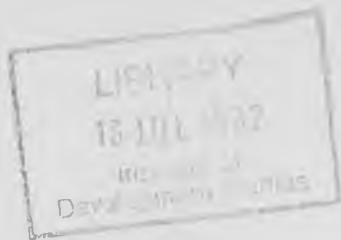


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# STATE COERCION AND FREEDOM IN TANZANIA



by

**Issa G. Shivji**

▷ Human & People's Rights Monograph Series  
No. 8



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Institute of Southern African Studies  
National University of Lesotho  
P.O. Roma 180  
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## PREFACE

Compared to the notorious dictatorships of Africa, Tanzania's human rights record comes out with flying colours. But, as the former President, Mwalimu Nyerere, once said 'You do not judge your health by comparing it with that of a sick person!'. And in that regard, Tanzania does not have a clean certificate of even average good health. As a matter of fact, the record is quite blemished - not in details, which is not really the concern of this monograph and I have not quibbled about it - but in larger questions, in questions which concern the large masses and the popular classes of the people.

The present monograph is not a survey of the state of human rights in Tanzania. It is rather a study of, what broadly may be described as, the right to life and liberty. What I have done is to illustrate the violation of these rights through the use of state coercion. In this regard I have further demonstrated the authoritarian nature of the legal system and related it to the neo-colonial-character of the political economy - the thesis which I have explored in my other recent writings, which have been cited at the appropriate place in the text.

Several case studies which have been presented in some detail, not only give the actual flavour of the concrete human rights situation but, I believe, vividly illustrate the lack of rights-consciousness at various levels of the state system. This is another piece of evidence to show that legal ideology has little hegemonic significance in a dominated formation and that law is a direct and unmediated instrument of coercion.

Finally, as I have mentioned in the conclusion, and repeat here, I do not see people as 'passive victims' of human rights violations; rather I see them as capable of resisting and fighting for their rights. We consider the lip-service paid to rights-ideology by African states and imperialism as part of their ruling armoury to legitimise authoritarianism and cold-war rivalries, respectively. While for the people that ideology, reconceptualised and distanced from imperialist propaganda, is the very stuff of which their daily struggles are made. Human rights therefore must play an ideologically mobilising function in that struggle against imperialism and for democracy from below.

This monograph deals with Tanzania Mainland only. Hopefully, it will encourage some concerned Zanzibari to do a similar study of Zanzibar, both in its internal aspect, but even more important, in the external aspect of Zanzibar's relation to the Mainland.

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University of Dar es Salaam  
July 1989.

## INTRODUCTION

### COERCION AND CONSENSUS IN LAW

All law is ultimately expressed in the use, or the apprehension of the use, of force. Yet ideologically, i.e. in consciousness, law is related to justice and rights rather than force. This apparent contradiction has been a subject of continuous jurisprudential discourse. The contradiction is apparent precisely because both positions, i.e. 'law as force' and 'law as justice', are correct on different levels.

Among the great victories of the bourgeois revolutions in the west was the enthronement of, what Engels so precisely called, the 'juridical world outlook'<sup>1</sup> of the bourgeoisie. The central element in this outlook is the notion of 'equality'. The status-based inherent inequality of the feudal era was overthrown and replaced by the contract-based legal 'equality'. This development was well captured in Sir Henry Maine's oft-quoted dictum that the movement of hitherto progressive societies has been from status to contract.<sup>2</sup> Marx summed up the difference between the feudal and the capitalist modes as 'the medieval mode of production, the political expression of which is privilege, and the modern mode of production, of which right as such, equal right, is the expression, ...'<sup>3</sup>

The idea of equality of all human beings as such is, as Engels noted, primeval but thousands of years had to pass before that idea was translated into a 'claim to equal political and social status' or a demand that 'men should have equal rights in the state and society'.<sup>4</sup> It is in the latter form that the concept of equality (rights or justice)<sup>5</sup> is embedded in law. The concept of equality is thus a defining and specific characteristic of the bourgeois law-form.



Various rights-theses, from the philosophers of the Enlightenment to modern jurists like Rawls<sup>6</sup> and Dworkin<sup>7</sup>, take the concept of equality as their point of departure.

Marx, in his scattered observations on law, showed how the law-form reflects the equivalence of commodity-exchange on the market.<sup>8</sup> Pashukanis later generalised these ideas and developed his famous commodity-exchange thesis of law.<sup>9</sup> The notions of equality, justice and rights therefore reside on the level of law-form (level of phenomenon) and help to 'mask' or 'disguise' its content which rests on the ultimate use or apprehension of the use of force. Thus 'law as coercion' and 'law as consensus' are not mutually exclusive explanations of law but rather explanations of law which correspond to different levels; which levels can be explained in terms of historical materialism, as was done by Marx and Pashukanis.

The separation between the legal form and its content (between phenomenon and essence), as a part of a series of separations (between abstract and concrete labour; between state and society), enabled the formation of the global juridical world outlook of the bourgeoisie as well as let legal ideology attain hegemony in developed capitalist formations.<sup>10</sup> Coercion therefore does not appear on the surface of law but is clothed in the consensual notions of equality, justice, rights etc. The state itself, which is the repository of all legitimate violence and force, appears as a guarantor, a protector and a custodian of rights. 'Might', if you like, puts on the garb of 'right' and thence the ideology that 'might is not right' attains societal consensus or hegemony in the Gramscian sense.

Matters stand differently with regard to law and legal ideology in Africa. Here the state and the legal system have been characterised as authoritarian.<sup>11</sup> Force appears on the surface of law and

legal ideology is peripheralised. It is the economic ideology of developmentalism which occupies the central terrain.<sup>12</sup> Notions of equality, justice, rights etc. exist, if at all, in embryonic or emerging civil society rather than being embedded in the law-form. As it has been argued, the civil society itself is hardly constituted. Bayart expresses it thus:

In sum, the concept of civil society seems best able to explain - by its absence - the continuing existence of African autocracy. In situations of tight political control, which prevent any organised opposition or explicitly political resistance and which force the leaders of the oppressed to 'move at chameleon's (agonisingly slow) pace towards an objective', ... generalising 'strategic movements' are less effective than secretive 'tactics' in attacking state control.<sup>13</sup> The ruling class in Africa may rule through the instrument of law but The Law rarely rules.<sup>14</sup>

Elsewhere I have argued that the relations of exploitation of labour in the dominated formations of Africa are based on unequal exchange and super-exploitation<sup>15</sup> In colonial and neo-colonial formations, labour itself is not 'free' i.e. free to create exchange values and to be exchanged at value. Both the peasant's labour and the worker's labour power are 'paid' below their value in which the producer cedes part of his necessary consumption to the appropriator. This unequal exchange can only be reproduced through the use of force. And it is the state which is centrally involved in the use of this force to reproduce the neo-colonial relations of production. Substituting 'force' for 'law' in Thompson's dictum<sup>16</sup>, we may say that in Africa state force is deeply intricately within the very basis of productive relations which are inoperable without this force.

Marx's succinct contrast between what he called the 'free labour' of the modern world and the 'forced labour' of the ancient world as the basis of the opposed notions of 'equality' and 'freedom' in each case, fits like a glove the neo-colonial situation in Africa. Marx writes,

Thus, if the economic form, exchange in every respect posits the equality of the subjects, the content, the material, both individual and objective, which impels them to exchange, posits freedom. Hence equality and freedom are not only respected in exchange which is based on exchange values, but the exchange of exchange values is the real productive basis of all equality and freedom. As pure ideas, equality and freedom are merely idealised expressions of this exchange; developed in juridical, political and social relations, they are merely this basis at a higher level. And indeed this has been confirmed by history. Equality and freedom at the higher level are the exact opposite of freedom and equality in the ancient world, which were not based on developed exchange value, but which on the contrary perished through its development. They presuppose relations of production not yet realised in the ancient world, nor indeed in the Middle Ages. Direct forced labour was the foundation of the ancient world; it was on this existing basis that the community rested. Labour itself regarded as a privilege, as still particularised, not labour generally producing exchange value, was the foundation of the Middle Ages.<sup>17</sup>

The fundamental difference between Marx's ancient world and the neo-colonial world of Africa, of course, lies in the fact that the latter is not some early stage of a developing society, but a

society dominated by imperialism and therefore responding to the laws of accumulation of monopoly capitalism.<sup>18</sup>

In such situations it is therefore, more correct to speak of rights-struggle rather than rights-thesis. Notions of equality, justice, rights etc., still have, in Engels words, an 'agitational' (as opposed to explanatory) role.<sup>19</sup> They have to be constituted in popular consciousness as much as embedded in the legal form.

The study of violation of rights in Tanzania in this monograph is an apt illustration of the several theoretical observations made in this introduction. Firstly, we submit that the primary and significant violator of rights in Africa generally is the state itself. Therefore, rights as 'claims' are essentially against the state, and rights-struggle itself is in the nature of a democratic struggle with broader implications on the organisation of the state and civil society. Secondly, violations of rights are not some episodes in the lives of individual citizens but rather the life-situation of the masses of citizens i.e. groups and collectivities. Thirdly, following from our foregoing arguments about the central role of state force without deep ideological mediations, law and legality play little role, if any, either in restraining the use of force or in legitimating it in the eyes of the people. We shall continually witness this lack of legal and rights-consciousness in several case studies in this monograph.

Finally, rights-struggle in Africa, of necessity, has to be from below constituting the process of the formation of civil society. We will return to the last question in our conclusion.

1. Engels, F., 'Juridical Socialism', quoted in Tumanov, V.A., *Contemporary Bourgeois Legal Thought*, Moscow: Progress Publishers, 1974, p.60.
2. Maine. H., *Ancient Law* quoted in Lloyd, *Introduction to Jurisprudence*, London: Stevens, 1979, 4th edn., p.661.
3. Marx, K. & Engels, F., *The German Ideology*, *Collected Works*, vol.5, Moscow: Progress Publishers, 1976, p.327
4. Engels, F., *Anti-Duhring*, Moscow Progress Publishers, 1969, p.124.
5. Indeed even historically, conceptually and linguistically, as Vlastos argues, 'equality' and 'justice' are almost equivalent notions; see Vlastos, G., 'Justice and Equality', in Waldron, J., *Theories of Rights*, Oxford University Press, 1984, p.41.
6. Rawls, J., *A Theory of Justice*, Cambridge: Harvard University Press, 1971.
7. Dworkin, R., *Taking Rights Seriously*, Cambridge: Harvard University Press, 1977.
8. See, for instance, *Capital*, vol.1, Moscow: Progress Publishers, n.d., Chapter II and *Grundrisse in Collected Works*, vol.28, op.cit. pp.174-7.
9. Pashukanis, E.B., *Law & Marxism: A General Theory*, London: Ink Links, 1978.
10. See, for instance, an excellent piece by Corrigan. P. &

Sayer, D., 'How the Law Rules: Variations on Some Themes in Karl Marx' in Fryer, B., et.al. (eds.) *Law, State and Society, ?*

- 11 Shivji, I.G., 'Equality, Rights and Authoritarianism in Africa' in MacCormick, N. et.al (eds.) *Enlightenment, Rights and Revolutions*, Edinburgh:University of Aberdeen, 1989.
- 12 For the notion of 'ideology of developmentalism' see Shivji, I.G., 'Introduction: The Transformation of the State and the Working People', in Shivji, I.G., (ed.) *The State and the Working People in Tanzania*, Dakar:CODESRIA, 1986.
- 13 Bayart, J., 'Civil Society in Africa', in Chabal, P. (ed.), *Political Domination in Africa*, Cambridge: Cambridge University Press, p.119.
- 14 Ghai, Y.P., 'The Rule of Law, Legitimacy and Governance', *International Journal of the Sociology of Law* 1986, 14, 179-208.
- 15 Shivji, I.G., *Fight My Beloved Continent: New Democracy*. In: SAPES, 1988.
- 16 Thompson's observation reads thus: 'Hence "law" was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law.' E.P.Thompson, *Whigs and Hunters*, excerpted in Beirne, P. & Quinney, R., *Marxism and Law*, New York: John Wiley, 1982, at p.132.

- 17 Grundrisse in Collected Works, vol.28, op.cit. pp.174-7 [Emphasis in the original]. I am grateful to Derek Sayers for drawing my attention to this quote.
- 18 See Shivji, I.G., 'The Roots of Agrarian Crisis in Tanzania - A Theoretical Perspective' Eastern Africa Social Science Research Review, III, 1:111-34 for the elaboration of this theme.
- 19 Engels, Anti-Duhring, op.cit. p.128.

## CHAPTER ONE

### ORGANS OF COERCION AND RIGHT TO LIFE AND LIBERTY

#### A. RIGHT TO LIFE AND LIBERTY

Right to life and liberty are basic, or core, rights around which other rights revolve. For the purposes of this monograph, I restrict myself to the fundamental aspects of these rights. Right to life therefore refers essentially to the right to exist and freedom from deprivation of life. Secondly, it refers to the right of being treated with human dignity and freedom from cruel, inhuman or degrading 'punishment' or treatment.<sup>1</sup>

In some jurisdictions, the right to life has been judicially extended to include the right to 'livelihood'<sup>2</sup>. The latter presumably interfaces with some of the rights which are traditionally categorised under the rubric of social and economic rights. These place positive obligations on the state to provide a wholesome life to its citizens. For the purposes of this monograph, however, we will be concerned with only the negative aspect of this right to the extent that it puts restraint on the use of coercion by the state.

The right to life (in its aspect of existence and protection of the physical body) is stipulated in the Bill of Rights, which was added to the Tanzanian Constitution for the first time in 1984.<sup>3</sup> Article 14 provides,

Every individual has a right to exist and receive protection from society for one's life, in accordance with the law.



The claw-back<sup>4</sup> nature of this provision is intriguing, to say the least. In international human rights instruments, including the African Charter on Human and Peoples' Rights<sup>5</sup>, which otherwise is fraught with claw-back clauses, it is unusual to make such a basic right 'subject to law'. Whether the judiciary will pay much heed to this limitation, remains to be seen.

The other aspect of the right to life, i.e. freedom from torture, cruel and degrading punishment and treatment is dealt with in specific terms in Article 13(6)(e) under which cruel, inhuman and undignified punishment is prohibited.<sup>6</sup>

The right to liberty and security of person is provided in Article 15 and a person may not be deprived of such right except in 'circumstances and in accordance with the procedures established by law'. Such law and procedures, it is submitted, must be based on the set of principles stipulated in Article 13(6). These are:

- right to be heard before a judicial or quasi-judicial tribunal and the right to appeal;<sup>7</sup>
- presumption of innocence until proved guilty;
- not to be held guilty under retrospective criminal legislation or be subjected to a penalty heavier than what was provided at the time of the commission of the offence;
- right to be treated and respected as a human being at all times during investigation, interrogation and conduct of criminal proceedings as well as while under any detention and during the implementation of any punishment; and
- freedom from torture, cruel, degrading, undignified and inhuman treatment and punishment.

Besides the limitations stipulated in the relevant articles themselves, the right to life and liberty are apparently also subject to the cumulative limitations of the general derogation clauses in Article

30 and 31, the later dealing with public emergency.

Article 30 has been a subject of severe criticism by academics for its very ambiguous formulation.<sup>8</sup> Read literally, it could easily be used to justify virtually any breach of the fundamental rights and freedoms. Indeed some persons in authority seem to hold the view that a majority of the 'offending' legislation on the statute book could be validated under this clause<sup>9</sup> For example, the Attorney General and the Minister of Justice recently defended the re-introduction of mandatory corporal punishment under this article, it being argued that the imposition of such punishment was in the interest of the community at large!<sup>10</sup>

However, it is possible for the judiciary to give Article 30 a restrictive interpretation by subjecting it to the standards expected in a democratic society stipulated, inter alia, in international human rights instruments. In the only judicial decision<sup>11</sup> on the Bill of Rights so far, the High Court of Tanzania under Mwalusanya, J. construed Article 30 restrictively for to do otherwise, he argued, would render the Bill of Rights an 'empty shell' (p.5). Mwalusanya, J. took the position that the phrase 'the law' in claw-back clauses like 'in accordance with the law' or 'subject to the law' or the provision that the rights of the community provided by 'the law' may override individual rights etc., meant something more than simply '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".' (p.8). Mwalusanya, J. elaborated his argument thus:

...I believe that the Rule of Law means more than acting in accordance with the law. The Rule of Law must also mean fairness of the government. Rule of Law should extend to the examination of the contents of the laws to see whether the letter conforms to the

ideal; and that the law does not give the government too much power. The Rule of Law is opposed to the rule of arbitrary power. The Rule of Law requires that the government should be subject to the law rather than the law subject to the government. If the law is wide enough to justify a dictatorship then there is no Rule of Law. Therefore if by the Rule of Law all it means is that the government will operate in accordance with the "law", then the doctrine of Rule of Law becomes a betrayal of the individual if the laws themselves are not fair but are oppressive and degrading. The Courts have to bridge the yawning gap between the letter of the law and the reality in the field of Rule of Law.<sup>12</sup>

These arguments signify, with respect, a very commendable approach and, in the case of Tanzania, probably a clear departure from the hitherto dominating positivist trend. Whether this approach will be upheld by the highest court of law in the land, the Court of Appeal, remains to be seen. One hopes that in an appropriate matter the Court of Appeal will adopt this approach because so much on the Tanzanian statute book (part of which we will have occasion to meet in this monograph) hardly meets even the minimum standards of the Rule of Law. Regrettably, this was also true of the Constitution before it was amended in 1984. As a matter of fact, the first President of the Republic, Julius Nyerere, is reported to have once remarked, 'I have sufficient powers under the Constitution to be a dictator'!<sup>13</sup> Now it speaks well of the person of Mwalimu Nyerere that he did not become a dictator in spite of the constitutional powers he had to become one, but it speaks very poorly of 'the law' and the constitutional structures of the country under which he ruled Tanzania for quarter of a century.

We now turn to the question of the use of state coercion.

## B. STATE COERCION

The modern state is the most centralised expression of the use of force. It monopolises the instruments of violence. In developed countries, as we saw in the introduction, use of state coercion or force is mediated through various legitimating ideologies which hold hegemonic position in that they receive, to different degrees, the consensus of the ruled classes as well. These ideologies do not simply play the role of rationalising the use of force by the state and its organs but also, more significantly, act as constraints and brakes on the abuse of powers to use force by the state, its organs and officials.

When the use of state coercion is not, or thinly, clothed with hegemonic ideologies<sup>14</sup>, it expresses itself in the violation of 'human rights', very often, to use the hackneyed claw-back clause, 'in accordance with the law'.

We distinguish two types of the use of force: 'legal' and 'illegal'. Legal use of force is where it has been authorised by law while the illegal one has not been so authorised. However, this does not mean that even legal force is necessarily legitimate. This is where conceptions of 'human rights' become relevant. Thus it is submitted that where force is legal but applied contrary to the basic conceptions of human rights or in violation of what may be considered absolute minimum standards in a democratic society, such use of force amounts to being 'illegitimate'. This too will form part of our investigation.

Besides, in the Tanzanian situation, it may be worthwhile also to talk of what might be called 'extra-legal coercion'. This is the application of coercion which strictly, speaking, is illegal, but is sanctioned by the highest organs or officials of the state or the Party and carried out by immediate perpetrators as if it was in

obedience of 'lawful' orders. There has been a very wide use of this type of coercion.

On another level of analysis, one may also distinguish between the use of force on an individual level by a particular official of the state and the use of force en masse by certain armed organs of the state. Both have been present in Tanzania. The former will be largely covered in our chapter on 'illegal coercion' while the latter will fall under the use of 'extra-legal coercion' in, what has come to be known in Tanzania, as 'operations' and campaigns. Before we proceed, it is important, even if briefly, to identify the major organs of the state which have been notoriously involved in the use of illegal, illegitimate and extra-legal coercion. We look at four para-military forces: the People's Militia, the 'traditional armies', the National Service and the Field Force Unit.

## **C. ORGANS OF COERCION**

### **1. People's Militia**

The militia was established in the wake of Portuguese invasion of Guinea and Obote's overthrow by Amin in Uganda which carried ominous signals for the Tanzanian regime.<sup>15</sup> The establishment of the militia by the ruling party, the then Tanganyika African National Union (TANU), was in implementation of directions in the Party Mwongozo or Guidelines of 1971.

The militia is recruited by Party organs but trained by instructors from the Tanzania People's Defence Forces (TPDF). It is based in every district at work places and villages. The Militia undergo four months training which is designed to produce an equivalent of a private soldier<sup>16</sup>. The people's militia is directly under the Party and, after training, it forms part of the reserve

army. 'The District Party Secretary is the militia commander and at the Branch level the relevant secretary of the Party becomes the commander'<sup>17</sup>. During peace time, the militia do routine police duties including participation in various 'operations' mounted by the state and the Party. During war, it performs rear tasks while the young among them may actually fight in the frontline, as they indeed did during the war with Idi Amin.

The actual number of the militia is probably difficult to know, although one source estimated it around 35000 in 1981-2<sup>18</sup>. In my research I could not find any law establishing the People's Militia. One piece of legislation, the People's Militia (Powers of Arrest) Act, 1975 (no.25) confers on the members of the militia powers of arrest and search equal to those of a police officer. But this Act assumes the existence of, but does not establish, the militia as such. The definition of 'people's militia' in this Act is interesting.

"Peoples militia" means an organised group of the people of the United Republic operating with the authority of and under the aegis of the Government and which is receiving any military training or participating in any military, quasi-military or law enforcement exercise for the protection of the sovereignty of the United Republic or for the protection of the people or the property of the United Republic, but does not include the Police Force, any arm or branch of the Defence Forces, the Prisons Service or the National Service.<sup>19</sup>

Strictly the force defined as above does not exist because what exists - i.e. the 'people's militia' - is not under the aegis of the government, or established under its authority, but is under the Party. To that extent the existence of 'people's militia' is contrary to

Article 147 of the Constitution, which prohibits any person, organisation or group of people, except the Government, to form or maintain an army in the United Republic. Strictly, therefore, the use of force by the militia is, at best, extra-legal. Yet this has never been an issue, or commented upon even by legal circles, which in itself is a comment on the legal consciousness (or rather the lack of it) of law-makers, law-implementors and law-receivers in Tanzania.

## 2. 'Traditional Armies'

If the 'people's militia' was established by the Party from above following events in Guinea and Uganda (which were perceived as threats to the security of the regime), 'traditional armies' began to operate as a result of initiatives from below in regions where cattle rustling had become endemic and there was a popular perception of the break down of 'law and order'. Very soon, however, these armies were co-opted by the state and converted into some kind of semi-regular force to conduct routine police duties.<sup>20</sup> This was not done under any enactment but rather under the Party. Thus in Mara Region, where this army has been operating extensively, the Party Regional Executive Committee issued a 'Code for the Operation of the Traditional Army in the Mara Region' which was considered by all concerned as the 'legal authority' for the existence of the army<sup>21</sup>. The Code purports to give the 'traditional army' wide-ranging police and judicial powers. It deserves quotation in extenso:

### Section 1:

1. Deal with the cattle thieves, thieves of fish traps, nets, canoes and any other movable property.

2. Deal with smugglers and those who deal in government trophies.
3. Deal with those who manufacture and those found in possession of illicit liquor known as moshi, as well as those who make bhang.
4. Deal with those pupils who fail to attend school.
5. Deal with rogues and vagabonds as well as those who do not take part in the campaign of everyone should work.
6. To ensure that the youth take part in the national development projects.
7. To encourage closer contact and good relationship among the villagers by promoting cultural activities, sports, soccer, dance, wrestling and other traditional dances.
8. To stop illegal businesses of selling goods at illegal prices in towns and villages.
9. To scrutinize foreigners within the country and send them to the appropriate authorities for action in accordance with the law.
10. To punish offenders of the above-named offences and similar offences in accordance with the traditional ways of their respective areas.
11. For any other criminal offences, the offenders should be sent to the Police to be dealt with in accordance with the law.<sup>22</sup>



As was observed by Mwalusanya, J. in the leading case of Sangija, where he declared traditional armies unconstitutional, the operation of these armies was totally outside the framework of law. Following a series of judgments<sup>23</sup> by Mwalusanya, J. declaring the so-called 'traditional armies' illegal, the People's Militia Laws (Miscellaneous Amendments) Bill, 1989<sup>24</sup> was passed. It expanded the definition of 'people's militia' quoted above to include the 'traditional army'. It also gives powers to the Minister to make regulations for the smooth operation of the militia as defined. However, the laws amended deal with compensation for injuries by members of the militia sustained in the course of duty<sup>25</sup> and the powers of arrest of the militia<sup>26</sup> - which are similar to those of the police. The question still remains whether these laws establish the people's militia as such, and whether the existing militia and the traditional armies are covered within the definition, since, in the existing practice they operate under the Party and not the Government. (Should the Minister in his regulations promulgate that the Party be responsible for the militia, there would still remain the question if the power to establish armed forces given the government under the Constitution can be delegated to the Party).<sup>27</sup>

### **3. The National Service**

This was established in 1964 under the leadership and guidance of Israel. In 1966 it was made compulsory and serves as a system of conscription. Since 1975 the Service has been fully amalgamated with the Tanzania People's Defence Forces.<sup>28</sup> Frequently, national servicemen are used in patrol and other duties, although not as often as the militia.

#### 4. The Field Force Unit

If the Militia and the National Service are the creation of the post-colonial state, the Field Force Unit was bequeathed to the people of Tanzania by the colonial state, and it bears all the notoriety of its birth. The nucleus of the Force in 1916 came from, ironically, South African Defence Forces, which sent the first 31 troopers under Major S.T. Davies.<sup>29</sup> They were stationed at Wilhemstal (Lushoto), where the Germans had carried out massive land alienations, to have steady effect on dispossessed peasants.

Since the Second World War, with the rise of the trade union movement, the Force, now called the Motorised Unit, operated as a kind of rapid mobile force which could be present within hours at any place of 'riot'. It was used against striking workers as during the 1950 dockworkers strike; against protesting peasants as against Sukuma peasants and also against recalcitrant nationalists. At independence, its name was changed to 'Field Force Unit' or FFU. 'The notoriety of its ruthlessness has earned it the Swahili translation of its acronym as "Fanya Fujo Uone" literally meaning "If you cause trouble you will face the music."<sup>30</sup> In post-colonial Tanzania, students, workers and peasants have all had the taste of that 'music'. The FFU beat up students during their 1978 demonstration<sup>31</sup>; it was used widely during the forced villagisation of 1972-74<sup>32</sup> as it was also deployed against striking workers during the post-Mwongozo workers movement.<sup>33</sup> Its ruthlessness was once again witnessed in the recent incidence in Kilombero where it killed four sugar-cane workers.<sup>34</sup>

\* \* \*

In the next three chapters we examine the use of state coercion in violation of right to life and liberty with illustrative case studies.

- 1 See Articles 4 and 5 of the African Charter on Human and Peoples' Rights.
- 2 See the Indian Supreme Court judgment in *Olga Tellis v Bombay Municipal Corporation* [1986] A I R 180 S C.
- 3 See *Sheria ya Marekebisho ya Tano Katika Katiba ya Nchi*, 1984, no.15 of 1984. [Fifth Constitutional Amendment Act]. For some discussion of the Constitutional Debate that preceded this amendment see Shivji, I.G., 'The Politics of Liberalization in Tanzania: Notes on the Crisis of Ideological Hegemony', forthcoming in TAAMULI. For a discussion of the Bill of Rights see Peter, C.M. 'The African Charter and the New Tanzanian Bill of Rights', manuscript, n.d. Also see Shivji, I.G. 'Rights Struggle and Bill of Rights in Tanzania', *Zimbabwe Law Review* 5 (1987).
- 4 For the meaning and discussion of claw-back and derogation clauses see Gittleman, R., 'The Banjul Charter on Human and Peoples' Rights: A Legal Analysis', in Welch, C.E., & Meltzer, R.I., (eds.), *Human Rights and Development in Africa*, Albany: State University of New York Press, 1984.
- 5 For a critical analysis of the African Charter see Shivji, I.G., *The Concept of Human Rights in Africa*, Dakar: CODESRIA, 1989
- 6 This seems to be the clear intention in line with the international human rights instruments, although the presentation in Article 13(6) is somewhat tortuous. Literally read, it obliges relevant authorities to provide for procedures and practices to ensure equality before the law and that such procedures and practices shall be based on certain principles including the principle that it is prohibited to torture a person

or impose upon him/her cruel, degrading, inhuman or undignified punishment. It is submitted that the whole of Article 13 should be construed purposefully as equivalent of 'due process clauses' in international human rights instruments of which the Universal Declaration of Human Rights and the two International Covenants of 1966 are the major ones.

- 7 In accordance with the suggestion in the foregoing note, it is submitted that this guarantees all the procedural rights stipulated in Article 14(3) of the International Covenant on Civil and Political Rights (1966) and that the existing common law rights and principles of natural justice are not overridden by, but rather incorporated in, the enactment of the Bill of Rights. See, for instance, the decision of the Privy Council in a case from Jamaica, *Bell v D.P.P. & Another* [1986] LRC (Const.) 392, at 398.
- 8 See, for instance, Mbunda, L.X., 'Limitation Clauses and the Bill of Rights in Tanzania', *Lesotho Law Journal* 4, 2:153-170 (1988)
- 9 See the Public Talk given by the Honourable Attorney General and the Minister of Justice, Mr. D. Z. Lubuva, to the Faculty of Law, University of Dar es Salaam, on 16th October, 1987 (mimeo.)
- 10 Radio Tanzania report on the National Assembly Debate on the Written Laws (Miscellaneous Amendments) Bill, 1989 (now Act No. 2 of 1989) aired on 24/4/89. See also Daily News, 25/4/89.
- 11 *Chumchua s/o Marwa v Officer i/c of Musoma Prison & The Attorney General, Mwanza*, Miscellaneous Criminal Cause No. 2 of 1988, High Court of Tanzania at Mwanza,

(unreported).

- 12 Ibid. p.7 (cyclostyled copy of the judgment)
- 13 Interview with BBC Television in London quoted by Mwa-kyembe, H.G., 'The Parliament and the Electoral Process', in Shivji, I.G. (ed.), *The State and the Working People in Tanzania*. op.cit. at p.45.
- 14 For a succinct account of the Gramscian notion of ideological hegemony see Valeriano Ramos, Jr. 'The Concepts of Ideology, Hegemony, and Organic Intellectuals in Gramsci's Marxism', *Theoretical Review*, 30:3-8, Sept./Oct., 1982.
- 15 Shivji, I.G., *Class Struggles in Tanzania*, Dar es Salaam: Tanzania Publishing House, 1975, 123 et. seq.
- 16 Swai, F. S., *The Integration of the Military to the Political System in Tanzania*. M.A. Dissertation 1982, University of Dar es Salaam, p.87.
- 17 Ibid., p.88.
- 18 Legum, Colin, *Africa Contemporary Survey*, 1981-2, p.6.
- 19 S.2. This definition has now been amended to include 'traditional army', see below p.
- 20 Abrahams, R., 'Sungusungu: Village Vigilante Groups in Tanzania' *African Affairs* 86, 343:179-96 (1987). For a different view see Campbell, H., 'Popular Resistance in Tanzania: Lessons from the Sungusungu', Paper presented to History Research Seminar Series, University of Dar es

Salaam, August 1987 (mimeo.)

- 21 See, for instance, the defence of the defendants in the case of *Misperesi K. Maingu v Hamisi Mtongori & 9 Others*, Civil Case No. 16 of 1988, High Court of Tanzania at Mwanza (unreported).
- 22 This excerpt is reproduced in the Judgment of Mwalusanya, J. in the case of *Ngwegwe s/o Sangija & 3 Others v R.*, Criminal Appeal No. 72 of 1987, High Court of Tanzania at Mwanza (unreported), pp.3-4 of the cyclostyled Judgment.
- 23 Besides the cases cited in notes 21 and 22 above, the other two are *Charles Mwita & Another v Mresi & 11 Others*, Civil Case No. 15 of 1988, High Court of Tanzania at Mwanza (unreported) and *Amoni Magigi Nyamuganda & Another v Bonifas Kilingo & 15 Others*, Civil Case No. 22 of 1988, High Court of Tanzania at Mwanza, (unreported).
- 24 By the time of going to press, this Bill had not as yet been published as an Act in the Government Gazette.
- 25 Peoples Militia (Compensation for Death or Injuries) Act, 1973, no. 27 of 1973.
- 26 Peoples Militia (Powers of Arrest) Act, 1975, no. 25 of 1975.
- 27 It is interesting to note that a number of members of the traditional armies - *sungusungu* and *wasalama* - who have been imprisoned at various times for their illegal/criminal activities by courts have been pardoned by the President; see Uhuru, 12/7/89. There is no doubt that initially these armies were popular, in that they succeeded in bringing down the crime

rate, particularly in areas of widespread cattle-rustling, but later their activities have included harassment and arbitrary arrests of innocent citizens and there have been complaints against them.

- 28 'Twenty Years of National Service', Daily News, 2/8/83.
- 29 The information on the FFU is from Ringo Tenga, 'Policing Tanzania: The Role of FFU', Africa Events 2, 9:43-4 (September 1986).
- 30 Ibid.
- 31 Chris Peter & Sengodo Mvungi, 'The State and Student Struggles', in Shivji, The State and the Working People, op.cit., pp.155-94 at p.188.
- 32 See Coulson, A., 'Agricultural Policies in Mainland Tanzania 1946-1976', Review of African Political Economy 10, pp.74-100 (1978).
- 33 Shivji, I.G., 'Working Class Struggles and Organisation in Tanzania, 1939-1975,' MAWAZO 5, 2:3-24.
- 34 See Case Study 9 below.

## CHAPTER TWO

### LEGAL BUT ILLEGITIMATE COERCION - I

In this and the next chapter, we discuss a number of statutes (and case studies) which authorise use of force in circumstances which would be considered in violation of the minimum standards set by human rights instruments. So, although force here is legal, in that it is statutorily authorised, it is illegitimate. However, this statement needs to be qualified in the light of the 1984 Bill of Rights embodied in the Constitution. It is possible to argue, as we do in this chapter, that a number of the statutes under consideration could be declared inconsistent with the Constitution and therefore to that extent void. Strictly then, such statutes, and the use of coercion under them, should be regarded as 'illegal' and not simply 'illegitimate'. But until such time as there are judicial pronouncements on the statutes under consideration, and to take account of the hitherto historical use made of these laws, we will continue to use in this monograph the proposed notion of 'legal but illegitimate coercion'.

#### A. CAPITAL AND CORPORAL PUNISHMENT

The Tanzanian Penal Code, Cap. 16, provides mandatory death penalty for the offence of murder and maximum death penalty for treason (ss.197 & 39 respectively). Although numerous death sentences are passed by Tanzanian courts every year, it is believed that few are carried out.<sup>1</sup> There is no public movement against death penalty and courts do not seem to have expressed much opinion on it, although some judges, it seems, would prefer courts being granted discretion in the imposition of death penalty.<sup>2</sup>



Corporal punishment is one of the punishments permissible under the Penal Code (s.28) and, where imposed, it is to be inflicted in accordance with the Corporal Punishment Ordinance, Cap.17, and the Corporal Punishment Order<sup>3</sup> made thereunder. The Ordinance is a carry over from colonial times and has been actively applied in post-colonial Tanzania.

The independent government made corporal punishment mandatory for certain offences under the Minimum Sentences Act, 1963 (no.29). The Bill was greeted with enthusiasm by Parliamentarians, some of whom went even further than the government proposals suggesting more torture as part of punishing offenders.<sup>4</sup> The average number of the incidences of corporal punishment between 1963 and 1964 was 2510 per annum, compared to the average of 46 in the previous four years (1958-61) of the colonial administration<sup>5</sup> In 1972, mandatory corporal punishment was abolished<sup>6</sup>, only to be brought back in 1989.<sup>7</sup>

Once again the honourable members of parliament shocked the nation by applauding the re-introduction of corporal punishment. One member even suggested that such punishment should be administered in public (market places) and that women offenders should not be exempted.<sup>8</sup> Defending the Bill against an objection of a lone parliamentarian on the ground that corporal punishment might be contrary to the Bill of Rights, the Minister of Justice and the Attorney General argued that bandits and robbers were breaching the rights of other citizens and therefore it was in the interest of the community at large that corporal punishment was being re-introduced. The Minister proffered his legal opinion that the constitutional validity of the proposed law would be covered under the derogation clause, Article 30 of the Constitution.<sup>9</sup>

On the face of it, corporal punishment is contrary to Article 13(6)(c) of the Constitution which specifically prohibits cruel,

inhuman and degrading punishment. The leading case in this regard is the decision of the European Court of Human Rights which has been followed in Zimbabwe. In *Tyrer v United Kingdom*<sup>10</sup>, where a 15 year old boy was sentenced by a juvenile court in the Isle of Man to three strokes of the birch on conviction of assault. The Court found that, while the punishment in the instant case did not constitute torture or inhuman punishment, it did amount to 'degrading' punishment and therefore was in violation of Article 3<sup>11</sup> of the European Convention. The substantive paragraph in the judgment deserves to be quoted in extenso:

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.<sup>12</sup>

The 'aura of official procedure' attending corporal punishment that the European Court refers to with apparent disgust is even more disgusting in Tanzania under the Corporal Punishment

Order which provides that:

2. A sentence of corporal punishment shall be inflicted upon adults upon the bare buttocks with a light rattan cane which is free from knots. Such cane shall be not less than half an inch and not more than five-eighths of an inch in diameter and shall not exceed forty-two inches in length.

.....

4. During the infliction of a sentence of corporal punishment the person undergoing punishment shall be so secured that he cannot, by reason of the movement of his body, cause the strokes to fall upon any other part of his body than that upon which they are to be inflicted in accordance with this Order.

It remains to be seen whether the Tanzanian judiciary will countenance such punishment by validating it under Article 30 as suggested, rather unfortunately, by the Attorney General. Rather than heed the Honourable Attorney General's gratuitous advice, Tanzanian courts may do well to emulate the Zimbabwe Supreme Court which has held 'whipping' to be an inhuman and degrading punishment. Reviewing the position in Zimbabwe, South Africa, the United Kingdom, Canada, Australia and the United States, Gubbay, J A in *Ncube, Tshuma & Ndhlovu v The State*<sup>13</sup> concluded that:

Fortunately on the few occasions where the issue of whether whipping is constitutionally defensible has been judicially considered, it appears to have resulted in little difference of opinion, whether imposed upon an adult person or a juvenile offender the punishment in the main has been branded as both cruel and degrading... .

## B. COLLECTIVE PUNISHMENT

Collective Punishment Ordinance, Cap. 74, is another piece of legislation introduced by the colonial state which continues to be used by the independent government. The rationale of this statute lies in the colonial anthropology which considered 'native' villagers to be too 'primitive' to understand and therefore be subjected to individual responsibility and punishment. Therefore whole villages or 'tribes' and 'sub-tribes' could be held responsible and punished for a crime committed within the boundaries of their vilage. It was clearly a mechanism on the part of the colonial state to strike terror in the hearts of peasants so as to better control them. The notion of 'collective' punishment, needless to say, is contrary to all modern systems of criminology and certainly in breach of basic human rights. As Article 7(2) of the African Charter on Human and People's Rights stipulates, 'Punishment is personal and can be imposed only on the offender'.

Section 2 of the Collective Punishment Ordinance provides that:

The President may impose fines on all or any inhabitants of any village, area or district, or members of any tribe, sub-tribe, or community if, after inquiry, he is satisfied:

- (a) That they or any of them have colluded with or harboured or failed to take all reasonable means to prevent the escape of any criminal;
- (b) that they or any of them have suppressed or combined to suppress evidence in any criminal case;
- (c) that stolen property having been traced to within the limits of any village, area or district, they have failed or neglected to restore the property or to trace it beyond the limits of such village, area or district;

....

The President may fine in like manner the inhabitants of any village, area or district where a person is dangerously or fatally wounded by unlawful attack, or a body of a person believed to be unlawfully killed is found therein (s.3). An inquiry under the Ordinance is conducted by a magistrate or other judicial officer, and the order of the President is final, no appeal lies therefrom.

The power under this Ordinance was used by the President as recently as 1984<sup>14</sup> against Wataturu families resident in eight named villages for being allegedly responsible for the deaths of 49 persons and the theft of 767 heads of cattle, 30 goats, 20 sheep and 4 donkeys. The President ordered every Kitaturu family resident in the said villages to pay 'such number of cattle, goats, sheep, donkeys or its equivalent in other terms as will realize 767 heads of cattle; 30 goats; 20 sheep and 4 donkeys.'

Clearly, the provisions of this Ordinance are not only outdated but offend a number of rights and freedoms stipulated in the Bill of Rights. To date the constitutionality of the Ordinance has not been challenged.

### **C. WITCHCRAFT**

The Witchcraft Ordinance, Cap. 18, is also a colonial statute but has been often used in post-independence Tanzania.<sup>15</sup> Under it a District Commissioner has powers to restrict a suspected witch, or a person practising witchcraft, to reside in a particular locality in his district 'and further or in the alternative may order such person to report to the District Commissioner or to a District Council at such intervals not being less than seven days as he shall direct until such order shall be varied or revoked.'<sup>16</sup> In the early seventies some 30 Wanyambunda in Mbeya were detained under the Ordinance allegedly because they were influencing people against

The powers granted under this Ordinance can now be challenged as infringing the freedom of movement as well as the 'due process' provisions of the Bill of Rights. It may be noted that the same Ordinance does create certain offences in respect of practice of witchcraft for which charges can be laid and trial held. Under the circumstances, it is gratuitous to grant further powers to a member of the executive to restrict a person without the usual judicial safeguards.

#### **D. FORCE AGAINST THE UNEMPLOYED AND VAGRANCY LAWS**

The neo-colonial economy creates the problem of the unemployed and other marginalised groups, which swarm the cities in large numbers.<sup>18</sup> But the same economy is incapable of taking care of the problem and so the neo-colonial state steps in with coercion. Use of extra-economic coercion to 'solve' economic problems is the common denominator of the colonial and the neo-colonial social orders. The post-independence Tanzanian state has retained, virtually intact, all the colonial vagrancy laws supposedly to control this 'problem' and has added some of its own.

Under the Townships (Removal of Undesirable Persons) Ordinance, Cap.104, a person who has no regular employment or reputable means of livelihood can be detained and served with a removal order to leave the town and go to a place specified in the order. Under the Destitute Persons Ordinance, Cap.41, a magistrate may order a destitute person (who is defined as 'any person without employment and unable to show that he has visible and sufficient means of subsistence'<sup>19</sup>) to return to his usual place of residence 'if he is a native who is not dwelling in his usual place

of residence'. Coupled with these are the provisions of the Penal Code under which 'idle and disorderly persons' and 'rogues and vagabonds', as the statute terms them, can be convicted of being so and imprisoned.<sup>20</sup> The so-called 'idle and disorderly' include, following an amendment of the law in 1983<sup>21</sup>, unemployed and even an employed person 'who is without any lawful excuse, found engaged on a frolic of his own at a time he is supposed to be engaged in activities connected or relating to the business of his employment'.

It is under this armoury of legislation that various 'round-ups' and campaigns against 'loiterers' in Dar es Salaam, and other towns, are periodically mounted. And as periodically, leaders at the highest echelons of the state and Party condemn the so-called 'loiterers'. The then President, Mwalimu Nyerere, called them 'criminals and idle parasites' and instructed his Prime Minister not to 'feel shy to disturb these loiterers'. 'If we don't disturb loiterers, they will disturb us ...', he said.<sup>22</sup> These 'loiterers' constituted some 40 per cent of the population over 6 years old in Dar es Salaam region in 1984<sup>23</sup> That seems to be much more a comment on the nature of the post-independence economy and society rather than any evidence of the criminality, idleness or parasitism of 'these loiterers'!

In these 'crackdowns', as the official media often terms them, people are thoroughly harassed, detained, taken to court, imprisoned or transported to their 'homes'. The following story culled from the Daily News<sup>24</sup> is not only typical but illustrates multi-fold biases involved in these incidences of rights-violations.

## Case Study 1: 'Round-ups'

TWENTY three women, including teenagers who were picked up in an overnight swoop in Dar es Salaam last Tuesday, have no proper means of earning a living, a police officer claimed before the Kisutu Resident Magistrate's court on Saturday. Corporal James of the Central Police Station in the city told presiding Principal Resident Magistrate Joseph Masanche that the crackdown followed information that there were some women prostitutes wandering in the streets of Dar es Salaam.

The accused who pleaded "Not Guilty", were on October 22, this year - at about 9.30 p.m. - found along Upanga Road, Garden Avenue, Ohio Street and Sokoine Drive "wandering", according to another police officer, Superintendent of Police (SP) Elias Mahenge.

SP Mahenge told the court that the accused were found along "road pavements and other public places wandering from one place to another, and at times picked up by cars".

"They were under such circumstances that could lead to the conclusion that their movements were for illegal or disorderly purposes", he charged.

Led by SP Mahenge, Corporal James - who appeared as the first prosecution witness - said the Policemen backed up with two police vans combed the streets and arrested the 23 women.

"When we (police) questioned them on how they earned their living, some remained silent while others said they were waiting for their brothers or friends. Others said they were just there", the corporal said.



At this point, Principal Resident Magistrate Masanche intervened for a point of clarification.

Masanche:- Many of them (accused) say they were rounded up while coming from evening movies and that they had their cinema tickets. Could you elaborate on that?

Corporal James:- We arrested them because they looked suspicious.

The accused's ages ranged between 16 and 42.

Two of the accused, Doto Saidi (30) and Salama Mohamed (18) entered the dock with their toddlers.

In cross examination, Betty Jonas (accused number 15) caused laughter when she asked: "why did you arrest women only and not men as well?"

Another accused, 34 year old Zaina Masanika claimed that police arrested her on her way back from a movie adding that the police tore up her ticket at the remand prison.

Adjourning hearing of a case to this morning, Magistrate Masanche ordered that all the accused be remanded in custody. A number of the accused broke into tears asking to be granted bails.

.....

The first accused in the case Doto Saidi alleged in her defence that she was arrested at Kinondoni while she was on her way to see her relatives, ...

Objecting to the allegations by the prosecution side that she (Doto) managed to survive through "begging" from men, she claimed that it was impossible for her to beg at that stage when she was breast feeding her very small child.

She further claimed that police who conducted the overnight swoop "just ordered me to go into the

land-rover and when I wanted to know why I should board into the police vehicle, I was beaten and ordered to obey what they were telling me". ....

Submitting her defence Safarani Nassoro who is the oldest accused claimed that she was arrested as she was returning to Kisutu from Empress Cinema hall where she had gone for a movie which starts at 9.15 p.m.

She said she was neither a loiterer nor a "beggar" because she was employed by the owner of a private salt packing company in the city and "earned 840/= per month"

However Presiding Resident Magistrate, Ndugu Joseph Masanche, told the accused that she was the eldest accused in the case and considering her age, he asked why she frequented cinema halls during awkward hours.

Nassor could not reply to the question by Masanche. Masanche: Why did you go for a movie at night? Nassoro: I just decided as that was the only suitable time for me.

Earlier the prosecution led by Superintendent of Police SP Elias Mahenge told the court that most of the accused were arrested while loitering aimlessly along Upanga Road, Garden Avenue and Ohio and Sokoine Streets.

The accused objected to the allegation claiming that they were arrested while waiting for buses to their respectable homes from the new and old Post Offices bus stands.

Ndugu Masanche adjourned the case to tomorrow when it comes up for judgement. The accused are remanded. ....

Nineteen out of the 23 women charged with loitering have been sentenced to terms ranging from three months to one year in prison.

Principal Resident Magistrate Joseph Masanche acquitted four of the accused after finding them not guilty of the charge.

Pronouncing judgement on the nineteen, Magistrate Masanche said the women were rounded up following a tip to the police that prostitution was on the increase in Dar es Salaam.

He said the reasons advanced by the nineteen accused were unacceptable, and therefore they were guilty of the charge.

Superintendent of Police Elias Mahenge, asked the court to hand out stiff sentences, saying prostitution was currently on the increase in the city, so was the spread of diseases, associated with prostitution.

In mitigation, the accused, except the youngest, said they had young children and relatives depended on them and that they were also jobless. Some of the accused said that they were suffering from dysentery.

Some of the accused laughed while others cried as the sentence was pronounced.

One of the accused Teddy Peter (19) was sentenced to one year imprisonment as she had previously been convicted on the same offence by the Kivukoni Resident Magistrate's Court.

One sixteen-year-old-girl was sentenced to one-year probation.

One of the significant points to emerge from this story is the way the court shifted the burden of proving their innocence on the accused which of course is contrary to the known rules of onus of proof.

Another piece of legislation directed against the marginalised population with little regard for their rights and freedoms is the Resettlement of Offenders Act, 1969 (no. 8). The original objective of the Act was to resettle 'habitual offenders' and rehabilitate and reintegrate them in society. The legislation, however, does not define habitual offenders.

Any person who has been convicted of a scheduled offence can be ordered to be resettled by the Minister of Home Affairs provided such order is made within thirty days of the determination of the sentence either by effluxion of time or otherwise (s.4). Persons who are the subject of a deportation order under the Deportation Ordinance, or the Witchcraft Ordinance, may also be subject to a resettlement order.

Four resettlement camps were established and three are still in operation.<sup>25</sup> All these camps are in the same compounds as ordinary prisons. Inmates are not treated differently either.

On a habeas corpus application, in the case of *Samwel Kubeja v R*<sup>26</sup>, Mroso, J. observed that it was unlawful to confine a 'settler' behind barbed wire guarded by armed prison officers and keep him under detention in custody pending resettlement. In that case, the Officer-in-charge and the State Attorney had explained to the court that it was the usual practice to confine settlers under such conditions for at least a year before they were allowed to lead normal lives in the camps. These stringent conditions were necessary because of the high incidence of escapes, they explained. The officer-in-charge cited the directions of the Principal Commissioner of Prisons [Ref. HQC. 57/XIII/88 of 18th July, 1981] as his authority. The Judge perused those directives and declared them to be ultra vires, to the extent that they imposed conditions of confinement contrary to the parent Act and were in breach of the freedom of the individual.

'It cannot be said too often that the freedom of the individual is sacrosanct within the confines of the law. It follows that an individual must not be deprived of his freedom more than the law clearly stipulates.'<sup>27</sup>

Shaidi, in his research of the camps, noted, as a matter of fact, that the camps had become ordinary detention camps used to victimise, rather than rehabilitate, alleged offenders. In practice, groups of people on mere suspicion would be served with 'resettlement orders' which did not even specify reasons for such orders. In some cases, he found that the 'settlers' were without previous convictions and some of them were elderly persons. 'In some cases', Shaidi observes, 'one feels that the Act was invoked to obtain the detention of the people who were thought to have committed offences, but there was no sufficient evidence to get a conviction in a court of law.'<sup>28</sup> Shaidi concludes:

From our observations it can be said that the resettlement centres are operating as punitive institutions, just like ordinary prisons. The suspects are rounded up unexpectedly, put in ordinary prisons pending their transfer to the centres. They get no time to settle their domestic chores, causing embarrassment and unnecessary problems to the suspect and his family. Although theoretically his family had the option of joining him, there is no time for discussing and planning for such an event. In the end, the whole thing becomes a mockery in attempting to 'resettle' a person in the absence of his family, and under conditions of captivity. We cannot train a man for freedom under such conditions.<sup>29</sup>

The Act itself, in more than one way, encroaches on fundamental freedoms now enshrined in the Constitution. But the practice of the high echelons of the state, as Kubeja's case cited above vividly illustrates, do not exhibit even a modicum of consciousness of, and respect for, the freedoms of a citizen.

- 1 Amnesty International, *When the State Kills ...*, 1989, p.214.
- 2 In the celebrated case of *R v Agnes Doris Liundi* [1980] TLR 38 (*Agnes Doris Liundi v R.* [1980] TLR 46 on appeal), where a mother killed her three children by administering poison as a result of long-standing matrimonial quarrels with her husband, both the High Court and the Court of Appeal made some lukewarm statements suggesting possible amendment to law to introduce diminished responsibility, but refrained from taking the opportunity to express their opinion on the legitimacy or righteousness of capital punishment as such.
- 3 G.Ns. No. 74 of 1930 and No. 76 of 1941.
- 4 Shaidi, L.P., *Explaining Crime and Social Control in Tanzania Mainland: An Historical Socio-economic Perspective*, Ph.D. Thesis submitted to the University of Dar es Salaam, 1985, at pp.323-331 quotes the Parliamentary Debate.
- 5 *Ibid.*, p.327.
- 6 Minimum Sentences Act, 1972, no.1 of 1972.
- 7 The Written Laws (Miscellaneous Amendments) Act, no.2 of 1989 provides minimum custodial sentences 'with corporal punishment' for a number of offences, including armed robbery.
- 8 Daily News, 25/4/89.
- 9 Radio Tanzania Report of the Parliamentary Proceedings, excerpts broadcast live on 24/4/89.

- 10 2 E.H.R.R. 1.
- 11 Article 3 of the European Convention on Human Rights is in almost identical terms to Article 13(6)(c) of the Tanzanian Union Constitution.
- 12 At p.11 of the Report.
- 13 Judgment No. SC 156/87 (Zimbabwe) excerpted in Human Rights Unit, Commonwealth Secretariat, *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms*, Judicial Colloquium in Bangalore - 24-26 February 1988, London: 1988, p.229, at p.230.
- 14 See GN No. 163 of 31/8/84.
- 15 See Robert Martin, *Personal Freedom and the Law in Tanzania*, OUP, 1974, pp.107-8.
- 16 S.8(1).
- 17 David Williams, 'Law and Socialist Rural Development', *Eastern Africa Law Review* 6, 3 (1973), p.196
- 18 The urban population in Mainland Tanzania grew at the rate of 8.87 per cent between 1967 and 1978 (United Republic of Tanzania: 1988 Population Census: Preliminary Report, Dar es Salaam: Bureau of Statistics, n.d., p.5) while one house to house registration of the Dar es Salaam Region conducted in December, 1984 estimated the number of unemployed at 37.5 per cent of the total population of the region over 6 year old, (Daily News, 26/5/85).



- 19 S.2. The relevant sections of these statutes are reproduced in Martin, *op.cit.*
- 20 Ss. 176 & 177.
- 21 Written Laws (Miscellaneous Amendments) (No.2) Act, 1983.
- 22 Quoted in Shaidi, L. P., *Crime and Social Control*, *op.cit* p.343.
- 23 See *fn.* 18 above.
- 24 28/10/85, 19/10/85 & 30/10/85.
- 25 Shaidi, L.P., 'The Resettlement of Habitual Offenders in Tanzania', *Eastern Africa Law Review* 15, (1982):153-74 at p.155.
- 26 (1981) TLR 72
- 27 *Ibid.*, p.75.
- 28 Shaidi, 'Resettlement of Offenders', *op.cit.* p.157.
- 29 *Ibid.*, p.171.

## CHAPTER THREE

### LEGAL BUT ILLEGITIMATE COERCION - II

#### A. FORCED LABOUR

Forced labour was prohibited towards the end of colonialism in the Employment Ordinance, Cap.366, although excepting what it called 'minor communal services'. These 'services' were neither 'minor' nor 'communal'. In practice, they involved what in the colonial parlance was called, 'tribal turn-outs', involving thousands of men putting in tens of thousands of man-days every year to build the infrastructure of the colonial economy.<sup>1</sup>

With independence, a new exception was added to the definition of 'forced labour' which is still applicable. Thus 'forced labour' does not include 'any work to be performed by a person allotted or occupying land in accordance with customary law ... in order to comply with any lawful requirement of a local authority as to the cultivation of such land ...'.<sup>2</sup> This is a euphemism to provide legal authority for the so-called 'minimum acreage laws' under which peasants in rural areas, on pain of imprisonment, are required to cultivate certain acreage of food crops and cash crops.

Interestingly, while Article 25(3) of the Union Constitution outlaws forced labour, it makes certain exceptions. A free translation of Article 25(3) would read:

For the purpose of this Article, and in the Constitution as a whole, no labour shall be construed as forced or oppressive, if such labour, in accordance with the law, is:

- (a) labour whose performance is required in pursuance of a judgment or order of a court;
- (b) labour which is necessarily required to be performed by members of any armed forces in due fulfilment of their duties;
- (c) labour which any person may be required to perform in a state of emergency or calamity threatening the life or well-being of the community;
- (d) labour or any services which form part of:
  - (i) normal civic obligations to ensure the well-being of a community;
  - (ii) compulsory nation-building in accordance with the law;
  - (iii) national efforts to mobilise human resources in the interests of the national economy and to ensure national development and productivity.

The exceptions in clauses (a), (b), (c) and (d)(i) are standard, and accepted by international instruments, such as the International Covenant on Civil and Political Rights, 1966 (see Article 8(3)) and the ILO Convention on Forced or Compulsory Labour (no. 29; Article 2(2)). However, clauses d (ii) and (iii) are controversial. The ILO Convention on the Abolition of Forced Labour, 1957 (no.105), which has been ratified by Tanzania, specifically obliges any member country ratifying the Convention to 'suppress and not to make use of any form of forced or

compulsory labour - ... (b) as a method of mobilising and using labour for purposes of economic development;'. It is submitted that (d)(ii) and (iii) above squarely fall within this prohibition. We would suggest that d(ii) and (iii) should be narrowly construed by courts as simply further elaborating d(i) rather than adding anything substantially new, so as to harmonise the constitutional provisions with the treaty obligations of the country. If this interpretation is accepted, the compulsory cultivation by-laws and other by-laws made pursuant to the Human Resources Deployment legislation (to be discussed below) would be considered unconstitutional. Needless to say a closer scrutiny of the human resources deployment legislation shows that it is contrary to many rights and freedoms (right to equality and equal treatment before the law, Article 13; right to personal liberty, Article 15; right to privacy, Article 16; freedom of movement, Article 17; freedom to choose one's profession or job, Article 23; etc.) enshrined in the Bill of Rights, and indeed runs contrary to the very spirit of the Bill of Rights.

Finally, it is interesting to note that the Zanzibar Constitution of 1984 prohibits forced labour (Article 22(2)) without exceptions.

We now turn to discuss the legislation dealing with the so-called deployment of human resources.

\* \* \*

The Human Resources Deployment Act, 1983 (no.6) adds further ammunition to the armoury of 'forced labour' legislation. In wide-ranging powers, the Minister is permitted to take a census of all people, identify 'unemployed' and 'non-productive' labour and 'make arrangements which will provide for a smooth, co-ordinated transfer and subsequent employment of unemployed

residents'.<sup>3</sup> The Minister is also given a blank cheque under which he can arrange for the deployment of the persons 'chargeable with or previously convicted' of being 'idle and disorderly' persons and 'rogues and vagabonds'.<sup>4</sup> The implications of such a provision for the potential violations of the rights of the people - and obviously lower classes - are enormous. The Legal Aid Committee of the Faculty of Law, in its comment on these provisions, observed:

Anyone who is actually found guilty and convicted of being an idle and disorderly person or a rogue and vagabond is caught by the Minister's net of rehabilitation and full deployment. And as we have already seen, the category of idle and disorderly and rogues and vagabonds includes unemployed workers as well as workers who may have absented themselves from their place of work. But the provision goes even further. A person need not be proved guilty and convicted by a court of law of being an idle and disorderly or a rogue and vagabond. For anyone who is "chargeable" with the said offences can be caught in the Minister's net.

Even to a lawyer, the concept of persons "chargeable" with a given offence is a strange innovation and novel indeed. In law, there are two concepts and categories which are known and which can be objectively ascertained. The category of people who are actually charged before a court of law can be ascertained so can a category of people who are convicted before a court of law. But how does one ascertain, identify and verify a category of people who are chargeable with a given offence? Surely, the practical implication of such a concept is to open flood-gates to subjectivism, arbitrariness, personal whims and in-

deed prejudices of some implementor somewhere.

It is not far-fetched to say that virtually any citizen of this country can fall within the category of being chargeable with the offences under sections 176 and 177 of the Penal Code; therefore brand-able as idle and disorderly or rogue and vagabond and therefore subject to being rehabilitated and deployed by the Minister! Read literally, this law seeks to punish potential idlers and disorderly persons or rogues and vagabonds.<sup>5</sup>

The central organs that are supposed to effect the provisions of the Human Resources Deployment Act are local authorities, and they have already begun to do so in what can only be described as draconian by-laws. Since the colonial era, by-laws have existed providing for forced cultivation of certain specified minimum of food and cash crops, depending on particular areas. These laws have been on and off used by local administrators as and when deemed expedient. Under these by-laws, hundreds of thousands of peasants are fined and imprisoned besides being harassed and humiliated.<sup>6</sup> As one peasant put it:

I know what is best for me. I do not need imposed advice. Most of the young men who advise us have no farms and have no farming experience. They just sit in offices ... If I fail to meet my needs it is me and my family which will suffer and no body else, so the government should leave us alone ... The people to be prosecuted are thieves, burglars and murderers in towns, not us.<sup>7</sup>

But the 'government of the people', as the Tanzanian state is fond of declaring itself, thinks otherwise. Commenting on the

prosecution of some peasants in Mafia, the government's mouth-piece, the Daily News<sup>8</sup>, argued in its editorial:

The two hundred and thirty one individuals in Mafia are in the process of being prosecuted for neglecting their shambas. To some, this may appear harsh, arbitrary and even a miscarriage of justice. It is not: the individuals concerned are being prosecuted under bye-laws made by the development council of the area in question. The former local government councils also used to make various by-laws in accordance with the needs of their respective areas. Those who contravened those by-laws used to be charged ... The present development councils are people's instruments of development. It would be a gross abdication of responsibility on their part if they left development to stagnate or to be undermined by the bad behaviour of certain individuals under their jurisdiction. It is a grave abuse of freedom and crime against society for any Tanzanian to have a piece of land, cultivate it, plant it with crops and then leave those crops to die half-way by refusing to weed the shamba. This is what the 231 individuals in Mafia have done. They deserve to be punished.

That ordinary economic activity has to be enforced by criminal sanctions is much more a comment on the character of law and state that rule the neo-colonies than an expression of 'people's instruments' cajoling peasants to earn their own livelihood!

Be that as it may, since passage of the Human Resources Deployment Act and the regulations<sup>9</sup> thereunder, there has been a spate of by-laws to enforce its provisions. These regulations and

by-laws require cell leaders to keep elaborate records of residents (i.e. able-bodied persons above the age of fifteen years) in relevant areas: names, family details, employment status, etc. The law requires residents to notify their cell leaders of any visitors and guests received by them. Cell leaders must be notified of and record all departures, deaths, marriages, births and any other changes in the status or movements of the resident's family. If these regulations and by-laws were to function in practice, the situation could easily be described as bordering on a police state, and in gross violation of the various freedoms in the Constitution. Thanks to the notorious inefficiency of the state's bureaucratic machinery, however, such a system can hardly function on the ground. But on the other hand, its selective application, or the threat of it, does become a nightmare of harassment and humiliation while obstructing daily, legitimate activities of citizens, particularly in rural areas.

Some District Councils have gone even further and made self-help and community work compulsory and legally enforceable, without any pretense of respecting the 'due process' provisions of the Constitution. Thus the Mwangi District Council (Self-help and Community Development) By-laws, 1984<sup>10</sup> require every resident, except those exempted<sup>11</sup>, to participate in self-help and community work so designated from time to time by the Council or Village Committees.

Any person who is bound by any provisions of these by-laws to participate in the self help and community development works through any means and failed to do so, the village council shall require him to pay a fine of shillings 200/- or extort his property equivalent to shillings 200/-; if the said property exceeds shillings 200/- shall be kept in safe custody and require the owner to pay the said fine in two days time. On failure



to pay that fine, the property extorted shall be sold by village council by auction and deduct shillings 200/- in favour of the village as a fine and remit the exceeding amount to the owner.<sup>12</sup>

This extra-ordinary provision is a dramatic reflection of the total disregard of even elementary provisions and principles underlying the Constitution or rule of law. The legislature (the Village Council, the District Council's delegatee) is at the same time the judge, who imposes punishment without any trial and executes it by distress, thus also acting as the sherriff. To add insult to the injury, the next provision declares such 'extortion' a 'just and final punishment'!<sup>13</sup>

As many researchers have noted, it is a fact of daily life that the implementation of the so-called deployment exercises, appropriately called in Swahili 'Nguvu-Kazi' [literally forced labour?!], are a long nightmare of harassment, beating, extortion of bribes etc. from ordinary citizens by the organs and officials of the state.<sup>14</sup>

## **B. DETENTION AND DEPORTATION**

The Preventive Detention Act, 1962, Cap.490, and the Deportation Ordinance, Cap.38, allow virtually indefinite incarceration of individuals without trial. The former is a post-independence statute while the latter has been taken over from colonial times. That the two exist side by side, and, as we shall see, have been used alternatively and concurrently, is in itself a comment on the continuity between colonial despotism and neo-colonial authoritarianism.

The official rationale behind Preventive Detention, as incessantly proclaimed in media and speeches, is that it is a measure

against a few elements bent on disrupting the security and stability of the state and the people of Tanzania. This propaganda seems to have been so successful that many forget all the empirical evidence of the last twenty-five years, which shows that the Act has been used largely to intimidate and politically demobilise initiatives of the large masses of the people. Even worse, it has been used by police to short-circuit the procedures of the court against alleged smugglers, saboteurs, gongo-drinkers etc.<sup>15</sup> Yet it continues to exist on the statute book, and even after the 1984 Bill of Rights, there has been obvious reluctance to repeal it.

The Act empowers the President to detain a person who, in the President's opinion, is conducting himself, or to prevent him from conducting himself, 'so as to be dangerous to peace and good order in any part of Tanganyika, or is acting in a manner prejudicial to the defence of Tanganyika or the security of the State'.<sup>16</sup> Before 1985, such order could not be challenged in a court of law, although it was required that the detainee be informed of the reasons for his detention within fifteen days.

The Preventive Detention (Amendment) Act, 1985, (no.2) gives a detained person right to challenge its legality in a court of law on any ground. Furthermore, if a person is not informed of the grounds for his detention within fifteen days, he shall be released immediately. The Act which previously did not apply to Zanzibar, has been amended to apply 'throughout the United Republic'.

So far the amendment has not been tested in court. In one case, though, where the detainees had challenged their detention and the amendment may have come under judicial scrutiny, the Republic produced a rescission order on the day of hearing and informed the court that the detainees were being held under the

Deportation Ordinance. The Judge therefore dismissed the petition on the ground that the subject-matter of the application, the detention order, had ceased to exist.<sup>17</sup> In a number of cases, the state has used the Deportation Ordinance to detain a person whose detention under the Preventive Detention Act was challenged or whose release was ordered by the court for some irregularity.<sup>18</sup>

Where detentions have been challenged in courts, the typical attitude hitherto has been to see if the order bears the Public Seal and the signature of the President.<sup>19</sup> Once that is shown, courts have refused to go beyond. As a matter of fact they have refused to invalidate a detention order even where it has been shown that reasons were not given within fifteen days or that the detainee was not shown the order on arrest.<sup>20</sup> In this regard, the courts have been over-positivist. Where a bold judge has dared to free a person because the order was signed by the Vice-President, and not the President, as in the case of *Ndenai*<sup>21</sup>, such persons have been immediately arrested on stepping out of the court and detained under the Deportation Ordinance.

It appears that the common practice of the police has been to detain a person first and then obtain a detention order from the President. Thus in the case of *Ex parte Saidi Hilali*<sup>22</sup>, Hilali was arrested and detained on 11 September 1979 while the detention order was signed on 2 October 1979. In *Muhidin Saidi Gongo v R*<sup>23</sup>, Gongo was detained in September 1979 while the order was dated three years later, 3 November 1982. Again in the case of *Ex parte Mapalala and Udindo*<sup>24</sup>, their counsel complained that the applicants had been detained prior to 30 October 1986, the date of the order. The worse happened in March 1983 during the 'operation' against the so-called 'economic saboteurs', when people were detained en masse under the Preventive Detention Act. It is believed the police had blank orders signed for them wherein they

just filled in names.

A month after the 'operation' against 'racketeers and economic saboteurs' began, some 1,139 people had been detained under the Preventive Detention Act.<sup>25</sup> Later a special law, the Economic Sabotage (Special Provisions) Act, 1983 (no. 9)<sup>26</sup>, was passed creating special tribunals to try alleged saboteurs. And the then President, Mwalimu Nyerere, went on record arguing that the 'racketeers' engaged lawyers to 'twist the law in their favour' and therefore the government hesitated to take the 'culprits' to courts of law.<sup>27</sup>

Besides the Preventive Detention Act, District and Regional Commissioners under the District Commissioners Act, 1962, Cap.466, and the Regions and Regional Commissioners Act, 1962, Cap. 461, respectively, have powers to arrest and detain a person for forty-eight hours if he has 'reason to believe that [such] person is likely to commit a breach of the peace or disturb the public tranquility, or to do any act that may probably occasion a breach of the peace or disturb the public tranquility, and that such breach cannot be prevented otherwise than by detaining such person in custody, ...'. These powers, too, have not been without abuse, as the case study below shows. Interestingly, in a Parliamentary debate the Minister of Justice and the Attorney General opined that such powers of detention were not in breach of the Bill of Rights<sup>28</sup> for, it was argued, individual rights had to be balanced against public interests.

In an amazing speech reported in the government paper recently<sup>29</sup>, the former President of the Republic and the Chairman of the ruling party, Chamacha Mapinduzi, Mwalimu Nyerere, called upon Regional Commissioners in Zanzibar and Pemba to use their powers of detention to detain political 'detractors' (term used

to describe those who have dared voice demands for greater autonomy for Zanzibar and question the highhanded actions of the Party or leaders). He advised them that they could renew 'the 48 hour detention of a given culprit as often as necessary' and that under the law 'RCs may seek presidential approval to hold the culprit for longer period.' (This newspaper report has not been rebutted).

We call this speech 'amazing' for the disregard, to say the least, it displays towards law, its spirit and the freedom of the individual. Firstly, as a Chairman of the Party, the speaker, with due respect, had no jurisdiction to issue such directives. Secondly, the power of detention referred to could only be that stipulated in section 79 of the Zanzibar's Local Government (District and Urban Authorities) Act, 1986 (no.3) in which case it falls squarely within the jurisdiction of Zanzibar and its President. Thirdly, no respectable court would countenance renewal of detention 'as often as necessary' under section 79 (as was apparently advised by the Chairman of the Party) for it would amount to abuse of power, even if a court was to hold that the Regional Commissioner's power of arrest and detention did not offend the Bill of Rights in the first place. And, finally, in law, neither the President of the Union nor of Zanzibar has authority to approve the detention of a person detained by a Regional Commissioner beyond 48 hours.

## **Deportation**

The Deportation Ordinance empowers the President to deport any person from one place in the country to another if he is satisfied that such person is conducting himself 'so as to be dangerous to peace and good order in any part of Tanganyika, or is endeavouring to excite enmity between the people of Tanganyika and the Republic, or is intriguing against the Republic's power and authority in Tanganyika ...'.<sup>30</sup> While awaiting his deportation, such

person may be detained in custody or prison 'until fit opportunity for his deportation occurs'.<sup>31</sup> Deportation orders cannot be challenged in a court of law.

Once again, the police have used this to detain people that they feel cannot be charged in a court for lack of evidence, and many times as sheer harassment. Alleged cattle rustlers and other offenders have been detained and deported in their hundreds under this legislation.<sup>32</sup> It has been used against persons who have dared question the political system (e.g. Mapalala case). A Muslim sheikh was deported from Dar es Salaam to Zanzibar under it for 'unspecified' reasons.<sup>33</sup> The Ordinance has also been used to continue detaining a person whose detention has been challenged under the Preventive Detention Act as happened in the Ndenai and Mapalala cases<sup>34</sup>.

After having survived on the statute book for some forty years of colonialism and some twenty-eight years of independence, the Ordinance was declared unconstitutional by the High Court in 1988 in a remarkable judgment delivered by Mwalusanya, J.

In the case of *Chumchua s/o Marwa v Officer i/c of Musoma Prison & The Attorney General*, the applicant's father, together with 155 others, was detained on 29/9/87 pending deportation from Mara to Lindi region. His son filed a habeas corpus application five months later while his father was still under detention. Mwalusanya, J. considered the Deportation Ordinance in the light of the Bill of Rights, and particularly Article 13(6)(a), which enshrines the principles of natural justice of the right to be heard and the right to appeal. He argued that on both these grounds the Deportation Ordinance was offensive, and therefore unconstitutional and declared it to be null and void.

The Judge also considered the effect of the derogation clauses, i.e. Article 30(2). Arguing that a Bill of Rights must be given 'generous and purposive construction' in favour of fundamental rights, Mwalusanya, J. held that the burden was on the state to show that the offending legislation could be rescued under the derogation or limitation clauses. He said:

[T]he overriding of rights and duties of the individual by rights and duties of the community [stipulated in Article 30(2)] does not entail 'arbitrary action' on the part of the community or its institutions. ...[T]he restriction to protect communal rights has to be done according to law. But it is not enough for the party supporting the legislation to be able to point to 'a law' in the sense simply of an Act duly passed by the legislature. If the Act relied on should be declared inoperative as violating a fundamental constitutional right it is not 'law'.<sup>35</sup>

This approach is undoubtedly most refreshing and one hopes will be upheld by the highest court, the Court of Appeal, in an appropriate case.

\* \* \*

We now move on to some case studies which illustrate the use of the legislation discussed in this section in practice.

## **Case Study 2: Deportation**

Saidi Hilali, with a number of other persons, was charged in the District Court of Utete with offences relating to unlawful dealing in government trophies and failure to report the possession of government trophies. While the case was still pending and they

were out on bail, Hilali was arrested on 11 September 1979 and held in custody. In an application for habeas corpus filed on his behalf, the Commissioner of Prisons did not produce him in court, as the law requires him to do, nor did he appear in person, but simply sent a photocopy of a deportation order signed by the President and dated 2 October 1979. The said order, among others, contained Hilali's name and they were supposed to be deported to an unspecified place. The judge threw up his hands in helplessness holding the detention to be valid and unchallengeable in courts.<sup>36</sup> He expressed hope that such powers will not be abused! The Judge continued:

It is conceivable that certain law enforcing authorities may resort to deportation orders as mere convenience even in a matter which could be a normal criminal case for the courts. Sometimes, if the several applications for a Writ of Habeas Corpus that have been dealt by the High Court in the recent months are anything to go by, one does get an uneasy feeling or suspicion that there is possibly a coveted desire by certain officials in the government to demonstrate power and authority by rushing to the President for deportation orders. I prefer to say no more on these anxieties.<sup>37</sup>

### **Case Study 3: Detention**

Two brothers, Dushom Susa Yamo and John Yamo, were detained on 30/3/85 and remanded in Tarime prison on allegations of possessing ammunition but no charges were preferred against them. When their houses were searched nothing illegal had been found in them. The same persons had been detained in July 1984 and released in December 1984, after their brother had complained to the Regional Commissioner. This time around their



brother filed a habeas corpus application.<sup>38</sup> The Commissioner of Prisons did not appear before the court but the two detainees were brought by a prison warden. John Yamo stated their plight thus:

Last year in July on 11th I was arrested. I was remanded till 16/12/84 when we were released. On 30/3/85 I was arrested again and sent to Tarime Police station where I was locked up for five days. After five days I was released on 5/4/85. I was told to go home but I was required to report back on 9/4/85. I reported as I was told by O.C.D. Tarime. When I reported as I was told, the O.C.D. asked me whether last year I had been arrested. I told him that I had been arrested and I was released by himself. The O.C.D. told me that my problem was a difficult one and I would be locked up. The O.C.D. told me to stop "maneno" [blabbering]. Since then I have been in remand. I have not been told what offence I have committed.

The state attorney was given a copy of the deportation order which had 280 names, among which the two names of the applicants also appeared. But the deportation order was dated 24 September 1983, while the arrests had been made on 30 March 1985, and in between they had been arrested once and released. Since the relevant government officials did not appear, there was no one to give explanation. The Judge assumed that their first arrest and detention must have been under the deportation order, but since they had been released that order lapsed. And since there was no fresh order, the second arrest and detention were illegal. He ordered their immediate release.

What is probably most frightening about this case study is the number of people involved. True, these two brought the application to court through their brother, who happened to work in the Ministry of Justice, and were fortunate to be released. But what

about the other 278 who were part of the original deportation order? No one knows and no one would know; nor is it the court's business to enquire after those who are not before it!

#### **Case Study 4: Detention by Regional Commissioner**

In the case of *Hamisi Masisi & 6 Others v R*<sup>39</sup>, the accused had been granted bail on 14/12/78 by the Resident Magistrate of Musoma, and two days later the same Magistrate cancelled the bail although the state attorney, appearing on behalf of the Director of Public Prosecution, had produced no fresh reasons for his application to cancel the bail. The Magistrate was, however, informed by the accused's counsel that his clients had been detained by the Regional Commissioner soon after they had been released on bail. The Magistrate therefore felt that it would be futile to grant them bail again, since the Regional Commissioner might rearrest the applicants. Furthermore, he wanted to avoid what he called 'conflict of powers' between the executive and the judiciary.

On review by the High Court, Mfalila, J. deplored the action of the Regional Commissioner as being unlawful and a gross interference with the judicial process and the independence of the judiciary. Commenting on the cancellation of the bail by the Magistrate, Mfalila, J. said:

The Resident Magistrate was wrong... . He is not supposed to make judicial decisions on expediency. His is a judicial office in which he is supposed to act only in accordance with the law despite any irrelevant pressures that might be applied on him. I note with regret the helplessness which the Resident Magistrate exhibited in the face of these pressures from the executive. So long as the executive is manned by

ordinary human beings who are bound to exhibit excesses in their enthusiasm to serve the Republic, he should expect such conflicts and pressures, and his duty is not to succumb as he did, but to stand firm in defence not only of the people brought to his Court, but also the Constitution and practices of the United Republic as by law established. ...

Next I will consider the question posed by the Resident Magistrate namely whether it is appropriate for the executive branch of Government in this case a Regional Commissioner to order detention of an accused person for an offence the same accused is charged with in Court in disregard of the Court's order that the same accused be admitted to bail. Quite clearly the answer is no ... . [I]t having been decided to take the applicants to a Court of Law, then only the rules applicable in the administration of justice became applicable and in their application the Court concerned should not be under any influence or pressure from any quarter, in other words the entire judicial machinery, the prosecution, the defence, the Court and the subject of the proceedings, i.e. the accused persons should be free from harassment however well intentioned. This is the meaning behind the concept of the independence of the judiciary. This concept is part of the laws of the United Republic.<sup>40</sup>

\* \* \*

Finally, together with the enactment of the Bill of Rights, the Preventive Detention Act was amended. Apparently, the legality of a detention order can now be challenged before a court of law on any ground; the detainee has to be given reasons for his detention within fifteen days, if not, he has to be released and the

Act, which previously did not apply to Zanzibar, is now made applicable to the whole of the United Republic. What looked like some 'gains' have been somewhat nullified. Be that as it may, it remains to be seen whether (1) with these amendments the Preventive Detention Act will be accepted by the judiciary as within the Bill of Rights<sup>41</sup> and if accepted (2) how far the judiciary will go in its scrutiny of a detention order when such an order is challenged. Further, as we saw in the Mapalala case above, there seem to be some signs that the state will continue to use other legislation, such as the Deportation Ordinance (may be after some amendment), in spite of Mwalusanya, J.'s strictures in Chumchua<sup>42</sup>, to defeat these amendments in the Preventive Detention Act.

- 1 Shivji, I.G., *Law, State and the Working Class in Tanzania: 1920-1964*, London: James Currie, 1986, pp.124-25.
- 2 S.14 of Act No.82 of 1962.
- 3 S.17(1).
- 4 Ss. 26 & 27.
- 5 Legal Aid Committee, Faculty of Law, University of Dar es Salaam, *Essays in Law and Society*, Dar es Salaam: 1985, p.77-8.
- 6 See generally Shaidi, L.P., *Crime and Social Control*, op.cit. pp.390 et.seq. and Williams, D.V., 'State Coercion against Peasant farmers: The Tanzanian State', *Journal of Legal Pluralism* 20 (1982).
- 7 Quoted in Shaidi, *ibid.*, p.391.
- 8 13/8/74, quoted in *ibid.*, p.380.
- 9 GN No. 19 of 31/1/86.
- 10 GN No. 72 of 18/3/88.
- 11 The category of exempted persons includes full time employees of the government, the Party, parastatals, private companies and other institutions; disabled and elderly over 55 years old and 'any other person with a lawful permit issued by the Council'; by-law 6.
- 12 By-law 7. Mistakes of construction are in the original.

- 13 See also similar provisions in GN 52 of 4/3/88, Newala District Council; GN 169 of 17/6/88 Mafia District Council and GN 291 of 16/9/88 Tabora District Council.
- 14 See, for instance, Mwarijabala, E.D.G., Implementing the Policy of "Nguvu Kazi", the case of Dar es Salaam Region, M.A. Dissertation, 1987, University of Dar es Salaam.
- 15 See articles in the Special Issue of the Eastern Africa Law Review, vols.11-14 (1978-81).
- 16 S.2(1).
- 17 This is the case of James Mapalala & Athumani Upindo reported in the Daily News, 31/10/87.
- 18 See fn. 21 below.
- 19 John Quigley, 'Cases on Preventive Detention Act', Eastern Africa Law Review 11-14, pp.326-70.
- 20 Ibid. See the case of James Mapalala below.
- 21 Lesinoi Ndenai and Anor. v R, High Court Criminal Applications Nos. 22 & 23 , 1979, Arusha, (unreported).
- 22 High Court at Dar es Salaam, Misc. Criminal Application No. 44 of 1979, (unreported)
- 23 High Court at Dar es Salaam, Misc. Criminal Application No. 18 of 1983, (unreported)]
- 24 High Court at Dar es Salaam, Misc. Criminal Cause no. 30

of 1986, (unreported)

- 25 Shaidi, L.P., *Crime and Social Control*, op.cit.p.353. The rest of the information on 'economic sabotage' is from this source.
- 26 See also *Economic Sabotage (Special Provisions) Act, 1983, No.10 of 1983*. These Acts have now been repealed and replaced by the *Economic and Organized Crimes Control Act, 1984, No.13*, which has brought the adjudication of the so-called 'economic crimes' within the mainstream judiciary. While the economic sabotage legislation lasted, it was never challenged on constitutional grounds even though it had virtually created a parallel system of adjudication without the usual 'due process' safeguards. In a moot court organized at the University of Dar es Salaam and presided over by a Court of Appeal Judge (the late Mwakasendo, J A), the "Court" quashed the proceedings of an Anti-Economic Sabotage Tribunal on the ground of bias. The applicant had alleged that the Tribunal included a Member of Parliament as one of its lay members who had participated in, and supported, the passage of the Economic Sabotage legislation. (Incidentally, the facts of the moot problem were based on a real case).
- 27 Quoted in Shaidi, L.P., *Crime and Social Control*, op.cit. p.356.
- 28 Daily News, 22/7/88
- 29 Sunday News, 5/3/89
- 30 S.2.
- 31 S.5.

- 32 See, as an example, the Chumchua case discussed below.
- 33 Sheikh Mohammad Nassor Abdulla v The Regional Police Commander & 2 Others, [1984] TLR 598 (draft TLR)
- 34 Daily News, 31/10/87.
- 35 P.8 of the cyclostyled judgment.
- 36 But In the Matter of Detention of Winfred Ngonyani [1982] TLR 272 Biron, J. held the deportation order invalid because it had failed to specify the place to which the deportee was to be deported. And in Sheikh Mohammad Nassor Abdulla the Court held a deportation order invalid because the destination was Zanzibar i.e. outside the territory (Tanganyika) specified in the Ordinance. Hilali was of course decided before these cases, and although the attention of the Court was drawn to the fact that the destination was unspecified, Mroso, J., while conceding that this was a 'significant lapse', nevertheless held that it was not a fatal irregularity. With respect, this ought not to be considered good law any more, in the light of the two cases decided later.
- 37 Pp.3-4 of mimeographed copy.
- 38 In the Matter of the Detention of Dushom Susa Yamo and Another, Misc. Criminal Cause No. 7 of 1985, High Court at Mwanza, (unreported).
- 39 [1984] TLR 751 [Draft Law Report]
- 40 Ibid., at 759-60.
- 41 Mwalusanya, J. in Chumchua commented obiter that the 1985



the minimum standards ..., though it still remains to be tested in courts as to whether that is all that has to be covered in this delicate field'. (p.14 of the cyclostyled Judgment). It will be a step backwards from the Constitutional Debate of 1983, which overwhelmingly came out against preventive detention, if the courts were to hold the amended Preventive Detention Act as being consistent with the Bill of Rights.

- 42 Although Mwalusanya, J. declared the Ordinance invalid on narrow grounds of infringing the right to be heard and the right to appeal, it is submitted that the whole of the Ordinance is inconsistent with several freedoms and rights stipulated in the Bill of Rights such as the freedom of movement and right of choice of residence (Article 17), right to be heard by an impartial judicial or quasi-judicial tribunal (Article 13(3), etc., and therefore cannot be rescued by some amendments.

## CHAPTER FOUR

### ILLEGAL COERCION

This refers to the use of coercion, depriving a citizen of his right to life or liberty, by an individual member of an organ of the state beyond that authorised by law. Such incidences happen on two levels. The first level is where the militia and the traditional army, occasionally national servicemen, and usually the police, come into contact with citizens, particularly when on patrol duties, at road-blocks or when searching and arresting etc., on suspicion. Here there are numerous reported and unreported cases of beating (up to death), harassment and molestation. It seems the police and militia on patrol are heavily armed, trigger-happy and reckless with their arms, as a number of court cases show<sup>1</sup>. In the case of *R v Abdallah Bakari Lugendo*<sup>2</sup>, the accused militiaman on normal patrol duty was armed with a she-gun which had twenty-eight live bullets. He shot dead an alleged hooligan who had attempted to escape. The bullet got the deceased in the stomach. Sentencing him to four years imprisonment on his own plea of guilty to the charge of manslaughter, the Court observed:

Most unfortunately instances of militiamen becoming trigger happy are on the increase and this must be curbed. It is admitted that the deceased misbehaved himself but at the same time had the accused been on the alert all the time as he was expected to be this incident would have been avoided. Secondly the accused could have fired a warning shot first and then aim at the legs.<sup>3</sup>

The same court in another case sentenced a 23 year old militiaman to death for killing instantly two persons who had

refused to stop when ordered to do so.<sup>4</sup> The Judge described the action as 'reckless'.

There are also numerous complaints against 'development levy' collectors who are alleged to harass, beat up and generally molest people in the course of collecting this hated tax. ('Development levy' is a kind of poll tax which was reintroduced amidst protests by parliamentarians in 1986.) The following story in the government newspaper Daily News reporting a complaint by a parliamentarian is typical:

The Government has been asked to throw an eye on Liwale District council officials who in their efforts to collect levy harass, beat up and detain people for long hours without food or water.

Lt. Col. Abbas Ngayaga (Liwale) told the National Assembly in Dar es Salaam yesterday that the people of Liwale were disheartened because the Government seems to approve such acts.

He said he had in the last budget session pleaded with the Prime Minister and first Vice-President, Ndugu Joseph Warioba, to take corrective measures against Liwale Council officials, but up to now nothing had been done.

In a terse speech, the MP said council officials ordered militia men to search for levy defaulters in villages. But upon arrival in the villages, the militia men did not bother to contact village leaders but went into people's homes and arrested them indiscriminately, he charged.

He said sometimes they follow women in shambas and arrest them or beat up children found in the homes without their parents.

He said the people of Liwale, like all Tanzanians, wanted to play a part in the country's development by paying levy 'but how can we like the levy when our mothers, wives and children are manhandled', he asked.

He said besides, the Liwale Council was doing very little to promote developing the district. He said the money collected from the people as levy was mainly used for administrative purposes.<sup>5</sup>

\* \* \*

The second level is where a person has been arrested and held in custody for interrogation or for some other reason, and is subjected to torture, beating and harassment. This is known to occur, and occur quite often, but is not usually reported and, it appears, the violators are rarely prosecuted by the state.

In the table below I have picked 28 incidences of the first kind reported in the Daily News between 1981-87. In the majority of the cases these reports found their way into the newspaper at all because the culprits were actually prosecuted in the High Court. Even then there are numerous cases, particularly in lower courts and in the High Court stations other than Dar es Salaam, which do not get reported, and numerous others which never see the doors of a court-room. One knows and hears through the grapevine about them, and has also witnessed them in daily life, either professionally or as a citizen.

Over the last two years a spate of letters from citizens complaining of police beating and harassment have found their way into the newspapers.<sup>6</sup> In one letter a reader enquired as to what had been done to the policemen and national servicemen who, on November 16, 1987 had rounded up some residents of

Mwanayamala in Dar es Salaam. They were armed with ‘machine guns, clubs, army belts and Police dogs...’

We were beaten and taken as prisoners to the CCM office at Mwananyamala (Kambangwa) where we were beaten again and taken to Oysterbay police Station. At Oysterbay police Station we were piled up at the back yard and in the morning they checked our I.D. cards and later allowed to go!<sup>7</sup>

In another story, 12 policemen took upon themselves to raid Msasani, a suburb of Dar es Salaam, beating viciously residents and passers-by, apparently as the measure of revenge, because one of them had been beaten up the previous night. Some ten people were severely injured.<sup>8</sup>

Thus the table is a far cry from being representative, especially in terms of the extent of the abuse. It is only the tip of the ice-berg. The ice-berg must be massive for, even the otherwise complacent government officials, have been occasionally forced to sound warnings.<sup>9</sup>

On the other hand, I believe, in other respects the table is a fair representation of various aspects of this violation. It occurs in villages as much as towns; in villages probably often on a more massive level - but unknown - while in towns more on individual level. Victims of these violations cut across all sections of the population but, obviously, the abuse affects much more the lower classes who, socially, economically and politically, have the least clout and virtually no social status, which are the biggest deterrents in such cases. Furthermore, these incidences are not simply minor irritants or harassment but gruesome beating, torture and deaths. In the incidences recorded in the table, there were over 40 per cent of deaths. Very often the beating and torture involve

**VIOLATION OF LIFE THROUGH THE ILLEGAL USE OF FORCE  
BY INDIVIDUAL AGENTS IN THE STATE ORGANS OF FORCE: 1981-87  
(some incidences)**

Out of 28 Incidences	PLACE OF OCCURRENCE		TYPE OF INJURY				CATEGORY OF VICTIM					ORGANS OF FORCE					
	Towns		Villages	Death	Beating	Harassment	Injury through Negligence	Villagers	Workers	Youth, Students	Journalists	Others*	Militia	National Service	Police	Sungu-Sungu	Party
	Dar es Salaam	Other															
NUMBER	10	10	8	12	6	8	2	8	2	5	3	10	9	3	16	2	3**
PERCENT	36	36	29	43	21	29	7	27	7	18	11	36	32	11	33	7	11

**SOURCE:** Daily News

**Notes:** \* Includes commuters at road blocks, residents and neighbourhoods.

\*\*The total of this does not add up to 28 (100%) because in some incidences more than one organ was involved.

degrading and inhuman treatment such as squeezing of a male's private parts, beating with rifle butts or striking on the head with truncheons. One letter in a newspaper, for instance, complained that the male police in Mufindi had investigated women workers of the paper factory at Mgololo by undressing them. The writer described this as 'beastly'.<sup>10</sup>

Finally, as the table shows, the organs of the state most involved at this level are the militiamen, the traditional army and the police. It is interesting that, particularly in villages, Party people - village chairmen and secretaries - also get involved in this type of behaviour, very often in their capacity as the leaders of the militia and implementors of various government and state 'operations' and directives. The following case studies have been selected to illustrate what is represented generally in the table.

### **Case Study 5: Death in Bagamoyo<sup>11</sup>**

In or around February 1982, an 'operation' was mounted in Vigwaza Village, Bagamoyo District to search and 'net' (to use the official media parlance!) those who had not cultivated four acres of shamba in accordance with the directive of the village council. This 'operation' was a local affair. The village CCM chairman testified that the usual procedure was that ten-cell leaders would report those who had not complied to the CCM office and the ward secretary would then decide on the steps to be taken. In this particular 'operation', search was conducted by the chairman and the secretary; those apprehended were brought to the CCM office for interrogation while they were being guarded by militiamen. The militiamen had obtained truncheons from the local police station for the purpose.

Two of the militiamen, including the accused, instead of guarding the CCM office went on their own to conduct further search. They came across two persons, including the deceased, selling pineapples at a 'genge' (stall). On seeing the militiamen, the deceased took to heels chased by the accused. The accused eventually caught up with him and severely beat him with a truncheon. After a couple of hours the deceased died.

The accused was first charged with murder but later the charge of manslaughter was substituted. The court found that the search and arrests were lawful as they had been conducted under the authority of the local militia commander, the Party Secretary. But the second search done by the militiamen themselves was unauthorised. The accused was found guilty and sentenced to imprisonment.

It is interesting that neither the counsel nor the Court ever addressed their minds to the legality or otherwise of the militia per se which, as argued earlier, is doubtful.

### **Case Study 6: Tortured to Blindness<sup>12</sup>**

Scarion Bruno was arrested on 23 December 1981 on suspicion of having encashed a cheque fraudulently. He was kept in remand for three days [i.e. exceeding the legal limit of 24 hours] before being sent to court. He was refused bail and remanded in custody until 11 January 1982. While in custody he was interrogated during which he was beaten severely. One of his interrogators hit him with a pistol butt hurting his eye. He was not provided with any medical attention. On 26 February 1982 he asked for a form which would allow him to get medical treatment but was refused one. When Bruno was released on bail he went to the Muhimbili hospital on his own where he was admitted on 13 January 1983 for a month.



The medical report mentioned that on admission, the patient had 'an ulceration of corne of his Right Eye. At that time he could only perceive light'. 'He was treated and discharged from our ward on 10/2/83 and continued with outpatient treatment. The ulcer healed with scar formation and up to now he can only perceive light with that eye.' In another medical report dated 15 August 1984 it was said: 'He has a corneal opacity of the "Leucoma" grade in his right eye. He has lost all vision in his [sic!] that eye. This is equivalent to 30% total permanent incapacity.' At that time Bruno was 38 years old.

Around June 1984, Bruno sought assistance of the Legal Aid Committee of the Faculty of Law. Correspondence between the Committee and the Attorney General's Office ensued. In December 1984 the Committee filed a plaint in the High Court but had to await consent of the Attorney General<sup>13</sup> before the case could proceed. More correspondence ensued. While still waiting for the consent, Bruno 'protested' with his life. He died sometime in September 1987.<sup>14</sup>

### **Case Study 7: 'Nationality' Oppression.<sup>15</sup>**

In this case ten persons of Wagunya (hailing from Tanga) and Wasomali (all born in different regions of Tanzania) nationalities, all resident for long periods in Songea and Tunduru Districts, were applying to the High Court at Songea for orders of certiorari and mandamus.<sup>16</sup> The applications were filed against the District Commissioners of the Songea and Tunduru Districts and the District Executive Director of the Tunduru District and the Town Director of the Songea Town council.

The order of certiorari was meant to quash the orders of the District Commissioners ordering the applicants to leave Songea

and Tunduru by 30 June 1987 and return to their 'homes'. The order of mandamus was prayed against the Executive Director and Town Director who had refused to grant them renewal of their business licences for 1987/88, to grant such licences.

Before the Court the District Commissioner of Songea District testified that Wagunya and Wasomali 'tribes' were suspected of being involved in illegal trade in government trophies and therefore, on orders from the Regional Commissioner, it had been decided not to renew their licences. Thus put out of business, they were then ordered under the Townships (Removal of Undesirable Persons) Ordinance, Cap.104, to leave Songea and Tunduru.

After reviewing the evidence before him and the applicable laws, Justice Rubama came to the conclusion that the authorities concerned had exceeded their jurisdiction and powers. That they had no legal authority to refuse granting of licences on racial or tribal grounds. Furthermore, the applicants were not caught by the relevant law on removals because they were not, among other things, persons who did not have reputable means of livelihood. The Judge therefore invalidated the removal orders and ordered the relevant authorities to consider the applicants' applications for the renewal of their business licences.

### **Case Study 8: 'Police in Duga-Maforoni are oppressing us'**

The following is a translation of a letter which appeared in Uhuru on 5 December 1987. It describes in gory detail the kind of harassment and molestation that villagers are subjected to in some parts of Tanzania.

Brother Editor,

The Police and militia here in Duga Mafaroni - on the border between Tanzania and Kenya - are oppressing us, citizens. For example, we are forced to go to bed before 8.00 p.m. and they ensure that water in the village is available only to the police station [after that time].

Travellers through Duga Mafaroni are also harassed a lot by the beastly behaviour of the police. For instance, on October 14, 1987 four baskets full of lemons were confiscated from a certain person allegedly because they were supposedly from Kenya. He was whipped and forced to trim grass at the police station.

On October 20, 1987, Brother Tembo was deprived of his one and a half sack of second hand clothing while he was travelling in the Kidato bus which plies between Dar es Salaam and Mombasa. This happened in Mbuluni village. He was accused of 'exporting' the goods to Kenya but then the distance from the place where his goods were confiscated to the border is some ten kilometers. And he does his business within five kilometers of the village where he lives. Now, if it is illegal to sell second hand clothing within a village how come such business is being done everywhere in Dar es Salaam?

Then, one day one girl (Mwanaidi) was thrown into a cell for two whole days and forced to scrub the floor with her bare hands and to trim the grass in the station compound. She was subjected to this punishment apparently because she had asked to be paid for her fried fish consumed by a policeman.

On August 15, 1987 a Masai from Tanga was picked up because he was found with 25000/- Tanzanian shillings. He was brought to the police station, whipped and subjected to other torture. Before being set free he was deprived of 15000/- shillings.

A similar incident happened to a trader of Duga Mafaroni, Brother Chikobe, on November 8, 1987. He was found with 30,000/- on his way to Tanga to buy merchandise. He was told that there was no law in Tanzania permitting any person, except a Bank, to move around with that much money. He too was whipped ('mikia ya taa'<sup>17</sup>) and forced to cut grass in the station compound. And before he was set free a sum of 17000/- shillings was confiscated from him.

### **Case Study 9: The Kilombero Killings<sup>18</sup>**

On 27 July 1986 some 500 sugar cane cutters at the Kilombero Sugar Plantations in the Morogoro Region refused to go to the fields demanding explanation for short payments. It is believed that the workers gathered at the main gate of the factory and prevented Company officials from entering. It is also believed that there was some stone-throwing and a windscreen of one official car was broken.

It seems that the company officials and the local police station sent messages to the Regional Police Headquarters in Morogoro. The Regional Police Commander (R.P.C.), with the approval of the then Regional Commissioner, immediately despatched a contingent of 10 Field Force Unit soldiers under the command of the Regional Crimes Officer (R.C.O.). The FFU contingent was armed to the teeth.

On arrival at the scene, it seems from all evidence, the FFU first

fired some tear gas bombs, thus dispersing the crowd, and immediately followed up by firing live bullets indiscriminately and chasing and pursuing the protestors to their places of residence (camps). Some four persons were killed as a result and 16 other severely wounded.

The tragedy sent shock-waves through the nation. It was the first time since independence that workers had been killed summarily in a labour dispute. The news broke out in the capital city two days later while the Parliament was in session. The Legal Aid Committee of the University of Dar es Salaam, in a first public reaction, issued a statement condemning the wanton killings and calling for immediate formation of an impartial and independent judicial commission of inquiry which would conduct its hearings in public. Some members of Parliament followed suit and demanded explanation<sup>19</sup>.

After some two weeks, the Minister for Labour appointed a Tribunal to investigate. It was headed by a High Court Judge. Two of its members came from the Department of Labour; one from the ruling party; one from the official trade union and one the Director of the Criminal Investigation Department. The Tribunal does not seem to have conducted its hearings in public and its report and recommendations have not been published. However, some of its findings have filtered through to researchers.

The Tribunal rejected the explanation of the FFU commanders that they had fired in self-defence. The Tribunal found that the firing was reckless and that, as a matter of fact, the FFU soldiers actually pursued the workers into the surrounding houses. Thus one person was killed while hiding in a kitchen; the other in a toilet. The Tribunal also found that the camps were bullet-ridden, showing indiscriminate firing by the FFU. Some 728 bullets and

12 tear gas bombs were used and each FFU soldier fired some 90 bullets on an average.

Out of some twenty persons injured, fifteen suffered from bullet wounds of which four (including a passer-by) died. Of the fifteen who suffered bullet wounds, some ten were injured in the upper part of the body, clearly showing that bullets were fired to kill, in total breach of normal procedures of dealing with civilian, unarmed protestors.

In spite of the grave irresponsibility of the regional authorities, the only action which seems to have been taken so far was to transfer the Regional Commissioner to another region (without any loss of prestige or position, it would seem, in the eyes of the government or the Party). The Regional Police Commander was also transferred and the Regional Crimes Officer dismissed. After practising for a couple of years, the former Regional Crimes Officer concerned now occupies the position of a corporation secretary in a prestigious parastatal! Meanwhile, no criminal charges have been preferred against any of these, or other officials and soldiers, responsible for the killing.

- 1 See, for instance, John Nyamhanga Bisare v R, Criminal Appeal No. 29 of 1979, Court of Appeal, where a militiaman was convicted of manslaughter and the Court observed obiter that reckless use of firearms by militiamen had become common. (The case is reported at [1980] TLR 6 but some pages are missing).
- 2 Criminal Sessions Case No. 6 of 1986, High Court of Tanzania at Tanga, (unreported).
- 3 Ibid., p.4 of the cyclostyled judgment.
- 4 Reported in the Daily News, 11/2/89.
- 5 25/6/88. See also Uhuru, 17/7/88, 9/8/88, 9/1/88 and 4/7/88; Mfanyakazi, 11/3/89.
- 6 See, for instance, Uhuru, 22/7/88, 23/6/87, 13/6/87 and 9/9/87 as well as Mfanyakazi, 7/1/89.
- 7 Daily News, February 1988 (Action Line)
- 8 Uhuru, 16/2/89
- 9 See, for instance, the Daily News of 17/10/87 where the Regional Police Commander of Dar es Salaam admitted that there was increased police harassment and that the matter was being investigated.
- 10 Mfanyakazi, 28/11/87
- 11 R v Abdu S. Abdu, High Court Criminal Sessions Case No. 40 of 1984, Dar es Salaam, (unreported).

- 12 Legal Aid Brief No. 5F/LAB/84/3. The facts are taken from the applicant's letter in the file.
- 13 This is required by law. See Government Proceedings Act, 1967, no.16 amended by Act no.40 of 1974.
- 14 See also the case of James Magoti who was detained under the Preventive Detention Act and severely tortured. Reported in Amnesty International Report, 1980, pp.82-3 and discussed by Peter, C.M. op.cit. pp.25 et.seq.
- 15 This case study hovers between 'illegal' and 'extra-legal' use of coercion illustrating the thin line between the two.
- 16 Abdi Athumani & 9 Others v R, Misc. Civil Cases No. 2 & 3 of 1987, High Court of Tanzania at Songea, (unreported). I am grateful to Mselem for drawing my attention to this case.
- 17 This refers to the tail of a skate - a large flat fish - which is often used as a whip.
- 18 This case study is a borderline case between 'illegal' and 'extra-legal' coercion but is included in this chapter because no official attempt was made to justify it, although those responsible have not been prosecuted, to date.
- 19 Daily News, 1/8/86.



## CHAPTER FIVE

### EXTRA-LEGAL COERCION

A review of the post-independence history of Tanzania reveals that in times of 'crisis' the state has unhesitatingly resorted to the use of force against citizens. While the proportion of such force, and the extent of violation of basic rights, may not be comparable to situations under the murderous dictators of Africa, it has nevertheless been fairly widespread, if subtle and undocumented.

The forced villagisation of 1972-74 when massive numbers of peasants were moved into villages compulsorily saw an extensive use of the FFU. This has never been fully documented, although, at the time, there were 'rumours' of deaths and certainly burning down of huts and property of peasants. During workers' protests, following the Mwongozo in 1971, again the FFU was used to round-up protesting workers and particularly to intimidate and instil fear. In July 1986, four sugar-cane workers were shot dead and a score wounded because they dared to demonstrate for their rights.<sup>1</sup> Students, both university as well as some secondary schools, also have had their share of FFU violence in 1966, 1971 and again in 1978. Peasants in the countryside, on and off, have been intimidated by the FFU. This fate has particularly befallen the Datoga (Barbaig) and other pastoralists. They have been treated like step-children ('step-nationalities') of the Tanzanian nation.

We have categorised these incidences as illustrative of the use of 'extra-legal coercion' not because, even by Tanzanian statutes, it was legal, but because it was ostensibly authorised at the highest

levels of the Party and the State. The immediate implementors believed it to be so authorised and could have never conceived of it as unlawful or even illegitimate. Thus, to my knowledge, the use of extra-legal force has never been challenged in courts of law by a private party. Where the excesses have been brought to court, it has been done so by the state itself, and in a very selective manner, to suit its ideological purposes and perform a legitimising function, as in the case of Shinyanga/Mwanza torture cases. All these issues, and many more, feature in the following three case studies which speak for themselves and need no further elaboration.

### **Case Study 10: The fate of ‘step-nationalities’**

This was a court case<sup>2</sup> which originally involved 23 youth from the Datoga or Barbaig nationality who were charged with the murder of 21 persons from the Wanyaturu nationality on January, 6th 1976. The incidence took place in the Iramba district. Apparently, on that date a group of Barbaig youths numbering between 80 to 100 attacked a party of Wanyaturu, allegedly killing the Wanyaturu. A few weeks earlier a number of Barbaigs had been killed, allegedly by the Wanyaturu, including the mother and two sisters of one of the accused. This raid, therefore, was to avenge those deaths.

Out of the original 23, five died (while in custody?) from natural causes before the trial, one was acquitted on grounds of ‘no case to answer’ and, at the end of the trial, 14 were found guilty and sentenced to death. On appeal, the convictions and sentences of 13 were confirmed by the Court of Appeal.<sup>3</sup> The prosecution case rested on extra-judicial statements made by the accused in which they had admitted the murders, describing in minute detail the way they had carried out the killings. These confessions were,

however, retracted by them in the open court where they put the story that they made the statements they did because (1) they had been offered inducements in terms of their cattle being released if they confessed, (2) they had been instructed by their elders to agree to having committed the crime so that their cattle might be released and (3) some said they had been beaten and starved. The question was whether these confessions were admissible. The defence argued that, taking account of the whole surrounding atmosphere in which the statements had been made, it could not possibly be contended that the statements were voluntary and truthful. For the purposes of this case study, it is this atmosphere which is directly relevant.

Evidence showed that after the tragedy, the regional authorities decided to round up Barbaig youths in four regions and detain them to investigate and locate the culprits. It was also decided, apparently at least at as high a level as regional officials, that 20 head of cattle should be seized from Barbaig families to ensure that Barbaigs did not run away. At the same time, there was somewhat confused evidence that the Party had simultaneously put into effect 'Operation Barbaig' to settle the Barbaig permanently in villages as a solution to what was alleged to be a long-standing feud between Wanyaturu and Barbaig. There was some confusion as to whether the two 'operations' were independent of each other or connected. But there was evidence that some of the cattle seized were sold and the money was supposedly to be used for resettlement. What is immediately relevant for our purposes is the way these 'operations' were carried out.

Barbaigs were arrested indiscriminately including women, elderly people and young girls; they were beaten and tortured while girls as young as 14 were raped. They were detained in ordinary prisons with criminals and their cattle were seized. There

was absolutely no evidence that these arrests, detentions and the seizure of property was done in accordance with the procedures provided in law. But no one questioned them, not even during the proceedings in the court! It is interesting to note that while the government and Party officials testifying before the court referred to the so-called permanent feud between the two nationalities, peasant and ordinary witnesses from both sides and belonging to both nationalities said that Barbaig and Wanyaturu had lived in peace and that there was no such feud.

The atmosphere is captured in the testimony of one Barbaig peasant:<sup>4</sup>

We were arrested at about 6.00 p.m. We were taken to Senga police post. Many of us were confined there. There were elders, women and children confined to the police post. We were confined in one group. The police surrounded us at that place. They were armed.....On the same day we were brought to Singida in police vehicles. .... Two days later we held a meeting to find the culprits. At that time our cattle had been taken. We did not talk about our seized cattle, but about finding the killers.

We were beaten up while our women were raped. ... [In re-examination] Yes, I was badly beaten. That was the day our cattle were taken. My wife was raped.

The testimony of Samson Ntinda living in Katesh, but a Party Chairman in Singida, is quite revealing and needs to be quoted in extenso. After hearing about the killings, local Party officials called a meeting on the 7th (January 1976).

We took two decisions. Firstly, we had to report to Government to decide what to do. It was our intention that senior officials of the Government should come over. Secondly, we considered it necessary to found a permanent solution.... We considered it desirable that as a permanent solution the tribes should be settled in villages where they could more conveniently be provided with basic amenities. We recommended accordingly. In fact that had been discussed in previous meetings...

I attended some of the meetings convened by Government as the result of the recommendations of the Party. A move was taken to have Government officials from this region, Arusha, Dodoma and Shinyanga regions meet to talk over the whole matter of resettling the Barbaigs living in these regions. They did in fact meet. Barbaigs in these regions had been leading nomadic life. It was, therefore, resolved to round them up and resettle them in villages. Yes, Barbaigs from these regions were, as the result, rounded up. The rounding up started in the same month of January but the move to resettle them had already started. We involved the police in the exercise but not the C.I.D. in particular. In the meeting of 7/1/76 we invited the C.I.D. to give us report of their investigations into the tragedy. It was recommended that, in order to ensure the Barbaigs were rounded up for resettling their cattle, too, should be seized. That was Government decision. It was decided at least 20 heads of cattle should be seized from each family (homestead). That was to affect Barbaigs living in all the four regions. It was also resolved that Barbaig youths should be rounded up. The move were not

taken in order to identify the culprits. I do not know that Government attitude was on this. The cattle at first were kept in one holding ground. Later Government decided they should be sold to meet the expenses of resettling them. The money realised is being used to establish permanent villages for Barbaigs. We did not thereafter receive any report from C.I.D. as regards their investigations. I was told that some culprits had been arrested alongside the general rounding up operation.

Barbaigs normally move in search of grass and water for their cattle. They would even move across districts and regions. [Answering cross-examination] I know Government used the police to round them up. Yes, they took them to remand prisons where criminals or criminal suspects are normally kept. They were not kept as criminals. They were kept there only for convenience. I do not know if there they were treated as criminals.

In the resettling operation the police were involved. (It) should be noted that the exercise affected other tribes as well. It is true only Barbaigs were kept in prison, this because other tribes were willing to be resettled. Yes, we used the police to take their cattle. I do not know if some Barbaigs had all their cattle taken. If that happened it was unfortunate for, it was not the intention of the Party. The Police may have erred in leaving some Barbaigs without any cattle at all.

They were not authorised to rape either. I am not aware of raping in the exercise. They were not supposed to beat them up.

Barbaigs had been asked to move into permanent

villages. The villages had been already demarcated. We had them demarcated in this region. All that was left was to take them there. They were kept in prison before it was decided which of them should be resettled in which village. We had not previously or in that exercise taken any of them to a village, I cannot say if that was punishment. There had been no problem in resettling other tribes. There were no villages demarcated specifically for Barbaigs. They were not demarcated according to tribes as that would have been contrary to Party and Government Policy. Barbaigs were refusing to move into those villages along with the other tribes.

The cattle were sold for the development of Barbaigs themselves. I did not investigate precisely what happened to those cattle. I am not aware of a meeting held with Barbaig where they pleaded for return of some of their cattle.<sup>5</sup>

Meanwhile in early 1980s some of the Datoga people in the Hanang District became victims of a different type of violation. This time, not allegedly because they were refusing to move into villages, but because they complained that their village land was confiscated by a parastatal. In March 1981, the Mulbadaw Village Council together with 66 other villagers (48 from agro-pastoralist Iraqw, 16 from Datoga and 2 from Somali nationalities) sued the National Food and Agricultural Corporation (NAFCO) for trespass to land.<sup>6</sup> The Plaintiffs alleged that their village and huts and crops were razed to ground by NAFCO caterpillars and their land taken away and integrated in the gigantic wheat farms. NAFCO is involved in developing wheat farms in Basotu with the financial and technical assistance of the Canadian International Development Agency (CIDA). The villagers won the case in the lower

court but lost it on appeal to the Court of Appeal. Before finally deciding the appeal, the Court of Appeal had issued an interim order of stay of execution to the Plaintiffs, who had already started cultivating the land returned to them following the High Court success. NAFCO, with the assistance of the FFU, semi-permanently stationed in Katesh, evicted the Plaintiffs forcefully in the process humiliating and subjecting them to the beating and torture of the FFU. One of the victims, Gidadel Jaladi, who was one of the original Plaintiffs in the case, told the researchers the following story:

It was 19 February [1985] around 1.00 p.m. I was returning from watering my cattle. A NAFCO landrover from the direction of Katesh town pulled up beside me. Mwaigul, NAFCO's Assistant Manager, was seated in the front seat beside the driver. In the back, there were four armed Field Force Unit (FFU) soldiers and a plainclothesman. Mzee Duncan was also in the vehicle.

Mwaigul pointed me out. The soldiers threateningly ordered me to board the vehicle. I had no guts to ask questions. The vehicle drove to Mahmud's farm. The soldiers jumped out firing shots in the air. I was also moved out. One of the soldiers started beating me with a stick. Beating, kicking and blows rained on those who were at Mahmud's farm including the Chairman of Mulbadaw Village, Jonas Samo. Jonas was whipped with his own belt; the metal buckle struck him on the head, blood gushed out.

With Daniel, Duncan, Jonas and myself in the vehicle, the landrover drove towards the Mulbadaw Farm offices of NAFCO. The soldiers were given beer and some food. Then we were driven to NAFCO



offices and staff houses at Waret. On the way, the soldiers laughed and amused themselves at our expense, all the while firing shots in the air.

At Waret, the vehicle was driven around the houses of NAFCO managers and white expatriates. More beer was served to the soldiers. The day was wet and chilly as it had rained heavily that day. It was late in the evening.

'Masikio' (ears!) called out one of the soldiers referring to me on account of my pierced ears. At gunpoint I was ordered to lie down in a ditch and roll in the mud. I began to shiver. Jonas, the Chairman, was called 'chairman of Wamang'ati'. [This is a derogatory term used to refer to Datoga people - IGS] He was also ordered to roll in the mud. Meanwhile women and children from the surrounding houses were watching us and NAFCO staff seemed to be amused and happy.

We were then driven to the Katesh police station where we spent a night in custody. We were released the next day. After a few days I was again followed. We spent a few days in Katesh and then we were sent to Babati.

At Babati nine of us were charged with disobedience of the lawful order of the Court of appeal; criminal trespass on NAFCO land and threatening violence in a manner likely to cause a breach of the peace. We pleaded not guilty. Some of us were released on bail while others were refused and were finally released on bail. The criminal case is still pending against us in the District Court at Babati. We complained to Regional Police authorities against the treatment accorded to us but to no avail.

Some time after this story was published in the Africa Events<sup>7</sup>, the prosecution entered nolle prosequi in the criminal case mentioned by Gidadel.

### **Case Study 11: The Shinyanga/Mwanza Tragedy**

Sometime in the middle of the seventies, there was a spate of killings in Mwanza and Shinyanga of suspected witchdoctors. Apparently, the situation had become so bad that a high-powered joint meeting of the Regional Security and Defence Committees met on 24 January 1976 under the chairmanship of the then Vice President and Prime Minister Mr. Rashidi Kawawa. The then Minister of Home Affairs, Mr. Ali Hassan Mwinyi, and the then Minister in the President's Office, Mr. Peter Siyowelva, as well as the Regional Commissioner for Mwanza, Mr. Peter Kisumo, were also present. The meeting was also attended by regional security officers and Party and other government leaders. At this meeting it was resolved that all those who were suspected of murders (including those who had been taken to court but acquitted for lack of evidence) should be arrested and interrogated. Those against whom there was enough evidence should be sent to court while those against whom there was not enough evidence should be detained. This resolution got christened 'Operation Mauaji' (literally 'killings'!).

The interrogations began in earnest. In Mwanza they lasted for about three weeks beginning 26 January 1976. In Shinyanga they lasted for ten days from 21 February to 3 March 1976. In Mwanza the suspects were interrogated at the Butimba prison. The interrogation was done by security officers who were in charge including some who had been sent from Dar es Salaam specially for the purpose. Apparently, this was because it was believed that the police had been lax in the matter. In Shinyanga interrogations

were done in an isolated place near Mwanagh'ola in three abandoned cotton buying centers.

Some 374 suspects were rounded up in Mwanza while some 524 in Shinyanga. All these were interrogated. In Shinyanga some 10 died, 8 after interrogations, while 109 were ordered to be detained. Many more at both places were maimed for life. As a result of the deaths, a number of regional level security officers were charged with murder in two separate trials. In Mwanza<sup>8</sup> some 5 persons were charged with the murder of Mazenguka and Mwanankobuku who died on 30 January and 9 February 1976 respectively. In Shinyanga<sup>9</sup>, some 8 officers were charged with the murder of Twigwa who died on 16 March 1976 and Kaliji Kang'wina who died on 18 March 1976.

Meanwhile the Minister of Home Affairs, the Minister in the President's Office and the Regional Commissioner, Mwanza resigned taking political responsibility for the incidence.

'Operation Mauaji' will go down as a tragedy in the annals of Tanzanian history. It was gruesome, degrading, inhuman and frightening as to what the organs of force even in Tanzania are capable of. As the High Court Judge in the Ihuya case observed:

...[T]here is no dispute in this case that what was originally expected to be an orderly and lawful execution 'operation mauaji' turned out to be an exercise of human degradation and torture. Suspects were stripped naked, beaten up and had pepper shoved into their orifices - including into their private parts. Male suspects had their testicles tied with strings and pulled and female suspects were subjected to most unspeakable degradation.<sup>10</sup>

The true gravity of the torture involved can only be gauged from the testimony of those who actually witnessed it or suffered under it. We quote at length the testimony of two, a policeman who actually saw Mazenguka dying and a woman who suffered and lived to testify in the Shinyanga trial.

Detective Sergeant Castory said:

I had known Mazenguka before the day we arrested him. He was also physically fit on the following morning at Kigoto. While there Dr. Nkulila asked Mazenguka to pull up his shirt ready for an injection on his arm. He injected some medicine on his left upper arm. I did not know the type of medicine injected. After the injection he was sent into a room where two people from Dar es Salaam started taking down his historical background. They also interrogated him about the murders committed at Magu. Mazenguka denied knowing anything about the murders. Up to this time Mazenguka was in good health. After they had interrogated him the 3rd and the 4th accused ordered the deceased to strip naked. He stripped naked and they (3rd and 4th accused) ordered him to enter into another room. Mazenguka complied. Soon after a security officer from Magu also entered the room. I also got into the room. While in the room the 4th accused brought a sisal-rope (as thick as my little finger) and tied Mazenguka's arms and ordered him to sit down against a wall and raise his arms backwards. Then the rope on his arms was tied to rods of a window. Then the security officer from Magu came and tied Mazenguka's scrotum with a sisal-rope and pulled them. The 4th accused then took a stick and started beating him on his thighs using

great force and telling him to confess that he had committed murders at Magu. Mazegenuka cried - 'You are killing me I have done nothing.' As he was being slashed the other security officer was pulling Mazegenuka's testicles. The 4th accused stopped beating the deceased and the 3rd accused took over and continued the beating and urging the deceased to confess that he had murdered people at Magu. The other security officer continued pulling deceased's testicles. Then in the room came the first accused accompanied by the Regional Crimes Officer of Shinyanga, one Kinonko. The first accused took a stick (from a heap of sticks on the floor) and also beat the deceased on the thighs and the other security officer was still pulling deceased's testicles. As the 1st accused was attacking him he was saying to him - 'Tell us what you did at Magu'. The deceased only cried. He did not confess at anything. The 1st accused left but the 4th accused continued interrogating the deceased. He was interrogating him and at the same time beating him - urging him to confess. The deceased did not confess to anything. The deceased got so exhausted that he could cry no more. As the security officer was pulling his private parts I could see a white fluid exuding from the urethra. At this stage Mr. Kinonko told them to stop beating the deceased and they stopped. At this time Mazegenuka's condition was in bad shape. We all left the room after Kinonko had told them to stop beating the deceased. We drank soda outside. Both 3rd and 4th accused were in the room from the time we entered to the time we all got out.

When we returned to the room we found that the Mazegenuka had died.<sup>11</sup>

In the Shinyanga trial, Habiba Shabani, a peasant Muslim woman testified as follows:

We were all driven to Shinyanga Police Station. We spent a night there. The following day we were taken to the court. I had no opportunity to question my incarceration for the askaris were very kali [fear-some], rebuking us. At the court a charge was read out. It was also alleged that the 5 of us had murdered some woman! Even the woman's name was not mentioned. We were told to remain in custody for mention on another date. We were then taken to Shinyanga Prison. I recall we were taken to court again after a number of days - I cannot recall how many. It was a mention date and we were informed that investigations were continuing. Another mention date was fixed.

We stayed in Prison at Shinyanga for one month. We were then taken to Mwangh'ola. We were 9 women and about 40 or 41 men. There came a tipper with policemen and we were taken. We left Shinyanga in the morning. We were taken first to Malya Prison. We were told the Prison was full. We were driven on straight to Mwangh'ola. Just before reaching there we met a motor vehicle which stopped us. We were told by a CID that the time was over; that they were tired of beating. We were driven back to Malya Prison where we reached between 3 and 4 p.m. The prisoners had just finished eating. We got no meal. We slept in the prison.

The following morning, after drinking uji, [porridge] we were taken back to Mwangh'ola. Same tipper was used and we had askaris with us. We reached there in the forenoon. The place Mwangh'olo

is in the pori [jungle]. There is an abandoned cotton store. There was a second a store [sic!] and a third smaller building. We were ordered down. We were ordered to squat outside one of the stores, facing the door. Two youths were taken inside the store and we heard them pounding with pestles. Apparently, they were pounding pepper. Meanwhile askaris were all over with sticks and guns saying 'kila mtu asalie mtume wake. Umefika wakati wa kuieleza.' [Let every person pray to his/her god. Time of reckoning has arrived.] They told us we would be thoroughly beaten even unto death or be maimed.

We were then ordered into that store where the pounding had been taking place. We were mixed up - men and women. We entered the store running. I in fact fell in the doorway in the stampede. All the women entered. On entering we were ordered to undress very quickly. We were then ordered to line up along the wall. An old man who was ahead of me was ordered to lie on his back. He complied. One of us was ordered to smear the old man with pepper solution in the mouth, nostrils, eyes, private parts. It was done. His prepuce was pulled and pepper stuffed therein. He was not circumcised. He was ordered to stand and go aside - being beaten with each such order. The old man was crying from the irritation of pepper and he was beaten to stop making noise.

Next came my turn. I was ordered to lie on my back. I complied. The pepper was put in my eyes, nostrils, mouth, ears and in my private parts. Husks and seeds of pepper were on orders, forced into my vagina in plenty. It swelled up like a loaf of bread. The youth who was doing the stuffing was ordered to stuff pepper even into my anus. The man was a Mhaya. He

had to comply. It was all painful. If I tried to wipe the pepper off I was beaten up. I was then - under beating - ordered to join the old man. All of us were treated with pepper then our names were called out. But before that we had to wait lying on our backs, one leg raised. Then we were called one by one to the second store.

I was called. On the way were askaris in the second house - but they were dressed in civilian clothes. One had papers; another had a stick. They were not in uniform. I was told to sit. I sat. I was told to stretch my arms and legs. I was beaten all over my arms. It was a severe beating. I was being asked: 'umepata wapi mali? Jangiri wee!' [Where did you get the property from? You cheat!] I was being beaten with a short stick. ('Kafimbo kafupi.') I told them how I acquired my property. I was asked how I got a Honda (motor-cycle?) I said I had purchased it. I was excused. I went back to the pepper house - beaten by askaris all the way - and was ordered to take my clothes, I took them.

I knew Kang'ombe Kaliji. I first came to know him when he failed to board the vehicle after we had been beaten. I knew his name because askaris were saying 'Pigeni tena kama hataki kuinuka.' [Beat him again if he doesn't want to get up]. He was crying and complaining of tremendous pain. They had to put him on the lorry. Before the beating none of us was unable to board the lorry on his own.

When he was taken on the lorry, Kang'ombe failed to sit. He had to be supported. We were then driven back to Maswa Prison. We were ordered down to go and eat. We came down - can't tell whether it was all of us because I could not observe for fear. We entered the prison. We did not spend the night there. After



eating we were ordered back on our tipper. We were driven back to Shinyanga. Kang'ombe was with us. But on the way, Kang'ombe gave up his soul. He had been vomiting blood. At Shinyanga we were taken to Prison. We came down. Kang'ombe's body was brought down and deposited at the Prison door. The prison officer refused to accept the body saying he does not receive bodies in his prison. We left the body at the door and were driven into the prison. It was Saturday. We were released on Monday.

The Mwangh'ola operation was very savage. My left leg is now lame and I no longer enjoy sex. The vagina had sores for about 2 years and it is now all but scars. I have lost the sex urge.<sup>12</sup>

Three further features of these two trials need to be quickly mentioned. First, in both trials medical doctors were involved contrary to professional ethics and integrity. In the Mwanza trial, a doctor was used to administer methedine to the suspects so as to make them talk during the interrogation. And in the court he said that ethically it was alright for him to have administered those injections.<sup>13</sup>

In the Shinyanga trial a doctor had been instructed by the Area Commissioner to make out false post-mortem reports. The doctor actually obliged, opining that the deceased had died of tuberculosis without even conducting an autopsy. When questioned on this he deposed that he had taken oath to keep government secrets! And that he complied with the instructions of the Area Commissioner because he thought they had 'presidential blessings'.<sup>14</sup>

Second, a number of fairly high-ranking police and security officers in the witness box testified that they knew what was being

done was unlawful but were still prepared to do it because orders came from the top. Thus in the Mwanza trial an Assistant Commissioner of Prisons admitted that,

As a prison officer if the Vice President tells me to put a person in remand I comply although I know it is legally wrong to do so. I thought it was right as it was a decision of the government. If I did not comply I would have jeopardized my carrier [sic!]. I agree our country is led by the laws of the land.<sup>15</sup>

Third, it was implied between the lines in the defence submissions in both trials (although never seriously pressed), that some 'big shots' had been left out, and that only relatively small fry had been brought to court as 'sacrificial lambs'. It is inconceivable that while this massive 'operation' was in operation for at least one month, top officials, and at least regional politicians, were simply ignorant. In the Mwanza trial the Assistant Commissioner of Police in fact testified that he had informed a regional security meeting chaired by the Regional Commissioner, Mr. Peter Kisumo, that he, the Commissioner, had observed serious injuries on the suspects. To which the first accused, Ihuya, had retorted that he, (the Assistant Commissioner), was supposed to keep government secrets and that there was no need to send them to the Bugando hospital. The Assistant Commissioner further testified,

The chairman, Mr. Peter Kisumo also replied me that 'interrogation is interrogation'. In view of what I had told the meeting about the injuries I observed on some of the suspects I understood the chairman to mean that the beating while conducting interrogations was proper.<sup>16</sup>

While the said Regional Commissioner resigned taking with him the credit of having assumed political responsibility, those who thought they were carrying out superior (government) orders were charged and convicted of manslaughter and sentenced to serve imprisonment for terms ranging from five to fifteen years.

### **Case Study 12: Sungusungu on the rampage**

The following case study describes a typical form of oppression and harassment by the so-called traditional army known by different names (Sungusungu, Wasalama, etc.) These armies have been in operation in Mara, Mwanza, Tabora and Shinyanga regions.

The plaintiff in the case *Misperesi K. Maingu v Hamisi Mtongori & 9 Others*<sup>17</sup> was claiming damages of over one million shillings against the ten defendants for trespass on his person and property. The ten defendants belonged to Sungusungu of Mwenge Village, Nyamatara ward in Musoma District. On 22/9/87 Maingu and his colleague Paulo were summoned before the Mwenge traditional army, tried for the offence of swindling one of the defendants of T.shs.85000/- some time in 1981. Each of them was ordered to pay back T.shs.42,500/- and a fine of T.shs.10,000/-. On 28/11/87 when the plaintiff had failed to pay the compensation and the fine, the defendants seized his property worth over T.shs.190,000/-.

The plaintiff appealed to the Divisional Office but his appeal was dismissed. He further appealed to the District Commissioner who ordered that part of the property be restored to the plaintiff pending the sitting of the District Committee for Defence and security. Part of the property was restored to the plaintiff. However in due course the District Committee for Defence and Security in its decision ... decided that the judgment of the Mwenge traditional

army was correct and ordered that all the property that had been restored to the plaintiff should be re-seized. And so the whole property of the plaintiff was re-seized.<sup>18</sup>

Again on 11/12/87 for no apparent reason the plaintiff was arrested by the members of the traditional army and kept in lock up at the Musoma police station for one day. He was later released without any charge being preferred against him. Then on 24/12/87 the plaintiff paid the fine of T.shs. 10,000/- in the hope that the property would be restored to him. Instead, the traditional army sentenced him to 25 strokes of corporal punishment or a fine of T.shs.2500/- in lieu of the strokes. He paid the fine.

Mwalusanya, J. in this case, following his own previous decisions<sup>19</sup>, held the traditional army to be illegal and their assumption of judicial and police powers as unconstitutional. He awarded damages to the plaintiff in the sum of T.shs. 353,150/- and once again castigated the party organs and leaders for sanctioning the operation of traditional armies outside the rule of law.

In this case the plaintiff was undoubtedly a man of some substance and therefore could and did fight his case up to the High Court. But the daily harassment and oppression of ordinary villagers by these armies in many cases go unremedied as the following letter implies.

Brother Editor:

We the residents of Ukerewe district greeted with pleasure the inauguration of the traditional army (Sungusungu) in the Mwanza region in the hope that, together with the Police, they would have helped to deal with robbery, racketeering, swindling etc.

Instead it has been killing, harassment and molestation of innocent citizens. Should some one suspect you of theft or that you have failed to repay a loan and the person concerned complaints to sungusungu or wasalama, as they call themselves, you would wish you were never born.

If they suspect you it is better to confess. If you don't you are in greater trouble - they would whip you all over the body and buttocks like an ox.

Even if you confess and then the stolen article cannot be traced, you would be beaten till you lose consciousness. And if you happen to have any cattle, those will be confiscated.

After the confiscation of your cattle your case is over and you are a free man again. Also, when you are being whipped, don't dare cry, for if you cry, they would construe it to mean that you are mocking at them as if you were their equal.

Following such beatings many citizens have lost their lives or become mentally disturbed.

A good incidence is that which happened in Busanda village in Ukerewe district where a villager was arrested by sungusungu for failure to pay development levy. When he tried to escape he was shot at with an arrow and died instantly.

And another example occurred in Bugula village also in the Ukerewe district when another person tried to escape by hiding in his home. The sungusungu set his house to fire and it was his wit that saved him otherwise he would have lost his life.<sup>20</sup>

- 1 See Africa Events 2, 9 (September, 1986), Case Study 9 above.
- 2 R v Bukunda Kilanga & Others, High Court Sessional Case No. 168 of 1976 at Singida (Dodoma Registry), (unreported). On appeal Noya Gomusha & Others v R [1980] T.L.R 19.
- 3 Noya Gomusha cited *ibid.*
- 4 P.65. These page numbers are from the Record of Appeal in the Court of Appeal Registry.
- 5 *Ibid.*, pp.78-80.
- 6 See Shivji, I. & Tenga, R., 'Ujamaa in Court', Africa Events 1, 2:18-21, (Dec. 1985). NAFCO v Mulbadaw Village Council & Others, Civ. App. No.3 of 1985 (Court Appeal) (Unreported)
- 7 *Ibid.*
- 8 R v Ihuya & 4 Others, High Court Criminal Sessions Case No. 8 of 1980 at Mwanza (unreported). The appeal is Godfrey James Ihuya & Others v R [1980] TLR 197. Page numbers cited herein in the Ihuya (High Court) case are from the Record of Appeal in the Court of Appeal Registry.
- 9 R v Kigadye & 7 Others, High Court Criminal Sessions Case No. 85 of 1980 at Shinyanga. The appeal is Elias Kigadye & Others v R, [1981] TLR 355. All page numbers for the High Court case are from the Record of Appeal in the Court of Appeal Registry.

- 10 Ibid., p.2 of the Judgment.
- 11 Ibid., p.14.
- 12 Pp. 83-5.
- 13 P.46.
- 14 P.75.
- 15 P.8. See also p.50 of the Shinyanga trial where another police officer answered to the same effect.
- 16 Pp.7-9.
- 17 High Court, Mwanza, Civil Case no. 16 of 1988, (unreported).
- 18 This quote is from the Judgment, p.2. of the cyclostyled report.
- 19 See chapter two above for discussion.
- 20 Uhuru, 19/4/88.

## CONCLUSION

### RIGHTS-STRUGGLE AND DEMOCRACY

The case studies in this monograph have shown that the rights-question in Tanzania, and elsewhere in Africa, we dare say, goes beyond simply the violation of personal freedom of the individual. Here we are dealing with a formation in which the freedom and liberty of the large majority are at stake, because the society itself is enslaved. We are therefore addressing a much more profound issue which cannot simply be captured within the conceptual framework of individual rights or Western liberal perspective.

This study (among others<sup>1</sup>) has demonstrated that in an African neo-colonial formation, law is an instrument for the application of state coercion and plays a subordinate role, if any at all, in legitimising the rule of the dominating class. It is not the legal ideology that occupies the centre-stage. Hegemonies are sought on other ideological planes, rather than law.

If law does not have an hegemonic significance, neither does it act as a restraint on the state, its organs and officials in the use of coercion. The widespread incidence of 'illegal coercion' recounted in this study shows that.

Explanations for the emergence and existence of what might be called right-less law are to be found in the character of the political economy of these countries. Force is integral to, or imbricated in, the production relations of a neo-colonial, imperialist-dominated social formation.<sup>2</sup> The producer - whether a worker or a peasant - is subjected to super-exploitation. The apparent role of the market in pumping out surplus from the producer is subordinate to the role of state coercion, which is



apparent on the surface. It is thus that the relations of (super)-exploitation are reproduced.

So the struggle for rights, for democracy, has wider and deeper implications and goes beyond the usual liberal assumptions and premises of 'individual rights' and 'limited government'. Central to this struggle is the struggle to 'free' the producer's labour from multifarious forms of force and bondage. It is indeed a process of constituting the civil society. Yet this cannot simply be a repetition of the process of development of capitalism (Maine's movement from status to contract), for what weighs down upon these societies are the world imperialist structures, even if such structures may be in erstwhile alliance with local feudal, semi-feudal, merchant or bureaucratic forces.

The current debate on democracy in Africa, accompanied as it is by recompradorisation à la IMF, has the danger of dangling the goal of liberal democracy - multiparty system, constitutionalism, entrepreneurship, etc. - before the popular, particularly middle-class, forces in Africa and thereby bury the agenda of the anti-imperialist, new democratic revolution<sup>3</sup> As Samir Amin puts it:

Western democracy is lacking in any social dimension. The popular democracy of the moments of revolutionary social transformation (such as the USSR in the 1920s, Maoist China) also teaches us a great deal about the nature of any 'popular participation', to use a tired expression, which is to have real meaning. To conserve Western democratic forms without taking into consideration the social transformations demanded by the anti-capitalist revolt of the periphery is to become trapped within a travesty of bourgeois democracy, which will remain alien to the

people and consequently extremely vulnerable. In order to take root, democracy should above all inscribe itself within a perspective which moves beyond capitalism.<sup>4</sup>

In the same vein, the human rights discourse, imported uncritically from the West, can act as a dominating, rather than a liberating, ideology for the working people. We need, therefore, to recast these ideologies within the paradigms of anti-imperialist, popular democracy. Rights-struggle too has to be seen in this perspective.<sup>5</sup>

As a struggle from below, the importance of rights-struggle lies not so much in achieving certain standards in legal documents; rather its importance lies in providing the standard-bearer for the autonomous, organisational mobilisation of the working people. If it is to play the role of an ideology of resistance and struggle, the rights-ideology, and constitutionalism<sup>6</sup> as a whole, need to be recast.

- 1 See, for instance, Shivji, I.G., 'Law in Independent Africa: Some Reflections on the Role of Legal Ideology', *Ohio State Law Journal* 46, 3:689-95 (1985)
- 2 See generally Mamdani, M. 'Contradictory Class Perspectives on the Question of Democracy: the Case of Uganda', in Anyang' Nyong'o (ed.), *Popular Struggles for Democracy in Africa*, London: UNU & Zed Press, 1987, pp.78-93.
- 3 Already, as one can notice at African intellectual conferences, even progressive African academics are apologetic about imperialism and even indulge in self-pity for having once sounded anti-imperialist.
- 4 Amin, Samir, 'Democracy and national strategy in the periphery', *Third World Quarterly* 9, 4:1129-57 at 1152-53.
- 5 I have developed this thesis in my *The Concept of Human Rights in Africa*, op.cit.
- 6 See Shivji, I.G., 'State and Constitutionalism in Africa: A New Democratic Perspective', Keynote Paper presented to the African Regional Institute on Comparative Constitutionalism, Harare, May 1989; an abridged version is published as 'Reconceptualising Constitutionalism in Africa', *SAPEM* 2, 9:12 (June 1989).



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