out of the reach of the poor, and those who do not have the means to pay for legal representation in matters where their liberty is at stake, must be provided with it at the expense of the State. Furthermore, the learned judge was of the opinion that the right to legal representation paid for by the State for indigent accused persons is a constitutional right incorporated in the right to a fair hearing in Article 13 (6) (a) of the Bill of Rights and the right to personal liberty provided in Article 15 (2) of the Constitution. Finally, the court held that the violation of this constitutional right rendered the trial a nullity. The appeal was allowed, conviction quashed, sentence set aside and the appellant was released forthwith.

Previous court decisions were to the effect that legal representation is a right for any one who can afford to pay for it. But the Eastern Africa Court of Appeal in the case of *Mohamed Salim v. R*⁶⁷⁵ back in 1958 had issued guidance on this issue that legal aid for the poor accused person is a right. It is disturbing to note that neither the judges nor the members of the Bar made reference to this authority. As Mwalusanya, J., observes, both sides have "with a calculated conspiracy of silence, buried their heads, in the sand like ostriches pretending that they are unaware" of this authority of the Eastern Africa Court of Appeal.

For a long time the court has protected the right of those who can afford to be defended by counsel and remained unconcerned about poor persons tried by subordinate courts. Whenever the accused person was denied the right of legal representation by the court, the trial to proceed in the absence of the accused person's counsel, such proceedings could be declared a nullity on

⁶⁷⁵(1958) E. A. 202.

appeal. In the case of *Alimasi Kalumbeta v. R*⁶⁷⁶ the District Court decided to hear the evidence of the witnesses in the absence of the counsel for the accused person. There was evidence that the learned counsel had been notified of the hearing date by way of telegram. On appeal conviction and sentence were quashed on the ground that the trial magistrate denied the accused person his right to be represented by an advocate. The case of *Alimasi Kalumbeta* shows that the right to legal representation could be exercised in court only after the accused person had hired the services of a lawyer. The court could try to be flexible and make sure that the accused person's counsel was present during the trial to defend the interests of his clients. For those who could not afford to hire such services, the trial continued without legal representation.

Bearing in mind the scarcity of financial resources and the country's economic situation, it might be unrealistic to claim State-funded legal aid for all criminal cases. However, Mwalusanya, J., advised the government to institute a system of salaried 'public defenders,'⁶⁷⁷ which is a less costly scheme, for free legal aid to the poor. Just for a start, this should be given as of right to indigent accused persons facing serious criminal charges which attract long prison sentences, where the accused person is charged with an economic crime, where complicated issues of law are involved, and where the Republic is represented by a State Attorney.

Knowing that there were many other accused persons who were facing trial without legal representation, the learned judge directed all District Courts and Resident Magistrate Courts to forward all case files eligible for legal representation, as indicated in his judgment, to the Chief Justice who is their certifying authority, for consideration as to whether free legal aid should be granted to the indigent accused persons.

⁶⁷⁶[1982] T.L.R. 329.

⁶⁷⁷This scheme has operated successfully in Zambia, Zimbabwe, Malawi, Nigeria and U.S.A.

As for civil cases, Mwalusanya, J., in *The National Bank of commerce v. Vitalis Ayemba*,⁶⁷⁸ considered the right to fair trial an area for liberal construction. He allowed para-legal officers⁶⁷⁹ (“McKenzie Friends”), to represent parties to the suit as recognized agents. In that case the plaintiff’s counsel objected to the appearance of one para-legal officer on behalf of the defendant under the pretext of holding special power of attorney. The court held that even para-legal officers holding special powers of attorney, have the right to be heard by the court as recognized agents even if the parties appointing them are also present in court. There was an earlier Court of Appeal decision to the effect that where the party concerned is also present in court, a person holding the power of attorney cannot be allowed to have conduct of the case.⁶⁸⁰ The learned judge tried to distinguish the facts of that case and those of the one he was attending to. It seems that this was the judge’s technique to find a way of expressing his views which would conflict with the binding decision of the Court of Appeal.

The reasons for the learned judge’s support of para-legal officers, was to help the poor who cannot be legally represented in court simply because they cannot afford to pay the high legal costs. This came out clearly in the case of *Protazi Kutaga v. Asteria Ndyamukama and Another*⁶⁸¹ where he observed:

“In view of a large illiterate populace that come to court to fight for their basic rights, it is in public interest that para-legal officers be allowed to appear in court... we hope the underprivileged will brazenly start to utilize this institution of para-legal officers so as to prove that might is not always right.”

⁶⁷⁸High Court of Tanzania at Mwanza, Civil Case No 37 of 1988, unreported (reproduced in PETER, C. M., (1997), p. 375).

⁶⁷⁹These are retired District Magistrates, and Primary Court Magistrates, some times referred to as public writers. They draft legal documents on behalf of laymen and advise litigants or the accused persons. Their charges are significantly low and possibly within the reach of a poor man.

⁶⁸⁰See *Naiman Moiro v. N. K. J. Zablon* [1982] T.L.R. 274.

⁶⁸¹High Court of Tanzania at Mwanza, Civil Appeal No. 115 of 1983 (reproduced in PETER, C. M., (1997), p. 372).

In that case a "public writer" was denied appearance on behalf of the applicant by the District Court at the hearing of the application and the judge viewed this as a denial of a right to legal representation. In order not to deny anybody such right, the judge tried to expound on the extent para-legal officers can be allowed to represent litigants in courts. This includes sitting beside his client and taking notes in court, quietly making suggestions to the litigant and advising him on what to say and do, proposing questions to the litigant, but he should not be allowed to address the court by way of making submissions or asking questions.

This is a significant extension of the right to legal representation to all people including the poor who cannot afford to pay for high costs involved in hiring services of lawyers. Practising lawyers viewed this as a step towards professional degradation if non-professionals or "Bush Lawyers" could be allowed to practise and represent litigants or accused persons in the court. Such complaints happen not because of the potentially low standards of justice likely to be occasioned by allowing people of sub-standard qualification 'to infiltrate into the sphere of legal practice.'⁶⁸² The main reason is the worry about the loss of clients by qualified practising lawyers in the event para-professional practice is allowed.

Experience and practice has shown that these para-legal officers, very common in Mara region, have not been well received by courts in Tanzania due to monopoly of the field by the advocates. In Dar Es Salaam and Arusha they are overwhelmed by practising professional lawyers and the community regards them as unlicensed "Bush Lawyers". Further, the amendments to the Advocates Ordinance⁶⁸³ introducing a penalty of up to five hundred thousand

⁶⁸²TWAIB, F., "Lawyers and the Availability of Legal Services in Tanzania Mainland", in MOHLIG, W. G., (ed.), *Law in Africa*, Köln; Rudiger Koppe Verlag, 1998, p. 79.

⁶⁸³Cap. 341.

shillings for any unqualified person practising as an advocate, have effectively undermined the decision by Mwalusanya, J.⁶⁸⁴

5:3:3 Adequate time and facilities to prepare the defence

The right to a fair hearing encompasses also the guarantee of adequate time and facilities to the accused person for the preparation of his defence. The accused person is protected against hasty trial but at the same time there is a requirement that an accused person must be tried within a reasonable time. It means that he should be accorded an opportunity to organize his defence in an “appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court,”⁶⁸⁵ and to allow him to communicate with his lawyer.⁶⁸⁶ These necessary components of the right to a fair trial were carefully considered by the court in the case of *Rev. Christopher Mtikila and Three Others v. R.*,⁶⁸⁷ The accused persons were charged with holding an unlawful assembly, and using abusive language in a manner likely to cause a breach of the peace. They were convicted and sentenced to imprisonment by the trial court.

When the defence case was opened the accused persons’ advocates asked for time to prepare their defence. This involved going back to Dar Es Salaam to collect some more documentary evidence and getting access to documents and photographs that had been seized by the police. The trial magistrate rejected the defence application because in his opinion the requested documents were irrelevant and not vital to the case. In protest, the accused persons declined to defend themselves and the two defence counsel

⁶⁸⁴See Written Laws (Miscellaneous Amendments) Act, 1997 (Act No. 31 of 1997).

⁶⁸⁵HARRIS, D. J., O’BOYLE, M., and WARBRICK, C., p. 254.

⁶⁸⁶See *Campbell and Fell v. U. K.*, 7 E.H.R.R. 165.

⁶⁸⁷High Court of Tanzania at Dodoma, Criminal Appeal No. 90 of 1992, unreported (reproduced in PETER, C. M., (1997), p. 665).

withdrew from the case. However, the trial magistrate went on to write a judgment and convicted the accused persons to whom he had denied the chance to prepare their defence. The trial magistrate did not only dismiss the defence application, but he went as far as to choose the line of defence for the accused persons that the only defence available to them was whether the abusive words were spoken or not.

On appeal the High Court quashed the conviction and the sentence on the ground that 'when the court denied the accused persons the chance to prepare their defence without restrictions, it also denied them a fair trial', which is both a statutory and constitutional right. Mwalusanya, J., found that the refusal by the trial magistrate to allow the accused persons access to the documents they required for their defence, was a fundamental defect which could not be cured by a retrial. Thus they were released and set free.

5:4 Conclusions.

This chapter has demonstrated how the courts in Tanzania have interpreted the Constitution with regard to laws which potentially violated the provisions of the Bill of Rights relating to the criminal justice process. We have seen that between the High Court and the Court of Appeal, the former has shown some activism in protecting individual fundamental rights. Mwalusanya, J., Lugakingira, J. (as he then was), Mroso, J., Mapigano, J., and Nchalla, J., were prominent in demonstrating judicial protection of individual fundamental rights. However, some of the High Court judges are not confident enough to declare a law unconstitutional for they think doing so might interfere with the legislature's province. As a result, there have been different conflicting decisions of the High Court about the same issues, depending on the attitude of the presiding judge. In that kind of situation, it was left for the Court of Appeal to provide guidance as to what should be the position of the law. Unfortunately, the Court of Appeal has taken too long to clarify such

conflicts and more often than not has relied on technicalities rather than substance.

Our discussion in this chapter has shown the Attorney-General's regular reference to the derogation clause in the Constitution, as saving every law that was challenged in court for being violative of fundamental rights and freedoms. It is interesting to note that in every case where the court declared a particular law unconstitutional, the Attorney-General opposed the argument that it was unconstitutional. This explains the government's inaction towards the laws whose amendment/repeal was recommended by various bodies, for being in conflict with the Constitution.

It is also interesting to note in *Daudi Pete's* case Mwalusanya, J., referred to various works by academic experts. This is a new practice among Tanzanian judges. Traditionally, a considerable number of judges in Tanzania had the tendency to ignore works by academicians believing that such works are too hypothetical and fit for teaching only. This new development ought to be maintained if human rights jurisprudence is to be developed in Tanzania.

It can be argued that, whatever little has been done is a step forward, for a judiciary which had no experience in matters of human rights. However, the decisions and reasoning of the Court of Appeal in criminal cases seem to frustrate the activist High Court judges. Would the approach be different in civil cases?

CHAPTER SIX

REACTION OF THE COURT TO CIVIL ACTIONS.

Since the Bill of Rights became justiciable in 1988, certain people have instituted civil claims to enforce their fundamental rights guaranteed under the Constitution. On some occasions the court deliberated constitutional guarantees on its own initiative even where the parties had not pleaded any particular right. A variety of issues have been subject of judicial attention by the High Court and a few of them reached the Court of Appeal.

This chapter attempts to show how the judiciary has responded to claims of a civil nature which aimed at enforcing fundamental rights and freedoms. We try to find out from the decisions of the courts whether the attitude of the judiciary in civil claims has been different from the one we observed in the criminal justice process. In this regard special attention is paid to the Court of Appeal's decisions, for it is the highest and final court in the country and therefore placed in a position to influence the development of the law.

6:1 Discrimination.

The promotion of equality and protection against discrimination on the basis of 'race, sex, language or religion' has been high on the United Nations agenda⁶⁸⁸ and one of the purposes of the Organization of African Unity is 'to promote international co-operation, having due regard to the Charter of the

⁶⁸⁸See the United Nations Charter, Article 1 (3).

United Nations and the Universal Declaration of Human Rights.⁶⁸⁹ Also the United Nations and the Organization of African Unity have promoted specific international agreements in order to fight against racial discrimination and discrimination against women.⁶⁹⁰ All member states signatory to the conventions, Tanzania being one of them, have to signify their consent by translating the spirit of these documents into municipal law. Tanzania's seriousness was manifested by the enshrinement of the Bill of Rights in the Constitution to the effect that, 'all persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.'⁶⁹¹ Discrimination on grounds of 'race, place of origin, political opinion, colour, occupation or creed' is prohibited under the Tanzanian Constitution⁶⁹² but discrimination on grounds of sex is not specifically referred by the Constitution. However, the court of law has on several occasions been asked to give this particular provision a purposive interpretation and to enable women, to benefit from its presence in the Constitution.

Shortly before the Bill of Rights became justiciable, Munyera, J., in the case of *Peter Byabato v. Pastory Rugaimukamu*,⁶⁹³ and later in *Gabriel Valery v. Birungi Balilemwa*⁶⁹⁴ held Haya customary law unacceptable for its discriminatory character whereby females were treated as inferior to their male counterparts when it came to the inheritance and disposition of clan land. In both cases the male clan members were challenging the rights of female heirs to sell clan land in the light of the provisions of Local Customary Law

⁶⁸⁹Charter of the Organization of African Unity, Article 2 (e).

⁶⁹⁰International Convention on the Elimination of All Forms of Racial Discrimination, 1966; International Convention on the Elimination of Discrimination Against Women, 1979; International Covenant on Civil and Political Rights, Article 26; African Charter on Human and Peoples' Rights, Article 18 (3).

⁶⁹¹Article 13 (1).

⁶⁹²Article 13 (5).

⁶⁹³Op cit.

⁶⁹⁴Op cit.

(Declaration) (No. 4) Order, 1963.⁶⁹⁵ Thus the learned judge was invited to interpret the relevant provisions of the Declaration which provide:

Rule 20.

Women can inherit, except for *clan land*, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.

Rule 31.

If there is only one child, he will inherit all the property but if the child is female she cannot inherit *family land* which she is allowed to use for life without selling it.

However, during the same period when the justiciability of the Bill of Rights was under suspension the Court of Appeal in *Rukuba Nteme v. Bi Jalia Hassan and Gervase Baruti*⁶⁹⁶ and also in *Haji Athumani Issa v. Rwentama Mututa*⁶⁹⁷ clarified in a definite way the position of law in relation to the sale of clan land by women. In these two cases, the High Court judges had held that females could inherit and sell clan land like their male counter parts, but the Court of Appeal overturned these decisions.

Nyalali C. J., in *Rukuba Nteme* felt it was premature to examine and invalidate Rule 20 of the Rules of Inheritance in the light of the Bill of Rights. He was of the opinion that the court could exercise the power to invalidate any customs or enactment, that are contrary to human rights and freedoms embodied in the Constitution, after the expiry of the period of suspension. Much as it is true to say that the courts' power with regard to the enforcement

⁶⁹⁵Op cit.

⁶⁹⁶Court of Appeal of Tanzania at Mwanza, Civil Appeal No. 19 of 1986, unreported.

⁶⁹⁷Court of Appeal of Tanzania, Civil Appeal No. 9 of 1988, unreported.

of human rights was held in abeyance from 1984 until March 1988, the Court of Appeal in this case was not barred from expressing its views about the discriminatory character of the impugned rule of inheritance. However, no criticism of the rule was made by the court.

Although the decision of the Court of Appeal in the case of *Haji Athumani Issa* came after the expiration of the period during which the justiciability of the Bill of Rights was suspended, Kisanga J. A., let the discriminatory Haya customary law prevail over the Bill of Rights just because the constitutionality of any law could not be challenged in the course of an appeal by an appellate court, and that when the lower court determined the issue the Bill of Rights was still under suspension. The best he could do was to remind the parties of the procedure that the aggrieved party had to follow if he/she felt that his/her rights under the Constitution were infringed. That is, to file a petition in the High Court under Article 30 (3) of the Constitution. This attitude is exactly what Shivji referred to as positivist tradition of the Tanzanian courts, especially the Court of Appeal, 'hanging on the thin technical strings' in order to avoid declaring a particular law invalid.⁶⁹⁸

Furthermore, the learned Justice of Appeal suggested that 'rules of the court'⁶⁹⁹ must first be enacted under Article 30 (4) of the Constitution before a citizen can file a petition to enforce his rights under Article 30 (3) of the Constitution. In other words, the justiciability of the Bill of Rights was once again suspended, this time by the court, until such time as rules of the court would be enacted. This means, if the statement of Kisanga, J. A., was to be given weight, no one could legally file any petition challenging the constitutionality of any law until 1995 when the Basic Rights and Duties Enforcement Act, 1994⁷⁰⁰ came in force.⁷⁰¹

⁶⁹⁸SHIVJI, I. G., (1987), p. 137.

⁶⁹⁹Rules of procedure that regulate both the institution of proceedings and the powers of the court to hear petitions.

⁷⁰⁰ Act No. 33 of 1994.

⁷⁰¹About this law see our discussion in chapter four.

Eventually, in the case of *Bernardo Ephrahim v. Holaria Pastory and Another*⁷⁰² discrimination of women by the laws of inheritance, on account of their sex was declared unconstitutional. In that case, a woman one Holaria Pastory sold to Gervazi Kaizilege a non-clan member, the clan land that she had inherited from her father by a valid will. The sale was nullified and declared void by the Primary Court as females under Haya customary law have no power to sell clan land. The Primary Court's finding was in accordance with rule 20 and 31 of the Local Customary Law (Declaration) (No. 4) Order, 1963.

On appeal the District Court took judicial notice and applied the Bill of Rights which had been newly enshrined in the Constitution, and rejected the old proposition which denied female clan members same rights as male clan members, to inherit and sell clan land. Hence an appeal to the High Court.

In his well-reasoned judgment Mwalusanya, J., was of the opinion that, because Tanzania has ratified a number of international and regional instruments which prohibit discrimination based on sex, it should always be ashamed to fall below the standards and principles proclaimed therein. The learned judge was aware of the then existing binding decisions of the Court of Appeal on the issue, that females in the Haya community did not have the right to sell clan land.

Nonetheless, Mwalusanya, J., invoked the provisions of the Constitution (Consequential, Transitional and Temporary Provisions) Act⁷⁰³ which allow the court with effect from March, 1988 to construe the existing law, including customary law 'with such modifications, adaptations, and exceptions as may be necessary to bring it into conformity with the provisions' of the Bill of Rights. He found Rule 20 of the Rules of Inheritance being discriminatory of females, and therefore inconsistent with Article 13 (4) of the

⁷⁰² High Court of Tanzania at Mwanza, Civil Appeal No. 70 of 1989, reported in [1990] L.R.C. (Const.) 757.

⁷⁰³Section 5 (1).

Tanzanian Constitution, a finding based on factors such as (i) the intention of Parliament to do away with all oppressive and unjust laws of the past; (ii) women's liberation; and (iii) the previous decisions of the Court of Appeal about the issue, being in conflict with the provisions of the Constitution and therefore not binding on him.

The case of *Bernardo Ephrahim* modified Rule 20 of the Rules of Inheritance such that males and females have now equal rights to inherit and sell clan land and the rule which entitled females to have usufructuary rights only, with no power to sell the land they inherit was declared void and of no effect. This time no appeal was preferred to the Court of Appeal which had previously represented part of the judiciary which was not 'bold enough to upset the customary law'.⁷⁰⁴ It is at this stage that a significant difference of attitude between the Court of Appeal and the High Court is clearly noted.

The statement by Kisanga, J. A., in the case of *Haji Athumani Issa* that no petition for enforcement of fundamental rights could be entertained unless specific law providing for the enforcement procedure was enacted, was subsequently ignored by judges. Mwalusanya, J., in *Bernardo Ephrahim's case* was very diplomatic to regard that statement as an *obiter dictum*. He went further to construe the language of Article 30 (4) as being permissive and therefore allowing petitions to be filed without rules having been made for the purpose.⁷⁰⁵

It is therefore apparent, the Court of Appeal has repeatedly frustrated the efforts of certain active High Court judges who viewed the discriminatory Haya customary law of inheritance as unsuitable for a democratic society based on the principle of equality before the law.

⁷⁰⁴MIGIRO, R. M., (1991), p. 362.

⁷⁰⁵COLDHAM, S., (1991), p. 205.

6: 2 Freedom of association, peaceful assembly and participation in national public affairs.

The idea of freedom of association and peaceful assembly is concerned with the right to form groups or organizations pursuing particular objectives. This will include, for example, the right to form and join political parties or trade unions, and assembling in order to discuss the affairs of that particular group or organization. This is a special aspect of freedom of association, for it enables individual citizens through their organizations to participate in the public affairs of the nation. In Tanzania, with the incorporation of the Bill of Rights in the Constitution, freedom of association was made a constitutional right.⁷⁰⁶

Ironically Article 20 of the Tanzanian Constitution guaranteed the freedom of association when the Bill of Rights was incorporated therein, but there was no right to form political parties for Tanzania was a one-party state.⁷⁰⁷ Lawyers had started questioning how the Bill of Rights could operate amidst conflicting provisions of the same Constitution which guaranteed the freedom of association, and at the same time barred the formation of political parties. However, the worries which occupied the lawyers' mind about these conflicts and contradictions, were not shared by Nyalali, C. J. The Honourable Chief Justice could not see how a provision which made Tanzania a one party state, could create inconsistencies in the Constitution. In the public lecture which he delivered to the University of Dar Es Salaam Law Society on 5th September, 1985, the Chief Justice was of the firm view that the right to form political parties was not included in the freedom of association under one party state:

⁷⁰⁶Article 20.

⁷⁰⁷ Articles 3 and 10 of the Tanzanian Constitution, established the one party state and declared CCM the sole political party in the United Republic. It was the Eighth Constitutional Amendment Act, 1992 (Act No. 4 of 1992) that brought about multi-party democracy by amending and deleting the provisions that were in conflict with the freedom of association.

“...the freedom of association guaranteed by Article 20 (1) does not include any freedom to form political parties apart from *Chama Cha Mapinduzi* established by the Constitution itself”.⁷⁰⁸

In 1992 multi-party democracy, replaced the one party state in Tanzania following the 8th amendments to the Constitution.⁷⁰⁹ However, the government imposed many restrictions on the registration of political parties and this constitutional right turned to be a right exercisable at the wish of the state. The restrictions on registration of political parties brought about by the Constitutional amendment and the Political Parties Act, 1992⁷¹⁰ included two-stages registration whereby every political party was required to satisfy the conditions for provisional registration first and full registration would be at a later stage upon fulfilling other conditions within a specified period.⁷¹¹ Any political party whose policy advocated 'the breaking up of the union' or carrying on 'political activities exclusively in one part of the United Republic' did not qualify even for provisional registration.⁷¹² Full registration was not possible unless a particular political party had its leaders drawn from Tanzania mainland and Zanzibar and also had 'obtained not less than two hundred members' from at least ten regions of the United Republic including at least two regions of Zanzibar.⁷¹³ Without fulfilling these conditions a political party risks rejection or cancellation. It is interesting to note that the law stated in unequivocal terms that CCM the ruling party was not to be affected by these conditions. Instead it 'was deemed to have been fully registered as a political party' and a certificate of registration was issued to that effect.⁷¹⁴ It was under these circumstances that some political parties were refused registration. As a

⁷⁰⁸NYALALI, F., p. 5.

⁷⁰⁹See Act No. 4 of 1992.

⁷¹⁰Act No. 5 of 1992.

⁷¹¹Section 8.

⁷¹²Section 9. See also Article 20 (2) of the Constitution.

⁷¹³Section 10.

⁷¹⁴Section 7 (2).

result people were forced to affiliate with any of the registered political parties in order to participate in national public affairs. These restrictions and perhaps coupled with other reasons, prompted Rev. Christopher Mtikila, a human rights campaigner *cum* political activist to institute a civil suit against the Attorney-General in the famous case of *Rev. Christopher Mtikila v. Attorney-General*,⁷¹⁵ questioning the constitutionality of such restrictions.

In that case the petitioner asked the court among other things, to declare unconstitutional and void the provisions of the Political Parties Act, 1992⁷¹⁶ which inhibited the formation of political parties; the provisions of the Local Authorities (Elections) (Amendment) Act, 1992⁷¹⁷ which rendered it impossible for independent candidates to contest presidential, parliamentary or local council elections unless they were sponsored by a registered political party; the provisions of the Police Force Ordinance, 1953⁷¹⁸ and the Political Parties Act which made it necessary for permits to be obtained in order to hold meetings or organize processions.

Earlier on, the Attorney-General had successfully expressed his objection against the case being presided over by Mwalusanya, J., merely because of his reputation for human rights activism. In fact in the earlier case of *Rev. Christopher Mtikila and Three Others v. R.*,⁷¹⁹ Mwalusanya, J., had declared unconstitutional the provisions of the Police Force Ordinance which gave power to the police to prevent private as well as public meetings. The issue of freedom of peaceful assembly was settled in that case. Following the objection that was mounted by the State Attorney, Mwalusanya, J., disqualified himself from presiding over the case, and the Chief Justice assigned it to Lugakingira, J., for hearing.

⁷¹⁵High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993, reported in [1996] 1 CHRLD, p. 11.

⁷¹⁶ Act No. 5 of 1992.

⁷¹⁷ Act No. 7 of 1992.

⁷¹⁸ Cap 322.

⁷¹⁹Op cit.

After hearing both sides, Lugakingira, J., held that the requirement for a permit under the Political Parties Act, 1992 infringed the right to freedom of peaceful assembly and procession and was therefore unconstitutional and that 'the freedom was rendered more illusory by the fact that the power to grant permits was vested in the District Commissioners who themselves were cadres of the ruling party'. Further, he declared and directed that it should be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and local council elections, notwithstanding Articles 39, 67, and 77 of the Constitution as well as section 39 of the Local Authorities (Elections) Act 1979 as amended by Act No. 7 of 1992 that candidates should be members of and sponsored by registered political parties. This finding was solely based on generous and liberal approach that was given to the provisions of the Constitution which on the one hand entitle every citizen to participate in the government of the country, without necessarily being a member of any political party⁷²⁰; and yet on another, bars the citizens from running for office unless they are members of certain political parties whose sponsorship they must secure first.⁷²¹ In that kind of situation where a provision of the Constitution establishing a fundamental right appeared to be in conflict with another provision in the Constitution, the principle of 'harmonization' had to be called in aid by the judge. The principle maintains that 'the entire Constitution has to be read as an integrated whole, and no one particular provision destroys the other but each sustain the other'.

The learned judge was prepared to identify himself with human rights if an attempt to maintain balance and giving 'effect to all the contending provisions' of the constitution was not possible, as verified by his remarks:

⁷²⁰ See Articles 21 (1) and 20 (4).

⁷²¹ Articles 67 (1) (b), 77 (3) (a), and 39.

“...the court is enjoined to incline to the realization of the fundamental rights and may for that purpose disregard even the clear words of a provision if their application would result in gross injustice”.

Lugakingira, J., spent some time expounding on the subject of *locus standi* in the context of constitutional litigation. The common law concept of *locus standi* which requires the litigant to have sufficient interest in the outcome of the case, has been a thorn in the flesh of human rights activists in many jurisdictions. Earlier, the State Attorney asked the court to dismiss the petition on the ground that the petitioner had no greater personal interest in the case than that of the general public. The State Attorney's litany of preliminary objections centred on the assumption that the petitioner had no *locus standi*. The learned judge took the opportunity to put it across that the principle would not apply in cases which aimed at enforcing constitutional rights. Such cases were considered by the court to be of the nature of public interest litigation and their origin was found in public law as distinct from private law. He emphatically observed that:

“In matters of public interest litigation this court will not deny standing to a genuine and *bona fide* litigant even where he has no personal interest in the matter”.

In arriving at this conclusion Lugakingira, J., took into account the development of the doctrine in India, Canada and England, particularly the decision in *IRC v. National Federation of Self-Employed and Small Business Ltd.*⁷²² In that case the court remarked that it would be grave in the system of public law if people ‘were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.’⁷²³

⁷²²(1981) 2 All E.R. 93.

⁷²³*Ibid.*, at p. 107.

Finally, he interpreted the provisions of the Constitution⁷²⁴ to cater for both personal and public interest litigation. He was of the firm opinion that it was not necessary to rely on foreign precedent in order to trace the doctrine of public interest litigation for 'it is already with us in our Constitution'. However, he emphasized that standing would always be granted on the basis of public interest litigation where the petition is *bona fide* and evidently for the public good and where the court can provide an effective remedy. This decision has not been overturned by the Court of Appeal and we take it to be the position of the law currently obtaining, as far as actions to enforce constitutional rights are concerned.

Perhaps the question would be, how many people/organisations have made use of this precedent to institute actions on the basis of public interest litigation? As far as we are aware, there has been none on record. The culture of apathy and silence, stemming from fear and ignorance, coupled with poverty, have immensely contributed to the state of complacency, that we experience today among the Tanzanians. It is important that the people should be educated about their rights and the need to enforce them without any element of fear. Other factors, like availability of resources, may then follow.

The question of the constitutionality of the restrictions on the formation of political parties, was intentionally left out by the judge because the same issue was pending before the Court of Appeal in the case of *Rev. Christopher Mtikila and The Democratic Party v. Attorney-General and the Registrar of Political Parties*,⁷²⁵ and it involved the same parties. The appellant's political party was refused full registration by the Registrar of Political Parties. When the appellants challenged the constitutionality of the Act which gave the Registrar such arbitrary powers, his application was dismissed by the High Court.

⁷²⁴Articles 26 (2) and 30 (3).

⁷²⁵Court of Appeal of Tanzania at Dar Es Salaam, Civil Appeal No. 28 of 1995, unreported.

Unfortunately, the Court of Appeal was not prepared to approach the appeal from the constitutional or human rights point of view. Instead, the Justices of Appeal relied on the principles of natural justice, that the Registrar of Political Parties reached the decision of refusing the appellant's party full registration without hearing the appellant. That was the basis for allowing the appeal. It should not be forgotten that the burning issue in the High Court was the constitutionality of the impugned law, but nothing was said about it by the Court of Appeal. Accordingly the order of the Registrar of Political Parties refusing to grant full registration to the appellant's party was quashed, and the court made the following order:

“...we return the matter to the said Registrar and order that he should deal with the appellant's application in accordance with the principles of fairness and justice.”

This turned to be an empty decree. The court was unnecessarily cautious when it failed to order the Registrar to issue full registration to the applicant's party, and yet made a finding that there was a violation of the principle of natural justice. It is tempting to say that the Court of Appeal was complying with the traditional practice, which requires it to issue an order of *mandamus* commanding the decision maker concerned to decide the matter afresh in accordance with the law, whenever an administrative decision is challenged by way of a prerogative order. However, in some similar instances the Court of Appeal had gone beyond the level of issuing commands to the decision maker to reconsider the matter afresh in accordance with the law. For example, in the case of *Patman Garments Industries Ltd. v. Tanzania Manufacturers Ltd*⁷²⁶ the Court of Appeal nullified the decision of the Commissioner for Lands, but never returned the matter to him to be considered

⁷²⁶[1981] T.L.R. 303.

afresh in accordance with the law, to determine who was the lawful owner of the plot in dispute. Instead, the Court of Appeal itself after considering the merits of the case, reached a decision on the substantive issue and declared the plaintiff the lawful owner of the plot in dispute. We would have expected it to do the same in the case of *Rev. Mtikila*. To date, the appellant's political party remain unregistered.⁷²⁷

6:3 The right to work.

Before the enshrinement of the Bill of Rights in the Constitution there was no right to work, and for Tanzania, that was one of the colonial legacies.⁷²⁸ When the Bill of Rights was incorporated in the Constitution, the right to work was unequivocally made a fundamental human right.⁷²⁹

It was on these grounds that Mwalusanya, J., in the case of *Augustine Masatu v. Mwanza Textile Ltd*⁷³⁰ held unlawful the termination of the plaintiff's employment by the defendant, after the Minister had ordered that he be reinstated. The plaintiff had successfully appealed to the Minister for Labour against his dismissal from work. The Minister used his powers under the Security of Employment Act, 1964⁷³¹ to order that the plaintiff be reinstated. However, the employer used the option provided under traditional construction of section 40A (5) of the Act to terminate the plaintiff's employment, by giving him full terminal benefits instead of reinstatement.

⁷²⁷In order to qualify to contest parliamentary bye-elections in Ludewa Constituency, following the mysterious death of Horace Koliimba, Rev. Christopher Mtikila whose party was refused full registration, sought sponsorship by another political party CHADEMA of which he was not a member.

⁷²⁸On the use of legislation by both the colonial and the post-independence governments, to remove the right to work, see MIHYO, P. B., pp. 14-15. See also the decision in *I. M. Mahona v. University of Dar Es Salaam*, [1981] T.L.R. 55, where the court held that an employer had a right to refuse to reinstate an employee and instead terminate his services with full terminal benefits.

⁷²⁹Article 22.

⁷³⁰High Court of Tanzania at Mwanza, Civil Case No. 3 of 1986, unreported (reproduced in PETER, C. M., (1997), p. 173).

⁷³¹Act No. 62 of 1964.

Aggrieved by the employer's act, the plaintiff filed a suit asking the court to order him comply with the Minister's order of reinstatement.

The issue before the court was whether the right to work is a reality or a fiction in Tanzania of today. Mwalusanya, J., applied a liberal construction to the provision of the Security of Employment Act which encroached on the worker's ordinary rights. He finally held that the Security of Employment Act did not in clear language, confer upon an employer the right to terminate the services of an employee, when there was an order of reinstatement. According to Mwalusanya, J., if this particular legislation removed the right to work then it stood a chance of being declared unconstitutional and void when the Bill of Rights became justiciable. It should be noted that this decision came just a few months before the Bill of Rights became justiciable.

On appeal by the employer, the Court of Appeal in *Mwanza Textile Ltd. v. Augustine Masatu*⁷³² relied on a technicality to overturn the High Court decision. It was held that the High Court had no power to try the suit, because the employee was not challenging the ministerial decision made as a result of breach of principles of natural justice, or in excess of jurisdiction; but was claiming damages against the employer for his failure to reinstate him in employment despite the Minister's order to that effect. We think the employee enjoys the right under the Security of Employment Act to enforce the Minister's decision of reinstatement by instituting a civil suit in the Court of law, as he did.⁷³³ The Court of Appeal decision was not the final word as far as the jurisprudence of the right to work was concerned.

When the Bill of Rights became justiciable, Mwalusanya, J., in the case of *Obadiah Salehe v. Dodoma Wine Company Ltd.*⁷³⁴ reiterated his previous proposition in *Masatu's* case and laid down a clear position in Tanzania. In

⁷³²Court of Appeal of Tanzania, Civil Appeal No. 8 of 1988, unreported.

⁷³³See sections 41 and 42.

⁷³⁴High Court of Tanzania at Dodoma, Civil Case No. 53 of 1990, unreported (reproduced in PETER, C. M., (1997), p. 181).

that case, the plaintiff's employment was terminated and his appeal to the Conciliation Board dismissed on merits. His further appeal to the Minister for Labour was dismissed on the ground that the proceedings by the Conciliation Board were a nullity for they were lodged out of time. He then filed a suit in the High Court challenging the decision of the Minister. The learned judge went through the previous decisions of the High Court and Court of Appeal, which interpreted section 40A (5) of the Security of Employment Act to mean that the employer had an option to refuse to reinstate the employee. Such decisions included the one in *Mahona's* case where the court held that the option also applied where a court ordered reinstatement and the employer opted to refuse to reinstate the employee. Having considered the effects of those decisions on the Tanzanian community, Mwalusanya, J., stated what we regard to be the law obtaining today:

“...in giving the employer the option not to reinstate an employee, the provision negates the constitutional right of an employee of ‘the right to work’ as provided in Article 22 (1) of our Constitution. There is no valid reason as to why an employee should be discontinued from working, when a court of law has found that he committed no offence or irregularity.”

The learned judge used his power under the Constitution (Consequential, Transitional and Temporary Provisions), Act⁷³⁵ to construe section 40A (5) of the Security of Employment Act, as modified so as to bring it into conformity with the Bill of Rights. The impugned law could not be saved by Article 30 (2) (b) of the Constitution for it was broadly drafted encompassing even innocent employees who committed no offence at all. Such law, therefore, could not be justified as being in the public interest.

⁷³⁵Section 5 (1).

The issue of the right to work was also examined by the High Court in the case of *Timothy M. Kaare v. Mara Industrial Co. Ltd. (MICO) and Another*.⁷³⁶ The plaintiff in that case complained against his compulsory retirement on reaching the alleged age of 55 years. His argument was that he was unlawfully and arbitrarily retired by the employer since at the material time there was no scheme on when to retire employees. The Staff Regulations were also silent and there had been no previous compulsory retirements of that nature. He felt that he was being victimized and he asked the court to order his immediate reinstatement. Mwalusanya, J., granted the declaration that the plaintiff was still a lawful employee of the defendant union. Further he emphasized the need to respect the 'Right to Work':

“That right should not be tampered with lightly except under clearly stipulated provisions of the law. That is a basic tenet of every country aspiring to build a socialist society as is the case with Tanzania. And surprisingly even in capitalist countries the right to work is a phenomenon that is greatly honoured...”

Finally, the court held that the defendant had interfered with the plaintiff's right to work, a fundamental human right, without rhyme and reason. The position in Tanzania today is as Lord Denning., said in *Lee v. The Showman's Guild of Great Britain*⁷³⁷ that 'a man's right to work is just as important to him as, if not more important than, his rights of property.'⁷³⁸ These developments have effectively guaranteed and served the purpose of enabling employees to secure their livelihood with certainty. The right to work therefore, with its aim of securing the possibility of continued employment, is necessary for the survival of the working class in Tanzania. The judiciary have now realized this, albeit belatedly. Since the decision in *Obadiah's* case has

⁷³⁶High Court of Tanzania at Mwanza, Civil Case No. 30 of 1986, unreported.

⁷³⁷(1952) 2 Q.B. 329.

⁷³⁸*Ibid.*, at p. 343.

not been overturned by the Court of Appeal, we hope that it will continue to represent the law.

6:4 The right to fair remuneration.

The right to work goes hand in hand with the right to fair remuneration. After introducing the right to work, the Tanzanian Constitution goes on to emphasize that 'every person who works is entitled to just and favourable remuneration.'⁷³⁹

This particular right was tested for the first time by the court in the case of *W. K. Butambala v. Attorney-General*⁷⁴⁰. In that case the applicant, who was an Advocate of the High Court, was assigned the conduct of three Legal Aid criminal session cases. When the trial ended the learned advocate applied to Mwalusanya, J., the trial judge, to have his fees, in respect of the three criminal session cases, assessed and paid. Under the Legal Aid (Criminal Proceedings) Act, 1969⁷⁴¹ the fees payable for each case ranged between Shillings 120/= and 500/= ⁷⁴². That amount appeared to be outrageously small. This prompted Mwalusanya, J., to take the initiative in setting the legal machinery in motion. He construed that particular provision of the law so as to bring it into conformity with the Bill of Rights which required 'favourable remuneration' to a person depending on the 'quantity and quality of the work done'.

The amount prescribed by law as an advocate's remuneration in all legal aid criminal cases is payable from the general revenue of the United Republic. The State Attorney also conceded that the amount was not reasonable nor proportionate to the quantity of the work done. However, he was convinced that the statute took into account the prevailing poor economic

⁷³⁹Article 23.

⁷⁴⁰High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 50 of 1990, unreported.

⁷⁴¹Act No. 21 of 1969.

⁷⁴²Ibid., section 4 (2).

conditions of the country, and was therefore saved by the derogation clause as being in the public interest.

Mwalusanya, J., reasoned that judges were aware of the economic conditions in the country and their decisions in assessing the remuneration of advocates would take into account the economic position of the country. They would use their good sense to strike a balance in making such assessment and avoid awarding unreasonably large sums which might cripple the economy. He further suggested that:

“If the government fears the abuse of the discretion by the judges, then it should take the initiative of revising the fees payable by enacting a new law”

According to Mwalusanya, J., the term “public interest” is a vague and unsatisfactory term, for it may mean ‘political expedience or that which is best for the common good of the community’. The learned judge resisted the assumption that the rights of the majority outweigh the rights of individuals. To encourage that approach would weaken the individual rights enshrined in the Bill of Rights. To him, when the courts have to weigh the various competing public interests, then the public interest in the doing of justice should be paramount and each case should be treated according to its merits:

“When the court is called upon to balance the public interest in the need to pay advocates reasonable sums as against public interest in the protection of the coffers of the government, the result must inevitably depend on the facts of each case.”

As for this particular case, the learned judge was of the view that justice would be done if the advocates were paid reasonable amount of money for the work done. He was mindful of the fact that much as many would like legal aid to the poor to continue, it should be at a cost that the government can afford.

Following this reasoning he construed section 4 of Act No. 21 of 1969 so as to bring it into conformity with the provisions of the Bill of Rights. He deleted the worthless amount mentioned in that section and modified it to read:

“An advocate in legal aid cases shall be entitled to be remunerated according to the quantity and quality of the work done as assessed by the certifying authority”.

The Attorney-General was aggrieved by the decision of the High Court and referred the matter to the Court of Appeal. The Court of Appeal in *Attorney-General v. W. K. Butambala*⁷⁴³ overturned the decision of the High Court on procedural grounds. Makame, J. A., did not consider the substance of the reasoning of Mwalusanya, J., since the appeal was capable of being disposed of on a procedural irregularity. By implication the Court of Appeal agreed with the finding of Mwalusanya, J., as to the inadequacy of the sums prescribed by law as remuneration payable to advocates who are assigned legal aid criminal cases. This is found in the post-script statement of Makame, J. A., where he remarks:

“By way of post-script we desire to add that the fees payable under section 4 of the Legal Aid (Criminal Proceedings) Act No. 21 of 1969 may be grossly inadequate and out of date. We think something positive must be done unless the public philosophy is that the service the advocates render under the law are intended to be the classical dock briefs of some jurisdictions”.

Makame, J. A., overturned the decision of the High Court because Mwalusanya, J., proceeded *suo motu* to construe section 4 of Act No. 21 of 1969 as modified, without any formal complaint being presented to him. It was the learned trial judge who initiated the proceedings by instructing the

⁷⁴³ Court of Appeal of Tanzania at Mwanza, Criminal Appeal No. 37 of 19991, reported in [1992] L.R.C. (Const.) 495.

Registrar to fix the hearing date after serving the Attorney-General and one Butambala advocate notice of his intention. So it was the trial judge who made W. K. Butambala an applicant and the Attorney-General as a respondent in that case, otherwise there was no formal application or complaint by any aggrieved person. That was considered undesirable as the warning of Makame, J. A., indicates:

“...our Constitution is a serious and a solemn document . We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions...it is not desirable to reach a situation where we have ‘ambulance courts’ which go round looking for situations where we can invalidate statutes”.

The Court of Appeal, for the reasons indicated above, was of the opinion that the learned trial judge had improperly raised the issue of constitutionality and that there was no legitimate occasion for him to do so.

The decision of the Court of Appeal raises some important issues of judicial activism and the extent to which it can be exercised. In this particular case the learned trial judge expressed intention to exercise his powers under section 5 (1) of Act No.16 of 1984 and to construe section 4 of Act No. 21 of 1969 as modified. He did not sit alone in his Chambers but he notified the Attorney-General to come and argue for his side as respondent and one Butambala as applicant. Both sides were given the chance of being heard. It should be noted that the government had categorically stated that all laws would continue in operation despite their inconsistency with the Constitution unless declared void by the court. The steps taken by Mwalusanya, J., could be an expression of the active role that the judiciary has to play in protecting individual fundamental rights. The need for such activism is underlined by the level of passivity among Tanzanians at large. This case could be an example.

If an advocate who is much more knowledgeable can allow the infringement of his rights until the court intervenes *suo motu*, then what of a lay person who is ignorant of the existence of those rights?

The same issue was the subject of judicial determination once again in *N. I. N. Ng'uni v. Judge In charge High Court Arusha and the Attorney-General*⁷⁴⁴ before a quorum of three judges, Mapigano, J., Mchome, J., and Rutakangwa, J. The petitioner was suspended by the judge in charge Arusha High Court centre from practising as an advocate following his refusal to take legal aid briefs assigned to him. Although he denied these allegations, he maintained that 'the fee payable to an advocate under sub-section (2) is so inadequate as to constitute an infringement of the right to a just and favourable remuneration given to every person under Article 23 (2)'. Thus in March 1998 the learned judges declared unconstitutional this particular provision on grounds that 'it provides for unjust and unfavourable remuneration to the advocates who render services under the Act'.

Before arriving at this conclusion, the court took into account the provisions of various international and regional instruments that Tanzania has acceded to, and which are a replica of article 23 (a) of the Constitution. Also the learned judges were guided by 'comparative case law from foreign courts and international Bills of Rights', and the principles⁷⁴⁵ set by the eminent jurists who attended the judicial colloquium at Bangalore, India in 1988, regarding the interpretation and application of human rights provisions.

As in *Butambala's* case, the court here found the remuneration prescribed to advocates under the section 'incredibly small', as expressed by the judges' comment:

⁷⁴⁴High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 3 of 1993, unreported.

⁷⁴⁵That a Constitution should receive a broad and purposive construction, that a Constitution should be given a construction which infuses fundamental rights provisions with life, and that restrictions to fundamental rights should be strictly construed.

"...judicial notice has to be taken of the fall of the shilling in value. That amount cannot now buy even a pair of plastic slippers."

Since the law says in clear language that an advocate is to be remunerated for his services, the court interpreted this to mean that 'he is to receive a just and favourable remuneration, according to the quantity and quality of the work he has done.' Having given this interpretation, the learned judges concluded:

"We are satisfied that section 4 (2) denies him such remuneration and, therefore, infringes his basic right."

Two important points are worth noting in this case. First, unlike in other previous cases, the Attorney-General did not contend that the impugned law was saved by the claw-back clause (Article 30 (2)). Second, the court found the Attorney-General guilty of neglect of duty, an inference drawn from his failure to take action so as 'to bring Act No. 21 of 1969 into conformity with the basic rights provisions of the Constitution.'

6: 5 The right of access to justice.

The right of access to a court is one of the guarantees of the right to a fair trial in both criminal and civil cases. However, the question of whether the hearing is fair may not be thought of if there are, at the outset, problems in gaining access to the judicial process.⁷⁴⁶ Thus, in order to have a trial there should be access to the court.

Under section 6 of the Government Proceedings Act, 1967⁷⁴⁷ as amended by Act No. 40 of 1974,⁷⁴⁸ before a suit was filed against the

⁷⁴⁶FARRAN, S., p. 147.

⁷⁴⁷Op cit.

⁷⁴⁸Government Proceedings (Amendment) Act, 1974.

government it was necessary to obtain the consent of the Minister for Justice first. The requirement of ministerial fiat was abused and it could be conveniently applied to frustrate genuine claims against the government or its officials. Even where the people avoided such requirement by instituting suits against government officials in their personal capacity the Attorney-General always applied to be joined as a party, not with intention of protecting the government's legitimate interests but to frustrate the plaintiff's claim.⁷⁴⁹ For example in the case of *Patrick Maziku v. G. A. Sebabili and 8 Others*⁷⁵⁰ the government was not a party to the original suit which was against six government servants and two others who were involved in the implementation of the nationalization of milling machines in Shinyanga. The State Attorney asked the court to join the Attorney-General as a co-defendant, because the government servants had acted *bona fide* in the course of their duties, and their actions were actions of the government. The court was persuaded by the State Attorney's submission and the Attorney-General was therefore joined as a co-defendant in the suit. The case then had to collapse for the plaintiff was directed by the court to comply with the statutory provisions relating to suits against government. In other words, the plaintiff was directed to obtain first the ministerial fiat, if he was still desirous of pursuing his case to which the government was now a party.

The same tactics were employed by the government in the case of *Jacob K. Makangaru v. G. Kindamba*.⁷⁵¹ The plaintiff in that case had sued the Principal of Musoma Folk Development College claiming damages following his eviction from college quarters. Then the Attorney-General successfully applied to be joined as a party to the suit. Subsequent to joining the Attorney-General as a party to the suit, the State Attorney submitted that

⁷⁴⁹For a detailed discussion on this see PETER, C. M., 1992, p. 157). See also SHIVJI, I. G., (1990 B), p. 401.

⁷⁵⁰Op cit.

⁷⁵¹High Court of Tanzania at Mwanza, Civil Case No. 45 of 1988, unreported.

the suit was incompetent for the plaintiff had to submit his plaint to the Minister first for the requisite consent before the court could entertain it. Again, the plaintiff's case collapsed at that stage. The trial judge simply lamented the frustrating and depressing state of affairs on the plaintiff's side bearing in mind the fact that it was the government itself which applied to be joined, and yet after being joined as a party the same party wanted the plaintiff to obtain consent. What is surprising in this case is the judge's failure to apply the Bill of Rights, which had just become justiciable, to do justice to the plaintiff. The plaintiff also never challenged the constitutionality of such fiat but expressed worries about the future of his petition once the Attorney-General was joined. Access to justice was curtailed if a suit involved the government or its officials.

Where the court was presided over by a bold spirited judge like Samatta, J. K., (as he then was) in *Rev. Christopher Mtikila v. The Editor, Business Times and Augustine Lyatonga Mrema*,⁷⁵² such an application by the Attorney-General was rejected. In that case the plaintiff sued one local newspaper and the Minister for Home Affairs in his personal capacity for defamation. The minister had uttered defamatory words to the effect that the plaintiff was plotting to kidnap him using foreign mercenaries. Those defamatory utterances were published and circulated by "Business Times" the local newspaper. The government tried to apply to be joined as a party to the suit with a view to using the ploy of the requirement of a ministerial fiat since the minister's utterances were made in the course of his duty. However, the learned judge held that it was not necessary for the government to be joined as a co-defendant.

One of the most creative steps taken by the High Court of Tanzania in its interpretation of the Articles of the Constitution on fundamental rights has been its ruling in the case of *Peter Ng'omango v. Gerson M. K. Mwangwa*

⁷⁵²High Court of Tanzania at Dar Es Salaam, Civil Case No. 47 of 1992, unreported.

*and Another*⁷⁵³ that the requirement of a ministerial fiat to sue the government was unnecessary, unconstitutional and void. In that case the plaintiff instituted a suit against the Principal of Mpwapwa Teachers College for malicious prosecution and defamation. The Attorney-General, through third party proceedings, applied to be joined as a co-defendant on ground that the Principal had acted in his capacity as a government official. After being joined as a co-defendant, the Attorney-General raised a preliminary objection to the effect that the suit was incompetent, for want of consent of the Minister for Justice as required under the Government Proceedings Act since the government was now a party to the suit. The plaintiff argued in reply that such requirement was unconstitutional and ought to be declared void.

Mwalusanya, J., explored the provisions of the Constitution and could not find any Article in support of such requirement. Instead, the requirement for ministerial fiat was an overt assault on the constitutional right of a fair hearing by the court. The learned judge adopted the interpretation by the European Court of Human Rights in the case of *Golder v. U.K*⁷⁵⁴ that the right to be heard includes the right of an individual to have free access to the court to file a suit for a remedy. His views found support in many Commonwealth jurisdictions like neighbouring Uganda,⁷⁵⁵ Northern Ireland⁷⁵⁶ and Canada which had earlier held that the requirement of a ministerial fiat was unconstitutional and void, in that it purported to deprive an aggrieved party of the protection of the law. Further, Mwalusanya, J., was of the opinion that the requirement was not saved by the derogation or claw back clauses in the Constitution because it allowed the arbitrary exercise of power, it was unreasonable and too broadly drafted. He could cite a number of instances

⁷⁵³High Court of Tanzania at Dodoma, Civil Case No. 22 of 1992, unreported (reproduced in PETER, C. M., (1997), p. 309).

⁷⁵⁴1E.H.R.R 524.

⁷⁵⁵*Shah v. Attorney-General* [1970] E.A. 523.

⁷⁵⁶*Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345.

where the grant of consent had been delayed until after the complainants or key witnesses had died. In the light of all this, the learned judge remarked:

“I see no compelling social need to have restriction to sue the government, whereby the rights of citizens are marginalised and emasculated.”

The decision of Mwalusanya, J., was approved by the Court of Appeal in *Kukutia Ole Pumbun and Another v. Attorney-General*.⁷⁵⁷ The appellant unsuccessfully sought from the minister the necessary fiat to sue the government. He decided to file an application challenging the constitutionality of such requirement. His application was dismissed by Munuo, J., for lack of consent on the grounds that the impugned provision was constitutional simply because it was enacted by Parliament. On appeal to the Court of Appeal, Kisanga, J. A., described the High Court as holding a ‘superficial way of dealing with the issue’ for:

“It is one thing for a provision of the law to be properly or validly enacted by competent legislature, but quite another for it to be constitutional; the two are not the same.”

The Court of Appeal held that the requirement violated the basic human rights to have unimpeded access to the court and that section 6 of the Government Proceedings Act, 1967 was void.

Further, the Court of Appeal found that the law was not saved by the derogation clause on public interest as it failed the test laid down in *Daudi Pete’s* case. Also the court took opportunity to elaborate the rules that it had previously set in *Daudi Pete*. Thus:

⁷⁵⁷Op cit.

“...a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by Article 30 (2) of the Constitution only if it satisfies two essential requirements; First, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by Article 30 (2) of the Constitution, it is null and void. And any law that seeks to limit the fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or clawback clauses of that very Constitution”.

The law was held arbitrary for it made no provisions for safeguards against abuse and it left the minister to exercise that power without any control, and in cases where consent was refused there was no provision for appeal.

6:6 The right to acquire and to own property

The right to acquire and to own property is explicitly provided for under Article 24 (1) of the Constitution. The Constitution prohibits arbitrary deprivation of private property 'without the authority of the law which shall set out conditions for fair and adequate compensation'.⁷⁵⁸

⁷⁵⁸Article 24 (2).

However, there was an attempt by the government to take away the right to own property when customary land rights were extinguished by way of legislation.⁷⁵⁹

The attempt was vehemently challenged in *Lohay Akonaay and Another v. Attorney-General*.⁷⁶⁰ In that case the petitioners were dispossessed, during villagisation campaign, of the land they had lawfully acquired and cultivated since 1943. Their land was re-allocated to Kambi ya Simba Ujamaa Village without compensation. In 1987 the petitioners successfully sued in the Arusha Resident Magistrate's Court for recovery of their land. They repossessed their land in 1990 but then the government had passed GN. No. 88 of 1987 followed by Act No. 22 of 1992 extinguishing customary land rights within specified areas. In effect the petitioners could be driven out of their customary lands thereby circumventing the court decision. Despite lawful recovery of the land the petitioners were threatened with eviction consequent to the enactment of Act No. 22 of 1992.⁷⁶¹ Thus they challenged this particular legislation on ground that it was inconsistent with the provisions of the Constitution and it violated their basic rights.

Munuo J., declared Act No. 22 of 1992 unconstitutional for, among other reasons, it violated the right to own property 'by denying the petitioners the right to keep possession of their deemed rights of occupancy and what is worse, denying the petitioners compensation.'

The Act was also attacked for being discriminatory by dispossessing a section of the people of their legally protected rights and affording the same protection to another section of the population.⁷⁶² The learned judge observed that:

⁷⁵⁹See the discussion in chapter seven about Regulation of Land Tenure (Established Villages) Act, 1992 (Act No. 22 of 1992)

⁷⁶⁰High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 1 of 1993, reported in (1993) 4 L.R.C. 327.

⁷⁶¹We discuss this legislation in chapter seven.

⁷⁶²See also MVUNGI, S., and MWAKYEMBE, H. G., p. 335.

“It is reverse discrimination to confiscate the petitioners deemed right of occupancy and reallocate the same to some other needy persons because by doing so the petitioners are deprived of their right to own land upon which they depend for their livelihood.”

However the Court of Appeal in *Attorney-General v. Lohay Akonaay and Another*⁷⁶³ was of a different view. Nyalali, C. J., held that Act No. 22 of 1992 was not discriminatory in that it did not discriminate people on the ground of their national origin, race, colour, political opinion or station in life⁷⁶⁴ the meaning provided by Article 13 (5) of the Constitution.

Nonetheless the Court of Appeal approved the view held by Munuo, J., that customary rights in land are real property protected by the provisions of Article 24 of the Constitution and that 'deprivation of customary rights of occupancy without fair compensation was prohibited by the Constitution'. However, according to Nyalali, C. J., fair compensation differs from one case to another for 'in some cases a re-allocation of land may be fair compensation'. The Court of Appeal emphasized that compensation is not confined to unexhausted improvements:

"Where there are no unexhausted improvements, but some efforts has been put into the land by the occupier, that occupier is entitled to protection under Article 24 (2) and fair compensation is payable for deprivation of property"

The Court of Appeal was satisfied that 'sections 3 and 4 of Act No. 22 of 1992 which provide for the extinction of customary rights in land and prohibit the payment of compensation with the implicit exception of

⁷⁶³Court of Appeal of Tanzania at Arusha, Civil Appeal No. 31 of 1994, reported in (1994) 2 L.R.C. 359.

⁷⁶⁴For a full analysis of the reasoning of the Court of Appeal see COLDHAM, S., (1995), pp. 240-241.

unexhausted improvements only violate article 24 (1) of the Constitution and therefore null and void. However, it was made clear that the finding had no effect on the villages which were listed in the Schedule to the Government Notice No. 88 of 1987,⁷⁶⁵ which included the area in dispute. The reasoning rested solely on ground that:

"The customary rights in land in those listed villages were declared extinct before the provisions of the Constitution, which embody the Basic Human Rights became enforceable in 1988...and since the provisions of Basic Human Rights are not retrospective, when Act No. 22 of 1992 was enacted by the Parliament, there was no customary rights in land in any of the listed villages of Arusha Region".

It is hard to accept the reasoning of the Court of Appeal on the effect of the Bill of Rights on offending laws enacted or rules made before the Bill of Rights became justiciable. By the reasoning of the Court of Appeal it is only laws enacted after the Bill of Rights became justiciable that can be affected or declared unconstitutional for violating the rights guaranteed under the Constitution. It should be noted that even the provisions of the Government Proceedings Act, 1967 which the Court of Appeal itself declared null and void in the case of *Kukutia Ole Pumbun* for violating the basic human right of unimpeded access to the court were enacted in 1967 before the Bill of Rights was made part of the Constitution.

The submission by the appellant that the trial judge erred in law by holding the entire Act unconstitutional instead of confining striking down only the four offending sections was found to have merit. The Court of Appeal reasoned that 'where the unconstitutional provisions of a statute may be severed leaving the remainder of the statute functioning, then the court should

⁷⁶⁵This particular Government Notice is discussed in chapter seven.

uphold the remainder of the statute and invalidate only the offending provisions.'

6:8 Conclusions.

The discussion in this chapter has basically examined the reaction of the Court towards civil claims, related to the enforcement of fundamental rights. There have been very few cases of this nature and this paucity can be attributed to ignorance and to the economic hardship people are experiencing in the country. Most people cannot afford to hire the expensive legal services involved in civil litigation. We saw how the High Court attempted to remove the common law requirement of *locus standi* and allow public interest litigation for claims enforcing fundamental rights and freedoms. However, due to ignorance and poor communications, people have not made use of the opportunity that was opened up by the court.

In those few cases which reached the courts, the High Court has attempted to effect meaningful realization of basic rights and freedoms. In fact very few civil cases of this nature reached the Court of Appeal, most of them ended at the High Court level. For the case of *Kukutia Ole Pumbun* which reached the Court of Appeal there was an impressive approach and the State was involved as a party.

We noted also the efforts which were made by few individuals to have their rights protected by seeking redress from the Court. Such litigious individuals include Rev. Christopher Mtikila who could speak and do what many others hesitated to do. He could not let his right to freedom of association be infringed but he was not certain of the outcome in the event that he filed a suit in court. Although he might have been expected to file his petition in the High Court at Dar Es Salaam where he lived, he travelled to Dodoma High Court where he lodged his petition. There could be many reasons for so doing but the paramount one was that he wanted his case to be

heard by Mwalusanya, J., whose approach to human rights issues was well known. This fact was also admitted by Mwalusanya, J., when interviewed by the author. At that time Mwalusanya, J., was stationed at Dodoma High Court Centre. As we saw, the State's objections made him disqualify himself from presiding over the trial.

The move by Rev. Mtikila is capable of many interpretations. One of them could be that people have no confidence in some of the judges because of the way they interpret the provisions relating to individual fundamental rights. This reaction by the public may not be a compliment to the Tanzanian judiciary, nor is it healthy to the future of human rights in the country.

To a large extent human rights activism has been Mwalusanya, J's 'crusade' with a little support from a few other judges.

CHAPTER SEVEN

THE GOVERNMENT'S RESPONSE TO JUDICIAL DECISIONS

As we saw in the preceding discussion, the judiciary has interpreted various laws in the light of the provisions in the Constitution which guaranteed individual fundamental rights. Certain laws were declared unconstitutional for they violated the rights that the Bill of Rights came to protect. On some occasions the courts ordered the immediate deletion of such laws.⁷⁶⁶ In fact the courts made a wide range of orders most of which touched the government's interest.⁷⁶⁷ As far as the courts were concerned, they had fulfilled their role and it was for the government to respond to the substance of such court decisions.

This chapter is essentially concerned with the government's reaction to those court decisions which protected individual fundamental rights. We shall explain and analyse the different forms of government response to judicial decisions and consider the ways in which they could affect the future of human rights protection in Tanzania. In some cases the government amended the law as ordered by the court and in other cases it ignored the court orders. This chapter therefore seeks to examine the nature and style of amendment of laws and other methods that the government adopted in responding to the court's decisions. Most of the reactions by the government were extensively reported in the local newspapers and even abroad.

7:1 Ignoring the court decisions

The court decisions were ignored by the government in two different ways. First, the government could choose to be indifferent to court orders by remaining silent and not taking any appropriate steps. Such inaction by the

⁷⁶⁶See for example the decision of the Court of Appeal in *Daudi Pete's* case.

⁷⁶⁷We discuss various court decisions in chapters five and six.

government could be considered a negative reaction. Secondly, on a number of occasions the government exhibited reactionary tendencies and expressed openly its resentment of court decisions.

7:1:1 Government's inaction.

Due to the binding nature of court decisions, it was expected that the government would be bound by the interpretation given by the court, concerning the laws which violated individual fundamental rights but remained unrepealed. The people thought that by leaving it to the judiciary to consider such laws and to determine the extent they infringed the rights guaranteed under the Constitution, the government was serious and sincere. It was also their hope that the government would take immediate action as soon as the court delivered its final judgment. However, as things turned out to be, it may take longer than people expected for the government to take meaningful steps.

The decision of the High Court in *Bernardo Ephrahim v. Holaria Pastory and Another*⁷⁶⁸ can be taken as an example. The Haya customary law which barred female heirs from disposing of the clan land but allowed the male counterparts to do so, was declared void for being discriminatory.⁷⁶⁹

That was a ruling in respect of one provision of the Customary Law Declaration Order and it was delivered in 1989. There was no appeal to the Court of Appeal against that decision. To date, the Declaration has not been amended to bring it into conformity with the decision of the court and the Constitution. It is almost ten years now since the court made the decision but the government has not taken effective measures. Perhaps the government is doing some necessary preparation for the change of law of succession in general. If this is the case, it is our submission that it has taken too long and

⁷⁶⁸Op cit.

⁷⁶⁹See footnote 702.

increasingly people are losing patience. Past experience has shown that it is not safe, for a country like Tanzania, to rely only on court precedents without any backing from specific legislation. There are two main reasons for this hypothesis.

First, there was no appeal to the Court of Appeal whose decision would be binding on the High Court and all subordinate courts. This means that, since one High Court judge is not bound by a decision of another High Court judge, there may occur a situation whereby another judge may wish to differ with the interpretation of Mwalusanya, J., in *Bernardo Ephrahim's* case. That kind of situation is likely to happen and would bring confusion to the existing approach now taken by courts when attending to such issues, as set by Mwalusanya, J.

Second, it should be noted that since there was no appeal against the decision of Mwalusanya, J., the Court of Appeal has had no chance to examine this issue. Past experience has shown that it may not be right to assume that the Court of Appeal would uphold the findings of Mwalusanya, J., in *Bernardo Ephrahim's* case. The position of the Court of Appeal on this issue before the Bill of Rights became justiciable remain opposed to the finding of Mwalusanya, J.⁷⁷⁰ We cannot therefore be certain as to change of attitude of the Court of Appeal after the Bill of Rights became justiciable. The possibility is there that, if a similar issue came up in another case, the Court of Appeal might strike down the celebrated decision of the High Court in *Bernardo Ephrahim*.

In fact the Customary Law Declaration Order contains a number of discriminatory rules of inheritance which treat female heirs as inferior to their male counter parts. For example, male heirs are entitled to the biggest share irrespective of their ages compared to what female heirs get.⁷⁷¹ Since this has

⁷⁷⁰See footnotes 696 and 697.

⁷⁷¹ GN. No. 436 of 1963, rule 26.

never been the subject of litigation in court and no judicial pronouncement has ever been made about it, it is still a valid law, even though discriminatory. From the above exposition there is no doubt that the rules under the Declaration 'discriminate against women and afford them limited rights to inheritance'.⁷⁷² Further, the court cannot exhaustively declare unconstitutional all laws that infringe on fundamental rights. Such laws and customs are many and the court by tradition does not, on its own initiative, set the legal machinery in motion unless formally asked by the aggrieved party.⁷⁷³ It is hard to imagine a length of time that the court may have to take in examining all laws which potentially infringe on individual fundamental rights. Arguably, allowing such laws to continue discriminating against women and depriving them of their rights is contempt of basic rights guaranteed under the Constitution. It should be remembered that under the Tanzanian Constitution women have a right to be treated equally with men.⁷⁷⁴

The government's inaction is also expressed by its response to the decision of the Court of Appeal in the case of *Bi Hawa Mohamed v. Ally Sefu*⁷⁷⁵. The Court of Appeal interpreted section 114 of the Law of Marriage Act, 1971⁷⁷⁶ as including housewifery duties in the list of factors to be taken into account by the court when determining the contribution by spouses to the acquisition of matrimonial property. Before the decision of the Court of Appeal, there were conflicting decisions by the High Court about this issue. Most of the High Court judges were of the view that housewifery duties did not constitute a contribution to the acquisition of the matrimonial assets. As a result, on a number of occasions housewives left the court empty handed after

⁷⁷²MIGIRO, R. M., (1991), p. 367.

⁷⁷³Mwalusanya, J., was bitterly criticised by the Court of Appeal in *W. K. Butambala's* case and his decision overturned when he attempted to decide on a matter that had not been formally presented to him.

⁷⁷⁴See Articles 12 and 13.

⁷⁷⁵Court of Appeal of Tanzania at Dar Es Salaam, Civil Appeal No. 9 of 1983, unreported (reproduced in PETER, C. M., (1997), p. 398).

⁷⁷⁶Act No. 5 of 1971.

divorce proceedings. The judgment of the Court of Appeal was delivered in 1983 but to date section 114 remains intact as it used to be without any legislative clarification to make it conform with the court's decision. Much as the Court of Appeal decision would be loved for its liberal stand, we cannot forget that the Court of Appeal is not bound by its own decision. This poses one important question as to what would be the fate of this decision if the same issue reaches the Court of Appeal once again, attracting a panel of full bench. We are not questioning the constitutionality of section 114 but it is desirable to make it clear that no other interpretation can be given to it. As Mtengeti-Migiro concluded:

“In the absence of a legislative clarification/ amendment, the celebrated judgment in the case of *Bi Hawa* could be a short term gain. This is because the issues at stake still depend on judicial activism, and what a particular judge considers to be public policy.”⁷⁷⁷

The worries expressed by the above quotation are not limited to the case of *Bi Hawa* or matrimonial proceedings only. In fact it is not safe to let human rights rely solely on judicial activism. This is tantamount to taking a gamble on individual rights instead of providing for their protection and guarantee as the Constitution requires. It is not clear why the government does not amend or repeal or clarify its laws so as to bring them to conformity with the relevant judgments of the court. By complying with the court decisions the government will make its laws certain and express definite acknowledgement of the prevalence of human rights in the country.

This behaviour by the government is not consistent or uniform, as we shall see later in this work. In a number of cases where its interests were threatened, the government has exhibited immediate response to court

⁷⁷⁷MIGIRO, R. M., (1990), p. 526.

decisions by amending the impugned laws. However, in others as discussed above it took a low profile or remained indifferent. The criterion upon which the government based its decision in selecting court decisions to be complied with and others worth total rejection is not clear. When the government was called upon through court decisions to bring into effect important changes in certain legislation or practice and yet nothing was done, there might not be a better explanation to that than being an expression of its unwillingness to comply with the finding and order of the court.

7:1:2 Open resistance by the government .

When we refer to the “government ” our attention is essentially focused on the executive policy-making body of a state. This body is constituted of individual high-ranking people with the power to control the affairs of a state. It would include the President, Cabinet Ministers, Regional Commissioners, District Commissioners and other executive who hold related positions. Any statement or act by any of them is considered to be that of the government . It is this group which we take to represent the government in this study.

It was common when the Bill of Rights was not yet made part of the Constitution to hear court orders being flouted by the executive. That was the experience which accompanied most of the orders of *habeas corpus*, *certiorari* and *mandamus*.⁷⁷⁸ The court in many such cases ordered the immediate release of the complainants due to the illegality of their respective detention. However, as they left the judges’ chambers or the court rooms they were re-arrested and transferred to various distant prisons in the country.⁷⁷⁹ This prompted Mnzavas, J. K. (as he then was), to complain about such behaviour by the state on the grounds that the freedom of the just man was worth little to

⁷⁷⁸See the discussion in chapter seven.

⁷⁷⁹For a detailed account of these events see the exposition by Mnzavas, J.K., (as he then was), in *Ally Lilakwa's case*.

him, if he could be 'arrested and held even when a court of law had found him innocent and ordered his release.'⁷⁸⁰ The learned judge directed that:

“No matter how politically charged an issue may be, legal process has a part to play and the law must be followed”.

All these comments by the learned judge were not persuasive enough to the government nor did they have any effect on the position of the government towards the detainees. Apart from disregarding court decisions, the government attempted also to pre-empt anticipated court orders as was the situation in *Attorney-General v. Lesinai Ndeinai and Others*.⁷⁸¹ Just one day before the High Court delivered a ruling invalidating the detention of the applicants, the government swiftly detained them under the provisions of the Deportation Ordinance. They were initially detained under the Preventive Detention Act, 1962. The government appealed against the decision of the High Court while the applicants were still in detention pending deportation. Even when the Court of Appeal upheld the High Court decision the detainees were not released. The government had opted for what can be described as guerrilla tactics against the court decision. Similar tactics were employed by the Zimbabwe government in relation to the anticipated decision of the court against death penalty by hanging in the case of *Chileya v. The State*.⁷⁸² While the constitutionality of the mode of executing death penalty was being contested in court, the Constitution was amended to state specifically that the death penalty by hanging could not be held to be in contravention of the Constitution.⁷⁸³

⁷⁸⁰Ibid.

⁷⁸¹Op cit.

⁷⁸² SC. 64/ 90, unreported. The case is briefly discussed in HATACHARD, J., and COLDHAM, S., p. 170.

⁷⁸³ Zimbabwe Constitution, section 15 (4).

The matter took a rather terrifying dimension when judicial officers could be punished for having decided against the government's wishes. One magistrate in Shinyanga was detained after granting bail to Kassela Bantu, the government critic, who was facing a murder charge. It was a fictitious charge of murder which aimed at silencing Kassela Bantu by locking him up. This argument finds expression in the government's reaction to his acquittal by the High Court after the trial.⁷⁸⁴ He was immediately detained under the Preventive Detention Act despite his innocence and acquittal by the court.⁷⁸⁵

The executive in Tanzania was very strong and to a large extent there was a feeling that it was above the law, and that is why it could flout court orders with impunity. When the Bill of Rights was enshrined in the Constitution, people expected a change of attitude by the government towards court orders. However, there was no remarkable change of attitude by the government and most of its responses to certain judicial pronouncements remain highly objectionable.

When Lugakingira, J., in *Rev. Christopher Mtikila v. Attorney-General*⁷⁸⁶ ordered that no permit from District Commissioners would be required any more for political parties to hold public meetings, the initial reaction by the government left the people flabbergasted. The Minister for Justice and Constitution told the press conference immediately after the judgment was delivered that the government did not recognize the order of the court. Further, the minister maintained that as far as the government was concerned, political parties were by law required to seek permits before holding any public meeting, the decision of Lugakingira, J., notwithstanding. It was unfortunate that such a regrettable reaction came from the Minister for Justice and Constitution, a lawyer by profession.⁷⁸⁷ Under normal

⁷⁸⁴ *R. v. Joseph Kassela Bantu* [1970] H.C.D. No. 170.

⁷⁸⁵ See the discussion in LEGUM, C., and DRYSDALE, J.

⁷⁸⁶ *Op cit.*

⁷⁸⁷ At that time Samuel Sitta was the Minister for Justice and Constitution.

circumstances the Minister for Justice was expected to advise and guide the government as to the acceptable steps to be taken in such a situation where the government was not satisfied with the decision of the court. It is interesting to note that no appeal was preferred to the Court of Appeal in this case by the Attorney-General, but the government simply resorted to a highhanded means of defeating justice.

The people of Kigoma were the first to face the wrath of the state when the CHADEMA political party, in accordance with a court order, attempted to hold a public meeting without seeking a permit from the District Commissioner. They were beaten up by the police and the assaults left many casualties. It took government a long time to come to terms with this particular court order. Later political parties were simply required to give notice to the District Police authorities for the purposes of maintaining peace and order during the intended public meetings.

Disobedience of court orders by the government seem to have assumed a character of an institutionalized practice among the executive when the President also took part. In one unusual instance, the President ordered the immediate restoration of property of the District Council that was auctioned in execution of the court decree. The Hai District Land Officer was sued by a group of people for damages after removing the building materials from their construction sites. The order to remove those materials came from the District Commissioner. The Resident Magistrate Court Kilimanjaro Region entered judgment for the plaintiffs. This was followed by execution of the decree which involved attachment of the District Council's motor vehicles. Since the property attached belonged to the 'public', the President ordered their immediate restoration and blamed the court for failing to defend the interest of the majority.⁷⁸⁸ This unprecedented intrusion and disobedience of the court

⁷⁸⁸This event was reported by many local newspapers including the ruling party newspaper *Uhuru*, 10th August 1996.

order by the President was attacked by the members of the legal profession but the President never apologized or regretted his actions. According to the President the interest of the majority overrode the rights of the individual or the minority.

If this practice is encouraged the concept of individual rights will become an illusive dream. That is why the court was reminded of its interpretation role to make sure that 'the rights of minorities are not subjected to the threat of the tyranny of the majority, lest they render the rights and freedoms illusory.'⁷⁸⁹ In any case, the President's personal convictions did not constitute a legal warrant for him to disobey and interfere with the order of the court.

When the head of state becomes involved in actions which undermine the rule of law then his aides and other state functionaries follow suit. For example, shortly after the said President's intrusive order, the police force was reported as having continued evicting small scale miners from Bulyankulu mines in Kahama District despite the court order that required the government to let the miners continue with their activities until their claims were settled in court. The High Court in Tabora had granted the injunction following the request from the miners that the mining contract between the government and one company, KMC, did not include compensation for the small scale miners.⁷⁹⁰ Further, the villagers and small scale miners' complaints related to violation of their constitutional fundamental rights which suit could only be heard by the High Court with a quorum of three judges.⁷⁹¹ Mchome, J., granted the injunction sought so as to maintain the *status quo* until the matter was determined. However, the villagers were evicted by the police from their traditional place of residence so as to give way to the newly licensed mining company, the court order notwithstanding.

⁷⁸⁹MBUNDA, L. X., p. 157.

⁷⁹⁰See *The Guardian* Newspaper, 26th August 1996. See also *Nipashe* Newspaper, 26th August 1996.

⁷⁹¹See Act No. 33 of 1994, section 10.

Also in 1992 the government used the police (FFU) to forcibly evict junior doctors from their residences at Muhimbili Hospital after they went on strike for a couple of days demanding improvements in their working conditions. The eviction took place irrespective of the court injunction which barred the Hospital administration from carrying out such eviction until the matter was finally determined by the court.⁷⁹² The government dismissed the junior doctors from employment following that strike and incarcerated them at Ukonga Prison pending repatriation to their respective places of origin. The same government made a U-turn when the Prime Minister ordered their reinstatement after the unprecedented demonstration by the hospital staff at the State House.⁷⁹³

In many cases, the government used police cover to flout the court orders.⁷⁹⁴ It is still common in Tanzania to see accused persons being re-arrested on court premises whenever they are granted bail against the wishes of the government. In one incident the Regional Police Commander Dar Es Salaam ordered that those accused persons who were out on bail while charged with violent crimes be re-arrested. He did so to express government's dissatisfaction with the way the court was handling those cases.⁷⁹⁵ If defiance of court orders is allowed to continue then the courts attempt to fulfil its role in protecting individual fundamental rights will be effectively undermined.

7:2 Amendment of laws.

Following the court's nullification of certain provisions of law, the government in some instances felt obliged to take action and show concern over the findings of the court. The main action taken by the government

⁷⁹²See *Joseph J. Masika and Others v. Muhimbili Medical Centre*, Resident Magistrate Court of Dar Es Salaam at Kisutu, RM Civil Case No. 16 of 1992, unreported.

⁷⁹³It was rumoured around that the demonstration was engineered by the students from the University of Dar Es Salaam who mobilized the hospital staff within a short time and the government was caught unaware.

⁷⁹⁴See for example the case of *Ally Lilakwa*.

⁷⁹⁵See *Nipashe* Newspaper, 3rd December 1996.

related to the amendment of impugned laws. Most amendments turned to be the source of more controversy as they frustrated a meaningful realization of the fundamental rights and freedoms. It is tempting to say that the government used the legislature to frustrate the rare examples of judicial activism in the country. This temptation is brought about by the government's attempt to amend the nullified laws contrary to the conventional legislative principles and also by the motive that surrounded the amendments.

7:2:1 Amendment of nullified laws.

Any law declared by the court as a nullity is void and ineffective. In other words, nullification of a certain law by the court has the effect of cancelling that particular law and taking away its legal validity. Unless the nullifying order is set aside by a superior court, the legislature cannot legally attempt to modify it for it is dead and non-existent. The High Court in *Chumchua Marwa v. Officer In charge of Musoma Prison and the Attorney-General*,⁷⁹⁶ declared the Deportation Ordinance, unconstitutional and therefore null and void. In responding to this decision of the court, the government hastily amended the nullified law by including the provisions which attempted to make it look constitutional.⁷⁹⁷ The said amendment brought some changes to the Ordinance but arguably not enough was done to make it constitutional. The Ordinance could apply to Zanzibar following the amendments⁷⁹⁸ and the deportee was given right to challenge the legality of the Deportation Order in the High Court.⁷⁹⁹ Further, the deportee could be represented by an advocate in court during such proceedings.⁸⁰⁰ Also the changes include the establishment of an Advisory Committee to the President composed of a chairman and two

⁷⁹⁶Op cit.

⁷⁹⁷See Deportation (Amendment) Act, 1991, (Act No. 3 of 1991).

⁷⁹⁸Section 4.

⁷⁹⁹Section 5.

⁸⁰⁰Section 6.

members appointed by the President and two by the Chief Justice.⁸⁰¹ The President is required to refer to the Committee every deportation order made under the Ordinance and the grounds thereof. Following the reference by the President, the Committee is required to advise him whether the deportation order should be continued, rescinded or suspended. However, a seemingly good idea was completely negated by a clause in the provision that the President was not bound by the advice of the Committee.

Having examined the Ordinance and its subsequent amendment as a whole the Nyalali Commission was of the opinion that it was by punishing the offender according to the laws in the courts of law rather than detaining him without trial, that the rule of law was strengthened in any democratic society. On the strength of this argument the Deportation Ordinance as amended by Act No 3 of 1991 was still found unconstitutional by the Commission and its immediate repeal was recommended.⁸⁰²

The amendment of the nullified laws came under attack from various scholars and members of legal profession. All criticisms of the Deportation Ordinance and its subsequent amendment were concluded by a recommendation like that of Nyalali Commission that its immediate repeal was absolutely necessary. To date the impugned law like many others is still in force despite all these criticisms.

7:2:2 Amendment and enactment of laws to defeat justice.

People have on a number of occasions witnessed controversial amendments to various laws and the enactment of new objectionable laws following certain court decisions. In effect such a reaction by the government is aimed at defeating justice.

⁸⁰¹Section 11.

⁸⁰²See the Nyalali Commission Report, Vol. 3, p. 5.

7:2:2:1 Enactment of new laws.

The background against which the Regulation of Land Tenure (Established Villages) Act, 1992⁸⁰³ was enacted demonstrates the government's reaction to the decisions of the court through legislative means as pre-emptive. During the villagisation programme the people of Arusha region were brutally displaced and their pastoral land was taken away by the government without compensation.⁸⁰⁴ Then large tracts of land which were taken away from these pastoralists were given to the Ujamaa Villages and some to one State Corporation (NAFCO) for large scale wheat farming.⁸⁰⁵ From 1980 there was a series of cases by the people particularly pastoralists⁸⁰⁶ challenging the legality of the alienation and claiming back their land which had been taken away from them by force. The courts awarded the damages sought and declared the Ujamaa villagers trespassers.⁸⁰⁷ In *Mulbadaw Village Council and 67 Others v. National Agricultural and Food Corporation (NAFCO)*⁸⁰⁸ the High Court awarded general damages to the plaintiff after finding the defendant a trespasser in the plaintiffs' land.

Although the Court of Appeal overturned the decision of the High Court by recognizing the right of NAFCO in the occupation of the land it also recognised the right to be compensated. However, in this particular case the Court of Appeal limited compensation to the very few villagers who had established the existence of property rights before their land was allocated to NAFCO.⁸⁰⁹ So there were many cases pending in the courts and some had reached the enforcement stage. When the Bill of Rights became justiciable,

⁸⁰³Act No. 22 of 1992.

⁸⁰⁴The effect of Villagisation is discussed in chapter three

⁸⁰⁵On the effect of government policies on pastoral communities see MWAUKUSA, J. T., (1993), pp. 144-163.

⁸⁰⁶Legal Aid Committee of the Faculty of Law University of Dar Es Salaam represented the complainants.

⁸⁰⁷SHIVJI, I. G., (1994), pp. 6-10.

⁸⁰⁸High Court of Tanzania at Arusha, Civil Case No. 10 of 1981, unreported (reproduced in PETER, C. M., (1997), p. 228).

⁸⁰⁹See *National Agricultural and Food Corporation v. Mulbadaw Village Council and Others*, Court of Appeal of Tanzania at Dar Es Salaam, Civil Appeal No. 3 of 1985, unreported.

many more such cases were anticipated. The Prime Minister Joseph Sinde Warioba swiftly issued Government Notice No. 88 of 1987,⁸¹⁰ extinguishing the pre-villagisation customary rights of occupancy within the areas in Arusha region as specified in the schedule to the order. This subsidiary legislation was not effective enough to take care of the government's interests in the region that were threatened by the rate of court decrees to be executed and more such suits that were being instituted. Five years later the government considered bringing in a law that protected its interests in a much broader way than the former that merely extinguished customary land rights. The Prime Minister's Order, therefore, was replaced by the Regulation of Land Tenure (Established Villages) Act, 1992 (Act No 22 of 1992).

Looking into what the Act provided for, there is no doubt it was purposely passed to nullify the already existing court's judgments and to preempt others that would have required the government to compensate all those whose land was taken away during the villagisation campaign. Pre-villagisation customary rights therefore were extinguished 'in order to remove the legal basis of the former customary rights owners dispossessed by the villagisation and who were claiming their lands in courts.'⁸¹¹ That is why it was specifically effective only to those areas established as a result of villagisation policy.⁸¹²

The Act went on to prohibit compensation payable only on account of the loss of any right or interest in or over land that had been extinguished.⁸¹³ It also prohibited institution of proceedings 'in any court or tribunal in relation to the extinction of any right under' the Act.⁸¹⁴ In order to terminate all existing proceedings relating to such rights the Act provides:

⁸¹⁰Op cit.

⁸¹¹SHIVJI, I. G., (1994), p. 11.

⁸¹²Act No. 22 of 1992, section 3 (1) and (2).

⁸¹³Section 4.

⁸¹⁴Section 5 (1) (a).

"any suit or other proceeding to which this section applies which shall have been instituted in or remitted to any court or the tribunal before the commencement of this Act shall forthwith be terminated."⁸¹⁵

Also the court's jurisdiction in all proceedings under the Act was ousted. The same was vested in the special land tribunals and the decision of the Minister for Land on appeal, was final and conclusive, not to be reviewed by any Court.⁸¹⁶ With this trend, is it not true, to use the words of Simon Coldham that:

"...the attitude of the government to the courts remains, as it has been since independence, profoundly distrustful."⁸¹⁷

This extraordinary piece of legislation was criticized from inception as a Bill, for depriving the people of their property rights and it was described as a "monstrous" decree.⁸¹⁸ It is interesting to note that the Bill was tabled shortly before a Presidential Commission on Land Policy had submitted its report. The Commission was chaired by Professor Issa Shivji who was embarrassed by the government's action to table a Bill which virtually contradicted his report. His report had not been read yet and because he did not want to be associated with that Bill Shivji issued a press release disassociating the Commission's proposals from the Bill.⁸¹⁹ Actually the Bill was strategically tabled to coincide with the time when the Commission's report was presented.

Back in 1963 the government had started using legislative means to overrule the decisions of the courts when the High Court awarded a huge sum of money to Chief Marealle being damages for loss of his office as Chief. Chief Marealle of Moshi instituted a civil suit against the government

⁸¹⁵Section 5 (1) (b).

⁸¹⁶Sections 6, 7 and 9 (2).

⁸¹⁷COLDHAM, S., (1995), p. 242.

⁸¹⁸See TENGA, R. W., pp. 95-100.

⁸¹⁹COLDHAM, S., (1995), p. 238.

following the abolition of the offices of chiefs in Tanganyika. As the court awarded him the damages sought, the government swiftly enacted The Chiefs (Abolition of Office: Consequential Provisions) Act, 1963 with a retrospective effect. The Act prohibited the institution of any suit for damages arising from the abolition of the office of chiefs. It also stayed such suits that were pending in court and execution of Marealle's court decree was left to the discretion of the President.⁸²⁰ After his retirement Julius Nyerere the first President of Tanzania and the one who engineered that particular legislation made a dramatic U-turn and recalled "the value of chiefdoms."⁸²¹ Chief Thomas Marealle described it as hypocrisy 'to recall the goodness of something he deliberately undermined thirty years ago.'⁸²²

The government adopted a similar course when it enacted Act No. 22 of 1992 as a response to court's decisions that awarded compensation and damages for the loss the people suffered during the villagisation campaign.

In the same category is the Basic Rights and Duties Enforcement Act, 1994.⁸²³ We saw in chapter four how the said Act complicated the process of seeking redress in court by limiting the enforcement of fundamental rights. As a reaction to the decisions of activist judges, the Act made it mandatory that only a quorum of three judges could preside over the proceedings for the enforcement of fundamental rights. It seems the government was not happy when a single judge declared a certain law unconstitutional. In order to minimize the possibility of many laws being nullified, it was provided that the decision should be based on 'the opinion of the majority of the judges hearing the petition.'⁸²⁴ Since there were very few activist judges, the government was pretty sure that very few laws would be declared unconstitutional by the court when constituted of three judges. In an attempt to take away the court's power

⁸²⁰See MARTIN, R., p. 57; MWAIKUSA, J. T., (1991), p. 686.

⁸²¹See *The Guardian* Newspaper, 26th September 1997.

⁸²²Ibid.

⁸²³Op cit.

⁸²⁴Section 10 (2).

to declare any law unconstitutional, the Constitution was amended to include a provision that instead of declaring any law unconstitutional the court should give time to the Parliament 'to correct any defect in the impugned law or action within a specified period.'⁸²⁵

Since 1995 when the Act came in force, there have not been any specific formal petitions to challenge it. However, the High Court has recently interpreted its provisions in other cases involving the violation of fundamental rights. The interpretation given by Mroso, J., in *Ngereza Masai's* case and the one by Nchalla, J., in *Angeline Ojare's* case⁸²⁶ are very encouraging. Both judges interpreted the provisions of Act No. 33 of 1994 as not necessarily limiting the enforcement of fundamental rights to formal petitions capable of being heard by a quorum of three judges only. Formal petitions were just one procedure for obtaining redress among many other ways which did not require a quorum of three judges. They were satisfied that a single High Court judge could competently preside over any matter as an appeal in which an individual sought to enforce his fundamental rights. The government's reaction to this liberal interpretation is not known yet for the matter is still *sub judice* in the Court of Appeal. As the Court of Appeal has not given its judgment the current High Court interpretation represents the law.

7:2:2:2 Amendment of existing laws

The government was reluctant to initiate changes in its laws to bring them in conformity with the Bill of Rights. The only law amended by the government during the period when the Bill of Rights was under suspension was the Preventive Detention Act, 1962. It was amended by the Preventive Detention (Amendment) Act, 1985⁸²⁷ in order to conform with the changes brought about by the Bill of Rights.

⁸²⁵Article 30 (5). See also Act No. 33 of 1994, section 13 (2).

⁸²⁶We discuss both cases in chapter five.

⁸²⁷Op cit.

The amendments gave a detained person right to challenge in the court of law the legality of his detention.⁸²⁸ Further, it required the immediate release of a detained person if he was not informed of the grounds for his detention within fifteen days. Previously the Act did not apply to Zanzibar, but the amendment extended its application also to Zanzibar.⁸²⁹ The rest of the Act which concentrated enormous power over the rights and freedoms of people in the hands of the President was left intact. Having considered the issue of detaining people without trial the Nyalali Commission decided that the entire Act was still unconstitutional and that its repeal was long overdue.⁸³⁰

The rest of the laws were amended as a negative reaction to the court decisions. In some instances the Constitution itself could not escape such amendment by the government. The event which followed the decision of Lugakingira, J., in *Rev. Christopher Mtikila v. Attorney-General*⁸³¹ illustrates the executive's firm view that a court of law should not decide against the government. As we discussed earlier in chapter six, the government was not content with the decision of Lugakingira, J., when he allowed private candidates not sponsored by any political party to run for election. Instead of exhausting the legal machinery by appealing to the Court of Appeal, the government rushed to use the legislative means to nullify the court's decision. The Article providing for qualifications for presidential candidacy⁸³² which the learned judge had interpreted in the light of the right to participate in national public affairs⁸³³ and as allowing private candidates to stand for election, was amended. A legislative clarification of the right to participate in national public affairs was made by adding a sub article to Article 39 to the effect that 'nobody will qualify to be elected President unless he is a member of and

⁸²⁸Section 5.

⁸²⁹Section 10.

⁸³⁰The Nyalali Commission Report, Vol. 3, p. 3.

⁸³¹High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993, unreported.

⁸³²Article 39.

⁸³³Article 21

sponsored by a political party.⁸³⁴ The court decision which granted Rev. Christopher Mtikila and perhaps many others, the right to stand for elections without necessarily being sponsored by any political party, was overridden.⁸³⁵ This could be an expression of the government's reluctance to allow people a meaningful realization of their fundamental rights and freedoms. On the other hand it is a direct disrespect of the decisions of the court and the whole transaction is nothing but an attempt to 'undermine the Constitution by constitutional means.'⁸³⁶

Zimbabwe had similar experience when the Supreme Court in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*⁸³⁷ set aside the death sentences and substituted them with sentences of life imprisonment on grounds that inordinate delays to execute the prisoners amounted to subjecting them to torture and inhuman treatment contrary to the spirit of section 15 (1) of the Constitution of Zimbabwe.⁸³⁸ Instead of approving the decision of the court, within weeks the government responded by enacting the Constitution of Zimbabwe Amendment Act, 1993.⁸³⁹ The Amendment Act 'retrospectively exempted the death penalty from the scope of section 15 (1).'⁸⁴⁰

When Mwalusanya, J., in *Daudi Pete's* case declared unconstitutional section 148 of the Criminal Procedure Act, 1985 for taking away the judicial discretion to grant bail to accused persons charged with certain offences, the first reaction from the government was to lodge an appeal with the Court of Appeal. Three months before the decision of the Court of Appeal was given, the Minister for Home Affairs was critical of the High Court's decisions which

⁸³⁴Article 39 (2). See also Act No. 34 of 1994, section 4.

⁸³⁵In our interview with Lugakingira, J. A., he expressed the view that the way the government reacted to his judgment in Mtikila's case 'amounted to striking it out'.

⁸³⁶A phrase used in HATCHARD, J., (1995 C), pp. 21-35.

⁸³⁷(1993)4 SA 239. It is also reported in (1993)2 L.R.C. 279.

⁸³⁸The prisoners had spent between four to six years on death row.

⁸³⁹Act No. 13 of 1993.

⁸⁴⁰HATCHARD, J., (1995 C), p. 23.

nullified some of the laws which, according to him were good and useful. He was addressing the Members of Parliament at a seminar when he described the court's action as "frustrating government's efforts" to fight against crimes.⁸⁴¹

When the Court of Appeal upheld the decision of Mwalusanya, J., but on different grounds and ordered that the offending provision be struck out of statute books, the government simply shifted the contents of the nullified sub-sub-section to another sub-sub-section of the same provision. The offence of armed robbery was then joined to the list of more serious offences of murder and treason which were not bailable and the paragraphs of section 148 (5) were renumbered.⁸⁴² In actual fact there was no compliance with the order of the Court of Appeal but simply the government's manipulation of its legislative influence to pre-empt the decision of the court.

What followed thereafter was very interesting. The court's response to the government's reaction was not directly confrontational but an expression of dissatisfaction and protest. After the Court of Appeal in *Daudi Pete's* case had set the position of law as regarded matters of bail for the offence of armed robbery, the courts in general seem to have ignored the government's subsequent attempt to bring back the nullified provision. Although the Act No. 27 of 1991 brought back the denial of bail for any one charged with the offence of armed robbery, in practice courts accepted the submissions often made by advocates to the effect that the decision of the Court of Appeal in *Daudi Pete's* case was binding on them. It means that courts relied on the directive of the Court of Appeal that they had discretion to grant bail to persons accused of armed robbery in accordance with the law as it existed before.

The High Court judges expressed their protest at the government's reaction by declaring unconstitutional also the sub-subsection in which the

⁸⁴¹See *Daily News*, 31st January 1991. See also MWAUKUSA, J. T., (1991), pp. 696-697.

⁸⁴²The Criminal Procedure Act, 1985, section 148 (5) (a) (as amended by Act No. 27 of 1991).

government put the contents of the sub-subsection whose deletion was ordered by the Court of Appeal. Only offences of murder and treason remained unbailable for a long time without court's intervention.⁸⁴³ It was Nchalla, J., in *Angeline Ojare's* case who declared unconstitutional the whole of paragraph (a) of section 148 (5) and made the offences of murder, treason and armed robbery bailable, Act No. 27 of 1991 notwithstanding. Nevertheless, in some cases the High Court judges have hesitated to give progressive interpretation of such laws. A seemingly firm stand taken by some judicial officers when reacting to the government's reponse, may provoke a confrontation between the executive and the judiciary. It will all depend on the attitude of the executive to court decisions.

7:3 Conclusions

It has been demonstrated in this chapter that the way in which the government has been responding to the court decisions raises one fundamental question, whether there can be a meaningful realization of basic rights in Tanzania. The executive seems to distrust the judiciary especially when matters of state interest are subject of judicial determination. This distrust by the government was manifested in its reaction to various court decisions. The government on a number of occasions decided to act contrary to the decisions of the court. In effect this practice undermines the integrity of the judiciary and the rule of law. Arguably this could be another indirect expression of the government's reluctance to allow a meaningful realization of the Bill of Rights. That is why Mwaikusa argues that although the government conceded later to the demands for the Bill of Rights, 'it would be sheer romanticism to

⁸⁴³See the decision by Bubeshi, J., in *Donati Jacob Mrema and Another v. Attorney-General*, High Court of Tanzania at Dar Es Salaam, Criminal Appeal No. 28 of 1992, unreported. See also the decision by Mroso, J., in *Ngereza Masai's* case.

think that the demand was conceded to solely out of a genuine commitment of the regime to respond positively to the interests of the people.'⁸⁴⁴

Although the government has occasionally been heard advocating transparency, accountability and the rule of law, in practice this seems to be mere lip service. It has been amply demonstrated that the government has several times shown little or no respect for the courts. It is our submission that if the government can disrespect the court orders then it clearly excludes itself from being committed to uphold justice, and as a result the judiciary becomes ineffective in protecting basic rights.

We have also tried to show how the legislature was used by the government to frustrate the courts' efforts to protect individual fundamental rights. The legislature has been used to enact laws that cannot be compatible with democracy and the newly enshrined Bill of Rights.⁸⁴⁵ More alarming is the fact that these offending laws were enacted after the Bill of Rights had come into force. Courts should continue developing more progressive ideas in the country's human rights jurisprudence irrespective of the government's negative response. There are signs of optimism in that more progressive court decisions continue to clear the way for a meaningful realisation of individual fundamental rights.

⁸⁴⁴MWAIKUSA, J. T., (1991), p. 690.

⁸⁴⁵ For example the Regulation of Land Tenure (Established Villages) Act, 1992.

PART FOUR: CONCLUSIONS AND
RECOMMENDATIONS

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS FOR REFORM

This study set out to examine the role played by the judiciary in protecting human rights in Tanzania. It also endeavoured to appraise the attitude of the executive as well as legislative attempts to put the idea of human rights into practice. This chapter is about our interpretations and understanding of the role played by the judiciary in protecting human rights in Tanzania, in the light of what we have expounded. After a careful exposition of the human rights jurisprudence in Tanzania, we now attempt to make some concluding remarks about the approach/attitude of both the judiciary and the government. We shall examine the possible causes for such attitude and their effects before suggesting various measures for reform.

8:1 Observations and conclusions

In this work we have traced and examined the performance of the judiciary from colonial period to date. An attempt has been made to show how difficult it was for colonial governments to observe human rights, as the idea was in opposition to colonial intentions. In order to achieve what they set out to do the colonial governments in Tanganyika allowed the executive to perform judicial functions.⁸⁴⁶ Indeed the administration of justice was characterised by a racial divide and two parallel court systems were established. The indigenous people, known as “natives” had their own court system staffed by administrators who had no legal training. Non-Africans were

⁸⁴⁶See the discussion in chapter one.

subject to a different court system staffed by professionally trained judicial officers. In that kind of situation justice to the indigenous people could only be done when the decision of the court would not conflict with the interests of the colonial master. We recall from chapter two how the idea of human rights, as a predominant constituent of good government, could not be extended to the colonies.

Although the colonial government was attacked by the nationalist leaders for not respecting human rights, ironically the independence government exhibited no significant difference. They opposed the enshrinement of the Bill of Rights in the Constitution and the judicial review of administrative action was the only recourse available in Tanzania.

We have demonstrated in chapters two and three how the independence government became increasingly autocratic by rejecting the popular demands for a Bill of Rights. Perhaps Dr. Nyerere genuinely believed that an enforceable Bill of Rights in the post-independence Constitution would immobilise government action and hamper economic development.⁸⁴⁷ However, the intended economic development could not be achieved and the failure to observe human rights produced undesirable consequences as most government policies turned out to be disastrous. The villagization programme was one such objectionable policy. It is interesting to note that most of such villages collapsed with time and institutions that were nationalised have been resold to private individuals under the new policy of privatisation.

What happened in Tanzania and perhaps elsewhere in the world is enough to support the argument that denial of human rights is a more expensive engagement than observing them. A considerable amount of resources were injected into the mobilisation of security forces and other coercive instruments of the state to carry out various exercises which involved the negation of human rights. The judiciary was deliberately marginalised and

⁸⁴⁷See KIBWANA, K., p. 43.

the executive was made extraordinarily strong. Also most of the judicial officers were positivists and conservative. These factors prevented effective judicial control.

Almost thirty years after independence the Bill of Rights was eventually made part of the Constitution. However, as detailed in chapter four, this was preceded by some resistance on the part of the government. The strong executive was not ready to let its powers be encroached on by the Bill of Rights. This is the interpretation we give to the contents of the Bill of Rights and the limitations thereof.

We saw in chapters five and six a dramatic change in terms of attitude by some members of the judiciary after the Bill of Rights came in force. Executive actions and a number of statutes were nullified by the court for conflicting with the fundamental rights that were guaranteed under the Constitution. The High Court was leading in that activism while the Court of Appeal adopted a more cautious approach especially in those cases where the government was a party or had a direct interest.

The reaction to the court decisions by the government has been largely negative. The response from the government, as expounded in chapter seven, to a number of the court decisions prompted the argument that the government enshrined the Bill of Rights in the Constitution simply for public relations reasons. On this score Kivutha Kibwana correctly concludes that 'African governments, more often than not pay lip service to human rights because aid donors make it a conditionality explicitly or implicitly for development aid.'⁸⁴⁸ It is therefore not recognised by the government that adherence to human rights is a condition without which no significant economic developments can be achieved by the country. Thus most of African governments maintain 'a

⁸⁴⁸Ibid., p. 44.

position where they can leisurely pick and choose which human rights-and the measure-they will allow citizens.¹⁸⁴⁹

Tanzania is no exception. It has carefully restricted through various means the realization of individual fundamental rights. To a considerable extent the government has maintained this policy even after the Bill of Rights became enforceable.

8:1:1 The sufficiency of the Constitution in safeguarding human rights

Essentially the idea of human rights as perceived today carries a message that outlines the rights of citizens and duties of the state. Thus fundamental rights secured to the individuals are limitations on state power. Sing argues that fundamental rights in the Constitution 'are not meant to protect persons against the conduct of private persons' since 'private action is sufficiently protected by the ordinary law of the land.'¹⁸⁵⁰ Its purpose is to protect the citizens' fundamental rights and freedoms against encroachments by the government. In this task the Constitution plays a very important role for it is the one which establishes the principles on which a state is governed. If a Constitution of a state provides for fundamental rights, then that particular state commits itself to respect fundamental rights. This commitment finds expression in the government's general behaviour when running its day-to-day activities. It is therefore not enough to enshrine individual fundamental rights in the Constitution without creating a good environment for their realisation. The Constitution by itself is not a sufficient means in safeguarding human rights since the state can still manipulate it to undermine the rights which the same Constitution attempts to guarantee. The Tanzanian Constitution and the limitations in the provisions of the Bill of Rights may provide a clear example. It would all depend on the way the Constitution has been framed.

⁸⁴⁹Ibid., p. 45.

⁸⁵⁰SING, D. K., pp. 17-18.

The Tanzanian Constitution therefore, does not give sufficient assurance to the citizens that legislature and government would be bound to observe fundamental rights written into the Constitution. At best they look like mere declarations of intent which could be departed from by any future legislature. This is illustrated by the government's repeated attempts to amend the Constitution in response to various court decisions.

It was a very significant step in the history of human rights in Tanzania, when for the first time the Bill of Rights was made part of the Constitution after being resisted for about three decades since independence. However, it is one thing to have a constitutional recognition of these rights and it is another thing to be able to realise them. It seems the government satisfied only one aspect of popular demands for a Bill of Rights. Although the Bill of Rights was enshrined in the Constitution, the government used the same Constitution to frustrate their meaningful realisation. This was achieved through use of limitation clauses, particularly the claw back clauses and derogation clauses.⁸⁵¹ By and large individual fundamental rights as contained in the Tanzanian Constitution could be exercised only to the extent prescribed by law. Here is the problem. Arguably, this could mean that enjoyment of fundamental rights can be restricted by any law no matter how disagreeable such limitations might be.

The unusual thing with the Tanzanian Constitution is that it saves all laws otherwise void for being inconsistent with the Constitution. This unusual attempt contradicts a long established principle that any law inconsistent with any provision of the Constitution should be void and of no effect to the extent of such inconsistency. Clearly, this could be another way of rendering the Bill of Rights ineffective.

However, in order to reduce the harshness of the claw-back clauses and the derogation clauses, we saw the Court of Appeal in *Daudi Pete's* case and in

⁸⁵¹Article 30.

Kukutia Ole Pumbun's case laying down three conditions which the "prescribed law" must fulfil first in order to be protected by the derogation clause.⁸⁵² The government was definitely not impressed by these restrictions imposed by the Court of Appeal's interpretation.

Also the Constitution prohibits all acts of torture or inhuman or degrading treatment,⁸⁵³ and the police are enjoined by law to treat the suspects with humanity and to refrain from cruel or degrading treatment.⁸⁵⁴ However, the police and other state agencies, like the Central Intelligence Unit, still use such practices in order to secure confessions from suspects during interrogation resulting in serious consequences and even deaths.⁸⁵⁵ In all these events the police escaped prosecution for none of the tortured persons was bold enough to take legal action against the officers responsible. Past record has shown that the courts are unsympathetic to police officers who are brought to justice after inflicting torture on suspects. The case of *R. v. Godfrey James Ihuya and Three Others*⁸⁵⁶ is illustrative. The accused persons in this case were jointly charged with murder. They had tortured, during interrogation, the persons suspected of murdering the witch-doctors in Mwanza and Shinyanga regions. The torture culminated into the deaths of two suspects.

It was established in court that the male suspects had their testicles tied and pulled, strip naked and beaten up, pepper put into their prepuce, injected with methedrine by a medical doctor⁸⁵⁷ and urged to confess that they had committed murders at different places. This was done by the Senior Police and State Security Officials. Actually all suspects had been either previously discharged or acquitted for lack of evidence. The court found the accused

⁸⁵²See the discussion in chapters five and six.

⁸⁵³Article 13 (6) (e).

⁸⁵⁴See the Criminal Procedure Act, 1985, section 55.

⁸⁵⁵See our discussion in chapter five, footnote 578.

⁸⁵⁶High Court of Tanzania at Mwanza, Criminal Case No. 8 of 1980, unreported

⁸⁵⁷A Medical Doctor was specifically brought from Bugando Hospital by the torturers to administer that particular substance to the suspects to force them speak and confess.

persons guilty of manslaughter and sentenced each of them to seven years imprisonment.

Little education on the part of police detectives and lack of facilities for investigation has immensely contributed to the increase in practices of torture of suspects at the police stations. Also to a certain extent the Law of Evidence Act, 1967 has encouraged these practices by allowing the production in court of illegally obtained cautioned statement of the accused person as evidence against him. Of course, the court can reject such statement when it is established that it was not voluntarily made. However, such illegally obtained evidence (like the accused person's cautioned statement made after being tortured) cannot be rejected by the court where it leads to the discovery of the stolen property. Furthermore, the Criminal Procedure Act, 1985 allows the court to admit any illegally obtained evidence where it believes and is satisfied on a balance of probability that admission of such evidence would be of specific and substantial interest to the public, without unduly prejudicing the rights and freedom of any person.⁸⁵⁸

Arguably this provision of the law potentially condones torture, by making it possible admission of the illegally obtained evidence, simply because it is on public interest. Thus, the police and other state functionaries are tempted and indirectly encouraged to inflict torture upon the suspects in order to obtain pleas from them.

The above discussion illustrates the insufficiency of the Constitution in safeguarding human rights if the government and its functionaries are not willing to respect these constitutional rights. Arguably the government's reaction to various court decisions expresses a serious lack of commitment to promote individual fundamental rights. It is therefore not enough to have a Bill of Rights laid in the Constitution if realisation of such rights is technically frustrated and effectively defeated in various ways.

⁸⁵⁸The Criminal Procedure Act, 1985, section 169 (1) Proviso.

Moreover, if people themselves are not aware of what their rights are and are not able to enforce them, it cannot serve any meaningful purpose to have a Bill of Rights in the Constitution. In Tanzania very few people are aware of the possibility of suing the government or its organs for any reason especially when it exceeds the permitted limits of its power.⁸⁵⁹ Many people are ignorant and not well informed about their substantive rights. Women, for example, very rarely include claims for maintenance, division of property or custody of children in their petitions for divorce, unless legally represented.⁸⁶⁰ In a country like Tanzania where the executive has for so long accumulated too much power it may not be easy to install confidence among the citizenry. The thirty years that the people spent without a Bill of Rights in the Constitution did a great damage to people's way of reacting to abuses by the state. This also explains the paucity of human rights cases in many High Court centres.

It was discovered during our field study that Mtwara High Court centre had not heard a single human rights case largely because of people's ignorance. In describing the magnitude of people's ignorance in the area, the then only resident advocate in the township John Kumwembe, regrettably cited the common practice whereby baskets of coconuts were taken to the policemen upon releasing persons they detained for days without any good cause. Instead of opening suits for malicious prosecution or wrongful confinement⁸⁶¹ against the police responsible, the people assemble to thank the otherwise culpable police for such release. Legal literacy is a necessary foundation for the future of human rights in Tanzania. Although higher legal fees involved in litigation has also contributed to the scarcity of human rights cases in some areas, for Mtwara region it was attributed mainly to ignorance. The account given by

⁸⁵⁹KAPINGA, W. B., (1990), p. 57

⁸⁶⁰WANITZEK, U., p. 263.

⁸⁶¹For example under the Criminal Procedure Act, 1985, section 51 (2). See also LUGAKINGIRA, K. S. K., (1986), p. 4.

Kumwembe (advocate) that despite his extraordinary low charges he was under-employed for people did not use his services, is illustrative. It is therefore an indisputable fact that the overwhelming majority of Tanzanians can hardly afford the services of an advocate at even very moderate fees.

Indeed, as Mwaikusa observed, the decision by the government to leave the offending laws unrepealed was not a healthy one, for the majority of the affected people might not be aware of their rights to seek redress from the court.⁸⁶²

8:1:2 The effectiveness of the judiciary in the protection of human rights

We saw significant efforts made by a few judges, particularly in the High Court, in giving a generous interpretation to the provisions which relate to human rights. This is the only way the judiciary can meaningfully protect human rights. Unfortunately most of Tanzanian judges have been very slow to shift from the traditional conservatism in which they were trained. This also explains the paucity of court decisions which promote human rights.

Judges' conservatism and pro-state attitudes in post-independence Tanzania has been the subject of many criticisms by scholars who viewed it as "uninspiring".⁸⁶³ Shivji made a general observation that judges in Tanzania 'even the best of them argued, reasoned and judged in terms of what the rules meant (interpretation and construing) rather than giving law the kind of integrity it deserved.'⁸⁶⁴ Lawyers in Tanzania doubted from the beginning, whether the judiciary would not be handcuffed by the limitation clauses in the Constitution. To them, the Tanzanian judges were not bold enough to look at the general spirit behind fundamental freedoms and strike down any law which negated that spirit. The main reason for such doubts was their past experience with the court as one scholar observes:

⁸⁶²See MWAIKUSA, J. T., (1990), p. 94.

⁸⁶³MWAKYEMBE, H. G., (1986 A), p. 26.

⁸⁶⁴SHIVJI, I. G., (1987), p. 117.

“The evidence from the past suggests that the Tanzanian judiciary has been nurtured heavily in the positivist tradition and would hang on an even thin technical string to ensure that no law passed by the legislature is declared invalid.”⁸⁶⁵

The discussion in this study has shown that the lawyers’ worries were very well founded. The Tanzanian judiciary led by the Court of Appeal has largely maintained its conservative and pro-state attitude⁸⁶⁶ except in few High Court cases. For example Mwalusanya, J., and Lugakingira, J (as he then was), maintained consistency in their activism. Others like Samatta, J. K (as he then was), Mapigano, J., Mroso, J., Mchome, J., and Munuo, J., have on some occasions exhibited liberalism in interpreting various provisions. However, the majority of judges of the High Court and those of the Court of Appeal, have been unnecessarily cautious in responding to human rights issues boldly, in favour of the underprivileged and oppressed. This attitude prompted one critic to draw a conclusion that ‘those few High Court judges who take an activist role seem to have taken the bull by the horns.’⁸⁶⁷

At one time Mwalusanya, J’s activism could be best understood as a human rights crusade. Other judges regarded it as Mwalusanya, J’s personal interest. Actually during our field study some judges expressed resentment about Mwalusanya, J’s activism. This attitude is worrying, and perhaps one might be tempted to ask for how long would Mwalusanya, J’s “human rights crusade”⁸⁶⁸ survive. In January 1997, Mwalusanya, J., was retired on health grounds after being bed-ridden for two years recovering from a stroke. If at all it was Mwalusanya, J’s personal human rights crusade then his retirement would mark the end of judicial activism in Tanzania. We hope that the

⁸⁶⁵Ibid., p. 137

⁸⁶⁶PETER, C. M., (1992), p. 139.

⁸⁶⁷Ibid.

⁸⁶⁸SHIVJI, I. G, (1991 A), p. 122.

emergence of Nchalla, J.,⁸⁶⁹ is not only a tribute to Mwalusanya, J's dedication but also good news to the people and all human rights activists. Others like, Mapigano and Mrosso are approaching the retiring age. Lugakingira's recent appointment as Justice of Appeal has been received with mixed feelings by human rights activists. Some saw it as a tribute to human rights jurisprudence in the country but others regard it as the government's deliberate move to frustrate effective judicial liberalism for two main reasons. First he would be sandwiched by the conservative judges since the decision of the Court of Appeal is that of the majority. Secondly his appointment came when he was preparing himself to retire

The words of Kisanga, J. A., that the Court of Appeal is ultimately responsible for keeping the country's laws in a state of readiness to cope with the changes which are constantly taking place in the society,⁸⁷⁰ are encouraging. However, the practice and statements of the Court of Appeal are diametrically opposed to these views. We saw, for example, in the case of *Mbushuu Dominic Mnyaroje* the Court of Appeal rejecting the importation of decisions from other jurisdictions on the issue of the death penalty.

The Court of Appeal has occasionally frustrated the sporadic efforts of the High Court to give purposive interpretation to provisions of the law that relate to fundamental rights and freedoms in Tanzania. A meaningful realization of human rights in Tanzania, like elsewhere, will depend on the attitude of the judiciary towards the infringements and violations of peoples rights by the state, in any way. As Mwaikusa remarked, 'if the courts are timid and always humble themselves before executive authorities, then there is the danger of unlawful exercise of public power continuing without straint.'⁸⁷¹

Sometimes the judiciary considered itself ineffective when its efforts to protect individual fundamental rights were frustrated by the government's

⁸⁶⁹See *D. P. P. v. Angeline Ojare*, op cit.

⁸⁷⁰See KISANGA, R. H., p. 24.

⁸⁷¹MWAIKUSA, J. T., (1990), p. 99.

reaction. Unless the government stops its attempts to undermine the court decisions the judiciary cannot effectively protect the rights that are guaranteed under the Constitution. While the Tanzanian judiciary is essentially positivist and conservative there is yet another problem caused by the government's retaliation to the rare activist court decisions which aim at protecting the individual fundamental rights. In fact the judiciary has not received proper co-operation from the government in this crusade.

8:1:2:1 *Marginalisation of the judiciary.*

Since independence the judiciary in Tanzania has been considered unimportant and insignificant in the development of the country. As a result judicial functions could be discharged also by various tribunals and many other *quasi-judicial* bodies as well as by the courts. Since it was easier for the powerful executive to influence/interfere with the decisions of the tribunals than the court decisions, much emphasis was put on the tribunals. That was one of the reasons for not having a strong judiciary after independence. It reached a stage where the ruling party leaders all over the country assumed judicial functions by conducting proceedings in their offices and presiding over a number of cases between individual citizens, and passing decisions to that effect. The judiciary was marginalised in terms of everything including funding, and emoluments. This also contributed to a wide spread of corruption in the judiciary, the fact which was admitted by the Presidential Commission on the Causes of Corruption in Tanzania,⁸⁷² otherwise known as the *Warioba Commission*. Today the situation has not changed except for judges' salaries which have recently been adjusted. However, the adjustment of judge's salary made him the lowest paid when compared to the adjustment made to the salary of the Cabinet Ministers, Regional Commissioners and the Members of

⁸⁷²See the Warioba Commission's Report, pp. 199-237.

Parliament. Previously the judge's salary, although small, was higher than that of the said senior government leaders as illustrated by the Table below.

A comparison of salaries between judges and selected public officers 1990-1997 (in Tanzanian Shillings)

| Title | 1990/1 | 1991/2 | 1992/3 | 1993/4 | 1994/5 | 1995/6 | 1996/7 |
|-----------------------|--------|--------|--------|--------|--------|---------|---------|
| Minister | 21,065 | 23,670 | 27,860 | 27,860 | 44,000 | 121,970 | 494,000 |
| Regional Commissioner | 20,585 | 23,670 | 27,220 | 27,220 | 43,625 | 121,405 | 470,000 |
| Deputy Minister | 17,810 | n.a | 23,595 | 23,595 | 42,625 | 88,995 | 462,000 |
| Member of Parliament | 14,500 | 16,740 | 19,250 | 19,250 | 40,638 | 77,640 | 450,300 |
| High Court Judge | 21,730 | 24,900 | 28,740 | 28,740 | 43,395 | 98,790 | 412,000 |

Source: *Report of A Special Advisory Committee to the Chief Justice on How to Combat Corruption in the Judiciary*, 1996. Also reproduced in LUGAKINGIRA, K., (1996).

Politicians are highly paid when compared to the judicial officers. At the Magistracy level the situation is appalling. The salary of a Ward Secretary is very far higher than that of a Primary Court Magistrate, a District Magistrate, a Resident Magistrate and even a District Registrar in charge of a High Court Zone.⁸⁷³ The government has increasingly paid little attention to judicial problems caused by underfunding. However, the High Court was relatively looked after compared with subordinate courts which barely receive the government's attention. The executive see law as text not as institution and the need for a good environment for its enforcers is not considered important. To them the question of access to justice is not a priority.

Our field study revealed that advocates and other private individuals, possibly those having interest in the outcome of various cases pending in

⁸⁷³LUGAKINGIRA, K. S. K., (1996), p. 17

court, are common financiers of day to day court's activities. They provided a wide range of things including stationery, fuel and sometimes transport for judicial officers when visiting the scenes of the crimes or disputed areas in land cases.⁸⁷⁴ It reached a stage where the United States Agency for International Development (USAID) offices in Dar Es Salaam donated to the Dar Es Salaam Resident Magistrate Court some stationery from its own stock. This fact could be established by the emblem of the United States of America and huge letters of the name of that Organisation conspicuously stamped on every sheet. Court's proceedings and judgments were written on those papers. It was not clear whether the United States of America had taken up the responsibility of running the Tanzanian judiciary or it was just a generous donation to keep the business of the court going.

Such a marginalised judiciary cannot meaningfully and effectively protect human rights. For example, during the constitutional debates at Karimjee Hall in June 1998, the Chief Justice publicly admitted that judges fail to decide against the government because they fear risking further slashing of the judiciary's budget in retaliation by the government.⁸⁷⁵ If the availability of the basic tools of work like papers on which to write proceedings and judgments, file covers, or even court rooms constitute a serious problem, justice is threatened for justice delayed is justice denied. All this, coupled with their miserable salaries have significantly contributed to the rapid growth of corruption in the judiciary especially in the Magistrates' courts thereby threatening the role of the judiciary in protecting human rights.

To a considerable degree corruption among judicial officers puts the independence of the judiciary at stake. There is no doubt that an independent and impartial judiciary is essential for the effective protection of human rights. However, this cannot be achieved by merely including safeguards in a

⁸⁷⁴For more effects of underfunding the judiciary see LUGAKINGIRA, K. S. K., (1996), p. 13.

⁸⁷⁵See *Majira* Newspaper, 8th June 1998.

Constitution which superficially offer the judicial officers security of tenure. There must be a deliberate move by the government to provide good environment for the independence of the judiciary in its wide perspective. Also there must be a desire on the part of the executive to respect the independence of the judiciary and a manifestation of that desire in appropriate form.

8:1:2:2 Ignorance.

The possibility of ignorance of matters of human rights among judicial officers cannot be ruled out. The nine months training for Primary Court Magistrates, most of them rising from court clerks, is too short a period to produce a person worthy of such an office in terms of knowledge and other professional skills. Most Primary Courts' Magistrates and District Magistrates know nothing about human rights since their training did not specifically cover these issues. Resident Magistrates were relatively better trained especially those who had had a chance to study Constitutional Law during their undergraduate studies. However, most of them are ignorant of the basic elements of international human rights. There has not been any system to ensure the availability of law books or journals nor have there been seminars or workshops to update them. It is interesting to note that even the binding decisions of the High Court and the Court of Appeal are not known to magistrates for there haven't been any published law reports in the country since 1983. Because of a lack of paper only a limited number of duplicated copies of the judgments of the High Court and Court of Appeal could be found at the High Court centres' libraries during our field study. For a legal system which is based on precedent, it is imperative that the decisions of superior courts reach the subordinate courts on whom they are binding.

The High Court judges, the judicial officers charged with responsibility for enforcement of Bill of Rights, seem to know little about human rights. A considerable number of them have never attended any course, or seminar on

human rights since they were appointed judges. As most of them were early graduates of law after independence, their training never included subjects like human rights, and Jurisprudence as a subject was optional. The idea of international human rights developed significantly when most Tanzanian judges had left University or were just about to complete their studies. Further, Tanzania acceded to various human rights instruments when most of Tanzanian judges were already at work. In addition, they had no chance to enforce/promote human rights as the government resisted their being enshrined in the Constitution until 1985.

All this underlines the importance of a special training for Tanzanian judges before they are called upon to adjudicate on matters of human rights. The judiciary did not use that period of three years during which the Bill of Rights was suspended, to prepare its officers to cope with the new situation. Seminars, or workshops for judicial officers would have increased their awareness or changed their attitudes and their approach to human rights issues.

As a result when the Bill of Rights became justiciable judges could not distinguish, in their interpretation, between the ordinary laws of the land and the provisions which relate to human rights. That is why some judges were shy to take a stand on issues of human rights and declare the offensive laws void.

Even after the Bill of Rights became enforceable the judiciary never took such initiative to update its officers on the development of the idea of human rights. Our field study has revealed that a large number of judges know very little about various key international human rights instruments. They have never read them, not to mention the possibility of not having heard of them either. There is no systematic arrangement to keep them informed of human rights developments in other jurisdictions. The Law Reports of Commonwealth has tried to communicate, among other things, the development of human rights jurisprudence in various Commonwealth countries. However, the Tanzanian judiciary has not benefited much from this

publication because of financial hardship. Due to under-funding it has been hard for the Tanzanian judiciary to press an order for being supplied with such useful law reports. The only updated information available to the Tanzanian judiciary is the one supplied by the Commonwealth Judicial Journal that does not require monetary subscription.

This also may explain the background for the positivist and conservative attitude of Tanzanian judiciary. The criticism mounted by judges of the Court of Appeal in the case of *Mbushuu Dominic Mnyaroje and Another v. R*⁸⁷⁶ against Mwalusanya, J's style, of dividing his judgment in sub-headings, illustrates the extent Tanzanian judges were out of touch with the rest of the world. In their own words:

“...we commend the learned trial judge for his unexcelled industry in his exploration of the human rights literature. However, we would also like to point out that the style he has used in writing the judgment, dividing into parts and sections, with headings and sub-headings, is unusual. That style is more suited for a thesis than for a judgment”

Perhaps, if the learned judges had been exposed to reading the Law Reports of Commonwealth⁸⁷⁷ and many other judgments of various jurisdictions,⁸⁷⁸ they would have realised that Mwalusanya, J., was not the only one nor was he the first judge to plan his judgment in sections and sub-headings. In fact the style of dividing a judgment in sub-headings helps the reader to appreciate the issues that the judgment tries to solve. Arguably this could be one of the indicators of a judge's initiative and creativity as opposed

⁸⁷⁶Op cit.

⁸⁷⁷See for example the judgment of CHASKALSON, P., in *State v. Makwanyane and Another* (1995)1 L.R.C. 296. He divided his judgment, into sub-headings (legislative history, contentions of parties, effects of disparity in the laws governing capital punishment etc).

⁸⁷⁸For example judgments of the Supreme Court of the United States of America.

to conservatism which simply sticks to old traditions. In character therefore, the Tanzanian Court of Appeal is essentially a conservative body.

The few Tanzanian judges who were able to cite in their judgments decisions from other jurisdictions, obtained them through personal initiative and contacts. When interviewed by the author, Mwalusanya, J., made it clear that his friends within and outside Tanzania kept him informed of various developments in human rights by sending to him relevant books and interesting court decisions from different jurisdictions. He regularly attended international conferences, seminars and workshops on human rights, an opportunity many other judges did not have as invitations were addressed to him in person. Having been exposed to such opportunities Mwalusanya, J., was able to translate his knowledge into comprehensive high quality judgments reminiscent of research papers.

The judiciary has now acknowledged its ignorance of the whole concept of human rights. A two weeks course on constitutionalism attended by twelve senior judges of the High Court and the Court of Appeal in Ireland,⁸⁷⁹ is an acknowledgement of the fact that judges were insufficiently equipped with the necessary tools to be able to protect human rights. Their course programme covered constitutional governments in Africa, international law and human rights, doctrine of separation of powers, the role of the judges, judicial review of legislation and conflict of law. On completing the course, many looked fascinated and expressed optimism and a change of attitude towards matters of human rights. The plan was that similar courses would be conducted in the country for the benefit of those judges who did not go Ireland. However, to date such courses have not yet been organised.⁸⁸⁰

⁸⁷⁹The course was conducted at the School of Law, University of Dublin, Trinity College from 10th-21st March 1997. It was attended by nine High Court judges and three Court of Appeal judges.

⁸⁸⁰It is interesting to note that some of the tutors in that seminar came from Tanzania.

8:1:3 Absence of effective civil organisations.

The Tanzanian government has since independence used the colonial Societies Ordinance⁸⁸¹ to restrict the formation of civil organisations in the country. Under the Societies Ordinance all civil organisations like other societies have to be registered first in order to run their activities. The government through the Minister for Home Affairs and the Registrar of Societies retains the discretion to reject any application for registration and even to cancel such registered organisation. Further, there are no registries outside Dar Es Salaam. The procedure to get the organisation registered and the bureaucracy involved discourages people from forming civil organisations. Those few which secure registration after such endurance, they are closely monitored in such a way that mere suspicion of a political inclination on the part of any particular organisation may lead to it being de-registered. This is exactly what happened to the women's society (BAWATA). Since its birth on 6th May 1995 BAWATA was suspected by the government of supporting the opposition and getting involved in political issues. By 17th September 1997 its activities were suspended and conditions imposed that its constitution be amended. This was followed by threats from the government and notice of cancellation of that organisation. However, the leaders went to court and obtained an injunction restraining the government from de-registering or interfering with the activities of BAWATA pending hearing and final determination of the constitutional petition.⁸⁸² A petition for enforcement of basic rights in which BAWATA question the constitutionality of the Societies Ordinance and the power exercisable thereunder is yet to be heard for it requires a quorum of three judges.

⁸⁸¹Cap. 337.

⁸⁸²See *Baraza la Wanawake Tanzania (BAWATA) and Five Others v. Registrar of Societies and Two Others*, High Court of Tanzania at Dar Es Salaam, Miscellaneous Civil Cause No. 27 of 1997, unreported.

Organisational initiatives including students organisations⁸⁸³ were suppressed unless backed by the ruling party.⁸⁸⁴ The government is until now suspicious of such societies. That could be one of the main reasons why there have not been effective civil organisations (non-governmental organisations) to assist in exerting pressure or influence upon the government whenever matters of human rights are at stake.

In order to avoid government control and possibly be free from arbitrary de-registration, some organisations have decided against registration under the Societies Ordinance. Instead, the Companies Ordinance, 1932⁸⁸⁵ which is significantly free from state intervention has provided an alternative. The Legal and Human Rights Centre Limited presently under the Chairmanship of Lugakingira, J., is illustrative. It operates under the auspices of the Tanzania Legal Education Trust (TANLET) established by a group of legal aid activists of the Faculty of Law University of Dar Es Salaam.⁸⁸⁶ The law lecturers realised that the Legal Aid Committee of the Faculty of Law could not be used to champion civil rights against the state without facing undue pressure from the authorities.⁸⁸⁷ Thus TANLET, an independent private organisation, was established under the Trustees Incorporation Ordinance as a better means of fighting the abuse of human rights by the state.

TANLET offered itself as the legal organisation under whose auspices the activists for multi-party democracy hosted their rallies and mobilised the masses before government conceded to their demands. In response the

⁸⁸³For a detailed discussion about suppression of student's organisations by the government see PETER, C. M., and MVUNGI, S., pp. 157-159

⁸⁸⁴See SHIVJI, I. G., (1981), p. 22.

⁸⁸⁵Cap. 212.

⁸⁸⁶In our interview with Dr. Mvungi Seng'ondo one of the Centre's Directors we were told that apart from the threats posed by de-registration it would have taken them years to register TANLET and LHRC under the Societies Ordinance.

⁸⁸⁷It is said that the Legal Aid Committee was forced by the government through the University authority to withdraw legal representation it had granted to Shariff Hamad the government dissident who was alleged to have been found in possession of government secret documents and against whom criminal charges were preferred. Shariff Hamad is the former Chief Minister of Zanzibar.

government banned TANLET and for more than two years the organisation existed under the protection of the court injunction given in *The Board of Trustees TANLET v. Attorney-General*.⁸⁸⁸ The case was withdrawn following the success of the democratic movement which made Tanzania a multi-party state.

The centre's main objective is to 'create legal and human rights awareness among the general public and in particular the underprivileged sections of society through legal civil education and the provision of legal aid.'⁸⁸⁹ Due to lack of funds the centre has been unable to sustain the programme for mass education⁸⁹⁰ and to a certain extent attention has been paid to a few cases involving pastoralists' rights over land in Arusha.⁸⁹¹

The centre was registered under Cap. 212 as a non-profit making company limited by guarantee and not having a share capital. The move taken to register the Legal and Human Rights Centre as a Limited Company under the Companies Ordinance is indicative of how desperately people needed civil organisations. Despite government's attempts to restrict their formation and to suffocate the already existing ones, still people could find other ways of promoting these organisations.

In Namibia for example, civil organisations have effectively played the role of a human rights watchdog. The Legal Assistance Centre, an NGO in post-independence Namibia, has immensely contributed to the development of the human rights culture and a more just society by promoting access to justice through legal aid and public interest litigation. The Centre established in 1988 has engaged in researching and advocating legal reforms where required and

⁸⁸⁸High Court of Tanzania at Dar Es Salaam, Miscellaneous Civil Cause No. 29 of 1991, unreported.

⁸⁸⁹See the Memorandum of Association of Legal and Human Rights Centre, Article 4 (a).

⁸⁹⁰The Centre receives funds from the Canadian Universities for Overseas (CUSO).

⁸⁹¹For example *Yoke Gwaku and 5 Others v. National Agricultural and Food Corporation (NAFCO) and Gawal Wheat Farm Ltd*, High Court of Tanzania at Arusha, Civil Case No. 52 of 1988, unreported; and *Ako Gembul and 10 Others v. The National Agricultural and Food Corporation (NAFCO) and 3 Others*, High Court of Tanzania at Arusha, Civil Case No. 12 of 1989, unreported.

has promoted grassroots legal education and finance has never been a problem.⁸⁹²

Perhaps, if there were vibrant and effective human rights civil organisations in Tanzania like in Namibia, significant protection of human rights would be realised. After Lugakingira, J., in *Mtikila's* case removed the barrier put by a condition of *locus standi* in cases for the enforcement of fundamental rights, one would expect a series of cases instituted by such organisations under the auspices of public interest litigation. Regrettably there were none, simply because human rights civil organisations had not been effectively established and the existing few focused on relief distribution as local funnels for international aid.

After being disappointed by the way the government was using funds donated by foreign countries for various projects, the donor countries changed their policies and decided to channel some of their funds through Non-Governmental Organisations. This gave rise to the emergence of such organisations. In fact most of them were elite organisations not emerging from people's needs and were not related to human rights. They were largely established by individuals for private gain. As a result they could not be relied upon to bring any infringement of human rights to the attention of the courts.

Economic constraints and ignorance curtail people from presenting their grievances when their fundamental rights are infringed upon. The High Court realised these barriers and waved the condition of *locus standi* but people and civil organisations do not make use of it.

Free civil organisations and interest groups do form an important component of a democratic government and they act as watchdog of individual fundamental rights.⁸⁹³ Alongside the active role to be played by the judiciary, significant internal protection of human rights in the country therefore depends

⁸⁹²For an account of both the Centre's performance and achievement see, LEGAL ASSISTANCE TRUST AND HUMAN RIGHTS TRUST, *Eighteen Month Report (July 1995 - December 1996)*.

⁸⁹³See MWAIKUSA, J. T., (1996), p. 81.

far more on the activities by human rights civil organisations. Where infringement of the rights is seen or reported they quickly take appropriate actions including exerting pressure upon the government and even instituting civil suits in court on behalf of the affected victims. Civil societies would represent the people's struggle 'organised against domination by the state, against denial of civic and political rights in the name of development.'⁸⁹⁴ Absence of such groups therefore, has negatively affected the development and protection of human rights by the courts in Tanzania.

From what has been highlighted we can rightly conclude that there is much still to be done for the judiciary to protect human rights effectively in the country. While the Tanzanian judiciary cannot deny being largely conservative we note also remarkable activism especially from few High Court judges. Prospects for a better and more activist judiciary increase with time as more judges change their attitudes towards human rights issues, following exposure to the outside world. However the High Court judges' efforts to protect human rights may simply serve as a short-term gain if the Court of Appeal maintains its conservatism to issues of a human rights nature. Concerted effort by Courts of all levels is imperative for a meaningful protection of human rights by the judiciary in Tanzania.

All in all, judging from the entire exposition in this work and the survey we have made in chapters six and seven, there is an immediate need for judges in Tanzania to change and take a liberal and activist role instead of being conservative and positivist when interpreting provisions which relate to individual fundamental rights. If this principle cannot be adopted then the role of the judiciary in protecting human rights in Tanzania may be doubtful and uncertain. As matters stand now, traces of conservative and pro-state judges portray a negative image of the Tanzanian judiciary and its role in protecting human rights.

⁸⁹⁴TAMBILA, K. I., p. 40.

We believe that the government also has to play a key role in the protection of human rights. Other institutions like the judiciary and civil organisations may assist the government to achieve this objective.⁸⁹⁵ This means that the executive in Tanzania has to change its attitude towards individual fundamental rights 'otherwise the much feared conflict between the judiciary and the executive will be rather difficult to avoid'.⁸⁹⁶

8:2 Proposals and recommendations for reforms

The general discussion in this work has shown that the judiciary in Tanzania cannot effectively protect human rights if, among other things, the majority of judicial officers maintain a conservative positivist tradition and an attitude of self-restraint when interpreting domestic laws that relate to fundamental rights and freedoms. We have also observed that some necessary preconditions for a meaningful protection of human rights by the judiciary have to be fulfilled by other two organs of the state, the executive and the legislature. The executive's behaviour and response to court decisions in matters of human rights nature shows the need for a change of attitude if the government is seriously committed to protect individual fundamental rights. Without changing its attitude towards the decisions of the court the government may inevitably attract unnecessary conflicts between the judiciary and the executive.

Having observed the unsatisfactory state of affairs among the three organs of the state with respect to human rights, this thesis makes some recommendations and proposals for reform.

⁸⁹⁵CLAUDE, W, E., p. 555.

⁸⁹⁶MWAIKUSA, J. T., (1991), p. 698.

8:2:1 Judicial activism

We consider that the judge's interpretation of the law should uphold rather than destroy the individual civil liberties.⁸⁹⁷ Many people in the world are now aware of the need for human rights protection and the judiciary is the main focus of their hopes. In Tanzania like elsewhere in the world, judicial activism is an important condition for the enforcement of individual fundamental rights. It is more important for Tanzania since the government has not created a good environment for realisation of the Bill of Rights and it is the judiciary that has to nullify relevant laws that infringe on individual fundamental rights. There is a call for an urgent shift from the traditional positivist attitude that has dominated the Tanzanian judiciary, to a liberal and activist approach.

It is noted that 'parliament cannot legislate for all time'⁸⁹⁸ and, in many parts of Africa, particularly one-party states, parliaments are weak institutions.⁸⁹⁹ This also supports the view that the development of law in Tanzania would largely depend on the flexibility of judges in adopting liberal interpretation. As Justice Holmes remarked;

"Whoever hath absolute authority to interpret any written or spoken law, it is he who is truly the lawgiver, to all intents and purposes..."⁹⁰⁰

Judges in Tanzania, therefore, play a negative role when they deny people justice by maintaining rigid and positivist approach particularly in issues of a human rights nature. Such an approach has increasingly been criticised by all people interested in social justice. Judges should not fear to make decisions even on political or weighty matters of state for by being so

⁸⁹⁷See DENNING, Lord., p. 188.

⁸⁹⁸LUGAKINGIRA, K. S. K., (1986), p. 9.

⁸⁹⁹Although Tanzania is practicing multi-party democracy, the opposition is still weak and vulnerable with very few parliamentary seats.

⁹⁰⁰Quoted in COOMARASWAMY, R., p. 3.

timid they relinquish their oath and judicial function.⁹⁰¹ They should not fear to decide sensitive matters for fear of encroaching on the political province. As Justice Bhagwati of the Supreme Court of India observed, 'every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political.'⁹⁰² The holding of the Supreme Court of Namibia in *Government of the Republic of Namibia and Another v. Cultura 2000 and Another*⁹⁰³ explains how constitutional provisions should be interpreted and the reasons thereof:

“A Constitution is an organic instrument...It must broadly, liberally and purposively be interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its peoples and in disciplining its government.”⁹⁰⁴

For a considerable length of time since independence the Tanzanian government has attempted to suffocate the judiciary and to prevent judges from taking an activist approach. Now that the Bill of Rights has been enshrined in the Constitution, judges should feel free to apply it. They should liberally make legal and policy pronouncements instead of restricting themselves to the traditional role of simply applying the law already made. Backlash from the executive should not warrant the abdication of the responsibility to enforce the commands of the Constitution by the judges whenever the government attempts to take away the fundamental rights.⁹⁰⁵ Judges should not be afraid of making decisions that do not find favour with

⁹⁰¹ See the judgment of Wilson, J., in *Operation Dismantle v. The Queen* [1986] L.R.C. (Const.) 421 at p. 440.

⁹⁰² Dissolution Case, 3 SC 1977, p. 660.

⁹⁰³ (1994) 1 SA 407.

⁹⁰⁴ *Ibid.*, at p. 418.

⁹⁰⁵ MWALUSANYA, J. L., p. 33.

the government to which they owe their existence. However, at the same time, they must be careful not to be seen to usurp the function of Parliament.

Since the Tanzanian judiciary has little experience in cases of human rights, it should be prepared to learn from decisions of other jurisdictions that have had opportunity to attend to such matters. There are many significant benefits on the part of domestic courts for maintaining links with the international human rights jurisprudence. As Chief Justice Gubbay rightly observed:

“...domestic courts have to construe domestic legislation in conformity with the developing international jurisprudence of human rights because, a judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many countries, than if it is based upon the parochial experience or foibles of a particular judge.”⁹⁰⁶

As the findings in chapter five and six have shown, attempts to cope with the developing international jurisprudence of human rights have been started by very few judges of the High Court. Unfortunately, Mwalusanya, J., (as he then was) who pioneered the group retired in January 1997 for health reasons. The number of progressive judges within the human rights context is alarmingly low and most of the decisions of the Court of Appeal have exhibited overcautiousness. Being the highest appellate court whose decisions cannot be overturned by any court, the finality of its decisions effectively determine the development of human rights jurisprudence in the country. This court has been accused of conservatism and frustrating the efforts of the High Court in protecting human rights.⁹⁰⁷ Although the Court of Appeal has occasionally made some progressive decisions in the jurisprudence of human

⁹⁰⁶GUBBAY, A. R., (1990), p. 999.

⁹⁰⁷See SHIVJI, I. G., (1991 A), p. 125; PETER, C. M., (1992), pp. 139, 147.

rights in Tanzania, it has consistently failed to interpret the law in favour of the underprivileged or oppressed when the state was involved. Claims and allegations of conservatism commonly levelled against the Court of Appeal may seriously damage the reputation of such highest institution of justice if they are completely ignored and the relevance of such a court could be questioned. As Mr. Justice Bhagwati the former Chief justice of India observed:

“...political legitimacy of a modern judiciary becomes questionable if it fails to make a substantial contribution to the issue of social justice.”⁹⁰⁸

Perhaps the Supreme Courts of Zimbabwe and India could be taken as models of the highest appellate courts whose decisions have always aimed at protecting civil liberties and not destroying them. The Tanzanian Court of Appeal could benefit from such institutions including the European Court of Human Rights that has had long experience in human rights cases and it could possibly adopt its interpretation of various articles. The Court of Appeal should be more concerned with justice than with technicalities and be able to show the fundamental relationship between law and justice. As Georges, C. J., carefully remarked;

“...the judiciary must seek to establish confidence itself - not by any abandoning of standards, but by showing its competence, by understanding the needs of the community and using its knowledge to help in formulating a body of law which will assist in their satisfaction.”⁹⁰⁹

What has been done by the court so far is too little, though promising, given the extent people were denied enforcement of their fundamental rights

⁹⁰⁸BHAGWATI, P. N., (1986), p. 65.

⁹⁰⁹JAMES, R. W., and KASSAM, F. M., p. 81.

since independence. More has to be done particularly by the Court of Appeal and new methods should be devised so as to bring justice within the reach of a common man. The Supreme Court of India by way of creative interpretation has made a procedural innovation through "social action litigation" and consequently 'made the judicial process readily accessible to large segments of the population which have so far been priced out of the legal system.'⁹¹⁰ Judges in Tanzania should be innovative to meet new challenges posed by the people's desire for realisation of fundamental rights and freedoms. There is an urgent need for creative interpretation by judges in order to bring justice to socially and economically disadvantaged. Too much judicial restraint turns the judiciary into a political instrument or indeed an institution that looks after the interests of the state. As Upendra Baxhi rightly observed:

"Between judicial restraint and the support of the status quo, there is a very thin line of difference, particularly in third world societies, whose governing elites are still apt to see the state as their private property."⁹¹¹

8:2:2 Strengthening the judiciary

Traditionally the executive in Tanzania has been very powerful. Elsewhere as in Britain the executive has also been very powerful but equally powerful are the legislature and the judiciary, the institutions charged with the task of imposing restraint on the executive. Such institutions in Tanzania were 'inhibited by the ever dominating executive.'⁹¹² This argument finds expression in the government's persistence to oust the jurisdiction of the court in a number of cases, and vesting it in the tribunals even after the enshrinement of the Bill

⁹¹⁰BHAGWATI, P. N., (1987), p. 20.

⁹¹¹BAXI, U., p. 111.

⁹¹²MWAIKUSA, J. T., (1996), p. 77.

of Rights in the Constitution.⁹¹³ Arguably, this reflects the government's continued distrust in the judiciary since independence. The effects of substituting such tribunals for the courts of law have been amply discussed in chapter three. Much as we appreciate the need for such tribunals it is our submission that their decisions should be subject to judicial intervention when necessary by way of review or appeal. A weakened judiciary cannot effectively stand up for people's rights. The judiciary should be strengthened and its confidence in performing its day-to-day activities has to be increased. This can be done if attention is paid to a number of factors that for a long time have contributed to the unsatisfactory state of the judicial function. In this part we attempt to point out some of such factors and also we suggest the attention that has to be paid to each of them.

8:2:2:1 Appointment of judges and the Chief Justice

There is a need to look again at the power to appoint judges and the procedure thereof. Judges of the High Court in Tanzania are appointed by the President after consultation with the Judicial Service Commission.⁹¹⁴ The President consults the Chief Justice before appointing judges of the Court of Appeal.⁹¹⁵ However, the law does not state that the President is bound by the recommendations of the Judicial Service Commission or of the Chief Justice. This means the President can make his own proposals to the Commission or to the Chief Justice and he can as well ignore their advice and proceed with his own choices.⁹¹⁶ The danger posed by this kind of unchecked power vested in the President is not imaginary but real. He is potentially free to use this loophole to bring into the judiciary a group of judges who he believes would

⁹¹³See the discussion in chapter seven about the effect of Act No. 22 of 1992.

⁹¹⁴Article 109 (2).

⁹¹⁵Ibid., Article 118 (3).

⁹¹⁶Article 37 (1) provides: "...except where he is required by this Constitution or any other law to act in accordance with or upon the advice of any person or authority, in the exercise of the functions of his office the President **shall** act in his own discretion and **shall not** be obliged to follow the advice tendered by any other person". (Emphasis added)

not decide against his interest, thereby defeating the idea of the judiciary being the protector of fundamental rights. Second, although there may be enough constitutional safeguards for judges' security of tenure, some might feel that they owe their existence to the government, or to the President for that matter, and therefore hesitate to disappoint him. It is our submission that the President should be bound by the recommendations of the Judicial Service Commission in relation to appointment of judges of the High Court and of the Court of Appeal when he is in disagreement with the recommendations of the Chief Justice.

The fact that the Chief Justice is appointed by the President without consulting anybody⁹¹⁷ supports the existing common understanding that the Chief Justice is personally indebted to the President. It also makes the office of the Chief Justice more political than legal for he holds this position at the pleasure of the President and can be removed any time. All this would perhaps explain the controversial pro-state attitude that the Chief Justices have shown since independence as discussed in chapter three. In order to make the judiciary more independent and to create a good environment for the protection of individual rights, the office of the Chief Justice should be democratized instead of being one of the Presidential appointments. We therefore subscribe to the view that judges and magistrates be allowed to vote and select the Chief Justice from a list of contesting judges.⁹¹⁸ They have successfully been doing so in electing a Chairman for the Judges and Magistrates Association and his secretariat. If adopted this method would potentially remove the possibility for the Chief Justice feeling duty-bound to defend the interests of the state at the expense of individual rights.

⁹¹⁷Article 118 (2).

⁹¹⁸See ONG'WAMUHANA, K., (1981), p. 264.

8:2:2:2 Availability of legal literature and law reports

Any legal system which is essentially modelled along the principle of *stare decisis* cannot effectively operate if the decisions of superior court(s) are not known to the lower courts or even to themselves. Under this doctrine the decision of a court is an authority or binding precedent both for the court itself and for all lower (subordinate) courts in subsequent cases where the very point is again in controversy. In the Tanzanian case, decisions of the Court of Appeal are binding on the High Court and all subordinate courts, whereas decisions of the High Court are binding on subordinate courts only. Decisions of both Court of Appeal and High Court are the only ones reported in the law reports as precedents. It is therefore important that decisions of superior courts binding on the lower courts are communicated to the latter. The conventional way of communicating these decisions is to publish the law reports on regular basis.

The latest law report in Tanzania was published in 1982 three years before the Bill of Rights became part of the Constitution. To date there have been no serious attempt to improve the situation and make judges, magistrates, advocates and other members of the legal profession aware of various decisions of the High Court and the Court of Appeal. Perhaps the effect of underfunding is more felt here where even the processing of copies of judgments becomes a problem due to the lack of paper and other stationery. This kind of situation raises one fundamental question as to how could judges and magistrates in Tanzania avoid making conflicting decisions about the same matter. It is highly possible for a judge in Tanzania to make a decision which conflicts with others without even mentioning them due to his unawareness of their existence. In fact 'departures from previous decisions are less frequent than conflicting decisions.'⁹¹⁹ This could be a threat to the future of human rights, if courts are not consistent in their decisions and if obsolete

⁹¹⁹LYALL, A., p. 55.

law might form basis of decisions simply because a particular judge or magistrate was unaware of the true legal position. Some of the allegations of corruption levelled against judicial officers stem from conflicting decisions of the courts and the unpredictability of the outcome of the cases. If a legal system based on precedents cannot have the decisions of superior courts published, it can hardly claim to do justice to its people.

Decisions of the Court of Appeal and High Court should be made available also to every District Police station. Duplicate copies of binding decisions of the Court of Appeal and High Court should be regularly made and distributed to all court centres not as providing an alternative to law reports but being an emergency and temporary solution to the problem while preparations for law reports are underway.

If the Tanzanian judiciary does not want to be out of touch with the outside world, it must be prepared to spare some money on buying law reports from other countries and international law journals or periodicals. High Court libraries should have such sources of materials for judges, magistrates and other members of the legal profession to update themselves about various important issues affecting their work. It is important that a judicial officer becomes aware of the trend of development of human rights issues in other jurisdictions. Also, members of the judiciary should be able to present their ideas and contribute to certain debates by writing articles from the practical point of view. This could be a learning process. Regrettably this role has been left to the academicians only. There are very few articles by judges that get published after being presented in seminars or workshops.

High Court libraries should be improved in terms of reference books and other legal literature. Every High Court Centre has a library. With the exception of Dar Es Salaam High Court Library the rest do not qualify for such a name. They are not libraries at all, but mere rooms with a few very old reading materials. No meaningful research can be conducted in these libraries

that lack even some of relevant statutes commonly applied by judges. During our field study, we were surprised to learn that at some High Court centres there were no copies of the Basic Rights and Duties Enforcement Act, 1994.⁹²⁰ Some judges and District Registrars were honest enough to tell us that they had never seen it before. This law is necessary for the enforcement of individual fundamental rights as it provides the procedure for enforcement of constitutional basic rights and duties, and jurisdiction of such matters is vested in the High Court only. It was very unfortunate that the people who were supposed to enforce that particular law had not even seen it.

It seems that every judge was forced by circumstances to have his or her own collection of statutes, books and some law reports in order to avoid embarrassments at work. While it may be difficult, given the country's limping economy to have a high standard library at every court, justice should not be compromised by economic excuses that seem to justify the marginalisation of the judiciary. Every High Court centre should have an updated library where judges, magistrates and other members of the legal profession can do their research. It may serve little purpose to equip the Dar Es Salaam High Court library only while the rest remain in a shambles.

8:2:2:3 *Research assistants*

Alongside the exercise to update the High Court libraries there should be a deliberate move to provide each judge with at least one law graduate as his research assistant. A research assistant to the judge would be involved in doing research about the various issues requiring the judge's decision. He would present to the judge the findings of his research and leave the rest to the judge to decide. At least the judge would have detailed information about the subject before him such as the views of various people of high standing, decisions from other countries and the debates, if any, that surround that

⁹²⁰Op cit.

particular issue. Any decision arrived at after such review of existing literature would definitely be different in all respects from the one based on simple logic and common sense.

Second, judges are very few but they are supposed to hear so many cases and at the same time write judgments after doing research. As a result no significant research is being done by judges who, for the most part, resort to writing routine judgments. This may not be healthy for the future of human rights. With the use of research assistants most of the research work otherwise done by judges would be done by people specifically employed to do research and judges would supplement such research when necessary in the course of writing the judgment.

In the same vein, we propose that each judge of the Court of Appeal write his own judgment instead of leaving everything to one of the presiding three judges to write the judgment of the court and the rest to concur.⁹²¹ We are not saying that judges should necessarily write dissenting judgments. They may all arrive at the same conclusion, but it may be on different grounds. Our concern here is about the reasoning of the judges as a contribution to the growing human rights jurisprudence in the country. It is our submission that writing such independent judgments could enable each judge to express his views and attitude to human rights.

8:2:2:4 Staff training

Since ignorance of the concept of human rights among judicial officers is apparent, it is important that the judiciary includes in its plans special training for judges and magistrates about the subject. Such a deliberate move would have been taken, with foresight, during the period when justiciability of the Bill of Rights was under suspension. However, the process of justice is a

⁹²¹We are aware of the arguments against separate judgments, but we think the advantages of separate judgments outweighs the disadvantages.

continuous one and the judiciary should always look forward to improving its performance. We are of the opinion that the Tanzanian judiciary can improve its performance on cases of human rights if they have sufficient knowledge of what they are to adjudicate upon.

Regular seminars, conferences and workshops about human rights should be conducted by the judiciary specifically for judges and magistrates.⁹²² This will effectively expose judicial officers to the whole concept of human rights, and development in the international human rights jurisprudence. Decisions of courts from other jurisdictions may be discussed with a view to considering how best they can be adopted to benefit the Tanzanian community. It is through this kind of training that the political and economic motives behind certain legislation can be examined in the light of human rights jurisprudence and related developments outside Tanzania.

Study tours for judges and magistrates should be organized by the judiciary on a regular basis to expose them to other jurisdictions having more experience in human rights matters. This will help the judicial officers to update their knowledge and also see for themselves the way other courts handle cases of a human rights nature.

We have consistently recommended that the training be accorded to both judges and magistrates although the latter group is not directly involved in deciding cases of human rights, for two reasons. First, experience has shown that most judges are appointed from Resident Magistrates.⁹²³ Moreover, Principal Resident Magistrates are commonly appointed to discharge the functions of judges by way of extended jurisdiction. In this capacity, Resident

⁹²²It is interesting to note that following the Warioba Commission Report on the sources of corruption in the judiciary a three weeks seminar about the aspects of corruption, ethics, democracy and law was organised by the judiciary specifically for Primary Court Magistrates. Most of them had never before attended any seminar or conference. See *Dar Leo* Newspaper, 9th January 1997.

⁹²³This practice has been criticized for turning judgeship into promotional grade from magisterial stage instead of being an appointment. See the Warioba Commission Report, and also LUGAKINGIRA, K. S. K., (1996)

Magistrates can hear cases for the enforcement of individual fundamental rights like any High Court judge. Second, the magistrates' courts deal with more cases of human rights nature in their day-to-day activities than the High Court, since the administration of justice is largely about the determination of rights. Although the magistrates' courts by law cannot interpret the Constitution, they can apply it.⁹²⁴ Knowledge of the concept of human rights is therefore imperative for any judicial officer irrespective of his or her grade.

As a long term plan, the judiciary should include a course on human rights in the training of Primary Court Magistrates and District Magistrates.⁹²⁵ Under a seemingly impressive new scheme of training judicial staff in Tanzania, a nine months course otherwise taken by Primary Court Magistrates will be a qualification for Court Clerks. A two years Diploma course in law previously taken by District Magistrates becomes the qualification for Primary Court Magistracy and the District Magistracy cadre is phased out. This means, therefore, law graduate magistrates will sit in the District Courts. To achieve these objectives a special Institute for Judicial Staff has been set up at Lushoto in Tanga region. However, its opening has suffered repeated postponement for more than three years because of lack of funds.

If effected, the scheme would raise the level of education of Primary Court Magistrates and the bar on advocates appearing in that court would consequently be removed. There has been no appropriate training to equip Primary Court Magistrates with enough tools to enable them to discharge such high responsibilities.⁹²⁶ For quite a long time there have been complaints from different corners against the exclusion of advocates from Primary Courts.⁹²⁷ The old view that advocates would take advantage of the magistrates'

⁹²⁴See for example *Bernardo Ephrahim's* case.

⁹²⁵The Tanzanian judiciary runs a two years Diploma course in law and a nine months training for Primary Court magistrates at IDM Mzumbe.

⁹²⁶See the Report of the Judicial System Review Commission, Government of Tanzania, 1980, pp. 108-110.

⁹²⁷READ, J. S., (1971), p. 317.

ignorance may have no force if their level of education is raised. It is our submission that the presence of advocates in Primary Courts would be of great assistance to magistrates in the process of administering justice at the lower level. It should be noted that Primary Courts are many in number and closer to the people than any other court in the country.⁹²⁸ Like superior courts, Primary Courts attend to a wide range of cases including sensitive matrimonial disputes whereby the rights of couples on divorce are determined.⁹²⁹ Further, all courts adhere to the adversary system whereby opposing parties contend against each other before the judge or magistrate who plays the role of an umpire in the proceedings. This requires legal representation, particularly in matrimonial proceedings because 'the ordinary lay person would not be able to efficiently present the facts according to the highly sophisticated rules of evidence.'⁹³⁰

The promotion of justice at the lower level by way of raising qualifications for Primary Court Magistracy and District Court Magistracy is likely to take very long before producing meaningful results. The whole attempt may still fail to promote justice if the role of assessors in the administration of justice at the Primary Courts level is not reconsidered. The assessors should play an advisory role to the Primary Court magistrate like the role they play to the High Court judge. This means that the Primary Court decision should no longer be based on the majority but on the presiding magistrate after taking into account the assessors' opinions. The assessors do receive allowances but there have been complaints against the government for keeping them at work without paying their allowances for many months. It should be noted that a Primary Court decision is passed by a quorum of two assessors against one magistrate. It is improper to base the decision on the

⁹²⁸Until January 1998 there were 970 Primary Courts, 87 District Courts, 21 Resident Magistrate Courts, 11 High Court Centres, and 1 Court of Appeal.

⁹²⁹See Magistrate's Court Act, 1984, section 18. See also Law of Marriage Act, 1971, (Act No. 5 of 1971) section 76.

⁹³⁰WANITZEK, U., p. 256.

majority of lay people whose tenure is not secure and regard this as the decision of the court.

For judicial officers holding a degree in law, there should be a deliberate move to upgrade their knowledge by encouraging them to pursue post-graduate studies. There is such a strategy in Zambia whereby every year at least two members of the judiciary (judges and magistrates) go to the United Kingdom for a Masters degree in law. One important course they have been taking, among others, was about human rights in developing countries. This could be a good plan for the future of human rights in the country.

It is also very important that the Faculty of Law University of Dar Es Salaam includes a course on human rights in the undergraduate programme. Anybody aspiring to join the judiciary on completing his studies should take this course which may remain optional to others. A condition of taking human rights subject could also be extended to those intending to seek employment from law enforcing institutions such as the police and the Attorney-General's Chambers or anybody intending to practise law in the United Republic of Tanzania.⁹³¹

8:2:2:5 *Allocation of funds and judicial officers' welfare*

The judiciary cannot effectively promote justice if it is marginalised and underfunded. When the judiciary is compelled by circumstances to accept donations from independent sources other than from the government in order to run its business, its independence is seriously threatened. This enables opportunistic individuals to take advantage of the situation by expressing concern over the court's financial difficulties through "generous" donations. The possibility of the court being influenced by such conduct and therefore feel morally bound to reciprocate the generosity cannot be over-emphasized.

⁹³¹In the United Kingdom all undergraduate law students who intend to practice law in England and Wales **must** take Property Law and Equity courses.

As a result seeking justice from a marginalised judiciary becomes an illusion imagination especially when one party has better financial means. Enough funds should be allocated to the judiciary in order to run its activities.

It is high time the government starts considering seriously the remuneration of judicial officers. By judicial officers we refer to magistrates and judges. Until now the government has shown some concern over the judge's remuneration but forgotten the magistrates who are very close to people and attend to more cases when compared to judges. In fact there are more complaints of corruption and miscarriages of justice against magistrates' courts than against the High Court. The reasons that the government took into account in considering a judge's remuneration should be the same for magistrates in that both groups discharge the same function, the administration of justice. An admission by the Minister for Justice that 'judicial officers are underpaid and they lack incentive'⁹³² expresses the threat facing the independence of the judiciary in Tanzania. In order to be independent the judiciary should be placed in a position whereby its officers can work without fear or influence. This is to say the judicial officers' working environment should also favour the intended independence.

8:2:3 The Executive and human rights

8:2:3:1 *Ratification of international instruments*

Arguably, the government's thinking about human rights could also be demonstrated by its readiness to accede to relevant international instruments and carrying out the obligations involved. Tanzania has ratified some of the United Nations key instruments on human rights but failed to ratify others.⁹³³ It

⁹³²See *Mtanzania* Newspaper, 12th January 1996.

⁹³³Those not ratified include Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of death penalty, Convention on the Non-Applicability of Statutory

is unfortunate that the latter are the ones that would specifically express the country's commitment to observing human rights. They relate to the party state's willingness to allow the United Nations Human Rights Committee to consider complaints by individual citizens. They also relate to the country's commitment to abolish death penalty, torture and other cruel or degrading treatment. These instruments should also be acceded to.

Furthermore, the obligation placed on every party state, to submit periodic reports to the appropriate UN bodies on the progress made and measures taken to implement the provisions of the instruments⁹³⁴ should be fulfilled. Tanzania, like many other African states, has delayed and sometimes failed to meet this obligation despite a number of reminders sent to it by relevant Committees.⁹³⁵ For example a report whose submission to the Human Rights Commission⁹³⁶ remained due since 1993, was sent in October, 1997 to be discussed by the Commission in July 1998. In any case such a report would be out of date. There could be many reasons behind this failure but probably the main one is 'lack of political will on the part of government'⁹³⁷ especially when there is nothing positive to be reported.

It is also our submission that the substance of all international instruments signed by the government should be translated into domestic legislation in order to make them enforceable by municipal courts.

Limitations to War Crimes and Crimes against Humanity, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment.

⁹³⁴See for example, article 44 of the Convention on the Rights of the Child; article 16 of the International Covenant on Economic, Social and Cultural Rights; and article 9 of the International Convention on the Elimination of all forms of Racial Discrimination.

⁹³⁵For statistics of the African states' failure to fulfil this obligation as required by the various international human rights instruments they have acceded to, see HATCHARD, J., (1994), pp. 61-63. See also UN Doc. CERD/C/251: 27 January 1994.

⁹³⁶Under article 40 of the ICCPR.

⁹³⁷HATCHARD, J., (1994), p. 63.

8:2:3:2 *Attitude to court decisions and the offending laws*

Any democratic government cherishing the rule of law should show great respect for the decisions of the court. It is in such an environment that the court can fairly and freely dispense justice without fear of backlash from the executive.⁹³⁸ The judges become frustrated and discouraged by the government's attitude towards the judicial functions as exhibited by its reactions that attempt to undermine the court's decisions.

The need for a change of attitude by the executive is apparent and we regard it as essential for the future of human rights in Tanzania. There can only be change of attitude if the executive and state functionaries express their willingness to respect individual fundamental rights unreservedly. If the executive continues flouting court orders, the country may find itself in a state of lawlessness and disorder. This conduct would in effect lead to authoritarian tendencies and the collapse of the rule of law, thereby encouraging people to take law in their hands. The government, therefore, should stop reacting to decisions of the court in the way it has been doing.

It is our submission that despite the government's intention to leave all offending laws unrepealed until challenged in court, the need to repeal or amend them is increasingly becoming urgent as days pass. This is because people have realised that it may take too long to clear off such laws by instituting formal petitions in court, given the barriers surrounding the institution of such petitions. Indeed the number of cases seeking to enforce fundamental rights and freedoms in court would not reflect the extent to which these rights are being violated.⁹³⁹ The government must bear in mind the people's low income and their incapacity to meet the legal fees involved. Thus deliberate steps should be taken to amend and repeal all laws containing

⁹³⁸PETER, C. M., and BIELWEGEN, R. M., p. 395.

⁹³⁹For example, the government has persistently harassed the private news media and banned many local newspapers when they reported against it but none of them went to court. It should be noted that under Article 18 (2) of the Constitution local private media has the constitutional right to keep the citizens 'informed of the developments in the country and in the world.'

provisions inconsistent with the Bill of Rights. This would demonstrate the government's seriousness and commitment to promote individual fundamental rights.

The government should respond to the recommendations made by the Nyalali Commission about a list of forty offending laws that have increasingly become the subject of public concern. The government has for so long expressed its unwillingness to amend them for fear of disrupting the legal system.⁹⁴⁰ We maintain that it is unsatisfactory to retain on the statute book laws that infringe the rights guaranteed by the Constitution. The government acted irresponsibly by remaining inflexibly determined not to effect the required amendments.

The government should stop reacting to situations by rushing to introduce more laws that infringe on individual fundamental rights.⁹⁴¹ It is our submission that law, like any other state policies in Tanzania, has to aid the process of development, if development is seen in terms of democracy, people's freedom and participation in deciding crucial matters that affect their lives, human dignity, as well as social and economic well being. It was a disservice to human rights for the government to enact the Emergency Powers Act, 1986⁹⁴² during the period when the justiciability of the Bill of Rights was under suspension. Under this Act the President and the Regional Commissioners as well as the District Commissioners have been given wide powers of arrest and detention without trial. According to the Constitution⁹⁴³ it is only the President who has the power to declare a state of emergency thereby suspending the exercise of individual fundamental rights and freedoms.⁹⁴⁴ However, the Emergency Powers Act, 1986 allows the President

⁹⁴⁰See LUBUVA, D. Z., p. 853.

⁹⁴¹For example we saw that Act No. 22 of 1992 was enacted extinguishing customary land rights in some areas four years after the Bill of Rights became justiciable.

⁹⁴²Op cit., sections 5 to 18.

⁹⁴³Article 32.

⁹⁴⁴Article 31 (1).

to delegate to the Regional and District Commissioners or to any other authority⁹⁴⁵ what the Constitution considers exclusive powers of the President.⁹⁴⁶ This is overtly unconstitutional. The only consolation is that since this law came into force no state of emergency has ever been declared in Tanzania.

8:2:3:3 Amendments to the Constitution

The Tanzanian Constitution is still unsatisfactory and needs some changes. This Constitution has suffered from almost yearly amendments and has almost lost certainty, the basic character of a grundnorm. It is a document patched together to suit the desire of the government in power. Arguably, a 'Constitution which is subject to frequent amendment may retain little or no respect and become an ineffective guardian of fundamental rights and rule of law'.⁹⁴⁷ The enshrined Bill of Rights has also suffered amendments. It is our submission that the provisions relating to individual fundamental rights and freedoms require special protection. As John Hatchard rightly observes, unlike other constitutional provisions, such provisions should 'not be amended at the convenience of government'.⁹⁴⁸

In fact the government should entrench the provisions relating to fundamental rights and freedoms in such a way that any amendment to the Constitution becomes of no effect so far as it attempts to diminish or detract from the spirit of the Bill of Rights.⁹⁴⁹ In this way we could prevent occurrences like the one when the government amended the Constitution to frustrate the order of the court that allowed private candidates to stand for any political election without necessarily being nominated by any political party.⁹⁵⁰

⁹⁴⁵See Act No. 1 of 1986, section 5.

⁹⁴⁶Article 32.

⁹⁴⁷A point emphasised in HATCHARD, J., (1995 C), p. 21.

⁹⁴⁸HATCHARD, J., (1991), p. 97.

⁹⁴⁹This approach is taken by the Namibian Constitution, 1990, section 131.

⁹⁵⁰See *Rev. Christopher Mtikila v. Attorney-General*, op cit.

Alongside the entrenchment of the Bill of Rights in the Constitution there should be a deliberate decision to remove the claw back clauses that attempt to take away with one hand what the Constitution gives with another. While we are not claiming that the fundamental rights and freedoms should be without limitations, we are equally unimpressed by the extent to which individual rights have been limited in the Tanzanian Constitution, making them almost impossible to realise. The problem lies with the restrictions attached to individual fundamental rights which remain effective provided they are being imposed “according to law” or as “prescribed by law”, or “subject to the relevant laws of the land.” It should be noted that such blanket saving of offending laws could make the whole Bill of Rights in the Constitution nugatory. It is a common practice to limit the extent to which people can enjoy fundamental rights and freedoms. Indeed there are such limitations in the European Convention on Human Rights but they are always being followed by an important clarifying phrase “and necessary in a democratic society”.⁹⁵¹

Such a provision enables the court to examine whether the limitations imposed by a particular law are necessary in a democratic society as well as whether it is in the interest of the public to allow them. This is not the case with the limitations in the Tanzanian Constitution. They have been saved in so far as they are backed by the law of the land. It is on these grounds that we submit that the Constitution is in an unsatisfactory state and should be re-written to include at every limitation clause “and necessary in a democratic society...”, a very important phrase for the future of human rights.⁹⁵²

Also the provisions of Article 30 (2) of the Constitution should be re-examined for they appear to be so general that if used improperly could cover

⁹⁵¹See for example Article 9 (2) which provides: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law *and are necessary in a democratic society* in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others”.

⁹⁵²For a discussion about the procedure to be followed in drafting a new democratic Constitution see SHIVJI, I. G., (1991 B), pp. 89-91; and JUMA, I. H., pp. 393-401 .

virtually every law no matter how much it infringes upon guaranteed rights and freedoms. The Attorney-General has repeatedly used this particular provision in his defence to justify every law that was being challenged in the court of law for infringing upon fundamental rights and freedoms under the Constitution.⁹⁵³ This shows how such a provision can potentially take away otherwise guaranteed rights and freedoms.

The need to re-write the Constitution by first seeking views of the people and of interest groups is apparent taking into account the country's dramatic shift from one-party state to multi-party democracy. Although the government in power is opposed to having a national convention to discuss the new constitutional structure that is being demanded by the opposition, we submit that the Constitution should originate from the people themselves in order to be respected as a grundnorm. People's views should be taken into account when drafting the Constitution. It is this kind of Constitution that cannot be amended on arbitrary grounds for it is the fundamental law of the country and the source of all legitimate power. People want to have a permanent Constitution in the real sense, free from regular amendments, and they should be given the opportunity to participate fully in making it.⁹⁵⁴ It is our submission that making and amending the Constitution should not be made one of the Parliament's regular functions. Any changes to the Constitution, except those related to the entrenched fundamental rights, should be preceded by a national referendum requiring say a seventy-five percent affirmative vote.⁹⁵⁵ The national convention after conducting a referendum perhaps would be a desirable forum for making a new Constitution since all political parties, trade unions, students' organizations, religious organizations and many other

⁹⁵³See our discussion in chapter seven.

⁹⁵⁴Between 1977 and 1995 the Constitution was amended 11 times and despite the recommendation by the Nyalali Commission that a new Constitution be written with full public participation, it was subsequently amended 5 times without involving the public.

⁹⁵⁵For analysis of more alternative approaches as safeguard against the erosion of fundamental rights by means of Constitutional amendments see HATCHARD, J., (1995 C), pp. 25-27.

civil organizations with diverse interests would be represented in the discussion.

8:2:4 Human Rights Commission and civil liberty organisations

The Human Rights Commission has been described as 'an important institution which assists individuals in enforcing the provisions of the Bill of Rights and promotes the observance and awareness of its provisions among all people'.⁹⁵⁶ Since the Bill of Rights became part of the Constitution, people have demanded the establishment of such an institution but the government's response remains unimpressive. We submit that the future of human rights in Tanzania requires the establishment of a Human Rights Commission tasked both with the promotion and the protection of individual fundamental rights.⁹⁵⁷ In other countries the Commission has been given the duty to investigate the infringement of these rights and it assists complainants to secure redress by representing them in court or providing them with financial support necessary for instituting proceedings in a competent court.⁹⁵⁸

Although the Tanzanian human rights history is different from that of South Africa and relatively better than the rest of East Africa, we still hold the view that the proposed Commission would discharge similar functions to those of its South African counter-part in addition to other obligations. For example, it could undertake research and education programmes to promote respect for and observance of human rights in the country,⁹⁵⁹ and also make recommendations to the relevant organs for reform. This would include surveying Tanzanian legislation and reporting to the government all laws it

⁹⁵⁶RAUTENBACH, I. M., p. 145.

⁹⁵⁷Such an institution is referred to in HATCHARD, J., (1998), p. 2, as "New Breed Human Rights Commission", different from that whose mandate is largely restricted to dealing with anti-discrimination issues.

⁹⁵⁸See the Constitution of the Republic of South Africa, 1993, (Act No. 200 of 1993), section 116 (3).

⁹⁵⁹On how the Uganda Human Rights Commission has fulfilled this obligation see HATCHARD, J., (1998), pp. 23-25.

considers to be in conflict with the Constitution and other international human rights laws.

We are aware of the controversy arising out of the Commission's exercise of powers,⁹⁶⁰ but our previous evaluation of the performance of the Tanzanian judiciary supports the view that protection of human rights should not be exclusively left to the courts. As John Hatchard has observed:

"Despite increasing judicial activism in Commonwealth African countries, there still remains the prospect of judges observing self-limitations that insulate them from dealing with troubling issues with human rights dimensions. In addition, the cost, delays, procedural complexities and strict rules of evidence make it impractical to expect the court to act alone as 'guardians of human rights'."⁹⁶¹

We emphasize that the enforcement of the decisions of a Commission would be better left to the courts in order to avoid constitutional and procedural problems noted earlier.

The Tanzania Human Rights Commission could also play the role of a safeguard on the power of the President to declare the state of emergency.⁹⁶² Presently the National Executive of the ruling party and the National Assembly have to hold a joint meeting within fourteen days from the date of the proclamation of the state of emergency to consider the situation, and determine whether or not to pass a resolution approving such proclamation by 'two thirds of all the members of the meeting'.⁹⁶³ Such a safeguard may not be effective in Tanzania where the National Assembly is dominated by a single party. It is our submission that the Human Rights Commission could fulfil this

⁹⁶⁰This is a serious constitutional issue facing the Uganda Human Rights Commission which functions almost like a court of law while the manner of its establishment contravenes the constitutional provisions relating to the establishment and staffing of courts.

⁹⁶¹HATCHARD, J., (1998), p. 18.

⁹⁶²For other responsibilities of a "new breed" Commission see HATCHARD, J., (1998), pp. 25-28.

⁹⁶³Article 32 (3).

role better because of its independent and wide-ranging representative character.⁹⁶⁴

It is not clear whether the Permanent Commission of Enquiry⁹⁶⁵ is specifically taking up the role of the Human Rights Commission or whether the demands for such institution are still being ignored by the government.⁹⁶⁶ In any case, our discussion in chapter three expresses the view that the Permanent Commission of Enquiry does not merit the job. Since its creation it has functioned as a mere investigatory body that reported its findings to the President.⁹⁶⁷ The promotion of human rights cannot be attained simply by investigating alleged infringements without the power to take appropriate action. At best the Permanent Commission of Enquiry could be left to deal with what one critic describes as 'administrative justice',⁹⁶⁸ covering complaints by individuals who claim to have suffered injustices at the hands of a government official.

The absence of effective civil liberties organisations has also contributed to the unsatisfactory state of human rights in Tanzania. We propose that the right to organise special interest associations such as civil liberties organisations, trade unions, professional or other organisations should be encouraged and protected by the law. Presently the law discourages the formation of such organisations by putting barriers and restrictions to their formation as well as the wide discretionary powers vested in the Minister for Home Affairs to register or de-register any such organisation. The threat by the government to de-register BAWATA⁹⁶⁹ explains how the atmosphere in

⁹⁶⁴This means that the appointment procedure would involve the broad-based representation of social groups and would take into account the need for suitably qualified Commissioners.

⁹⁶⁵The Tanzanian Ombudsman.

⁹⁶⁶During our interview with Hon. Kingunge Ngombare Mwiru, Minister of State in the Prime Minister's Office responsible for government policy and information, we were told that the government was planning to improve on the performance of the PCE by giving it more powers.

⁹⁶⁷The Human Rights Commission would be constituted of independent appointees enjoying good conditions of service but accountable to the Parliament.

⁹⁶⁸HATCHARD, J., (1991), p. 99.

⁹⁶⁹See chapter seven for a discussion about the government's attempt to de-register this organisation.

Tanzania has for a long time since independence been unconducive to the formation of independent special interest civil organisations.⁹⁷⁰ Such civil organisations would play the role of pressure groups and also function as a watchdog of human rights infringements by the state. They would presumably get support from the Legal Aid Committee University of Dar Es Salaam⁹⁷¹ and TAMWA (Tanzania Media Women Association) and TAWLA (Tanzania Women Lawyers Association) that offer free legal services to women and children victims of domestic violence.

8:2:5 Access to justice

8:2:5:1 Legal representation

Because of ignorance and poverty many violations and infringements of individual rights are not being taken to court. It is quite essential to have legal representation in cases for enforcement of individual fundamental rights for the subject itself is highly technical and requires a clear knowledge of law. In the absence of legal representation such petitions may be very difficult for a layman to conduct. Due to the technicalities involved a petition could be dismissed at the initial stages when the court examines the preliminary issues whether the petition is frivolous or vexatious. As Lugakingira, J., observed, in *Rev. Mtikila's* case an ordinary man cannot articulately argue constitutional matters. These factors have generally compelled the people to contain their complaints against the violation of fundamental rights and freedoms. Legal aid should be made available to people who seek to enforce their rights that are being infringed. This can be done by assigning every private advocate a specific number of legal aid cases every year. He should be required to take

⁹⁷⁰For a detailed account of suppression by the Tanzanian government of the right of association see WELCH, C. E., (1978), pp. 639-656.

⁹⁷¹On the performance of Legal Aid Committee see KAPINGA, W. B., (1985 B), pp. 179-194.

them with utmost professional ability and to give a report to the assigning authority.

Legal representation should also be guaranteed to any one facing a serious charge that attracts the death penalty, life imprisonment, or a minimum sentence of fifteen years imprisonment. The government should establish a system of salaried 'public defenders' to work together with the existing system of 'public prosecutors'. This would be a little bit costly but it would remove the perception that the government is more concerned with obtaining convictions than doing justice. The Directorate of Legal Aid therefore has to be established to offer legal aid in criminal and civil cases in Subordinate Courts, High Court and Court of Appeal.⁹⁷² The importance of this system in the administration of justice had been seen and recommended to the colonial government in 1933 by a special commission that observed:

"We recommend that the defence of accused persons at all levels be undertaken by public defenders. We regard this matter as one of great importance, and we urge that every effort be made to initiate some such system at the earliest moment"⁹⁷³

8:2:5:2 *Enforcement of basic rights and duties*

The government should make it easier for the people to enforce the Bill of Rights. According to the law currently obtaining in Tanzania, it is only the High Court that has original jurisdiction over cases for the enforcement of individual fundamental rights. However, in Tanzania like in many other African states, judges for various reasons are very few in number⁹⁷⁴ and there

⁹⁷²READ, J. S., (1971), p. 311.

⁹⁷³See Report of the Commission of Inquiry into the Administration of Justice in Kenya, Uganda and Tanganyika Territory in Criminal Matters, London, May 1933 (Cmnd 4623), p. 69.

⁹⁷⁴READ, J. S., (1979 B), p. 158. Up to March 1998 there were 7 Court of Appeal judges, 29 High Court judges, 112 Resident Magistrates, 178 District Court Magistrates and 476 Primary Court Magistrates.

are therefore very few High Court centres in the country. During our field study we found the judge in charge of Mbeya High Court Centre overwhelmed by a big number of cases filed at his station where he had been the only judge for the past nine months. Since he had nobody to assist him, all fresh civil cases were being scheduled for a couple of months ahead pending the coming of another judge.

It is our submission that the number of judges should be increased in order to deal with the heavy case load. This also could provide enough time for judges to reflect on fundamental issues of constitutional interpretation and this would consequently have effect on the quality or style of their reasoning. Also magistrates of all levels should be increased to provide a solution to the seemingly chronic problem of delay and to make justice more accessible. The number of Primary Court magistrates, for example, is incredibly low compared to the number of Primary Courts in the country.⁹⁷⁵ This means that some Primary Court magistrates attend to more than one station.

If senior Resident Magistrates can be appointed to exercise extended jurisdiction we do not see any sound reason why as magistrates they should not have jurisdiction over cases for the enforcement of individual rights. Magistrates are more numerous than judges and so are the magistrates' courts and they are therefore closer to people than the High Court. It is our recommendation that jurisdiction for enforcement of fundamental rights be extended also to Magistrates of senior grade. Without serious attempt to make legal forums more accessible 'people at whom the fundamental rights were aimed will be in no position to act on them.'⁹⁷⁶ This attempt should go alongside a deliberate campaign for mass education about human rights.

The common law doctrine of *locus standi* should not apply to cases for the enforcement of fundamental rights. Under this doctrine only a person who

⁹⁷⁵See footnotes 928 and 974 for comparison between the number of magistrates and the number of courts.

⁹⁷⁶BENNETT, T., p. 47.

has suffered specific legal injury or whose rights has been violated can bring action in court for judicial redress. As a matter of principle the doctrine was declared by Lugakingira, J., inapplicable in matters where a person seeks to enforce his basic rights under the Constitution.⁹⁷⁷ However, there has never been any statutory recognition of the court's progressive finding and no civil organisation has ever applied it to institute a public interest litigation suit on behalf of any person whose rights were violated. Perhaps this is the case because the Court of Appeal has not expressed its views about it in that there was no appeal against the decision of Lugakingira, J. In India the Supreme Court went as far as allowing institution of a suit by way of an open letter addressed to it or any organisation bringing to the attention of the court any injustice being perpetuated.⁹⁷⁸ The law currently obtaining in India is that 'where a legal wrong or a legal injury is caused to a person or to a class of persons by reason of violation of their constitutional or legal rights, and such person or class of persons is by reason of poverty or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public or social action group acting *bona fide* can maintain an application in the High Court or the Supreme Court seeking judicial redress for the legal wrong or injury caused to such person or class of persons.'⁹⁷⁹ The government of Tanzania should, by way of legislation, remove the condition of *locus standi* for cases of fundamental rights and allow civil organisations to sue on behalf of the affected persons by way of social action or public interest litigation.

Advocates also as officers of the court must play an active role by offering interpretations that compel judicial action in a way likely to produce social justice. Members of the legal profession therefore should take a more active role and tell the court what the people of Tanzania, as a changing

⁹⁷⁷See *Rev. Christopher Mtikila v. Attorney-General*, op cit.

⁹⁷⁸See *People's Union for Democratic Rights v. Union of India* (1982) SC. 1433.

⁹⁷⁹BHAGWATI, P. N., (1987), p. 24. See also *ibid*.

society, need. They too should be accessible to the people. It means, therefore, advocates' fees should not be too high for the ordinary person. Without removing this barrier legal representation will remain far beyond the poor man's reach and consequently give rise to injustices.

If these reforms are carried out, it is likely that the country's human rights record will be improved after more than thirty years since independence. A serious undertaking by the government to improve its human rights record is very important now that the country is undergoing economic reforms. Foreign and local investors would be attracted by such reforms which effectively guarantee security of property and business undertakings. Once investors are attracted by the country's business environment, jobs would be created and consequently the problem of unemployment would be alleviated. Without improving the country's human rights record, the on-going campaign for economic reform would be far from producing the desired results. The proposed reforms would considerably restore confidence within the state and its institutions and also improve the country's international image. There is room for optimism on this score but every person and every organ of the state must play their part.

Appendix : Bill of Rights⁹⁸⁰

CHAPTER ONE

PART III

BASIC RIGHTS AND DUTIES

The Rights of Equality

12. (1) All men are born free, and are all equal.
(2) Every person is entitled to recognition and respect for his dignity.
13. (1) All persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.
(2) No legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect.
(3) The civil rights, obligations and interests of every person and of the society shall be protected and determined by competent courts of law and other State agencies established in that behalf by or under the law.
(4) No person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the discharge of the functions of any State office.
(5) For the purpose of this section the expression discriminatory means affording different treatment to different persons attributable only mainly to their respective descriptions by nationality, tribe, place of origin, political opinions, colour, creed or occupation whereby persons of such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
(6) For the purposes of ensuring equality before the law, the State shall make provisions-

⁹⁸⁰This is an unofficial translation by the United Nations Electoral Secretariat in Tanzania made shortly before the 1995 elections.

- (a) that every person shall, when his rights are being determined, be entitled to a fair hearing by the court of law or other body concerned and be guaranteed the right of appeal or another legal remedy against the decisions of courts of law and other bodies which decide on his rights or interests founded on statutory provisions;
- (b) every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty;
- (c) no person shall be punished for any act which before its commission was not defined as such offence, and no penalty imposed for any criminal offence shall be heavier than the penalty in force at the time the offence was committed;
- (d) every person is entitled to respect for the dignity of his personal equality and shall not be deprived of such dignity save in accordance with the procedure permitted by law in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
- (e) no person shall be subjected to torture or to inhuman or degrading treatment.

The Right to Life

- 14. Every person has a right to live and subject to law, to protection of his life by the society.
- 15. (1) Man's freedom is inviolable and every person is entitled to his personal freedom.
(2) For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, imprisonment, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:-
 - (a) in certain circumstances, and subject to a procedure prescribed by law; or

- (b) in the execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted or upon reasonable suspicion of his having committed a criminal offence.
- 16. (1) The human person and the dwelling of each person are inviolable and for that purpose every person is entitled to respect to his person, his private and family life, his home and his private correspondence.
(2) For the purposes of affording protection to the right to privacy and personal security in accordance with this section, the State shall make provisions imposing limitations to that protection, being limitations designed to ensure that the enjoyment of the said rights and security by any individual shall not be prejudice to the provisions of this section.
- 17. (1) Every citizen of the United Republic is entitled to freedom of movement and residence, that is to say, the right to move freely within the United Republic and to reside in any part of it, to leave and to enter into it, and immunity from expulsion from the United Republic.
(2) Any lawful act or law made for the purpose of:-
 - (a) imposing reasonable restrictions on the exercise of freedom of movement, and to subject him to restriction or arrest; or
 - (b) imposing restrictions on the exercise of movement so as to:-
 - (i) execute sentence or court order; or
 - (ii) to secure the fulfilment of any obligations imposed by law on that person; or
 - (iii) to protect the interest of the public in general or any specific public interest of a category of the public, such an act or law shall not be or be deemed to be inconsistent with this section:

The Right of freedom of conscience

- 18. (1) Subject to the laws of the land, every person is entitled to freedom of opinion and expression that is to say, the right to freely hold and

express opinions and seek, receive and impart information and ideas through any media and regardless of frontiers, and freedom from interference with his correspondence.

(2) Every citizen has the right to be kept informed of developments in the country and in the world which are of concern for the life of the people and their work and of questions of concern to the community.

19. (1) Every person is entitled to freedom of thought, conscience and option in matters of religion.

(2) Subject to the relevant laws of the United Republic, the profession, practice, worship and propagation or religion shall be free and a private affair of an individual; and the conduct and management of religious communities shall not be part of the functions of the State.

(3) References in this section to a "religion" shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

20. (1) Subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble freely and peacefully, to associate with other persons and in particular to form or belong to organizations or associations formed for the purposes of protecting or furthering his or any other interests.

(2) Notwithstanding the conditions prescribed in sub-section (1), it shall be illegal to register any political entity which for reasons of its Constitution or policies:-

- (a) intends to promote and defend the interests of:
 - (i) creed or any religious association;
 - (ii) any tribal association at places of origin, colour or gender;
 - (iii) a certain part of the territory of the United Republic
- (b) defends the dissolution of the United Republic;
- (c) consents to or advocates the use of violence or confrontation as a means of achieving its political objectives;
- (d) defends or intends to conduct its political activities in one part of the United Republic;

(e) bars its leadership from being elected periodically and democratically.

(3) Parliament may enact legislation prescribing provisions to ensure that political parties are cognisant of the limits and criteria specified in the provisions of sub-section (2) regarding the freedom and the right of people to associate and assemble.

(4) Subject to relevant laws of the land, it is prohibited to force a person to join a political party or an organisation or to raise an objection to the registration of a political party for reasons of its ideology or philosophy.

21. (1) Subject to the provisions of sections 5, 39 and 67 of this Constitution and the laws of the land relating to electing and being elected, or appointing and being appointed to participate in the government of the country either, every citizen of the United Republic is entitled to take part in the government of the country either directly or through freely chosen representatives, in accordance with the procedure provided by or under the law.

(2) Every citizen has the right and freedom to participate effectively in decision-making on matters which affect him, his livelihood or the nation.

The Right to Work

22. (1) Every person has the right to work.

(2) Every citizen shall be entitled to access on equal terms to every office and every function under the State.

23. (1) Every person without any discrimination, has the right to equal pay for equal work and , accordingly all citizens working according to their ability shall be entitled to receive remuneration according to the quantity and quality of the work done.

(2) Every person who works is entitled to just and favourable remuneration.

24. (1) Subject to 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 the law which shall set out conditions for fair and adequate compensation.

Duties to the society

25. (1) Labour alone creates the material wealth of human society, and is the source of the well-being of the people and the measure of human dignity. Accordingly, every person is obliged:-

- (a) to voluntarily and honestly participate in lawful and productive work; and
- (b) to observe labour discipline and strive to achieve the individual and communal production targets required or prescribed by law.

(2) Notwithstanding the provisions of sub-section (1), there shall be no forced labour in the United Republic.

(3) For the purposes of this section, and in this Constitution generally, no work shall be deemed to be forced labour, compulsory labour or inhuman services, if that work, subject to any law is:-

- (a) any labour required to be undertaken in consequence of a sentence or order of a court;
- (b) any labour required of members of a disciplined force in pursuance of their duties as such;
- (c) any labour required of any person which is reasonably necessary in the event of any emergency or calamity threatening the life or well-being of the society;
- (d) labour or service which forms part of:-
 - (i) normal social service or other civic obligations for the well-being of the society;
 - (ii) compulsory national service provided by law;
 - (iii) the national endeavour at the mobilization of human resources for the enhancement of the

national social and economic survival, and ensuring progress or advancement of national productivity.

26. (1) Every person is obliged to comply with this Constitution and the laws of the United Republic.
- (2) Every person is entitled, subject to the procedure provided by the law, to institute proceedings for the protection of the Constitution and legality.
27. (1) Every person is obliged to safeguard and protect the natural resources of the United Republic, State property and all property jointly owned by the people, as well as to respect another person's property
- (2) All persons shall be by law required to safeguard State and communal property, to combat all forms of misappropriation and wastage and to run the economy of the nation assiduously, with the attitude of people who are masters of the fate of their own nation.
28. (1) Every citizen of the United Republic has the inalienable and inviolable right and duty to defend, protect and promote the independence, sovereignty, territorial integrity and unity of the nation.
- (2) Parliament shall enact appropriate laws to facilitate the service by the people in the disciplined forces and in the defence of the nation.
- (3) No person shall have the right to acknowledge or sign an act of capitulation, nor to accept or recognise the occupation or division of the United Republic or any part of its national territory and, subject to this Constitution and any other law, no person shall have the right to prevent citizens of the United Republic from fighting against an enemy who has launched an attack upon the country.
- (4) The offence of treason as defined by law shall be the gravest crime against the United Republic.

General Provisions

29. (1) Every person resident in the United Republic shall be entitled to enjoy the basic human rights, and share in the result of the discharge by every person of his duty to society, which rights and duties are set out in sections 12 to 28 of this part of this Constitution.

(2) Every person resident in the United Republic shall be entitled to be afforded equal protection under the laws of the United Republic.

(3) No citizen of the United Republic shall be accorded any rights, privilege or advantage by virtue only of his status, place of origin, occupation or creed.

(4) No law of the State shall confer any right, status, privilege or advantage to any citizen of the United Republic by virtue only of his status, place of origin or descent.

(5) For the purposes of better enjoyment by all persons of the rights and freedoms specified in this Constitution, every person shall so conduct himself and his affairs as not to prejudice the rights and freedoms of others or the public interest.

30. (1) The rights and freedoms whose basic content have been set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest.

(2) It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for-

- (a) ensuring that the rights and freedom of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;
- (b) ensuring the interests of defence, public safety, public order, public morality, public health, rural and urban development planning, the development planning, the development and utilization of mineral resources or the development or utilization of any other property in such manner as to promote the public benefit;
- (c) ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceedings;
- (d) the protection of the reputation, rights and freedoms of others or the private lives of persons involved in any court proceedings, prohibiting the disclosure of confidential

information, or the safeguarding of the dignity, authority and independence of the courts;

- (e) imposing restrictions, supervision and control over the establishment, management and operation of societies and private companies in the country; or
- (f) enabling any other thing to be done which promotes, enhances or protects the national interest generally.

(3) Where any person alleges that any provision of this Part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court.

(4) Subject to the other provisions of this Constitution, the High Court shall have and may exercise original jurisdiction to hear and determine any matter brought before it in pursuance of this section; and an Act of Parliament may make provision with respect to-

- (a) the procedure regulating the institution of proceedings under this section;
- (b) the powers, practice and procedure of the High Court in relation to the hearing of proceedings instituted under this section;
- (c) ensuring the more efficient exercise of the powers of the High Court, the protection and enforcement of the basic rights, freedoms and duties in accordance with this Constitution.

(5) Whenever it is alleged that a legislation enacted or an action taken by the Government or any other authority revokes or terminates the rights, freedoms and basic duties specified in sections 12 to 29 of this Constitution, and the High Court is satisfied that the relevant law or action is null and void due to the extent it contradicts the Constitution or contrary to the Constitution and the High Court considers that the prevailing situation or the welfare of the society requires so, instead of expressing that the law or action is null and void, it shall have the authority to give time to the Government or any other authority to modify the alleged legislation or action in question within a period

specified by the High Court provided that the shortest possible period is taken into account and that the legislation or action shall have the force of law until when the modifications shall be effected.

Extraordinary Powers of the State

31. (1) Notwithstanding the provisions of section 30 (2), an Act of Parliament shall not be invalid for the reason only that it provides for the taking, during periods of emergency, or in ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security, of measures that derogate from the provisions of sections 15 and 15 of this Constitution.

(2) No measures referred in subsection (1) shall be taken in pursuance of any law during any period of emergency, or in ordinary times in relation to any person, save only to the extent which they are necessary and justifiable for dealing with the situation that exists during the period of emergency or in ordinary times dealing with the situation created by the conduct of the individual in question.

(3) Nothing in this section shall be construed to authorize the deprivation of any person of the right to live except in respect of death caused as a result of acts of war.

(4) In this and the following sections of this Part "period of emergency" means any period during which the proclamation of a state of emergency made by the President in the exercise of the powers conferred on him by section 32, continues in force.

32. (1) Subject to this Constitution and to an Act of Parliament in that behalf, the President may proclaim the existence of a state of Emergency in the United Republic or in any part of it.

(2) The President may proclaim the existence of a state of emergency only if-

- (a) the United Republic is at war; or
- (b) the United Republic is in imminent danger of invasion or involvement in state of war; or

- (c) there is actual breakdown of Public Order and public safety in the United Republic or in any part of it to such an extent as to require the invocation of extraordinary measures to restore peace and security; or
- (d) there is a clear and present danger of an actual breakdown of public order and public safety in the United Republic or any part of it which cannot be avoided except through the invocation of the extraordinary authority; or
- (e) there is an imminent danger of the occurrence of some disaster or natural calamity threatening the community or a section of the community in the United Republic; and
- (f) there is some other kind of public danger which clearly constitutes a threat to the State or its continued existence.

(3) Where a state of emergency is proclaimed in relation to the whole of the United Republic, or in relation to the whole of Mainland Tanzania, or Tanzania Zanzibar, the President shall forthwith transmit a copy of the Gazette containing the proclamation to the Speaker of the National Assembly who shall after consultation with the Leader of Government business in Parliament, within a period of not more than fourteen days from the date of proclamation, convene a Parliamentary meeting to consider the situation and determine whether or not to pass a resolution, supported by votes of two thirds of all members of the meeting, approving the proclamation of the state of emergency issued by the President.

(4) Parliament may enact legislation making provision regarding situations and procedure whereby certain persons in charge of the functions of Government in specified areas in the United Republic may request the President to exercise powers under this section in relation to any of those areas where there is an existence of any of the situations specified in paragraphs (c), (d) and (e) of subsection (2) and such situation does not extend beyond the boundaries of such areas; and for providing in exercise of executive power during the period of emergency.

(5) A proclamation issued by the President under this section shall cease to have effect:-

- (a) if it is revoked by the President;

- (b) if fourteen days elapse from the date of proclamation without there being passed the resolution stipulated in sub-section (3);
- (c) after the elapse of a period of six months from the date of the proclamation; save that a meeting of the National Assembly may, before the expiry of the period of six months, extend the period of operation of the proclamation from time to time for further periods of six months by a resolution passed by not less than two-thirds of all the members of that meeting;
- (d) at any time when the meeting of the National Assembly revokes the proclamation by a resolution supported by not less than two-thirds of all the members.

(6) For the avoidance of doubts in relation to the interpretation or application of this section, it is hereby declared that the provisions of any Act of Parliament and of any other law, dealing with the declaration of a State of Emergency provided for under this section shall apply only to that part of the United Republic where any such emergency exists.

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