TOWARDS RESPONSIBLE DEMOCRATIC GOVERNMENT

Executive Powers and Constitutional
Practice in Tanzania 1962-1992

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A B S T R A C T

With independence in 1961, the British system of Parliamentary government, incorporating the principle of responsible government, was formally adopted in Tanzania. But within only one year that system was discarded first, by adopting a Republican Constitution with an executive President in 1962, and then by adopting a one-party state system of government in 1965.

The one-party system reached the height of prominence through the concept of "Party Supremacy", and dominated constitutional practice for a whole generation before giving way to demands for greater freedom and democracy through competitive politics in 1992. Throughout this time, however, the preambles to successive constitutions proclaimed that the government in Tanzania was responsible to a freely elected Parliament representative of the people.

This thesis traces the constitutional developments in Tanzania during the first three decades after independence so as to assess the extent to which the principle of "Responsible Government" has been maintained. It analyses the adoption of the Republican Constitution with an executive President having enormous powers even to override the Parliament, and tries to show that the one-party system and the concept of Party Supremacy, while appearing to replace Parliament with the Party as the instrument of democratic responsibility, merely served to legitimise the government tendency of holding the people responsible to it, rather than the other way round.

While acknowledging the contribution of external influence in reversing that trend and working towards changes for a more responsible and democratic government as signalled by the constitutional amendments of 1992, the thesis highlights some internal factors which have played very important roles in that development. These include the personal contribution of the

first President of Tanzania, Julius Nyerere, who, although very dominant, nevertheless had the foresight to reverse his previous positions and welcome a Bill of Rights in the Constitution in 1984, and encourage competitive politics in 1990. The thesis welcomes these latest changes, but still insists on greater popular participation in making a new Constitution and in all future constitution making.

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Reports and Notices

E A	East African Law Reports
G N	Government Notice
H C D	High Court Digest (Tanzania)
L R C	Commonwealth Law Reports
L R T	Law Reports of Tanzania
Q B	Queen's Bench Law Reports
T L R	Tanzania Law Reports

Others

A J M	Association of Journalists and Media Workers
AMNUT	All Muslim National Union of Tanganyika
A N C	African National Congress (Tanganyika)
A S P	Afro Shirazi Party
A T C	Air Tanzania Corporation
BAKWATA	*Baraza Kuu la Waislamu Tanzania* (Tanzania Supreme Muslim Council)
BALUKTA	*Baraza la Uendelezaji Kurani Tanzania* (Tanzania Council for Promoting Quranic Teaching)
C C M	Chama cha Mapinduzi
C C T	Christian Council of Tanzania
C P P	Convention People's Party (Ghana)
C U T	Cooperative Union of Tanganyika
D U S O	Dar es Salaam University Students Organisation

FILMUP	Financial Institutions and Legal Management Upgrading Project
I D M	Institute of Development Management
JUWATA	*Jumuiya ya Wafanyakazi wa Tanzania* (Union of Tanzania Workers)
KIPOC	Koronkoro Integrated People's Organisation for Conservation
M P	Member of Parliament
MUWATA	*Muungano wa Wanafunzi wa Tanzania* (Tanzania Students Union)
NAFCO	National Agricultural and Food Corporation
NCCR	National Convention for Construction and Reform
N E C	National Executive Committee
N G O	Non - Governmental Organisation
N U T A	National Union of Tanganyika Workers
P C E	Permanent Commission of Enquiry
P S C	Political, Social & Cultural (series of the *Africa Research Bulletin*)
P D P	People's Democratic Party
R D A	Ruvuma Development Association
T A J A	Tanzania Journalists Association
TAMWA	Tanzania Media Women Association
TANGO	Tanzania Association of Non - Governmental Organisations
T A N U	Tanganyika African National Union
T A P A	Tanganyika African Parents Association
T C A	Tanzania Cooperative Alliance
T E C	Tanzania Episcopal Conference
T F L	Tanganyika Federation of Labour
T L C	Tanzania Legal Corporation
T P P	TANU Parliamentary Party

T Y L	TANU Youth League
USARF	University Students African Revolutionary Front
V S A	Village Settlements Agency
U N [O]	United Nations [Organisation]
U S A	United States of America
USSR	Union of Soviet Socialist Republics
U W T	*Umoja wa Wanawake wa Tanganyika/Tanzania* (Women's Union of Tanganyika/Tanzania)

A GLOSSARY OF SWAHILI WORDS

Haki	justice, right
Mwenzetu	one of us, i.e. a close colleague
Shamba	farm or farming plot
Ujamaa	socialism
Usawa	equality
Utu	(human) dignity
Vijana	youths, young people (singular is *kijana*)
Vikao	sessions, i.e. meetings (singular is *kikao*)

TANZANIA:
A CHRONOLOGICAL PROFILE OF CONSTITUTIONAL EVENTS

1961	December	Tanganyika is granted Independence
1962	January	Julius Nyerere resigns as Prime Minister and is succeeded by Rashidi Kawawa
	December	Tanganyika becomes a Republic with Julius Nyerere as President
1963	December	Britain grants independence to Zanzibar
1964	January	The Zanzibar Revolution overthrows the one-month old independent government in Zanzibar
	April	Tanganyika and Zanzibar unite to form the United Republic of Tanzania, led by Nyerere as President
1965	July	Tanzania formally becomes a one-party state
	October	The first post-independence general election is held and Nyerere is re-elected President
1967	February	Announcement of the Arusha Declaration and its accompanying Leadership Code
1968	March	The Leadership Code becomes fully operational
	October	Eight Members of Parliament are expelled from the ruling and only political party, TANU, and lose their seats in Parliament as a consequence
1970	October	Second general election after independence; Nyerere is re-elected President

1974 November The NEC of TANU meeting in Musoma adopts a formal resolution on "Party Supremacy"

1975 June The *Interim Constitution of Tanzania 1965* is amended to formally institute Party Supremacy

October Third general election after independence; again Nyerere is re-elected President

1977 February TANU and the ASP (the sole political party for Zanzibar) merge to form *Chama cha Mapinduzi* (CCM) as the only political party for the entire United Republic

April A new *Constitution of the United Republic of Tanzania 1977* is adopted and comes into force

1980 October Fourth general election; Nyerere is re-elected into what he has already declared is going to be his last term of office as President

1984 January Vice-President of Tanzania, Aboud Jumbe, who is also the President of Zanzibar, is removed from both offices by the NEC of the ruling party, CCM, meeting in Dodoma, and he is replaced by Ali Hassan Mwinyi

October The Constitution is extensively amended to include, among other things, a Bill of Rights and a maximum limit to Presidential tenure

1985 October Fifth general election; Ali Hassan Mwinyi is elected President to succeed Nyerere who remains Chairman of the Party

1987 September Nyerere is re-elected Chairman of the Party

1990	February	Nyerere encourages public debate on changing the Constitution to a multi-party system
	August	Nyerere retires as Party Chairman
1991	February	President Mwinyi appoints the Nyalali Commission to review the political party system
1992	February	The Nyalali Commission submits its report to the President, recommending a multi-party system
	July	The *Eighth Constitutional Amendment Act 1992* comes into force, putting an end to the one-party state system and allowing opposition political parties
1995	October	First multi-party general election; Ali Hassan Mwinyi ends his tenure of office as President

CHAPTER ONE

General Introduction

1.1: BACKGROUND AND MAJOR PREMISE

In recent years there have been some significant political and constitutional changes in Africa, which have attracted world-wide attention. Perhaps the most dramatic changes, and those which attracted the greatest attention, have been the developments in South Africa which culminated in the April 1994 election involving, for the first time, people of all races and installing a fully democratic government. But elsewhere in the continent, the general trend has shown a widening scope of democracy and popular participation with the lifting of the ban on opposition parties. There has thus been a renewal of the multi-party political system in most countries of the continent, inspiring a widespread optimism that Africa has seen the dawn of a new political era.[1]

Tanzania was also swept by those same winds of change, and as a result the Constitution was amended in 1992 to allow the formation of opposition parties. It was in the atmosphere of these changes that the undertaking of this study was conceived.

The euphoria with which the return of multi-party politics in Africa has sometimes been greeted creates an impression which tends to equate political parties with democracy, and to dismiss

[1]See, for example, some articles in (1991) 35 *Journal of African Law*.

as almost eventless or insignificant the entire period of 30 years of African independent statehood. At the same time, this "equation" of political parties with democratic governance in Africa suddenly became a major concern of the western countries; they began insisting on democratic governance or popular participation in the political process, often in synonymous terms with a multi-party system, as a pre-condition for continuing financial assistance to Africa. To that extent, there is a claim that they have contributed to the democratisation process in Africa.

But this study proceeds from the premise that the changes that ushered in multi-party politics in Tanzania are part of a process in constitutional change and development within the country, which could be a reflection of the general trend in Africa. This process can be traced back to the nationalist movements and their demands for independence, in which a central objective was a responsible democratic government. In the event, like many of the other ideals which the demands for independence sought, responsible democratic government proved elusive and may not have been achieved fully, or perhaps even at all.

The constitutions adopted at independence in Africa did not survive intact for long. They were amended and modified, and even completely replaced in most countries; and in some countries the new constitutions were replaced yet again. The most extreme cases were in those countries where constitutions were abrogated by force through military coups. The trend may indicate lack of

a capacity for permanency in both the independence constitutions and their replacements. But also it reflects some kind of a failure in achieving the ideals sought at independence. This failure is also reflected by some of the slogans and catch-phrases like "democratic rights", or "rule of law", and so on, which have been employed in the recent campaign for multi-party politics in much the same way as they were once used to challenge the colonial order. There has been a very similar recurrence in the specific demand for a government which is democratic and responsible to the people it governs.[2]

1.2: PURPOSE AND RELEVANCE OF THE STUDY

This study specifically looks at the principle of "responsible democratic government" in the constitutional practice and development of Tanzania since independence. It is a principle which was sought by the nationalist struggles for independence; and the campaigns for multi-party politics thirty years after independence appeared to demand the same ideal.

In this study, we seek to make an assessment of the extent to which the coming of independence, and the political and constitutional developments that followed, succeeded or failed in achieving that particular ideal. We also seek to look at the 1992 constitutional changes which brought a multi-party system, and to assess the extent to which these changes are capable of

[2]See, for example, the proceedings in Mbikusita-Lewanika & Chitala, and some of the articles in Bagenda.

achieving whatever had so far been elusive in terms of a truly responsible democratic government.

As a constitutional principle, "responsible government" is typified by the Westminster system of parliamentary government. A fundamental tradition of this principle is that ministers are collectively responsible to Parliament for all government decisions and, individually, ministers are also responsible to Parliament for the actions or omissions of their respective departments. It is an obligation of the Prime Minister and the Cabinet he leads, which constitutes the government, to account to a democratically constituted body, the Parliament. Should a minister fail to account before Parliament for some unacceptable conduct in his ministry, the principle requires him to resign. And should the Cabinet lose the support or confidence of Parliament, it should also resign. It is essential for the effective operation of this principle that Parliament should have supreme legislative authority and should be politically free from control or domination by any other organ or institution.

In that sense, "responsible government" has become fundamental to the British tradition of parliamentary government; it is almost peculiarly British. Over the years, developments resulting from membership of the European Union have brought some limits to the competence of the British Parliament. And other recent developments in the system of government administration within Britain itself have made cabinet or ministerial resignations as a direct consequence of the operation of this

principle extremely rare in practice. Still the principle has remained indispensable in the British constitutional system (Turpin).

But there is need to state the relevance of that principle to countries like Tanzania where the constitutions embodying that principle which were adopted at independence were soon replaced by new ones whose structures were not fully compatible with some of the tenets of the Westminster model. In Tanzania, the *Republican Constitution* of 1962 provided for a powerful executive President to whom all ministers were responsible, and omitted the provisions for ministerial responsibility to Parliament; this was a radical departure from the Westminster system. The one-party state constitution adopted in 1965 further eroded the authority of Parliament and left the government responsible largely to itself (de Smith 1964:216,231, 247-52). Yet the principle of responsible government has never been irrelevant to Tanzania.

To explain the relevance of that principle to Tanzania, and to Commonwealth Africa generally, we begin with the nationalist campaigns for independence. When the African nationalists demanded independence from Britain, a responsible democratic government was part of the independence package they envisaged. Britain was the model of democracy and that is what they demanded for their countries. It is not that the British had much else to offer, other than the Westminster model; but even where there may have been suggestions or attempts to modify it, the nationalists were not going to accept anything other than or

short of the Westminster model.[3] And, accordingly, independence was granted with Westminster model constitutions drawn by Whitehall.

The subsequent departure from that model did not quite discard that principle. The *Republican Constitution* still required the President to appoint the Cabinet ministers from amongst the members of the National Assembly. The *Interim Constitution of Tanzania 1965* and the *Constitution of the United Republic of Tanzania 1977* also had the same requirements. Moreover, the preambles to all those constitutions declared that the constitutions were enacted to provide for a government "responsible to a freely elected Parliament representative of the people." And, in practice, Cabinet ministers continued to present themselves as a team in defence of government policies before the National Assembly, although the Assembly had no effective powers of censure.

Clearly, there was no intention to discard the system of parliamentary government entirely, and in practice many of its most apparent features have been retained throughout the period reviewed by this study. Finally, the constitutional amendments which were enacted in 1984 restored to the body of the Constitution express provisions for collective ministerial responsibility before the National Assembly. All this justifies a study of this principle in relation to Tanzania.

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[3]Remarks by Sir Richard Turnbull, the last colonial governor of Tanganyika, in Kirk-Greene:157.

But there are even more justifications than that. Firstly, this study also seeks to look at the principle of responsible government in the wider context of its democratic implication. In that context, responsible government is relevant as a principle which ensures that the government governs with both the consent and the support of the people it governs. Great emphasis is therefore placed on the representative character and the democratic composition of the body to which the government is accountable. In this sense, "responsible government" is synonymous with democratic government, which even those who discarded the Westminster model constitutions claimed they were working for.

Secondly, there is also the notion of responsible government sometimes used to refer to a "system of government in which the administration is responsive to public demands and movements of public opinion" (Birch:17-8). This is the notion of a government willing to listen to the people and to act according to their wishes and persuasion, not to bully them; a government willing to be a servant of the people rather than their master. It is like an extension of the first one because a government responsible to "a freely elected Parliament representative of the people" is more or less certain to act according to the wishes of the people. But it also requires a system that enables the people to make their views heard and their opinion known by other means as well, in addition to Parliamentary avenues. It is therefore necessary to have autonomous civil organisations, pressure groups and a free press, so as to ensure this form of

responsibility as a necessary manifestation of democratic government. There is nothing peculiarly British about this aspect of responsible government.

Finally, the principle of responsible government implies a system in which the Rule of Law is effectively observed. The Rule of Law is itself a vast subject. For our purposes, we may simply say that to observe the Rule of Law, a responsible government should not have or exercise wide prerogatives and arbitrary powers, but it should always be subject to the supremacy of regular law, which ensures justice, equality and all basic human rights. In this sense, government responsibility also implies that the government should be liable before the courts for its actions or omissions if they happen to violate any law. In short, it means "government according to law." And to ensure this, one essential is that the Judiciary should be independent of the executive.

Those three notions of responsible government have a complementary inter-relationship and it is in that context that this study proposes to review the application of that principle in Tanzania.

There could yet be another notion of "responsible government", which means a "prudent government", one which accepts it as a moral duty to pursue policies adjudged wise in the circumstances of the day even if the people may oppose them. In many African countries, this has been the basis for deliberately overriding

democracy and the need for popular participation. Army officers have used it to justify their overthrow of governments and abrogation of legitimate constitutions, claiming to be on missions to rid their countries of corruption; in most cases they have ended up as leading perpetrators of corruption. In civilian governments, political executives have similarly claimed to know all the answers to the people's problems, insisting that the need for fast economic development and freedom from poverty overrides that of democratic participation. This is a controversial concept of responsible government which this study wishes to deliberately omit from consideration and assessment.

1.3: LITERATURE REVIEW

During the period under review, many scholarly works have been written on diverse topics about Tanzania; however, very few have dealt with law and legal issues. Most of the legal literature consists of articles in diverse journals. There are also some which have been written or published specifically to form part of collections of articles covering other subjects in the social sciences.

Regarding the constitutional developments in Tanzania, one of the earliest books was that of Cole and Denison (1964), being part of the series on the development of the Laws and Constitution of the British Commonwealth. But its coverage ends with the transition from colonial rule to independence and the authors seem to have been obsessed with some prejudice regarding the

early post-colonial developments and made no attempt to assess them objectively. More objective was the long article by McAuslan (1964), which gave a detailed analysis of the provisions of the 1962 *Republican Constitution*.

The book by Robert Martin (1974) comes very close to the subject of this study but it only covers one third of the period under review. His main concern was the extent to which personal freedom was and could still be maintained under the socialist state that Tanzania had just declared itself to be. He also wanted to show that socialism and the one-party system did not necessarily mean an end to democracy in Tanzania.

The establishment of the one-party state in 1965 did inspire a number of writings, including some early articles by Ghai and McAuslan, some published jointly and others individually. The same inspiration was certainly behind the speeches and writings of Mr Telford Georges, Chief Justice of Tanzania, edited by James and Kassam (1973), which were a deliberate endeavour to show that the one-party system would not undermine the Rule of Law.

The Arusha Declaration of 1967 also stimulated a number of publications as well. But again, only a small proportion of the output was in the field of law. There were a few articles which looked into the use of law and its role in implementing nationalisations and other socialist-oriented policies initiated in the wake of the Arusha Declaration. They did not seek to question the validity of the powers of the government used in

implementing some of those measures, possibly because of the widespread general optimism towards socialism at the time.

Among the post-Arusha Declaration writings were some by Issa Shivji, who has since emerged as the most prolific writer among Tanzanian lawyers. A consistent leftist, Shivji has written almost as much on political economy and socialist ideology as on law. Of particular relevance to this study, in 1984 Shivji edited a special issue of the *Eastern Africa Law Review*, which collected articles written, and presented in seminars and conferences, as part of the 1983 Constitutional Debate in Tanzania. Shortly after, he edited another collection titled *The State and the Working People in Tanzania* (1986). Both those collections dealt mainly with the way the state used its extensive powers to suppress democratic rights and freedoms. Their main thrust was towards an ideological explanation of the excessive powers of the government and their use. Only a few articles referred in passing to the question of constitutional mechanisms for government control and accountability.

Another monograph by Shivji, *State Coercion and Freedom in Tanzania* (1990), continues the same thematical line by documenting cases in which the government has exhibited its might against helpless citizens, quite often in violation of its own laws. And his *Tanzania: The Legal Foundations of the Union* (1990) deals exclusively with the controversial constitutional structure of the United Republic.

Apart from the wave of writings inspired by the Arusha Declaration, there seems to have been a halt in the flow of legal literature on Tanzania in the 1970s. More recently, there has emerged a category of legal literature which seems to have been inspired by the Bill of Rights which was enacted in 1984. They include a book and an article by Chris M. Peter (1990, 1992), and articles by Mbunda (1988), Wambali (1990), and Mwaikusa (1991), among others. And finally, there are papers written for conferences and seminars held as part of the recent debate on the transition from a one-party to a multi-party state. They include published collections edited by Okema and Mwaikusa (1992), Fimbo and Mvungi (1993), and Mtaki and Okema (1994). Most of them are relevant to this study in one way or another but none of them specifically addresses the question of government responsibility.

Besides that, however, there is a great deal of published material about Tanzania which is not on constitutional law developments or any other topic in the field of law. Indeed, a study like this cannot claim to restrict itself exclusively to law. Questions of constitutional practice and development are as much questions of politics as they are questions of law. Therefore they also draw relevant topics from history, economics, public administration, sociology and so on. This casts the net of relevance rather wide and its precise limits become difficult to demarcate; but the bibliography at the end of this study may give an indication of the other works whose coverage relates to that of this study.

Of the earlier works, William Tordoff's *Government and Politics in Tanzania* (1967) is thematically closest to this study. Its main concern was the changing role and structures of the administrative agencies of the government from independence up to the formal transition to the one-party state, but does not go beyond 1966. The account by Cranford Pratt (1976) is very good in its detailed presentation and analysis of facts; but in places the author seems to have been obsessed with admiration for Nyerere and his search for socialist morality.

Much of the non-legal literature also deals with issues and problems related to the one-party state and, even more, to the Arusha Declaration and its socialist policies. Besides books by individual authors there are collections of articles published in specially edited volumes. Perhaps the most comprehensive of such collections is contained in the two volumes of *Socialism in Tanzania* edited by Cliffe and Saul (1972 and 1973). The diversity of the articles is quite impressive and there are some which deal with the institutions of the state but without, however, focusing on the executive and its accountability.

Also of relevance are the volumes of election studies which have been made over the years, from the first election under the one-party system in 1965. The various studies have been edited by Cliffe (1967), the University Election Study Committee (1974), Othman, Bavu and Okema (1990), and Mukandala and Othman (1994). They make a very good analysis of how far the elections under the one-party state in Tanzania, held so regularly, constitute a

genuine exercise in democracy. But the studies are limited to the conduct of the election process itself, and do not seek to enquire much about what then happens after polling days.

Another interesting category of published collections include *Re-Thinking the Arusha Declaration* edited by J. Hartmann (1991), assessing Tanzania's performance over the twenty-year period following the Arusha Declaration; it amounts to an assessment of Nyerere's performance as the President of Tanzania committed to socialism. Other assessments of Nyerere are in collections edited by M. Hodd (1988) and Legum and Mmari (1995), which include some articles which tend to assess Nyerere the man more than Nyerere the President. That does not make the collections any less relevant; Nyerere has constantly played a decisive role in institution building and government practice in Tanzania.

Nyerere's own contribution to the literature on the constitutional developments of Tanzania is immeasurable. As the architect of modern Tanzania, no realistic study of any aspect of the country's constitutional development can be made without reference to or reliance on his writings. They span a period of 40 years, addressed to diverse audiences in diverse places, in Tanzania and the world over. It is not possible to categorise Nyerere's writings as exclusively belonging to a particular discipline; they are as interdisciplinary as the man himself. But on certain constitutional questions, they reveal a remarkable consistence of views. From his writings and speeches, it is obvious that Nyerere was never in doubt about what institutions

he wanted in and for Tanzania, and why he wanted them.

But the writings are not as open and clear in assessing what was actually achieved in establishing a responsible democratic government, and his own role in that achievement or failure. That is part of what this study proposes to do.

1.4: RESEARCH METHODOLOGY

The material and information for this study were gathered through a combined use of three methods: archival or library research, interview and personal observation.

The term "library research" is used here as a general reference to "reading" as a source of information and material, and as a method of gathering the same for purposes of this study. The material or documents read need not necessarily be in a library although, as a matter of fact, most of the reading for this study was actually done in established libraries. And "library research" has been the method most heavily relied upon/source /for material.

The libraries of the University of London and its schools, colleges and institutes contain most of the known published books about Tanzania, and about Africa in general. In doing this study, the library of the School of Oriental and African Studies has been a most reliable source of information in published books, journals, as well as in some official government reports.

Its periodicals section has even some collections of old Swahili newspapers like *Ngurumo* and *Mambo Leo* which would be difficult to find in Dar es Salaam. Whatever that library did not have was certain to be in the other libraries of the University of London.

With specific regard to legal literature, the library of the Institute of Advanced Legal Studies has a good collection of published statutes and law reports from Tanzania. It also has some law journals which could not be found in some other libraries. The British Library of Political and Economic Sciences, situated at the London School of Economics, has an impressive collection of all the published Legislative Council and National Assembly Debates from Tanzania. And the Institute of Commonwealth Studies had some publications not commonly available in other libraries. On brief occasions, the University of London Senate House Library was consulted, and so was the British Museum Newspaper Library at Colindale.

But a notable absence from the collections of the libraries in London was the original *Constitution of the United Republic of Tanzania 1977*, as originally enacted in 1977, although most of the amendments can be found in their respective annual volumes of statutes. This could in part be due to the fact that the original constitution was published only in the Swahili language; a few other useful publications in that language are also absent from the London libraries, and have to be sought from Tanzania.

In Tanzania, the library most heavily relied upon was that of the

University of Dar es Salaam. It met most of the requirements missed by the London libraries. The library of the High Court at Dar es Salaam provided most of the unreported cases referred to in this study. And the National Archives library has a wealth of documents, including many unpublished records, although it could not be used very extensively for this study because it was still being reorganised after a change of premises. There were also some brief visits to the library of the Ideological College of the Party at Kivukoni, now called the Social Sciences Academy, mainly for assurances on Party records.

Besides the established libraries, the offices of the National Assembly provided access to some of the most recent statutes as well as some of the unpublished parliamentary debates. There were also visits to offices of the Permanent Commission of Enquiry and of the Commission for the Enforcement of the Leadership Code. The visits were necessary partly because these commissions no longer publish their annual reports regularly. But also the visits were conveniently used to conduct oral surveys and interviews with the officers there.

As stated earlier, interviews were another method employed in gathering information for this study. People interviewed included politicians, party and government officials, lawyers, judges, trade unionists, cooperative movement activists, and a few leaders of professional organisations and emerging opposition parties. The interviews were not conducted by way of questionnaire; rather the respondents were engaged in relaxed

guided conversations in which they were asked about facts, events and opinions from their own experiences in politics, in government service, or in any other capacity or activity that they may have been involved in.

Among those interviewed was Mr Rashidi Kawawa, who was Prime Minister for ten months up to December 1962, then Vice-President up to February 1977, and for most of the time up to December 1992, he held one of the top three positions in the Party hierarchy. Another prominent politician interviewed was Mr Joseph Warioba, Prime Minister and First Vice-President from 1985 to 1990, who was particularly informative about the crucial period of 1975-85 during which his position as Attorney General gave him access to all decision making bodies, more as a technocrat than a politician. Other people interviewed were similarly asked about their respective experiences, either present or previous, and about the conclusions they reached from those experiences.

In late 1992, a group of Tanzanians made a tour of Germany, and the author had the privilege of joining them from London. It provided the first opportunity of talking to some leaders of the then emerging opposition parties who were in the tour. But it was also an opportunity to observe the attitudes of Western Europe towards democracy in Africa which were exhibited by some officials of the German government who spoke to the Tanzanian group. The tour, therefore, was a welcome source of material by both interview and personal observation.

Much of the personal observation, though, was made by way of involvement in the diverse activities of the University of Dar es Salaam Legal Aid Committee for some time up to 1992. The activities created contacts with various groups of people who had to be assisted in solving some legal problems relating in one way or another to the extent and the use of government powers: workers' groups, women's cooperatives, students' organisations, professional bodies like the Junior Doctors Association, pastoral communities, as well as civil rights activists like James Mapalala and his supporters who later redirected their energies into active opposition politics.

The contacts with those groups were made well before this study started, and they were entirely for purposes of providing them with legal advice or legal representation, unrelated to this or any other academic research work. But when work on this study commenced, it was easy to make the necessary follow-ups on the contacts in order to relate the problems and experiences observed from there to the objectives of the study.

1.5: SCOPE AND OUTLINE OF THE STUDY

As suggested by its title, this study covers Tanzania. References to other countries, which are few, are made for comparative purposes only. It is hoped, though, that the experiences of Tanzania given here may in various ways be instructively compared with the experiences in other countries of Africa.

Tanzania is a United Republic, consisting of the former Republic of Tanganyika and the former island Sultanate/Republic of Zanzibar, which united in April 1964. The structure of the union provides for a limited autonomy for Zanzibar, which has its own executive, legislature and judiciary for matters pertaining exclusively to Zanzibar, which are not under the jurisdiction of the union authorities. On the other hand, the Mainland part of the union (or Tanganyika) has no such government of its own, and the union government is constitutionally the government for Tanganyika as well. The overall population of Tanzania is estimated at 28 million, of which less than 800,000 people are in Zanzibar. The geographical area of over 363,000 square miles for the Mainland and 1,020 square miles for Zanzibar.

The peculiar constitutional structure of the union remains a source of controversy.[4] This study will not venture into that controversy. Up to April 1964, the date of the union, the study covers Tanganyika only, and does not include Zanzibar. After that, the exclusion of Zanzibar ends because the study then covers the United Republic of Tanzania whose institutions are also the institutions of and for Tanganyika, and in which Zanzibar is invariably represented. What are excluded, though, are those matters peculiar to Zanzibar which, according to the Union Constitution, are not "union matters" and are therefore not the direct concern of the Union Constitution on which this study bases its analysis.

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[4]For details see Shivji 1990a.

The period covered by the study spans thirty years from 1962 to 1992. But invariably, there are spill-overs in the events and therefore the developments before 1962 are analysed extensively because they are necessary in explaining subsequent events. Similarly, events which have occurred after 1992 are considered in illustrating the arguments and conclusions to be drawn from the developments during the period of study.

The study reviews the constitutional developments in Tanzania. In examining those developments it would obviously have been unsatisfactory to follow a merely chronological sequence. The material has therefore been collected and analysed under a series of themes, each one the subject of a separate chapter, with overlaps being allowed only for the sake of clarity and consistence in the flow of the chapters. The flow does not conflict with the chronological order of the main events.

Independence is the starting point and, accordingly, after this introduction Chapter Two starts with independence. It reviews how the coming of independence was perceived by the various groups involved in that process, and the extent to which the *Independence Constitution* established a responsible democratic government.

Chapter Three looks at how the nationalist leadership tackled the challenges of independence firstly, by strengthening the executive through the *Republican Constitution* of 1962 and, secondly, by proscribing political dissent and opposition. The

argument for a one-party state is considered at the two levels advanced by the nationalist movement leadership: the philosophical rationalisation and the practical justification. And the steps taken towards a one-party state are outlined.

In Chapter Four the study analyses the juridical implementation of the one-party state, which was effected by the *Interim Constitution of Tanzania 1965*, and its effect on government responsibility. The changing roles of the Parliament and the ruling party are considered in relation to the powers of the executive. Subsequently, the concept of "Party Supremacy" which came with the *Constitution of the United Republic of Tanzania 1977* is discussed, and the role and competence of the Party as an instrument of ensuring a responsible government is also appraised.

Much of Chapter Five is devoted to reviewing the legal liability of the government as a necessary requirement of responsibility. It reviews the role and status of the Judiciary and its relations with the executive, both in law and in practice. There is also an analysis of the possible effects of the concept of "Party Supremacy" on the role of the Judiciary. The chapter ends with a review of the controlling function of the Permanent Commission of Enquiry (or the Tanzanian Ombudsman) and the Commission for the Enforcement of the Leadership Code.

Chapter Six goes beyond the relations between state institutions and looks at the way the Party, declared supreme by the

Constitution, was used to consolidate a centralised oligarchy with which the state then dominated and controlled popular institutions and civil society through and through: trade union and cooperative movements, youth and women's organisations, the mass media, professional associations, religious organisations, and even the less formal village communities. And it is argued that this excessive control of civil society was tolerated because of the hope for social justice proclaimed by the *ujamaa* socialist ideology to which the political leadership, and particularly President Nyerere, were clearly committed.

Chapter Seven starts by pointing out some inherent problems of the one-party state system: the Party turned into an exclusive elite club and "Party Supremacy" became the pretext for disregarding legality in government administration. The system could not sustain itself much longer and had to change. In analysing the recent changes, the study begins with the *Fifth Constitutional Amendment Act 1984* which, for the first time, incorporated the Bill of Rights in the Constitution. In due course, the Bill of Rights was resorted to for support and inspiration in challenging the dominating executive and the restrictive one-party state system itself. This development was marked by a growing assertion of freedom of expression and autonomy of popular organisations, which the state was forced to concede. Finally, with significant external backing, the Constitution was amended to reintroduce a multi-party political system, effective from July 1992.

In conclusion, Chapter Eight tries to make an assessment of the developments outlined and discussed in all the preceding chapters, considering how far each step in the developments may have advanced or hindered effective democratic control of the government by the people. The conclusion also tries to assess the prospects for a responsible democratic government after the 1992 Constitutional Amendments, and, in particular, after the Presidential and General Elections of October 1995.

CHAPTER TWO

Adoption of the Principle of Responsible Government

2.0: INTRODUCTION

The principle of "Responsible Government" as it is known today formally came to Tanzania, as to other countries of East Africa, through Britain. Ironically, however, the principle was not introduced during the many years of British colonial administration, but during the hurried process of colonial exit.

Colonial regimes were unpretentiously authoritarian and not subject to any semblance of control by the people they ruled. When colonial rule was coming to an end, however, the colonial authorities wanted to ensure that the governments they left behind in Africa were responsible democratic ones. But views and expectations of what would actually constitute responsible democratic government varied. In this chapter, we seek to highlight those variations: to show that the nationalist leaders' conception of responsible government as they demanded it may have been different from what some of their supporters perceived it while, on the other hand, the colonial authorities may have had a somewhat different conception of their own.

At independence many such differences of views and beliefs were

compromised and played down deliberately for the sake of peaceful political transition, or they were drowned in euphoric hopes for a politically bright future. But they were nevertheless real and they contributed to the constitutional developments at and after independence.

2.1: THE COUNT-DOWN TO INDEPENDENCE

Under the colonial state the organisation of the government facilitated the subjugation of the people through a hierarchy of authorities. At the lowest level, the local organs of administration consisted of native authorities who were actually local chiefs appointed as "native authorities" by the Governor under the *Native Authority Ordinance*. Above them were District Officers and District Commissioners, and above the district were Provincial Commissioners, and the Governor was the overall in-charge. Above the Governor was Her Majesty's Government, exercising authority through the Secretary of State for the Colonies, wherefrom flowed all authority and went through an unbroken chain of command down to the lowest level (Chidzero:49).

In governing the territory, the Governor had two important councils: the Executive Council whose function was to advise the Governor in the government of Tanganyika and he consulted it regularly, and the Legislative Council discharged the territory's legislative functions. In short, the two councils performed the functions of the Executive and the Legislature respectively; but their colonial setting had no room for many principles, like

"Government Responsibility", which operate in a democracy. Those councils were nevertheless important in the developments to independence because out of them the Cabinet of Ministers and the National Assembly ultimately evolved;[1] even the nationalist demands for responsible government and independence mainly sought to change the structure and composition of those two councils, and how they related to each other.

Members of the two councils were appointed by the Governor who also chaired both councils until 1953 when he left the Legislative Council and was replaced by a Speaker. The Legislative Council was first established in 1926 by the *Tanganyika (Legislative Council) Order in Council 1926*. Its members were in two categories: "official" and "unofficial" members. "Official" members were "persons holding office of emolument under the Crown in the territory" while "unofficial" members were not holders of such office. By deliberate design, the official members were always the majority. The Executive Council, on the other hand, started with official members only; a few unofficial members were appointed there later.

Following some changes in the organisation of the government in 1948, some specified members of the Executive Council were designated to be responsible to the Legislative Council for the activities of certain government departments. Those so designated were made *ex officio* members of the Legislative Council,

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[1]For the evolution of these institutions in Tanganyika, see, Cole & Denison:39-47, 60-5, and Tordoff 1967:189-94.

responsible for the activities of their respective departments before that Council in a way similar to ministers being responsible for Government policies and activities before Parliament. But these *ex officio* members were civil servants, primarily responsible to the Governor; they were therefore not "Ministers" and the term "Members" was used instead. In council proceedings they were referred to as "Member for Law and Order" or "Member for Finance" or "Member for Native Administration", etc., and that system was known to operate in British dependencies as the "Member System". It was from this "Member System" that both in Tanganyika and elsewhere in the Commonwealth (Wiseman:60-81), the "Ministerial System" of responsible government was evolved.

The campaign for independence was led by the Tanganyika African National Union (throughout hereinafter referred to as TANU), formed in July 1954 under the leadership of Julius Kambarage Nyerere. By 1958 it had reached all parts of the country; in the very first elections to the Legislative Council which were held in two phases in September 1958 and February 1959, all the contested seats were won by TANU or TANU supported candidates. After the elections the Executive Council became the "Council of Ministers", and five of its 12 members were drawn from the newly elected members of the Legislative Council.

But TANU was demanding elected majorities in the composition of both councils. By that time, however, even British attitudes were changing in favour of independence and by 1960 British

policy in Africa was for independence without delay (de Winton: 186-7). Accordingly, in 1959 it was announced that general elections would be held the following year. They were held in 1960 on a wide, albeit limited, franchise. TANU showed the mass support behind it by winning 70 out of the 71 contested Legislative Council seats; even the single seat lost was actually lost to a TANU member who contested as an independent. After the elections Nyerere formed a Government with himself as Chief Minister.

In March 1961, the vital Constitutional Conference was held, significantly, in Dar es Salaam and not at the Lancaster House in London. It has been described as the shortest constitutional conference in British colonial history (Listowel:380-90). Evidently, both the holding of the conference in Dar es Salaam (instead of London) and its record brevity were possible because many issues had already been dealt with in several informal meetings between Nyerere and Iain Macleod, the Secretary of State for the Colonies, which took place at the latter's flat in London over a period of four months prior to the conference (Listowel:383).

On 1st May 1961, Tanganyika achieved internal self-government; Nyerere became Prime Minister and his Council of Ministers and the Legislative Council were re-named the Cabinet and the National Assembly respectively. On 9th December 1961, Tanganyika became independent. Thus the process of transferring power and installing in Tanganyika a parliamentary system of responsible democratic government similar to that in the United Kingdom was

completed within a short period of about three years.

Notably, though, the changes were not as fast regarding the judiciary. Under colonialism, there was a dual court system consisting of the High Court and the Local Courts systems. In the latter, established under the *Local Courts Ordinance* and having jurisdiction --both civil and criminal-- over Africans only, the judicial and administrative functions of the state were discharged by one and the same person and, originally, the Governor constituted the system's final court of appeal (Cole & Denison:102-10; James & Kassam:12-5).

There was a long term objective of separating the local courts from the executive and incorporating them in an independent judiciary under the High Court (Tanganyika 1951). But at independence this objective was far from achieved. Only the Governor had been replaced by a Central Court of Appeal presided over by a High Court Judge. But Provincial Commissioners still had wide powers of hiring and firing local courts officers and wide discretion to grant or refuse leave (a mandatory condition) for appeal to the Central Court of Appeal. District Commissioners also still had wide disciplinary powers over local courts officers and extensive revisionary powers over the decisions of local courts. At independence, this position was handed over intact.

But the speed of political developments defied all predictions and expectations. In December 1956, Nyerere had predicted

independence in ten years' time (Nyerere 1966:44); by 1960 independence was coming almost too soon. He was actually prepared to delay it and wait for developments in Kenya and Uganda to catch up so that the three countries could achieve independence simultaneously and federate (Nyerere 1966:85-98; Taylor:214). The three were linked in an East Africa High Commission which had a Central Legislative Assembly and ran inter-territorial services like railways, harbours, posts and telecommunications, and customs and excise (Chidzero:93-105; Taylor: 106-12). A believer in African unity, Nyerere hoped for an independent East African federation. But the hope did not materialise and Tanganyika moved to independence alone.

Unity behind a single movement, TANU, contributed much to the fast developments to independence. But also by the time that unity manifested itself fully in the 1958-59 elections, British policy was already going in favour of independence without delay. This provided an opportunity for cooperation, instead of confrontation, between the British authorities and the nationalist leadership, which ensured smooth progress.

Possibly, Nyerere derived some inspiration from what had happened in Nkrumah's Ghana which in 1951 had semi-responsible government and in 1954 achieved internal self-government (Rubin & Murray:2-7), just about the time Nyerere was founding TANU; in fact his draft of the first TANU Constitution was modelled on Nkrumah's Convention

Peoples' Party (Bennett:17; Listowel:223).[3] Even in cooperating with the British authorities, Nyerere accepted measures which fell short of his demands much like Nkrumah had done when he denounced the "Coussey Constitution" of 1950 as "bogus and fraudulent" and yet cooperated with the British under that same constitution (Nyerere 1966:67-8; Harvey:18).

International opinion too was strongly in favour of decolonisation; the anti-colonial attitude of the USA often led it to deliberately side with the USSR against Britain, much to the embarrassment of the latter (Listowel:124). International opinion was of particular importance to Tanganyika, a Trust Territory administered by Britain in accordance with the terms of the Trusteeship Agreement between Britain and the UN Trusteeship Council. A detailed study of the implications of that status for Tanganyika (Chidzero) concludes generally that it did not make the territory any different from the other British dependencies. Indeed, Tanganyika was governed in the same way as the other dependencies were. But for Tanganyika, Britain had an obligation to prepare the territory for independence and was, for that purpose, accountable to the Trusteeship Council.

Tanganyika's international status was obviously a source of inspiration for the nationalists. They made use of the right to appear before the Council and complain against the administering authority; Nyerere appeared there no less than three times, and

[3]But Iliffe: 511, also mentions the *British Labour Party* in addition to Nkrumah's *CPP*.

Kirilo Japhet went there to petition on behalf of the Meru people dispossessed of their lands (Japhet & Seaton). In Dar es Salaam, TANU used to mark United Nations Day rather conspicuously and the very first meeting of TANU's National Executive Committee in August 1954 had

> only one item on the agenda: to draft a memorandum for submission to members of the UN Visiting Mission, due to arrive in Dar es Salaam in September. (Listowel:228)

On the other hand, Britain was keen to satisfy the Council that the territory was being treated in accordance with the Trusteeship Agreement. Thus in June 1957, when Britain's report on Tanganyika was discussed by the Trusteeship Council, British authorities went to the deliberate extent of sending to New York, in addition to two responsible British officials, a conservative local chief who could put before the Council an African "point of view friendly to the administration" and counter balance Nyerere's nationalist view (Listowel:294-7; Taylor:151-2). And in explaining why the transition to independence was so smooth, Nyerere has stated:

> Tanganyika was a Trust Territory under British administration. That whole phrase must be taken together.... The British are sensitive to public opinion and we as a Trust territory had a forum at the United Nations where we could exploit that sensitivity. That completes the answer.
>
> (Stahl:7)

Many other Tanganyikans must have regarded their country's status of a Trust Territory as quite significant in achieving their demands for responsible government and independence. When the UN Secretary General, Dag Hammarskjold, visited Dar es Salaam in January 1960, the airport was crowded with its residents who, in their thousands, also lined the roads from the airport to the city centre to welcome him (Listowel:371).

2.2: THE NATIONALIST MOVEMENT AND RESPONSIBLE GOVERNMENT

The nationalist movement which spearheaded the demands for independence was, in various ways, a struggle for responsible government. Firstly, it sought to bring an end to foreign political domination, which ruled through a government neither democratic nor responsible. The colonial government was outright authoritarian and owed allegiance and responsibility to a foreign colonial power based outside the territory.

Although the Governor governed through councils, those councils were neither representative nor democratically constituted; their role and function was not to make the government responsible to the people it governed. Both the Executive Council and the Legislative Council consisted of majorities of "official" members who were, as a rule required and in practice committed, to support and defend the government at all times. The unofficial members were not so required but, by deliberate design, they were a permanent minority and their membership in the councils was not intended to enhance government responsibility. The nationalist movement sought to change that.

Secondly, the nationalists were actually demanding some form of responsible government and democratic representation. In his farewell letter to Sir Richard Turnbull, the last Governor of Tanganyika, Julius Nyerere refers to their 1958 demands for "Responsible Government" by which "we meant a majority of Elected

Members in the Legco,[4] and a majority of Elected Ministers in the Government" (Listowel:425).

In any case, it would not have been acceptable, or even possible, for the nationalist movement to seek an end to colonial rule in order to replace it with a system that did not even have a semblance of responsible democratic government. Even if they had undemocratic inclinations, the nationalist leaders and activists had to promote democracy, at least for strategic reasons. Colonialism had distorted and altered the role and functions of indigenous institutions and traditional authorities to serve colonial purposes (Iliffe:31841); for that reason, those institutions would not be accepted to continue in a post colonial establishment (Listowel:320-1; Maguire:290-1). Invariably, even the sentiments against colonial rule sometimes manifested themselves in forms of defiance against tribal institutions and authorities. Thus the nationalist leadership had to "legitimise" itself as a credible alternative by founding its political base on some form of democratic institutionalisation, however rudimentary.

Moreover, the concern of the nationalist leadership was not only to bring an end to colonial domination, but also to create a nation-state within the colonial boundaries and, conveniently, the two objectives had to be fought for contemporaneously (Tordoff 1984:50-1; Davidson 1992:99-196). The nation-state envisaged had no room for traditional authority which was seen as tribal or otherwise sub-national, and therefore likely to undermine the

[4] "Legco" is short for "Legislative Council".

national integration sought (Listowel:320-1; Bates,D.:278). It was part of the strategy to use the appeal of democracy to champion the cause of nationalism and vice-versa.

Finally, part of the irony in the process of colonial exit is that even to the colonial power itself, handing over political power to successor states in Africa whose governments were anything less than responsible democratic ones was inconceivable. This attitude was backed by international opinion which at this time also supported democratic self-government. Accordingly, all policy programmes of the colonial government after 1950 sought to achieve just that. Whether that objective was actually achieved may be a different matter.

But while there was agreement between the nationalists and the colonial authorities that the end of colonial rule would see a democratic government in office, there were variations regarding how each conceived that responsible democratic government to be.

2.2.1: The Aims of the Colonial Authorities

In considering the nationalist demands for self-government and independence, the colonial authorities contemplated a truly democratic government which would be subjected to the same rigorous controls as known or believed to operate in Britain: a powerful democratically elected and representative parliament, an independent judiciary, strong political parties competing in free elections, a generally knowledgeable public, with a widely

circulating free press, etc. These were the "infrastructure" necessary for a truly responsible democratic government but in the colonial states, not having been developed, they were absent.

The colonial authorities considered it dangerous to hand over power to a tiny minority of privileged persons, which is what the few educated nationalist leaders were regarded to be. The rest of the African population was too uneducated and too uninformed to be able to exercise checks against any dictatorial practices or tendencies which the small elite, once given state power, could easily engage themselves in. Thus handing over power to the nationalist leaders would be a "road not to democracy but to tyranny" (Huxley:125-6; Blundell:115-6).

To avoid that, the colonial authorities preferred a delayed process towards self-government and independence so as to enable some training and education of a reasonable proportion of the African population who could then be relied upon to ensure that the Government after independence is constantly subject to democratic control. The British wanted to increase economic interests in Africa while at the same time preparing African countries for self-government and independence ultimately. This was logical because the increased economic interests could only be guaranteed continued security if independence was to be given to regimes which were thoroughly trained in, and committed to, the principles of western liberal democracy (Huxley:117-24).

But there was also concern for the interests, both future and

present, of the minority immigrant races: mainly European and, in Tanzania, Asian as well. They were relatively very few in numbers but the economies of the colonial states depended heavily on them. In Tanzania, for example, in 1958 the population was made up of about 9 million Africans, 100,000 Asians and 25,000 Europeans; but the Europeans and Asians were contributing about 60% of the territory's revenue (Twining:15,21). Thus, while the nationalists demanded responsible self-government and independence almost immediately, the colonial authority sought to delay it in order to protect the interests of those immigrant races. The argument was that a fully democratic government as demanded by the African nationalists would completely exclude the immigrant races from positions of political power and influence, their economic importance notwithstanding.

To avoid that, the colonial authorities preferred a very gradual process of step-by-step reforms in the developments towards full democracy (Twining:20-2; Blundell:115-6), with a system in which the minority races who dominated the economy would also have a politically influential position. This became an aim vigorously sought by the colonial authorities in Tanzania, and they sought to achieve it through the local government system.

Conscious of the growing post-war nationalism in Africa, and an increasingly anti-colonial international opinion, Britain designed some strategies to prepare her colonial possessions for democratic self-government. One strategy recommended by the Colonial Office was the democratisation of local government

institutions as a way of ensuring a democratic political system at the centre (Pratt 1976:14-5). Partly in response to that recommendation, the colonial government in Tanzania started a gradual process of "democratising" the native authorities by encouraging the formation of councils to advise the native chiefs who were the ones designated as the "Native Authorities" under the *Native Authority Ordinance*.[5]

But democratising the native authorities could not secure a politically influential position for the minority races since the *Native Authority Ordinance* did not apply to non-natives. More reliable was the *Local Government Ordinance*, enacted in 1953 with the aim of ultimately replacing the former. The colonial government sought to secure the position of the minority immigrant races in the local government system by promoting a policy which was called "*multi-racialism*." By "*multi-racialism*," the colonial government sought to secure the political representation of racial communities, irrespective of their sizes. Thus in the 1958-59 elections to the Legislative Council, each voter was required to vote for three candidates, one from each racial group, so that the Council's composition was 10 Africans, 10 Asians and 10 Africans. Strongly opposed to that tripartite system, TANU nevertheless took part in the elections, won all the seats (for all the races), and then went on to use the victory to upset the plans of the colonial government (Iliffe: 555-62; Listowel:303-11, 343-67).

[5]For this development see, generally, Taylor:97-106, Montague & Page-Jones, and Kingdon.

The contest over "*multi-racialism*" was even greater in local government (Pratt 1960; Stephens:127-9). The law did not require that all local councils should have a multi-racial composition, but the colonial government used "*multi-racialism*" to insist on a multi-racial composition as a pre-condition for the establishment of any council. The Government then tried to forcefully establish a few multi-racial councils, provoking enormous opposition which was so protracted in some districts (Maguire:196-234) that the whole policy had to be abandoned, and the councils established were dissolved by legislation.[6]

Apart from preoccupation with "*multi-racialism*," the colonial authorities certainly conceived a "responsible government" suitable for Africa as a weak central government, in stark contrast with "Government" as it was in the colonial state (Ghai 1972:410-3; Pratt 1976:49; Okoth-Ogendo:9). In Kenya, that attitude led to an independence constitution with provisions safeguarding regional authorities which it created. Ghana's Independence Constitution also contained similar provisions guaranteeing "regionalism". In a remarkable parallel, Ghana repealed those provisions less than two years after independence (Rubin & Murray: 8) while Kenya did the same thing without even attempting to implement those provisions (Ghai & McAuslan 1970:196-215).

In Tanzania, a somewhat similar constitutional arrangement was

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[6]*The Local Government (Geita, Kondoa, Manyoni and Pangani District Councils) (Dissolution) Ordinance 1959*, and the *Local Government (South-East Lake County Council) (Dissolution) Ordinance, 1959*.

contemplated. In 1958, E.G. Rowe was relieved of all his responsibilities as a Provincial Commissioner and charged with designing an appropriate scheme of decentralisation. Accordingly, he recommended the setting up of very strong regional institutions, complete with their own governments, treasuries and representative assemblies, and with extensive jurisdiction that would take many administrative matters away from the central departments and the political ministers who would head them after independence (Pratt 1976:48-9). But then the pace of change became so fast after October 1958 that no time was left for experimenting with Rowe's recommendations.

This fast pace was mainly due to the cooperation and understanding which developed during this period between the Government and the nationalist leadership, especially its overall leader, Mr Julius Nyerere,[7] whose brilliance, astute personality and charismatic leadership ensured peace between the colonial establishment and some of his less sophisticated followers.

2.2.2: The Expectations of the Indigenous Population

Regarding anti-colonial nationalism in Africa generally, Tordoff identifies seven different interest groups: traditional chiefs wishing to preserve their privileged positions; professionals and merchants seeking African enfranchisement and political power; a petty-bourgeoisie of teachers, clerks and petty businessmen wishing to change places with the advantaged colonial elite;

[7]See, generally, Listowel: chapters 35 - 36, and Pratt 1976: chapter 3.

African members of the bureaucracy expecting to profit from anticipated Africanisation policies; an urban workforce hoping for self-improvement through trade unionism; an urban based informal sector often getting inadequate incomes; and cash crop farmers organised in powerful associations (Tordoff 1984:51-2).

The respective significance of the various groups, in terms of their contribution to the nationalist cause, varied from country to country. But for Tanzania, one group missing from Tordoff's categories and yet of crucial significance is that of peasants (and pastoralists) sustaining themselves exclusively on a subsistence economy; at independence they possibly constituted more than 60% of the adult population (Stephens:38). Their numerical strength and unity behind TANU, as shown in the 1960 elections, was very significant in Tanzania's progress to self-government and independence.

The united support behind TANU had only one objective: an end to colonial rule. Significantly, TANU's mass membership and support did not consist of very sophisticated minds that could articulate the evils of colonialism *as a system*, or what they wanted it replaced with. Rather, most of them saw colonialism in simple factual terms of a *rule by foreigners*, which was humiliating (Listowel:240-1; Kirk-Greene:160). TANU organisers campaigned for support by invoking the indignation of being ruled by foreigners (Listowel:270-1; Tordoff 1984:51) and many supported TANU simply to end that rule; whether that end would bring a more egalitarian rule with a government responsible to the people did not preoccupy

their minds (Temu:203).

Because the resented rule was perpetrated by Europeans and because colonial policies often accorded favours and privileges to European settlers and, to a lesser degree, Asian immigrants, many supported TANU also as an expression of anti-European and anti-Asian sentiments generally. Thus there were some who thought that the coming of self-government would see the automatic departure of all Europeans and Asians from the territory, leaving all the privileges enjoyed by them and all the good land held by them to revert to the Africans (Taylor:142). Certainly, anti-European feelings inhibited many people's contemplation of responsible government and many simply looked forward to the replacement of the "whiteman" with TANU stalwarts and enthusiasts in the entire government structure.

There were yet others who saw in responsible government an opportunity to avenge their humiliation by removing all Government officers and agents, and TANU taking over all functions of the state and they, as TANU members and supporters, assuming all the powers of Government officers. Some imagined themselves elevated above the law; this was manifested by acts of disrespect for law and order, and contempt for established authority (Taylor:149-50; Listowel:355), including illegal attempts to usurp public functions and even to purport to constitute "TANU courts" and try cases! (Taylor:148-9; Kirk-Greene:145-6)

Such acts were certainly not on the nationalist agenda. But in

the early stages the TANU leadership could do little more than condemn such acts and strongly appeal against their occurrence; the TANU enthusiasts responsible for the acts could not be completely "disowned" by the leadership because their support was, at least in numerical terms, still needed. But after victory was assured, Nyerere started giving strong warnings to his own supporters who were disrespectful of the law and established authority, and those who thought that TANU and the coming of responsible government would condone lawlessness (Taylor:176-7,192; Listowel:376-7, 380-1; Maguire 249-57). He was thus telling them that their view of responsible government was certainly different from his.

Other views at variance with Nyerere's became increasingly manifest with independence drawing closer. Some imagined the coming of independence as the fall of a hunted bull buffalo and themselves as the hunters with drawn knives ready to move forward and cut away their pieces of the meat (p'Bitek: 188-9); they talked of the "fruits of independence". Yet others imagined their share to be part of the relative wealth of the immigrant minority races who had been enjoying far better living standards. Thus they gave their desire for self-improvement through responsible government and independence a racial dimension.

Those elements must have given backing to the extremist TANU back benchers elected in the 1960 elections who demanded a rapid "Africanisation" of the civil service, an immediate integration of the school system (with a view to sending their children at

once to the better equipped European and Asian schools), liberal expenditure of government funds, and Tanganyika's withdrawal from the East Africa High Commission (with a view to an immediate "Africanisation" of the Tanganyika share of the Commission's services), and so on (Taylor:194-5, 198-9, 214-5). In their demands they exploited crude emotions of African racialism and this became very obvious when discussing the Citizenship Bill in October 1961; they strongly pressed an argument that citizenship should primarily depend on race. Nyerere reacted very strongly against this argument; he threatened to resign.[8]

2.2.3: The View of the Nationalist Leadership

Julius Nyerere, the TANU leader, had a very clear vision of the responsible government he sought to achieve and he articulated his demands with passionate eloquence. To him, the nationalist movement was "a struggle for human rights," as much opposed "to one country ordering the affairs of another country against the wishes of the people of that other country [as] to the idea of a small minority in any country appointing itself the masters of an unwilling majority" (Nyerere 1966:76). His principle was that:

> Government belongs *to all the people* as a natural and inalienable possession, it is not the private property of a minority, however elite or wealthy or educated and whether uniracial. Government is properly constituted....not to secure the....advantages of the few, but to promote the rights and welfare of many. Therefore the many must inevitably be genuinely consulted, and the just powers of government derived from them. (Nyerere 1958:87) [emphasis added]

In modern conditions such a government must be democratically

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[8] *Parliamentary Debates*, October 18, 1961: cols.333-6; also see Listowel: xvii-xix, 403-4, Leys 1972: 191-2, and Pratt 1976: 64-5, 112-3.

elected. According to the British parliamentary system, which apparently both Nyerere and the British colonial authorities had in mind for Tanganyika, the government must also be responsible to a legislature which is representative of the people. Thus, when the arrangements for responsible government were announced in the Legislative Council in 1959, Nyerere remarked:

> ....unlike the present Government which....is responsible to the Governor and through the Governor to the Secretary of State for the Colonies, ...the new Government would be responsible to this Council and through this Council[9] it will be responsible to the people of Tanganyika.... [It] will truly be a responsible Government, a Government responsible to the people of this country.
>
> (Nyerere 1966:75-6)

And he was committed to the achievement of such government. By his own admission, his impatience was more for responsible government than for complete independence and after achieving responsible government he felt confident enough to say that the people of Tanganyika were "free already" because they now had the power to decide what was going to happen and when it was going to happen (Pratt 1976:84,85); independence would simply perfect what, substantially, had already been achieved.

In the endeavour to achieve responsible government, Nyerere always insisted upon certain basic principles which illustrated his vision of a responsible democratic government. From the very beginning, soon after the founding of TANU in 1954, Nyerere repeatedly demanded an official statement declaring that Tanganyika, despite its multi-racial population, was primarily an African country and was to be developed as such (Taylor:96-7, 129, 146). When that statement was finally given in October 1958

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[9]Refers to the Legislative Council.

by the Governor, Sir Richard Turnbull, it removed the African fears of continued European domination, fears which Nyerere shared with his colleagues in TANU (Iliffe:479-81) and with other nationalists in neighbouring countries. They feared that the minority European and Asian inhabitants, being far more educated and wealthier than the Africans, could easily dominate political life to the exclusion of the majority Africans, a development which had already taken effect in Southern Rhodesia with the grant of self-government to the settler minority in 1923.

Indeed, many serious minded African nationalists were even ready to delay steps towards self-government and independence if such steps fell short of guaranteeing the absence of political domination by European settlers or other immigrants. In 1950, Malawi's Dr Kamuzu Banda warned against imminent self-government in Central Africa because it would simply deliver "the Africans into hands of white minorities inspired by the same *Herrenvolk* ideas as the South African Nationalists" (Davidson 1992:167). And in 1954, Nyerere and other nationalists deliberately wanted to avoid introducing a majority of unofficial members into the Legislative Council at that early stage because such a majority would have given non-African members a dominant position (Pratt 1976:84; Iliffe:480).

Fear of domination by the European settlers based in Southern Rhodesia made the Africans of Malawi strongly oppose the Central African Federation (Banda; Chiume), while fears of a similar domination by Kenya-based settlers was behind the Tanganyika

African opposition to the East African High Commission (Twining: 17-8; Taylor:107-10). Other reflections of that fear were the opposition to the policy of "*multi-racialism*" in the form of racial parity mentioned earlier, and the strong opposition to a limited franchise because the high qualifications set, based on wealth and education, were easily met by practically all Europeans and Asians, but they disenfranchised almost all Africans (Pratt 1976:37).

Another reflection of that same fear is the fact that non-Africans were not admitted into TANU membership until well after independence. Apparently, this contradicted Nyerere's belief in equality as an essential corollary of democracy. But he had to maintain an appearance which assured his members and followers that TANU was indeed their own organisation, and not just another institution which the Europeans could use to continue dominating them. Any such domination, or appearance of domination, would fail to constitute the truly responsible government that Nyerere and TANU were so keen to achieve.

Nyerere has always opposed racial discrimination, both in principle and in practice. Such discrimination would fail to constitute the ideal government belonging "to all the people" which he had in mind as it would exclude some people from participating in it. Thus he had always insisted that race is irrelevant in considering a person's political rights (Nyerere 1966:64,76,79, 126-9). Yet, in appreciation of the racial prejudices and suspicions prevailing in his country at the time of

independence, he accepted an arrangement with reserved seats for European (10) and Asian (11) members in the 71 member legislature. This was to assure the minority races that there was no intention to exclude them, on the basis of race, from participating in the government of the country (Nyerere 1976:78-9, 100-1). But this arrangement was, like the exclusion of non-Africans from TANU membership, only temporary.

Finally, an important aspect of responsible government which Nyerere saw ahead of most of his nationalist colleagues, was the economic factor. He knew that the Africans were expecting independence to improve their incomes and welfare services. He knew that if no effort was made to try and meet those expectations, there would be serious discontent which, inevitably, would be expressed in terms of racial hostility to the better off non-African minorities (Taylor:202). Thus his view of responsible government was that the government should effectively work to improve living standards. In an article published only two days to independence, he wrote:

> ....we have also a responsibility to improve the well-being of the people of Tanganyika... Our people must have healthy bodies and healthy minds. They must have sufficient control over the forces of Nature to avoid the constant recurrence of disastrous famines. *All these things are now our responsibility.* It means that *the Government of Tanganyika must lead the people in an all-out fight against poverty, ignorance, and disease. It must lead them forward to economic development,* to an expansion of production, and to a fair distribution of the fruits of production, so that every individual really stands a chance to develop himself. (Nyerere 1961c:340) [emphasis added]

That, in Nyerere's view, was a very important aspect of responsible government, and he returned to that theme now and again after independence. A government not capable of "lifting"

the people out of their poverty, ignorance and disease, and leading them "forward to economic development" could not, according to him, claim to be responsible. The problem he faced at independence was that his government did not have enough resources for the discharge of this particular responsibility.

Nyerere was also worried about inefficiency in the government machinery resulting from the likely mass departure of British civil servants after independence; there were hardly any competent and qualified Africans to replace them (Pratt 1976:91-4). An inefficient government cannot provide any of the expected benefits of a responsible government. For those reasons Nyerere was even inclined to delay full independence so that with British support and assistance, he could improve economic development and train a minimum proportion of local civil servants during an extended period of responsible government (Pratt'1976:83-5).

But not all his supporters and colleagues in TANU agreed with him. They were so committed to the general demand for "independence now" that when in 1960 Nyerere offered to delay Tanganyika's independence so as to achieve it simultaneously with Kenya's and Uganda's, with a view to federation, he was "sharply criticised" in TANU's National Executive Committee (Leys 1972:191; Taylor:214). And there were many more in TANU who demanded immediate "Africanisation" of the civil service and liberal government expenditures so as to enjoy the "fruits of independence" (Taylor:194-5, 198,215); they would not agree with Nyerere and his inclination to delay independence. In the event

Nyerere acted according to their wishes and welcomed immediate independence. But their demands indicated some of the differences in attitude and outlook which he had to contend with at independence, as well as after.

2.3: AN OVERVIEW OF THE INDEPENDENCE CONSTITUTION

The framework of government after independence was established by the *Constitution of Tanganyika, 1961* (also referred to as the *Independence Constitution*), which came into force on December 9, 1961, with Britain's cessation of responsibility to govern Tanganyika.[10] But this constitution did not present an abrupt change in the structure of government; much of it had been introduced with responsible government in 1960, and independence merely completed the process (Colonial Office:1-7; Dale:68).

Section 14 of the Constitution established a Parliament consisting of "Her Majesty and the National Assembly." Like other British colonies on achieving independence, Tanganyika in effect became a monarchy (Dale:69) headed by Her Majesty, to be represented by the Governor-General whose office was established by s.11. The Governor-General, who was also Commander-in-Chief, was appointed by Her Majesty and held office during Her Majesty's pleasure. Section 29 gave legislative power to Parliament, to be exercised, as per s.36(1), by "bills passed by the National Assembly and assented to by the Governor-General on behalf of Her

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[10] *Tanganyika (Constitution) Order in Council,1961*, s.1(2) and *Tanganyika Independence Act, 1961*, s.1.

Majesty." Parliament could also amend the Constitution and, in so far as if formed part of the law of Tanganyika, the *Tanganyika Independence Act, 1961* of the United Kingdom, but the bill for the amendment had to be supported by a two-thirds majority of the National Assembly on the second and third readings [s.30(1)].[11]

On the composition of the National Assembly, the Constitution merely re-stated the then existing composition of 71 elected and 10 nominated members and left it to Parliament to change, for future elections, the number of elected members and the manner of electing them [ss.16 and 17]. There was no mention of reserved seats for minority races, and franchise was extended to include all citizens aged 21 years or more.

Executive authority was vested in Her Majesty, to be exercised in that behalf by the Governor-General. But, typical of all Westminster models (de Smith 1961), the Governor-General's authority was no more than formal. Actual authority was in the Prime Minister and the Cabinet which he headed. Section 46(1) of the Constitution was a general requirement for the Governor-General to act according to the advice of the Cabinet or the Prime Minister in practically all cases. Even the exceptions listed in that section did not give the Governor-General much discretion. They included the power to appoint the Prime Minister who, in any case, had to be a person "likely to command the support of the majority of the members of the National

[11]Throughout in this section, references in square brackets refer to provisions of the *Independence Constitution*.

Assembly"[s.42(3)]. The other exception involved the power to dissolve Parliament, or to replace the Prime Minister without dissolving Parliament, if the incumbent did not resign within three days after a National Assembly resolution of no confidence in the Government [s.40(3)].

In addition to the general requirement, numerous provisions required the Governor-General to act "in accordance with the advice of the Prime Minister," in practically everything. In short, the Governor-General was not expected to do anything on his own, and he was certainly not to be responsible for whatever he did: the question whether he actually received advice or acted according to it was "not to be enquired into in any court"[s.46(2)]. But the Prime Minister was duty bound to keep the Governor-General fully informed of the conduct of the government [s.47], and to give him advice according to which he, the Governor-General, was required to act. The advice of the Prime Minister was given under the authority of the Cabinet whose duty and function was "to advise the Governor-General in the government of Tanganyika"[s.43(2)]. The clear purpose was to approximate the role of the Governor-General, as closely as possible, to that of Her Majesty in the United Kingdom.

The Prime Minister and his Cabinet were "collectively responsible to Parliament for any advice given to the Governor-General," and "for all things done by or under the authority of any Minister in the execution of his office"[43(2)]. That provision encapsulated the core element of government responsibility under

the Westminster system. In effect, therefore, the Ministers were responsible not only for the advice given to the Governor-General, but also for whatever he did, and for whatever they did. This responsibility was not to him, the one who appointed them, but to Parliament. The overall effect was that the Cabinet Ministers were both collectively and individually responsible to Parliament for the entire business and conduct of the government.

The Parliament represented the interests and the general will of the people, and its supremacy was reflected by its overall authority over the Cabinet; the National Assembly could remove the entire Cabinet from office by passing a resolution of no confidence in the Government [s.40(3)]. In the event of such a resolution the Prime Minister was required to resign or to advise the Governor-General to dissolve Parliament; if he did not resign within three days, the Governor-General was bound to dissolve Parliament or to remove the Prime Minister without dissolving Parliament if the resolution was passed within 14 days after a general election and the Governor-General considered it possible to simply replace the Prime Minister without dissolving Parliament. In either case the other Ministers were to vacate their offices because removal of the Prime Minister from office, or a change in the holder thereof, led to automatic loss of office by the other Ministers [s.42(6)(b) and (c)]. These provisions emphasised the doctrine of collective ministerial responsibility stated expressly in s.43(2).

The Constitution also re-established the High Court, as "a

superior court of record" with "all the powers of such a court," which thus included the power of judicial review.[12] The High Court was headed by the Chief Justice who was appointed by the Governor-General acting in accordance with the advice of the Prime Minister. Other judges of the High Court were appointed by the Governor-General, acting in accordance with the advice of the Judicial Service Commission (not the Prime Minister). Once appointed, the judges enjoyed security of tenure: they could not be removed except for inability to perform the functions of their office or for misbehaviour and this could only be done following an elaborate procedure of investigation, by a competent judicial tribunal, into the conduct of the judge sought to be so removed.

For other judicial officers (the Registrar and Deputy Registrar of the High Court, Resident Magistrates and other magistrates), the powers of appointment, disciplinary control and removal from office were vested in the Judicial Service Commission [s.65], established under s.64 of the Constitution. Thus, judicial officers were not placed under the direct control of the Government. This was, like the entrenched security of tenure for judges, intended to make the judiciary independent of the executive so as to ensure impartiality.

Two other important public officers should be mentioned here: the Director of Public Prosecutions and the Controller and Auditor General. Their tenure of office was secured by the Constitution

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[12]By virtue of the *Judicature and Application of Laws Ordinance 1961*, which was passed on independence eve.

[ss.79 and 80] in terms similar to those for the tenure of High Court judges. Further, in the performance of their functions, they were to be guided by the Constitution and other laws, and were expressly not subject to the direction or control of any other authority or person [ss.53(6) and 73(6)]; they were thus free from executive control. Their salaries and allowances, like those of the Governor-General and judges of the High Court, were charged on the Consolidated fund.

In addition to the Judicial Service Commission, the Constitution also established the Public Service Commission and the Police Service Commission. The former was empowered to appoint, control and remove from office all officers in the public service (other than judicial and police officers), and the latter was given similar powers in respect of police officers. The purpose of this arrangement was to keep the police officers and civil servants free of political pressure and avoid subjecting them to the whims of the executive.

One early remark about the *Independence Constitution* was that its preamble, with its emphasis on equality, freedom and justice, was so reflective of Nyerere's general attitude to political questions that he may well have written it himself (Bates,M.L:448). This, we think, was mere speculation; the *Constitution of Tanganyika, 1961*, was just another of those "Whitehall Constitutions" made, almost as a routine exercise, for every British colony becoming independent. Like other such constitutions, it sought to set up a parliamentary system of

government similar to that obtaining in Britain (de Smith 1961); its provisions were intended to reproduce, by express enactments, the unwritten conventions operating in the United Kingdom.

Significantly, though, the strongly appealing words of the preamble were not strictly part of the Constitution because of the rule that preambles do not form part of the laws they introduce.[13] Thus the cherished principles of equality, freedom and justice, not being in the body of the Constitution, could not be enforced on the basis of the declarations in the preamble. In that regard, the *Constitution of Tanganyika, 1961*, was a conspicuous exception among the "Whitehall Constitutions" of its period; all others incorporated those principles in elaborate detail in entrenched provisions known as "Bill of Rights".

There has been no official explanation for this exception but considering Nyerere's opposition to a Bill of Rights in subsequent developments, most likely the omission at independence was also a result of his deliberate wish. Prior to the Constitutional Conference (whereat the constitutional framework to be adopted at independence was agreed upon), Nyerere had several informal meetings with Ian Macleod, the Secretary of State for the Colonies, and it was at these meetings that most issues were actually resolved and settled (Listowel:383). Significantly, the issue of a Bill of Rights did not even feature as an item for discussion in the Constitutional Conference.

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[13]*Hatimali Adamji v. E A Posts & Telecomms Corporation*, 1973 L.R.T.,n.6.

No doubt that Nyerere knew exactly what he wanted, and how best to negotiate for it. Constitutional Law and British History were among his subjects at Edinburgh University (Hatch:27). He knew the British system. The British had confidence in him. He was certainly in a position to convince Macleod in their pre-conference informal meetings that the absence of a Bill of Rights would be as harmless for Tanganyika as it was for Britain. And accordingly Tanganyika was given a Constitution which, like Britain, had no Bill of Rights. This arrangement was in perfect agreement with Nyerere's view of a good government for Africa which was that "once freely elected," the government "must also be free to govern...without fear of sabotage," and have ability to "deal firmly and promptly with trouble makers" (Nyerere 1961a: 8,9)[14] and further that the executive must be enabled "to function without being checked at every turn."[15] The absence of a Bill of Rights gave him that kind of government.

Regarding the judiciary, the *Independence Constitution* did not alter the dual court system; in fact s.65(3) of the Constitution gave it legitimacy by excluding local courts officers from the jurisdiction of the Judicial Service Commission. As such, the ideal emphasised by Nyerere in October 1961, that the judiciary "at every level must be independent of the executive arm of the State" (Nyerere 1966:131) remained a far cry.

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[14]Significantly, Nyerere still had this view in the 1990s, defending the need to empower the government fully so that it could safeguard certain basic principles, like national unity, if these were to be threatened by the coming of multi-party politics.

[15]*The Observer*, June 3, 1962.

2.4: INDEPENDENCE: A PACT OF CONCESSIONS AND COMPROMISES

The *Constitution of Tanganyika, 1961*, in both its promulgation and its content, constituted an aggregate of concessions and compromises by the various parties involved in the process of Tanganyika's decolonisation. The colonial authorities, the nationalist leaders, their followers and supporters, each had their own respective principles, beliefs, desires and aspirations regarding independence. Ultimately, in attaining independence at the time and in the manner it was, each had to make concessions and compromises. Herebelow we highlight some of those compromises by the colonial authorities and by the nationalist leader, Julius Nyerere.

2.4.1: The Colonial Compromises

As already pointed out (*supra*, section 2.2.1), the colonial authorities would have preferred a deliberately delayed process towards responsible government and independence. The British ambition in Africa generally was to increase British investment and allow some time to build up a sound and healthy economy while at the same time training and educating as many Africans as time and resources would allow, so as to build up a well informed public which is necessary for democratic institutions to work effectively (Huxley:124; Blundell:115-6). The idea was that state institutions like Parliament, even if constituted through some democratic process, were not enough to ensure a living democracy if the general population was uneducated and ignorant of their

operational dynamics.

In the end, however, those British ambitions were never realised and the beliefs and principles behind them were compromised: independence was granted without them. In fact the British compromised even the need to build up *structures* and *institutions* necessary for effective democracy. They just "stumbled out of Africa" without a sufficiently "planned and prepared transfer of power", thus handing over the colonial legacy almost intact (Davidson 1987:7-8). Lord Twining, Governor of Tanganyika from 1949 to 1958, mooted the idea that the Westminster model of constitution could be unsuitable for the conditions of Africa (Twining:23); but it was not followed up. Instead, another "Whitehall" constitution was adopted for Tanganyika even before the institutional structures necessary for its effective operation had been sufficiently developed.

In the British system of parliamentary democracy which was being established in Tanganyika, political parties were an essential institution for the system's effective operation. But the *Constitution of Tanganyika 1961* did not reflect that fact; it merely assumed the existence in Parliament of a government party and an opposition party, an assumption absurdly removed from reality (Nyerere 1961c:339; Mwakyembe 1986:16-7). With that constitution, the British could indeed hope to deliver to the successor state a Parliament, a Government and a Judiciary; but unfortunately, they could not deliver political parties able to compete effectively in elections as envisaged by the

Constitution. As a result, the independence government was a one-party government.

Institutions like the legislature were indeed set up but had not fully taken root in the political society; only in 1958 were the first ever elections held, followed by the pre-independence elections in August 1960. There had been virtually no experience with the system of parliamentary democracy, and the government knew next to nothing about organised opposition in Parliament; the National Assembly consisted of only one party, TANU. Even the principles of "separation of powers" and "independence of the judiciary" were compromised. The colonial legal system, with its local courts still presided over or controlled by government administrators, was left intact. Further afield, even the decentralisation scheme, regarded as a restraint upon central government power, was abandoned: apart from 11 town councils, the *Local Government Ordinance* was, at independence, in application in only 6 out of the country's 52 districts.[16]

Obviously, if the British ambitions had to be achieved and those institutions be built up first before handing over power, independence would have been delayed. But by 1960 the British did not want to delay independence. And for fear of delaying independence, they compromised almost everything: the need to build up a sound and healthy economy, the need to train and educate the African population, and the need to build up institutions of democracy which would be effective in fact, and

[16]The districts were Kilwa, Lindi, Mafia, Masasi, Mtwara and Newala.

not just in theory.

The philosophy behind this new strategy of compromise was, according to the Secretary of State for Colonies, Mr Ian Macleod, that although it may have been dangerous to give "independence too soon", it would have been "much more dangerous to give it too late" (Listowel:390). In 1959 the waves of African nationalism had led to chaos and violence, with loss of lives, in neighbouring Congo (now Zaire) and Nyasaland (now Malawi), while Kenya had been under a state of emergency since 1952. In Tanganyika, by contrast, Nyerere and TANU had managed so far to demonstrate an impressive commitment to constitutional (and, in any case, non-violent) means in pressing forward with their demands. There was fear that further delays in meeting the nationalist demands might exhaust the patience Tanganyikans too and the country might erupt into chaos.

On the other hand, cooperation with the nationalist leadership seemed to offer a better promise of further cooperation after independence.[17] It was hoped that after taking over political power, the nationalists would continue to be in alliance with British officers in the civil service who would continue to be relied upon, thus ensuring continued dependency upon Britain (Pratt 1976:90-8; 1982:279-80). This hope was largely based on the confidence that the British had in Julius Nyerere, who was described variously as "the ablest African politician of our day", the "most poised, confident, extrovert and radiant of all

[17]See Pratt 1976: chapter 3, particularly at pp.57-9.

the African leaders", and "no ordinary man" but "a leader to whom not only the people of Tanganyika but many others in all parts of the world can look to with confidence...", and "a man of high principles and strong convictions, ...an outstanding political leader...", and so on.[18]

This trust and confidence was so immense that the last governor of Tanganyika, Sir Richard Turnbull, was to recall in 1978 that in forming the first government they "were prepared to give way on certain lines" but:

> ...one point upon which we had to be insistent was that Julius Nyerere should be at the head of the administration. The administration must be directly under him, ...down to the most newly recruited district officer. (Kirk-Greene:159)

It would seem that independence was granted, not to Tanganyika as such, but to Julius Nyerere on account of the trust and confidence the British had in him, rather than in the people generally or in any of the institutions set up before or at the time of independence.

2.4.2: Nyerere's Compromises

Nyerere, on the other hand, compromised some of his own beliefs too. He saw the need to delay full independence so as to improve the economy and local staffing in the civil service during an extended period of responsible government; but he never tried seriously to pursue that line because it could lead to a rift

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[18]See the various remarks in Listowel:284-5; Perham:53; Colonial Office:11; Bates,D.:293; Taylor:220-1; Pratt 1976:58-9, etc.

between him and some of his colleagues and followers. Possibly for the same reasons he made compromises by giving in, albeit cautiously, to those elements in TANU whose demands for an immediate "Africanisation" of the civil service (Pratt 1976:105-7), instead of "localisation" as Nyerere himself thought was the correct principle,[19] liberal government expenditures and enjoyment of the "fruits of independence" had racialist tones; he even bowed to their pressures to expel some Europeans for alleged racial discrimination, and failed to stop the racialist tones in some lead articles of the TANU newspaper, *Uhuru*.[20]

But Nyerere's most glaring compromise was in respect of his beliefs on democracy and how best it could operate in Africa. He argued that it was erroneous to equate democracy with the forms or institutions of democracy known in the United Kingdom and other western countries, and that those forms were not necessarily the best for Africa.[21] But he did not attempt to have his views adopted, even minimally, in the framework adopted for Tanganyika. More surprising is that Nyerere did not only accept the Whitehall designed parliamentary system of government but also he cooperated with the British with remarkable commitment in installing that system in Tanganyika. On assuming office as Chief Minister, he wrote a circular outlining the respective functions of, and relationships between, the central

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[19]See his view of "Africanisation" in Nyerere 1966:99-102.

[20]*East Africa and Rhodesia*, January 25, 1962; also see Taylor:194-5, 198, 200-1, 215, 226-7, Leys 1972:187 and Pratt 1976:113-5.

[21]See Nyerere's 1961 publications (1961d excepted) listed in the bibliography, and Nyerere 1966:103-6, 133-4, and 195-203.

government, the civil service, the politicians, and the party (Nyerere 1961d). The circular was intended to make his colleagues understand and accept the traditional conventions of the parliamentary system for its effective operation in Tanganyika (Pratt 1976:97).

Many explanations have been given for constitutional changes subsequent to independence, but none explains Nyerere's happy acceptance of, and apparent commitment to, the British parliamentary system in 1961. Nyerere's own belief about political institutions has been that "we must grope our way forward" (Nyerere 1966:121-2; 1968:37). Possibly, the British offered the parliamentary system because it was the only system they knew, and Nyerere accepted it as "a platform from which to grope forward" and not necessarily because he believed in it as the best system (de Winton:186-8).

But perhaps Nyerere's acceptance of the *Independence Constitution* was logical at that time because of the need, as he saw it, for continued cooperation with Britain. He looked forward to British assistance in the implementation of the Three Year Development Plan (1961-64) and in the continued use of British officers in the civil service (Colonial Office:12-3,16; Listowel:391-8; Pratt 1976: 96-103). Thus the British parliamentary system was adopted so as to inspire the confidence of the British authorities and the British people which must have been necessary in order to get the much needed British assistance.

That could also explain even the acceptance of the transformation from a "Trust Territory" to a "British Dominion" with the Queen of England as the Head of State, a position which today's attitudes would find absurd and unacceptable. At the Constitutional Conference in March 1961, Nyerere had actually asked the Secretary of State for the Colonies that Tanganyika become a republic immediately on independence. But Mr Macleod could not agree without referring the matter to the Cabinet. So as not to delay progress, Nyerere dropped the idea (Listowel:386).

In his compromises, Nyerere was nevertheless not prepared to abandon certain basic principles. On racialism, for example, he was uncompromising. Shortly before the Dar es Salaam Constitutional Conference, he risked the much needed British cooperation and even Tanganyika's independence by demanding the exclusion of apartheid South Africa from the Commonwealth as a condition for Tanganyika's (anticipated) membership of that body (Listowel:401-2; Nyerere 1966:108-13). And in the heated debate on the Citizenship Bill in October 1961, he did not restrain his anger and impatience with the TANU back benchers who put up a racist opposition to the government proposals, and they were finally endorsed.

Perhaps we should mention that those extremist elements in the nationalist ranks compromised some of their beliefs too; their defeat on citizenship was only part of the things they had to concede. Although Nyerere gave in to some of their demands, he never gave way to the full extent they demanded on

"Africanisation", or on radical integration of schools, and he did not give in at all to their demand for a disintegration of the East African High Commission. Much as they may have felt very strongly about their demands and beliefs, they accepted defeat without opting out of TANU and forming an opposition.

CHAPTER THREE

The Government Under Nationalist Leadership

3.0: INTRODUCTION

Barely six weeks after independence, on 22 January 1962, Nyerere resigned as prime minister; the reason given was that he wanted to devote himself fully to reorganise and revitalise TANU in the new circumstances of independence. He was replaced as Prime Minister by Rashidi Kawawa. The resignation was announced at the end of a meeting of TANU's National Executive Committee (hereinafter referred to as NEC). At the same meeting it was announced that TANU had recommended that Tanganyika become a Republic, and that the Government had accepted the recommendation.

The following month a motion was passed by the National Assembly inviting the Government to draft necessary amendments to the Constitution to enable Tanganyika become "a Republic within the Commonwealth." Subsequently, a Government Paper on "Proposals for a Republic" was published, and then discussed and endorsed by the National Assembly in June 1962. In September the *Constituent Assembly Act 1962* was passed to enable the National Assembly to turn itself into a Constituent Assembly, capable of enacting a "Republican Constitution" and other laws related to it without the otherwise necessary Royal Assent.

In November 1962, the National Assembly constituted itself a

Constituent Assembly and passed the *Constitution of Tanganyika 1962* (also referred to as the *Republican Constitution*), along with 13 other related bills. They all became effective on 9 December 1962, making Tanganyika a Republic. Julius Nyerere was sworn in as the first Executive President, thus ending his period of absence from Government. He had been elected President in November, by universal adult suffrage, under the *President Designate (Election) Act 1962*, a transitional law repealed at the commencement of the Republic.[10]

In January 1963, the NEC resolved that Tanganyika should become a one-party state, and the Annual Conference, TANU's highest organ, endorsed this resolution. A year later the President set up a Commission[11] to recommend the form and institutions that the one-party state should adopt; it submitted its report in 1965. On the basis of its recommendations, a new constitution was drafted and adopted in July 1965 as the *Interim Constitution of Tanzania 1965*, formally making the country a one-party state.

The change to Republican status and the formal adoption of the one-party state constitution were closely related and we look at them together in this chapter, as we seek to analyse the changes from independence through to the adoption of the one-party system, particularly focusing on how they affected or related to the powers of the executive.

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[10]*Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act* 1962, s.34 and 1st Schedule, Part II.

[11]*Government Gazette*, February 7, 1964: General Notice No.300.

3.1: TRIUMPHANT NATIONALISM AND THE CHALLENGES OF INDEPENDENCE

Two important events occurred in close succession in 1964, which must be mentioned here: the army mutiny in January, and the Union of Tanganyika and Zanzibar in April.

The army mutiny began in the early hours of 20 January 1964. The demand was for higher pay and for "Africanisation" of the army ranks. It was the latter, especially, which prompted the mutiny; Nyerere had just announced, on 8 January 1964, that the government was abandoning the policy of "Africanisation" it had since January 1962. Besides that the mutiny had no political agenda. But it revealed the extreme weakness and vulnerability of the state and its institutions: it was after five days that the mutiny was put down, by 60 British marines who came in at Nyerere's request. He has referred to this incident as the most humiliating experience in his career.[12] Following the mutiny he disbanded the army and went on to recruit and build a new one on the basis of loyalty to TANU (Martin,R:22; Lee:149; Bienen 1965:44-5). He was later to say, rather proudly, that while many other institutions were inherited, the army "we built ourselves."[13]

The union between Tanganyika and Zanzibar was swiftly executed. Zanzibar was granted formal independence from Britain on 10 December 1963. But, contrary to popular opinion and wishes as expressed in pre-independence elections, the independence pact

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[12]Interview with *Africa Now*, December 1983.

[13]Smith:121, and the whole of chapter 8 for an account of the mutiny.

granted power to an Arab sultanate which had dominated the African majority for well over a century. On 12 January 1964 the Arab sultanate was overthrown in a bloody African uprising. A Revolutionary Government headed by Abeid Amaan Karume of the Afro-Shirazi Party took over. There are no details of any negotiations leading to the union but Karume is said to have declared to Nyerere in March 1964 that Zanzibar was ready to unite, apparently in an East African Federation (Smith:127). The Federation never materialised but on 22 April 1964, Nyerere and Karume signed the "Articles of Union" to form the United Republic of Tanganyika and Zanzibar, later renamed "Tanzania". Nyerere became President of the new United Republic of Tanzania with Karume becoming First Vice-President. But under the structure of the union Zanzibar retained much of its autonomy, with Karume continuing as Zanzibar's President, except for a few key departments, like Defence and External Affairs, designated as "Union Matters".[14]

Those two events of early 1964, the army mutiny and the union, led to some rather peculiarly Tanzanian features in African political and constitutional history. The structure of the union has often been questioned and sometimes led to controversies but it makes Tanzania the only case of two independent countries successfully uniting in Africa. And after the mutiny, Tanzania built up the most politicised army in Africa, probably the only such politicised army under a purely civilian African government.

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[14]For the legal framework of the union, see Shivji 1990a.

Those events and the way they were handled presented significant challenges to the new state and its leadership. They were part of the many challenges that the political leadership had to face and resolve in the unfolding process of political developments analysed in this chapter.

3.1.1: The Alienating Effect of Independence

Independence was the single objective around which revolved the unity of almost the entire population of Tanganyika in support of TANU. For the sake of achieving independence as early as possible even the nationalist leadership deliberately avoided considering other policy issues for fear of uncovering disagreements amongst them and lessening their unity (Stahl:9). But the rapid achievement of independence, itself largely facilitated by that unity, removed that unifying factor and TANU faced a likely disintegration and even possible demise due to loss of purpose (Bennett:29; Leys 1972:190,192). There was need "to define for the nation as a whole a new set of general aims to replace *Uhuru* itself" and to provide a "fresh definition of TANU's role" in achieving the new aims (Leys 1972:193).

Nyerere had a very clear vision of the new objective which TANU and its government had to pursue with the utmost commitment and devotion: the need for economic development and for the TANU Government to "lead the people in an all-out fight" for the same (Nyerere 1961c:340). For this goal, he insisted, there was need for a "maximum united effort by the whole country" just as much as

(if not more than) there had been for achieving independence (Nyerere 1961a:8). But with independence, the unity he so desired was threatened because:

> independence brought...also a nagging sense of uncertainty about the substance of freedom. It raised the possibility that the nationalist elite, who had taken control of the political process in order to provide superior rewards and opportunities to Africans, might lose the support of those in whose name they had acted. (Stephens:155)

With responsible self-government and then full independence, many TANU leaders were absorbed into government and lost touch with their members and supporters; even party organisation suffered. To make it worse, "except for the Prime Minister, the Cabinet, and an expanded legislature," the apparatus of both central and local government after independence remained much the same as it had been before (Stephens:159; Pratt 1976:108-9).

The TANU members and supporters, sometimes tauntingly reminded that independence had brought them nothing after all,[6] were being driven into desperate frustration. Nyerere saw this problem each time he visited districts as Prime Minister:

> I am met by the provincial commissioner and by the district commissioner both of whom are likely to be colonial officers, the very men who TANU fought but a few years ago. I am introduced by them to the other government officers who are also usually expatriates. I am then introduced to the chiefs and to the officials of the native authority and again I am meeting men who either opposed TANU or who carefully stayed out of the political struggle. Then off to one side I notice a few chaps in torn green shirts[7] wielding banners but looking somewhat forlorn. (Pratt 1976:108)

Thus TANU, now in Government, was drifting away from its members and supporters, and a gap was growing between the two.

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[6] *Africa Report*, February 1962; also see Pratt 1976: 118.

[7] Green shirts were the uniform for the TANU Youth League.

Nyerere resigned so as to bridge this gap by creating a new role for TANU which would provide a link and an understanding between the state institutions and the people by acting

> like a two way all-weather road along which the purposes, plans and problems of the Government can travel to the people, at the same time as the ideas, desires, and misunderstandings of the people can travel direct to the Government. (Nyerere 1966:158)

Following his resignation, Nyerere devoted time and effort in explaining the role and function of the independence government and TANU's role in it; on the one hand, he urged the TANU leadership at all levels to continue identifying themselves with the aspirations of the people.[8] But he did not change the organisational structure of the party.

3.1.2: Growing Intra-Party Rift

Nyerere's resignation in January 1962 was also prompted by a growing rift between himself and some of the activists within TANU, including many in its middle level leadership, some of whom had won seats in the 1960 elections. With independence, differences within TANU became more pronounced and difficult to compromise. Indeed, at independence Julius Nyerere was the undisputed national leader but among his colleagues in TANU were some individuals with real political influence in their own right either through their leadership in the trade union or cooperative movements, or by their influence in populous tribal groups (Pratt 1971:95). Some of them started making demands which were not

[8]He published two pamphlets in the Swahili language: *TANU na Raia*, intended for the people, and *Tujisahihishe*, intended for the leadership.

entirely compatible with Nyerere's ideals and principles.

Nyerere was keen to retain the nationalist unity that TANU had forged during the campaign for independence. So, when radicals within TANU insisted on an "Africanisation" of the civil service, he cautiously gave in, albeit to a limited extent, by according preferential treatment to Africans in appointments to the civil service, and he justified this concession with the argument of redressing past wrongs and giving the civil service a "local look" such as the legislature had. With that concession he hoped to avoid splitting TANU into factions while, in the meantime, waiting for the definition of Tanganyika citizenship to clarify the question of the rights of citizens, irrespective of their different races.[9] The same radical elements came out strongly against Nyerere and his Government debating a Government Motion to abolish the previous system of separate schools for each racial group. The radicals criticised the Government for being too moderate and gradualist in implementing its policy, which they did not oppose, of integrating the school system. Nyerere's impatience in his response to them was unmistakable.[10]

But the rift between Nyerere and the TANU radicals was most glaringly manifested in the Citizenship Debate in October 1961. The Government proposals emphasised loyalty to the country by rejecting dual citizenship; but they sought to grant automatic

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[9]*Legislative Council Reports*, October 19, 1960: cols.375-7; also see Nyerere 1966:100-1.

[10]*Legislative Council Reports*, December 7, 1960: cols. 97-9 and 115.

citizenship to any person born in Tanganyika provided that at least one parent of such person was also born in Tanganyika. This proposal reflected TANU'S belief in human equality irrespective of race, but it provoked strong opposition from the TANU radicals simply because it would give automatic citizenship even to the non-African residents of Tanganyika. They attacked the proposals so vehemently that they generated considerable tension in the National Assembly.

The strongest peroration against the proposals was by John Mwakangale, the Member for Mbeya, who charged that the European and Asian races in Tanganyika still regarded the Tanganyika Africans, whom they had been dominating "both economically and politically", as inferior human beings. For that reason, the majority African population would not agree to have equal rights with the non-Africans. He demanded that registration of non-Africans as citizens "should commence 5 years after independence," after they had proved their loyalty to Tanganyika; that "foreigners" living in Tanganyika who had transferred their money out of Tanganyika should bring it back within the 5 year period; that those "foreigners" who were rich should contribute 15% of their money reserves to a Tanganyika National Fund; and that all non-African members of the Cabinet should resign on independence day "because we cannot be governed by foreigners!"[11]

In a bitter intervention, Nyerere called Mwakangale and his group

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[11]*Parliamentary Debates*, October 18, 1961: cols.329-32.

"potential Verwoerds...drunk with the atmosphere of the House" and talking rubbish, "like Hitlers," glorifying their race, "like Hitlers." He reminded that racial discrimination was what TANU had been fighting against, attacked the apologetic "special circumstances" argument often employed by racists, emphasised his Government's commitment to non-racialism, and then ended with the threat:

> ...the vote here is going to be a completely free vote. No...whip here... The views of those Hon. Members and those of the Government could not be further apart...and the moment the majority of the representatives of our people show that their views are different from ours, we resign at that point.[12]

Richard Wambura got up to reply at once, challenging the government to a referendum.[13] But Nyerere's angry intervention and threat of resignation had the desired effect; the National Assembly endorsed the citizenship proposals.

That victory in the National Assembly, however, was not victory within TANU or in the country generally, where nationalist activists and their followers wanted tangible benefits to count on as gains from their involvement in TANU. They wanted some immediate manifestations of the independence they had achieved. In the run-up to independence some of these activists had promised their followers benefits of independence which the TANU government could in no way honour, thus leading to tension between the leaders in "the new cabinet... responsible for the limitations of the government, and those outside, including some

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[12]*Parliamentary Debates*, October 18, 1961: cols.333-5; also see Nyerere 1966:126-9.

[13]*Parliamentary Debates*, October 18, 1961: cols.335-6.

who had made the largest promises to their followers" (Leys 1972:189).

That tension was explicit in the Citizenship Debate. The opposition to the Government proposals was actually an expression of the frustration which many TANU followers felt upon seeing that independence was giving them no immediate benefits. Their frustration was expressed by hostility to the racial minorities (Pratt 1976:113-5) who were relatively richer. They wanted a "wholesale dismissal of British expatriates" to facilitate an immediate "Africanisation" of the civil service, they demanded a republic, and complained about "TANU's tolerant attitude towards non-Africans" (Stephens:169-1). These demands and complaints were expressed at the January 1962 meeting of the NEC. Nyerere was faced with a dilemma; he decided to resolve it by resigning as prime minister.

3.1.3: Nyerere's Resignation: A Tactical Appeasement

Nyerere had made up his mind to resign before the NEC meeting commenced; it was not a reaction to his critics in the meeting.[14] For three days, he insisted on his decision to resign and for three days his senior colleagues resisted; in the end "he just announced his resignation and we had to accept it."[15] By resigning, Nyerere managed to avoid further serious strains

[14]*Africa Report*, February 1962, and Nyerere 1966:157 (introductory note), contrast with Listowel:409, and Leys 1972:192-3.

[15]Interview with Mr Rashidi M Kawawa, Songea, August 25, 1994.

in relations with the radicals and thereby saved TANU from a split, and also succeeded in retaining the moderates' control of the organisation (Stephens: 161; Leys 1972:192-3).

Nyerere also wanted to counter the attitude, apparently common among some expatriate civil servants, of regarding Tanganyika as synonymous with him personally;[16] "expatriate resignations jumped from 15% to 40%" immediately after Nyerere's resignation (Stephens:160; Leys 1972:194). That may have helped to "appease" the radicals who demanded "Africanisation" of the civil service because Africans were given priority consideration in filling vacancies in the service. In fact the Government under Rashidi Kawawa, who succeeded Nyerere as Prime Minister, carried out a policy of "Africanisation", and took a number of rather high-handed and apparently racist actions some of which Nyerere, by his own admission, would have resisted (Pratt 1976:121).

By those actions the Government "sought to demonstrate African political control" (Cartwright:168) and a show of power, it seems, was a way of making the demonstration. There were impatient demands for an almost worshipful respect for national symbols and institutions, and even personalities, and when some Europeans failed to show the expected respect, they were summarily expelled.[17] Although the expulsions were effected by Nyerere shortly before he resigned, he was clearly pushed to that decision by elements within TANU (Pratt 1976:115-6). After his

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[16]*East Africa and Rhodesia*, February 8, 1962.

[17]*East Africa and Rhodesia*, January 25, 1962.

resignation the Government went on to harass emerging opposition parties out of existence.

Zuberi Mtemvu's African National Congress (ANC) had contested the 1960 elections in only two constituencies and lost deposits in both. But after independence Mtemvu managed to open a few more branches of his party. Another party, the People's Democratic Party (PDP) was formed in 1962. It was led by C.S.K. Tumbo, a trade unionist who had been elected to the National Assembly in 1960 and had been one of the TANU radicals in Parliament for a while before being appointed Tanganyika's first High Commissioner to London. It was a way of getting him out of the way; he resigned after a few months and was back in the country to lead the PDP.

Certainly, these small parties were not strong in any way that could challenge TANU's hegemony. In a few areas they exploited some local dissatisfactions with TANU and attracted some followers with whom they could genuinely hope to make some political headway. But the TANU Government suppressed these opposition parties with impatience reminiscent of the treatment sometimes meted out to TANU itself under colonial rule.[18]

The Government[19] used the same colonial enactment, the *Societies Ordinance 1954*, to require separate registration for every new

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[18]There are various accounts to that effect: Pratt 1976:185-7, Maguire: 338-60, Mwakyembe 1986:37-9, and Mlimuka & Kabudi:59-63, among others.

[19]The account in this paragraph is based on Maguire: 338-60.

branch of the already registered parties. Individual ANC members who were elected to District Councils, only one each for Kwimba and Mwanza districts, were subjected to continuous harassment and frustration, to force them to resign. Government servants were threatened with dismissal if they left TANU and joined the ANC or PDP (Maguire:350). A number of chiefs appearing sympathetic to the opposition were deposed from their offices.[20] One of them, Chief Francis Masanja of Usimao was also MP for Kwimba District. After a somewhat insulting speech by the new Regional Commissioner, Richard Wambura, Chief Masanja angrily resigned from TANU and joined the ANC. He was immediately deported to Geita where he was restricted for several months (Maguire:351-2; Tordoff 1967:13). Kidaha Makwaia, a former chief and Member of the Legislative Council in the 1940s was deported to remote Tunduru in October 1962, after only one week of aggressive recruitment for the PDP in Shinyanga; the then chief of Usiha in Shinyanga District, Hussein Makwaia, was somehow seen as an associate of his brother and was at the same time deported to remote Chunya (Maguire:353-5).

Apparently, the deportations were effected under the *Deportation Ordinance 1921* which enabled the executive to order the deportation of any person to a particular area of Tanganyika, to remain there for as long as the order was not revoked. After independence a new law, the infamous *Preventive Detention Act 1962*, was added in September 1962, enabling the executive to detain any person indefinitely without trial or charge.

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[20]By G.N. 39, 347, 380, 467 and 489, all of 1962.

One overall result of the high-handed actions of the Government was to reduce the rift between itself and some of the TANU radicals. As for those opposed to Government policies, the actions reminded them of the extent of the powers of the government and its ability and willingness to use them if its patience ran out. This silenced them. But the fact that Nyerere had resigned when these actions were taken does not mean that he had no responsibility at all for them. Kawawa had obviously been groomed as Nyerere's assistant and most trusted lieutenant; on succeeding Nyerere, he was unlikely to do anything without consulting him.[21] But even after resigning Nyerere was revered as "Father of the Nation"; he "remained the effective national leader as President of TANU" and occasionally he even attended cabinet meetings! (Bennett:29; Leys 1963:136; Pratt 1971:99). Apparently, even Nyerere was conscious of his overriding influence. When discussing the Government proposals for a Republic, once again John Mwakangale attacked the proposal that Tanganyika would remain in the Commonwealth; that, he argued, would undermine African unity by encouraging the formation of blocks in the continent. Nyerere intervened and, though speaking as a back bencher, spoke with authority:

> *I want to assure* the Hon Mr Mwakangale that if it appeared, even at this moment, that our membership of the Commonwealth was not in the best interests of our efforts to advance the unity and welfare of our continent *we would pull out of the Commonwealth.*[22] [emphasis added]

His overall authoritative tone was unmistakable.

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[21]*Africa Report*, February 1962.

[22]*Parliamentary Debates*, February 15, 1962: col.175; also see Nyerere 1966:172.

Nyerere's position is emphasised here because it was during 1962, with Rashidi Kawawa as Prime Minister, that radical changes in the constitutional pattern and practice were initiated. They included the replacement of the purely administrative heads of the provinces and districts with political heads called "regional" and "area" commissioners respectively (Tordoff 1967:96-100). The first new commissioners were personalities with strong TANU connections; they became both Government executives and TANU Secretaries for their respective regions and districts. Officially, it was Kawawa, the Prime Minister, who appointed them; but as TANU secretaries, they also reported directly to Nyerere, the TANU President, who also had a direct hand in their appointment (Listowel:412; Hopkins:29). This move greatly enhanced the position of TANU and its leaders in the regions and districts. To the ordinary peasants, it completed the apparent fusion between the Government and the Party. Significantly, the first appointments included some of the TANU radicals who had attacked Nyerere's moderate policies.

Those changes culminated in the *Republican Constitution*, which greatly increased the powers of the executive, concentrating them in the President who, predictably, was to be Julius Nyerere. Certainly, it was him and not Kawawa or any other person, who was behind those developments; they reflect his thinking and belief in the need for a strong government. He publicly defended the *Preventive Detention Act 1962* when it was passed (Martin,R:91; Nyerere 1966:312), and in the National Assembly he defended the extensive powers of the proposed presidency so convincingly that

he may well have drafted the Government Paper himself.[23] The one advantage he exploited by being officially out of the Government while the changes took place was that TANU was able to satisfy its activists while he managed to distance himself from its government's excesses (Cartwright:168).

Rashidi Kawawa has acknowledged that the 1962 changes were largely dictated by the political mood of the time; there was need to defuse tensions within TANU and the country generally. But there was nothing that he did as Prime Minister without the full knowledge and the sanction of the TANU President:

> I was the Prime Minister. But I was a TANU Prime Minister and TANU was in full control. In everything that I did I consulted with TANU President and everything was done with TANU approval. TANU and the Cabinet were very close and agreed in all decisions.[24]

Apparently, Kawawa's tenure as Prime Minister provided a useful interlude during which some significant changes were made under Nyerere's directions before he came back to command the government as President in December 1962; he appointed Kawawa as Vice-President.

3.2: THE REPUBLICAN CONSTITUTION OF TANGANYIKA

The decision to adopt a republican status for Tanganyika raised no controversy. It was explained in very straightforward terms: in view of Tanganyika's previous status as a UN Trust Territory,

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[23]See "Appendix A" to this study.

[24]Interview with Mr Rashidi M Kawawa, August 25, 1994.

the proclamation of Her Majesty Elizabeth II as "Queen of Tanganyika"[25] was not only odd but also an embarrassment, and not easily understood by the people.[26] The motion introduced in the National Assembly in February 1962 was simply for the Government to draft amendments to the *Independence Constitution*, thus implying no more than mere severance from the British Crown.

But when the republic came, it brought an entirely new constitution, radically changing the structure of power. The *Constitution of Tanganyika 1962* (also referred to as the *Republican Constitution*) created the President as the new Head of State and Commander-in-Chief of the Armed Forces [s.3(1)],[27] and also vested him with all executive power [s.3(1)], to be exercised by himself directly, "or through persons holding office in the service of the Republic" [s.10(1)]. He was not a member of the National Assembly [s.21(2)]; but he was a constituent part of the Legislature [s.20], with power to assent to all Bills before they became law [s.34(1)]. He also had power to appoint up to ten members to the National Assembly [s.23], and to address it at any time either in person or through a Minister [s.37]. Unlike the Governor-General, he could not prorogue Parliament, but he could at any time dissolve it [s.44(2)].

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[25]See G.N. 9 OF 1962.

[26]*Parliamentary Debates*, February 15, 1962: col.167; *East Africa and Rhodesia*, June 7, 1962.

[27]References in square brackets throughout this section refer to provisions of the *Republican Constitution*.

The Constitution omitted the Prime Minister but established the office of Vice-President, to be the "principal assistant of the President in the discharge of his executive functions and the leader of Government business in the National Assembly" [s.11(1)]. Other "offices of Minister" were to be established by the President [s.11(2)]. The Vice-President and the Ministers were appointed by the President from among the members of the National Assembly; specifically, the Vice-President had to be an *elected* member of the Assembly [s.13(1)]. The President could at any time remove them from office [s.14(a)]. The Vice-President and the other Ministers comprised the Cabinet but its meetings were chaired by the President. The Cabinet was to be, "subject to the powers of the President, ...the principal instrument of policy" advising the President "on such matters as may be referred to it" by the President [s.15].

The number of ministries was now to be determined by the President [s.11(2)] without any reference to Parliament as previously. The President was also given powers of constituting and abolishing offices in the service of the Republic, "making appointments to such offices, and of promotion, termination of appointment, dismissal and disciplinary control" of the persons so appointed [s.18]. But, save for the appointment of the most senior officers, like principal secretaries, these powers of the President were in effect delegated to the Civil Service Commission under the *Civil Service Act 1962* which established it in place of the former Public Service Commission, established under the *Independence Constitution*.

The President also appointed the Chief Justice and, after consultation with the Chief Justice, the other judges of the High Court [s.47]; but once appointed, their tenure of office remained secure. The President's power of appointing other judicial officers [s.53(1)(a)] was delegated to the Judicial Service Commission (re-established by s.52 of the Constitution) under the *Judicial Service Act 1962*. The members of both the Judicial Service Commission and the Civil Service Commission were appointed by the President.

This Constitution did not change the position of the Controller and Auditor-General; but the Director of Public Prosecution lost his security of tenure and, by an amendment to the *Criminal Procedure Code* effected by a Constituent Assembly Act, the exercise of his powers became subject to directions of the President.[28] The President was also given the powers of prerogative of mercy [s.19] and, while still in office, he was immune from criminal proceedings and civil proceedings against him were subject to procedural restrictions [s.9].

Apart from the role of "Leader of Government Business in the National Assembly", previously the Prime Minister's and now the Vice-President's, all the other functions and powers of the previous offices of Prime Minister and Governor-General were now fused in the President. Besides the Constitution, consequential provisions vested all "rights, powers, privileges, duties or

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[28]The *Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act 1962*, Fourth Schedule, Part I (added s.80A of the *Criminal Procedure Code*).

functions" of the Governor-General or of the Prime Minister in the President; they empowered the President "to do all things necessary for the exercise or performance" of "rights, prerogatives, powers, privileges, duties or functions" formerly vested or imposed on Her Majesty the Queen in respect of Tanganyika; and they directed all references in the existing law to the Governor-General and to the Prime Minister to be read as references to the President.[29]

That gave the President vast powers under some colonial laws specifically designed for a repressive regime. He acquired powers of deportation, inflicting collective punishment, expulsion (of non-citizens) from the country, and abolition of associations.[30] Under the *Emergency Powers Order in Council 1939* the President inherited extensive powers to issue Emergency Orders and Regulations suspending the application of any law and the jurisdiction of any court so that in effect, he had power to suspend the Rule of Law. To those were added detention powers under the post-independence *Preventive Detention Act 1962*. And with all that, s.3(3) of the Constitution stated:

> ...in the exercise of his functions, the President shall act in his own discretion and shall not be obliged to follow advice tendered by any other person.

The remark that the *Republican Constitution* "gave the Tanganyika President even more sweeping powers than those of the American

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[29]Ibid., ss.7 and 8.

[30]He got those powers under, respectively, the *Deportation Ordinance 1921*, the *Collective Punishment Ordinance 1921*, the *Expulsion of Undesirables Ordinance 1930*, and the *Societies Ordinance 1954*.

President" (Listowel:413; Leys 1963:137) was not a baseless exaggeration.

The Preamble to this Constitution also proclaimed its commitment to a "democratic society where the *government is responsible to a* freely elected *Parliament* representative of the people." But whereas the *Independence Constitution* required the Cabinet to be collectively responsible to Parliament for the conduct of the Government, which could be removed from office by a Parliamentary vote of no confidence, the *Republican Constitution* had no such provisions. Section 11(3) of this Constitution merely stated:

> The Vice-President and the other Ministers shall be responsible under the direction of the President for such departments of state or other business of the Government as the President may assign them.

Plainly, they were responsible to the President, not to Parliament. Although it was said that their membership of the National Assembly made them responsible to the Assembly as well (McAuslan 1964:509-10), that responsibility to the Assembly was constitutionally limited because their duties as Ministers were to do what the President assigned them and according to his directions. It was only the President who could effectively hold them to account and who, strictly speaking, was ultimately responsible for what they did. But the President was not a member of the National Assembly, and not responsible to Parliament, justifying the claim that in 1962 the government ceased to be accountable to Parliament (Srivastava:108).

But deliberately, the Constitution sought to avoid conflicts or

serious differences between the President and the National Assembly. This was done by tying Presidential elections to Parliamentary elections in a scheme, adopted with modifications from Ghana, which ensured that the President would have the support of the majority party in the National Assembly.[31] But the scheme was never used; Nyerere was elected by universal adult suffrage under a transitional law, and the constitution changed before another election could be held. in November 1962

But if there was a disagreement in the legislative process with the President persistently refusing to assent a Bill passed by the National Assembly, the impasse could result in a dissolution of Parliament. If the President refused to assent to a Bill, he had to return it to the National Assembly with his reasons for refusal. Such a Bill could not be presented to the President for assent again within 6 months after the refusal unless it was re-passed by a two-thirds majority of the members of the Assembly. And if presented with such a majority within 6 months after the first refusal, the President had to assent to the re-passed Bill within 21 days or dissolve Parliament [s.31(2), (3) and (4)], implying his own resignation [s.4(1)(a)], and the calling of general elections.

That was all the power that the National Assembly could have against the President. But Nyerere's popularity reduced it to nil; his re-election as President was almost always assured while

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[31] *Constitution of Tanganyika 1962*, s.4(4)(a) read with the *Presidential Elections Act 1962*.

even the most popular MPs could not hope for nomination to contest their seats without his support as TANU President. That support would be unlikely if the dissolution of Parliament was occasioned by their differences with him. In fact this provision, and the power to dissolve Parliament at any time, became tools with which the President could threaten the National Assembly and force it to comply with his wishes. In fact even the life of Parliament, within the constitutional five year term, further depended upon the President's pleasure. Thus a government "responsible to a freely elected Parliament" as declared in the Preamble had no firm place in the Constitution.

It is intriguing that the granting of such enormous powers to the President was hardly opposed. In Parliament, some reservations were timidly expressed by Mr Sarwatt (the only MP elected as an independent), Mr Tunze and Mr Mtaki: that the enormous powers could easily be misused, and that the sovereignty of Parliament was being compromised by the overriding powers of the President.[32] And Mr Mtaki specifically warned against basing the Constitution on "today's good leaders... like Mr Nyerere or the Prime Minister" who would go, while the constitution would remain "for years to come."

But Nyerere, then a back bencher, stood up and defended those powers in what may have been his strongest parliamentary speech. He eloquently expounded on the need for what he called the "National Ethic" as the only sure "safeguard of a people's right,

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[32]*Parliamentary Debates*, June 28, 1962: cols.1092, 1096 and 1101.

the people's freedom and those things which they value." The speech underlines Nyerere's philosophy about the need for power, its proper use and safeguard against abuse, which was also the basis for rejecting the inclusion of a Bill of Rights in the Constitution. Extracts of the speech are appended to this study as Appendix A.

From the beginning of the plans for a Republic, it was clear that Julius Nyerere would be the first President.[33] It was apparent even in the parliamentary debate; members desisted from speaking out against the powers proposed for the President because it would sound like doubting his wisdom and ability. It was his personality which alleviated fears of likely misuse of power by the President. It cannot be known whether without him those provisions would still have been approved, or even at all proposed in the first place.

3.3: THE EMERGING PATTERN AND CONCEPTS OF DEMOCRATIC GOVERNMENT

In addition to setting new aims and objectives that would keep it a party in power after independence, TANU also had to show that it was capable of governing *democratically*. This was a serious challenge. The struggles for independence in Africa did not address the question of democracy; the demands for political independence were not synonymous with demands for democracy (Mushingeh:106). And TANU, from its origins until independence:

[33]Mr Kawawa confirmed this in an interview, Songea, August 25, 1994.

> was a highly centralised, primarily bureaucratic organisation; its democratic constitution was partly inoperative, because the issues to be decided were largely tactical, and partly fused in the charismatic authority of Mr Nyerere... (Leys 1972:191)

Indeed, the single pre-occupation then, achieving independence, united all TANU members and the entire population behind TANU.

But the coming of independence raised the question whether democracy could and would actually work in Africa. Specific to Tanganyika, there was a need to explain the problem of the political pattern that emerged at independence failing to fit into the assumptions of the *Independence Constitution*. The constitution assumed a Government party and an Opposition party in Parliament; but there was an entirely one-party parliament, a peculiar situation not envisaged by the Westminster Model of constitutions. It invited fears, and charges, that Tanganyika was becoming a dictatorship.

It was in effect a charge directly against Nyerere, who was proud of the sweeping electoral victory of his party. He replied by pointing out that the charges equated democracy with political parties, which was absurd. He picked on this absurdity to attack the relevance of the multi-party system of democracy to Tanganyika and to Africa generally, and to defend his (and TANU's) achievement.

3.3.1: Democracy and the Role of Political Parties

Nyerere's arguments then about democracy and political parties were articulated in some of his writings.[34] No model or form of democracy as known to the world was faultless, he said; the ancient Greeks, despite "slave-owning and women-ignoring", are accredited with "inventing" democracy.[35] He wrote:

> It was possible for the ancient Greeks to boast of "democracy" when more than half the population had no say at all in the conduct of the affairs of the state. It was possible for the framers of the Declaration of Independence to talk about "the inalienable rights of Man" although they believed in exceptions; it was possible for Abraham Lincoln to bequeath to us a perfect definition of democracy although he spoke in a slave-owning society; it was possible for my friends the British to brag about "democracy" and still build a great empire for the glory of the Britons. These people were not hypocrites. They believed in democracy. It was "government by discussion" which they advocated, and it was discussion by equals; but they lived in a world which excluded masses of human beings from its idea of "equality" and felt few scruples in doing so. (Nyerere 1961b:30-1)

And he went on to say that the critics of "African democracy" have in mind not democracy but the particular *form of democracy* they knew best: that which is organised through contending political parties, and he called it the "Anglo-Saxon form of democracy."

He argued that it was not necessary to adopt the "Anglo-Saxon form of democracy" in order to be democratic, and that the circumstances of Africa at the time of independence were extremely unlikely to lead to a pattern of democracy "familiar to Anglo-Saxon countries." The African countries were led not

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[34]See Nyerere's works: 1961a, 1961b, 1961c and 1963, all listed in the Bibliography. The first mentioned was also published in *Transition* (Kampala), December 1961, pp.9-11, and the others are also reproduced, substantially abridged, in Nyerere 1966, at pp.103-6, 133-4 and 195-203.

[35]He repeated this three decades later; see Sandbrook & Halfani: 16.

by political parties as such but by nationalist movements which, during the struggles for independence, had succeeded in uniting the people behind them. It was these movements which formed the first governments of the new states and it was unimaginable "that a united country should halt in mid-stream and voluntarily divide itself into opposing political groups just for the sake of conforming to...the Anglo-Saxon form of democracy at the moment of independence" (Nyerere 1961b:33).[36]

His further argument was that while the two-party tradition emerged as a reflection of the class divisions into "haves" and "have-nots" in society, such divisions were generally absent in Africa, and they were to be deliberately avoided in Tanganyika (Nyerere 1961c:339-40). After their formation, the first governments of independent Africa were always faced with the enormous task of building up the economy "so as to raise the living standards of the people" and that task left "no room for difference or division," making it a situation comparable to those of war-time coalitions or emergency governments in the liberal west (Nyerere 1961a:8-9).

What then did he consider to be the essentials of democracy? These, he said, were: discussion, equality and freedom. Democratic government simply meant "government by discussion" provided that the people involved were all free and equal in their freedom because "there can be no true discussion without freedom, and *equals* must be equal in freedom, without which there

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[36]For a similar argument, see Mboya:335-7.

is no equality" (Nyerere 1961a:7; 1961b:29). Thus pure democracy would require participation by all the people in discussions and decisions on the affairs and conduct of the government. But such an arrangement would be "too clumsy" and unworkable in "conducting the affairs of a modern state." Therefore democratic government in modern day conditions had to be government by representation (Nyerere 1961b:34; 1963:1), without ever sacrificing the freedom of the individual:

> *When, then, you have the freedom and well being of the individual; and where the individual has the right freely and regularly to join with his fellows in choosing the government of his country; and where the affairs of the country are conducted by free discussion, you have democracy.* (Nyerere 1961a:8) [emphasis from original]

Nyerere's argument was that those essentials of democracy were traditionally present in African society: a society of equals, undivided into classes of aristocrats and commoners, which had always conducted its business by discussion. As such the African was "a natural democrat" (Nyerere 1961a:8; 1961b:30) and it was absurd to think of him as unable to put up and maintain a democratic government!

Regarding Tanganyika, Nyerere insisted it was "thoroughly democratic" despite having "a one-party Government" and a National Assembly with only TANU members "facing, as well as behind, the Government benches." This was democratic because it was the result of a democratic election in which:

> TANU did just what the Conservative and Labour parties do in Britain --it contested every seat. The only difference seems to us to be that whereas the two British parties always lose a large proportion of the contests, we won all except one. Is it seriously suggested that a Government can be democratic only if it is rejected by nearly half the people? (Nyerere 1961c:339)

He defended the one-party Government then not because of ambitions to set up a one-party state, but because already he was Head of a one-party Government not arrived at by deliberate design, but emerging in a constitutional framework designed for a multi-party system. That was the reality.

Nyerere's views may have been in response to charges of his Government being undemocratic because it was a one-party government. He was defensive and seeking to disprove such charges. Apparently, he was arguing to European critics and others who, like himself, were trained in and moulded by western parliamentary tradition and its concepts of democracy and democratic institutions. He felt a need to explain how he could reconcile his proclaimed commitment to democracy, as they all knew it, with his headship of a government with absolutely no opposition. Pratt states that Nyerere was actually "debating with himself":

> Nyerere had already absorbed much of the conventional wisdom of Western liberal democracy. He had not rejected these values. He was not discarding the ethical and political heritage which he had acquired from his church, his education and his reading. Rather he was examining the relevance to Africa of a number of constitutional arrangements which Western thinkers had long assumed were essential corollaries of these values... If there was to be democracy in Africa it would need to receive a different institutional expression than that normally associated with it. (Pratt 1976:67)

And he concluded that democracy required merely the freedom to form an organised opposition, "not the existence of it."[37]

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[37]*East Africa and Rhodesia*, June 9,1960.

3.3.2: The Justifications for a One Party System

Soon after independence, Nyerere took deliberate steps to remove that freedom to form an organised opposition. The NEC resolved in January 1963, and TANU's Annual Conference endorsed the resolution, to adopt a one-party state constitution (Msekwa:20). Now this needed an explanation, not just to defend a situation already there, but to justify the new initiative being taken.

To explain that, Nyerere advanced a thesis[38] incorporating all his previous arguments and emphasising further that not only was organised opposition unnecessary in the newly independent states of Africa, but that its presence there could be dangerous. Pressing forward the view that the one-party system would make Tanganyika more democratic, he actually asked: "How can you have democracy with a two-party system?" (Nyerere 1963:12)

Nyerere always emphasised *free discussion* and, for the sake of free discussion, he urged doing away with party discipline in parliamentary debates. Indeed in a one-party parliament, party discipline no longer made much sense and it was rather awkward for the TANU parliamentary party to continue with private debates (at which members spoke their minds freely) and adopt a party line before going to Parliament where members had to toe the party line: Parliament and the parliamentary party were constituted alike. As a result, Parliamentary debates were dull

[38]Nyerere 1963; extracts of the thesis, about half the original length, are in Nyerere 1966: 195-203; it was also published in *Spearhead*, January 1963, which is what this study refers to.

and stifled. In the absence of an Opposition party, continued observation of such party discipline could not be defended.

But he went further and sought to show that party discipline was not very meritorious even in multi-party systems. He argued that requiring "members to oppose a rival party's policies must force them, at times," to do so against their conscience, thereby stifling "not only freedom of expression but, indeed, honesty of expression" as well. This, he suggested, must have been responsible for the phrase "politics is a dirty game", which need not be the case in Tanganyika (Nyerere 1963:16). He accused the two-party system of reducing democracy to the level of football games and the government of a nation to a "Football Cup":

> Each party constantly aims at bringing about the defeat of the other. So, of course, do football teams. But, admirable though it may be for a soccer team to thwart its rivals' attempts to score a goal, parallel success on the part of a political party in obstructing the Government's efforts to do the job it was elected to do is of more dubious merit. (Nyerere 1963:15)

Nyerere based his concept of what he called "football politics" on the assumption that all serious political parties should aim at providing those things which are essential for the welfare of the people as a whole. As such, party differences will be on minor issues only, like matters of details, of what they all agree should be done. With parties thus agreed on the fundamental issues, Nyerere saw sense only in the two sides disbanding "their football teams and let[ting] the electorate choose the best individuals from them all" (Nyerere 1963:15; 1966:196). The individuals so elected should then meet in Parliament for a *free discussion* of the details of what they will

then cooperate in doing. This is what he wanted the one-party system for, because he believed that differences over minor issues of detail did not need to be expressed in a two-party system (Nyerere 1961c:340).

Disagreement over fundamental issues was the only justification he saw for a two-party system. But such fundamental differences in a nation will necessarily divide it into hostile camps and bring about a "civil war situation", often leading to disastrous bloody conflicts (Nyerere 1963:14; 1966:196) which no sane person should encourage. And in the new states of Africa there were, rationally, no issues on which could be based any fundamental disagreements. The sheer poverty of the people, the abject living conditions, the backward economy and infrastructure, all left only one priority objective: economic development in order to improve the people's living standards. For any meaningful progress, Nyerere always argued, there was need for total unity. Ethnic divisions in African states, themselves demarcated by artificially based boundaries, made them susceptible to intra-state conflicts, rendering dangerous the encouragement of political differences among the inhabitants. The Katanga crisis of the Congo was there to illustrate this.

The differences along which political parties are divided in the liberal democracies are not fundamental, according to Nyerere, otherwise their systems would have failed to work (Nyerere 1963:15-6). He repeated this argument in 1991, referring to America as:

> A plutocracy, but the native gets the vote; so it's a democracy!... There

> are two parties... Both parties agree on the basic national objectives. Internally, both of them are highly capitalist. Externally, both of them are imperialist.... So they basically agree. The problem comes when the two parties don't agree on the essentials. When the difference in national objectives between the two parties is too great, it can't work.
> (Sandbrook & Halfani:27)

Hence his reference to their differences as "football politics", which he considered a luxury not affordable by his country.

3.3.3: The Twin Objectives: Democracy and National Unity

Nyerere's rejection of what he called "football politics" was also linked to his pre-occupation with the need to build up and maintain national unity. It may thus be correct to say that *democracy* and *national unity* were the twin issues which dominated in his mind up to the adoption of the one-party system.

He may have indeed sounded convincing when he argued that democracy did not necessarily require an opposition party. Even the argument that his one-party government was democratic because TANU had contested and won all seats may have sounded convincing as well. The reality, however, was that the absence of an effective opposition party in the framework of the *Independence Constitution*, which envisaged such an opposition, reduced Tanganyika to a near mockery of democracy.

The claim that TANU had contested every seat was true in purely theoretical terms only. In the 1960 elections, upon which the independence government was formed, of the 71 seats open to contest, only 13 were actually contested; the remaining 58 were simply taken by TANU candidates returned unopposed. Similarly

in the local government elections after independence, of the 356 seats open for election to urban councils, only 6 were actually contested and 350 had TANU candidates returned unopposed! This was the awkward outcome of the institutional framework adopted at independence, and it served to advance the case for a one party state (Bomani:495-6).

In the 1960 elections most voters had only become eligible for the first time, the previous election having been on a very restricted franchise; they were nevertheless unable to vote because, technically, there were no "contestants". In the event they were given representatives selected for them by TANU. With a TANU membership then of about one million (Bennett:29; Leys 1972: 190) out of a total population of about 9 million, one can safely say that the only sure support behind the 58 candidates returned unopposed was that of TANU members, or 11% of the population. This outcome met the standard principle of responsible government, stated by Nyerere himself in 1958, that Government ought to "belong to all the people" and its powers to be derived from the majority (Nyerere 1958:87).

Besides the question of mere numbers, TANU's highly centralised organisation did not make it particularly democratic, and the 1960 elections were not a very remarkable demonstration of democracy by TANU. The selection of the TANU candidates, including the 58 who were unopposed was strongly controlled by the party's central executive which frequently overruled local preferences. Local TANU opposition to official candidates

endorsed by TANU headquarters was severely punished, often with expulsion from party membership (Bennett:24; Pratt 1976:80; Maguire:354). It was in reaction to this that in Mbulu District Mr Sarwatt, until then an active TANU member, stood as an independent and challenged the official TANU candidate who, in the event, earned TANU its only defeat. In Rungwe, a similar rejection of the local preference by TANU headquarters led to a very low turn out of voters (Bates,M.L:459). Thus even the assumption that the 58 returned unopposed had the support of TANU members could be erroneous; rather, the proven support they had was that of TANU headquarters.

But Nyerere did not attempt to reduce the authority of the central organs of either the party or the state. Instead, the post-independence years saw a progressive centralisation of power, a trend noted as common all over Africa (Tordoff 1984:4-10).

That trend was motivated by fear of risking the fragile national unity whose beginnings the nationalist movements had forged during the struggles for independence. That unity was constantly threatened by a number of factors, including ethnic divisions and identities within the boundaries of the new state. Nyerere was so committed to national unity, at any cost, that it is hard to dispute conclusions attributing his adoption of the one-party system solely to that commitment (Hopkins:25). It led him to ensure the disbanding of the Sukumaland Federal Council, and other similar tribally based organisations, because: "We can't have another Katanga here" (Maguire:281-2; Bennett:28). He referred

to Katanga again when he warned Kenyan nationalists against accepting a federal state structure.[39]

Even before deciding to adopt a one-party system, he used the need to preserve unity to justify restrictions on opposition groups and their activities. And he warned of the "intrigues of the international diplomacy of rivalry" and their divisive effects, often working through "irresponsible individuals" claiming to be the opposition. It was the fragile unity within the new, poor and unstable African states which led him to compare the situation in his country to an emergency situation, like that of a country at war; in such a situation, he said, even the opposition had to act more responsibly than does an opposition in a more developed, stable, unified and well equipped country in times of peace. And, claiming there was no such responsible opposition, he believed the government had the right to "deal firmly and promptly" with the irresponsible individuals claiming to be the opposition, whenever they threatened national unity (Nyerere 1961a:9). For, he conceived it a duty of the government to "safeguard the unity of the country from irresponsible or vicious attempts to divide and weaken it, for without unity the fight against the enemies of freedom cannot be won" (Nyerere 1961a:8). The enemies of freedom were summed up as: ignorance, poverty and disease.

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[39]*East Africa and Rhodesia*, October 19, 1961.

3.4: THE SEARCH FOR A ONE-PARTY FRAMEWORK

Nyerere's ideas had supported the one-party system well before independence; but even after the January 1963 decision to adopt a one-party state system, it took more than two years for the decision to find statutory expression in the Constitution. He obviously had good reasons for the apparent hesitancy (Nyerere 1966:261; Tordoff 1967:2; Msekwa:20n.). But also some elements in the TANU leadership may have supported the one-party system simply to assure themselves of continuing to enjoy their high offices. Many of the deportations of opposition party activists were initiated by the new Regional Commissioners who felt their authority being challenged, and Oscar Kambona, the TANU Secretary-General, is said to have even argued against the need for elections! (Pratt 1976:187-8)

A rushed implementation might have given those elements a measure of influence. If Nyerere was to maintain his credibility as a leader committed to democracy, he had to ensure that undemocratic elements did not dominate or influence the course of developments. And it appears that he resolved to be himself in firm control of the developments after 1962, making effective use of the powers he assumed as President. In defence of those powers, he had written to the London *Observer*:

> Our constitution differs from the American system in that it... enables the executive to function without being checked at every turn... Our need is not for brakes to social change... - our lack of trained manpower and capital resources, and even our climate, act too effectively already. *We need accelerators powerful enough to overcome* the inertia bred of poverty, and *the resistances which are inherent in all societies.*[40] [emphasis added]

[40] *Observer*, June 3, 1962; also reproduced in *Africa Report*, July 1962.

Clearly, he knew what he wanted: enough powers to govern without being checked at every turn.

Over the years of his leadership of TANU, he grew confident that he knew the problems of his country well; that he knew the right answers to its problems; and that he had the *correct principles* to follow (Cartwright:172). And *in defence of* those *principles* he was ready to steamroll and proceed like a dictator. During the citizenship debate he had declared: "I never like being challenged on a matter of principle" (Nyerere 1966:129). That was true of him. An early manifestation was in 1958 when the leader of the Elders Section of TANU, Sheikh Sulemani Takadir, questioned the absence of Muslims from the list of TANU candidates for election to the Legislative Council. Nyerere would not tolerate religious partisanship in TANU and summarily expelled Takadir from the party, a step which was unconstitutional (Bennett:24; Bienen 1967:69; Pratt 1976:79-80).

The challenge of the citizenship debate to his principles had driven his patience to the limit. His threat to resign had worked well then; but would he happily repeat that defeatist strategy? By putting up and adopting a Constitution that gave him such extensive and unchecked powers, Nyerere demonstrated his preference for "positive" rather than "negative" action in the event of a similar challenge to principles. Rather than risk being "pushed" to the corner again, as had happened over citizenship, he chose a position that enabled him to do the pushing instead. Thus, following the January 1963 decision he

took his time to set up a Commission and he owed nobody an explanation. And after setting up the Commission he took a number of steps putting into effect some aspects of a one-party state without even waiting for the recommendations of his own Commission. In a way, Nyerere was like preparing the ground for the formal adoption of the one-party state which followed.

3.4.1: Laying the Ground for the One-Party State

The timing of the appointment of the Commission, officially known as the "Presidential Commission on the Establishment of a Democratic One-Party State", was most probably prompted by the army mutiny; it was appointed on January 28, 1964, only three days after the British Marines had put down the mutiny.

As the Commission started its work, the *Preventive Detention Act 1962* was used extensively for the first time, detaining well over 500, of whom more than half were trade unionists (Tordoff 1967:147,163). The trade union movement was the only organised group which appeared sympathetic to the mutineers' demands; in fact some disgruntled trade unionists may have sought to take political advantage of the uncertainty and doubtful stability during and immediately after the mutiny (Listowel:437-8; Cliffe:11). But the sheer number of trade unionists detained, picked from all parts of the country (including areas which had *only heard* of the mutiny), indicates a deliberate action to silence political opposition, however minor or remote.

After independence the trade union movement emerged as the most coherent and well organised independent pressure group, and the Government sought to contain it with both patronage and harassment of its leadership (Tordoff 1967:144-7). In 1962 the President of the Tanganyika Federation of Labour (TFL), Michael Kamaliza, was appointed Minister for Labour and had, therefore, to resign his union post. His successor, Victor Mkello, and another prominent trade unionist were deported to a remote district for three months.

Another trade union activist and consistent critic of Nyerere's moderate policies was Mr C S K Tumbo; in early 1962 he was appointed High Commissioner to London. He resigned in August 1962 and went into opposition as leader of the People's Democratic Party (PDP). He criticised the *Preventive Detention Act 1962*,[41] and, in apparent fear of it, he fled to Mombasa in Kenya. In late 1963, instigated by Nyerere's Government, the Kenya police picked him up and took him to a Tanganyika border post where he was immediately arrested and detained (Pratt 1976:186). Victor Mkello, the TFL President, joined him in detention soon after the mutiny.

Apparently, political opposition was finding expression through the trade union movement; one MP even referred to the TFL as "a party" in a tug of war with TANU (Tordoff 1967:148). And Nyerere used his detention powers to silence political opposition even before such opposition had been outlawed. In February 1964, with

[41] *The Standard*, September 28, 1962.

all trade union leaders in detention, a Bill was introduced in Parliament and was, in a day, passed as the *National Union of Tanganyika Workers (Establishment) Act 1964*. The Act dissolved the TFL and its member unions and established a new central union instead, making it the only lawful trade union in the country, and affiliating it to the ruling party; TANU.

The new union, the "National Union of Tanganyika Workers" was deliberately given (the inaccurate) **NUTA** as its official acronym so as to emphasise its affiliation to TANU. The objects of NUTA, as stated in the schedule to the Act, included the promotion of TANU's policies and encouraging its members to join TANU. The Secretary-General of NUTA and his deputy were appointed by the President of the Republic who could also dissolve the Union at any time, and replace it with another body of employees. Nyerere immediately appointed his Minister for Labour, Michael Kamaliza, as NUTA's first Secretary-General. This outlawing of trade union activity except through a single organisation statutorily affiliated to the ruling party and committed to promoting its policies was, in our view, implementing the one-party state system well in advance of its formal adoption.

Another such advance step was in respect of the army. After the mutiny, which was regarded as an act of betrayal of the people and, particularly, of Nyerere and TANU (Bienen 1965:44), Nyerere disbanded the army and started building a new one that would be loyal. And loyalty to TANU became the new criterion for recruitment into the armed forces. The TANU Secretary and

commissioner for Coast Region, Mr S Kitundu, was commissioned into the army with the honorary rank of colonel and appointed political commissar of the People's Defence Forces, as the new army was styled. TANU was also infused into the Police Force, thus projecting TANU as the single national institution loyalty to which was loyalty to the country and its people (Bienen 1965:44-45; 1978:155-9; Tordoff 1967:164). Civil servants were similarly invited and encouraged to join TANU.

All that took place in 1964 while the Presidential Commission on the Establishment of the One Party State was yet to complete its work and report to the President.

3.4.2: The Presidential Commission for the One-Party State

In the Terms of Reference given to the Commission, the President emphasised a number of principles: Tanganyika to remain a Republic with an executive president, equality for all citizens, maximum political freedom within the context of "a single national movement", people's free choice of their representatives in the legislature, people's participation in the Government and their ultimate control over state organs, and observance of the Rule of Law and independence of the Judiciary. He amplified those principles in two accompanying documents: *The National Ethic* and *Guide to the Commission on a One-Party State*.[42] The former included, in a condensed form, Nyerere's ideas lucidly explained in his June 1962 speech in the National Assembly.

[42]See Tanzania 1965:2-4, paragraphs 7, 12-16, and Nyerere 1966:262-5.

The Commission was required to consider a number of things. They included the kind of representative institutions necessary in a one-party state; whether party membership should be open to all irrespective of differences of opinions; whether the National Assembly and the NEC should continue as separate entities; the appropriate party organs for policy formulation, popular expression, peaceful change of leadership, and preventing corruption and abuse of power; qualifications and procedures for elections to representative bodies and to the presidency; the need to avoid conflict between the legislative body and the President; whether there should be any system of discipline over members of the Government and of the legislature; the participation of civil servants in political institutions; the need to ensure people's freedom to form pressure groups; and the role of trade unions and other specialised organisations. The list was not meant to be exhaustive.

The Commission was given a fairly wide scope in its deliberations. No time frame was given for it to submit the report although the President had made it clear that he wanted it to expedite its work. But in addition to the principles which the Commission had to observe, the decision whether Tanganyika should be a one-party state was not for the Commission's consideration; it had already been taken, and was not to be the subject of further debate. That is probably why President Nyerere went ahead with changes in the organisations of the trade union movement and the armed forces without waiting for the Commission's recommendations or a new constitution.

In the course of its work, the Commission received submissions from organisations as well as individuals suggesting various ideas for consideration by the Commission in recommending the form and institutions of the one-party state to be established. In its submission to the Commission, the Tanganyika Law Society emphasised the need for a Bill of Rights in the proposed one-party state (Martin,R:42), a suggestion which was not accepted.

Ghai and McAuslan, then lecturers in the Faculty of Law at Dar es Salaam, proposed a reorganised Executive to be formed out of a merger of the Cabinet and the Central Committee of TANU. The merger, they suggested, should form a National Political Bureau of up to 45 members to include the President, Ministers, leaders of national organisations like the Trade Union, Youth League, Women's Union, etc., senior TANU leaders, and a few members nominated by the President. From amongst the members of this Bureau the President should select a Central Executive Committee (or Cabinet) of about 10 to 12 members, headed by the President himself, which would meet weekly to "keep under constant review the policies of the nation, and their implementation," while the Bureau would be responsible for the general direction and control of the Administration (Ghai & McAuslan 1965:128-9).

To ensure government responsibility they suggested that the members of the National Political Bureau should be responsible, both collectively and individually, to the National Assembly, which should include all members of the Bureau; but directly elected members, they insisted, should always constitute a clear

majority of the National Assembly (Ghai & McAuslan 1965:140-1).

The suggestions submitted to the Commission were in no way similar or uniform. Thus, while Ghai and McAuslan proposed a merger of the National Assembly and the NEC of TANU into a single body to constitute the legislature (Ghai & McAuslan 1965:137-8), Ronald Blanche, then an expatriate Assistant Controller and Auditor General, proposed in his submission that the two bodies should retain their separate existence because they had essentially different functions.[43] In the event it is the latter suggestion which was adopted.

Finally, the Commission submitted its report in March 1965. In the Terms of Reference, and in the President's *Guide to the Commission*, the idea of a system whereby elected leaders could, if proved unsuitable, be removed by the people without having to wait for their terms to expire was not put forward as clearly as it was in the President's One-Party Thesis (Nyerere 1963:23; 1966: 202). As a result no views were invited on that suggestion and the Commission does not even mention it in its report.

On removing Party discipline the recommendations of the Commission were far short of Nyerere's arguments, in his thesis, that elections should be free and open to any member of the party to contest. It is worth noting that in elections to the Bukoba District Council held after the publication of Nyerere's thesis,

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[43]Ronald B. Blanche, *A Memorandum Submitted to the Presidential Commission*," Dar es Salaam, March 31, 1964, paragraphs 10, 24 & 24.

a number of councillors, though TANU members, were elected as independents; they had been encouraged by Nyerere's argument for open elections. Once in the council they were joined by a few TANU councillors, again encouraged by Nyerere's argument on free discussion, in resisting the TANU whip. The council was divided. Following that experience the NEC decided to retract Nyerere's argument when it came to implementation (Tordoff 1967:114-5).

In the event, the Commission recommended that in elections to Parliament, only TANU candidates may seek nomination and go through a pre-selection process in which the NEC should have the final authority of selecting up to a maximum of three candidates in a constituency, from among whom the voters would then elect one. A similar arrangement was recommended for elections to local government authorities, with the District Executive Committee of TANU making the final selection of three candidates to be presented to the voters. Regarding the Party whip the Commission said it served no useful function, but failed to make any clear recommendation. While emphasising "complete freedom of discussion in the National Assembly" the Commission still insisted that MPs should "remain loyal to the basic principles of the Party," which left it rather ambiguous. On party membership the Commission recommended that it should be open to any person who accepted the basic principles and beliefs of the party. This would not be restrictive because TANU principles were not narrow ideological formulations, but "a broad statement of political faith" supported by "the vast majority of the people of Tanganyika" and all people "of goodwill in every civilised

country in the world" (Tanzania 1965:16).

The Commission recommended against merging the National Assembly and the NEC, and that instead of the TANU Parliamentary Party (TPP), all MPs should constitute a Standing Committee of the Annual Conference (the highest organ) of TANU, of which they should be *ex-officio* members. Other recommendations needed no consideration because they had already been effected: allowing civil servants and members of the armed forces to join TANU, and affiliating the trade union and cooperative movements to TANU.

The overall framework recommended by the Commission was adopted and effected by the *Interim Constitution of Tanzania 1965*, which we see in detail in the next chapter.

CHAPTER FOUR

Government Responsibility Under the One Party System

4.0: INTRODUCTION

Section 3 of the *Interim Constitution of Tanzania 1965* (hereinafter the *Interim Constitution*) which was adopted on July 11, 1965, declared that "there shall be one political party," and that "all political activity in Tanzania, other than that of the organs of State... shall be conducted by or under the auspices of the Party." The Constitution of TANU was, as the only lawful political party, appended to the *Interim Constitution* as its First Schedule.

The proposals for the *Interim Constitution* were based on the recommendations of the Presidential Commission on the Establishment of a Democratic One Party State (hereinafter the "Presidential Commission"), and they were presented to the National Assembly by President Nyerere on June 8, 1965, exercising his right to address the National Assembly in person under s.37 of the *Republican Constitution*. In his address, the President repeated his belief in "groping forward" in search of structures and institutions that could most suitably serve Tanzania's conditions. So he insisted that while a constitution should "not be treated lightly", neither should it be regarded as a "sacred text" which cannot be criticised or amended (Nyerere 1968:37-8).

Yet this constitution was deliberately styled "interim" because of some features in it which needed explanation; they all related to some of the consequences of the union of Tanganyika and Zanzibar, which had created Tanzania. Firstly, although establishing a one-party state the *Interim Constitution* acknowledged, in s.3(2), the existence of two parties, TANU for Tanganyika and the Afro-Shirazi Party (hereinafter ASP) for Zanzibar. This position was to remain transitional only, pending the union of those two parties, after which there would then indeed be only one political party for the United Republic.

Secondly, to make a new constitution for the United Republic, the Articles of Union (1964)[1] required a constitutional commission and a constituent assembly to be appointed and summoned for that purpose by the President acting in agreement with the Executive for Zanzibar. This was not done in 1965; the only justification for the course adopted then was that the constitution was interim only, like the arrangement that had been there since the union in April 1964.

Finally, following the January 1964 revolution which had put the ASP in power in Zanzibar, there were no elections in the isles. It was generally understood that democratic processes had been suspended as a necessary and temporary consequence of the violent overthrow of the previous order, and the new constitution did not seek to alter that position yet. There were thus a number of reasons for styling this Constitution as "Interim".

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[1]Schedule to the *Union of Tanganyika and Zanzibar Act 1964*.

But this "Interim" Constitution remained in force up to 1977 when it was replaced by another Constitution. During that period of 12 years under the *Interim Constitution*, the one-party state system was established and strengthened, and reached the peak of its consolidation. This chapter looks at the effect of the one-party system and its consolidation on government responsibility.

4.1: AN OVERVIEW OF THE INTERIM CONSTITUTION OF TANZANIA 1965

Generally, the *Interim Constitution* re-enacted most of the essential features of the *Republican Constitution* as outlined in Chapter 4. Provisions of the *Interim Constitution* specifically relating to the one-party system made little visible impact because there was a *de facto* one-party state even before the new constitution. A completely new innovation, though, related to the electoral process which was designed mainly in accordance with the recommendations of the Presidential Commission [s.28],[2] and was used for the first time in the general elections in September 1965. An aspiring candidate for election to the National Assembly had to be a TANU member nominated by securing 25 signatures of persons registered as voters in the constituency he wished to contest. The nomination papers bearing the 25 signatures were then submitted to the Returning Officer for the area.

Then came the pre-selection process: all those who had submitted

[2]Throughout this section, references in square brackets are provisions of the *Interim Constitution*.

their nomination papers appeared before the TANU District Conference which interviewed them and then recorded its order of preference amongst the candidates (by way of preferential votes cast by the delegates to the Conference in a secret ballot). The District Conference then forwarded the entire record of its meeting to the NEC which made the final selection of two candidates to be presented to the electorate. In its final selection, the NEC was not bound by the preferential order of the District Conference. The Presidential Commission had actually recommended that three candidates be selected and presented to the electorate but this was reduced to two to ensure nobody could be elected by a minority vote.

Next came the campaigns. The new law[3] required all campaigning to be organised by TANU's District Executive Committees, always ensuring a fair and equal opportunity to each of the candidates and, specifically, that candidates incurred no expenses of their own in furtherance of their campaigns for election. Accordingly, campaigns were made through public meetings organised by TANU District Committees, at which the two contending candidates took turns to address the audience and answer questions, sharing the same TANU platform. Finally, the people voted by secret ballot; for most voters, the 1965 General Election gave them their first opportunity to vote.

These elections, being the first under the one-party system, were

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[3]The *National Assembly (Elections) Act 1964*, as amended by the *National Assembly (Elections) (Amendment) Act 1965*.

observed with great interest, both within and outside the country. A number of incumbents, including a couple of cabinet ministers, lost their seats. Generally, the elections were acclaimed as a success in democratic practice.[4]

Presidential elections were held at the same time as parliamentary elections. But the Presidential candidate had no competitor. Section 7(3) of the *Interim Constitution* provided for nomination of only one candidate by the Electoral Conference of the Party. The Conference was constituted by members of the Annual Conference of TANU, re-named "National Conference" in 1965, in a joint meeting with delegates of the ASP.[5] The candidate so nominated was then presented to the electorate to be voted "For" or "Against". The President was declared elected if he obtained more than 50% "Yes" vote.

For the Presidential election the Party was, as recommended by the Presidential Commission, required to campaign actively for its sole candidate. Campaigning for the Presidential candidate was done by TANU regional and district leaders in the same parliamentary election campaign meetings which they organised and supervised. The people of Zanzibar also took part in the election of the President of the United Republic; there, the campaign for the Presidential candidate was vigorously conducted by the ASP leadership and the "Yes" vote was proportionally far much larger than on the Mainland (Cliffe:359).

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[4]For a detailed account, see Cliffe.

[5]Article E.3(2) of the TANU Constitution.

As hinted above, apart from the election of the President of the United Republic, the *Interim Constitution* provided for no elections at all in Zanzibar and none were held until 1980. Zanzibar's representatives to the union legislature, whose number was 52, were all appointed by the President [s.24(1)(d),(e), and ss.31,32].

The National Assembly thus consisted of four categories of members [s.24]. The first consisted of 107 (increased to 120 later[6]) directly-elected constituency members. Secondly were 20 Regional Commissioners who were *ex officio* members; their number grew to 21, 23 and 25 in 1971, 1972 and 1974 respectively.[7] Thirdly were members appointed by the President: 32 from amongst the members of the Revolutionary Council of Zanzibar, 20 from Zanzibar (not being members of the Revolutionary Council), and 10 from any part of the United Republic. The fourth category consisted of 30 members, designated "National", who were indirectly elected by all the MPs of the other categories, from a list submitted by institutions designated by the President as "national institutions."[8] As Regional Commissioners were appointed by the President [s.20], the National Assembly included up to 82 MPs appointed by the President, and the elected members

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[6]By the *National Assembly (Alteration of the Number of Constituency Members) Act 1968*.

[7]*Interim Constitution (Increase in the Number of Regional Commissioners) Act 1971*, and similarly short-titled Acts of 1972 and 1974.

[8]In the 1965 election, the President designated the following institutions: the National Union of Tanganyika Workers (NUTA), the Cooperative Union of Tanganyika (CUT), the Tanganyika Women's Union (UWT), the TANU Youth League (TYL), the Tanganyika African Parents' Association (TAPA), the Tanganyika Association of Chambers of Commerce, and the University College of Dar es Salaam. For the 1970 elections, the last two were omitted.

had only a narrow majority.

Apart from those changes in elections to the National Assembly and in its composition, other provisions remained as they were previously. Even relations between the legislature and the executive remained much the same as they were under the *Republican Constitution*.

But one significant pre-occupation of the *Interim Constitution*, especially with regard to the executive, was the structure of the Union. Thus while executive power continued to vest in the President, it was in respect of Union matters only; for non-union matters the President's executive authority was limited to Tanganyika [s.12(1)]. Executive power for non-union matters in and for Zanzibar was vested in the President of Zanzibar [s.54(1)]. The constitution provided for two Vice-Presidents: the First Vice-President was the principal assistant of the President in relation to Zanzibar and the Second Vice-President was such assistant in relation to Tanganyika; but the former was also the President of Zanzibar [s.13(1)], vested with executive power in and for Zanzibar in all matters other than union matters [ss.53 & 54(1)]. The Second Vice-President was in effect the same as the Vice-President under the *Republican Constitution*: Leader of Government Business in the National Assembly [s.13(1)], of which he had to be an elected member as a pre-condition [s.15(1)].

All ministers, which expression included both vice-presidents

[s.85(1)], were appointed by the President [s.15]; but the appointment of the First Vice-President was no more than a "formal endorsement", by the President, of the position of the head of Executive for Zanzibar in whose election or appointment neither the President nor the *Interim Constitution* had anything to do whatsoever. But a simultaneous effect of this "formal endorsement" was to make the President of Zanzibar a member of the National Assembly, a necessary qualification for the vice-presidency and membership of the Cabinet [ss.15 & 17(1)].

But all in all, the powers of the President were not derogated from by the *Interim Constitution*. His absolute discretion and power to disregard advice were retained [s.6(2)]; the Cabinet remained his "principal instrument of policy" primarily responsible to him "for such departments" as he "may assign them" [s.13(3)] and for such matters as he chose to refer to them [s.17(2)]. And the relationship between the President and the National Assembly, as well as provisions relating to the civil service and the judiciary, remained as they had been under the *Republican Constitution*.

Another notable innovation of the *Interim Constitution* was the introduction of the Tanzanian Ombudsman, in the form of the Permanent Commission of Enquiry (hereinafter the PCE). This had been recommended by the Presidential Commission as a way of safeguarding the rights and freedom of the individual, a subject strongly emphasised by the President himself. A Bill of Rights was considered for that purpose by the Presidential Commission

which had even received a submission by the Tanganyika Law Society urging the adoption of a Bill of Rights (Martin,R:42). But a Bill of Rights was rejected by the Presidential Commission, amplifying reasons given earlier in the 1962 "Proposals for a Republic", and in Nyerere's "National Ethic" statements.

A Bill of Rights, said the Presidential Commission (Tanzania 1965:30-2), was unsuitable for a young nation. Quoting Nyerere about the absence in Tanzania of both a "long tradition of nationhood" and "strong physical means of national security which older countries take for granted" (Nyerere 1966:312), the Presidential Commission warned that a Bill of Rights would limit "in advance of events the measures which Government" could otherwise take against the threat of subversion and disorder. The Commission also saw that a Bill of Rights would "invite a conflict between the Judiciary and the Executive and Legislature" by drawing the courts "into the arena of political controversy", and into political decision-making which is not a judicial function.

The Presidential Commission therefore adopted Nyerere's argument that a "National Ethic", not the cold print of the law, was ultimately the best safeguard of the rights of the individual. It cited the United Kingdom as "a striking example" of the effectiveness of "a national ethic in controlling the exercise of political power":

> A Government in Britain... could legislate to abolish elections, detain political opponents without trial and establish a censorship of the Press, radio and television. Indeed most of these things were done by Parliament when the British people stood on the brink of disaster in the Second World

> War. They are not done in peacetime; not because there is anything in the law... but because they are unthinkable. In other words there is a consensus between the people and their leaders about how the process of Government should be carried on. It is on this that the traditional freedoms of the British people depend.[9]

And the Presidential Commission urged a deliberate effort to build such a tradition on the basis of ethical principles to be declared in the preamble. The Presidential Commission's was possibly the most comprehensive, reasoned public rejection of a Bill of Rights in Tanzania.

But appreciating the need to safeguard individual rights, the Commission recommended the establishment of the PCE and the recommendation was adopted. The role and function of the PCE are given in detail in Chapter Five below.

4.2: CHANGING INSTITUTIONAL ROLES

The *Independence Constitution* incorporated the principle of separation of powers, and the system whereby the Government, through the Prime Minister and the Cabinet, was responsible to an elected Parliament whose authority over the Cabinet was supreme. This position was derogated from by the *Republican Constitution* which established an executive president who was also part of the legislature but was not accountable to it. Then the *Interim Constitution* elevated the Party to a new constitutional position.

This development had a number of effects and implications

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[9]Tanzania 1965, paragraph 104 at p.32.

regarding the key organs of the state, their powers and their inter-relationships in discharging their respective functions. In this section we look at the changing roles of the Parliament and the Party, and their inter-relationship with the Executive. While Parliament lost much of its power and authority, the Party correspondingly gained importance. Meanwhile, the Executive certainly stabilised its position of unchallenged dominance.

4.2.1: The Decline of Parliament

The progressive erosion of the powers of Parliament brought by the *Republican Constitution* illustrates how illusory the cold print of the law can be where the actual conditions are different from what the law envisages. Certainly, the *Independence Constitution* sought to set up a "government responsible to a freely elected Parliament" as its preamble declared; yet it soon proved so easy to replace it with the *Republican Constitution* under which the government ceased to be responsible to Parliament while retaining the preambular declaration of a "government responsible to a freely elected Parliament." The preamble to the *Interim Constitution* also retained that declaration.

The fact, however, is that in spite of express provisions in the *Independence Constitution* for Parliament to censure the government, the Independence Parliament was nevertheless a weak one, and was not fully capable of exercising the effective control envisaged by the constitution. The fact that the Government Party held all seats in the National Assembly was, in

itself, a weakening factor; the Government could easily use the leadership of the Party to ensure that the National Assembly approved every proposal presented before it. After all, Government policies and proposals were all based on the beliefs of the party, of which all MPs were members. That relative weakness of Parliament was evident in 1962 when Nyerere, the party leader, had resigned as Prime Minister; the focus of public attention shifted from Parliament to TANU as the maker of major policy decisions (Leys 1963:136). Even the decision that Tanganyika should become a Republic was made by TANU, and only brought to Parliament for implementation.

The *Republican Constitution* eroded the authority of Parliament by stripping it of its power of censuring the Government. It also undermined the principle of separation of powers by making the President, in whom was concentrated so much power, a constituent part of the legislature. And in s.44(2), it underscored the subservience of Parliament to the Executive by empowering the latter to dissolve Parliament at any time. All this added to the already weak position of Parliament on account of it being an entirely single-party Parliament.

It even enabled the President to go forward with plans to establish a one-party state simply on the basis of a party decision and without any reference at all to Parliament. Unlike the 1962 developments leading to a Republic, in which the National Assembly was first asked to approve a Government Motion in February and then a Government Paper in June before passing the

constitution in November, in June 1965 the National Assembly was presented with the proposed one-party state constitution as a *fait accompli*.

Subsequently, under the *Interim Constitution*, even the legislative supremacy of the Parliament was lost. In January 1967 the NEC of TANU met at Arusha and passed a resolution, since known as the Arusha Declaration,[10] committing Tanzania to socialism. President Nyerere first announced it, explaining at length, at a public rally on February 5, 1967. The declaration specifically mentioned "public ownership of the major means of production and exchange" as an essential aspect of socialism. Almost immediately after the President's announcement of the Arusha Declaration the Government nationalised all banks, the insurance business, and well over ten private firms engaged in various businesses (Nyerere 1968:251-6). When the National Assembly subsequently met on February 14 and 15, 1967, it was presented with Bills which it dutifully passed and retrospectively legalised the nationalisations.[11] It was not imagined that the National Assembly could reject the Bills. Parliament had thus changed from a legislating authority to a rubber stamp giving legitimacy to decisions made elsewhere.

Following those "Arusha Declaration" enactments, a question was

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[10]For the text of the Arusha Declaration, see Nyerere 1968: 231-50.

[11]*National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act 1967, State Trading Corporation (Establishment and Vesting of Interests) Act 1967, National Agricultural Products Board (Vesting of Interests) Act 1967, Insurance (Vesting of Interests and Regulation) Act 1967,* and *Industrial Shares (Acquisition) Act 1967.*

raised in Parliament in 1967: which was supreme, Parliament or the Party? (Msekwa:40; Mwakyembe 1986:42) The question was apparently played down then, only to resurface in the 1968 "Supremacy Debate." During the June-July 1968 session of the National Assembly, some MPs questioned the Government on a number of issues, including the role of Regional Commissioners in the Assembly, the absence of elections in Zanzibar, why TANU and the ASP had not merged, and so on. Mr Chogga, the MP for Iringa South, particularly called for the formation of other political parties to be allowed and also sought to amend the constitution in order to compel the President to act only according to the advice of Parliament which, he insisted, was supreme.[12]

The Second Vice-President sharply criticised the attempts to question the authority of the Party, emphasised that the role and function of the National Assembly was actually no more than ensuring that the Government implemented the policies of the Party, and called for the resignation of any MPs opposed to the policies of TANU or the ASP.[13] In that same session, a private member's motion tabled by Mr Ndobho, MP for Musoma North, wanted the Government to abandon its decision to pay generous gratuities to Ministers, Regional Commissioners and Area Commissioners, contrary to the spirit of the Arusha Declaration. The motion was carried.

The success of the Ndobho Motion was seen as a sign of the

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[12]*Majadiliano ya Bunge*, July 22, 1968: cols.2469-72.

[13]Ibid., cols.2533-4.

National Assembly regaining its authority.[14] It was a false sign. In the October 1968 session of Parliament, the contest for supremacy between Parliament and the Party came up again through Mr Masha (Geita East), Mr Mwakitwange (National), and again Mr Chogga (Iringa South), amongst others.[15] Once again, the Second Vice-President, Mr Kawawa, and a Deputy Minister in his Office, Mr Richard Wambura, insisted that Parliament belonged to TANU, which had picked the MPs in nominations and had the right to discipline them and to dictate their tasks, and that the supremacy of the Party had to be accepted and understood once and for all.[16] And indeed it was soon so understood by everybody. A couple of weeks after the National Assembly debate, the NEC of TANU met in Tanga and expelled seven MPs from the party for, among other reasons, "gross violation of the Party creed and opposition to its policies."[17]

Their expulsion from the Party meant automatic loss of their parliamentary seats: according to ss.27(1) and 35(1)(a) of the *Interim Constitution*, membership of the Party was a necessary qualification both for election to and for continued membership of the National Assembly. It became immediately clear that the expulsion was intended to be both a punishment for, and a warning against, questioning the superiority of the party over Parliament. All except two of the expelled MPs were those who

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[14]Thoden van Velzen & Sterkenburgh 1972(a):248-53, especially at p.252.

[15]*Majadiliano ya Bunge*, October 1, 1968: cols.30-42.

[16]Ibid.: cols.23, 47-8.

[17]See Thoden van Velzen & Sterkenburgh 1972(b), and Msekwa:48.

had insisted on Parliamentary supremacy. The only two exceptions would have nevertheless lost their parliamentary seats due to absence: they were Oscar Kambona who was in self exile in London, and Eli Anangisye who was in detention. Following that expulsion the National Assembly's public esteem and its importance as a national institution were severely eroded (Kjekshus:79).

While in 1968 the attempts to assert parliamentary supremacy were made by only a few MPs, a similar attempt in November 1973 was made by a majority of the Assembly when they rejected the Government's Income Tax Bill. Immediately upon rejection, the President exercised his right under s.46 of the *Interim Constitution* and made an unscheduled address to the National Assembly. In his address, he threatened to exercise his powers to dissolve Parliament under s.40(2) of the Constitution if the MPs persisted in rejecting that Bill. It was soon presented again and the Assembly passed it unanimously as the *Income Tax Act 1973*, proving its utter powerlessness.

In 1975, even the representative character of the National Assembly seemed to have lost its importance. A constitutional amendment[18] reduced the number of directly elected constituency members from 120 to 88 (it was shortly raised to 96[19]), and increased by 20 the number of indirectly elected members. These developments were part of the process of the formal entrenchment

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[18]The *Interim Constitution of Tanzania (Amendment) Act 1975*, s.5.

[19]The *Interim Constitution (Increase of the Number of Constituency Members) Act 1975*.

of the concept of Party Supremacy which we look at in a separate section below. They culminated in the *Constitution of the United Republic of Tanzania 1977* which virtually stripped Parliament of its sovereignty by reducing the National Assembly to a committee of the National Conference of the Party which was declared by the same constitution to be supreme and having "final authority in all matters." Parliament came close to losing its identity.

4.2.2: The Ascent of the Party

TANU's pre-dominance in the nationalist struggle and its sweeping electoral victory laid the foundations of its future claim to political monopoly as its right. Before independence, opposition to TANU amounted to betrayal of the cause of nationalism. After independence, opposition to TANU was almost similarly regarded as treachery or treason, mainly (if not only) because of TANU's role in achieving independence. As the only basis for such negative regard to opposition may have been utterly implausible and misconceived according to liberal democratic standards; but it was nevertheless there, and it accounted for the abject weakness or near absence of opposition at independence.

Nyerere's popularity and astute personality were other factors behind TANU's ascendancy to a position of unquestioned authority. Thus, when in January 1962 TANU decided that Tanganyika should become a Republic, the legitimacy of that decision was not questioned. And the subsequent merging of the offices of state President and TANU President in Julius Nyerere added to TANU'S

pre-eminence; TANU's decisions were taken for granted as final. Thus the decision of TANU was, alone, enough to change the state constitution and adopt a one-party system. Significantly, even the recommendation of the Presidential Commission that members of the NEC who were not already MPs should be paid the same salary and benefits as MPs is said to have been implemented immediately by the Speaker's Office (Tanzania 1965:17; Msekwa:34-5), without further authorisation!

But really it was the *Interim Constitution* that enhanced the status and importance of the Party. The role of the NEC in the electoral process could be used to ensure that only those who support the Party in all things had access to Parliament. And the power of the NEC to terminate the parliamentary tenure of a member by mere expulsion from the Party ensured that an MP, once elected, supported the Party at all times. Thus where both Nyerere and the Presidential Commission had recommended doing away with the Party whip, its substitute was in effect far worse than the whip. Significantly, after the 1965 general election, the very first law that was passed by the new Assembly was the *National Executive Committee (Powers and Privileges) Act 1965* which, as recommended by the Presidential Commission, gave to the NEC the same powers of summoning witnesses and calling for papers as those of the National Assembly.

By annexing the Constitution of TANU as a Schedule to the state constitution, with unfettered freedom to TANU to amend its constitution, the Party was in effect authorised to dictate

amendments to the state constitution. This did in fact occur in 1967. Among other things, the Arusha Declaration also adopted some rather stringent qualifications for offices of political leadership, to conform with socialist objectives.[20] The qualifications prohibited TANU and Government leaders, including MPs, from holding shares in companies, being directors in privately owned enterprises, owning houses for rent or receiving more than one salary. Following that declaration of the Party, the *Interim Constitution* was extensively amended by adding to the qualifications for membership of Parliament the leadership qualifications of the Arusha Declaration and requiring all MPs to comply with them within a year and a month after the announcement of the Arusha Declaration.[21]

In another manifestation, also through the Arusha Declaration, TANU in effect issued what amounted to a directive straight to the Government to implement the policy of socialism "without waiting for a Presidential Commission on Socialism."[22] Apparently, the Government took this "directive" as the basis for nationalising banks and other privately owned business, and only legalising the nationalisations after the event.

Certainly, the 1968 expulsions from the Party, and thereby from Parliament, graphically demonstrated the Party's superior might. The expulsions were followed by a directive that all major policy

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[20]*The Arusha Declaration*, Part V(a).

[21]The *Interim Constitution of Tanzania (Amendment) (No.2) Act 1967*.

[22]The *Arusha Declaration*, Part V(b)(2).

issues should be submitted to the NEC of the Party first for consideration and approval before being taken to Parliament. Subsequently, that became the procedure for all development plans, both annual and five-year plans; the Second Five-Year Development Plan 1969-74, and the Decentralisation Programme of 1972 (which abolished local government) were carried out in that order (Msekwa 49-52).

A number of such decisions have actually originated from the Party itself, and the Government has simply been directed to implement them, Parliament coming in only to enact laws where necessary for such implementation. They include the decision to transfer the capital from Dar es Salaam to Dodoma, the decision on the Villagisation Programme[23] under which huge numbers of rural peasants were moved from scattered homesteads to village settlements. Meanwhile, the powers of summoning witnesses and calling for papers given to the NEC in 1965 was used for the first time in February 1973, when heads of some parastatal firms and one Minister and his Principal Secretary were summoned to explain problems pertaining to their respective bodies before the Central Committee of the Party, acting on behalf of the NEC.

Generally, it became the norm that issues of policy were the preserve of the Party and Parliament remained with the technical function of passing legislation to facilitate Government implementation of Party policy and decisions. It was further

[23]There is a lot of literature on this subject: Lofchie, McHenry 1979, Mwapachu, de Vries & Fortmann, Mwansasu & Pratt:93-165, Hyden 1980, etc.

understood that once the Party had decided anything, everybody else was to conform with that decision without further debate. It was a pattern which ultimately developed into the concept expressed as "Party Supremacy."

The formal incorporation of Party Supremacy in the constitution began in 1975 when s.3 of the *Interim Constitution* was amended[24] so as to require not only "all political activity" as was hitherto the case, but also the "functions of all the organs of State" to "be performed under the auspices of the Party." Shortly after this amendment Nyerere proposed to TANU and the ASP, in a joint meeting as an Electoral Conference, that the two should merge. Subsequently, the proposal received overwhelming support and in February 1977 TANU and the ASP merged to form one political party, *Chama cha Mapinduzi* (CCM). Following this merger, a new state constitution was adopted and came into force on April 26, 1977, asserting Party Supremacy more categorically.

Before looking into the details of that constitution and the implications of the supremacy it declared so categorically, we first look at the position of the executive.

4.3: THE DOMINANCE OF THE EXECUTIVE

As the power and authority of the Party in relation to Parliament increased, the power and dominance of the executive, which had begun rising under the *Republican Constitution*, grew even further

[24]By s.3 of the *Interim Constitution of Tanzania (Amendment) Act 1975*.

under the *Interim Constitution*. As the instrument for controlling the government, Parliament was weakened in two ways. Firstly, was the power of the President to appoint some MPs and, from amongst the MPs, to appoint ministers and junior ministers. Secondly, was the complete lack of censorial powers on the part of the National Assembly. The result was a position of unchecked dominance for the executive.

4.3.1: Effect of Presidential Appointments

The *Interim Constitution* strengthened the Executive over the legislature in one significant way: by increasing the number of MPs appointed by the President to 82, from a mere 10 under the *Republican Constitution*. Now, in addition to the original 10 members, the President also appointed 32 from amongst the members of the Zanzibar Revolutionary Council, and another 20 to represent Zanzibar. In addition, there were 20 regional commissioners, also appointed by the President, who became *ex officio* MPs under the *Interim Constitution*. Therefore, out of a maximum capacity of 204 members of the National Assembly (with 107 elected and 15 indirectly elected members), the President appointed up to just over 40% of the Assembly. Indeed, a majority of this group consisted of MPs from Zanzibar where, as a temporary measure, there were no elections; but the said "temporary" arrangement was in force for well over 15 years during which the President continued to nominate MPs from Zanzibar.

The assumption that such nominated members played to the tune of the Executive cannot be dismissed. The President's power to appoint MPs does not seem to have been constrained by a strict requirement to observe the qualifications of membership which bound the elected members, enabling the President to appoint to Parliament even a person disqualified for election. Thus in 1965, the President appointed Chief Abdulla Saidi Fundikira to Parliament although the latter was no longer a TANU member, a necessary qualification, having resigned from TANU in protest against the one-party state system.[25] And on occasions the President used this power to bring electoral casualties back to Parliament: Paul Bomani was appointed to Parliament (and to the Cabinet) after his 1965 election defeat; Johnston Kihampa was appointed regional commissioner after a similar defeat in 1970; Daud Mwakawago lost in the 1980 elections but was appointed to Parliament in 1981 and to the Cabinet in 1982; Chrisant Mzindakaya lost his parliamentary seat through a successful election petition in 1981, contested the by-election that followed and lost, but returned to Parliament on appointment as a regional commissioner.

That appointed MPs owed their loyalty to the Executive was not merely theoretical: the President also had the power to revoke his appointment and thereby terminate prematurely the parliamentary tenure of his appointed members. Such premature

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[25]Bagenda: 108; Fundikira's 1964 letter of resignation from TANU, addressed to Nyerere, and Nyerere's reply accepting the resignation were read out at a seminar of the Tanganyika Law Society on "Democracy and Political Pluralism" held in Dar es Salaam in September 1990.

termination of tenure was not very common but in the early years of the *Interim Constitution* it must have occurred, specifically with members from or representing Zanzibar. As there were no elections in Zanzibar, membership of the Zanzibar Revolutionary Council was by appointment of the First Vice-President and President of Zanzibar, who was the Chairman of the Revolutionary Council, in whom the *Constitutional Government and Rule of Law Decree 1964* vested all powers: executive, legislative and judicial (Othman & Shaidi:194-6). An MP appointed to the Union Parliament on the basis of his or her membership of the Revolutionary Council could not continue as an MP if he or she ceased to be a member of the Council for whatever reason, including removal by the Zanzibar President.

It would seem that when such cessation of membership occurred, hardly any information was given to the public, or even to Parliament. Thus in 1968 the MP for Geita South, Mrs Milembe Ng'winamila, was prompted to complain in Parliament:

> Why is it that each time we meet in this Parliament we always see new faces from Zanzibar? Where have all the old ones gone? ...And even if they have been replaced by whatever methods used in Zanzibar, why aren't we informed? ...We all understand that these are our fellow MPs, and they disappear just like that! We must be informed...[26]

She went on to complain about the MPs from Zanzibar (all of them nominated) for their unjustified silent complacency and total reluctance to criticise the government even mildly, and concluded that they maintain silence in the Assembly because they feared their appointments would be revoked if they spoke their minds.

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[26]*Majadiliano ya Bunge*, July 22, 1968: col.2502. [Translation from Swahili is my own]

Mrs Ng'winamila's complaint may have implied far more than the mere composition of the National Assembly. Following the January 1964 revolution the Karume regime in Zanzibar was reputed for its brutal suppression of freedom and consistent violation of human rights. Karume ordered indiscriminate arrests, detentions, tortures and executions of his political rivals, real and imagined. The union with Tanganyika provided him with an opportunity to transfer some of his rivals to the mainland in various capacities, including membership of the National Assembly. But such transfers may not have reassured Karume enough, and a few of those so transferred may have still fallen foul of his indiscriminate orders which, being issued by word of mouth, were carried out unrecorded (Mlimuka:217).

Apparently, one of Karume's perceived rivals was Kassim Hanga. Until the union, he was Vice-President of Zanzibar. After the union he became a minister in the union Cabinet; but in a reshuffle made on June 7, 1967, he was dropped from the union Cabinet. Two months later it was announced in Zanzibar that his tenure as member of the Revolutionary Council and the Zanzibar Cabinet had been terminated. And in December 1967, it was officially announced in Dar es Salaam that Hanga was detained.[27] Karume then demanded that Hanga be returned to Zanzibar to stand trial for an alleged conspiracy to overthrow the Zanzibar Government. Nyerere obliged and subsequently Hanga was atrociously killed, by Karume's orders, without even a semblance of a trial (Babu:98-9; Mvungi 1989:20; Smith:188). The complaint of Mrs

[27](1967) 4 *Africa Research Bulletin*: 795BC, 836B and 934B.

Ng'winamila fitted quite well into the context of Kassim Hanga's disappearance, and possibly of others like him.

Another weapon of the Executive in reinforcing itself over the legislature was the power of the President to create as many ministries as he wished, and to appoint, from amongst the MPs, ministers to head them with as many junior ministers as he thought fit. There is an argument that by their membership of the National Assembly, ministers were also responsible to the Assembly, in addition to their responsibility to the President (McAuslan:518-9). But by appointing as many of the MPs ministers and junior ministers (and in later years regional commissioners) as he wished, the President easily reduced the size of the Assembly to which the ministers were supposed to be responsible.

Appointing MPs ministers or junior ministers or regional commissioners is a common (and certainly old) technique of silencing vocal independent MPs. In 1962 Richard Wambura and in 1963 John Mwakangale, until then known to be back bench radicals, were appointed regional commissioner and junior minister respectively, and at once turned to defending the government. The *Official Oaths Act 1962* to which all ministers and junior ministers became subject not only bound them to secrecy but also reinforced "the conventions of collective ministerial responsibility" before the National Assembly (McAuslan:518-9). But in the circumstances of Tanzania those conventions guaranteed the practical reality of "ministerial solidarity," whereby ministers stand firmly together in defence of each other's positions

(Turpin:146-8), more effectively than responsibility.

That the power of the President to appoint ministers could weaken the authority of the National Assembly can be illustrated by looking at the 1978 composition of the Assembly in relation to the Cabinet. Of the Assembly's maximum capacity of 228 members, 96 were elected constituency members and up to 97 appointed members (including 25 regional commissioners). The remaining 35 were members indirectly elected to the Assembly. While the constituency members, at 96, were not the majority, the President reduced their voice further by appointing 19 of them to the then 40-member cabinet, including junior ministers (Mwakyembe:44).

Besides appointing ministers, the President also had powers of appointment in respect of all other important posts; he appointed all the directors of parastatal corporations and heads of all important public institutions. Some of these posts could be fairly lucrative and the President sometimes used them as the carrot with which to silence outspoken MPs (Shivji 1984:6). One such classic case was in 1982 when Edward Mwesiumo, the MP who had led an unsuccessful opposition to the Government Bill to establish a National Urban Water Authority, was appointed Chairman of the Board of Directors of that same Authority immediately after it was established!

Another factor adding to the dominance of the Executive was possibly the low level of political sophistication and general understanding of many of the MPs. Even the callous demands for

a multi-party system and for compelling the President to act according to parliamentary advice as made by Mr Chogga, the champion of parliamentary supremacy, revealed his limited appreciation of the country's recent constitutional history and his own position as an MP lawfully elected under the one-party system. The debate following Chogga's motion seemed to get into some apparent confusion, with members defending the one-party system in purported support of Chogga's motion for a multi-party system.[28] President Nyerere may have been aware of this factor when he opened the new National Assembly following the 1965 elections and lectured the MPs on their responsibilities (Nyerere: 93-6). He insisted, among other things, on the MPs' right to question ministers and demand explanations about issues concerning their respective departments, and about the policies of the Government in general.

4.3.2: A Powerless National Assembly

Even if the President's powers of appointment were removed, or the quality and political sophistication of the MPs improved (as it increasingly did in subsequent elections), the executive would still remain dominant in relation to Parliament. This is because Parliament had no powers over the executive; even the right of MPs to question ministers and demand explanations did not entail any censorial powers over the ministers. Even where a minister failed completely to answer questions satisfactorily or to

[28]*Majadiliano ya Bunge*, July 22, 1968: cols.2484-2505, especially Mr Kapilima's interjection at col.2489.

explain problems in his department, the National Assembly has been unable to take any action against the minister.

There have been cases where MPs called for particular ministers to take political responsibility for affairs in their departments and resign. In 1983 the Minister for Home Affairs, Saidi Natepe, resigned upon such parliamentary pressure following the escape of two remand prisoners (facing treason charges) from Ukonga Maximum Security Prison in Dar es Salaam. But had he refused to resign, there is nothing that the National Assembly could have done. Only the President has had the power to take action against his ministers.

Individual ministers have resigned in Tanzania but Saidi Natepe's is the only known resignation upon immediate parliamentary pressure. Oscar Kambona resigned from the Cabinet and as Secretary-General of TANU in 1967 on alleged grounds of ill health; but he soon fled the country and it became clear that he resigned on account of differences with the President. Edwin Mtei resigned as Minister for Finance in 1979, also because of differences with the President over economic strategies and dealing with the International Monetary Fund (IMF).

The most prominent resignations, almost without precedent in Africa, were in January 1977 when Ali Hassan Mwinyi, then Minister for Home Affairs, Peter Saidi Siyovelwa, Minister of State in the President's Office (responsible for state security), and Marco Mabawa and Peter Abdalla Kisumo, commissioner for

Shinyanga and Mwanza Regions respectively, all resigned in one day taking political responsibility for deaths that had occurred in those two regions at the hands of police and security officers conducting investigations and interrogations. Those ministers and regional commissioners were never questioned about those deaths in Parliament; in fact only a few MPs had heard about them. The four were advised to resign in order to appease the President who was extremely furious when he heard about the murders. All the resignations, therefore, demonstrate the authority of the President, not of the Parliament.

On the other hand there have been cases which have shown that the National Assembly is utterly powerless over the executive. In 1981 the local media found large quantities of sugar mouldering in some Dar es Salaam warehouses while the commodity was in extremely short supply in the country. The MPs angrily demanded the resignation of the minister responsible, Mr Joseph Mungai, but he defiantly refused. Even after the government admitted negligence and impropriety in various areas in the sugar industry,[29] the minister did not resign. He was only removed by the President in a major cabinet reshuffle in 1982.

In the National Assembly, ministers have actually felt like delegates of the President whose authority and wisdom, the MPs are sometimes reminded, should not be questioned. In the July 1968 session of Parliament, MPs questioned the paying of

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[29]See (1981) 62 *The Parliamentarian*: 309-10, and (1982) 63 *The Parliamentarian*: 119.

gratuities to ministers, junior ministers and regional and area commissioners, as intended by the Government. The Minister of State responsible for Central Establishment warned the Assembly not to discuss terms and conditions of service for ministers (of which the gratuities were part) because that was solely the responsibility of the President.[30]

Apparently, the MPs' right to question ministers and demand explanations from ministers as encouraged by the President in 1965 did not envisage their right to resist or block Government measures. To that extent, then, parliamentary debates were to be of little more than academic value. One is reminded of another address to the National Assembly in July 1982 when the President warned that although democracy was good for giving everyone the right to express his views, it could nevertheless be problematic because it gave that same right even to a fool! The address came shortly after a fairly bold attempt by Rev P Misigalo, MP for Tabora Urban, to block the budget estimates for the Ministry of Education because the Minister could not explain satisfactorily the pervious year's poor performance by his ministry. The President's warning was widely interpreted as intended to caution the likes of Rev Misigalo.

The private motion mentioned above was, in the event, successful and the gratuities proposed by the Government were abandoned. But this, apparently, was simply because the President, with whom lay the final decision, agreed in principle with the MPs' views

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[30]*Majadiliano ya Bunge*, July 10, 1968: col.1614.

against the gratuities. Otherwise, in an event of serious disagreement between the Government and the National Assembly, the threat of dissolution easily came in. Even in his lecture to the new Assembly in 1965, Nyerere had said:

> There will be no Whips operating in this House; Government will submit Bills for you to consider and pass or reject. Occasionally, on major issues -- the Budget is an obvious example -- the Government will inform the Members that the Government is committed to a Bill and will appeal to the people if the Assembly rejects it. (Nyerere 1968:94)

He was not referring to a situation where the National Assembly passes a Bill and the President refuses to assent to it, an unlikely event since practically all Bills are Government Bills. Rather he was referring to a situation where a Government Bill or other measure is rejected by the Assembly. This is precisely what s.40(2) of the *Interim Constitution*,[31] empowering the President to dissolve Parliament "at any time", was intended for. The use of that power was threatened for the first time in November 1973 when the National Assembly rejected the *Income Tax Bill*, and the President threatened the Assembly with dissolution if the MPs refused to change their mind; the Bill was subsequently passed.

Had the National Assembly persisted in rejecting the Bill and the threat of dissolution carried out, fresh elections would have been called for both the National Assembly and the President because each time Parliament is dissolved, for whatever reason, the President also vacates office. But in a one-party state in which the President is also head of the party, the President is

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[31]Previously s.44(2) of the *Republican Constitution*.

usually certain to be re-elected while the MPs he differed with are not even likely to be nominated to contest for Parliament in the snap elections.

After that threat, the lesson was probably learnt and serious disagreements became rare and in no case did they come close to the 1973 stalemate. The Executive has always had its way. Thus at the end of 1982 the Ministry of Finance unexpectedly announced some new tax measures in what was then nick-named the "Mini-Budget". And in the customary New Year's Eve Presidential Address to the Nation, President Nyerere said:

> You will already have heard of the new taxes which come into force tomorrow. These tax measures will be debated in Parliament at its next sitting, but in the meantime they have to be paid by everyone.[32]

The President was certainly confident that the National Assembly would approve the measures.

By this time, in fact from 1967, the Executive could and actually did justify its disregard of Parliament in many of its actions and measures by claims of having obtained legitimacy or other mandate for its actions from the Party which had become supreme. The nationalisation measures following the Arusha Declaration in 1967 were the first indication of this attitude of the Executive.

But claims that all Government measures were mandated by the Party were, in many cases, exaggerated. Even the formal proclamation of Party Supremacy sought no more than to emphasise

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[32]*Daily News*, January 1, 1983, and *Uhuru*, of the same date.

the role and function of the Party as the supreme organ of policy. But the Executive conveniently used the concept of Party Supremacy to manipulate the National Assembly into approving, or at least acquiescing in, all Government measures. Tax measures like the "Mini Budget" mentioned above were certainly not policy decisions.

4.4: PARTY SUPREMACY AND THE 1977 CONSTITUTION

On April 26, 1977, the *Interim Constitution of Tanzania 1965* was replaced by the *Constitution of the United Republic of Tanzania 1977* (hereinafter the *Constitution 1977*). Subsequently, the latter underwent various amendments, some of them so fundamental that calling it "permanent" was almost misleading. But at least the temporary arrangement of two political parties in a one-party state had come to an end with the merger of TANU and ASP to form *Chama cha Mapinduzi* (hereinafter "CCM") as the sole political party for the entire United Republic.

The requirement of appointing a constitutional commission and then summoning a constituent assembly as provided by the *Articles of Union*[33] was technically complied with in promulgating the *Constitution 1977* (Shivji 1990a:56-60). But the new constitution still provided for no elections in Zanzibar and the President continued to nominate MPs from there.

The *Constitution 1977* has often been associated with the concept

[33]Schedule to the *Union of Tanganyika and Zanzibar Act 1964*.

of "Party Supremacy". That association could be misleading because as a constitutional fact, party supremacy was first introduced in 1965 by the *Interim Constitution*; it was prominently manifested by the 1967 Arusha Declaration and its subsequent nationalisations; and it was conclusively established in 1968 with the termination of the parliamentary tenure of seven MPs by simply expelling them from the Party. As we see below, formal constitutional provision for "Party Supremacy" was first made in 1975 through amendments to the *Interim Constitution*.[34] The *Constitution 1977* re-enacted the one-party state structure of the *Interim Constitution* in all its essentials, including the amendments, and also reinforced the concept of party supremacy by way of three new provisions.

Firstly, s.3 of the *Constitution 1977* proclaimed CCM not only "the sole political party in the United Republic" but also as having "final authority in all matters in accordance with the constitution of the Party." Secondly was the provision relating to the President's general exercise of his functions. From 1962 the President had absolute discretion and was not "obliged to follow advice tendered by any other person."[35] But now s.5(2) of the *Constitution 1977* enjoined the President to abide always by the policies and directives of the Party. Finally, s.54(1) of the *Constitution* made the National Assembly a "Committee of the National Conference of the Party, in accordance with section

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[34]By the *Interim Constitution of Tanzania (Amendment) Act 1975*.

[35]Section 3(3) of the *Constitution of Tanganyika 1962* and s.6(2) of the *Interim Constitution of Tanzania 1965*.

59(11) of the Constitution of the Party, whose function was to supervise the implementation of the policy of the Party by the Government and various other public institutions."[36]

Those provisions completed the process of entrenching the concept of "Party Supremacy" in the state constitution. Following is a brief outline of that process, and an assessment of how far the concept effected the exercise of control over the executive, a function which the Parliament was increasingly being rendered incapable of discharging.

*4.4.1: Background to the **Constitution 1977***

When it was first adopted in 1965, the *Interim Constitution* elevated the single political party to a supreme position, especially in relation to Parliament. When in 1968 the Second Vice-President declared that "in a one party state the Party" was "supreme" over the Parliament and other institutions,[37] he was stating an existing constitutional fact, subsequently proved beyond doubt by the October 1968 expulsions of MPs from Parliament by merely terminating their Party membership. Yet, in 1975 it was felt necessary to emphasise that fact with constitutional amendments, and to elaborate it as a new constitutional development (Nyerere 1975).

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[36]These were the section numbers prior to the *Fifth Constitutional Amendment Act 1984*, which is considered below in Chapter Seven.

[37]*Majadiliano ya Bunge*, July 22, 1968: col.2534.

This new constitutional development can be linked to the *TANU Guidelines 1971*, issued by the party as a reaction to the military coup which brought Idi Amin to power in Uganda in Janaury 1971. In the document,[38] the coup was contrasted with the Portuguese invasion of Guinea in late 1970 which was successfully repelled as a result of "the people and the army standing solidly together" in defence of their national independence.[39]

The idea behind the *TANU Guidelines 1971* sought to instil in the people a sense of duty and responsibility for safeguarding their national independence against subversion and, in that responsibility, the party had a crucial role:

> The responsibility of the party is to lead the masses and their various institutions, in the effort to safeguard national independence and to advance the liberation of the African. The duty of a socialist party is to guide all activities of the masses. The Government, parastatals, national organisations, etc. are instruments for implementing the Party's policies... The time has now come for the Party to take the reins and lead all the people's activities.... Ways must be found to ensure that the Party actively supervises the activities and the running of its implementing agencies.[40]

The logic was that through the party the people could monitor the activities of all government agencies and ensure that national independence is in no way subverted, as happened in Uganda. That seems to have been the philosophy behind the concept of "party supremacy."

The Party, TANU, next deliberated on "party supremacy" in early

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[38]The document is reproduced in full in Coulson (ed):36-42.

[39]*TANU Guidelines 1971*, paragraphs 8-9.

[40]Ibid., paragraphs 11, 14.

1974; the subject was discussed by the NEC in its March 1974 meeting. Finally, the NEC made specific recommendations for constitutional amendments during its November 1974 meeting at Musoma (Blaustein & Flanz:5; McHenry 1994:57). The recommended amendments to the *Interim Constitution* were first introduced in the National Assembly in April 1975 and passed in early June of the same year as Act No. 8 of 1975 (hereinafter the "1975 Amendment"). This was the most extensive amendment made to the *Interim Constitution*. It amended the Preamble by adding some socialist principles, as expounded by the Arusha Declaration, to the list of factors declared basic to "freedom, justice, fraternity and concord." The amended Preamble also emphasised the need to prevent exploitation and exalted a society that was both democratic and socialist.

On party supremacy, s.3(3) of the *Interim Constitution*, which had specifically exempted from the auspices of the Party the performance of the functions of the organs of state of the United Republic and the Zanzibar Executive and Legislature, was amended by deleting that exemption. And a new sub-section (4)[41] declared: "The functions of all the organs of State of the United Republic shall be performed under the auspices of the Party." This, then, removed all ambiguities about the constitutionally superior position of the Party in relation to all other "organs of State of the United Republic."

Further emphasis on party supremacy was made through the

[41]The old sub-section (4) was re-numbered as sub-section (5).

amendment to s.20 of the *Interim Constitution* under which previously the President had appointed "a regional commissioner for every region within Tanganyika." The 1975 Amendment made the post of "regional commissioner" *ex officio* only, and the President was to "appoint a regional secretary for every region within Tanganyika" and a person so appointed became the regional commissioner for that region. And, accordingly, s.24 of the *Interim Constitution* was amended to replace "regional commissioners appointed for regions in Tanganyika" with "regional secretaries appointed for the regions in Tanganyika", as one of the categories of the members of the National Assembly. The term "regional secretary" was not defined but it was understood and accepted as meaning "regional secretary of TANU", referred to in Article IV,D of the TANU Constitution, scheduled to the *Interim Constitution*. In that regard the amendment made no visible change because already, from 1962, regional commissioners were also TANU regional secretaries.

A very significant change was in respect of the composition of the National Assembly. In 1968 the number of constituency members had been raised from 107 to 120. The policy then was to have one MP for up to 100,000 inhabitants provided that geographically no constituency extended to more than one district; the 1968 increase took into account the population distribution as established by the 1967 national census.[42] But the 1975 Amendment reduced the number of constituency members

[42]The national population was then just over 12,000,000.

from 120 to 88; it was raised again to 96 shortly after.[43] The new policy was to have one MP to a district without regard to population. It emphasised the role of the MP not as a representative of the people in his constituency but a member of the Party Leadership Team in the district, of which the other members were the District Party Chairman and the District Party Secretary.[44]

The 1975 Amendment introduced an additional category of indirectly elected "national MPs", who were popularly referred to as "regional MPs" because there was one such MP for each of the regions, also forming a "Regional Team" with the Regional Party Chairman and the Regional Party Secretary. The procedure of electing them, as provided under a new s.30A of the *Interim Constitution*, was that a committee for each region nominated up to five persons whose names were submitted to the NEC for its approval as part of the selection process. The NEC then presented the candidates it approved (not being less than two) to the National Assembly which then elected one "national MP" from each region.

One overall effect of the amendment was that the directly elected MPs became a minority in the National Assembly: only 96 out of a maximum capacity of 218.

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[43]By the *Interim Constitution (Increase in the Number of Constituency Members) Act 1975*.

[44]Vol.8 *Africa Contemporary Record 1975-1976*: B318.

Notably, though, the 1975 Amendment did not concern or affect Zanzibar, and the new composition of the National Assembly concerned only those MPs from Mainland Tanzania. Even the functions of the organs of state, whose performance was brought under the auspices of the Party under s.3(4) of the *Interim Constitution* (as re-numbered by the amendment), were functions of "the organs of State of the United Republic" only. The exclusion of Zanzibar was necessary because the concept of "Party Supremacy" which the amendment sought to effect was conceived, developed and promoted exclusively by TANU and TANU had no jurisdictional role or authority over Zanzibar.

Significantly, it was immediately after the 1975 Amendment was passed that developments towards the merger of TANU and ASP began. On September 22, 1975, the Electoral Conference, i.e. the TANU National Conference in a joint meeting with ASP delegates, renominated Julius Nyerere as sole Presidential candidate in the elections due on October 26. In his acceptance speech, Nyerere recommended that it would help the country if TANU and ASP merged without further hesitation. The idea was received with great enthusiasm; it was discussed and overwhelmingly supported by the party branches of both TANU and ASP. Subsequently the two parties merged and out of the merger, on February 5, 1977, a new party, *Chama cha Mapinduzi* (CCM), was launched.

Following the birth of CCM as the single political party for the whole of Tanzania a new constitution, the *Constitution 1977*, was enacted in April 1977. All the provisions of the 1975 Amendment

were re-enacted in the new constitution, thereby applying them to the whole of Tanzania. The merger of the two parties into one also facilitated the formal declaration of the new single party as supreme in all matters, the subjecting of the President's general powers to the policies and directives of the Party, and the formal declaration of the National Assembly as a committee of the National Conference of the Party. That is what the *Constitution 1977* did.

4.4.2: Party Supremacy in Practice

As outlined above, "Party Supremacy" was already in the constitution even before the *Constitution 1977* came in with its reinforcing declaration and extension of its application to Zanzibar. A graphic demonstration of party supremacy was the way the *Constitution 1977* itself was adopted. After the proposed merger of TANU and ASP was endorsed by the branches of the two parties, a twenty-member committee was appointed to formulate a constitution for the proposed new party, which was then adopted as the constitution of CCM. After the founding of CCM in February 1977, the very first directive of the NEC of the new party was that Tanzania should have a new constitution. The same twenty-member committee was assigned by this new NEC to formulate the new constitution, and it immediately started work on its new assignment. On March 26, 1977, the twenty-member team submitted its proposals for a new constitution to the NEC (Mohamed:85-6).

But the law as contained in the *Articles of Union* had its

requirements for making a new constitution. It required the President, acting in agreement with the Executive for Zanzibar, to appoint a constitutional commission to make proposals for a new constitution. Then the President, again in agreement with the Executive for Zanzibar, was required to summon a constituent assembly composed of members from both Zanzibar and Tanganyika to pass the new constitution.[45] To comply with these technical requirements the President appointed the same twenty-member team as the "Constitutional Commission", and the members of the current Parliament then as the members of the "Constituent Assembly" which he summoned to meet on April 25, 1977, to enact the new constitution.[46] The appointment of the Constitutional Commission, on March 16, 1977, was long after it had started its work, assigned to it by the Party, and shortly before submitting its proposals to the NEC (Mohamed:85-6; Shivji 1990a:56-60).

In effect, therefore, the appointing of the Constitutional Commission was done by the Party. The subsequent formal appointment was done by the President (of the United Republic) merely to ensure compliance with legal technicalities.[47]

Party supremacy was then authoritatively affirmed by the late Edward Sokoine, then Prime Minister, when he presented the Draft Constitution for consideration by the Constituent Assembly on

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[45]Article (vii) of the Schedule to the *Union of Tanganyika and Zanzibar Act 1964*.

[46]G.N. 38 & 39 of 1977, both published on March 25, 1977.

[47]In fact the Commission submitted its proposals to the NEC one day after the publication of the notice of its appointment, see Mohamed: 85-6.

April 25, 1977. Having stated that the Constituent Assembly, because it was enacting the basic law of the Nation, had greater authority than the ordinary Parliament, he went on:

> This Constituent Assembly is at liberty either to accept or to reject these proposals. But, Mr Speaker, in exercising our authority, we ought to be conscious of its limitations. The proposals we are about to debate are the outcome of the Party directives. We Tanzanians, in our wisdom, have determined without hesitation that the Party shall be the ultimate authority in the country. Therefore, this Constituent Assembly has full powers to reject or amend these Government proposals if it feels that they are contrary to or in conflict with the Party directives. On the other hand, if these proposals correctly represent the Party's wishes, I beg the Assembly to accept them without a moment's hesitation.[48]

After three hours of "seven laudatory speeches", the *Constitution 1977* was passed on the same day by the Constituent Assembly (Shivji 1994a:87), and took effect the next day.

The process of adopting the *Constitution 1977* was accomplished rather swiftly. It took little more that two months between the Party decision to have a new constitution and its adoption. It seems to have been an almost exclusive agenda of the top Party leadership with all involvement limited to the NEC only; the general public was not involved at all. Not even the Attorney General and the legal drafting experts of the Government were sufficiently involved. The drafting was not even done by the 20-member Constitutional Commission; rather it was virtually dictated by the NEC itself. The *Constitution 1977* was drafted, passed and published only in Kiswahili, the popular language of the political arena, an exclusive domain of the Party. It was not made available in English, the official language of legislation, until 13 years later.

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[48]As quoted in Shivji 1994a:86-7.

The position of the late Edward Sokoine when he presented the Draft Constitution before the Constituent Assembly on April 25, 1977, deserves a comment. He was the Prime Minister, having replaced Kawawa in a major cabinet reshuffle made immediately after the launching of CCM in February 1977. The office of Prime Minister was not an establishment of the *Interim Constitution* but it had been established in 1972 by Presidential Instrument[49] and Kawawa had held it in combination with that of Second Vice-President and Leader of Government Business in the National Assembly. But Sokoine did not hold the two offices as his predecessor had done and, curiously, from February to April 1977 the office of Second Vice-President (and Leader of Government Business in the National Assembly) remained vacant.

However, when the *Constitution 1977* came into force in April 1977, it made no provision for a Second Vice-President; it provided for only one Vice-President who was also to be the President of Zanzibar. But it provided under s.14(2) that the President could appoint any one of the ministers a "Prime Minister." Apparently, Edward Sokoine was appointed Prime Minister in contemplation of the *Constitution 1977* even before it was enacted; it was another case of implementing a constitutional arrangement in advance of its formal adoption, the only mandate being the Party decision to formulate a new state constitution.

A number of instances could be cited to illustrate party

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[49]G.N. 41 of 1972.

supremacy in practice. Herebelow we refer to two cases which appeared to demonstrate that the Party was somehow assuming powers of censuring the Government similar, in effect at least, to those which Parliament had lost in 1962.

In 1981 there was wide public indignation with the Government following press revelations of a mishandled international transaction involving the national airline, Air Tanzania Corporation (ATC), and an Athens based businessman called George Hallack. Some aircraft were leased to the airline upon terms which smacked of a deliberate fraud: one of the aircraft could not even make a single flight after delivery!

The Central Committee of the Party, with powers delegated to it for that purpose by the NEC in accordance with the *National Executive Committee (Powers and Privileges) Act 1965*, summoned for questioning a number of public officials involved in the transaction or otherwise concerned with the airline's business. Thus the Central Committee of the Party acted as a Parliamentary Committee might do in the United Kingdom. Those summoned included the Minister for Communications and Transport, Mr Augustine Mwingira, and the General Manager of ATC, Mr Lawrence Mmasi. Following that the Central Committee confirmed that the transaction had indeed been mishandled thus causing a considerable loss to the nation. Most important, the Central Committee issued a directive requiring the President to take action against the minister and the ATC General Manager. The President proceeded to sack them. Subsequently, the Chairman and

the General Manager of the Tanzania Investment Bank, and some executives of the Tanzania Elimu Supplies Ltd (all parastatal firms) were also sacked following similar action by the Central Committee.[50] Significantly, when the Central Committee took these actions it was chaired by Aboud Jumbe, its vice-chairman, and not by its regular chairman who was the President himself.

In January 1984, it was Aboud Jumbe's turn to be censured by the Party. The year before, the NEC of the Party issued some proposals for constitutional amendments and invited the public to discuss them. In the ensuing debate some strongly felt views were made advocating greater autonomy for Zanzibar. This aspect of the debate escalated into a major political issue.[51] An unscheduled meeting of the NEC was called at Dodoma to clear what was called "political pollution" over the union. In short those advocating greater autonomy for Zanzibar were accused of sabotaging the union and Jumbe, as Zanzibar President, was "put in the dock" for near complicity in the sabotage. It was like a censure motion by the NEC and Jumbe was forced to resign from all his positions: President of Zanzibar, Vice-President of the United Republic, and Vice-Chairman of CCM.

The sacking of Augustine Mwingira from the Cabinet was a graphic demonstration of party supremacy as a practical reality, and not merely an aspect of Tanzanian constitutional theory. It contrasted sharply with the earlier inability of Parliament to

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[50]Vol.13 *Africa Contemporary Record 1980-1981*: B331-2.

[51]Vol.16 *Africa Contemporary Record 1983-1984*: B272-3.

force, by exerting pressure, the Minister for Agriculture to resign. And the forced resignation of Jumbe projected the NEC sharply as the focus of final authority. For the people of Zanzibar, especially, the January 1984 meeting of the NEC at Dodoma had an extremely powerful impact: their President went to Dodoma to attend the meeting, and he came back without his office! The NEC nominated Ali Hassan Mwinyi as Interim President; three months later he was confirmed by a popular vote.

The following year the Party made another demonstration of its position of authority. President Nyerere had stated consistently from 1980 that he was in his last five-year term as President of the United Republic. Yet, until the NEC proposed to the Electoral Conference of the Party the name of Ali Hassan Mwinyi to be the sole Presidential candidate, there was absolutely no prediction of Nyerere's successor. After that there was no doubt that Mwinyi was going to be the next President. He was indeed endorsed by an approximately 92% "Yes" vote (Othman, *et al*:233-41).

That the party was supreme was beyond question. But the question we now turn to is whether the Party was indeed sufficiently disposed to exercise effective control over the executive.

4.4.3: The Party as an Instrument of Responsibility

It may be of interest to note that the constitution of CCM was not scheduled to the *Constitution 1977* as the previous TANU Constitution was scheduled to the *Interim Constitution*. But by

its own proclamation in s.3, the *Constitution 1977* made itself inferior not only to the Party Constitution, wherever it was, but also to all Party decisions made "in accordance with the constitution of the Party." That proclamation removed, as far as the Party was concerned, any pretence of supremacy in the state constitution.

Given the constitutionally proclaimed supremacy of the Party, its policies and directives were not to be questioned by any other institution; rather they bound every body. Further, by s.5(2) of the *Constitution 1977*, obedience to Party directives was specifically expected of the President. And by s.54(1) the role of Parliament was reduced to that of a "committee of the Party," supervising the implementation of policies and decisions in whose making it had no authority. This virtually stripped Parliament even of its mere status as the sovereign law-making body because as a committee of the National Conference of the Party, it became liable to dictation by the latter.[52]

It would seem that in the arguments made to advance the supremacy of the Party, the role of Parliament as an institution representing and expressing the popular will was dismissed or simply ignored. This, it may be argued, could have been due to the subservient role that Parliament was found to be playing under the one-party system. Being subservient, therefore, it could not be the ideal institution for popular control of the

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[52]The section numbers cited here are based on the original edition of the *Constitution 1977*, prior to the 1984 amendments.

Government. But, without reference to the role of Parliament as a people's institution, Nyerere, in explaining "Party Supremacy" emphasised the distinction between the Government and the Party (Nyerere 1975), a distinction which, ironically, in 1963 he had considered to be unnecessary (Nyerere 1966:202).

Apparently in this distinction Nyerere was not referring to "the Government" merely as "the executive organ of State" as this study generally does; rather he was referring to the entire set of the institutions of the state. In short he argued that the Government, by its very nature, was and had to be detached from the people. It was coercive, it was bureaucratic, and, almost inevitably, its servants easily and complacently drifted away from whatever attachments and identifications they may have had with the people they were supposed to be serving (Nyerere 1973: 281). The Party, on the other hand, was the only organised institution which was and could remain close to the people, and always with them. It made practical sense, therefore, to make use of the Party as the institution for exercising people's control over the Government.[53] In that way, "Party Supremacy" would also constitute "People's Supremacy" over the Government. This was the line of argument which was first given in the *TANU Guidelines 1971*.

There have been arguments that the Party did have, or at least in due course did acquire, the capability and resources necessary

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[53]Vol.8 *Africa Contemporary Record 1975-1976*: B317; also see Mwansasu:172-9.

for the discharge of its supervisory and controlling functions. Some have argued that TANU's capacity resource was enhanced by the Government assuming responsibility for paying all TANU salaries, by the secondment of civil servants to TANU Headquarters, and by placing "the entire Civil Service machinery at the disposal of the NEC" (Msekwa:56-9; Mwansasu:181-2). But that, in our view, could easily have undermined the authority of the Party because "he who pays the piper chooses the tune."

More important, though, was how the Party itself was organised and what, institutionally, constituted the Party that was declared "supreme." From the beginning, TANU had sought to organise itself into a geographical structure coextensive with that of the Government Administration. After independence the two organisational structures, TANU's and the Government's, deliberately replicated each other; the regional and district secretaries of TANU were also regional and district commissioners. The TANU Constitution which was adopted in 1965 made this structure very clear by establishing definite Party organs at national, regional, district and branch levels.[54] Subsequent amendments to the Party Constitution never altered that basic structure.

Below the "branch" was the "Cell" which consisted of ten houses (or households) grouped together for that purpose; all party members living in those ten houses comprised a cell. Significantly, the "cell" has been the only organ of the Party

[54]See Appendix B in Tordoff 1967.

to which all party members (within the cell) have belonged as of right. Above the cell was the "Party Branch" with a "Branch Annual Conference" attended by all Cell Leaders as well as delegates (from the Branch) to the District Party Conference, and all local government councillors resident in the area of the Branch. The Party Branch also had an Executive Committee whose Secretary was, significantly, appointed by the Central Committee, a national organ of the Party.

Above the Branch was the District with the District Conference comprising of, among others, all Branch Chairmen and Secretaries, and two delegates elected by and from each Branch within the District. There was also a District Executive Committee whose secretary, also the District Commissioner, was "appointed by the President of the United Republic." Above the District, the Regional organisation of the Party replicated the one at the district level. Above all those were the national organs of the Party: the National Conference, the National Executive Committee (NEC), and the Central Committee. There was also the Electoral Conference which was the National Conference meeting (until 1977 jointly with ASP Delegates) for purposes of nominating the sole candidate for a Presidential election.

The National Conference consisted of the "National Leaders of the Party" (President, Vice-President, Secretary-General, and National Treasurer), all Regional Chairmen and Secretaries, all District Chairmen and Secretaries, all MPs (from Tanganyika), all members of the Central Committee, one delegate elected

from each region, and two delegates (increased to 10 in 1969) from each district. Apart from the last two categories, all other members of the National Conference were *ex officio*.

The National Conference was the supreme organ of the Party responsible for policy formulation and general superintendence of the activities of the Party. It elected the Party President and Vice-President and the regional delegates to the NEC, and it has always had the power "to confirm, amend, repudiate or revoke any decision made by any other organ" or any other officer of the Party. It also had power to expel any member or affiliate organisation from the Party. From 1965 it met once every two years. It could delegate, and actually delegated almost all its powers to the NEC and remained only with the residual powers of confirming or revoking whatever the NEC had decided. No known action or decision of the NEC has ever been revoked or reversed.

As a result it is the NEC, the chief executive organ of the Party, which became the supreme organ of the Party in fact. Its meetings were once every three months, and it included in its membership all the National Leaders of the Party, all Regional Chairmen and Secretaries, the regional delegates elected by the National Conference (one from each region), the secretary-generals of (or delegates from) the Trade Union, the Cooperative Union, the Party Youth League, Women's League and Parents Association. The NEC elected the Secretary-General and the National Treasurer of the Party.

There was also the Central Committee which consisted of the 4 National Leaders of the Party, and another 8 members appointed by the President. These 8 members of the Central Committee attended the NEC meetings as of right, even if they were not members of the NEC. The Central Committee met at least once every month, and was responsible for the day to day administration of the affairs of the Party, and also performed any function delegated to it by the NEC. It had the power to appoint or remove from office any officer of the Party, except the "National Leaders". It appointed the branch secretaries of the Party. It also considered, as part of the electoral process, the names of aspiring candidates for local government elections; and it could delegate this function to the District Conference.

The Party has a very elaborate network of branches all over the country but its organisation has concentrated all power at the centre and the function of the local organs of the Party has been limited to carrying out the policies, decisions and directives handed down from the centralised national organs, to which the local organs are required to report and look for guidance in every activity. The fact that even the Branch Secretary of the Party is appointed by the Central Committee reflects the heavily centralised structure of the Party.

In that structure, party supremacy has in fact meant supremacy of the central organs of the Party, notably the NEC. But by its composition, the NEC has not always been very democratically constituted. Apart from the regional delegates and regional

chairmen (one of each category from each region), it was at one time full of appointed *ex officio* members. But its powers have been immense. It is the one that has screened candidates aspiring for parliamentary elections, and it is the one which has always proposed to the Electoral Conference the name of the sole presidential election candidate. Even in the election of the overall Party Leader (President and later Chairman) by the National Conference, it is the NEC which presents to the conference the name of only one candidate to be voted for or against. The Central Committee, to which the NEC has often delegated its powers and functions, for sometime consisted of appointed members only. With all power vested in those central institutions, one is inclined to doubt whether "Party Supremacy" did indeed constitute "People's Supremacy" over the government.

Such doubts are reinforced by two factors. Firstly, the members of the Central Committee and those of the NEC whose membership was by appointment were all appointed by the Party President, also the Chief Executive of the United Republic. It is hard to imagine such appointees being bold enough genuinely to seek to exercise control over the government which paid their salaries and was headed by the person who had appointed them, and could remove them from their positions. Secondly, apart from the "National Leaders of the Party", many other leading members of the Cabinet were also members of the Central Committee. It is doubtful whether these organs of the Party could indeed exercise any influence, let alone control, over President Nyerere.

Instead, many studies concede that Nyerere often presented major issues before an unexpecting NEC and simply argued them through, often with relative ease, thereby giving a mandate to his Government to take steps which he may have had in mind.[55] The most obvious example is the way the Arusha Declaration was adopted: it was indicated in the agenda for the NEC meeting simply as the "President's Opening Address" whose content nobody had any idea until it was given and then it dominated the rest of the meeting to the exclusion of everything else (Msekwa:38-9; Mwansasu:184). Indeed, up to 1969 at least, neither the Central Committee nor the NEC made any policy initiatives; they relied on President Nyerere to make all initiatives (Mwansasu:186), which were then adopted as NEC policy decisions.

When such "policy decisions" are then handed down to the districts and branches, the local party organs have a duty to ensure local implementation of the decisions, and to act as watchdogs by reporting to the superior organs about any person or institution hindering implementation. They also act as publicity agents, campaigning and mobilising support for any decision claiming to have the NEC "stamp" of approval. Increasingly, the distinction between "Party" and "Government" decisions became meaningless to the Party Branches not only because they were both headed by the same person but also the entire compositions of the Cabinet and the Central Committee were increasingly becoming the same, and that pattern was replicated

[55]Many writers verify this: Cartwright:170,172; Hopkins:38; Msekwa:23-5, 38-40, 61-2; Pratt 1971:122; Pratt 1976:160-5.

at the regional and district levels.

The like composition of the Cabinet and the Central Committee continued even after 1969 when Central Committee membership became elective. Also, more and more ministers sought to be elected to the NEC. In the end, particularly after the formation of CCM and NEC membership became exclusively elective, either through regional conferences or through the National Conference, winning a seat in the NEC became a highly prized political achievement.

At this point we should only say that CCM adopted all the organisational features and structures of TANU almost wholesale. A significant change was that of 1982 when the size of the NEC was increased to at least 180 members, and the Party Chairman (formerly President) lost his power to appoint District and Regional Party Secretaries, as well as to appoint any NEC members. Regional secretaries and Central Committee members were elected by the NEC from amongst its members. District and Branch secretaries continued to be appointed by the Central Committee.

Also the offices of district and regional secretaries of the Party were separated from those of district and regional commissioners. This was repeated at national level when Mwinyi replaced Nyerere as President of the United Republic but the latter continued as Chairman of CCM. But this arrangement ceased in 1990 when the positions were fused back into one person again at all levels: national, regional and district. By that time,

though, the one-party state system was entering a period of acute crisis in its legitimacy, and its end was drawing close.

4.5: BEHIND PARTY SUPREMACY: AN APPRAISAL

From the above exposition one may not conclude that "Party Supremacy" enhanced either democracy or any mechanism of effective control over the executive. The constitutional provisions tended to indicate that the Party replaced the Parliament as the institution for exercising control over the executive and bringing it to account. But the simultaneous membership of most, if not all, cabinet ministers in the superior organs of the Party must have eroded the prospects of effective control of the Government by the Party.

But on the other hand, the position of the executive was not affected in any significant way. In fact, party supremacy strengthened the executive. The NEC was used, as in the case of the Arusha Declaration, to give legitimacy and a direct mandate to the Government to undertake any program while the nationwide network of party branches was used for publicity and mobilisation of support for the Government and its policies.

Julius Nyerere was largely responsible for the dominant position of the executive. As TANU President and later CCM Chairman, he was the chief executive and spokesman of the Party. As President of the United Republic, he was the state's chief executive, with all state powers, including powers over individuals' personal

freedom, concentrated in his hands, and not subject to control or vetting by any other person or body. He also held powers of appointment to executive positions and directorships not only in the government but also in the ever-elastic parastatal sector. It was within his powers to render the NEC virtually useless by taking particular steps in respect of individual NEC members of influence, using not only the stick but the carrot as well.

But the NEC, or the Party in general, could not remove him from office as President. Party control over the President, therefore, was extremely remote; all that the Party could do was to refuse to nominate him as the Presidential candidate in the next election. With Nyerere, this was unlikely not just because he occupied the highest seat in both the Party and the Government but also because of his personal qualities: a great thinker, and a visionary, the Party was acknowledgeably his creation both in its form and in its ideas and policies which made it widely credible. And he was immensely popular, both within and outside the Party. Internationally, he was acclaimed as a leader with credible ideas to which he was genuinely committed, thus drawing wide international assistance without which Tanzania's economic constraints would have severely intensified.

In short, the concept of "Party Supremacy" reduced neither the powers of President Nyerere, nor his prospects of continuing to have them. On the other hand, seeking and obtaining the sanction or approval of the Party for his Government's programs as he was increasingly doing served to add a democratic veil of legitimacy

to the actions of the Government in what had effectively become "Executive Supremacy".

As pointed out in Chapter Three above, Nyerere wanted to be in firm control of all developments. But also he always wanted to have some assurance that he had the backing of some popular support in everything he did. That is why he always preferred to win support for his ideas, policies and programs by arguments given in what he conceived as free discussions, rather than to exercise direct coercion. In other words he preferred to "legitimise" his control with the force of argument and an acknowledged superiority of his ideas, not just the force of law. Party supremacy, rather than parliamentary supremacy, was better suited for his preferred kind of leadership.

Nyerere's view of democracy has always emphasised the need for free discussion and reaching decisions by agreement. Even in his early writings on democracy, he gave no evidence for the claim that Africans were "natural democrats" other than the elders' practice of "sitting under a tree, discussing until they agree." Apparently, Nyerere has valued "discussion" mainly as a means to an agreement, not for its exposure of divergent views. And for that reason, he preferred "government by consensus" rather than "government by rules". Even in his Cabinet:

> ...decisions tended to emerge from informal face-to-face discussions. Many TANU leaders, including Nyerere, continued to prefer or at least to gravitate back to this style of decision making. Some government decisions continued, therefore, to be taken by the president on the basis of informal discussion and without reference to the carefully established [cabinet] procedures which the president himself had established. (Pratt 1971:103)

Thus Nyerere used discussions to secure the agreement of his colleagues in the Cabinet or the NEC or Central Committee, as the case may be, and to secure their commitment to whatever the agreement then was.

In his style of "government by consensus", he deliberately avoided differences with or among his colleagues and when they occurred, he carefully avoided making them public. For that reason he sometimes adopted "the politics of accommodation": deliberately avoiding to take action against a colleague, like a minister who has abused his office, because such action would reveal that there have been conflicts or differences between them (Pratt 1971:104, 106-7). Sometimes he took some action after a long delay which made it unlikely for the public to link, say, a dismissal from office with an abuse of office by the dismissed officer (Smith:24).

Nyerere's penchant for consensus can also be traced in his passionate appeal for a one-party system,[56] as well as in his strong rejection of the necessity of class struggle in building socialism.[57] And in reaching for decisions, Nyerere never presented issues for discussion if a consensus was unlikely to emerge from the discussion, unless he considered the need for a consensus to be a minor issue (Hopkins:34-5, 38; Pratt 1971:113). Otherwise, rather than risk a deadlock, he was prepared to take

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[56]See *Spearhead*, January 1963:12-23, and Nyerere 1966:196-203.

[57]See Nyerere 1966: 162-71, and his articles on "Socialism" contained in (and especially the introductory essays to) his 1968 and 1973 volumes.

a decision on his own, if the law permitted.[58] But more usually, he took issues to a forum where and when a consensus was most likely to emerge.

Thus in 1966 "he drew back from" establishing a commission on building socialism as had earlier been announced because he feared a deadlock; instead he took the matter to the NEC, rather than the Cabinet, and singlehandedly argued it through (Pratt 1971:113; Msekwa:38-9). The issue of transferring the capital from Dar es Salaam to Dodoma was discussed by TANU branches, which voted 1,017 in favour and 842 against the transfer. In August 1973 the NEC considered those views and resolved to transfer the capital to Dodoma. And when the National Conference (the supreme organ) of TANU met the following month, Nyerere did not present it to the Conference as an issue for deliberation but as simply giving notice of a final decision made by the NEC (Msekwa:52-3). And the TANU-ASP merger was proposed by Nyerere at an electoral conference which had just nominated him as Presidential candidate and was still drunk with the mood of enthusiastic support for him. Ultimately, the pattern became such that:

> ...a presidential decision based on tactical considerations rather than clearly defined procedures determines whether a major question is referred to the cabinet, discussed with the regional commissioners, raised at a National Executive Committee meeting, or handled by direct presidential initiative after whatever discussion he judges necessary. (Pratt 1971:116)

Now the constitutional relationship between the President and the National Assembly made the latter completely out of style with

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[58]As he did when he recognised Biafra in the Nigerian conflict in 1968; his ministers were simply notified of the recognition as they left at the end of a Cabinet Meeting: information from Mr A M Babu, then a Cabinet Minister.

Nyerere. Unlike the President of Kenya (Ghai & McAuslan 1970:231-2), the President of Tanzania has never been a member of the National Assembly. He could address the Assembly at any time but he could not have discussions with it. There could therefore be no contemplation of a "Parliamentary" consensus emerging out of a discussion involving the two parts of Parliament: the President and the National Assembly. To make it worse, the President's relationship with the National Assembly was such that any differences between them were always in the public glare.

The November 1973 stalemate over the Income Tax Bill[59] made that position abundantly clear. The Bill was crucial to the Government because the East African Income Tax Department which had administered the collection of income tax for the three East African territories from the beginning of the East Africa High Commission in 1947, and then under the East African Common Services Organisation 1963-67, and finally the East African Community after 1967, was being wound up. The Bill therefore was part of the measures the Government of Tanzania was undertaking to administer this tax properly on its own. But, although the President expressed some bitter surprise at the Assembly's rejection of what he regarded as "measures aimed at promoting socialism"[60] contained in the Bill, the stalemate was nowhere close to a clash of principles as in the 1961 Citizenship Debate.

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[59](1973) 7 *Annual Survey of African Law*: 136-7, 165-6; Vol.6 *Africa Contemporary Record 1973-1974*: B259-60.

[60]Vol.6 *Africa Contemporary Record 1973-1974*: B259.

But the President was nevertheless very concerned about the Assembly's rejection of the Bill and was prepared to dissolve Parliament over the issue although, he said, he had no immediate intention of doing that. It is significant, though, that very soon after this stalemate, in March 1974, the concept of "Party Supremacy" started getting serious consideration within the Party. It ended with the 1975 Amendment exalting the party above all other institutions of the state.

The effect of entrenching "Party Supremacy" in the state constitution was a practical revival of the Party Whip because party members were required, now by the state constitution, not to oppose party policy. Any measure considered crucial by the Government could be assured of Parliamentary support by simply making it known to the MPs that it was a "policy matter" sanctioned or directed by the Party. But the 1975 Amendment was not enough to guarantee Parliamentary consensus in absolute terms because at the time it was passed there were no less than 52 MPs from Zanzibar who were not TANU members; the revival of the TANU Whip had no effect on them. It may not be surprising then, that Nyerere made the proposal to merge TANU and ASP so soon after the 1975 Amendment was passed because without the merger the desired effect of the amendment could not be fully realised.

The formation of CCM made possible the constitutional provision which then made the National Assembly a "committee" of the National Conference of the Party. This, and that all MPs should be *ex officio* members of the National Conference, had been

recommended in 1965 by the Presidential Commission (Tanzania 1965: 21,28). The TANU Constitution made all MPs *ex officio* delegates to the National Conference.[61] But they did not, and could not, constitute a "committee of the Party"; the National Assembly was an institution of the United Republic, with members from Zanzibar who were neither members nor eligible for membership of TANU. It would have been awkward, therefore, for the state constitution to make "the National Assembly a committee of the Party" as that would have necessarily included non-members of the Party. Even the "all MPs" who became *ex officio* delegates to the National Conference of TANU meant only those MPs who were TANU members. This technical hindrance ended with the merger of TANU and ASP into a single political party. It enabled the President to meet the National Assembly, and actually hold discussions with it as a "committee" of the Party.

Thus the formation of CCM in February 1977, and the subsequent passing of the *Constitution 1977* were a great accomplishment for "Party Supremacy", and for Nyerere's strategy of governing without exposing conflicts or differences to the public.

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[61]Article IV,E.2.(1)(c) of the *TANU Constitution*.

CHAPTER FIVE

The Role of the Judiciary and Other Controlling Agencies

5.0: INTRODUCTION

Implied in the principle of responsible government is the requirement that government actions should always be within the limits prescribed by the law, and that the government should be liable for any of its actions which violate those prescribed limits. In both requirements the Judiciary plays a crucial role. Firstly, through judicial pronouncements the courts define with greater precision the limits to executive powers imposed by the constitution and other laws. Secondly, in case of violation of those limits the courts will hold the government liable and thereby ensure "government according to law."

For the courts to perform their role effectively, an important requirement is the independence of the Judiciary. As the administration of justice invariably requires adjudication between the interests of the state and those of the subjects, it is essential for the courts to be free from political or executive pressure. Also the authority of the courts must be respected by the Executive, irrespective of whether judicial pronouncements are favourable to the government or not. If the government refuses to respect court orders then the Judiciary, independent though it may be, will also be irrelevant. On the other hand, the Judiciary must project itself as an institution

committed to serve society and meet its aspirations for both individuals and groups or communities; it should not be an institution alien to the people.

With that in mind, we examine the role and function of the Judiciary with specific regard to the need to exercise control over the use of executive powers. In addition to the Judiciary, this chapter also examines the role of two other controlling agencies: the Permanent Commission of Enquiry and the Commission for the Enforcement of the Leadership Code.

5.1: THE INDEPENDENCE OF THE JUDICIARY

We have pointed out in Chapter Two that the independence package failed to deliver an independent Judiciary; instead it delivered the dual court system of the colonial administration consisting of the High Court and the local courts systems. For the local courts, with jurisdiction only over the majority Africans, the independence of the Judiciary was wholly inapplicable: they were part of the administration, presided over by persons in the administration (Cole & Denison:102-10; James & Kassam:12-5).

Local courts officers were subject to the wide disciplinary powers of District Commissioners who also had extensive revisionary powers over their decisions. And Provincial Commissioners had wide powers of hiring and firing them, and wide discretion to grant or refuse leave (a mandatory condition) for appeal. Their tenure had absolutely no security, and this

position was preserved under s.65(3) of the *Independence Constitution*, by excluding them from the jurisdiction of the Judicial Service Commission; the security of tenure introduced by that constitution applied only to High Court judges and other judicial officers under the High Court system.

But from independence, the nationalist leadership affirmed a commitment to the Rule of Law which they said was essential to freedom and equality, and could only be guaranteed with an independent Judiciary. Shortly before independence Julius Nyerere, then Prime Minister, stated:

> ... it is of paramount importance that the execution of the law should be without fear or favour. Our Judiciary at every level must be independent of the executive arm of the state. Real freedom requires that any citizen feels confident that his case will be impartially judged, even if it is a case against the Prime Minister himself. (Nyerere 1966:131)

And in the 1962 proposals for a Republic, the Government stated that it sought, among other things, to preserve the Rule of Law as a necessary safeguard against tyranny, and further that:

> ... the Rule of Law is best preserved, not by formal guarantees in a Bill of Rights which invite conflict between the executive and judiciary, but by independent judges administering justice free from political pressure. (Tanganyika 1962:6)

The Presidential Commission similarly emphasised that the independence of the Judiciary was the foundation of the Rule of Law in both one-party and multi-party states (Tanzania 1965:33).

Accordingly, the post-independence government separated the courts from the administration by integrating the local courts system with that of the High Court into a single system under the

High Court. The process of integrating the courts[1] was completed on July 1, 1964, when the *Magistrates' Courts Act 1963* brought in the new system consisting of the High Court as the superior court of record, the district courts (and courts of resident magistrates) below it, and below those were established primary courts. Above the High Court was the East African Court of Appeal, which was also the final court of appeal for Kenya and Uganda as part of the East African Community establishment. But as a result of the collapse of the East African Community in 1977, that court could not survive and each of the former member states proceeded to establish their respective national courts of appeal. For Tanzania, the national Court of Appeal was established in 1979.[2]

5.1.1: Appointment and Tenure of Office

All judicial officers under the new court system came under the provisions of the Constitution and of the *Judicial Service Act 1962* relating to the appointment, disciplinary control, tenure of office and removal from office of judges and other judicial officers.

Under the *Independence Constitution* the Chief Justice was appointed by the Governor-General acting in accordance with the advice of the Prime Minister, and the puisne judges were

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[1]For a detailed account, see Cotran.

[2]By the *First Constitutional Amendment Act 1979*; for a detailed account of the Tanzania Court of Appeal, see Fimbo.

appointed by the Governor-General acting in accordance with the advice of the Judicial Service Commission. Under the *Republican Constitution* the President appointed the Chief Justice and, after consultation with the Chief Justice, the puisne judges, and that position was retained in the *Interim Constitution*, and the *Constitution 1977*, only slightly modifying it in 1979 to accommodate the establishment of the Court of Appeal, headed by the Chief Justice; since then the President appoints the Chief Justice and, after consultation with the Chief Justice, the other Judges of Appeal, the Principal Judge of the High Court and all the other Judges of the High Court.[3]

From 1962 the President has delegated his power to appoint Resident Magistrates and District Magistrates to the Judicial Service Commission.[4] But the power of disciplinary control over them, and of terminating their appointment and of removing them from office is directly vested in the Judicial Service Commission by the Constitution.[5] The Commission is established by the Constitution[6] and governed by the *Judicial Service Act 1962*, and regulations made thereunder. It is chaired by the Chief Justice and its members include two judges and two other members appointed by the President. Members of Parliament are

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[3]See the *Republican Constitution*, s.47(1) & (2); the *Interim Constitution of Tanzania 1965*, s.57(1) & (2), and the *Constitution of the United Republic of Tanzania 1977*, ss.109(1) & (2), 117, 118(1), (2) & (3).

[4]See s.53(1)(a), s.61(1)(a) and s.113(1)(a) of the constitutions (short titled as in *ibid.*) of 1962, 1965 and 1977 respectively, and G.N. 665 of 1964, s.4(1)(a).

[5]See s.53(1)(b), s.61(1)(b) and s.113(1)(b) of the constitutions of 1962, 1965 and 1977 respectively.

[6]Ibid., sections 52, 60 and 112 respectively.

disqualified from membership of the Commission.

Primary court magistrates are appointed by the Minister responsible for legal affairs acting on the recommendations of the Judicial Service Special Commission established by s.21B of the *Judicial Service Act 1962* (as amended by the *Magistrates' Courts Act 1963*). The Special Commission also has power to exercise disciplinary control over primary court magistrates, and, subject to ministerial consent, to terminate their appointment and to remove them from office. In its functions the Special Commission acts through Regional Judicial Boards which in turn act on the recommendations of District Judicial Boards.[7] Ultimately, therefore, a primary court magistrate cannot be appointed or dismissed, for whatever reason, on the basis of a single person's decision.

Once appointed all judges and all magistrates enjoy a secure tenure of office. They may only be removed for inability to perform the functions of their offices or for misbehaviour, and before one can be so removed, there has to be an enquiry into the alleged inability or misbehaviour by an impartial tribunal. For judges of the High Court and Court of Appeal, the Chairman of the tribunal and at least one half of its members must be High Court or Court of Appeal judges from Commonwealth countries. So far such a tribunal has been formed twice in Tanzania. The first time was in 1982 when three judges were investigated and one of

[7]See s.21 of the *Administration of Justice (Miscellaneous Amendments) Act 1971*.

them was removed from office on the recommendation of the tribunal. The second time was in 1991 when the tribunal recommended the removal of two judges, and they were removed. In short, the procedure[8] in all cases ensures impartiality and observes natural justice so that a judicial officer, even the most junior, cannot be arbitrarily removed from office (James & Kassam:20-5). Thus the scheme of service for judges and magistrates raises no doubts about the independence of the Judiciary.

But, the Chief Justice as the Head of the Judiciary and the Principal Judge as his "special assistant... in the administration of the High Court and courts subordinate to it"[9] have security of tenure only as judges of the Court of Appeal and the High Court respectively, not as Chief Justice and Principal Judge; those offices are held at the pleasure of the President. For that reason it has been argued that the executive can exert undue influence on them (Ong'wamuhana:264).

But no evidence supports that argument. The Chief Justices up to 1971 were non-citizens appointed on contract terms and not entirely on the basis of the Constitution. The first citizen to be appointed Chief Justice was extremely sympathetic to the policies of the Government and the Party (Ong'wamuhana:264-5; Peter 1980:26; Srivastava:113-4); he held the office for six years. His

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[8]See s.48, s.58 and ss.110(5) & 120(5) of the constitutions of 1962, 1965 and 1977 respectively, as well as G.N. 57 of 1965 and G.N. 175 of 1965.

[9]Sections 109(3) & 118(2) of the *Constitution of the United Republic of Tanzania 1977*.

successor, under whose leadership the Judiciary has increasingly asserted its independence from the executive, was appointed in 1977 and is still in office today (1995).

The office of Principal Judge was first established in 1979 and the first incumbent is known to have delivered some strong judgments against the Government.[10] But he held the office for ten years, up to 1989 when he retired and was nevertheless appointed on contract to the Court of Appeal. His successor is renowned for his strong affirmations, both judicial and extra-judicial, of the independence of the Judiciary. Clearly, the President's power of appointment has not been used to erode that independence.

There have been worries too that the President can easily remove a judge or a magistrate by appointing him or her to a prestigious and well rewarding office outside the Judiciary. In 1975 Miss Justice Julie Manning was appointed MP and Minister for Justice, and Mr Justice Yona Mwakasendo was appointed Chief Corporation Counsel of the Tanzania Legal Corporation (TLC). It is understood that Miss Manning had resigned as a judge when she was dropped from the Cabinet in 1982. Mr Mwakasendo, on the other hand, was appointed judge of the Court of Appeal in 1979. Another High Court judge, Damian Lubuva, was assigned to Zanzibar where he then became Attorney General until 1985 when he became union Attorney General, until 1993 when he was appointed judge

[10]See *Laiton Kigala v. Musa Bariti*, 1975 L.R.T., n.40, and *Re: Application by Paul Massawe*, 1979 L.R.T., n.18.

of the Court of Appeal. Generally, therefore, appointments whose effect was to remove judges from the Brench have been few, and they have not sought to remove them entirely from the Law sector.

But there have been a few cases of executive interference with the tenure of some judicial officers. In 1984 President Nyerere ordered the dismissal of a magistrate in Mara Region, and in 1991 the Minister for Home Affairs issued a similar directive in respect of a magistrate in Rukwa Region. Apparently, some complaints were genuinely made about the conduct of the two primary court magistrates. But both orders were contrary to law and the Chief Justice (in the Mara case) and the Registrar of the Court of Appeal (in the Rukwa case) intervened to ensure that the law was strictly followed.

5.1.2: Interference With the Judicial Process

There have been cases of direct interferences in the judicial process but generally they are due to ignorance rather than a deliberate intent to interfere with the Judiciary. An extreme case occurred in 1982 in Morogoro Region when a Ward Secretary[11] stormed into a primary court in the middle of court proceedings and angrily shouted at the presiding magistrate because he had not turned up at a meeting at his (the Ward Secretary's) office.

[11]A ward secretary is a local executive of the central government, reports and is answerable to the District Commissioner.

The Ward Secretary was immediately arrested and charged with contempt of court. He was subsequently convicted and sentenced to two weeks' imprisonment. His appeal to the District Court only earned him an enhanced sentence of six weeks' imprisonment. And almost as a gesture of support, the primary court magistrate involved was promoted to District Magistrate and posted to the new district court of Ileje.[12]

Unfortunately, not all magistrates have always been as diligent about guarding the independence of the Judiciary. In *James Bita v. Idd Kambi*[13] a district commissioner (also District Party Secretary) directed the district magistrate to refer the case to Party authorities for decision because it was a "political issue." The magistrate complied and let the District Party authorities decide the case. Then he wrote a formal judgment of the court complaining of the unfairness of the decision by the Party, and yet incorporated that decision into his judgment because he felt bound by it! Fortunately this miscarriage of justice was rectified on appeal to the High Court which also severely criticised the magistrate for abdicating his judicial function to the Party.

In *Hamisi Masisi & Six Others v. R*,[14] the High Court was similarly critical of the Resident Magistrate of Musoma for

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[12]This incident was first accounted at an Orientation Seminar for (newly appointed) District Magistrates, attended by the magistrate involved and held at IDM Mzumbe, September-October 1982.

[13]1979 L.R.T., n.9.

[14][1984] T.L.R. 751 (in Draft)

succumbing to executive pressure. The Regional Commissioner had unlawfully detained the applicants after they had been granted bail by the Resident Magistrate. When they applied for bail again the magistrate, feeling helpless, refused the application on the ground that even if he granted them bail, the Regional Commissioner would probably detain them anyway.

Perhaps more disturbing was the case of *Ally Juuyawatu v. Loserian Mollel & Another*[15] before the High Court at Arusha. While the case was pending in court, the local Ward Secretary sought to forcefully evict the plaintiff from the disputed land and reinstate the Defendants thereon. Then the Regional Commissioner sought to transfer the case to his office for determination but the lawyer from the Attorney General's chambers, whose offices the Regional Commissioner had hoped to use to secure the transfer, refused to help because it would be illegal. Finally the chambers of the judge who was hearing the case were, in his absence, searched and the case file taken therefrom and away to Dar es Salaam for action to be taken on it by the Chief Justice on instructions of His Excellency the President.

The file was returned after some weeks with a written message merely indicating that the Chief Justice, having gone through it, was returning it to the judge to continue hearing the case accordingly. The judge was extremely bitter about the way the matter had been handled. Calling it an unprecedented case, he

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[15]1979 L.R.T., n.6.

took the unprecedented step of declaring not only himself but the entire High Court as incompetent to decide the case, and he referred it instead to the Court of Appeal, established later that year, for decision.

Generally, interference with the independence of the Judiciary has not been condoned, certainly not by the Judiciary, and the incidents of interference which have occurred have had no Government backing in any way.

5.2: JUDICIAL CONTROL AND EXECUTIVE ATTITUDE

A responsible democratic government is expected to have its commitment to the Rule of Law manifested in various ways. It is not, for example, expected to insist on having wide arbitrary powers given to the executive by statute with little or no limitation to their use. Even if it has those powers, it is not expected to show preference for their use instead of the ordinary court process. And finally, the government should have respect for the Judiciary and accept its control.

In Tanzania, the entire set of instruments of arbitrary power of the colonial government were carried over at independence and adopted by the post-colonial government. Initially these powers vested in the Governor-General, who exercised them only in accordance with the advice of the Prime Minister or the Cabinet. But on transition to a Republic, those powers were vested in a single individual, the President, who was given absolute power

and discretion to act without, or even in disregard of, any advice whatsoever, a position which has been retained ever since.[16]

The overall result has been the vesting of enormous powers in the executive with hardly any mechanism for checking against their indiscriminate use. It may have undermined the role of the courts in controlling government powers because it made it difficult to challenge government actions before the courts. That difficulty was enhanced by the statutory protection against legal proceedings which the government enjoyed for many years.

5.2.1: Proceedings Against the Government

The power of the court to exercise control over the government was severely restricted. Firstly, for well over a decade after independence the Government was virtually immune from tortious liability, and this position did not change significantly even after the *Government Proceedings Act 1967* was enacted. Secondly, up to 1984 Tanzania had no Bill of Rights in the Constitution thus leaving the extensive powers of the executive free from likely checks by the Judiciary.

Generally, the Government of Tanzania has exhibited a persistent reluctance to submit itself to adjudication by the courts. When the *Government Proceedings Act 1967* was enacted, it provided that

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[16]Sections 3(3), 6(2) and 5(2) [now s.37(1)] of the *Republican Constitution*, the *Interim Constitution* and the *Constitution 1977* respectively.

the Government could sue and be sued in court like any other person. But the Government deliberately delayed the effective date of the new law until 7 years later,[17] and after amending s.6 of the Act[18] to require the consent of the Minister before any suit can proceed against the Government. Research has shown that the Government has used this provision simply to avoid liability by granting consent to no more than 10% of the applicants, and not even responding to most of the rest (Wambali 1985). Where the Minister responded, either way, the delay was inordinate.

In some of the letters communicating the Minister's refusal, the reasons given have been that the claim "is not maintainable," or "has no chance of success," or "has no basis at all in law," or "has nothing whatsoever involving the interests of the Government," and even that it "is hopelessly barred by limitation."[19] One would expect those reasons in defence pleadings by the Government. Thus the Government has used that law to adjudicate in its own causes, as Korosso, J., lamented when on October 1, 1991, he was on that account unable to proceed with a case[20] filed back in 1986.

A more mischievous use of that law was in *Patrick Maziku v. G.A.*

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[17]G.N. 308 of 1974.

[18]By the *Government Proceedings (Amendment) Act 1974*.

[19]From the records of the (Faculty of Law) University of Dar es Salaam Legal Aid Committee.

[20]*Njile Maheda v. Mbalagane Village Council & the Attorney General*, High Court of Tanzania, Tabora, Civil Case No. 14 of 1986.

Sebabili & Others[21] which arose out of actions by the first defendant as Regional Commissioner for Shinyanga but so as to avoid the consent requirement, the plaintiff chose not to join the Government as co-defendant. However, the Government asked to be joined and then successfully prevented the case from proceeding by pleading lack of the Minister's consent! But as we see further below, this is no longer the position today.

After independence the power of judicial review of administrative action was retained by the *Judicature and Application of Laws Ordinance 1961*, and it was specifically saved by s.75 of the *Magistrates' Courts Act 1963* and subsequently by s.77 of the *Magistrates' Courts Act 1984*. The procedure is to apply to the High Court under the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance 1955*, as amended in 1968, for the orders of mandamus, certiorari and prohibition, and under the *Habeas Corpus* Rules of the *Criminal Procedure Act 1985* for *habeas corpus*. But while judicial review can be an effective way of controlling the use of public power, until recently, its significance in Tanzania has been limited. From 1951 to 1969, applications for judicial review were made at the rate of one per year! (Martin,R:130)

That low rate was partly due to ignorance; most of the people affected by the use or misuse of public powers have been ignorant of the availability of judicial remedies. But also the subjective statutory wording used in granting extensive powers

[21]High Court of Tanzania, Tabora, Civil Case No. 3 of 1982.

to the executive, usually crowned with finality and ouster clauses excluding judicial enquiry, has often discouraged people who would otherwise have sought judicial review. As a result, it has not been easy for the Judiciary to establish itself as having any controlling role over the executive.

5.2.2: Attitude to the Due Process of Law

On the other hand, political executives have sometimes acted as if the courts had nothing to do with them or with their powers, and they have sometimes happily used their wide discretionary powers purely for administrative convenience.

Detention powers were defended by President Nyerere in the 1960s as necessary in a young and weak nation for occasional use against traitors and those likely to threaten the country's fragile peace and stability (Nyerere 1966:312-3). The clear implication was that those powers would not be invoked unless it was absolutely necessary in order to preserve peace. Nyerere even warned his District and Regional Commissioners not to use their limited detention powers[22] against political critics (Nyerere 1977:44-5). But on occasions, and especially in the second half of his rule, his own detention powers were invoked against isolated political dissenters and even suspected common criminals instead of taking them to court (Peter 1993; Shaidi:255).

[22]From 1963 district and regional commissioners have been empowered to detain any person up to 48 hours under the *District Commissioners Act 1962* and the *Regions and Regional Commissioners Act 1962*.

It means that the President's powers of detention have been used as an alternative to the normal court process under criminal law for the convenience of the government since there has been no need for proof or even evidence of guilt. In 1969 some people were arrested for plotting to overthrow the government; they were subsequently charged in court and convicted.[23] But some five persons (including two MPs) arrested and detained for similar allegations in mid-1967 were never taken to court.[24] And in November 1969 some 39 people said to be involved in a corrupt racket forging passports were detained and after five months the non-citizens amongst them were released, their property confiscated, and expelled from the country (Martin,R:92-3). These had criminal allegations against them but no charges were preferred. But the 14 peasants of Ukerewe detained for over a year in 1968 for refusing to give up their farming land to an *Ujamaa* village (Martin,R:92) had hardly done anything upon which even a charge against them could be based; it could have been a case of abuse.

There have also been detentions for corrupt practices which could not be proved in court; four Indian brothers were detained for that reason in 1969 until June 1970 when they were expelled from the country (Martin,R:92). In 1981 Abdul Haji and Akperal Rajpar, both prominent businessmen, were detained for what was believed to be mass tax evasions, bribery and foreign exchange

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[23]*Mattaka v. R*, [1971] E.A. 495.

[24](1967) 4 *Africa Research Bulletin*: 823C-824A.

racketeering.[25] And recently, (former) President Nyerere gave an account of a Greek Cypriot businessman he detained for boasting around saying he had the entire Government (of Tanzania) in his pocket.[26]

Nyerere admitted that such use of the detention law contravened the Rule of Law but justified it with the need to combat worse evils which are difficult to rout. One wonders what could be used to justify invoking the *Collective Punishment Ordinance 1921* as recently as 1984 when Taturu families in eight villages in Singida Region were ordered to pay compensation for the death of 49 persons and loss of several hundred head of livestock suffered by a neighbouring ethnic community.[27] Whatever justifications one may advance, using detention or similar powers as an alternative to the courts helped to enhance an attitude of contempt for the judicial process on the part of political executives.

In March 1983, over 1000 people were arrested and detained in a massive operation against what was called "economic sabotage." The detentions were under the *Prevèntive Detention Act 1962* but some detention orders had been signed in blank by the President and distributed to the regions and districts where the respective commissioners then filled in the names of the detainees; it was

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[25]Vol.13 *Africa Contemporary Record 1980-1981*: B331-B332.

[26]J K Nyerere in a talk to the Dar es Salaam Press Club, at the Kilimanjaro Hotel, Dar es Salaam, March 14, 1995. A transcription was published in *Business Times*, March 31 & April 7, 1995.

[27]G.N. 163 of 1984; also see Shivji 1990b:29-30.

the regional (and district) commissioners, therefore, who made the actual decisions as to who to detain, and not the President as the law provided. Invariably, some had their detention orders made several days subsequent to their actual detention.

Incidentally, one of those detained was an advocate, the late Mr Tukunjoba, who was arrested and detained for trying to challenge in court, by *habeas corpus*, the detention of his client. About two weeks later, President Nyerere announced that the "economic saboteurs" detained would not be taken to court because in court they could use their ill-gotten money to engage clever lawyers to twist the law in their favour. Subsequently, the *Economic Sabotage (Special Provisions) Act 1983* was passed and retrospectively effected from the day the campaign began. This law created an almost parallel system of adjudication by setting up special tribunals to try economic sabotage cases without any of the known safeguards of right to bail or right to counsel or even right to appeal. Even the principle of separation of powers was violated: the composition of one of the tribunals included an MP who had participated in passing the law (Shivji 1990b:52-3).

The *Economic Sabotage (Special Provisions) Act 1983* may have shown the peak of the executive's contemptuous regard for the judicial process. But that attitude has been exhibited at various other times over the years. In 1964 President Nyerere said publicly that his Government had no intention of varying the court sentences imposed on the convicted army mutineers despite the justified criticism of the lenient court sentences; yet, in

a glaring contradiction, he detained many, without charge, for alleged involvement in that same mutiny. Sometime in 1983 the preliminary hearing of charges of treason against some 30 suspects stopped suddenly because the charges were withdrawn and instead the accused were detained under the *Preventive Detention Act 1962*. This followed the escape of two of the leading suspects from custody, as a result of which the Minister for Home Affairs resigned under Parliamentary pressure. A year later, after one of those who had escaped was re-arrested, the court hearing restarted and proceeded, to end with conviction.

At times the judicial process has been treated like a tool for achieving specific ends desired by the executive, and which could otherwise be done without. In 1969 Mr Ngitami, then a Resident Magistrate presiding at a preliminary inquiry, was detained for two days for allowing bail to Mr Kasella-Bantu, one of the accused in a charge of murder who was also an MP and a renowned critic of the government. Hearing continued before another magistrate who, not surprisingly, did not allow bail.[28] Ultimately Mr Kasella-Bantu was acquitted by the High Court;[29] he was nevertheless kept in detention for several years.[30]

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[28]Vol.1 *Africa Contemporary Record 1968-1969*: 214.

[29]*R v. Joseph Kasella-Bantu*, [1970] H.C.D., n.170.

[30]*Watu*, No.08, December/February 1991.

5.2.3: Attitude to Court Orders and Legality

Respect for court orders has not always been there where the government did not like the verdict. Some of the suspects tortured to death in the course of Police interrogation, which led to the unprecedented resignations of two ministers and two regional commissioners in January 1977 as mentioned in Chapter 4, had actually been acquitted by the courts; but they were re-arrested for re-interrogation (Shivji 1990b:90-1). In some cases detention orders have been successfully challenged in court, only to be replaced immediately by deportation orders. In *Lesinoi Ndeanai & Others v. Regional Prisons Officer & Another*[31] the High Court judge held the detention order invalid, as it was signed by the Vice-President, not the President. But he lamented in his judgment that he was doing a futile exercise because already it had been replaced by a fresh order properly signed by the President himself under the *Deportation Ordinance 1921*.

Similarly in *Re: An Application by James Mapalala & Athumani Upindo*[32] the detention order was challenged after the law had been amended to allow such orders to be challenged on any ground.[33] But on the day of hearing the detention order had been rescinded and replaced by a deportation order (Shivji 1990b:51-2), ensuring the applicants' continued restriction. There have

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[31]High Court of Tanzania, Arusha, Misc.Criminal Applications No. 22 & 23 of 1979; the Court of Appeal judgment is in [1980] T.L.R. 214.

[32]High Court of Tanzania, Dar es Salaam, Misc.Criminal Cause No. 30 of 1986.

[33]By the *Preventive Detention (Amendment) Act 1985*.

even been cases of people set free by the courts being immediately re-arrested, sometimes just outside the courtroom!

That attitude of the executive sometimes tends to make the courts appear helpless or even redundant. In *Ally Lalakwa v. Regional Prisons Officer & Another*[34] the respondents, served with the summons for *habeas corpus* could not bring the detainee to court (in Arusha) because he had been secretly transferred to Dodoma under a fresh order, of deportation. In *Re: An Application by Paul Massawe*[35] an order of the district court to restore to the applicant goods seized by the Police was flouted by the Regional Commissioner for over a year.

An order of the Resident Magistrate's court not to send two Kenyan fugitive soldiers back to Kenya[36] was flouted in 1983; they were sent back in exchange for one of the treason trial suspects who had escaped from custody. When one Mr Nyirenda was the General Manager of the Tanzania-Zambia Railway Authority, he was on private prosecution convicted of contempt of court (having disobeyed an order to re-instate employees wrongfully dismissed by the Authority). But by the time the court entered judgment, the Government had removed him from the jurisdiction of the court by transferring him to Zambia.[37] And in January 1992 the

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[34]High Court of Tanzania, Arusha, Misc.Criminal Cause No.29 of 1979.

[35]1979 L.R.T., n.18.

[36]*R v. Hezekiah Ochuka & Another*, Kivukoni Resident Magistrate's Court, Criminal Case No. 1059 of 1982.

[37]Information from Issa G Shivji, who had conducted the prosecution.

Government sent troops of Riot Police to evict some 70 doctors from their residences at the Muhimbili Medical Centre contrary to a court order of temporary injunction.[38]

This trend led to a tendency of total disregard for legality. In *Kivuyo & Others v. Regional Police Commander*[39] the applicants were arrested for allegations of attempting to smuggle goods to Kenya, and their four vehicles and goods were seized by the Police. Instead of charging them in court, the Police referred the matter to the Regional Security Committee of the Party, chaired by the Regional Commissioner, which discussed it secretly and decided to recommend to the Prime Minister to forfeit the vehicles and allocate them to government departments in the region! The applicants neither appeared nor were they represented at the committee "hearing." Strangely, the committee's recommendation was adopted, thus making the order of mandamus sought against the respondent impracticable because he no longer had the vehicles.

In *Ernest Masola v. Charamba Ngerengere*[40] the appellant, a Ward Secretary (with Police powers of arrest) had ordered the arrest of the respondent and had put him in a "lock-up" for seven days without any charges or any explanation whatsoever.

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[38]Issued in *J J Masika & Others v. Muhimbili Medical Centre*, Dar es Salaam Resident Magistrate's Court, RM Civil Case No. 6 of 1992.

[39]High Court of Tanzania, Arusha, Misc.Civil Application No. 22 of 1978.

[40]1979 L.R.T., n.24.

In *Abdi Athumani & Nine Others v. The District Commissioner of Tunduru & Others*[41] the respondents had, on orders of the Regional Commissioner for Ruvuma, refused to renew the applicants' business licences and then used the *Townships (Removal of Undesirable Persons) Ordinance 1944* to order the applicants to leave Tunduru and Songea districts. The reasons behind this were that the applicants belonged to the Gunya and Somali tribes who, having moved to those districts, were suspected of engaging in illegal trade in government trophies. Both the refusal to renew the licences and the expulsion order were held unlawful.

At one time, unlawful expulsion orders, made without any pretence to invoke any law, were quite a favoured resort against journalists whose revelations did not please the authorities in the districts they worked in. But instead of questioning the power of those authorities to expel them for any reason, most of the affected journalists simply devoted themselves towards defending what they had published as true and therefore arguing that authorities had no reason to expel them (Konde:112-6). Unfortunately, this reinforced the attitude of disregard to legality because it tended to suggest that the authorities had power at law to expel them for good reason.

Disregard of legality was most grossly demonstrated in the implementation of the Villagisation Program referred to in

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[41]High Court of Tanzania, Songea (Sessions), Misc. Civil Causes No. 2 & No. 3 of 1987.

Chapter Six herebelow. But another development which has raised issues of legality has been the emergence of traditional defence groups known as *Sungusungu*, which first emerged as a result of the failure of the state agencies of law and order to protect rural communities against a growing wave of cattle raids and other criminal conduct (Abrahams; Bukurura). The groups do Police work in their respective areas, operating according to the traditional customs of their communities, without reliance on the state. In 1982 the government allowed them to operate in Geita District and the crime rate fell; this encouraged the spread of *Sungusungu* into other districts.[42] But the traditional customs guiding *Sungusungu* activity are often at variance with the law. Thus, while acknowledged as responsible for the fall in the crime rate in Geita District in 1983, they did not report a single case to court or to the Police![43]

Despite the questionable legality, the role of *Sungusungu* in enforcing law and order reached phenomenal proportions with the appointment of Augustine Mrema as Minister for Home Affairs in November 1990. In a frantic endeavour to arrest the increase in urban crime rate, he urged the formation of *Sungusungu* groups everywhere, and virtually sought to make *Sungusungu* night time patrols compulsory for every adult male in urban areas.

Apart from the questionable legal status of *Sungusungu*, in practice they have employed illegal methods, usurping judicial

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[42]*Daily News*, November 28, 29, and December 5, 1995.

[43]*Daily News*, November 29, 1983.

functions and inflicted punishment (Shivji 1990b:16-8, 99-100). But Mrema's own regard for legality and jurisdictional limits has been no better than *Sungusungu*'s. As Minister for Home Affairs, Mrema has:

> ...heard complaints, investigated suspicions, arrested suspects, summoned lawyers, judged cases and handed down sentences and orders dissolving marriages and dividing matrimonial assets; reprimanding recalcitrant and awarding compensation against those found "guilty" by him. (Shivji 1995:28)

In the event, he was accused of going beyond the limits of his jurisdiction, an accusation made most consistently by lawyers. In one "case before Mrema", the Minister, through the Arusha Regional Police Commander, summoned two advocates based in Arusha to appear before him and explain how they had allowed their firm to be used in executing what he said was a fraudulent transfer deed to deprive a poor woman of her property. The woman had gone to complain to him. The two lawyers refused to appear before Mrema and instead sought to apply to the High Court for an order to prohibit the minister from assuming judicial functions by purporting to adjudicate in a civil matter at the instance of the woman who had complained to him. The lawyers were actually granted leave to apply for the order of prohibition.[44] The case was subsequently settled out of court.

But the Minister continued with his campaign. To charges that he was not observing the law he insisted that the people were not interested in legal niceties but in tangible results and "an end

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[44]*Colman M Ngalo & Joseph D'Souza v. Hon Augustine Mrema MP, Minister for Home Affairs*, High Court of Tanzania, Arusha, Misc. Civil Application No. 24 of 1992.

to the problems bothering them", and that as long as he was able to deliver those results, he would continue. Making no pretences about the need to act according to law, he claimed that his campaign was sanctioned by the *CCM 1990 Election Manifesto*! For him, therefore, the Judiciary was an institution that was almost unnecessary and could even be done without.

The overall picture of the role of the Judiciary as shown above is a bit uninspiring. That is rather misleading, though, because as we show further below, the courts have not been timid. Over the years, the Judiciary has managed to assert its independence on many occasions and today, its role as an institution for exercising control over the executive is not doubted.

5.3: EXECUTIVE POWERS AND JUDICIAL ATTITUDE

5.3.1: Early Post-colonial Experiences

Before independence the courts defended colonial law and order which the nationalist movement fought against, sometimes making deliberate challenges to it. Some nationalist leaders were even convicted by the courts for offences committed essentially because of their devotion to the struggle.[46] As such the courts were regarded as allies of colonialism, and that attitude stayed on after independence (McAuslan & Ghai:487). Worse still, the judiciary was predominantly expatriate and not representative "of

[46]Nyerere was also convicted in 1958; see Listowel:323-33 and Ngh'waya.

the indigenous majority" in its composition. As a result, many found it logical to look to the nationalist "politicians and politics to protect them from the courts, rather than the other way round" (Leys 1963:135). There was a danger of the courts being isolated and regarded as irrelevant by the people.

To compound the problem, in the early years of independence the line dividing administrative questions, reviewable by the courts, from purely political questions was sometimes extremely thin, and the Government was often impatient with court decisions which ignored political considerations. Thus the High Court decision in *Re: An Application by Bukoba Gymkhana Club*[47] was criticised as irrational, absurd, and insensitive to the problem of racism encouraged by colonialism and sought to be eliminated by the independent government (Martin,R:126,128). The High Court quashed the decision of the Liquor Licensing Board refusing to renew the liquor licence of the applicant club on the ground that the club's constitution was "still largely discriminatory." The rule found to be discriminatory by the Board was that a new member could not be admitted into the club unless proposed by a member and seconded by another member. In itself, the rule was not discriminatory; but, with the colonial policies encouraging discrimination against Africans, it was extremely difficult to get even two members, out of its entirely non-African membership, to support the admission of an

[47] [1963] E.A. 478.

African.[48] But according to the High Court, considering this would have amounted to going beyond the rule's purport.

An extreme manifestation of the government's impatience with judicial indifference to political considerations followed the High Court decision in *Marealle v. Kilimanjaro District Council*,[49] awarding damages to the plaintiff for loss of office as chief without regard to the statutory abolition of that office[50] as part of the post-independence democratisation of local government. The High Court decision was overruled by an Act of Parliament passed 12 days after the judgment.[51]

It would certainly be wrong to encourage the courts to base their decisions on political considerations. But the problem arises in situations where the courts may be required under the law to make decisions which are essentially political, and such a situation could easily arise with a Bill of Rights in the Constitution. In its report in 1965 the Presidential Commission warned that:

> ...a Bill of Rights would invite conflict between the Judiciary and the Executive and Legislature... [as] it would have overriding legislative effect. This means that the Courts could be asked to declare invalid any law passed by Parliament if it were inconsistent with a provision contained in the Bill of Rights. By requiring the Courts to stand in

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[48]On May 3, 1995, Mr Trevor Jagger recalled to me (in London) that when he was District Officer in Bukoba in 1950, he proposed Dr Mtawali, a fully qualified African doctor, for membership of that club. The uproarious opposition to his proposal shocked him so much that it added much to his early disillusionment with the colonial service.

[49]High Court of Tanganyika, Arusha, Civil Case No. 44 of 1961.

[50]By the *African Chiefs Ordinance (Repeal) Act 1963*.

[51]By the *Chiefs (Abolition of Office: Consequential Provisions) Act 1963*; see Martin,R:57-8.

> judgment on the legislature the Commission feels that the Judiciary would be drawn into the arena of political controversy. (Tanzania 1965:31)

Indeed, the exclusion of the Bill of Rights from the Constitution helped to avoid a conflict between the Judiciary and the other organs of state, as can be seen when events surrounding the 1967 Arusha Declaration are considered. Immediately after the declaration, a number of private firms were nationalised. Although the previous owners were subsequently compensated, their firms were compulsorily taken over by the government and they got neither the right nor, for many of them, the opportunity to negotiate the take over. The government acted without any legal basis; legislation to legalise the steps was passed subsequently.

With a Bill of Rights in the Constitution, the High Court would have been invited to prevent the Executive from nationalising, and to declare the nationalisation laws invalid. This would have led to the kind of conflict which the Presidential Commission had feared. In that conflict the Rule of Law would have been undermined and the impartiality of the courts would have been jeopardised. Support for the Arusha Declaration and nationalisation was demonstrated by numerous mass rallies and long distance marches conducted countrywide over a period of several months. Were the courts to declare the nationalisation measures unlawful, it would have enraged the public and probably turned the mass rallies into protest demonstrations against the Judiciary. Alternatively, the courts might have simply defended the nationalisations out of fear, compromising the impartiality required of the Judiciary.

The point emphasised here is not the legality or the wisdom of the nationalisation measures, but the wisdom of involving the courts in deciding to take or not to take those measures. It is unwise to involve the Judiciary in making decisions which are, strictly speaking, more political than judicial. At that time, as stated by the Presidential Commission, it was seen that:

> Decisions concerning the extent to which individual rights must give way to the wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible to the electorate. (Tanzania 1965:31)

The absence of a Bill of Rights kept the Judiciary away from involvement in making those political decisions.

5.3.2: Contending With Executive Might

But on the other hand, the absence of a Bill of Rights also gave the government freedom to act without much control or restraint by the Judiciary, so much so that some magistrates and even some judges may have adopted an attitude which exalted the Executive as superior beyond censuring by the Judiciary, even in decisions which were not strictly political. Thus, while a decision to restrain the freedom of an individual is not, in ordinary circumstances, a political decision, the Court of Appeal of Tanzania stated in *Attorney General v. Lesinoi Ndeanai & Others*[1] that the power of the President to detain a person under the *Preventive Detention Act 1962* was "entirely subjective" and not to be tested or questioned in any court.

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[1] [1980] T.L.R. 214.

In *Ahmed Janmohamed Dhirani v. R*,[2] the Prime Minister had signed a detention order purporting to have been delegated the detention powers of the President. No instrument of such delegation was shown in court; only the detention order itself recited that the Prime Minister was exercising the powers of the President under the *Preventive Detention Act 1962* "and all other powers thereunto enabling." And the High Court simply assumed that there must have been some delegation or other enabling laws, not named, upon which the Prime Minister had acted!

In *Saidi Hilali v. R*[3] the applicant was out on bail pending some criminal charges before a district when he was arrested and put in custody. At the hearing of an application for *habeas corpus* filed subsequently, a photocopy of a deportation order signed by the President three weeks after the arrest was produced in court. The order did not indicate where the applicant was to be deported to. All the same the High Court dismissed the application saying the deportation order was not challengeable in court.

In *Ali Yusuf Mrope v. R*[4] the applicant was detained without any order being signed until the day of hearing his application for *habeas corpus*. Rather surprisingly, the court allowed an application by the state attorney for a few hours' adjournment to enable the production in court of a detention order, signed

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[2][1979] L.R.T., n.1.

[3]High Court of Tanzania, Dar es Salaam, Misc. Criminal Application No. 44 of 1979.

[4]High Court of Tanzania, Dar es Salaam, Misc.Crim. Cause No.2 of 1977.

on that same day, and then directed that the applicant remain in detention.

Mohamed Ahmed v. R[5] exhibited an uninspiring judicial attitude. It was an attempt to question, by *habeas corpus*, the detentions made in the campaign against economic sabotage. In a half page ruling, Munyera, J., dismissed it with these words:

> ...I would say that any fool knows that there is a nationwide crackdown on suspected economic saboteurs which began in March 1983. The detainee Mohamed Ahmed is not the only person detained as a result of the crackdown... The applicant knows very well that ordinary courts have no jurisdiction over cases of suspected economic saboteurs. His application is misconceived.

Indeed, under the *Economic Sabotage (Special Provisions) Act 1983*, ordinary courts had no jurisdiction over matters of economic sabotage. But this was an application to determine the legality of the applicant's detention, not for adjudication on economic sabotage. The decision had no basis in law.

Fortunately, that has not been the overall attitude of the Judiciary. On occasions the High Court has delivered strong judgments condemning the government for its excesses and in fact some of the cases already referred to above indicate a firm resolve by judges to defend the independence of the Judiciary and to emphasise its role in controlling the executive. Thus in both *James Bita v. Idd Kambi*[6] and *Hamisi Masisi & Six Others v. R*,[7] the High Court condemned the district and regional commissioners'

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[5]High Court of Tanzania, Mwanza, Misc. Criminal Cause No.16 of 1983

[6][1979] L.R.T., n.9.

[7][1984] T.L.R. 751 (in Draft).

interferences with the courts below. In *Ernest Masola v. Charamba Ngerengere*[8] the ward secretary who had detained the respondent with absolutely no cause for seven days was held liable in damages. In *Abdi Athumani & Nine Others v. The District Commissioner of Tunduru & Three Others*,[9] the High Court quashed the unlawful decisions and orders of the district and regional authorities. In a series of judgments, the High Court declared *sungusungu* illegal. And in *J J Masika & Others v. Muhimbili Medical Centre*,[10] the Director of the Medical Centre which had evicted doctors from their residences was committed to serve two weeks in civil prison for disobeying an order of temporary injunction.

In *Re: An Application by Paul Massawe*[11] the applicant had been acquitted of charges of smuggling goods to Kenya and the trial court had ordered the said goods and the lorry carrying them, which had been seized by the Police as evidence, to be returned to him as the rightful owner. This order was not complied with. The applicant paid visits and wrote letters to various government authorities in an effort to get his goods back, but all in vain. By the time the High Court granted his application for an order of mandamus, it was almost 21 months after the goods were first seized.

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[8][1979] L.R.T., n.24.

[9]High Court of Tanzania, Songea (Sessions), Misc. Civil Causes No. 2 & No. 3 of 1987.

[10]Dar es Salaam Resident Magistrate's Court, RM Civil Case No.6 of 1992.

[11][1979] L.R.T., n.18.

At the hearing before the High Court, it transpired that the Regional Commissioner had ordered the confiscation of the goods, thus violating the order of the trial court. Delivering judgment, Mnzavas, J., as he then was, condemned this interference with the independence of the Judiciary:

> ...should one now commence, as did the Honourable Regional Commissioner, blocking and interfering with court orders which are not to his liking, we will, I am afraid, be sinking to the level of a Banana Republic where Judges can be dismissed at whim and where judgements are written by rulers. No one of us would like such a situation to develop in Tanzania.[12]

Although judicial activism was in many cases restricted by statutory clauses ousting the jurisdiction of the courts, judges still insisted on a strict observance of procedural legality. Thus in *Attorney General v. Lesinoi Ndeanai & Others*[13] the Court of Appeal, while holding that the President's decision to detain anyone under the *Preventive Detention Act 1962* was entirely subjective and not to be questioned in any court, nevertheless held the particular order in question invalid for the procedural defect of wanting the Public Seal. Kisanga, J.A., stated:

> For, it seems to me correct on principle to insist that the application of such a stringent Act to curtail the freedom of the subject is a matter which should not be done casually or lightly.... In other words, justice demands that in order to take away or to curtail that which is so precious to the individual, the power to do so must be exercised with scrupulous accuracy.[14]

That principle was invoked in *Re: An Application by Winfred Ngonyani*[15] concerning a deportation order which did not indicate

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[12]Ibid., at p.166.

[13][1980] T.L.R. 214.

[14]Ibid., at p. 247.

[15][1982] T.L.R. 272.

the place where the applicant was to be deported to. Biron, J., quashed the deportation order upon this irregularity because provisions curtailing the liberty of the subject "must be strictly construed."

As already shown earlier, the powers of the President were so immense that some people tended to regard the President as being above the law. Therefore the emphasis in those two cases that the President must observe the law "with scrupulous accuracy" was a good contribution to the Rule of Law in Tanzania.

Significant too are those few cases in which the court quashed orders or decisions of the President because they were *ultra vires*. In *Sheikh Muhammad Nassor Abdulla v. Regional Police Commander & Two Others*[16] a deportation order signed by the President purporting to deport the applicant from Dar es Salaam to Zanzibar was quashed by the High Court because the *Deportation Ordinance 1921* was limited to Tanganyika in its application, and did not extend to Zanzibar.

Patman Garments Industries Ltd v. Tanzania Manufacturers Ltd[17] concerned revocation of a Right of Occupancy under s.10 of the *Land Ordinance 1923*. The President was empowered to revoke a Right of Occupancy either for good cause, which consisted of circumstances listed in the Ordinance, or in the public interest.

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[16]High Court of Tanzania, Dar es Salaam, Misc. Criminal Cause No. 21 of 1983; [1984] T.L.R. 598 (Draft Law Report).

[17][1981] T.L.R. 303.

Apparently, personnel in the Lands Department had, either inadvertently or mischievously, granted offers of Rights of Occupancy to both parties in respect of the same land. It appears that the President was advised to revoke the right of the earlier grantee as a convenient way out of this "double allocation" of the same land.

Citing three English authorities, the Court of Appeal first rejected the old "distinction between judicial and administrative or executive functions of public officials", with the attendant bar to judicial review in respect of the latter. Then the court found that the revocation of the Right of Occupancy was unlawful because it was done neither in the public interest nor for good cause. And finally, this being an appeal from a suit and not an application for judicial review, the court relied on a passage from Lord Denning, M.R., in *Congreve v. Home Office*[18] to nullify the revocation by the President and to declare the appellant the rightful owner of the disputed land.

5.3.3: After the Bill of Rights

The Bill of Rights, incorporated in the Constitution in late 1984, removed or weakened many previously existing statutory protections to executive and administrative actions and thereby enhanced the scope of judicial control considerably. Provisions of an Act of Parliament became insufficient as the basis for executive or administrative action unless they also conformed

[18] [1976] Q.B. 629.

with the Bill of Rights as contained in the Constitution, otherwise the High Court could declare them null and void. On that basis, in *Chumchua Marwa v. Officer i/c Musoma Prison & the Attorney General*,[19] the High Court declared the entire *Deportation Ordinance 1921* null and void for being unconstitutional. This rendered the President incapable of issuing deportation orders.

Significantly, in that case the question whether the Ordinance was constitutional or not was raised, *suo moto*, by the court (Mwalusanya, J.). This was found to be quite proper by the Court of Appeal because:

> Firstly, all courts of law in this country are duty bound to take judicial notice of all constitutional and legal matters. Secondly, the courts in this country are not courts of the parties but are courts of law and have thus inherent jurisdiction to raise and to consider matters which are necessary to a fair and just decision of a case, provided the parties are given reasonable opportunity to respond to the matters thus raised.[20]

As the condition in the proviso had not been observed, the case was remitted to the High Court with directions to the trial judge to invite the parties to specifically address the court on the constitutionality of the Ordinance. This was subsequently done and, as directed by the Court of Appeal, the judge made a finding on it (which was the same as the previous one) and then forwarded the whole record to the Court of Appeal for final judgment.

In the event, however, the final judgment was never entered by

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[19]High Court of Tanzania, Mwanza, Misc. Criminal Cause No. 2 of 1988.

[20]*Attorney General v. Marwa Magori*, Tanzania Court of Appeal, (at Mwanza), Criminal Appeal No. 95 of 1988 (unreported), at p.3 of typescript.

the Court of Appeal because the appeal was struck off the Register at the instance of the appellant, the Attorney General, who had sought to withdraw it.[21] Thus, the decision of the High Court remains. In that decision the *Deportation Ordinance 1921* was found to offend the right to personal freedom, to freedom of movement, and to a fair hearing (including the right to appeal) which are now guaranteed by, respectively, sections 15, 17 and 13 of the *Constitution 1977*.

In *Director of Public Prosecutions v. Daudi Pete*[22] the Court of Appeal held s.148(5)(e) of the *Criminal Procedure Act 1985*, which denied the right to bail in charges for certain offences, to be unconstitutional because it was too wide and unguarded against abuse.

Meanwhile, problems with the rule requiring the consent of the Minister to sue the Government continued. In mitigation, the courts started upholding the right of individual claimants to sue only the particular government officers whose actions gave rise to the claims in their personal capacities, as joint tortfeasors, without joining the Government. That position was given great publicity when the High Court ruled in *Rev Christopher Mtikila v. Business Times & Augustine Lyatonga Mrema*[23] that the Minister for Home Affairs, the 2nd Defendant, could be sued in his

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[21]By letter Ref. No.J/J.10/26/84, dated April 2, 1992. The appeal could not be withdrawn as it had already been heard and was only pending judgment; the appropriate course therefore was to strike it off the Register.

[22][1991] L.R.C. (Const) 553.

[23]High Court of Tanzania, Dar es Salaam, Civil Case No. 47 of 1992.

personal capacity without joining the Government. It was hoped that this position would encourage the government, acting through its officers, to be more mindful of the law.

But then came *Peter Ng'omango v. Gerson Mwangwa & the Attorney General*[24] in which Mwalusanya, J., declared s.6 of the *Government Proceedings Act 1967*, requiring the consent of the Minister to sue the Government, unconstitutional. Then the Court of Appeal considered the same issue in *Kukutia Ole Pumbun & Another v. Attorney General*[25] and, after referring with approval to the High Court judgment in the former case, also held the provision unconstitutional.

A case which greatly illustrates the present position is *Rev Christopher Mtikila v. The Attorney General*[26] in which the Attorney General specifically requested Mr Justice Mwalusanya not to preside over the hearing of the case because he was unlikely to be seen to be impartial. It appeared from the pleadings that the petitioner may have been inspired in some of his claims by a pamphlet written by the judge (Mwalusanya) for general popular readership. The Attorney General's request was readily granted and the case proceeded under another judge who nevertheless upheld many of the petitioner's claims. It showed that before the High Court, the Government was not in any way better placed than an individual litigant.

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[24]High Court of Tanzania, Dodoma, Civil Case No.22 of 1992.

[25][1993] 2 L.R.C. 317.

[26]High Court of Tanzania, Dodoma, Civil Case No. 5 of 1993.

Briefly, the Judiciary in Tanzania has been fairly active in recent years. It has not tried, however, to take its activism beyond the limits of judicial decision making. Some attempts have been made in recent years to drag the Judiciary into political decision making but they have been resisted by the High Court. In *Mwalimu Paul John Mhozya v. Attorney General*[27] the plaintiff sought to use the judicial process to remove the President of the United Republic of Tanzania from office for violating the Constitution. The High Court dismissed the case because it involved a political issue the jurisdiction for which was vested exclusively in the National Assembly. And in *Rev Christopher Mtikila v. Attorney General*[28] the High Court dismissed a number of claims by the plaintiff, including prayers for orders to declare the Constitution void and to require the government to convene a constitutional conference or set up a Constitutional Commission, because the "High Court cannot... adjudicate on matters that are purely political as distinct from legal issues."

At the same time the High Court has not been indifferent to the overall interests of society and it has made no attempt to use its powers deliberately to frustrate the executive. This was illustrated in *Ally Mohamedi Liheta v. R*[29] in which the High Court, Mkude, J., held that s.148(5)(d), prohibiting the courts from granting bail to persons charged with offences alleged to

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[27]High Court of Tanzania, Dar es Salaam, Civil Case No. 206 of 1993.

[28]High Court of Tanzania, Dodoma, Civil Case No. 5 of 1993.

[29]High Court of Tanzania, Dar es Salaam, Misc.Crim. Cause No.29 of 1991.

have been committed by those persons while out on bail, was unconstitutional for infringing the discretionary powers of the judiciary. But having so held, the court used its discretion to refuse bail to the applicant.

5.4: PARTY SUPREMACY AND THE JUDICIARY

In emphasising the independence of the Judiciary, judges and magistrates are required to be free from political control and influence in discharging their judicial functions. For that reason, they enjoy a secure tenure of office, free from worries of possible removal as a result of a change of government. They are also not to be actively involved in politics or political parties because such involvement may raise doubts about their impartiality.

But in one-party state Tanzania, the context has been different, and in upholding the independence and impartiality of the Judiciary it has not been necessary to stick to every letter of the rule as known to the western tradition. The greatest novelty was party membership for judicial officers, which was actually encouraged by the then Chief Justice, Mr Telford Georges (James & Kassam:26-8).

His reasons were that firstly, political commitment as such was, as shown by English and American practice, not in itself a bar to judicial office (James & Kassam:27); competence and professional integrity is what counted. Secondly, TANU beliefs were not in

conflict with the principles of justice to which all lawyers subscribe. And thirdly, and most important was the need for the Judiciary to establish its relevance and legitimacy in Tanzanian society. The apparently negative role of the Judiciary in the struggle for independence contrasted sharply with that of TANU which had established itself firmly as the people's champion. The Judiciary could not gain popular acceptance as an institution committed to serve the people if it chose to operate in total isolation from, rather than in cooperation with, TANU.

The need for the Judiciary to understand people's fears, hopes and aspirations was also strongly emphasised by the President when he warned that the independence of the Judiciary:

> ...must not lead to the belief that...Judge[s] can be, or should be, "neutral" on the basic issues of our society.... Otherwise their interpretation may appear ridiculous to that society, and may lead to the whole concept of law being held in contempt by the people. (Nyerere 1968:112)

Accordingly, the idea of the Chief Justice was to build up a Judiciary which was, "without sacrifice of principle, to remain independent though not isolated, impartial but not indifferent, positive but not inflexible" (James & Kassam:62). It was certainly not for anyone to become a politician while still retaining judicial office.

A worry was expressed that a judge or magistrate so committed to the party as to register as a member may not be impartial in a conflict of interests between the party and an individual (Nwabueze:281-2). This was unlikely because firstly, as mentioned

above, the basic principles and beliefs of the Party supported justice, which judges and magistrates swore to uphold. Partly for that reason, perhaps, at least at the time Mr Georges was encouraging party membership for members of the bench, the sole political party enjoyed the support of the entire population generally and propagated nothing whatsoever to conflict with the law. Secondly, judicial decisions were made entirely in accordance with the law, and not subject to party or other beliefs. That is why Mr Georges also strongly emphasised the need for high professional standards and integrity. Therefore that worry was, in our view, as idle as worrying that a judge or magistrate who strongly believes in religious morals may not be trusted to administer provisions of the *Law of Marriage Act 1971* which confer certain rights of a married woman to a woman who has merely been cohabiting with a man.

But Tanzania has been more than just a one-party state: the 1975 constitutional amendment required "the functions of all the organs of state" to be "performed under the auspices of the Party", and in 1977 the Party was declared "supreme in all matters in accordance with the Constitution of the Party." And party supremacy over the legislature and with regard to policy was well established even before 1975.

But in so far as the Judiciary was concerned, courts continued under the requirement to operate in accordance with the law, thus affirming the continuing supremacy of law as enacted by Parliament, irrespective of any changes in the Parliamentary

relations with the Party or the Executive.

This is well demonstrated by some judgments in which there was apparent conflict between the implementation of party policies, and some rights of the individual. In *Laiton Kigala v. Musa Bariti*[30] the applicant had been expelled from an *ujamaa* village. He did not contest the expulsion but claimed, and was awarded by the primary court, compensation for the contribution of his labour in clearing the village's *shamba*. The district authorities wanted to avoid implementing the decision of the court because, according to them, its implementation would undermine the party policy on rural socialism. But the High Court, Mnzavas, J., reminded the district authorities that it was not "the policy of this country to substitute expediency for legality." Quoting from the *TANU Constitution*, then scheduled to the *Interim Constitution*, and from the writings of President Nyerere, the High Court affirmed the applicant's legal right to "a just return for his labour," irrespective of any adverse implications to the policies of the party.

In *Lalata Msangawale v. Henry Mwamlima*[31] an *ujamaa* village purported to take over the appellant's piece of land following an alleged decision to that effect at a meeting of the village; the said decision was claimed to be backed by the TANU district authorities. Once again, the High Court affirmed the property rights of the individual, and the need to pay compensation if at

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[30] [1975] L.R.T., n.40.

[31] [1979] L.R.T., n.3.

all one's property was to be lawfully expropriated. In this case too, the court relied on the *TANU Constitution* and Nyerere's writings to show that there need not be any conflict between party policies and the law.

The above case was one in a series in which some local party authorities, perhaps misled by a provision in the *Villages and Ujamaa Villages (Registration, Designation and Administration) Act 1975* that village councils had final authority over land matters within their respective village boundaries, purported to take over individually held properties claiming to be exercising powers at village level similar to those of the Government of the United Republic in nationalising private firms. This was the claim in *Khimji Gangji Sisodya v. R*[32] in which the appellant had, as a result of the claims, suddenly found himself charged with criminal trespass over his own land! In this, as in the other cases, the High Court affirmed the supremacy of the law.

It should be noted that even the flouting of the order of the district court by the Regional Commissioner in *Re: An Application by Paul Massawe,*[33] and the usurpation of judicial functions by the Regional Commissioner in *Kivuyo & Others v. Regional Police Commander*[34] and by the District Commissioner in *James Bita v. Idd Kambi,*[35] accounts of all of which have been given above,

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[32]High Court of Tanzania, Arusha, Criminal Appeal No. 191 of 1978.

[33][1979] L.R.T., n.18.

[34]High Court of Tanzania, Arusha, Misc. Civil Application No.22 of 1978.

[35][1979] L.R.T., n.9.

were done in the name of the Party's Regional Security Committee (District Security Committee in the latter case) of the Party, of which the commissioners were chairmen.

The Judiciary has also refused to back the party policy of favouring or giving preference to public enterprise, in the form of parastatal firms, over private enterprise unless the preference is clearly supported by the law. In *Agro Industries Ltd v. Attorney General*[36] the President had exercised his power under s.10(2) of the *Land Ordinance 1923* to "revoke a right of occupancy if, in his opinion, it is in the public interest so to do." It transpired that the President had revoked the right of a lawful owner, a private company, in favour of a trespassing parastatal company. The Court of Appeal found this to be an illegal exercise of the powers of the President because:

> In the eyes of the law a trespasser is a trespasser, be it a public enterprise or a private enterprise or an individual. So the crucial question is what action is in the public interest?.... We are satisfied that public interest, as we have stated to understand it, requires that legal property rights should be protected against.... a trespasser, albeit a public enterprise.[37]

That Party Supremacy did not allow the party to disregard the law was also shown in relation to the *sungusungu* traditional defence groups. They were not established by or under any law and, as pointed out earlier, they often did not observe the law in their operations. In Mara Region, the Regional Executive Committee of the Party issued a "Code for the Operation of *Sungusungu*" which

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[36]Court of Appeal of Tanzania, Civil Appeal No.34 of 1990.

[37]Ibid., at pp.14-5 of the typescript.

was then considered as the "legal authority" for the groups' existence (Shivji 1990b:16-7). In a series of judgments,[38] Mwalusanya, J., declared *sungusungu* unconstitutional[39] and their methods of operation illegal. Those decisions are said to have extremely offended some leaders of the Party who supported *sungusungu* activities; there were even unconfirmed reports that the delay in effecting the transfer of Mr Justice Mwalusanya from Mwanza to Dodoma was because they did not want to see him in the Party's "capital."

But the Judiciary was not to compromise legality with party supremacy. Following those judgments, an attempt was made to legalise *sungusungu* by passing the *People's Militia Laws (Miscellaneous Amendments) Act 1989*, which included *sungusungu* in the definition of "people's militia." It is doubtful whether that law resolves fully the issue of *sungusungu*'s legality because the law does not say who is responsible for raising and maintaining *sungusungu* units. As a kind of military force, it is only the government of the United Republic of Tanzania which has authority under the Constitution to raise and maintain them; but in practice the government does not do so.

One can say, however, that in spite of the concept of Party

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[38] *Ngwengwe Sangija & Others v. R*, High Court of Tanzania, Mwanza, Criminal Appeal No. 72 of 1987; the others are civil cases at the same (Mwanza) Registry of the High Court: *Charles Mwita & Another v. Mresi & Eleven Others*, *Misperesi K Maingu v. Hamisi Mtongori & Others*, and *Amoni Magigi Nyamuganda & Another v. Bonifas Kilingo & Others*, being Civil Cases Nos. 15, 16 and 22 respectively, all of 1988, and all unreported.

[39] S.147(1) of the Constitution provides that raising and maintaining "any military force of any kind" is the exclusive monopoly of the Government.

Supremacy, the Judiciary remained steadfast in defending its independence, and the supremacy of law in the administration of justice. Apart from occasional individual aberrations, members of the Judiciary have, on the whole, not allowed the Judiciary to succumb to undue party pressure or interference.

Perhaps the greatest threat to judicial independence could have come from within the Judiciary itself. The Chief Justice who succeeded Mr Telford Georges in 1971 is known to have been an ardent supporter of the party and its policies, and to have even issued a circular telling judges that they were obliged to further the policies of the party. The circular was rejected by the other judges of the High Court who remained firm in defence of the independence of the Judiciary and their duty to administer justice according to law, and without fear or favour. Responding to the circular, Mr Justice Biron stated that the Chief Justice had no right or authority to issue circulars requiring courts to abide by "political or executive whims". And on party policies he said:

> The fact that the NEC made policy did not mean that it followed without saying that whatever came out of it was law. No! Where an important policy matter had been issued without a corresponding parliamentary endorsement by the way of legislation, the courts are not bound to enforce it. (Peter 1980:24)

Such firm stand by judges may well have saved the Judiciary from falling under the control or influence of political party whims.

The same Chief Justice is said to have once directed that all cases going to the High Court by appeal or revision, and in which *ujamaa* villages were either parties or had a direct interest

should not be sent to other judges but himself (Ongw'amuhana:264-5). This directive does not seem to have had much effect either. Mr Saidi was removed from the office of Chief Justice in 1977, just after the new constitution formally declared the Party to be "supreme in all matters in accordance with the Constitution of the Party." Ironically, the power of the President to remove the Chief Justice from office at any time which has been criticised for its likely use to influence the judicial conduct of an incumbent Chief Justice (Ong'wamuhana: 264-5) was in this case used to terminate the tenure of a chief justice whose conduct tended to jeopardise the independence of the Judiciary.

Subsequent to that the Judiciary has steadfastly remained independent and the whole public generally acknowledges it as such. Evidence of this acknowledgement is in the public demands to have judges to head commissions or probe teams whose tasks demand a high degree of integrity and impartiality. It is for that reason that the President deliberately appointed the Chief Justice to head the Commission which, after collecting the people's views, recommended an end to the one-party state, a recommendation adopted and implemented from July 1992.

5.5: THE PERMANENT COMMISSION OF ENQUIRY

A great innovation of the *Interim Constitution* was the Tanzanian Ombudsman, known as the Permanent Commission of Enquiry (hereinafter the PCE). Having rejected the incorporation of a Bill of Rights in the Constitution, the Presidential Commission

recommended the establishment of the PCE specifically as a safeguard against abuse of power by officials of both the Government and the Party (Tanzania 1965:32). That recommendation was adopted.

In his address to the Assembly which passed the *Interim Constitution* President Nyerere strongly commended the proposal to establish the PCE because:

> The nature of our economic problems in Tanzania demands that many officers of the Government, the Party, and the law itself, should be entrusted with great powers over other individuals. At the same time our recent history, and the educational backwardness of the majority of our people mean that automatic checks on abuse of power are almost non-existent. (Nyerere 1968:39)

Thus ss.67-69 of the *Interim Constitution* established the PCE specifically as a safeguard against abuse of power. Subsequent constitutional changes have retained the PCE and now it is deemed to be established under ss.129-131 of the *Constitution 1977*.

5.5.1: Set-Up and Jurisdiction

The PCE was the first Ombudsman ever to be established in Africa, and only the second in the Commonwealth, after New Zealand which had established the Ombudsman in 1962. The New Zealand model was actually studied and some of its features adopted in the PCE. Notably, the PCE visited New Zealand during its first year in office.[40]

Initially, the Constitution set up the PCE with a Chairman and

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[40] *Permanent Commission of Enquiry Annual Report 1966-1967*:14 para 58.

two commissioners, all appointed by the President, to hold office for two years but one commissioner vacating office each year so as to ensure continuity. A commissioner could be re-appointed for another term provided that after two consecutive terms, a commissioner had to vacate for at least one term before he could be re-appointed again. Later, there was an increase in the length of terms to three years and the number of commissioners to a maximum of four. Usually, those appointed chairmen and commissioners are highly respected persons of proven integrity with long experience in the the Judiciary or other sectors of the public service.

The Constitution gives a broad mandate to the PCE to enquire into the conduct of any person holding office in the Government, the Party, local government authorities, public corporations, and other institutions specified by Parliament. Excluded from this mandate are the President and judges and magistrates in the discharge of their judicial functions.[41]

Details of how the PCE operates are provided for under the *Permanent Commission of Enquiry Act 1966*. Section 8 of the Act provides that, apart from the constitutional exemptions, the jurisdiction of the PCE shall not be ousted by statutory clauses of finality or exclusion. According to its first Chairman, the PCE was set up to investigate arbitrary arrests and other improper uses of discretionary powers; nepotism, decisions taken maliciously, or in bad faith, or on irrelevant considerations;

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[41]Section 129(4),(5) of the *Constitution 1977*.

inordinate delays in taking a required action, cases of misapplication or misinterpretation of laws, and so on (Mang'enya:6). And according to one of his successors, the PCE was also to investigate all acts of "oppression, threats, discrimination, bribery and misapplication of public property."[42]

Generally the PCE has quite a wide jurisdiction which is justified by the purpose of its establishment: protection against abuse of power and official authority. Investigation by the PCE can be initiated by the PCE itself upon notice of any conduct that justifies such enquiry; but usually an enquiry is commenced by a complaint being made to the PCE. The President may direct the PCE to make any such enquiry; he can also order any enquiry to be stopped.[43] At the commencement of every enquiry, s.9(1) of the *Permanent Commission of Enquiry Act 1966* requires the PCE to inform the head of the department or institution being enquired into.

According to s.10 of the Act, enquiries must be conducted in private. Nobody is entitled to a hearing by the PCE as of right; but the PCE is not to make any adverse recommendation on any person or organisation without giving a prior opportunity to the person or organisation to be heard. Sections 11, 12 and 13 of the Act give to the PCE powers similar to those of a court of law to summon witnesses, call for papers and enter premises for

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[42]*Permanent Commission of Enquiry Annual Report 1973-1974*: 6, para 16.

[43]Section 129(2) of the *Constitution 1977*.

purposes of conducting enquiries. The Commission determines its own procedure and it is not bound by the rules of evidence applying in courts.

The working language of the PCE is Swahili;[44] complaints may be lodged in writing or orally, and there is no fee. This has made the PCE easily accessible to most people, far more than the courts are. After concluding an enquiry, the PCE submits its findings and recommendations in confidence to the President for appropriate action. Where the report to the President is not a unanimous report, s.15(2) of the Act requires the dissenting Commissioner to attach his dissenting report, properly signed by him. The PCE is not allowed to disclose the contents of any report made to the President except with the President's permission. And s.19 of the Act accords to the reports of the PCE, and to any information and document given to it in the course of an enquiry, the same privileges as are accorded to court proceedings.

But unlike the courts, the PCE has no power to issue orders of its own to enforce its findings. It just reports them to the President and leaves it to him to redress whatever wrongs it may find in its enquiries, and the President has no obligation to act as recommended by the PCE. That position is not very different from that of the New Zealand Ombudsman who also has no direct powers of his own but can only make recommendations to the relevant department to change any decision or conduct disapproved

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[44] *Permanent Commission of Enquiry Annual Report 1966-1977*: 14, para 56.

by the Ombudsman. If the department is unwilling to change, the Ombudsman reports the matter to the Minister concerned, then further to the Prime Minister and finally to Parliament (Robson:144).

In New Zealand, however, the Ombudsman is appointed by the Governor-General on the recommendation of the House of Representatives, and reports his findings and recommendations ultimately to Parliament; he is generally regarded as "Parliament's man" (Robson:145). In other countries too, legislative control is often regarded as an essential feature of the Ombudsman institution (Norton:609). In the United Kingdom, the Ombudsman is known as the Parliamentary Commissioner and even the investigation he makes is usually at the instance of a Member of Parliament who requests it on behalf of or for the benefit of a constituent.

But while the Tanzanian position may be an exception in global terms, it is not so in Africa. In many African countries the Ombudsman is appointed by the Head of State (who is usually also the head of government), reports to him, and depends on him to implement the decisions or recommendations made (Hatchard:257-9).

5.5.2: An Assessment of Its Role

During its first year of operation the PCE covered 16,096 miles in 215 days, touring and holding meetings of 104 divisions in 53 districts in 14 regions, addressing an overall total of 64,065

people.[45] The following year the PCE visited 7 regions, 10 districts, 45 divisions and addressed a total of 21,262 people.[46] That was how many people got to know about the PCE and many of the up-country complaints submitted to the PCE were made orally in private sessions held immediately after each such meeting.

The PCE received 1627 complaints during its first year of operation, of which 65.3% were rejected for lack of jurisdiction.[47] The following year saw a proportional decline in the number of cases rejected, showing a better public understanding of the PCE's jurisdiction.[48] From inception in 1966 to June 1990, the PCE received a total of 57,520 complaints, of which 27,222 were rejected, either for lack of jurisdiction or because they had alternative channels, 8,521 were withdrawn or discontinued, 3,746 were still pending and 6,686 were upheld (Mjemmas:41-2). The proportion of complaints upheld, at 11.6%, compares well with those of the Ombudsman institutions in other countries (Robson:145-6; Norton:618-20).

The PCE often handles cases which could have been handled by other bodies, whenever such intervention by the PCE is justified. Even where it has no jurisdiction, complainants are advised what to do; where the acts or omissions complained of are lawful,

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[45] *Permanent Commission of Enquiry Annual Report 1966-1967*: 4, para 6.

[46] *Permanent Commission of Enquiry Annual Report 1967-1968*: 3, para 6.

[47] *Permanent Commission of Enquiry Annual Report 1966-1967*: 7-9.

[48] *Permanent Commission of Enquiry Annual Report 1967-1968*:11 para 34-5.

thorough explanations are given to the complainants. And even where the PCE has no jurisdiction, complainants are given advice and guidance on what to do; thus

> ...the man who complained "that his wife does not want him and after divorce proceedings judgment was given in her favour" was advised to appeal, if he wished; the complainant who considered "that personal tax is excessive" was advised to contact his Member of Parliament; the complaint "that too many thefts have occurred at railway stations" stimulated the advice "to go and see the Police". But complaints of unjust personal treatment, such as unlawful detention, expulsion from school without reason, or unlawful seizure of property were investigated by the Commission, which reported its finding thereon in confidence to the President.[49]

As such the PCE has also been acting as a poor man's "Legal Aid Clinic" and as a "Citizens' Advice Bureau."[50] Many of the "withdrawn" or "discontinued" cases have actually ended in negotiated settlements as a result of the PCE's initiatives; thus the PCE has worked on them but the end did not require or justify a report to the President. Therefore, a proper assessment of the extent of the PCE's effectiveness in curbing abuse of power is hard to make, and reliance upon numbers alone can be misleading.

By far the greatest criticism against the PCE is the fact that it has no powers of its own and depends entirely on the President for any positive effect to its work. The criticism is that the PCE, appointed by the President, reporting to the President, and depending on the President to implement its decisions cannot be an effective check against abuse of power by the executive and its agencies; it can only serve the interest of the executive. The argument in that criticism, however, overlooks the fact that

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[49](1968) 2 *Annual Survey of African Law*: 131.

[50] Ibid.; also see Ghai 1969, Martin,R:213-4 and Mjemmas:44-5.

from the beginning the PCE was so linked to the President so as to conform with the structure and organisation of state power in Tanzania, where

> ...it is the unity, not the division, of the branches of government which is the basic principle of the Constitution. The symbol and focus of this unity is the President himself, who is effectively both responsible for the efficient operation of the executive functions of government and for ensuring that individual rights are not transgressed in the process. (Norton:609)

And the PCE was deliberately designed to be, in effect, an instrument of the President for exercising control over officers in the service of his government (McAuslan & Ghai:505-6).

In Tanzania, with a Parliament relatively weak and subservient to the Executive, it would have been unrealistic to subject the PCE to legislative control and expect it to be effective. The effectiveness of the PCE should be seen in terms of the President's own effectiveness in discharging his contradictory responsibilities of, as quoted above, running an efficient government and ensuring that individual rights are not violated. The PCE, therefore, was meant to enhance the stature and authority of the President, not to reduce it. That is why the President has been excluded from the PCE's jurisdiction, has final discretion to take action on PCE reports or not, and can order any enquiry to be stopped.

The latter discretion was exercised in 1968 when the President ordered the PCE to stop enquiring into what was actually a political conflict between the Regional Commissioner for West Lake (now Kagera) Region and two MPs representing constituencies

in that region.[51] The matter was instead investigated by the Party which then expelled the two MPs, along with 7 others, from the Party and consequently from the Parliament as we saw earlier (*Supra*, Section 4.2). The step taken by the President proved correct the early assessment that the PCE "could not be allowed to become a rallying point for political opposition, yet it had to be effective enough to prevent" resentment and complaint against the bureaucracy "turning into political opposition" (McAuslan & Ghai:503). It is difficult to imagine how the PCE could have maintained that position without the President's power of intervention.

A further indication of the enhancement of the President's position is that even with the proclamations of "Party Supremacy", the PCE has always had power to investigate the Party and its officials, and to report its findings to the President.

The effectiveness of the PCE is thus a direct result of the immense powers of the President on which it relies: there is no government or public official who would not be concerned at being adversely reported on to the President. The range of actions open to the President to take against an official is almost limitless, and the outcome unpredictable. The routine secrecy (from both the complainant and the official investigated) which accompanies the PCE reports to the President makes them apprehensive and uncertain. Partly for that reason the PCE has sometimes been feared by public officials, especially during the

[51]See, Thoden Van Velzen & Sterkenburg 1972b: 259-60.

early years (Ghai 1969:34). During 1967-68 the PCE Chairman with its Secretary and Legal Secretary, on a tour of Europe, were surprised on arrival in Oslo to see the entire staff of the Tanzanian Embassy in office although it was a Sunday: they were evidently apprehensive of possible adverse reports on them.[52]

That fear almost verged on hostility sometimes, as observed by the PCE when making regional and district tours and holding meetings to explain its role and function to the public. In some areas the meetings were not well attended because of poor cooperation by government officials in the regions and districts who were expected to give advance notice of the PCE's tours and to encourage people to attend the meetings. Some local heads of government departments did not want their staff to attend PCE meetings, and there were even cases of further victimisation of people who complained to the PCE by officers against whom they had complained.[53]

But there has been some criticism[56] and charges that after reporting to the President, there is no feed back at all and so the PCE (or anybody else) cannot know whether the President treats the reports seriously. Sometimes he takes so long before acting upon a particular recommendation of the PCE that it is

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[52]From interview with Bob Makani, Legal Secretary to the PCE (1966-1968), Dar es Salaam, September 1994.

[53](1969) 3 *Annual Survey of African Law*: 137.

[56]This paragraph is based on accounts given at a workshop held in Dar es Salaam on September 7, 1994, organised by the "Legal Task Force" which cordinated the "Legal Sector Studies" of the on-going *Financial Institutions and Legal Management Upgrading Project* (FILMUP).

difficult to associate it with his subsequent action. Sometimes he may even act in a way which frustrates both the PCE and the complainants. In one case, a person dismissed from his executive post in a parastatal organisation complained of unfair dismissal to the President who directed the PCE to investigate the matter. The PCE found that the dismissal was both lawful and justified, and reported so to the President. Shortly after that, however, the President appointed that same person to the Board of Directors of that same corporation!

A number of lawyers (including High Court judges, senior State Attorneys and practising advocates) interviewed in January and February 1994 were rather sceptical of the PCE's usefulness. But there has been no suggestion to dissolve the PCE. Most commentators, however, would prefer to divest the President of most of his powers over the PCE, and to vest them in Parliament. In the constitutional changes taking place after 1992, it may indeed be desirable to re-align the PCE with a more representative institution. Trends in recent constitutional amendments, which we examine in Chapter 7 below, show that the Parliament is getting increasingly powerful over the executive. It will therefore make sense, in our opinion, to re-align the PCE with the Parliament instead of the President as is now the case.

One should always bear in mind, however, that institutions like the PCE cannot, in themselves, make a bad government good; but they can make a good one better.

5.6: THE COMMISSION FOR THE ENFORCEMENT OF THE LEADERSHIP CODE

A code of conduct for political leaders and other public figures is there in every society. It is a controlling instrument because it conditions the behaviour and conduct of political executives to a standard presumed acceptable to the particular society and its values and aspirations.

The Tanzanian "Leadership Code" was actually Part V(a) of the *Arusha Declaration* which had a very clear purpose: to set and maintain a high standard of socialist morality for the leadership, consonant with the high aspirations of that declaration. Thus according to the code, no leader of the Government or the Party (or his or her spouse) was to be in any way "associated with the practices of capitalism or feudalism." The practices so proscribed included holding shares in any company; being a director in any privately owned enterprise; receiving two or more salaries; owning houses for rent to others; and employing labour. And leaders were defined as MPs, members of the NEC, senior officials of organisations affiliated to the Party,[57] Party leaders at all levels, senior officials of parastatal organisations, local government councillors, and high and middle level civil servants.

The Code was so stringent that Nyerere only managed to win its acceptance by the NEC by shrewdly trading it off with the

[57]These were the Youth League, the UWT, the Trade Union and the Cooperative Movement.

nationalisation measures, with which Party and Government leaders were quite happy, apparently because they had nothing to lose (Cartwright:170; Pratt 1976:160-5). With the Leadership Code Nyerere wanted to prevent, or at least to discourage, Government and Party leaders from taking advantage of their positions to advance themselves materially at the expense of the people they led.

A conspicuous aspect of the Leadership Code in Tanzania has been the endeavour to enforce it by statute. After the Arusha Declaration, the *Interim Constitution* was amended[58] to include the Leadership Code in the qualifications for membership of Parliament. All MPs were required to submit to the Speaker by March 5, 1968, (or within 15 days if elected or appointed to Parliament after March 2, 1968) their declarations of compliance with the Code and, subsequently, annual statements specifying property they (or their spouses) owned and how it was being used, and showing their annual incomes. Copies of the declarations and statements were forwarded to the Attorney General who was subsequently authorised to petition the High Court to declare vacant a seat whose incumbent failed to observe the code.[59] Similar requirements were made for local government councillors.[60]

In December 1969, the High Court actually declared one

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[58]By the *Interim Constitution of Tanzania (Amendment) (No.2) Act 1967.*

[59]By the *National Assembly (Qualification of Members) (Forms and Procedure) Act 1968.*

[60]By the *Local Government Laws (Amendment) Act 1968.*

Parliamentary vacancy on that basis.[61] But apart from that, all MPs apparently complied with the code; even Oscar Kambona, who fled the country in August 1967, submitted his declaration one day before the deadline.[62]

Subsequently, the Leadership Code was extended, by amendments to the relevant Service Regulations, to all government servants, including judicial officers, receiving a monthly wage of Shs 1,066/- or higher.[63] But as early as January 1971 the NEC of the Party noted:

> There are presently some leaders who do not fulfil these conditions. They disregard and cleverly avoid the leadership code. The time has come for the Party to supervise the conduct and the bearing of the leaders.[64]

Following similar complaints by Party members at seminars and meetings, the NEC recommended that a special committee be set up to deal with alleged breaches of the Leadership Code (Mwinyigogo: 267). Accordingly, such a committee was established by the *Committee for the Enforcement of the Leadership Code Act 1973*. The Constitution was then amended[65] so that copies of declarations of compliance with the Code by MPs were now submitted to this committee and not to the Attorney General as previously.

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[61](1969) 3 *Annual Survey of African Law*: 132-3.

[62](1968) 5 *Africa Research Bulletin*: 1010B.

[63]G.N. 180 of 1969 and G.N. 286 of 1970; (1969) 3 *Annual Survey of African Law*: 133, and (1970) 4 *Annual Survey of African Law*: 135.

[64]*TANU Guidelines*: para 16.

[65]By the *Interim Constitution of Tanzania (Amendment) Act 1974*.

In 1977 the committee was deemed to be established under s.78 (now s.132) of the *Constitution 1977*, as a commission (not a committee as known under the Act) with jurisdiction "to inquire into the behaviour and conduct of any leader for purposes of ensuring compliance with the requirements of the Leadership Code." The Commission (or committee as the Act still calls it) consists of a Chairman and at least two and at most three members, all appointed by the President.

The Commission investigates cases of alleged or suspected breaches of the Leadership Code and reports its findings to the President for appropriate action. Like the PCE, this Commission has no power to issue orders pursuant to its findings; it leaves it to the President to act as he may see appropriate. Similarly, its enquiries are in private; nobody is entitled to a hearing but nobody should be adversely reported on without first being given an opportunity to be heard. It can summon witnesses and call for papers, and its proceedings are also privileged.

During its first decade (1974-1984) it received 2,125 complaints, of which it confirmed only 78 breaches of the Code (McHenry 1994: 39). By 1986, the confirmed cases reached 83 and the President is said to have acted against the culprits as follows: 41 were sternly warned, 14 were dismissed from leadership, 2 were demoted, 10 were referred to the disciplinary committee of the Party, and 16 were dealt with miscellaneously (Mwinyigogo:273). Many factors undermined the Leadership Code. Commitment to socialism, the underlying objective of the Code, was doubtful

among the top leaders themselves, except for a few like Nyerere (Ghai 1975:160-1). Economic hardships made a strict observance of the Code difficult, its violation understandable in some circumstances, and the all too powerful President was also too forgiving of code violators, "recycling" them to meet demands of skilled manpower (McHenry 1994:40-3).

Increasingly, the Leadership Code became absurd and unrealistic. The unreviewed wage limit of Shs 1,066/- soon categorised most public servants as leaders; by 1990, then equalling $11, it had been surpassed by the official minimum wage. Although it is claimed that during 1989/90 the Commission confirmed and reported to the President 3 cases of breaching the Code (Tanzania 1990:273, 28112), public attitude towards the Code had changed and there was little interest in whether the Commission was even in existence at all.

In December 1986 President Mwinyi, who had succeeded Nyerere in November 1985, suggested that there was a need to review the Leadership Code (McHenry 1994:43). This was ultimately done by the Party six months after Mwinyi became Party Chairman as well, following Nyerere's retirement from Party leadership in August 1990. The NEC met in Zanzibar in February 1991 and resolved to effectively "repeal" the Leadership Code. This was a decision of the Party only, and there was no immediate change in the law; but all enforcement of the Leadership Code stopped immediately.

In July 1992, constitutional amendments scrapping the Leadership

Code and the commission for its enforcement[66] took effect.

Unlike the PCE, the Commission was regarded with much public scepticism. From the beginning, leaders engaged in private businesses under the disguise of proxies, and on retirement they suddenly had large amounts of capital with which to continue in business openly (Shivji 1976:95; McHenry 1994:40-1). Unlike abuse of power, the Leadership Code could be breached without creating a host of complainants to come forward and complain or give evidence before the Commission. In many cases, people with information useful as evidence were themselves assessories to, and part beneficiaries of, the elaborate schemes used to breach the Code. Consequently, this Commission's record of performance is unimpressive.

The Leadership Code itself was rather stringent and ensuring its enforcement was a task that may have been well beyond the competence of the Commission. Breaches of the Leadership Code were mostly committed through corruption and other deceitful conduct hard to detect and amounting to offences under some other laws administered by the Police or the Anti-Corruption Squad[67] which were better capable of making effective investigation, ending in open prosecutions in court. By contrast, the Commission had little investigative expertise and its findings, whatever they were, remained throughout shrouded in dubious secrecy, never openly proved, and their outcome never known

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[66]Sections 19 & 35 of the *Eighth Constitutional Amendment Act 1992*.

[67]Established under the *Prevention of Corruption Act 1971*.

beyond speculative reports. While corruption proved in court was punished by imprisonment, an adverse report by the Commission was left to the President for action, without any assurance that the culprit would not be dealt with less severely. There were thus other agencies which appeared capable of dealing with that same problem more effectively than the Commission.

Despite those reservations, a credible political system should have a code of ethics, and it may not be necessary to have a special commission to enforce the code. The Leadership Code had become almost impossible to enforce when it was repealed. The repeal, therefore, may have been justified. But what was almost absurd was its replacement with nothing.

CHAPTER SIX

Party Supremacy and the Consolidation of Central Control

6.0: INTRODUCTION

A representative and democratically elected Parliament and an independent Judiciary are generally regarded as essential for a truly responsible democratic government. But in the complex relations of present day societies, those organs alone are not enough. Ensuring that the government is responsible to the people it governs requires a number of other factors and institutions which in well established democracies are sometimes taken for granted. They include popular organisations, pressure groups and civil associations of various kinds, both formal and informal, through which popular opinion is mobilised and expressed.

This chapter looks at such people's organisations and their relationship with the state. We look at institutions in the cooperative and trade union movements, the local government system, and at government powers in relation to the people's right to civil liberties and organisations in various forms. The general assessment is that the Executive sought to bring all aspects of public life and activity under the direct supervision and control of its centralised command and, in that endeavour, the machinery and organisation of the Party has usually been employed to great effect.

6.1: STATE CONTROL OF POPULAR INSTITUTIONS

The "popular institutions" referred to here are the trade union and cooperative movements, and the local government system. Many of the functions of the state, especially the service provision functions of the modern day welfare state, are best discharged through local authorities close to the people being served. At the same time local government enhances democracy, with local authorities as the organs through which the people's interests generally can best be served and promoted.

On the other hand, trade unions and cooperative societies are institutions formed to protect and promote specific interests of the particular groups of the people who form them: workers' rights and interests for trade unions, and the common interests of the "cooperators" in the case of cooperative societies.

In Tanzania, however, the government has carried out policies whose effect was to transform those institutions and make them instruments to be used by it in controlling the very people those institutions were supposed to serve.

6.1.1: The Trade Union Movement

At independence, the trade union movement constituted what was probably the strongest independent organisation apart from TANU, the nationalist movement itself. Trade unionism first emerged among dockworkers in Dar es Salaam in 1947, and then spread gradually to other crafts and sectors like sisal plantations.

After a slow and generally troubled start, a small number of unions managed to get established and by 1955 they were able to federate into the Tanganyika Federation of Labour (TFL).[1]

During the campaign for independence there was close cooperation and alliance between the TFL and TANU but with the coming of independence, the alliance ended.[2] It soon turned to conflict as the TANU Government was unable to meet trade union demands for rapid Africanisation of the public service while at the same time it sought to secure greater control of union affairs. The conflict reached its peak after the January 1964 army mutiny when more than 200 trade unionists, mostly those in the leadership, were detained, and the TFL, with its affiliated unions, was dissolved and replaced by a single Government-controlled union (*supra*, section 3.4.1).

The government had started to seek control over the trade unions well before 1964. Firstly, in 1962 the *Trade Unions Ordinance* was amended[3] to require all trade unions to affiliate themselves to a single federation of labour so designated by the state. The TFL was so designated and any union not affiliated to it could have its registration cancelled. But the government could easily make the TFL and its unions illegal by simply changing the designation to any other organisation. Also under this law the

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[1]For a detailed account, see Friedland 1969.

[2]For a detailed account, see Friedland 1967.

[3]By the *Trade Unions Ordinance (Amendment) Act 1962*.

Minister for Labour and the Registrar of Trade Unions were empowered to intervene in the financial affairs of the TFL to ensure that union funds were not misapplied. It has been suggested that this was simply to ensure that union funds were not used for political purposes (Kapinga:89). Another law, the *Civil Service (Negotiating Machinery) Act 1962*, excluded from trade union membership all civil servants earning more than £702 a year. This undermined the trade unions' leadership by removing from membership the most educated and well talented civil servants (Friedland 1967:87-8); by then the starting salary for a university graduate employed in the public service was about £660 a year.

Secondly, in 1963 the Minister for Labour, Michael Kamaliza, himself a former trade unionist and President of the TFL (1960-62), proposed to integrate trade unions directly into his ministry; the proposal was rejected by the TFL after considerable discussions (Friedland 1967:85,92). The mutiny, therefore, simply created an opportunity for the government to implement swiftly its intention to control the trade union movement.

As we saw in Chapter Three, the National Union of Tanganyika Workers (NUTA) was established by statute as an affiliate of the ruling party, TANU, and replaced the TFL which was dissolved by the same statute.[4] Its objects included an obligation "to promote the policies of TANU and to encourage its members to join

[4]The *National Union of Tanganyika Workers (Establishment) Act 1964*.

TANU."[5] Its Secretary-General became an *ex-officio* member of the NEC of TANU. All trade union activity outside this union was unlawful. NUTA was not a "federation" with constituent unions but a "unitary" institution with nine industrial sections, each under an assistant secretary. It was highly centralised in its organisation, replicating TANU's set of organs at national, regional, district and branch levels.

NUTA's chief executive, the Secretary-General, and his deputy were appointed by the President of the United Republic and they held office for five years. They could be re-appointed, but the President could also remove them before the expiry of the five-year term. The Financial Secretary, the nine assistant secretaries who headed the industrial sections, and the directors of major departments were all appointed by the Secretary-General. Executives at lower levels, right down to branch secretaries, were appointed by NUTA's Executive Council, itself consisting of appointed officials, which could remove them at any time.[6] The only directly elected leaders of the union were the members of the branch committees. The organisational structure was almost a replica of that of the ruling party.

The President appointed Michael Kamaliza as NUTA's first Secretary-General, and he also retained his post as Minister for Labour. Ever since, successive secretaries-general of NUTA have

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[5]Ibidem, 1st Schedule, s. 3.

[6]This paragraph is based on Kapinga: 90.

also held office simultaneously as ministers for labour, thus making a norm of this absurd combination. NUTA was certainly not a body established by the workers but by the government through legislative action. The President was empowered to dissolve and replace it with another body of employees if, in his opinion, it did not serve the purposes it was established for; but its members had no power either to dissolve it or to make provision for its dissolution.[7]

Significantly, the period 1971-74 saw a growth of industrial unrest. Workers laid down tools and, obviously inspired by the 1971 *TANU Guidelines*, locked out managers of parastatal firms who were arrogant and oppressive, and even sought to "take over" privately owned industrial plants (Mihyo; Shivji 1976:134-45). But in all this, NUTA was hardly ever involved; rather, many workers regarded it with suspicion (Shivji: 137-8).

In February 1977 TANU (of which NUTA was an affiliate) and ASP merged to form a single new party for Tanzania, *Chama cha Mapinduzi* (CCM). It was understood at the time of the merger that the trade union would continue to affiliate to the new party as had been the case with TANU. But now the state constitution declared the party to be supreme with "final authority in all matters" in accordance with the party's own constitution. Therefore, subsequent developments were to be dictated by party decisions. Section 70 of the Constitution of the Party provided

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[7]The *National Union of Tanganyika Workers (Establishment) Act 1964*, section 5(1) and (2).

for five "mass organisations of the Party", including a workers' organisation,[8] to be established and closely supervised by the Party, and their constitutions to be approved by the NEC of the Party before taking effect. It is on that basis that in 1978, NUTA was replaced by a new workers organisation called *Jumuiya ya Wafanyakazi wa Tanzania* (hereinafter JUWATA).

JUWATA was established by the Party as a "mass organisation" of the Party *for all workers*. It was formally launched on February 5, 1978, taking over the assets, personnel, officers, members and even leadership of NUTA, which was thereby dissolved and replaced. Rather surprisingly, however, JUWATA functioned as a trade union without any statutory backing for almost two years; the law for its establishment,[9] hereinafter called the *Juwata Act*, was not passed until the end of 1979.

It is clear from the recital in the preamble that the *Juwata Act* was passed merely to give legal status to JUWATA, an already existing organisation, established by the Party to replace NUTA, which was accordingly disestablished from February 5, 1978, the deemed effective date of the Act. The power of dissolution which the President had had over NUTA was retained by s.8 of the *Juwata Act*, but subject to the approval of the NEC of CCM and, in the event of JUWATA being so dissolved, any "new body representative of employees designated in that behalf by the Party" was to be

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[8]The others were the Women's Organisation, the Party Youth League, the Parents Association and the Cooperatives.

[9]The *Jumuiya ya Wafanyakazi wa Tanzania Act 1979*.

deemed a trade union.

Scheduled to the *Juwata Act* was the Constitution of JUWATA, as made by the Party in 1978. One of JUWATA's objectives stated therein was to ensure the implementation of Party directives concerning workers. JUWATA's Secretary-General and his two deputies, one for the Mainland and one for Zanzibar, were appointed by the Chairman of CCM.[10] This was not a big change from the previous position because the Party Chairman was also the President and up to 1982, he continued the norm of appointing the Minister for Labour as the Secretary-General. JUWATA's regional and district executives were appointed by either the Chairman or the Central Committee of CCM.[11] All elective posts within JUWATA were contested by members under the supervision of the Party and all aspirants were subjected to a screening process by the Party Central Committee.[12]

Like NUTA, JUWATA was not established by the workers and s.7(4) of the *Juwata Act* prohibited them from making rules providing for its dissolution. In a further surprise, s.4(2) of the Act requiring the Registrar to register JUWATA under the *Trade Unions Ordinance* was "overlooked" until February 1981, after JUWATA's competence to act as a trade union was questioned in judicial proceedings initiated by it on behalf of a worker. The Court of

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[10]*Juwata Act*, Schedule, ss.41 and 42.

[11]Ibidem, s.40.

[12]Section 71(1) of the *CCM Constitution* (1977 Edition).

Appeal held that although JUWATA may have been "recognized by law to exist as a trade union," the *Trade Union Ordinance* "prohibited it or its officers from acting for its members" without first being registered.[13] It has been suggested that this "oversight" occurred because JUWATA was "virtually a government department," not a workers' union (Kapinga:94). It sounds true of the Government of Tanzania which, as we saw above (section 5.2), often acted in disregard of the law.

Later on, there started a movement amongst the workers for greater trade union autonomy. This was part of the developments we analyse below (*infra*, section 8.3).

6.1.2: The Cooperative Movement

Agricultural crop marketing cooperatives first began in the Kilimanjaro region in 1925 for marketing African produced coffee. Initially, the colonial administration did not support this development because it sympathised with the European settlers who wanted a ban to be imposed against coffee growing by Africans. But later on cooperative societies were allowed to operate subject to registration and government control under the *Cooperative Societies Ordinance 1932*. The movement then spread to other coffee growing areas in Mbinga and Rungwe districts in the south, and Bukoba in the Kagera Region. Subsequently, the cotton growing regions of Lake Victoria formed the strongest

[13] *Zambia Tanzania Road Services Ltd v. J K Pallangyo*, [1982] T.L.R. 24 at pp.28-9.

cooperative organisation in East Africa (Coulson 1982:60-9).

The cooperative movement was most active in the major cash crop growing areas and, like the trade unions, it was also used to mobilise support for the nationalist movement. After independence the government promoted the cooperative movement in a country-wide campaign. As a result some cooperative societies were registered with government encouragement and even political pressure, but with little local demand and possibly even less understanding of what they meant.

The number of registered societies rose from 857 in 1961 to 1533 in 1966 in response to this government campaign, the reasons for which were as much political as they may have been economic:

> It was decided that the cooperative form was well suited to the African setting and to the achievement of independence in the economic sense: control of the economy by the indigenous people rather than by expatriates and others non-African in origin. (Tanzania 1966:5)

The idea, therefore, was to replace the Asian middleman with government-supported cooperatives in purchasing agricultural produce. The government also hoped to use them to extend various forms of rural credit and agricultural advice to improve the position of the rural Africans economically (Coulson 1982:149; Naali:136-7).

Quite a few of the well established cooperative unions, on the other hand, had accumulated some reserves whose magnitude gave the government some concern regarding their proper use (Naali:138; Pratt 1976:192). That was also a reason for the government wishing

to exercise control over the cooperative movement. The government encouraged the separate cooperative unions to federate under a government sponsored body, the Cooperative Union of Tanganyika (CUT), whose formation in November 1961 pre-empted moves to form a more independent apex organisation by powerful unions around Lake Victoria (Kimario:21). After formation, CUT was affiliated to TANU and in the changes that came with the one-party state, its Secretary-General became an *ex-officio* member of the NEC of TANU.

Meanwhile, the hastily established government inspired cooperative societies lacked both trained personnel and effective democratic control. This led to inefficiency, unchecked misapplications of funds and corrupt practices by officials and committee members (Coulson 1982:150-2; Bryceson:6-9). Finally, the President appointed a Special Committee to enquire into the cooperative movement. The committee recommended that administrative controls over the cooperative movement should be strengthened (Naali:138-9), and its recommendations were adopted and implemented by the *Cooperative Societies Act 1968* and the *Unified Cooperative Service Act 1968*. Significantly, the government dismissed all criticisms which alleged political interference in the cooperative movement (Kimario:31).

Under s.3 of the *Cooperative Societies Act 1968*, the President appointed the Registrar (of Cooperatives), a Deputy Registrar "and such number of assistant registrars as may be required." Apart from powers relating to the registration of cooperative

societies [s.10],[14] the Registrar could remove the elected committee members of a society [ss.39 & 40], he could control how a society invested its funds [s.45(2)], and he could order enquiries into a society's constitution, activities and finances [s.68]; he also exercised control under Rules made by the Minister [s.99].

There was no improvement in democratic control of the cooperative movement. Instead, the *Unified Cooperative Service Act 1968* deprived the cooperatives of the power to employ their own staff by establishing, under s.4 of the Act, a Commission responsible for appointment and transfer of, and exercising control over, all employees of cooperative societies other than primary societies. Presumably, primary societies were excluded because they were usually economically weak and not capable of employing more than one or two clerks at a time, mostly on temporary basis; but the Minister could, under s.13 of the Act, extend the Commission's jurisdiction to any primary society, a provision obviously intended to cover the wealthier primary societies. The Commission's Chairman was appointed by the President and the members, a minimum of 4 and a maximum of 6, were appointed by the Minister. Of the members, one represented the Minister and one represented the CUT.

Also under ss.73 and 75 of the *Cooperative Societies Act 1968* the Registrar could order compulsory amalgamation of two or more

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[14]In this paragraph, references in square brackets refer to provisions of the *Cooperative Societies Act 1968*.

societies and compulsory division of a society into two or more societies. This power was used to merge and divide cooperatives into units suitable for government control of the movement: one cooperative union was established for each administrative region, so that each union came under the direct supervision of a Regional Cooperative Officer acting as an Assistant Registrar of Cooperatives under the Act.

Meanwhile, as a result of the Villagisation Programme (*infra*, section 7.3.2), a new law was enacted in 1975 to give legal status to the many villages established over the previous two years. The *Villages and Ujamaa Villages (Registration, Designation and Administration) Act 1975* gave corporate personality to villages registered under it, declared such villages multi-purpose primary cooperative societies, but disapplied the *Cooperative Societies Act 1968* in those villages. *The Cooperative Societies Act 1968* was disapplied partly because membership of those villages was not entirely voluntary, which is a cardinal principle of the cooperative movement worldwide and which was also embodied in the Act. As a result of that disapplication, the regional unions lost their rural support base and, in May 1976, they were themselves abolished following a Party resolution to that effect (Kimario:132-40). The cooperative movement was virtually halted, its crop marketing function taken over by parastatal authorities.

After the merger of TANU and ASP, s.70(2) of the constitution of the new party, CCM, named the cooperative movement as another of

its "mass organisations." Accordingly, the Party "formed" such an organisation under its constitution, calling it "*Washirika.*" Then the *Jumuiya ya Muungano wa Vyama vya Ushirika (Establishment) Act 1979* made *Washirika* the sole apex organisation and required all cooperative societies[15] to affiliate to it. The rules and practice of *Washirika* reflected its status as an organisation of, and subservient to, the Party in the same way as was the status of JUWATA (McHenry 1994:113-4).

In 1982 the *Cooperative Societies Act 1982* was passed to revive the cooperative movement. It retained many of the powers of the Registrar (Naali:148-9) under the 1968 law, which it repealed. But the new law also repealed the *Jumuiya ya Washirika Act 1979* and asserted the right of the cooperative societies themselves to form and control their own apex organisation, to which the Registrar was expected to "gradually delegate his duties of promoting" and advising cooperative societies, and whose Secretary-General he had to consult each time he wanted to dissolve or suspend a committee, for failure to perform its duties properly, and to appoint a temporary one in its place.[16]

Despite the repeal of the *Jumuiya ya Washirika Act 1979*, its creation, *Washirika*, continued with Party backing to function as an apex organisation without any legal basis for almost 8 years. Once again the Government was startled by the High Court in

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[15]Urban cooperative societies survived the 1975-76 abolitions.

[16]The *Cooperative Societies Act 1982*, ss. 14(2) & 106(1), and s.2.

Conrad Berege v. Registrar of Cooperatives[17] when it quashed the order of the Registrar purporting to suspend a committee (of which the applicant was the Chairman) and to appoint a temporary one in its place. The order was quashed because the Registrar had not consulted the secretary-general of the apex organisation, and he had not consulted because there was then no such organisation in law. Following the court order, issued on March 17, 1990, the *National Apex Organisation of Tanzania (Formation) Act 1990* was passed and made *Washirika* an apex organisation.

This, however, was only a temporary measure. The cooperative movement was now falling into disgrace and by the end of 1992, unions had a debt of TShs 66 billion.[18] Besides poor or inefficient management, the extent of corruption reached alarming proportions, with cooperatives being used as mere conduits for moneys from bank loans dubiously negotiated by political leaders and government executives. A widespread attitude tended to regard the cooperatives as entirely government institutions. The committee members of the societies, elected there under the supervision of the party often assisted the bureaucrats in misapplying cooperative funds and felt no obligation to account to the members.

Meanwhile, however, some genuine cooperators continued to press for greater freedom, and to reject the state created *Washirika*

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[17]High Court of Tanzania, Dar es Salaam, Miscellaneous Civil Application No. 174 of 1989 (unreported).

[18]*Daily News*, October 13, 1992.

as their apex organisation. These developments (McHenry 1994:114-21) ultimately led to a new law, the *Cooperative Societies Act 1991*, abolishing *Washirika* and completely divorcing the cooperative movement from political control and patronage. In February 1992, CCM formally gave up claims over the movement as its mass organisation.

6.1.3: The Local Government System

Local government authorities are supposed to be institutions through which people are involved and participate in making decisions on matters affecting them in their localities. In practice, however, the central regime has always sought to use them to assert its control and influence over the population.

As mentioned earlier (*supra*, 2.4.1 and 3.1.1), at independence most of the country was administered through traditional chiefs under the *Native Authority Ordinance 1926*. But after independence, "district councils" under the *Local Government Ordinance* spread rapidly and replaced the native authorities.[19] But this promotion of local government strengthened central control and influence more than democratic control of local affairs. Firstly, it facilitated the swift elimination of tribal native chiefs. Before independence most of them, as agents of the colonial order, had been either indifferent or opposed to TANU and now the TANU government was not going to tolerate

[19]Wherever a district council was established, the *Native Authority Ordinance* ceased to apply; a detailed account of the post-independence development is given by Dryden.

continuance of their authority (Listowel:320-1; Morris & Read:263).

Secondly, apart from replacing chiefs, whose loyalty to TANU was doubtful anyway, the new district councils were also used to silence opposition to TANU. The generally small and weak opposition emerging against TANU (before the one-party state) and impatiently harassed out of existence (*supra*, 3.1.3) had actually sought political influence in local government in a few districts like Kwimba, Mwanza, Kilimanjaro and Bukoba.[20]

In elections to the Bukoba District Council in March 1963, some TANU candidates were defeated by independents; and once in the council they were joined by a few TANU councillors in resisting the TANU whip. This was clearly in line with, and probably inspired by, Nyerere's 1963 thesis on one-party democracy (Nyerere 1963); but the councillors were condemned as traitors (Bienen 1967:104-5). The TANU government dissolved the council and reconstituted another by nominations which included all the former councillors except the "independents," four of whom were detained (Hyden 1969:134-5). It demonstrated TANU's resolve not to tolerate either opposition to, or independence from it in the organs of local government.

Control by TANU eroded local autonomy and enhanced central control; the organisation and power structure of TANU usually exalted central organs (*supra*, 4.4.3), at the expense of the

[20]See generally, Tordoff 1967:115, Bienen 1967:102-3, Maguire:339-43, and Pratt 1976:196-7.

branches. Even in the one-party elections introduced by the *Local Government Elections Act 1966*, the District Executive Committee of TANU sometimes reversed the local preferences expressed through TANU Branch Conferences in nominating the two candidates presented to the electorate.[21] An attempt to question the District Executive Committee overturning such a local preference was made in *Re: Petition by Habel Kasenha*,[22] but failed because courts were precluded from questioning the deliberations of any Party organ in the electoral process.

Local authorities were then invariably regarded, and increasingly used, as tools for carrying out programmes decided upon by the central government without any local involvement. Although the Government provided grants to pay for these programs, they nevertheless burdened local authorities with incidental costs and in various other ways. Primary education, for example, was a local government responsibility but the central government decided, without involving local authorities, to expand its provision to at least 50% of all children and then, under the 1964-69 Five-Year Development Plan, to extend its duration from 4 to 7 years. These practices added to the burdens of the local authorities, many of which were already weak and facing numerous other problems which tended to justify central government intervention and control to ensure survival (Dryden:111; Pratt 1976: 194-6).

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[21]In local government elections, the TANU District Executive Committee had the screening powers exercised by the NEC in national elections.

[22][1967] E.A. 455.

In frantic endeavours to raise revenue, some of the local authorities even used Riot Police to track down local rate defaulters, which is itself revealing since the Police Force is an exclusively central government institution. Then the 1968 Ilemera tragedy in Mwanza District where 13 local rate defaulters died of suffocation while locked up in a cell[23] prompted the Government to abolish the local rate, leaving local authorities without revenue. And in 1972, local government was abolished in a massive reorganisation of Government administration ironically labelled Decentralisation (Nyerere 1972).

The Decentralisation Programme was carried out under the *Decentralization of Government Administration (Interim Provisions) Act 1972* which dissolved the local government district councils and replaced them with District Development Councils. The latter councils were dominated by Staff and Functional officers consisting mainly of local heads of the central government departments in the districts, many of whom were quite senior in the ranks of government administration but were transferred to the districts as part of the programme. They were headed in each district by the District Development Director who was appointed by the President and, through him, they were responsible entirely to the central government, which provided the funds for carrying out all programmes and decisions affecting the district. In short, the Decentralisation Programme was a "decentralisation" of personnel, not power, from the headquarters

[23]Vol.1 *Africa Contemporary Record 1968-1969*: 214.

of the central ministries in Dar es Salaam, to the regions and districts (Coulson 1982:254).

The decision to re-establish local government ten years later was given the usual praise as enhancing democracy and giving power to the people.[24] But while the new law did not require the establishment of district councils in every administrative district immediately[25] so as to enable gradual implementation responding to popular demands from the respective districts, in 1983 all district councils in the country were established on a single day[26] and mandated to start functioning in January 1984. Popular demand is usually spontaneous; it could not have led to that wholesale re-establishment of district councils in a single day, with a uniform staffing pattern pre-determined by the central authorities without any regard to differences in geographical areas, population sizes, resource base and so on amongst the various districts (Mutahaba:142-3). The central government must have had its own objectives, other than enhancing local democracy and people's power, in reviving the local government system.

For village councils, constituting a tier of local authorities subordinate to district councils, it is at least clear that their initial establishment under the *Villages and Ujamaa Villages*

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[24]*Daily News*, October 7, 1982.

[25]*Local Government (District Authorities) Act 1982*, s.5(1), (2) & (3).

[26]By G.N. 134 of 1983.

(Registration, Designation and Administration) Act 1975 was for purposes of giving legal status to the thousands of village settlements established, some of them forcefully, under the Villagisation Programme (*infra*, 6.3.2). That law has now been repealed but village councils have been saved as local government authorities. The law has always provided for all adult members of a village to elect the village chairman, village secretary and the other members to constitute the village council. But until July 1992, it also provided that in any village with a branch of the Party, the Party Branch Chairman and Secretary automatically became Chairman and Secretary of the village[27] (and village council). As most villages had Party branches, it is these Party functionaries who automatically assumed leadership in the villages. The Party Branch Chairman was elected by party members of the Branch while the Branch Secretary was appointed by the Central Committee of the Party. In some villages, the ordinary villagers had no power or influence over them at all (Ngware & Haule:30-1).

At other levels, the Party has continued to control both district and urban councils in various ways, including screening candidates in council elections. Other central government controls could be defended because, after all:

> ...local government presupposes a central authority to which it is subordinate.... [and] the central government must ultimately be in control or else it is not a central government and "the state" will have no international reality. (Davies:1)

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[27] *Local Government (District Authorities) Act 1982*, s.56; it has since been changed by s.13 of the *Local Government Laws (Amendment) Act 1992*.

But in Tanzania, that control tends to go beyond what is necessary to safeguard sovereignty. For example, all local government employees are appointed and controlled by a central Commission whose chairman and members are appointed by the President and the Minister respectively, under s.4 of the *Local Government Service Act 1982*. Even amongst the local population in some areas there is very little understanding of local authorities as their institutions; they regard them generally as institutions through which the Government hands down to them orders and directives, and ensures they are complied with (Ngware & Haule:32-3).

With multi-party politics in July 1992, the central authorities still ensured that local authorities do not become too independent of central control. The *Local Authorities (Elections) (Amendment) Act 1992* does not allow independent candidates in council elections. It means that all local councillors must, as a condition, subscribe to fully registered political parties which, according to the *Political Parties Act 1992*, must espouse a highly centralist orientation in both their ideologies and their constitutions.

The ruling CCM took advantage of its well established network by fielding candidates for all seats in the 1994 local government elections and winning absolute majorities in all urban and district councils,[28] except for Bariadi District Council where

[28] *Tanzanian Affairs*, No.50 (January 1995): 9-10.

CCM and the Opposition members are evenly balanced.

6.2: STATE CONTROL OF CIVIL ORGANISATIONS

The power of state control over groups and organisations not otherwise defined by specific laws is provided for under the *Societies Ordinance 1954*. Enacted the same year as the formation of TANU, it is sometimes claimed that the Ordinance was specifically intended to contain TANU. But apart from its subsequent use to proscribe TANU in some districts, the claim is extremely doubtful.[29] Rather, there seems to have been a policy of the Colonial Office at the time which led to the enactment of this Ordinance and similar laws in other British colonies mainly in response to growing African nationalism after the Second World War.

The *Societies Ordinance* is a very repressive law administered by the Ministry of Home Affairs. It defines a "society" as any club or group of ten or more persons, whatever its nature or object, but does not include cooperative societies, trade unions, business partnerships, companies registered under the *Companies Ordinance*, or any society declared by the President "not to be a society." The remark that its wording "was so wide that it covered even Sunday School classes" (Bates,M.L.:423) was certainly correct: a statutory order was issued to expressly declare, among others, congregations assembling "exclusively for the purpose of

[29]The *Societies Ordinance* came into force on June 1, 1954, by G.N. 121 of 1954, published on May 7, 1954, while TANU was formed on July 7, 1954.

religious teaching and worship" not to be societies for the purposes of the Ordinance.[30]

Every society is required by s.7 of the Ordinance to apply for registration otherwise it will be an unlawful society; according to the statutory definition, every society is an unlawful society unless it is either registered or exempted from registration. The Registrar of Societies has power to register a society, or to exempt it from registration, or to refuse it registration. Refusal could be for various reasons, including the subjective opinion of the Registrar that the society is likely to be used for purposes prejudicial to "peace, order and good government," or simply that its registration is "undesirable." He may, for similar reasons, rescind an exemption or cancel a registration. The Registrar of Societies is the Principal Secretary to the Ministry of Home Affairs, responsible to the Minister and holding office at the pleasure of the President.

Under s.6A of the Ordinance the Minister may require any group, even if excluded from the statutory definition of "society", to apply for registration. The group must then apply at once or else it becomes an unlawful society, membership (and the management) of which is an offence. And s.6 empowers the President, "in his absolute discretion," to declare any society unlawful where he considers such a declaration to be in the public interest. That power can be invoked against any society,

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[30]G.N. 208 of 1954.

group, or body of persons, including any that is "not a society" under the Ordinance!

In short, under the *Societies Ordinance* the right and freedom of individuals to associate and form groups for various lawful purposes is there only at the pleasure of the Executive. With that background, we look at how the state has been able to stifle and control civil society to its use and advantage. The cases of youth and women, religious organisations, and professional associations are used as illustrations of the general pattern.

6.2.1: The Youth and Women Organisations

Throughout the three decades of independent Tanzania, any references to youth and women's organisations generally have been references to the Youth and Women's wings of the ruling, and for the most part, only political party. Both were established before independence as part of the nationalist movement. The Women's League, hereinafter UWT, was founded in 1955 as the Women's Section of TANU by *Bibi* Titi Mohamed, a semi-literate Dar es Salaam woman who, within a year, mobilised it into the largest and only women's body in East Africa then (Bennett:20). The Youth Wing began as a TANU supporters club for those aged under 18. It became known as the TANU Youth League (TYL) and its first leader was Rashidi Kawawa (Bennett:23-4). Later, its constitution prescribed the age of 12 to 35 years for its members, and after 1977 it became known as the CCM Youth League, or *Vijana*.

The secretaries-general of both organisations were appointed by the President (who was also the Chairman of the Party), and held office at his pleasure. In making the appointments the Chairman was not subject to any restraints, and he sometimes appointed even persons who might not have qualified for membership! On a number of times, TYL or *Vijana* had a secretary general aged over 35 years, and for a brief period in the 1960s, a man was secretary-general of UWT! Regional and district secretaries of UWT and *Vijana* were appointed by the Central Committee of the Party. Other positions were elective but contestants were subjected to a screening process by the Party. The secretary-general and national chairperson of each of the two organisations have always been *ex officio* members of the NEC.

As constituent sections of the Party the two organisations always took it as their duty to actively recruit and mobilise support for the Party and its policies. Through them, the formation of other general purpose youth or women's organisations was actively and successfully prevented. There was no law against it as such; but the presence of UWT and *Vijana* was used to discourage as divisive, and therefore undesirable, all attempts for such organisation outside the Party. Thus the only other youth and women organisations were those of special interests or particular characteristics like the Young Christian Society, or the Tanzania Media Women Association (TAMWA) formed in the 1980s. But these were few and even there, UWT or *Vijana*, as the case may be, always sought involvement just to ensure that they were not used for rival purposes.

Briefly, the two organisations have been used to further the general interests of the ruling party.

An interesting case in relation to the youth is that of students. In October 1966, students of the University College, Dar es Salaam (then a college of the University of East Africa), apparently joined by a few students from some other colleges in the city, staged a protest march to the State House. They protested against terms of a new scheme which required them to do two years of National Service at a considerably less pay than their prescribed civilian salaries (Coulson 1982:225). The students' demands were generally elitist and self indulging, and President Nyerere expelled them; they only returned to college after a series of apologies and pleadings, and a year of humiliation (Smith:27-30; Peter & Mvungi:164-73). An immediate reaction of the TYL was to establish branches in all colleges and secondary schools, and to seek domination in almost all students' extra-curricula activities. But at the University, it was not TYL but the leftist University Students African Revolutionary Front (USARF) and its publication, *Cheche*, which became prominent in influencing students' political thought (Peter & Mvungi:174-81).

In July 1970, Dar es Salaam was established as a complete university and Pius Msekwa, until then TANU's Executive Secretary, was appointed Vice-Chancellor. On November 9, 1970, he announced that the government had banned USARF and its publication, *Cheche*, because:

> USARF had become a redundant organisation since TYL was supposed to exercise a monopoly of all political activities on the campus. USARF, the Vice-Chancellor explained, had been meddling in the political affairs of Tanzania by its mordant commentaries on various issues without any specific *locus standi* since it represented no recognized body inside Tanzania or abroad. (Peter & Mvungi:178-9)

And so ended one of Africa's most independent student bodies. The TYL campus branch, soon elevated to a district of the TYL, tried with a new publication, *Majimaji*, to capture the militant elements left by USARF. But unlike USARF, the TYL University District was not independent and its purported militancy was simply a strategy to keep militant students under control.

Besides the presence of the TYL, the *University of Dar es Salaam Act 1970* provided for a representative body of students and on that basis the Dar es Salaam University Students Organisation (DUSO) was established. It was not part of the TYL and was free to comment and give its own views and position on matters of public interest. In 1977 DUSO demonstrated against France's Foreign Minister, Mr Giringaud, when he came to Dar es Salaam in his African tour seeking to sell the idea of a French commanded African peace keeping force. This French initiative, strongly opposed by Nyerere, followed Zaire's Shaba Province uprising against General Mobutu, which had been put down earlier that year by Moroccan troops using French transport planes. Angry at the demonstrations, Giringaud demanded an apology, but Nyerere's government did not oblige; furious, he abandoned his mission (Peter & Mvungi:187). Nyerere was to admit later that he was actually happy with that outcome of the students' demonstration![31]

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[31]In a talk with the University community on July 31, 1978.

For those demonstrations DUSO had been refused Police permission under the *Police Force Ordinance*, so the students had demonstrated without a permit. They repeated that in March 1978, when they demonstrated against lucrative salaries and fringe benefits which Parliamentarians had just voted for themselves, this time with dire consequences (Peter & Mvungi:187-91).

Firstly, in their protest march, actively supported by some city workers, the students were violently intercepted by the Police who dispersed them. Secondly, those who managed to regroup and proceed to their destination in the city, about 400 of them, were expelled from the university by the government. Finally, DUSO was immediately banned. The contrast between 1966 and 1978 was that while in the former the students sought to protect their own privileges, in the latter they joined the "exploited workers and peasants to protest" against a privileged state bureaucracy which then saw them as a real threat (Coulson 1982:230). On the difference in government reaction between the 1977 and the 1978 demonstrations, Nyerere light heartedly advised the students that in future they should also try to figure out which side of their cause the "Chief of Police" was likely to be before demonstrating without a permit.[32]

The abolition of DUSO coincided with the change in the youth organisation from TYL to *Vijana* (or CCM Youth League) after the birth of CCM in 1977. The University Branch of *Vijana* was

[32]In a talk with the University Community, July 31, 1978.

instructed to assume all DUSO's functions and responsibilities. *Vijana* branches in other institutions of learning were instructed to do the same in their respective campuses.[33] Later that year, *Vijana* held its National Conference at Iringa, where:

> *Muungano wa Wanafunzi wa Tanzania* (MUWATA) was conceived as a pan-territorial student organisation under the control and supervision of the Youth League. A tailor-made constitution was adopted without students having been consulted. (Peter & Mvungi:191)

MUWATA was, simply stated, a campus extension of the ruling CCM through *Vijana*, its Youth League. The constitution of MUWATA was drawn by *Vijana* whose own constitution was drawn by CCM. Elections for MUWATA leadership were supervised by *Vijana*; the latter also screened the aspirants like the Party did in national and civic elections. With MUWATA, state control over students was complete.

6.2.2: Religious Organisations

There are three main religious groups in Tanzania: Christian, Muslim and Traditional. A small minority belongs to other smaller groups but those three are the main ones, sharing the population amongst them almost equally. Freedom of religious belief and practice is a right of the individual guaranteed under s.19 of the *Constitution 1977*, which also precludes the state from propagating any (or against any) religion.

In considering relations between the state and religious

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[33]Until then, independent students' organisations had continued in a few colleges like IDM Mzumbe, and Ardhi Institute (Dar es Salaam).

organisations, it is common to ignore traditional religions for various reasons, including their indeterminate numbers and sometimes indefinite organisations, as well as the ease with which they can either accept or co-exist with foreign religious practices.

Of the remaining two major groups, the government deals with them, conveniently, through main bodies which function as "umbrella" organisations (Omari:29). These are the Christian Council of Tanzania (CCT) for all Protestant denominations and the Tanzania Episcopal Conference (TEC) for Catholics, and for all Muslims there is the Supreme Muslim Council of Tanzania, better known by its Swahili acronym, BAKWATA. The government has desisted from dealings with religious congregations except through those organisations. Usually any religious group claiming to be Christian or Muslim must indicate its affiliation with one or the other of those three bodies, otherwise it may invite the use of the government's censorial powers under the *Societies Ordinance*.

The government has always had very good relations with those three bodies, effectively using them to contain all religious groups and to encourage harmony with them. The leaders of those three bodies have usually been invited to NEC meetings as observers whenever matters touching on religion were to be deliberated. All attempts to challenge their hegemonic role over religious groups has been discouraged. Thus, in those three, it is as if a single ruling party has been established for each

religious organisation and administration.

That those three bodies serve to facilitate state control of religious groups is not always too obvious. But it may be easier to see it in relation to BAKWATA than it is in relation to the other two. The state in Tanzania has had good reason to concern itself with either appeasing or containing Muslim communities. Until independence Muslims lagged behind in secular education and for that reason they were the only community to form a political party based on religious identity: the All Muslim National Union of Tanganyika (AMNUT) was formed in 1959 and sought to challenge TANU by demanding that independence be delayed until more Muslims were educated (Omari:26; Mwakyembe 1986:39).

After independence the TANU government, unable to educate more Muslims overnight, had to be concerned about the possible Muslim dissatisfactions developing into mass grievances of an entire religious community. It suited the government to have an all embracing Muslim Council through which their impatience could be assuaged. Accordingly, BAKWATA was formed in 1968 with active government encouragement. The founding conference at Iringa was attended and addressed by, among others, Abeid Karume, the First Vice-President and President of Zanzibar, and Rashidi Kawawa, the Second Vice-President. And from its inception, the organisation and administrative set-up of BAKWATA has been remarkably similar to that of the Party.

Rashidi Kawawa has admitted that the government had indeed

encouraged the formation of BAKWATA for the sake of harmony among Muslims who, until then, belonged to diverse groups, sometimes quarrelling amongst themselves; only an irresponsible government would remain insensitive to such growing social divisions. But he insists that the Policy of the TANU (and later CCM) government has always been to work in cooperation with all religious groups and not to dictate to them. He and Karume, he says, attended the Iringa Conference and addressed it as Muslims; what they said was probably given much weight because of their national leadership positions "but certainly there was no scheme for TANU to dominate any religious organisation."[34]

On the organisational similarity between BAKWATA and the Party, Kawawa says:

> TANU began in Dar es Salaam and spread among Muslims. Naturally the Muslims in TANU had a hand in forming BAKWATA as Muslims, not as TANU. And in 1968 TANU's organisational structure was regarded by all of us as ideal for any organisation. Thus when forming BAKWATA, we TANU leaders and members who were there copied the TANU structure into BAKWATA simply because we saw it as the ideal structure.

That is overall a convincing explanation.

But doubts about government intentions with BAKWATA are not based on the founding conference. One of the resolutions at that conference was for all Muslims to dissolve their then existing congregations and make them regional and district organs of BAKWATA. Most congregations dissolved themselves accordingly. The state assisted in implementing that resolution against the

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[34]Interview with Mr Rashidi M Kawawa, August 25, 1994; this whole paragraph and the next are based on that interview.

few congregations not willing to dissolve themselves voluntarily. Thus the *East African Muslim Welfare Society*, along with the Tanzania Council of that society, were dissolved and ordered to wind up by the government,[35] and their assets then vested in BAKWATA by a subsequent order.[36] Similarly, the *Al Jummiyatul Islamiyya Bi Tanganyika* was declared an unlawful society, and its assets subsequently vested in BAKWATA.[37]

The Arusha Muslim Union survived until 1990 when the courts held it to be an unlawful society, and it thereby lost all its assets to BAKWATA.[38] The reason for the holding was that because the group had engaged itself in a number of other ancillary activities like running a dispensary and a school, it was beyond a congregation assembling "exclusively for the purpose of religious teaching and worship", which were excluded from the application of the *Societies Ordinance*. To be lawful, therefore, it ought to have been registered as a society.

Recently, some Muslim groups have tried to organise themselves independent of BAKWATA but most have failed to secure registration. There is one though, which managed to secure registration and even to gain prominence in recent years: the *Baraza la Uendelezaji Kuran Tanzania* (BALUKTA). Its prominence

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[35]By G.N. 434 & 435 of 1968.

[36]G.N. 169 of 1969.

[37]G.N. 97, 98 & 312 of 1970.

[38]*Arusha Muslim Union v. BAKWATA*, Tanzania Court of Appeal, Civil Appeal No. 33 of 1990.

shot up almost overnight in 1991 when it took position in defence of the one-party state by condemning Muslims who engaged in politics in opposition to the ruling (and by then, only) political party. Apparently, therefore, BALUKTA "bought" its prominence by seeking an alliance with the Party. The alliance failed to persevere, though, as in 1993 BALUKTA was given notice of intention to cancel its registration. This followed the arrest of its leader, Yahya Hussein, and some of its members for alleged criminal conduct which included unruly behaviour and wanton destruction of property.[39]

Meanwhile, state relations with BAKWATA, and with the CCT and the TEC, have continued to be generally harmonious.

6.2.3: Professional Associations[40]

The state has been able to control professional organisations in various ways but by far the most effective has been the outlawing of trade union activity outside the single government-controlled union. This was used to suppress voluntary professional associations by requiring them not to concern themselves with issues relating to better working conditions in their professions because those are trade union concerns; it undermined the meaningful purpose of professional association. After some years

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[39]This was the chaos of Good Friday 1993 in which a number of Dar es Salaam pork butcheries were destroyed, as prominently reported by the local press from 10th to 17th April, 1993.

[40]The analysis here does not include statutory organisations, like the Tanganyika Law Society or the Tanzania Medical Association, which are established by specific laws governing practice in their respective professions.

without any formal organisation of their own, members of the academic staff of the University of Dar es Salaam managed only in 1983 to organise themselves into an "Academic Staff Assembly" (in 1983) by claiming that it was a constituent part of the university's Convocation, established under the *University of Dar es Salaam Act 1970*.

As the greatest single employer of all professions in the country, directly or indirectly, the government has been able to control the geographical distribution of various professionals, often isolating them into tiny pockets of individuals, impossible for any meaningful organisation or, alternatively, weakening the effectiveness of any professional organisation that manages to be formed.

The few professional associations formed in Tanzania have generally sought to organise themselves into single territorial organisations, reducing the chances of having a multiplicity of associations drawing members from the same profession. The associations are based in the capital, Dar es Salaam, where their office bearers are also stationed; they can only have branches in the up-country regions. Inevitably, therefore, they end up with organisational structures very similar to that of the ruling party. But most of them are not active outside the capital, where most of their members are usually based.

The general belief is that the tendency to avoid rival or multiple organisations in the same profession has been voluntary.

It would seem, however, that the government has also preferred that pattern and discouraged the formation of multiple organisations for the same reason of avoiding divisions in society through multiple organisations. It has also made government control easier. Thus after any professional association is registered, attempts to form another organisation in the same profession are strongly discouraged.

In 1989/90 a group of junior doctors based at the Muhimbili Medical Centre in Dar es Salaam decided to form an organisation of their own, the Tanzania Junior Doctors Association. The idea was that junior doctors in the other consultant hospitals at Mwanza, Moshi and Mbeya would join the association and form active branches in their respective centres. But registration of this association was delayed for over a year because, as the doctors were told, there was already registered long ago a Tanzania Medical Association embracing all medical practitioners; the junior doctors were reminded of their freedom to join it at any time instead of setting up a rival organisation. It was as if a "one-party" rule applied with regard to every civil and professional organisation as well.

Rather surprisingly, even lawyers tended to support this "one-party" rule. At the 1990 Annual General Meeting of the Tanganyika Law Society,[41] there came up for discussion the question whether two lawyers' groups should be registered (under

[41]Established under the *Advocates Ordinance* for governing and regulating legal practice, and of which all practising lawyers must be members.

the *Societies Ordinance*) or not: the Kilimanjaro Lawyers Association (formed by lawyers based in and around Kilimanjaro Region) and the Tanzania Women Lawyers Association (formed by women lawyers generally but mainly based in Dar es Salaam). There was strong opposition from some of the members of the Law Society who advanced learned arguments remarkably similar to those of the Party in defence of its monopoly position.

That this came up for discussion at the Annual General Meeting of the Law Society could be revealing. After receiving applications for registration from the two lawyers' groups, the Registrar thought it wise to seek the opinion of the Law Society before making his decisions. Before the Annual General Meeting the Council of the Law Society had discussed the applications, and was inclined to advise the Registrar to refuse registration for the two groups; but the minority view in the Council vehemently insisted that the question be put before the Annual General Meeting which, in the event, supported the registrations.

Apparently, one means the government uses to control professional and other civil associations is through existing organisations or their leaders, patronising them or offering them favours, and then using them to exert influence or exercise control over potential activism. When favours and co-optation into government ranks fail, suffocation or subtle coercion of the organisations may serve the purpose. Either way, it is always better and more efficient for the government to exercise control through a single organisation. That is why with the proliferation of non-

governmental organisations (NGOs) in the late 1980s, the government initiated and virtually organised the formation of an "NGO umbrella" organisation, TANGO (Sandbrook & Halfani:180).

With the Junior Doctors Association the government, unable to suppress or patronise it, decided to use its powers as the employer. In January 1992 when the doctors stopped work demanding improved facilities at the consultant hospital, the government sacked all 70 of them. The entire hospital came to a halt as all doctors, nurses, medical students and all students of the University of Dar es Salaam, marched to the office of the Prime Minister, who was forced to reverse the decision sacking the doctors. But to weaken the association, its secretary, Dr J J Masika, a paediatrician was transferred from the consultant hospital to a Council Clinic in the city. Another leader of the association, Rubera Mafwiri, a surgeon who was very active in mobilising support in the January 1992 crisis, was transferred to the Lindi Regional Hospital in the far south; and to remove all pretexts for him to remain in Dar es Salaam, his wife, an eye specialist, was transferred to the same remote region, where her expertise could not be utilised. All three doctors resigned from government service.

An organisation of professionals which became a faithful servant of the government is the Tanzania Journalists Association (TAJA). It was formed in the 1980s; Salim Ahmed Salim, Minister for Foreign Affairs and then Prime Minister, was its Patron. TAJA did nothing to arrest the degeneration of the mass media industry

into a publicity enterprise for the government. The association sank into absurdity: when in 1992 the President, exercising his powers of appointment (and removal from the public service), removed its secretary from active journalism as Managing Editor of the government owned *Daily News* and made him a Desk Officer in the Information Department, TAJA's President congratulated the government for the reforms!

At a meeting in May 1994, called by concerned journalists (not TAJA leaders), TAJA had only one confirmed subscribing member, Ndimara Tegambwage. Ironically, he led the initiative to form a rival organisation, the Association of Journalists and Media Workers (AJM), which was registered in August 1994.

6.2.4: The Mass Media

The uninspiring role of TAJA shown above reflects the extent to which the mass media came to in serving the government: state control of the mass media during the period of this study was thorough and complete.

At first, the instruments of control were the *Newspaper Ordinance 1928* and the *Penal Code*, both relics of colonial legislation. The former required a newspaper to be registered, and its publisher or proprietor to execute a bond, with or without sureties, in a sum not exceeding Shs 20,000/-, against possible liabilities arising out of the publication of the newspaper. On the other hand, s.51 of the *Penal Code* empowered the President,

"in his absolute discretion" to prohibit the importation of any publication if "in his opinion" such prohibition was in the public interest. Also under ss.55 and 56 of the Code, the offence of sedition was so widely defined as to include publishing anything that could provoke disaffection to the government (Shivji 1991:10-2).

Then the *Newspaper Ordinance* was amended[42] to empower the President, if "in his opinion it is in the public interest" or that of "peace and good order", to order any newspaper in the country to cease publication. In 1976 the *Newspapers Act 1976* repealed the Ordinance and consolidated all the control powers with those hitherto under the *Penal Code* as cited above. Under the new law, though, the power to ban a newspaper or publication was moved from the President to the Minister.

The power to prohibit the importation of publications was used in 1968 to impose an 18-month ban against the *Daily Nation* and its sister papers,[43] in 1974 against *Drum* magazine,[44] and in 1976 against a dozen books,[45] all from Kenya. On the other hand, it is said that the initial aim of the provision whereby a newspaper can be ordered to cease publication was to enable the government to ban a publication by elements loyal to Oscar

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[42]By the *Newspaper Ordinance (Amendment) Act 1968*.

[43]Ban imposed by G.N. 391 of 1968 and lifted by G.N. 35 of 1970.

[44]G.N. 285 of 1974.

[45]G.N. 105 of 1976.

Kambona, former Foreign Minister and Secretary-General of TANU who in 1967 fled into exile in Britain (Martin,R:94). In the event, no such publication ever went into circulation, and that power has hardly been used; the only known case was as recent as 1993, when two papers, *Michapo* and *Cheka* were banned.[46]

But the mere presence of that power, which could be used at any time, made newspaper publishing a risky business and may have scared many prospective newspaper publishers. Most of the newspapers registered under the *Newspapers Act 1976* were owned and published either by government departments or by parastatal corporations, promoting their respective concerns.

Kiongozi, owned by the Catholic church, was one of the very few exceptions. But by 1976 it had lost much of its previous reputation as a free and independent paper for a general readership. In 1972 the bi-monthly was moved from its centre at Kipalapala in Tabora, where it was under independent management, to Dar es Salaam where it merged with the official Catholic mouthpiece, *Ecclesia*, under the Public Relations department of the Tanzania Episcopal Conference. This was after an incident in 1971 when the *Kiongozi* offices at Kipalapala were ransacked by the Police looking for the original script of a reader's letter published under the pseudonym "Macho", i.e. "eyes", condemning the conduct of some members of the National Service

[46]By G.N. 8 of 1993.

forces.[47]

As such, the only available newspapers for general purpose readership were the Party-owned dailies, *Uhuru* (Kiswahili) and *Nationalist* (English). The other English daily, *The Standard*, was taken over by the government in 1970 and in 1972 merged with the *Nationalist* to form the *Daily News*, owned by the government. For over two decades, *Uhuru* and *Daily News* remained the only dailies in Tanzania. This is something of a paradox since, during that same period, Tanzania earned an international reputation for a highly successful literacy campaign which was set to exceed the 90% literacy rate under the 1981-1986 Development Plan (Tanzania 1982:143-60). But it explains why there was no banning of newspapers: besides those owned by the state, there were hardly any newspapers to ban. Besides newspapers there has been Radio Tanzania, the most effective medium in the country, which is a government department. Until 1994, Tanzania had no television broadcasting service, except for Zanzibar where there was one, government owned, since 1972.

Unable to use its harsh laws against its own press, the government used other methods to ensure that the content of the press conformed with its requirements and interests. The most effective was to appoint as editors only those persons least likely to disappoint the government. This was used, with

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[47]This paragraph is based on information from Fr David Matipa, former editor of *Kiongozi*, and Fr Rweikiza, current head of the Publicity department of the TEC, as well as my own knowledge as former contributor to *Kiongozi*.

considerable demonstrative effect, against Frene Ginwala,[48] the first Managing Editor of the government owned *The Standard*, when she was sacked abruptly in 1971. There had been a coup which toppled Jaafar el-Numeiri in Sudan but he was restored to power in a successful counter-coup three days later, and he immediately executed the coup-plotters. Frene Ginwala was sacked because of her editorial in *The Standard* clearly sympathising with the coup-plotters, and virtually advising any "other progressive oriented" coup plotters to be more scrupulous in executing their plans.[49]

The lesson was learnt. Since then, the editors adopted and rigorously enforced a "self-censorship" code to ensure that they do not offend the government. There were even claims, which have never been disputed, that some editors saw it prudent sometimes to send to the State House draft editorials on sensitive issues for approval before publishing them. Those who properly observed this code were well rewarded with promotions to become Press Secretaries to the President or the Prime Minister, or even ambassadors. These promotions may as well have been used to remove good independent editors from the press. Either way, they worked as "an incentive" to succeeding editors to observe the "self-censorship" code.

Besides the *Newspapers Act 1976*, state control of the mass media has also been exercised through the *Tanzania News Agency Act*

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[48]Now Speaker of the South African Parliament.

[49]Information from Mr Jenerali Ulimwengu, MP, then a *Standard* staff writer, and Mr A M Babu, then a cabinet minister.

1976. The Act established the Tanzania News Agency and gave it exclusive monopoly rights to collect and to distribute any news in the country. Under that law, no other person or body may collect or disseminate news in Tanzania, save with the authorisation of the Agency, given upon application and payment of a fee to the Agency. At any time the Agency may suspend or revoke its authorisation without assigning reasons. One effect of this law is to impose a "self-censorship" obligation on all news writers and publishers otherwise the Agency may revoke its authorisation for them to operate.

In serving the interests of the state, the press became very selective in the news it reported, and how it reported it. Sometimes even reports critical of some government practices were published, provided they did not appear to challenge the hegemony of the state party. For example, in the early 1970s a very lively debate was carried on in the government owned daily about the dangers of government policies on tourism.[50] Also, all newspapers and the radio reported in detail the series of industrial actions of 1971-73 in Dar es Salaam, and their brutal suppression by the government. But the "Villagisation Programme" (*infra*, 6.3.2), in which the use of force against peasants would have been equally embarrassing to the government, was never reported.

At times the press gave misleading reports or deliberately

[50]The debate was subsequently published as a book: Shivji (ed) (1973).

falsified impressions to suit government interests. Thus when university students were expelled for demonstrating against ministers' and MPs' salaries and fringe benefits in 1978, the press reported that the students were expelled because of their acts of hooliganism in an illegal demonstration against government plans to send experts to work in rural areas! (Peter & Mvungi:190) Another interesting case occurred in after the government published the Bill for the *Regulation of Land Tenure (Established Villages) Act 1992*. Apparently, the Bill was widely criticised and some people even tried to campaign against it.[51] To counter the criticism, Radio Tanzania announced in one of its popular broadcasts that the Bill actually resulted from the recommendations of the *Presidential Commission of Enquiry into Land Matters* which had just submitted its report (Tanzania 1992b). This turned out to be a lie and the Chairman of the Commission refuted it;[52] the Commission submitted its report on November 12, 1992, while the Bill had been published three days before! It was therefore a case of Radio Tanzania lying in order to defend a particular government policy.

For a long time the people of Tanzania had had doubts about the authenticity of the reports they were getting from the Radio, as well as from the other state owned media. That is why throughout the 1980s it became increasingly common to rely on foreign publications and the BBC Swahili Service for authentic balanced

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[51]*The Express*, November 26, 1992.

[52]By *Press Release*, reference No.LC/ADV/1 of November 17, 1992.

news about Tanzania.

That was changed by the emergence of a vigorous free press after 1990. By the end of 1994, there were a total of five dailies and more than ten periodicals, one independent radio station (excluding those of religious organisations), and three independent television stations.

6.3: COMMUNITY RIGHTS AND THE STATE

Since independence, and especially after the Arusha Declaration of 1967, Tanzania's policies placed a heavy emphasis on rural development. Underlying that emphasis was the importance of agriculture, by small holder peasant farmers, to the national economy, and the fact that more than 70% of the population lives in the rural areas. There was also compliance with Nyerere's view of responsible government: to him, a responsible government was not only one voted into office by, and deriving authority from, the many (Nyerere 1958:87), but also one capable of, and devoted to, leading those many forward to economic development (Nyerere 1961c:340). That, we may say, has been Nyerere's concept of an ideal government.

Accordingly, Nyerere repeatedly drew attention to issues of rural development throughout his rule. Even the thrust of his argument for socialism as a development strategy reflected his concern for the well-being of the many. Thus in 1967 the Arusha Declaration

was followed shortly by "Socialism and Rural Development",[53] a policy paper for the application of socialist principles of development to rural Tanzania. This led to the "*ujamaa* village"[54] strategy and its subsequent variations which dominated rural development policy making and implementation in the late 1960s and 1970s.

One of the requirements of the *ujamaa* village strategy was the need for the rural population to settle in permanent village clusters. Within the village, *ujamaa* emphasised "work by everybody", preferably work in communal endeavours as far as possible, and exploitation by none. The ultimate in Nyerere's ambition was an egalitarian rural society based on the members' equal participation in their affairs, both economic and political, and self-reliance. Democracy was essential to *ujamaa* villages: there could be "no socialism without democracy" (Nyerere 1968:5,234). Achieving that kind of development, even if difficult, would not be impossible because, according to Nyerere, *ujamaa* socialism was to be based on traditional African familyhood which, though interfered with by external influences through colonialism, could still be recaptured and developed to suit modern conditions (Nyerere 1966:164-6).

Before 1967 Nyerere had emphasised the need for village settlements so that peasant farmers could share the high costs

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[53]Reproduced in Nyerere 1968: 337-66.

[54]May be translated as "socialist village".

of modern farming facilities, and to make easier the provision of essential facilities like hospitals, schools, and clean water supply, and to provide an opportunity to improve democracy (Nyerere 1966:183-4). After 1967, he added a socialist objective to village settlements (Nyerere 1968:351-3, 405-7) by emphasising self-reliance (instead of government-provided services), the voluntary association of the members and their own initiative and self-governance, as the essentials of an *ujamaa* village:

> Ujamaa villages.... cannot be created from outside, nor governed from outside. No one can be forced into an ujamaa village, and no official at any level can go and tell the members of an ujamaa village what they should do together, and what they should continue to do as individual farmers. No official of the Government or Party can go to an ujamaa village and tell members what they must grow.... For if ...an outsider gives such instructions and enforces them - then it will no longer be an ujamaa village! An ujamaa village is a voluntary association of people who decide of their own free will to live together and work together for their common good. They ....should not be persuaded to start an ujamaa village by promises of the things which will be given to them if they do so... (Nyerere 1974:36-7)

The role of Party and government leaders was simply to provide leadership by educating and convincing the people to set up or join *ujamaa* villages of their own volition.

But the paradox we analyse in this section is that a few typical *ujamaa* villages, voluntarily established and democratically organised, were disbanded by the government, which then went on to use compulsion to establish village settlements. There is thus an almost alarming contrast between Nyerere's "ideal" government referred to above, and his "real" government. The only explanation for this contrast is that the real government is consistent in its overall tendency to control, and to refuse to be controlled by, the people.

6.3.1: The Case of the Ruvuma Development Association

The Ruvuma Development Association (hereinafter "RDA") was an association of villages in Ruvuma Region, southern Tanzania, established by some determined TANU Youth League (TYL) members, and first registered under the *Societies Ordinance* in 1963.

During the first three years after independence, government sponsored village settlement schemes were launched in many parts of the country. A Village Settlements Agency (VSA) was established to coordinate the development of the schemes. It employed a number of staff and, through it, the government provided capital for the schemes. But many of the settlers in the schemes joined them merely on some unfounded expectation that the schemes would soon make them rich. They considered themselves as deserving a wage from the government, or the VSA, for working in the schemes. Not involved in the planning or management of the schemes, they had no commitment to their success (Brain:236-9). In only four years the schemes collapsed and the whole policy of settlement schemes was abandoned.

By contrast, the RDA presented a genuine *ujamaa* village experiment, from which even Nyerere's subsequent theoretical expositions on developing rural socialism are said to have evolved (Martin,R:34-5; Coulson 1982:319). It began at Litowa village and by 1967 it had 17 member villages. Its members had enough food, with a surplus to sell, from their communal farms; they had a sawmill and a grain milling machine, both operating profitably;

they ventured into wool processing and soap production; they had a clean water supply system installed with their own labour; they ran a boarding school at Litowa for 300 school children; and from 1963 to 1969 at Litowa, the village with the largest number of children (in addition to the 300 boarding school children), only 7 children died, against a regional average death rate of 40% for children under 5 years old![55]

The secret behind RDA's success was its members' commitment to socialist discipline and self-reliance, and their highly democratic organisation. The members' commitment was first seen from their unwavering determination in the face of hardships during the early days: the threat of wild animals, food shortages and uncertainty of harvests or prosperity (Coulson 1982:263-70). After establishing themselves many others sought to join; but the new applicants were subjected to a rigorous test and a long period of observation (Brain:241-2), so that only a committed person would persist to the end of the process. The long period also gave the members enough time to assess each new applicant before accepting or rejecting him.

Unlike the VSA and its settlement schemes, which had a host of paid "experts" and managers, all offices in the RDA villages were elective, the electorate being all adults in the villages, and none was remunerative. Progress in all projects and activities of each village was democratically reviewed at weekly (or bi-

[55]This paragraph is based on Coulson 1982: 263-70.

weekly) meetings so arranged that everybody attended: they were held at the end of the weekly occasions when the entire community in each village ate together in common. It was at those meetings that the office holders were called to account and

> ...public opinion was brought to bear on anyone not pulling his or her weight. Very gently but quite remorselessly a person would be asked to explain why such and such had not been done. It was good-humoured but highly effective; the sanction of shame is worth all the laws ever written. (Brain:241-2)

No RDA village undertook a plan which the members did not fully understand, or about which they had doubts (Lewin:190). Clearly, their concept of democracy went beyond the right to cast a vote.

RDA villages had a similarly practical concept of equality. Government policy for the village settlement schemes was to recruit only married and able-bodied men, aged 18 to 40 years, on the assumption that they were the ones truly capable of working. At one of the RDA villages, by contrast:

> ...there were nine old men and women, incapable of sustained field work, yet able to do a lot of useful and needed tasks such as bird and baboon scaring, sweeping the street, taking care of young children or weeding the vegetable garden. There was also a young man with a withered arm who worked as a storeman and clerk and who gave the younger children some rudimentary instruction in the three Rs. (Brain:242)

Also women were in the communal farms for only three and a half hours (compared to seven and a half for men), because they had to attend to other household concerns which were individual responsibilities but nevertheless necessary. But all adults, male and female (including holders of the elective positions), received equal shares out of the profits made from the communal enterprises of the village (Brain:242-3).

RDA's success in providing essential services for its members resulted from their commitment to self-reliance. Although they were assisted in purchasing the sawmill and grain milling machine, these were then operated entirely by the villagers themselves. The water pump and water pipes at Litowa were donated by the charity organisation, Oxfam, but the labour for constructing the whole water supply system there was provided entirely by the villagers themselves. Their priority was always the production of food for their own consumption, rather than for a cash income (Coulson 1982:265-7).

A really great success was in reducing child deaths, as mentioned above. This was done firstly by jointly preparing and providing meals to all the children of the village together, thus ensuring that all were fed well. Secondly, a small dispensary was opened and run by one of the villagers who had done a three months' observation study at the local hospital. It was not until July 1969 that a trained Rural Medical Aid gave up his paid job to work in the dispensary as a member of the village (Coulson 1982:267). In short, from 1963 the RDA practised the essentials of an *ujamaa* village which Nyerere was to write about in 1968.

Nyerere's 1967 paper on the need for a relevant education, *Education for Self-Reliance* (Nyerere 1968:267-90), was also a theoretical exposition of another RDA experience. In it he emphasised that Tanzania's education system had to encourage and "foster the social goals of living together and working together for the common good"; to inculcate a "sense of commitment to the

community" and to emphasise equality (Nyerere 1968:273). He criticised the present system for divorcing children from the realities of their society and failing to relate theory to practice (Nyerere 1968:275-6, 278-83).

Nyerere's ideas on education were already practised by the RDA school at Litowa (Toroka). The school was founded by the community, it belonged to and was part of the community; participation in the village projects and activities was integrated in the school's curriculum as part of the learning process. It thus did not divorce the pupils from the community, but integrated them in it and prepared them to serve it as full and responsible members when they grew up (Toroka:265-6). The relevance of the education given at Litowa was proved when at the end of their schooling the pupils had no interest in going away to urban areas, the common tendency elsewhere, or from the RDA villages which, on the other hand, were ready to usefully absorb them. For the first 36 who finished school at Litowa in 1969:

> ...there were many more jobs requiring skills available than there were school-leavers to fill them. They were asked to fill in a form indicating what they would like to do when they left school. Only two (both from nearby non-ujamaa villages) chose to try and proceed to a secondary school. (Coulson 1982:269)

The Litowa experiment was indeed achieving the aspiration expressed as almost a dream by Nyerere in his *Education for Self-Reliance* in 1967.

But in 1969 the President declared the RDA an unlawful society

and ordered it to be wound up.[56] The paradox is that Nyerere disbanded an association which was practising, with encouraging success, his own theories, an association he had supported with money to buy a grain milling machine and whose school he had authorised to test his theories in *Education for Self-Reliance* (Coulson 1982:266, 270).

Apparently, a conflict had developed between the RDA and local TANU (and other government) leaders in Songea some of whom were, admittedly, regarded with contempt by RDA villagers. When the former imposed a compulsory requirement for each family to grow one acre of tobacco, most peasants resented it and kept quiet; but the RDA was able, as an organisation, to argue publicly against it (Coulson 1982:266,270; Brain:245).

One argument is that Nyerere banned the RDA because it was "turning into a new privileged elite group, through both its selectivity in choosing members and its growing affluence" (Cartwright:173-4). In fact this is the reason Kawawa gives for banning the RDA:

> The RDA had indeed some very good ideological principles. But they wanted to be a select and exclusive club of people, admitting to their membership only those they could convert to their beliefs, to which they held so rigidly. We in TANU merely wanted villages with membership open to all, for the development of all. Naturally, we clashed.[57]

That may well be an explanation. But it is still not entirely satisfying because the ban came so suddenly and it was not

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[56]G.N. 254 & 255 of 1969; also see Coulson 1982:270-1; Martin,R.:34-5; and Cartwright: 173.

[57]Interview with Mr Rashidi M Kawawa, August 25, 1994.

preceded by any complaint about RDA's exclusivism.

It would seem, however, that the RDA was banned because of its autonomy and resolute intent to remain independent and free from central control which, at this time, was increasingly being exercised through the Party network (Martin,R:34-5; Cartwright 173-4; Coulson 1982:270-1). As already shown in this chapter, the government wanted to control every activity and every institution capable of influence. The RDA was not to be an exception. Even Kawawa's reply quoted above tends to support the view that the RDA was banned because the *government was unable to compel it* to admit just anybody into its membership.

The decision to ban the RDA was a decision of the Central Committee of the party made at its meeting in Dar es Salaam in September 1969; it was not Nyerere's own decision. The Central Committee at this time is said to have consisted of a substantial number of members elected by regional party branches, who saw their political future as lying in their ability to exercise party influence and control over rural organisations in their respective regions. It is to people like them that organisations like the RDA, committed to remain free from party control, posed the greatest threat. "If RDA organisations became a norm nationally," these rural based "professional politicians" would be rendered redundant. It is believed that these were the ones strongly behind the decision to ban the RDA (Coulson 1982:270-1) and Nyerere gave in because he needed their support and commitment in mobilising other development efforts all over the country.

6.3.2: Popular Participation and the Villagisation Programme

In sharp contrast with the RDA were the thousands of villages established later as part of the government's *Villagisation Programme*.

Nyerere's ultimate ambition was to have *ujamaa* villages established voluntarily all over rural Tanzania. Only persuasion, and no compulsion, was to be used to establish *ujamaa* villages; that would negate the very essence of *ujamaa* villages. But with persuasion very little progress was made and Nyerere himself was not impressed. In 1969 he issued a circular encouraging some preferential treatment to registered villages in providing government funded services.[58] This contradicted his earlier emphasis not to use promises of such services to persuade people into *ujamaa* villages.

And even the few villages that managed to be established in that slow progress were, save for the RDA villages, not *ujamaa* villages. Unlike the RDA villages, they were not founded upon a voluntary commitment to socialist development or self-reliance, but mainly as a strategy for getting favours and services from the government. Their leaders were often elected on their promise to negotiate for such favours from the government and not for purposes of genuine democratic governance within the villages. Communal work undertaken was only the bare minimum

[58]Presidential Circular No.1 of 1969; Coulson 1982: 240-2.

required for registration as *ujamaa* villages, and was often abandoned after the government approved plans for a school or dispensary, or for some other service in the village (Coulson 1982:244-6).

Some of these villages were in fact founded by Party and government officials at regional and district levels seeking to impress President Nyerere with numbers and figures of *ujamaa* villages established in their areas; the concern to impress was so great that some officials even cheated about the facts and figures they gave.[59]

Compulsion was first used in Rufiji District in 1969 to settle flood victims on higher ground which they did not like; they preferred the more fertile lower areas, regularly fed with silt brought by flood waters. But they had to oblige because only those who moved to higher ground were given famine relief (Coulson 1982:142, 247-8).

Then in September 1973, the NEC resolved that settlement in permanent villages was no longer optional, and the government was required to ensure that by the end of 1976 all rural peasants were settled in villages. It was to be left to the villagers themselves, subsequently, to develop their respective villages into *ujamaa* villages if they so wished.

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[59]*Africa Report*, December 1971; Ingle:252-3; Coulson 1982:244-5.

This resolution was well received by government officials. Unlike the earlier emphasis on persuasion, it enabled them to plan and work for specific targets which, when met, gave them a sense of achievement. Accordingly, the resolution was implemented in massive military style "operations", and accomplished well ahead of the deadline. In January 1974 there were 4,666 villages with a population of 2,319,786; by May 1976 there were more than 8,000 villages with a population of more than 12 million, or 85% of the population of Tanzania (Tanzania 1974:3; Tanzania 1976:3). But the exact number of people actually moved in the operations was probably around 6 million only, because the program also merely gave formal recognition to many previously existing villages.[60] It has nevertheless been described as the largest movement of people in Africa's history (Cartwright:174).

But the whole program was planned and organised entirely by government officials in the regions and districts, who then implemented it with the assistance of military personnel or units of the People's Militia. The people who were moved in the process were in most cases hardly consulted about the new village sites, or even the appropriate time to move there. Threats and harassments, and occasionally actual force, were used to ensure peasant compliance with the programme; old homesteads were often burned, and subsequently by-laws were passed to make it an

[60]Regarding these figures, see Tanzania 1975; Nyerere 1977:41-2; Hyden 1980:130; Mapolu:119.

offence to return to them.[61] In one case a government official died after being beaten by peasants resisting removal. They were subsequently convicted of manslaughter but the judge sentenced them to a conditional discharge because, among other things, he found the conduct of the government officials in carrying out the program to have been highly provocative (Williams:115).

The government did not insist on communal farming or on any socialist investment or organisation in the new villages. But it insisted on production, of both food and cash crops, often with by-laws prescribing minimum acreages for specified crops (Williams:101-3). Enforcement of these requirements was facilitated by the location of the new villages whose sites were often chosen for their accessibility, making government control and supervision easier (Boesen:136-7; De Vries & Fortmann:129).

Initially, the villages were encouraged to become registered as cooperatives under the *Cooperative Societies Act 1968* but after 1973 that law was unsuitable for the thousands of new villages, most of which had nothing resembling a cooperative society. The *Villages and Ujamaa Villages (Registration, Designation and Administration) Act 1975* (or the "*Villages Act*") was then passed. Under it the Registrar (of Villages) could register a village as a village if satisfied that 250 households had settled in it. But the Minister could authorise registration of a village without regard to that number.

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[61]Some case studies are well documented in Coulson 1979: chapters 8, 9 and 10; also see Hyden 1980:129-31, 143-51; Coulson 1982:250-4; Williams:103.

Apparently, after being settled in the new villages, the peasants never regained control of their affairs. According to *Directions*[62] made under the *Villages Act*, the application for registration of a village was not made by the village or villagers, but by the District Development Council (replaced by District Council under the 1982 local government legislation). The first meeting of the Village Assembly (consisting of all adult residents of the village) after registration was convened by the District Party Secretary who also supervised the meeting for purposes of electing the village council. But as mentioned earlier (7.1.3), in a village with a Party Branch, the Branch chairman and secretary automatically became the village council chairman and secretary respectively. And under s.16 of the Act a village could be designated an *ujamaa* village by the Minister upon recommendation to that effect by the Regional Committee of the Party, if the committee was satisfied that a substantial portion of the village's activities was done on a communal basis.

Section 11 of the *Villages Act* made village councils corporate bodies, and required villages to function as multi-purpose cooperative societies; but ss.13 and 14 of the Act disapplied the *Cooperative Societies Act 1968* in the villages and prohibited any registered society from operating there. This was partly because under the Villagisation Programme, village membership was not necessarily voluntary, thus making it incompatible with the cooperative principle of voluntary membership. But also it

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[62]G.N. 168 of 1975.

ensured that no parallel unit or organisation besides the village council was allowed in a village. This suited the control purposes of the government as s.15 of the *Villages Act* required the village assembly and village council to "perform all their functions under the auspices of the Party."

Organisational structures were determined by government officials and took little account of the actual needs and capacity resources of the people. The village sizes of 250 households, with most households having more than one adult each, were too big for meaningful democratic control of village affairs by the village assembly, the RDA equivalent of which used to meet at least once a week to review every activity in detail. But the largest of the RDA villages had only 60 families (Coulson 1982:264).

Under the *Villages Act*, supervision of village affairs was entrusted to the village council and its five committees: Finance and Planning, Production and Marketing, Works and Transport, Security and Defence, and Education, Culture and Social Welfare. Again, those committees reflect common features in governmental departmentalisation and have no relationship with the main day to day concerns of most ordinary villagers. But statutory regulations required all village councils to set up those committees![63]

In 1982 the *Villages Act* was repealed by the *Local Government*

[63]G.N. 162 of 1975, Regulation 8.

(District Authorities) Act 1982, but the latter saved all the structures and institutions established under the former. But what we wish to emphasise from the account given here is that the Villagisation Programme and the thousands of villages it created were essentially different from the earlier concept of *ujamaa* villages, a fact which, unfortunately, tends to elude even some authoritative commentaries about Nyerere and Tanzania (Hatch:197-8; Nyalali 1994). An integral feature of *ujamaa* villages was the promotion of socialism and democratic self-governance. The Villagisation Programme, on the other hand, was an exercise in state authoritarianism which created some thousands of villages through which the government then secured a thoroughly effective controlling position over the entire rural population.

6.3.3: Villagisation and Pastoral Communities

For a long time the government attitude to pastoralism was dominated by a tendency to compel pastoralists to abandon their "primitive nomadism" and settle for agriculture (Klima:18-21). Some years after independence, however, this attitude is said to have been rejected in principle (Parkipuny:154).

But in implementing the Villagisation Programme, there was no attempt to understand the pastoral way of life and to improve or even save the social and economic structures upon which it was based. Pastoralists were actually living in communities; no individual pastoral family could sustain itself living in isolation. The pastoral way of life depended on a communal

system of land tenure for grazing grounds, so as to maximise the feeding capacity of the entire land for the equal benefit of all users (James & Fimbo:94; Tenga:4). In a fairly elaborate transhumant land use system, pasture land was divided into classes according to seasonal use and importance, and used by the community in a rotational pattern enforced by traditional customs to ensure sustainability. This has always been the pattern for the Maasai, the Barabaig, and other pastoralists (Fosbrooke:65-7, 166-8; Arhem:17, 42-3; Lane 1991:22-8).

But the Villagisation Programme established "ranching villages" for pastoralists without regard to their land use patterns and requirements. Here too, the programme was planned and implemented by government officials who resorted to harassment and even the occasional use of force, simply lumping pastoralists (and their livestock) into overcrowded units without considering the sustaining capacity of pasture lands in the new ranching villages (Parkipuny:154-5). For most of them, the pasture lands could not sustain the livestock because the areas were either too small or unsuitably located to enable the rotational grazing necessary to sustain pastoral life. This was to lead to disastrous ecological imbalances (Parkipuny:154-5; Mustafa:108-11; Lane 1993:63-4).

In the new villages the traditional institutions of the pastoral communities, which had been instrumental in observing the transhumant land use system, were given no role or place. Although pastoral communities like the Maasai and Barabaig are

known to have traditionally powerful women's councils with important roles in their communities (Klima:88-94), the new arrangements gave no role or place for such councils. Instead came the new set of institutions: the village council, established under the *Villages Act*, and its 5 statutory committees mentioned above, the functions of some of which hardly make sense to the pastoralists.

As an institution the village council has failed to prove its worth in defending the interests of pastoral communities. When the Barabaig pastoralists used its name in court to recover communal pasture lands taken from them by a parastatal corporation for large-scale wheat farming, they lost the case[64] because, among other things, a village council, being a corporate body and therefore not a native,[65] could not hold land under customary law, on which the claim was based. It could only get title by making a formal application for a Right of Occupancy under the *Land Ordinance 1923*, and following procedures not fully understood by the Barabaig, which the village council could not have managed without advice and guidance from, say, the Party. But the district leaders of the Party are the ones who facilitated the acquisition of the pasture lands by the parastatal corporation in the first place.

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[64]*National Agricultural and Food Corporation v. Mulbadaw Village Council and Others*, Tanzania Court of Appeal, Civil Appeal No.3 of 1985 (unreported).

[65]The *Land Ordinance* defines a "native" as a citizen of Tanganyika of African origin or descent, which means, by necessary implication, a natural person.

The case showed the extreme variances between the acclaimed socialist objectives of *ujamaa* villages and what the government actually achieved through villagisation. One radical view is that the policy of the government, implemented partly through villagisation, was to deliberately marginalise and, if possible, proletarianise the pastoralists by imposing forced destocking and taking more and more land from them, and giving it either to cultivators or to the state sector for state ranches (Mustafa:108-16) or state farms.

Another view is that to the Maasai pastoralists, the new hierarchy of institutions brought by villagisation are alien to them and deliberately created to facilitate state control of their communities and their resources (Arhem:22-7). Perhaps realising this, some Maasai in Ngorongoro District started an organisation for safeguarding the rights and interests of pastoral communities and their environment. The organisation, known as KIPOC, was registered in 1988 under the *Societies Ordinance*. Through its efforts and coordination a number of development projects were undertaken, including the securing of title deeds for the pasture lands of seven pastoral villages in the district.[66]

Soon after its registration a branch was opened by some Barabaig pastoralists in Hanang District. But KIPOC, much like the RDA twenty years earlier, was independently established and

[66] *Express*, November 18-25, 1992.

autonomously organised, and was free from control by the government or the party. This led to conflicts. The executive secretary of KIPOC, Mr Moringe Parkipuny (MP for Ngorongoro District 1980-90 who did not seek re-election in 1990 so as to devote himself fully to the organisation), was harassed with repeated arrests and short term remands in Police custody on some holding charges although never fully prosecuted in court. The Katesh Branch of KIPOC was proscribed from September 1991 to December 1992.

Mr Parkipuny's harassment was believed to be instigated by some local party leaders who felt challenged by KIPOC's influence. Apparently, they charged that KIPOC was "usurping party functions of bringing development to the people."[67] In a letter to KIPOC's executive secretary, the Minister of State in the Prime Minister's Office stated that the government supported KIPOC's developmental efforts but, he insisted:

> KIPOC should not perform its functions without involving or cooperating with the leaders of *Chama cha Mapinduzi* and its Government in the districts otherwise it will be sowing seeds of *mutual suspicion* unnecessarily.[68] [original emphasis]

Once again the propensity of the government to control every civil organisation showed itself.

But now the atmosphere had changed. Partly as a result of the Bill of Rights which was adopted in 1984 (*infra*, 8.2) people were

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[67]Ibidem.

[68]Ref. No. PMC/2/0.60/23 dated November 23, 1992.

asserting their right to organise themselves for lawful purposes, free from control by the government or the party, and the courts were increasingly being resorted to for enforcing basic rights. The government could not act against KIPOC as it had done against the RDA.

6.4: RESPONSIBLE GOVERNMENT AND THE ROLE OF IDEOLOGY

President Nyerere once said that he had "sufficient powers under the Constitution to be a dictator" (Hopkins:27). It was a correct statement of constitutional fact. Constitutional developments after independence replicated the authoritarian power structure of the colonial era; the dominant roles of the executive president and the sole political party compare well with the colonial governor and the Colonial Office respectively (Ghai 1972:407-10, 418-22).

But, in spite of the various accounts in this study, the executive in Tanzania has had far more powers than it has actually used. An almost surprising remark is that the executive has actually been shy "to exercise coercive power even when developmental imperatives dictate so" (Mudoola:121). Nyerere's 1962 parliamentary speech on the "National Ethic"[69] could perhaps explain this. He supported the granting of so much power to the executive; but he never expected that those immense powers would be invoked indiscriminately, without circumstances

[69]See "Appendix A" to this study.

compelling their use. Therefore, Nyerere premised the use of executive powers on factors other than the mere enabling provisions of the Constitution or other law.

The restraint on the use of coercive power by the executive is said to be due to the absence of anti-government power centres or internal political tensions in the country, which is the result of the government's popular goodwill earned through the ideology of *ujamaa* (Mudoola:121-3). Thus, if the government has not been dictatorial in practice, it is due to factors other than legal or formal constitutional restraints upon its powers. And this raises the importance of the extra-legal basis of the state and government practice in Tanzania.

6.4.1: "Ujamaa": The Extra-Legal Basis of Government Legitimacy

The Chief Justice of Tanzania said in a recent talk that during the one-party state in Tanzania the bonds holding the nation state together were not based on law but on the ideology and organisation of the sole political party. For that reason:

> The ruling party ideology and party constitution was taught in Tanzanian schools, and the party was organised at all levels and in all sectors of the society, ...civics and the country's constitution ceased to be taught in Tanzanian schools by the end of the 1960's. It... was possible to move the vast majority of the rural population into about 800 new ujamaa villages *[sic]* without enacting or using any law to legalise such a far reaching programme, ...[and] government was managed by a politicized civil service which increasingly became ignorant of administrative law and practice.[70]

On that basis, government powers were not subjected to rigorously

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[70]Nyalali 1994, also reproduced in *Bulletin of Tanzanian Affairs*, January 1995: 13.

imposed legal limitations.

But on the other hand, a naked brutal despotism was also absent because, despite its extra-legal basis, the state in Tanzania was not lacking popular legitimacy:

> The rule of the extra-legal state was legitimised through the ideology of Ujamaa or the Arusha Declaration. Unlike many other African countries, where the extra-legal states faced the crisis of political legitimacy resulting in... explicit political repression, the Tanzanian state was pretty successful in mobilising the consent of the ruled through the ideology of Ujamaa.... [The] Arusha Declaration (1967)... had a popular support and provided political legitimacy to the state for the next ten to fifteen years. (Shivji 1994a:83)

Indeed, the ideology of *Ujamaa* had a very strong popular appeal. Although first advanced by Nyerere in 1962,[71] it was not until the Arusha Declaration of 1967 that the ideology was formally adopted and articulated into a framework for government action. Popular support for the declaration and its subsequent measures was shown by country-wide mass demonstrations and long-distance marches of support. Subsequently, all major decisions of the government and the party were deliberately linked, in one way or another, to the Arusha Declaration as the basis of legitimacy.

An important component of the Arusha Declaration was the emphasis on its notion of equality between the leaders and the led, which was then translated into the Leadership Code. The Code appealed strongly to the general public because it sought to prevent leaders from using their advantaged positions to enrich themselves at the expense of the ordinary citizen. Thus it was to achieve the *ujamaa* notion of equality, which was essentially

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[71] *Ujamaa - The Basis of African Socialism*, in Nyerere 1966: 162-71.

different from the liberal democratic concept of "equality before the law":

> *Ujamaaist*... "equality" ("usawa") and "right" ("haki") in the consciousness of the people is fundamentally different from those in the rule of law. *Usawa* (equality) here is akin to "*utu*" (one's humanity) which is real, concrete and lived, and defines one simply because of the fact that one is a member of a human community. Similarly, ...a more correct rendition of the concept "*haki*" would be "justice" rather than "right." (Shivji 1995:24-5)

And in pursuit of the ends of equality according to that *ujamaaist* notion, it was possible for the government even to breach the law and other liberal democratic notions of equality, with popular support.

The nationalisation measures immediately after the Arusha Declaration, massively supported by the public, were taken without any statutory backing. Similarly the 1983 campaign against "economic sabotage" (*supra*, 5.2.2) consisted of government actions which were basically illegal, but they evoked wide-spread popular support. The *Economic Sabotage (Special Provisions) Act 1983* passed to give formal legality to the campaign and create special tribunals to try alleged "economic saboteurs" was soon amended to exclude the right to bail for persons charged before the tribunals, and to prohibit appeals from the decisions of those tribunals. It is significant that this amendment[72] was actually demanded by the public, keen to punish individuals in responsible positions believed to be skilfully circumventing the Leadership Code and unlawfully using their offices to accumulate wealth, while the rest of the

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[72] *Economic Sabotage (Special Provisions) (Amendment) Act 1983.*

population suffered under severe economic hardships.

While that law and the campaign behind it obviously violated the Rule of Law, the general population felt few qualms about it. Many other actions of the government may have been equally "unlawful" but they were acquiesced in or supported by the public simply because they appeared, or were claimed, to work for one or the other of the objective principles of the Arusha Declaration. Public support for government actions done without a basis in law was demonstrated most prominently during the Kagera War against Idi Amin's forces in 1978-79. The civilian population, especially in Kagera and other Lake Victoria regions, enthusiastically made extensive sacrifices to contribute to the war effort. The government did not declare a state of emergency under the *Emergency Powers Order in Council 1939*, not even in areas close to the war front, simply because the people's own support for the war rendered it unnecessary.

After retiring as President, Julius Nyerere correctly attributed Tanzania's peace and stability to the Arusha Declaration, not because it had done away with poverty or achieved equality (as indeed it had not), but because its *ujamaa* ideology "engendered hope and a vision around which the consensus between the ruler and the ruled was constructed" and "held out a promise, hope of building a society based on equality" (Shivji 1995:20-2). Nyerere repeated this tribute to the Arusha Declaration in his last address to the CCM National Conference in August 1990 when he retired as Chairman of the Party.

6.4.2: Political Leadership and Ideological Commitment

Next after the Arusha Declaration of 1967, the *TANU Guidelines 1971*, popularly known in Swahili as *Mwongozo*,[73] had a tremendous effect in instilling confidence in state institutions by emphatically declaring "the people" as the primary objective of all developmental efforts and for whose interests and concerns the government and all state institutions were to work for. *Mwongozo* emphasised that "development" meant "liberation" and the elimination not only of poverty, but also "oppression, exploitation, enslavement and humiliation, and the promotion of independence and human dignity" (*utu*); it demanded a "deliberate effort to build equality between the leaders" and the led, and called for supervision of the conduct of leaders to ensure compliance with the Leadership Code.[74] It resulted in the establishment of the Commission for the Enforcement of the Leadership Code (*supra*, 5.6).

The establishment of that Commission indicated that the political leadership was seriously committed to serve the people. This commitment was also shown by the heavy government investment in social services which brought tremendous improvements in the quality of life generally. During the first 25 years of independence (1961-86) the infant mortality rate fell by 40% and life expectancy went up by 50%; primary education became

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[73]English version is reproduced in Coulson 1979: 36-42.

[74]*TANU Guidelines 1971*, para 28 and para 15 & 16.

available to 95% of the eligible children, primary health care became easily accessible to at least 60% of the population, and a child immunisation programme protected 500,000 children a year (Legum:3-4). Those in leadership positions made no significant gains above the ordinary population but cooperated in narrowing the income gap between the highest and the lowest paid public servant (Nyerere 1977:16), thus showing that they were not clamouring for personal gain.

Commitment to self-less service was led by President Nyerere himself. In 1966, when protesting university students alleged that the salaries of the political elites were too high, Nyerere ordered their immediate revision, himself suffering a 20% reduction (Smith:29-30). It was due to his determined persuasion that the Leadership Code was included in the Arusha Declaration, against resistance by many leaders who believed that they deserved higher rewards for their service than they were getting (Hatch:194-5; Pratt 1976:160-5). Then he sold his house at Magomeni, his wife gave up her poultry farm, and he made a public declaration of compliance with the Code even though the law did not require the President to do so.[75]

In 1971, when the coconut trees around his private house at Msasani were ready for harvest, his wife arranged to sell the coconuts to some dealers in Dar es Salaam, and they came regularly to pick them. As the trees were on his private

[75](1968) 5 *Africa Research Bulletin*: 1010B.

property, this arrangement appeared logical and regular, until the President learned about it and angrily terminated it, greatly humiliating his wife. His argument was that the President or his spouse could not be allowed to engage in private business even in their private residence.[76]

The standard of commitment demanded by Nyerere was not only high but also diametrically opposed to the then current thinking among other political leaders in East Africa who saw every justification for "enjoying the fruits of independence." In Kenya, for example, Bildad Kaggia, who had served in prison with Jomo Kenyatta during the independence struggles, resigned from the Cabinet shortly after independence because he publicly insisted on land reforms on the basis of some radical egalitarian ideas not accepted by Kenyatta's government (Odinga:262-8). Subsequently, in a speech intended to make Kaggia look stupid for sticking to empty egalitarianism instead of personal material gains, Kenyatta admonished:

> We were together with Paul Ngei in jail. If you go to Ngei's home, he has planted a lot of coffee and other crops. What have you done for yourself? If you go to Kubai's home, he has a big house and has a nice shamba. *Kaggia, what have you done for yourself?* We were together with Kung'u Karumba in jail, now he is running his own buses. *What have you done for yourself?*[77] [emphasis added]

By contrast, Nyerere defended the Leadership Code with the argument:

> Which is the politician who, [when] sent to the people at election time... asked them to elect him so that he could provide for his future?...

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[76]Information from Mr Joseph S Warioba.

[77]As quoted in Ngugi: 89.

> Whenever a person seeks political work, whether it is through election or by appointment, he says he wants the opportunity to serve the people, to guard their interest and further their aspirations. What right has such a person, once he has the appointment he sought on this basis, to use his responsibility for his own betterment?[78]

Other measures of commitment to people's service were not very direct. One example was the replacement of English by Swahili as the language of most government business: it removed an unnecessary veil of secrecy on the government and made government administrators less of an elite group. The politicisation of the army had a similar effect. In fact *Mwongozo* declared the army "the people's army... for both the liberation and the defence of the people", whose task during peace-time was "to enable the people to safeguard their independence and their policy of socialism and self-reliance," and enjoined the Party to be responsible for giving political education to the army.[79] This was to remove elitist attitudes in the army, and to commit it to the defence of the people and their genuine interests, and not merely to defend the interests of the political leaders.

The politicisation of the army also reduced the likelihood of a military take-over, once a fashionable way of changing governments in Africa, by allowing, and even encouraging, military personnel to take active parts in politics. The army was incorporated into the party structure: each army camp also constituted a Party Branch and the whole army constituted a "region" (with its own network of branches and districts) in the

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[78]As quoted in Brown: 14.

[79]*TANU Guidelines 1971*, para 23-7.

party organisation, with full representation in the NEC and National Conference. Four army officers won parliamentary seats in the 1975 elections, others were appointed Regional and District Commissioners, and from 1974 to 1992 there has always been at least one army officer in the cabinet. Removing the likelihood of a military take-over reduced some of the insecurity which could otherwise provoke political leaders to accumulate wealth to fall back on in the event of losing office.

Rather sadly, however, the success of the *Ujamaa* ideology in shaping the policies and conduct of the government to engender popular support has been limited by the fact that it has really been Nyerere's ideology; the other leaders, caring no more than not to disappoint him, "have merely echoed his words, and often in a way which shows little understanding of the principles underlying it," while some were either opposed to or sceptical about the ideology, but sometimes used it to cover or justify their own political arrogance and arbitrariness (Ghai 1975:159-61).

Amir Jamal, one of Nyerere's most dedicated ministers, made an explicit admission of this fact when he said:

> One of the reasons why Julius Nyerere made *his* Arusha Declaration in February 1967 was that six years after independence practically no foreign investment for Tanzania had been forthcoming.[80]
>
> [emphasis added]

Thus knowing his immense commitment to the *ujamaa* ideology, and fearing his immense powers to hire and fire, many tried their

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[80]As quoted in *New African*, June 1980: 69.

best at least to appear to comply with his guiding ideology. It was Nyerere the President, therefore, along with his powers, his style of leadership and his own commitment to the ideology of the party, rather than the ideology itself, that had the greatest influence upon the conduct and behaviour of the government and its leaders.[81]

This was the greatest weakness of the extra-legal basis of the state in Tanzania. Dependent on an individual personality, it was bound to crumble with his exit from office.

[81]This view was also expressed by Mr Joseph S Warioba, interviewed in Dar es Salaam, July 1994.

CHAPTER SEVEN

The Decline of the Party State

7.0: INTRODUCTION

The extra-legal state identified in the previous chapter reached the peak of its formal consolidation with the adoption of the *Constitution of the United Republic of Tanzania 1977* (hereinafter the *Constitution 1977*). Then there was the war with Uganda in 1978, followed immediately by a deep economic crisis which eroded the confidence of the government, seriously shaking the foundations of its legitimacy, as shown by the 1983 campaign against "economic sabotage", in which all pretensions of observing the Rule of Law were discarded (Shivji 1994a:87-8).

Subsequently, changes towards some form of legal basis for the state and its institutions were made; the extensive 1984 amendments to the *Constitution 1977* marked the turning point away from Party ideology and organisation as the basis for government legitimacy. Finally came the 1992 changes abolishing the one-party state system and formally restoring to Parliament some of the authority it had lost.

In this chapter we analyse those changes and try to show that they were bound to come because of problems inherent in the one-party system as it functioned in Tanzania. Gradually, Party ideology and organisation proved increasingly limited in sustaining the legitimacy of the government. Apparently, Julius

Nyerere came to see the limitations of his own creations and was willing, in his own way, to accept as inevitable the changes that were being demanded.

7.1: SOME LIMITS OF ONE-PARTY DEMOCRACY

One argument for adopting the one party-system in Tanzania was that it would enhance democracy, in the circumstances then existing, by giving the people an opportunity, in voting, to exercise a real choice (*supra*, 3.3.3). On that basis, the first elections under the one-party system were observed with keen interest and generally accepted as a success for democratic practice (Cliffe). Some prominent politicians, including two cabinet ministers, lost their parliamentary seats in those elections, an occurrence repeated in subsequent elections held at regular 5-year intervals, a fact adding to the system's apparent credibility.

But democracy requires more than merely casting a vote and electing a representative. It also requires leaders and institutions, democratically constituted, to be responsible to the people and to defend their interests. In Tanzania, the contrary has often happened:

> We have democratic institutions: they exist. But they are not being used. Especially in our rural areas, people are disregarded, and sometimes even ill-treated, without their representatives taking any action. Indeed, it is sometimes the leaders who should be speaking for the people who are committing the evils.[1]

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[1]President Nyerere, February 1977, as quoted by Scope: 9.

Thus the one-party system was failing to serve the ends of democracy intended by its adoption.

Instead, the single party turned into a tool for a systematic "Top-Down" imposition of ideas and programmes which the recipient population became increasingly incapable of resisting or influencing. In the process, law and its institutions were frequently overridden by party organs. The party itself was increasingly bureaucratised and finally taken over as an exclusive club of select individuals to protect their privileged interests against the rest of the population who then, logically, began to withdraw the support which in the 1960s they had given to the one-party state without question.

7.1.1: Law, Democracy and the "Vikao" Culture

A favourite description of "African Democracy" used by Nyerere in support of the one-party system was from Guy Clutton-Brock's description of a typical African village life, where the elders sat under a tree and talked until they agreed (Nyerere 1966: 103-4, 195). Nyerere picked that as the fundamental principle of democracy and used it to emphasise the need for government action to follow agreements reached at in free discussions. Simplifying the concept of democracy, he even reduced its definition to "government by discussion"; after reaching a consensus or an agreement, all it then required was disciplined action according to the agreement (Nyerere 1974:32-5). Apparently, this concept of democracy did not contemplate a dissenting opinion surviving

alongside the mainstream consensus-based action.

Under this concept of democracy, government action depended for its base or support not on the force of law as such, but on an expressed agreement or consensus. The need for consensus as the basis for government action enhanced the role of meetings, commonly referred to in Swahili as *vikao*,[2] even informal ones, which then characterised Nyerere's style of government. The execution of government plans depended increasingly on decisions emerging "from informal face-to-face discussions" involving the President and the ministers concerned, instead of following established cabinet rules and procedures; in fact, established cabinet rules were sometimes deliberately resisted in favour of decisions emerging from relaxed discussions in informal *vikao* (Pratt 1971:103-4).

These *vikao* were diverse in number and their respective composition, although membership increasingly overlapped. But the President headed all the important ones: the Cabinet, the Regional Commissioners meetings (informal), the party's Central Committee and NEC. As Nyerere grew in his "confidence that he had the right answers" to his country's problems (Cartwright:172; Pratt 1971:114), he started using the various *vikao* to push his ideas through, shrewdly selecting which particular *kikao* to take each particular issue to, always avoiding those from which a consensus or agreement was unlikely to emerge (Pratt 1971: 113,116).

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[2]The singular is "*kikao*".

Significantly, Parliament was not used as the organ for discussing and deciding important issues. One reason for this was that the parliamentary rules of procedure gave no opportunity to the President to meet MPs for purposes of "talking until they agree," which had become essential to Nyerere's style of government (*supra*, 4.5). Decisions on important issues with far-reaching implications were usually taken to the NEC where Nyerere, who headed it, argued his ideas through to acceptance.

Paradoxically, one consequence of this style of government, government by *vikao*, was to sacrifice democracy. There is no doubt that Nyerere was a leader of immense abilities; he easily convinced the NEC to accept his ideas, and then eloquently explained them directly to the people. But also, as President, he had immense powers which he could use to ensure compliance with his views. There must have been times, even if infrequent, when support for his ideas in the NEC or other *vikao* was, at least partly, out of fear of his immense powers. Those with different views had neither his intellectual abilities, nor his opportunity to explain their ideas to the public. Consequently, government by *vikao* became the means of imposition of ideas from the President, through the NEC down to the people. Any democratic practice in that system depended largely on the personal democratic inclination of the President himself, not on the structure of the government (Smith:31).

Democratic checks and controls from below were especially eroded by the concept and structure of the party which gave supreme

authority to the NEC (*supra*, 4.4.3). Whatever came from the NEC was carried out without question. While little is known about the course of deliberations within the NEC itself, and therefore whether they were indeed democratic or not, NEC decisions have been virtually final, even if in theory the law did not acknowledge this.

No decision of the NEC has ever been reversed. In Presidential elections, the sole candidate proposed by the NEC has always been guaranteed endorsement by both the National Conference (of the party) and the electorate (Martin,D:108, 111-3; Mutahaba & Okema:69-75; Othman:136-43). In parliamentary elections, after nominating the two candidates to be presented to the electorate, the NEC also issued election manifestos and guidelines, rigorously enforced by local party officials, severely restricting the conduct of campaigns to the extent of disabling the electorate from properly assessing the candidates; party supervisors of campaign meetings often disallowed questions which sought to be critical of the candidates, rendering the campaigns an empty exercise (Bavu:32-3; Mvungi & Mhina:116-9; Shivji 1994b:26-7).

Another deficiency of the one-party system was its tendency to deny completely and ignore the interests and views of the minority. In modern day conditions it is impracticable to have everybody participate in the consensus seeking discussions, as was the case in the traditional African villages which the one-party system claimed to emulate; therefore it had to run a representative government. But the elections, under party

supervision, ensured that only those who echoed the views of the party as endorsed by the NEC went through as representatives. Therefore, unlike African traditional societies which ensured that each person's viewpoint could be heard, the one-party system never gave a forum for expressing minority views (Ayittey:67-9). As a result, the system gradually ceased to represent the people's interests but rather reflected those of the leaders and their purported representatives (Scope:9-10; Mmuya & Chaligha 1992:6).

Coupled with the concept of "Party Supremacy", the *vikao* culture was behind the widespread attitude of disregarding legality referred to in previous chapters. Government administrators became increasingly "ignorant of administrative law"[3] as party supremacy became the pretext for overriding the law. When Augustine Mrema was Minister for Home Affairs (1990-94) he became particularly outspoken by, and - paradoxically - popular for, his numerous surprise orders which took no account of jurisdictional limits or other legal requirements.[4] Challenged about the illegality of some of his orders and actions, Mrema made no pretences to observe the law; he simply claimed that his actions were in accordance with the 1990 *Election Manifesto*, issued by the NEC from its pre-election *kikao*!

Considerable problems resulted from disregarding the law in implementing the Villagisation Programme. People were settled,

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[3]*Bulletin of Tanzanian Affairs*, January 1995: 13.

[4]see *Africa Events*, February 1991, and the *Bulletin of Tanzanian Affairs*, May/June 1991: 2-5, and September 1991: 17-8.

in some cases compulsorily, in new villages situated on lands which legally still belonged to a few individuals who were displaced by the programme. A decade later, some of these former owners realised that they could actually recover their lands by court actions against the new village settlers. A few early successes of such cases in court led to a crisis (Tanzania 1992:53-60; Shivji 1994c:6-15) as more cases were filed by individuals seeking to evict entire villages consisting of thousands of people, settled there by government compulsion in the first place, together with amenities like schools and houses of worship. Government attempts to terminate the rights of the claimants by legislation[5] collapsed when the new law had many of its crucial provisions struck off by the courts for being unconstitutional.[6] Therefore the crisis is still on.

Meanwhile, in February 1991 the NEC met in Zanzibar and resolved virtually to repeal the Leadership Code (McHenry 1994:22-3; Nyerere:15). The moral force behind the socialist ideology of *ujamaa* evaporated as, immediately, political leaders freely engaged in private business and other activities hitherto prohibited by the Code. Again, this was done in disregard of the law. Until July 1, 1992, when the *Eighth Constitutional Amendment Act 1992* took effect, s.67 of the *Constitution 1977* still prohibited all MPs from such activities.

President Mwinyi, who succeeded Nyerere in November 1985, greatly

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[5]The *Regulation of Land Tenure (Established Villages) Act 1992*.

[6]*Akonaay and Another v. Attorney General*, [1994] 2 L.R.C. 399.

enhanced his popularity during his first year in office when he repeatedly pledged his government's commitment to accountability. In a public gesture of support, the Party Youth League presented to him a symbolic "iron broom" with which to sweep and rid the government administration of corrupt and irresponsible leaders. But the *vikao* culture, having taken root and frequently overriding the law, made it virtually impossible to hold anyone accountable. In March 1990 the President dismissed the entire cabinet because corruption and "malpractices were widespread throughout the government."[7] But he dropped only four ministers from the reconstituted cabinet. There was similarly little change in the new cabinet after the October 1990 general election.

The government lost credibility; its structures exhibited signs of collapse. The President virtually lost confidence in the structures of his own government. In 1991 he physically took part in road repair works along Bagamoyo Road and personally supervised a campaign to clean up the Tandale Grain Market in Dar es Salaam. He then started having regular sessions of "meeting the people" at the Party Office along Lumumba Street, for a first hand hearing of their pertinent problems presented to him in confidence by each individual complainant!

The system needed a change and the change to a multi-party state constitution was a welcome change.

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[7]*Daily News*, March 13 & 16, 1990.

7.1.2: Party Supremacy and a Centralised Oligarchy

Under the one-party system the NEC of the party was a most powerful institution. Corresponding with its growing might and importance, its decisions increasingly disregarded and ignored grassroots interests and preferences.

We have already referred to the *Election Manifesto* which severely restricted the scope for the electorate to question the candidates so as to assess them properly before voting. Another fairly common occurrence was the screening out, by the NEC, of aspiring candidates widely supported in their constituencies when those aspirants, for whatever reason, did not enjoy the confidence of the NEC which rarely, if ever, made explicit its reasons for rejecting popular aspirants (van Donge & Liviga 1990:4; Kiondo:82-4). Sometimes the NEC deliberately selected an extremely weak candidate, one lowest rated by the local party preferential votes in the primary nominations, to compete with the one it favoured so as to enhance the chances of its favourite (Mwakyembe 1986:39-40). There then developed a concept whereby a person would be selected for office simply because he or, rather rarely, she is regarded as *mwenzetu*, i.e. "one of us."

This often frustrated the electorate who reacted by refusing to vote at all or casting their votes so as to deliberately upset the NEC, by choosing the one lowest rated by the local party preferences (Bavu:26-7). This is how Johnston Kihampa, then a cabinet minister, lost his seat in 1970, and again lost a by-

election for the Kinondoni seat in 1981. In both cases the NEC deliberately pitted him with weak and politically unknown opponents. In 1980 the election of Chrisant Mzindakaya, a deputy minister, was nullified by the court on a successful petition.[8] In the by-election held subsequently (1982), Gilbert Ngua, the successful petitioner, got the highest preferential vote at the local party conference but the NEC rejected him this time and selected Mzindakaya and a low rated new comer to the contest. Mzindakaya lost, by a big margin, the seat he had held for 15 years.

The reaction of the electorate to the overriding powers of the NEC was shown most strongly in Mbozi District in the 1985 election.[9] The incumbent MP, Japhet Sichona, got 400 preferential votes in the local party conference, against 111, 71, 23, 17 and 13 votes, in that order, for the other contenders. But the NEC rejected Sichona and nominated the second and third rated. There was an angry reaction from the Mbozi residents. They boycotted campaign meetings and rudely disrupted most that could be held at all. To ensure a turnout of voters, Party and government leaders threatened people that Sichona and those refusing to vote would be detained. They did vote finally, but the number of votes deliberately spoilt was so big that the winner actually had a minority vote.[10]

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[8]*Chrisant Mzindakaya v. Gilbert L. Ngua*, [1982] T.L.R. 18.

[9]This paragraph is based on Mwakyembe 1990.

[10]Of the 70,099 votes cast the winner got 29,639, the loser 27,356 and an overwhelming 13,104 votes were spoilt.

The reasons for rejecting Sichona were not made clear by the NEC. But it would seem that while the district party leadership did not want him for some undisclosed reason, the national leadership did not want him for his 1982 criticism, in Parliament, of corruption and nepotism which was even getting into the party hierarchy (Mwakyembe 1990:137-9, 145-7). This, then, is what led the NEC to force upon the people a leader or representative contrary to their obvious choice.

The only institution with powers similar to, or greater than, those of the NEC was the President of the United Republic, who was for most part also the NEC Chairman. He exercised his powers of appointment uninhibited by contrary indications from the electorate. President Nyerere appointed Paul Bomani and Daudi Mwakawago to Parliament, and to the cabinet, after their electoral defeats in 1965 and 1980 respectively. He appointed Johnston Kihampa and Chrisant Mzindakaya regional commissioners, thus *ex-officio* MPs, after their electoral defeats in 1970 and 1982 respectively. The 1980 election victories for Chediel Mngonja and Abel Mwanga were nullified by the courts; the two former ministers were also found guilty of corrupt practices and therefore disqualified from holding political office for 10 years as a punishment. But President Nyerere invoked the presidential prerogative of mercy under the *Constitution 1977*, and pardoned the two politicians,[11] thus enabling them to contest, and win, in both the 1985 and 1990 elections.

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[11]G.N. 120 of 1984, and G.N. 36 of 1985.

After losing his parliamentary seat in the 1985 election, John Malecela was nevertheless appointed regional commissioner by President Mwinyi. Also in 1985, Mwinyi appointed Joseph Warioba to Parliament, so as to make him Prime Minister and Vice-President, and the Leader of Government Business in the National Assembly; he repeated the same with John Malecela in 1990. Significantly, Joseph Warioba, John Malecela and Cleopa Msuya, who have each held the position of Prime Minister and First Vice-President, began their political careers by presidential appointment to political office; by 1995 all were members of the NEC and each of them was well placed to succeed Mwinyi as President. Ben Mkapa, the ultimate CCM presidential candidate in the October 1995 election, similarly began his political career by a simultaneous appointment to Parliament and to the Cabinet as Minister for Foreign Affairs in February 1977.

Sometimes parastatal corporations, districts and constituencies, or even ministries have been unaccountably established, leading to speculations that the reason for the establishments was to give specific jobs to particular individuals. From 1977 to 1992 the President's power to create districts was subject to approval by the party which, given his power and influence, was not hard to get. His appointment of Warioba (1985) and Malecela (1990) as vice-presidents gave those two seats in the NEC almost as a right. Also the President appointed regional commissioners who, by virtue of their positions as also Regional Party Secretaries, became members of the NEC. The position changed in 1982 when the two offices were separated; but it was restored in 1990.

In the 1982 elections to the NEC President Nyerere, as Party Chairman, used his powers and influence to ensure a place in the NEC for some of his trusted ministers. Besides other categories of contestants, the Chairman was also entitled to submit to the National Conference a list of candidates for election to a limited number of seats. It was from this list that some prominent ministers (with doubtful grassroots party support) like Salim A. Salim, Cleopa Msuya and Amir Jamal were elected to the NEC (van Donge & Liviga 1985:53-5). Kigoma A. Malima, then Minister for Planning and Economic Affairs, had lost the contest for NEC membership as a regional representative, but was immediately added to the Chairman's list and was elected from there (van Donge & Liviga 1985:51,53).

All this indicates that the President's favour or confidence could be relied on for security in a political office, even if one had doubtful grassroots support. Therefore, career in a political office was secure if one had the favour of either the NEC or the President or, most certainly, of both.

When Nyerere declared in 1980 that he was accepting the Presidency for the last five-year term, those who depended on him for their political career suddenly felt insecure. The identity of his successor was unknown, almost up to the eleventh hour. But the NEC was to continue being powerful and, at least for a little while more, to be headed by Nyerere as party Chairman; the next President was to be proposed by it, certainly from amongst its members. There then began a clamour for NEC membership by

prominent politicians already holding positions of national importance. They are the ones who did well in the 1982 elections for NEC membership, not the "peasants and workers" who made up the party membership (van Donge & Liviga 1985:50-5). They included the four ministers mentioned above, and the veteran Paul Bomani who made a surprising come back after a long absence in diplomatic service.

Bomani's come-back was part of a scheme by a "liberal camp" in the party who wanted to take over control of the party from "leftist radicals" who appeared set to increase their domination with the expected gradual exit of Nyerere. Part of the leftists' strategy was to discredit Bomani by questioning him, before the electoral conference, about his personal wealth and relations with wealthy foreigners; but Bomani stood his ground and won. The leftists partly succeeded, however, in that Bomani was not elected Secretary-General of the party as the liberals had wished. Nyerere, aware of the rival camps, managed to have the post given to Rashidi Kawawa to ensure that neither camp took over, and then appointed both Bomani and the leftist contender, Kingunge Ngombale-Mwiru, to the cabinet.[12]

Subsequent to this election the NEC made a show of might by removing Aboud Jumbe from office as Vice-President (and President of Zanzibar) in January 1984. This added to the clamour for NEC membership in the next party elections, held in 1987. Again it was a contest for political heavyweights and prominent figures

[12]Paragraph based on interview with J.S. Warioba, July 1994.

already holding responsible positions. Those who won included Gibbons Mwaikambo and Amon Nsekela who headed, respectively, the National Insurance Corporation and the National Bank of Commerce (both monopolies); David Wakati, the Director of Radio Tanzania; Nicholas Kuhanga, the Vice-Chancellor of the University of Dar es Salaam; and virtually all cabinet ministers. Philemon Sarungi, then Director of the Muhimbili Medical Centre, won his NEC seat in a 1988 by-election, then a parliamentary seat in 1990, after which he was appointed to the cabinet.

By then the NEC had become an exclusive club protecting the interests and positions of an oligarchy of political elites. For politicians and those aspiring for political office, membership of the NEC became absolutely essential. Many became NEC members not because of any commitment to party beliefs, but because of the positions they held in the government. Standing for membership of the NEC was now beyond the contemplation of most ordinary card-carrying members of the party, the peasants and the workers, whose party the political jargon still claimed it was.

The one-party state system became increasingly difficult to defend, even by its founders. The former President, Julius Nyerere, encouraged a public debate which led to political reforms introduced in 1992, with his support, because he found that the party had actually ceased to act in the interests of the people for whom it was founded (Bagenda:7-8). And his exit from the leadership of the party itself in August 1990 came so suddenly that Titi Mohamed, the founder of the Women's

Organisation (UWT), was almost certain it was done in protest.[13]

7.2: THE FIFTH CONSTITUTIONAL AMENDMENT ACT 1984

The amendment made in 1984 to the *Constitution 1977* was so extensive that commentators have sometimes erroneously referred to a "1985 Constitution".[14] The fact is that the *Constitution 1977* was merely amended, not replaced.

The other fact, though, is that the amendment was an important landmark in the constitutional history of Tanzania. Firstly, this was the first time ever that the general public had taken part in constitution making. In 1983 the NEC proposed that some changes should be made to the *Constitution 1977* and invited a public debate on its proposals. The *Fifth Constitutional Amendment Act 1984* (hereinafter the 1984 Amendment) resulted from the then ensuing one-year long debate.

Secondly, the amendment brought the Bill of Rights into the Constitution, overcoming the previous strong resistance to such inclusion. Finally, the amendment marked the beginning of a significant shift towards asserting law as the basis for government legitimacy, and gradually discarding the role of *vikao* as the basis for government action. One overall effect of the amendment, and one whose real extent did not manifest itself very

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[13]*Mzalendo*, August 5, 1990; *Radi*, No. 8 (September 1990): 5.

[14]The amendment, officially known as the *Fifth Constitutional Amendment Act 1984*, became effective in March 1985.

clearly from the practice, was the reduction, probably slight but significant, in the powers of both the Executive and the Party. Even Party Supremacy, though still proclaimed in the Constitution, was tacitly circumscribed by a new emphasis on the supremacy of law and the Constitution, which both the party and the chief executive were enjoined to observe.

We try to show here below, how this change was effected. Another thing we wish to point out is that the change was deliberately effected by Julius Nyerere as part of his attempt to bequeath a constitutional edifice that offered a better assurance of stability.

7.2.1: Background to the Amendment

Commentaries about the 1984 Amendment have often been dominated by the Bill of Rights, regarding which it has often been remarked that the regime in Tanzania did not really intend to bring it into the Constitution in 1984. Indeed the Bill of Rights was not even mentioned in the 1983 NEC proposals issued to the public for debate on and consideration for constitutional changes.[15] But the public did not feel limited by the NEC proposals and demanded a Bill of Rights, and the regime conceded. This enhanced the role of the public in effecting that particular amendment and showed the prudence of the regime in conceding to popular demands. But little attention is drawn to the question why the regime, through the NEC, proposed to amend the constitution at

[15]*Daily News*, January 31, 1983.

this particular time and, further, why it proposed to use a popular debate rather than a select commission as in previous cases.

In 1975, when Julius Nyerere was nominated presidential candidate he indicated in his acceptance speech that that might be his last 5-year term as President. But in 1980 he was nominated again and, accepting the nomination "for the last time," admitted that only recently had he changed his mind from his 1975 indication.[16] This time he stuck to his decision to vacate the Presidency. But before vacating office, he oversaw changes in the Constitution which made executive powers, still vested in the President, a little more circumspect than had been the case under him.

It appears that one (and perhaps the main) reason for Nyerere changing his mind and not retiring in 1980 is that he suddenly doubted the ability of the then existing constitutional structures to operate effectively and smoothly. They were mostly his creation, finding him already in office as President, they were almost "made to measure" for his style. There was no guarantee for their smooth operation without him in office. Of the things that first prompted his re-evaluation of the constitutional structures were the murders committed by Police and State Security officers in early 1976, which prompted the January 1977 resignations of Mwinyi and Siyovelwa from the

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[16]Vol.8 *Africa Contemporary Record 1975-1976*: B314-5; and Vol.13 *Africa Contemporary Record 1980-1981*: B326.

Cabinet, and the regional commissioners for Mwanza and Shinyanga Regions.

At the peak of the Villagisation Programme in 1974-75, a number of people, in diverse areas of the rural districts of Mwanza and Shinyanga Regions, were inexplicably killed in what is thought to have been an underground campaign to eliminate people believed to be practising witchcraft. Investigations into those killings were not very successful. Complaints about unsatisfactory investigation by the Police reached the President. Concerned about the adverse effects this could have upon villagisation, he commissioned Prime Minister Rashidi Kawawa, Home Affairs Minister Ali Hassan Mwinyi, and Peter Siyovelwa, the Minister of State in the President's Office (responsible for State Security), to look into the matter and ensure that appropriate measures were taken.

Subsequently, a joint meeting of the Regional Party Committees for Defence and Security for Mwanza and Shinyanga was held in Shinyanga in January 1976, chaired by Mr Kawawa and attended by the two ministers and the respective regional commissioners. The meeting resolved to arrest all suspects of the murders for interrogation, including some who may have been acquitted already for lack of evidence in connection with the same murders. The arrests and interrogations began almost immediately after this meeting. Altogether some 898 suspects were interrogated by a number of police and security officers. No less than a dozen suspects died, and a lot more were maimed for life, as a result of torture inflicted in the course (and, apparently, as part) of

the "interrogations." A few years later some police and state security officers were charged with the murder of the suspects in two separate cases before the High Court which then heard a horrendous account of inhuman treatment.[17]

In both cases the accused were convicted of the lesser offence of manslaughter. In the first case the trial court judge remarked that it was the "worst case of manslaughter" he had ever encountered in his long period on the bench; confirming the verdict, the Court of Appeal observed that the appellants were "lucky to have been convicted of manslaughter instead of murder," and enhanced the prison sentences imposed from 7 to 14 years although there had been no appeal against sentence by the Republic.[18] In the second case the Court of Appeal also confirmed the verdict of manslaughter but remarked that some, even "if not all appellants, could have been convicted of murder," and further that "some parties... not charged before the court could perhaps have been successfully prosecuted for the deaths" of the victims in the "disgraceful episode."[19]

Meanwhile, there was a concerted effort to cover up and conceal those murders from President Nyerere. But due to the persistence of Mr Edward Ngh'wani, then an MP for Bariadi in Shinyanga Region, some of the victims who survived the tortures were given audience by Nyerere in early January 1977 and recounted to him

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[17]A short but comprehensive account is in Shivji 1990b: 90-9.

[18]*Godfrey James Ihuya & Others v. R*, [1980] T.L.R. 197.

[19]*Elias Kigadye & Others v. R*, [1981] T.L.R. 355.

their whole experience. He was furious. The two ministers and the regional commissioners were advised to resign to appease his fury.[20] They took the advice and resigned, taking political responsibility for the murders.

The resignations occurred on January 21, 1977, just as the new party, *Chama cha Mapinduzi* (CCM) was about to be launched. Nyerere readily accepted the resignations because, as he said in his answer to the resigning ministers, the principle of ministers accepting political responsibility for the actions of officers under them in their departments was a sound principle which had to be encouraged to take root in Tanzania so as to ensure justice:

> Once our people know that Party leaders to whom certain instruments of state have been entrusted will not tolerate evil, we will have bequeathed to the new Party a firm foundation for the furtherance of justice in our country... By this selfless act, ...you remind us of leadership obligations, ...you are showing us the example of a good leader. This is a sign of maturity in leadership...[21]

But until Nyerere vacated office in 1985, the example of good leadership set by those resignations was not very enthusiastically emulated. In 1981 the Minister for Agriculture, Joseph Mungai, resisted all parliamentary pressure to resign over the sugar scandal in 1981 and was only removed by the President in a 1982 cabinet reshuffle (*supra*, 4.3.2).

It was after those resignations that Nyerere decided to stay on as President for a while after 1980 so as to try and make changes

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[20]The paragraph is based on information from Mr Joseph Warioba.

[21](1977) 14 *Africa Research Bulletin*: 4284C.

to the constitution so that such "maturity in leadership" is not left entirely to sheer chance.[22] Accordingly, in 1981 the party issued a new document, the *CCM Guidelines 1981*, which declared an even greater commitment to socialist principles (van Cranenburgh:117-20). But also the Guidelines called for greater democracy as a safeguard against bureaucracy, a more powerful and more representative Parliament, and for strengthening people's power by devolution of government powers to democratic institutions at district and village levels.[23] Within the party, the Guidelines sought greater democracy by proposing an end to the appointment of members to the NEC; its entire membership was to be elective. This proposal was adopted immediately and implemented in 1982.

From the *CCM Guidelines 1981* the NEC issued, in January 1982, the proposals for constitutional amendments, citing four major areas to be considered: redefining the powers of the President and their precise limits; enhancing the stature and authority of Parliament; increasing the power of the people; and strengthening the Union (between the Mainland and Zanzibar).[24]

Meanwhile, Amnesty International and other international human rights organisations continued to press Tanzania to improve her human rights record. Much of the campaign was directed against the *Preventive Detention Act 1962* and its use. Even within the

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[22]Based on information from Mr Joseph Warioba.

[23]*CCM Guidelines 1981*: 44-6.

[24]*Daily News*, January 31, 1983.

country, that law became more and more difficult to defend. In 1982, senior judges Kisanga and Mnzavas were among prominent lawyers who attacked it as a law whose original reasons were no longer there, and which was now increasingly being misused.[25]

As the constitutional debate began, an unprecedented number of detentions were effected in the crackdown on economic sabotage which started in March 1983. Complaints about misuse of detention powers by having detention orders post-dated or signed in blank or upon flimsy grounds and then being used by the President's subordinates for self-serving motives had started emerging, but with the 1983 crackdown their numbers rose sharply. Many people were detained on groundless or very flimsy allegations, and many had their lawful properties looted while in detention. This, in turn, led to a series of complaints and petitions to the President. In one case involving two priests detained in remote Sumbawanga under the *Economic Sabotage (Special Provisions) Act 1983*, the President was so moved that he was inclined to release them although the economic sabotage Special Tribunal was yet to hear their case. But the Attorney General, himself strongly resentful of that draconian law,[26] firmly advised the President that either the law had to be amended to allow bail for all other suspects, or the two priests

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[25]*Africa Now*, January 1983: 12-3.

[26]The Attorney General's Chambers were never even involved in preparing this law. The Bill was hastily drafted by some Police and Immigration officers in the Ministry of Home Affairs and presented to Parliament while the Attorney General was away on an official trip overseas.

had to wait to appear before the tribunal like all the others.[27]

The total implication of all this amounted in effect to a demand on the President himself to observe the Rule of Law.

Also in 1983, Chediel Mgonja, whom the Court of Appeal had found guilty of corrupt practices in an election petition and thereupon disqualified from holding political office for 10 years,[28] was nevertheless appointed Regional Commissioner for Shinyanga. But the President had to revoke this appointment three days later, after being reminded of the court ruling.[29] During that same year, the Chief Justice "invited himself" to meetings of the party's Central Committee and NEC and warned, in his addresses to them, against the dangers of increasingly disregarding the Rule of Law.[30] While all this happened, the constitutional debate continued.

In mid-1984, a few months before Parliament debated the Constitutional Amendment Bill, the government introduced a policy of liberalisation of trade and economy, reversing the previous policies which had discouraged and restricted private investment. Promises of security of property rights were necessary to encourage private investors, both local and foreign.

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[27]Based on information from Mr Joseph Warioba.

[28]*Bakari & Alua v. Chediel Mgonja & Another*, Tanzania Court of Appeal, Civil Appeal No. 22 of 1981.

[29]This happened before the President had pardoned him.

[30]*Daily News*, June 8, 1993; *Bulletin of Tanzanian Affairs*, Jan.1995:16

It is against that background that the 1984 Amendment was passed and brought into the *Constitution 1977* the Bill of Rights and a renewed commitment to legality and the supremacy of law.

7.2.2: Reasserting Legality and Government Responsibility

According to Joseph Warioba, who was Attorney General for ten years (1975-85), one intention of the 1984 Amendment was to subject the powers of the party to some strict legal limits. Indeed, a survey of the provisions brought into the *Constitution 1977* by that amendment reveal a particular emphasis on the requirement to observe the provisions of "this Constitution and the laws of the United Republic," an emphasis which was absent before the amendment.

The amendment did not alter the position of the party but although it still remained supreme with "final authority in respect of all matters", the new s.3(2) of the *Constitution 1977* now made it "*subject to this Constitution* and party constitution", unlike the previous position under which the party had been supreme according to its own constitution.

An important new provision was in s.4, expressly declared the principle of separation of powers and vested "all state authority"[31] in the three separate organs: the legislature, the executive and the judiciary, and requiring them to exercise their

[31]The English version of the *Constitution 1977* refers to "all executive authority", which is not a correct translation of "shughuli zote za *Mamlaka ya Nchi*" appearing in the original Swahili version.

functions according to the Constitution. The Party was not even mentioned, thus implying that the government could run its business without waiting for, or referring to, the party to make decisions or give directions. This was a subtle change in the position of the party.

Indeed s.10(2) still required, "*subject to this Constitution*, all activities of all public institutions... [to] be conducted under the auspices and control of the Party." But this was part of the unjusticiable "Fundamental Objectives and Directive Principles of State Policy"; moreover, s.10(3) went on to impose a duty on the party to ensure that all organs and public institutions carry out their functions "in strict adherence to the provisions of this and the laws of the land," a requirement also directly imposed on those institutions themselves.

Under the concept of "Party Supremacy", matters of policy were always said to be the prerogative of the Party, although there was no constitutional provision to that effect. But after the 1984 Amendment, s.53(2) of the *Constitution 1977* stated: "the Executive of the United Republic shall, under the authority of the President, determine the general policy of the Government." Therefore, even with regard to policy, the party remained supreme more as a matter of practice and Presidential discretion rather than as a matter of law or constitution.

The position of regional commissioners holding that office merely by virtue of their positions as regional party secretaries ended

in 1982 when the two offices were separated. The 1984 Amendment reinforced this position by providing for the President to appoint regional commissioners, and requiring them to perform their functions according to law [s.61].[32] Also the power of the President to act in his absolute discretion without, or even in disregard of, advice was, before 1984, "subject to the policies and directives of the party", but after 1984 it became subject to "the provisions of this Constitution, the laws of the United Republic and the policy and directions of the Party" [s.37(1)]. This did not, in fact, reduce the discretionary power of the President; but it emphasised the supremacy of law, not the party, in the exercise of that discretion.

The 1984 Amendment made little reduction in the actual powers of the President as such; but it subjected them to some apparently "harmless" circumspection in various ways. The requirement upon the President to act according to law, previously merely assumed, was now repeatedly highlighted like a tacit warning against the tendency towards "government by *vikao*." A big change, though, was the limit to a maximum of two five-year terms for any one person holding the office of President [s.40(2)]. Previously, a person could be re-elected over and over again which, under the one-party system, was practically the rule; it tended to make the presidency an appointment for life, and presidents unsusceptible to any form of accountability.

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[32]References in square brackets in this and the next sections refer to the *Constitution 1977* after the 1984 Amendment.

Following the 1984 Amendment, the Presidential powers of appointment were slightly reduced. The *Constitution 1977* now provided for two vice-presidents, one of whom was to be the President of Zanzibar, and the other was also to be the Prime Minister, whose office was now established by the Constitution [ss.51-53], and not created by the President exercising his discretion as previously. The Constitution now required the President to appoint the Prime Minister, from amongst the MPs, within 7 days of assuming office [s.51(2)]. Subsequently, the Prime Minister must be consulted by the President when appointing Cabinet Ministers and Deputy Ministers (also from amongst the MPs), as well as Regional Commissioners [ss.55 & 61] who then became *ex-officio* MPs [s.66(1)(g)].

In the event, the status of the Prime Minister was enhanced. The requirement to consult him in appointing Ministers and Deputy Ministers means that although all ministers hold office at the pleasure of the President [s.58], the removal of the Prime Minister from office entailed loss of office for all the other ministers, at least so as to enable the new Prime Minister to be consulted in constituting a new Cabinet.

That interpretation was first followed in Zanzibar where there is a similar provision requiring the President to consult the Chief Minister in appointing ministers. In May 1988, President Idris Abdul Wakil dissolved the Zanzibar Cabinet and reconstituted it two days later simply because he wanted to replace Seif Shariff Hamad with Omar Ali Juma as Chief Minister; almost

all the other ministers were re-appointed to the new Cabinet. For the United Republic of Tanzania, President Mwinyi did exactly the same thing in December 1994, the whole purpose being to replace the Prime Minister, John Malecela, who had come under severe attack from former President Nyerere, whose influence is still enormous, for failing to advise the President properly (Nyerere 1994).

The *Constitution 1977* now charges the Prime Minister with the "control, supervision and execution of the day to day functions" of the government, being "Leader of Government Business in the National Assembly," as well as any other functions as may be directed by the President [s.52]. In the performance of his functions, the Prime Minister is answerable to the President [s.53(1)], but on the other hand, the Constitution [s.53(2)] also declares:

> The Ministers, led by the Prime Minister, shall be collectively responsible to the National Assembly for the discharge of the functions of the Government of the United Republic.

This came in 1984 like a return to the doctrine of ministerial collective responsibility of s.43(2) of the *Independence Constitution*, encapsulating the basic element of government responsibility to Parliament under the Westminster system. But in 1961-62 the Prime Minister was also the effective Head of the Executive and the Cabinet, a position now held by the President, who is not even an MP. And under this new position the Prime Minister and the Ministers still remained responsible to the President, who appointed them and could remove them from office

at any time. Thus they were now responsible to both the President and the National Assembly, which was not exactly the position in 1961. Also the 1984 Amendment did not restore the power of the National Assembly to pass a motion of no confidence in the government.

Whatever its limitations, however, the 1984 Amendment did attempt to change, for the better, the status and composition of the National Assembly. Indeed, it remained a "special committee of the National Conference of the Party" [s.63(4)], but only for the stated purpose of supervising the implementation of party policies by the government and parastatal organisations and not in general terms as previously, and the provision now made no reference to the Party Constitution. A completely new provision [s.63(2)] stated:

> The National Assembly shall be the principal organ of the United Republic which shall, on behalf of the people, supervise and advise the Government of the United Republic and all its agencies in the exercise of their functions in accordance with this Constitution.

The emphasis thus shifted in favour of Parliament regaining its supremacy as the representative organ of the people and their common rights and interests, a role which, over the years, had been lost to the party.

The 1984 Amendment made the National Assembly more democratic in its composition [s.66]. The number of members directly elected to represent constituencies rose from the previous 111 to 169, and that of indirectly elected members fell from 72 to 35. The number of MPs appointed by the President fell from 56 to 40,

including regional commissioners. The 35 indirectly elected members were so elected as follows: 15 women members elected to represent women; 15 members elected to represent the 5 mass organisations (3 for each), i.e. the Women's Organisation, the Youth League (*Vijana*), the Trade Union, the Cooperative Movement, and the Parents' Association; and 5 members elected by the Zanzibar House of Representatives to represent Zanzibar [ss.78-80]. Other members from Zanzibar, totalling 50, were directly elected constituency members, thus putting an end to the previous category of 52 members appointed from Zanzibar.

Another important new provision was s.100 of the *Constitution 1977*, which made parliamentary proceedings absolutely privileged and not to be questioned anywhere outside parliament. This was reinforced a few years later by the *Parliamentary Immunities, Powers and Privileges Act 1987* which restated that nothing said in the National Assembly shall be questioned in any court or other place outside the Assembly, and gave all MPs freedom to hold public meetings in their constituencies and required all respective authorities to facilitate the holding of such meetings whenever required by the MPs. As the one-party state has since been abolished, the full impact of those provisions at that time may now never be known. But it is doubtful whether the questioning of MPs by the NEC in 1968 and their subsequent expulsion from the party and the Parliament for what they had said in Parliament would have indeed occurred if a similar provision, and all others brought in by the 1984 Amendment, had been in the Constitution.

The 1984 Amendment also introduced two new sections on local government which is now expressly established "for purposes of consolidating and giving more power to the people" [ss.145-146]. This was the first constitutional reference ever to local government. Whether local government does give more power to the people ultimately depends on how much power the local government laws actually give to the local institutions and how far those institutions are democratically controlled, issues which the *Constitution 1977* does not cover. But the provision for local government in the Constitution makes it difficult for the executive to simply abolish local government, as it did in 1972, without violating the Constitution.

Finally, the 1984 Amendment also enhanced the role of the Judiciary. The emphasis on legality and on the supremacy of the Constitution [s.64(5)], the constitutional declaration of separation of powers and the adjudicative role of the Judiciary [s.4(2)], the inclusion of the Bill of Rights and the right of individuals to institute proceedings in defence of legality and constitutional rights [ss.26(2) & 30(3)], and the power of the High Court to hear and determine the constitutionality of any act or law [ss.30(4) & 108], all had the effect of greatly enhancing the role and status of the Judiciary to a level not known before.

There was a great increase in the amount of litigation, much of it relating to the Bill of Rights. Consequently, this enhanced role and status of the Judiciary is also inextricably associated with the Bill of Rights.

7.2.3: Some Effects of the Bill of Rights

The 1984 Amendment incorporated the Bill of Rights as ss.12-32 of the *Constitution 1977*. This now guarantees the right to freedom, dignity and equality before the law; the right to life, privacy and personal liberty; freedom of movement, expression, religious belief and association; and the right to property. The Constitution did not create these rights; it only guarantees their protection by, among other things, empowering the High Court to review any act, and to declare null and void any law, infringing upon them.

The operation of that power of the High Court was deliberately withheld for 3 years by s.5(2) of the *Constitution (Consequential, Transitional and Temporary Provisions) Act 1984*, so as to give time to the government to repeal or amend all statutory provisions which were inconsistent with the Bill of Rights (Nyalali 1991:4). But apart from the *Preventive Detention (Amendment) Act 1985* which, among other things, required the President to give reasons for a detention order and allowed such an order to be questioned in court, little else was done. All other laws offending the Bill of Rights, and there were quite a lot, remained intact and thus amenable to challenge before the High Court when the 3 years expired.

An early challenge came through the case of *Chumchua Marwa v. Officer i/c Musoma Prison & the Attorney General*,[33] in which the

[33]High Court of Tanzania, Mwanza, Misc. Criminal Cause No.2 of 1988.

Deportation Ordinance was held unconstitutional and declared null and void (*supra*, 5.3.3). And in the *Director of Public Prosecutions v. Daudi Pete*,[34] not an entire law but only paragraph (e) of s.148(5) of the *Criminal Procedure Act 1985* was similarly declared null and void. Besides the declaration, a very important holding in the latter case, made by the trial judge and upheld on appeal, was that although the procedure which Parliament was empowered to enact under s.30(4) of the *Constitution 1977* to regulate proceedings for enforcing the Bill of Rights had not been enacted, the power of the High Court to enforce the Bill of Rights was not limited by the absence of procedural rules; proceedings for enforcing the Bill of Rights can thus be instituted by any procedure within the jurisdiction of the court. Thus in this particular case the proceedings were by way of application for bail.

The importance of that holding is that it enabled the High Court to hear a number of other applications in which more provisions of the *Criminal Procedure Act 1985* and the *Economic and Organised Crime Control Act 1984* were held unconstitutional for attempting to remove completely the discretionary power of the courts to grant bail. These holdings were, in a way, not only in defence of the constitutional right to personal liberty [s.15] and to the presumption of innocence until proved guilty [s.13(6)(b)], but also defending the principle of separation of powers, now expressly declared in the Constitution [s.4]. The other important decisions were, as we saw earlier (chapter 6.3.3), in

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[34] [1991] L.R.C. (Const) 553.

Peter Ng'omango v. Gerson Mwangwa & the Attorney General[35] and *Kukutia Ole Pumbun & Another v. Attorney General*[36] in which s.6 of the *Government Proceedings Act 1967*, which had required the consent of the Minister to sue the government, was declared unconstitutional and therefore null and void.

With the success of a few early cases involving the Bill of Rights, public awareness was enhanced in two ways. Firstly, more and more people became aware of their rights under the law and the Constitution. Secondly, they became aware not only of the right to defend their rights by court action, but also of the power of the courts to enforce their rights against the government. This enhanced awareness has contributed significantly towards dispelling the myth of "executive infallibility" by challenging in court even decisions of the President; until very recently, it has been common to hear that nobody was above the law *except the President!*

The case on the *Deportation Ordinance* mentioned above was thus a reminder that even the President is not above the law. Similarly, in *James F Gwagilo v. Attorney General*,[37] the plaintiff successfully challenged the power of the President to remove a civil servant from service "in the public interest" under the *Civil Service Act 1989*, when the President removed him without disclosing what that public interest was. Before the

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[35]High Court of Tanzania, Dodoma, Civil Case No. 22 of 1992.

[36][1993] 2 L.R.C. 317.

[37]High Court of Tanzania, Dodoma, Civil Case No. 23 of 1993.

purported removal the plaintiff had been charged under the *Economic and Organised Crime Control Act 1984* and acquitted; then he was charged with a disciplinary offence under the Civil Service Regulations and acquitted again. Had he been found guilty in either of the charges he would have been dismissed from service. The High Court quashed the purported removal because, among other reasons, it appeared that the powers of the President under the *Civil Service Act 1989* had been invoked not in the public interest but to punish the plaintiff after failing to do so through those charges.

Growing public awareness is well illustrated by the case of the Junior Doctors Association referred to earlier (*supra*, 6.2.3). Registration of the Association under the *Societies Ordinance* was inordinately delayed until after its founders had threatened the Registrar of Societies with court action. Then in January 1992, hardly a year after registration, the government sacked the junior doctors following a dispute, and ordered them to immediately vacate their living quarters at the Muhimbili Medical Centre. The Association's secretary, Dr Joseph Masika, at once filed a civil case on behalf of his colleagues.[38] Unrepresented, his pleadings were not perfectly drafted but they were enough basis for him to make an oral application for temporary injunction, which was granted, against forced evictions from the doctors' living quarters.

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[38] *J.J.Masika & 66 Others v. Muhimbili Medical Centre*, Resident Magistrate's Court, Dar es Salaam, RM Civil Case No. 6 of 1992.

In defiance of the court order, troops of Riot Police were sent to evict the doctors and their families, leading to the crisis mentioned earlier (*supra*, 6.2.3), with a big protest march and ultimately the Prime Minister reinstating the doctors. But while most of the doctors were in the protest march, a few of their representatives spent the day at the Resident Magistrate's courthouse where, having secured legal representation, they got an order committing the Director of Muhimbili Medical Centre to civil prison for 14 days for contempt of court in defying the order of temporary injunction.[39]

The doctors' case may not have been directly based on the Bill of Rights as such; but it highlighted the power of the courts, which was increasingly made known by the enforcement of the Bill of Rights. In other cases constitutional rights were increasingly being used to enforce claims which may well have been based elsewhere. Thus in claims essentially based on Planning and Local Government Law, the constitutional right to life was interpreted as including a clean environment free from pollution in two successful cases against waste dumping close to residential areas by the Dar es Salaam City Council.[40]

In the early 1990s, students made considerable use of the High Court in defending their rights. Not all cases have been very

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[39]Execution of the order was stayed pending appeal by the Director. By September 1994 the appeal was yet to be heard as, the crisis being over, there was little pressure for it and the Director concerned was retiring.

[40]*Joseph D Kessy & Others v. City Council of Dar es Salaam*, High Court of Tanzania, Dar es Salaam, Civil Case No. 299 of 1988; *Festo Balegele and 794 Others v. Dar es Salaam City Council*, High Court of Tanzania, Dar es Salaam, Miscellaneous Civil Cause No. 90 of 1991.

successful but they have helped to reveal the alarming extent of "administrative lawlessness" often involved in handling students' problems, with students' victimisation being the rule. On March 4, 1991, students of the Dar es Salaam Technical College boycotted classes after several years of dispute with the government and the college authorities over, among other things, the need for a clear definition of the status of the college and the diploma courses it offered. A week later, the College Board expelled 232 Diploma Course students; they took the matter to court. The High Court quashed the decision of the Board and reinstated the students because they had been condemned without a hearing and the Board was not properly constituted.[41]

On 5 September 1991, some 248 Advanced Diploma Course students of the Institute of Development Management, Mzumbe, were expelled after a dispute lasting several weeks. The expulsion order was apparently made by the government but the Board of the Institute immediately endorsed it. Again, the decision was wrong for condemning the students unheard and the High Court quashed it and ordered the expelled students to be either treated as suspended pending a proper inquiry into the crisis to be initiated by the Institute within 6 months, or reinstated.[42]

The overall effect has been a tightening of the limits of executive and administrative power. It is now no longer

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[41]*Mtoka s Mtwangi & Others v. Board of Dar es Salaam Technical College & Another*, High Court of Tanzania, Dar es Salaam, Misc. Civil Cause No. 25 of 1991.

[42]*Felix Bushaija & Others v. Institute of Development Management & Another*, High Court of Tanzania, Dar es Salaam, Misc.Civil Cause No.89 of 1991

sufficient merely to cite a law as the basis for an administrative action; one has to ascertain further that the law cited is not inconsistent with the Constitution. The power of the High Court to enforce the Bill of Rights has thus demanded that government administration be more scrupulous in observing the Constitution. On the other hand the growing public awareness of the controlling power of the courts leads to a forced reawakening of government administrators to the need to learn and use some of the essential rules of administrative law like the principles of natural justice.

The Bill of Rights has also contributed greatly to the confidence of the people in challenging the restrictions to freedom imposed under the one-party state policies. On its basis, people felt confident to assert their right to freedom of expression and organisation and, subsequently, to challenge the legitimacy of the one-party state itself, as shown further below.

7.3: CHANGING POLITICAL CLIMATE

After the adoption of the Bill of Rights, Tanzania saw a change in the political climate. People acquired a new confidence in asserting their rights and freedom against censure by the government or the party, against harassment by the Police, the City Council militia, or other agencies of the state. They started demanding and asserting their rights, as individuals and as groups, to exist and to organise and conduct their affairs, free from control and interference by the ruling party.

This new spirit of freedom and confidence owed much to the Bill of Rights, information about which spread gradually after 1985. The Faculty of Law of the University of Dar es Salaam contributed significantly to that spread. In October 1986 the Faculty commemorated its 25th anniversary with a week-long, widely publicised seminar devoted exclusively to a discussion of the Bill of Rights. And the Legal Aid Committee (of that Faculty) embarked on an ambitious campaign for Legal Literacy (Sandbrook & Halfani:57-60) with the Bill of Rights providing a major part of the syllabus.

There also developed a wider scope of freedom of expression as a result of a few bold-spirited independent newspapers, and an upsurge in popular demands for the autonomy of popular institutions and civil organisations. In the event the government had to adjust to this new climate, leading ultimately to the abolition of the one-party system. We look briefly at how this new climate manifested itself through greater freedom of expression and association, as well as the struggle for political expression outside the one-party state establishment.

7.3.1: Freedom of Expression

As we have seen (*supra*, 6.2.4), two state-owned dailies and the state owned radio were all the information media available in Tanzania for most of the period under review. The government used them to report (or misreport) issues to suit its purposes and interests. Sometimes the media just kept quiet even on major

issues about which the public desperately needed information, thus encouraging a thriving rumour industry (Tegambwage). The private media, consisting of a few irregular periodicals with limited circulation, apparently afraid of the extensive government powers over the press, rarely corrected the misinformation by the state and concentrated on sports and entertainment.

But after 1985 a few independent publications emerged. *Radi*, a Swahili monthly, was one of them. It often failed to maintain its publication schedule but when it appeared it was a refreshing contrast with the official media. It reported the activities of a group which had actively campaigned against Zanzibar President Idris Abdul Wakil in the 1985 election. The official sources said nothing, although Wakil's margin of victory in the election was so small (in the context of the one-party single candidate elections) that an explanation was needed.[43] An official explanation finally came in May 1988 when Seif Shariff Hamad, until then a member of the NEC and extremely popular Chief Minister of Zanzibar, was expelled from the party and all leadership positions for allegedly not campaigning effectively for Wakil in the 1985 election.[44]

Another issue of *Radi* in 1986 had a long article, *"Hatukumjua Nyerere"* [literally: "We Did Not Know Nyerere], attacking the official media for its unnecessary and unjustified secrecy around

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[43]Wakil obtained a mere 61% "Yes" vote; see Othman & Mlimuka: 62-3.

[44]*Daily News*, May 17, 1988.

the private lives of national leaders such that until Nyerere left the Presidency, the public virtually did not know him as a human being, with ordinary human needs and weaknesses.

Shortly before the party elections in 1987, the Roman Catholic Church-owned bi-monthly, *Kiongozi*, came out of obscurity with a bold editorial challenging the wisdom of Nyerere's apparent reluctance to hand over chairmanship of the party to President Mwinyi, and let the latter hold both positions as Nyerere himself had done up to 1985.[45] The issue was picked up and intensely debated by readers and writers, not so much in *Kiongozi*, but mainly in the up and coming Trade Union-owned bi-weekly, *Mfanyakazi*, which had not raised it in the first place. The debate did not stop Nyerere's re-election as party chairman in October 1987, but it prompted some explanation in his acceptance speech to justify his continuing as chairman.[46]

Fahari was another irregular, independent publication which had existed in the 1970s, concentrating on entertainment, then went out of circulation for several years. It re-emerged in 1989 with a bitter attack on the World Bank-IMF inspired economic policies of Mwinyi's government. In particular, it severely criticised the Minister for Finance, Cleopa Msuya, for a somewhat arrogant remark in Parliament that Tanzanian peasants were unwise to expect the government, or anyone else, "to bear their cross [i.e. their economic burdens] for them." Then *Fahari* disappeared

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[45] *Kiongozi*, August 15-31, 1987.

[46] *Sunday News*, November 1, 1987.

again, only to re-appear after a few months, dispelling rumours that its editor had been detained. It started serialising elaborations of the Bill of Rights for its Swahili readership.

Two English language periodicals, *Business Times*, a weekly started in 1988, and *Family Mirror*, a bi-monthly started in 1989, soon established themselves as regular independent publications. Together with *Radi* and *Fahari* (although these two were sometimes irregular), they effectively opened up the way to independent news reporting in Tanzania, often correcting the biases created by the state owned media.

One case of deliberate misreporting by the state media was the Dar es Salaam University crisis of 1989-90 in which students boycotted classes in April 1990 and were expelled by the government the following month. The crisis had centred on poor and deteriorating facilities at the university on account of a 55% reduction in the university budget, which the students associated directly with poor management of national resources and total lack of accountability on the part of the government. After expelling them the government used the state media to paint a biased picture of the students as self-indulgent and demanding increases in their allowances which were claimed to be already higher than the salaries of most public servants. Only those four publications explained the students' demands objectively, and when investigation by an independent commission vindicated the students, only those four publicised its report.[47]

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[47] *Family Mirror*, October 1-15, 1990.

By 1990 the independent press was able to publish individual views challenging the legitimacy of the one party system. The first time those views were expressed to a wide public was at press luncheons organised through the Dar es Salaam Press Club and addressed by individuals who were soon to become prominent in the movement against the one-party system. The press luncheon addresses were reported prominently in the new independent media.

We should emphasise that all the laws with which the government could suppress the media (*supra*, 6.2.4) remained intact. But the government did not invoke them against the emerging free press to the extent of suppressing it completely. In the event the state owned media was also forced to adjust itself and report more objectively. Otherwise it was bound to frustrate journalists as already shown by some who began leaving and joining the independent press which, after 1990, saw the emergence of more publications.

7.3.2: Autonomous Civil Organisations

After 1984 there was an upsurge in the formation of diverse groups and organisations, free from party control. They included most of the non-governmental organisations registered by 1990 (Mmuya & Chaligha 1992:18-9). Besides new organisations, within existing ones there emerged a movement in favour of autonomy and freedom from the ruling (and only) political party. And, invariably, the government started conceding to these demands.

The new struggle for autonomy for both the cooperative and the trade union movements seems to have started in 1982. We saw in Chapter Six how the two popular institutions were put under state control by statutory provisions and by organisational affiliation to the ruling party. Following the *CCM Guidelines 1981* which, among other things, called for greater democracy and strengthening of people's power, the *Cooperative Societies Act 1982* was enacted. It revived the cooperative movement (which had virtually been abolished in 1976) and repealed the *Jumuiya ya Washirika Act 1979* under which a "mass organisation of the party" called *Washirika* had been the sole apex organisation for the cooperative movement. The new law gave power to cooperative societies to form and control their own apex organisation.

However, for some years the cooperative societies did not form an apex organisation and the party continued to exercise influence through its "mass organisation", *Washirika*, although in law there was no such organisation. In 1990, the *National Apex Organisation of Tanzania (Formation) Act 1990* was passed to specifically make *Washirika* an apex organisation. This move did not satisfy mounting pressure for autonomy and cooperative societies and their members rejected the state-created *Washirika*. With increasing support from government officials (McHenry 1994: 116-9) the demands for autonomy led to the *Cooperative Societies Act 1991*.

This new law ended the affiliations with the party and repealed the one designating *Washirika* an apex organisation. Cooperative

societies formed their own apex organisations according to sector, which then federated into the Tanzania Cooperative Alliance (TCA). In 1993 the TCA, entirely controlled by its member organisations, took over the assets of the officially defunct *Washirika*.

Regarding the state controlled trade union (*supra*, 6.1.1), the appointment of Joseph Rwegasira as Secretary-General of JUWATA in 1982 was a break with the tradition, started in 1964, of appointing successive ministers for labour as secretaries-general of the trade union; Rwegasira was not a minister. Two years later, Alfred Tandau, who had served for years up to 1982 as Minister for Labour and Secretary-General of the trade union, contested for its chairmanship in elections supervised, in the usual way, by the party. He lost to Horace Kolimba.

Rwegasira and Kolimba then led a concerted campaign to free JUWATA from party control. As a result of this campaign the Party Chairman lost his power to appoint the Secretary-General of JUWATA to the union's National Conference which used it for the first time in 1989, confirming Joseph Rwegasira in that position. The conference also re-elected Kolimba as Chairman. The campaign went on and finally the party lost its supervisory role over the elections and other affairs of the trade union movement. This was effected by the *Organisation of Tanzania Trade Unions Act 1991* which established a new trade union, unaffiliated to the party.

The government did try to contain these developments with the aim of retaining *de facto* control of trade unionism. In 1988 Joseph Rwegasira was appointed Minister for Labour. But in 1989 the JUWATA Conference nevertheless elected him to continue as Secretary-General. Following the October 1990 general election, Horace Kolimba became Secretary-General of CCM and was, in that capacity, appointed to Parliament and to the Cabinet. Rwegasira was also elected to Parliament and retained as Minister for Labour. Under the new trade union rules effective from 1991, these appointments disqualified the two from leadership and, accordingly, they both resigned their trade union posts. A new leadership, elected in August 1991, entered office at the start of the reformed trade union established under the new law.

The new trade union, styled the Organisation of Tanzania Trade Unions (OTTU), faced widespread suspicion that it was not a workers' organisation but another state institution created to facilitate government control of the workers. Indeed the *Organisation of Tanzania Trade Unions Act 1991* simply replaced JUWATA with OTTU and, besides an end to party control and supervision of the trade union, did little else to enhance free trade unionism. Like JUWATA, OTTU became the only lawful trade union to which all workers must belong if they are to participate in any trade union activity. Upon establishment in 1991, OTTU inherited the entire structure and membership, as well as assets and liabilities, of the former JUWATA. As such OTTU came in essentially as an organisation established by law, not a voluntary federation of free trade unions. The law establishing

it also empowers the President to order its dissolution, and the Minister to close any of its branches.

But the OTTU leadership set out to demonstrate some determination in confronting the government, as the biggest employer, without fear. From 1993 relations between OTTU and the government deteriorated because of an unfulfilled promise of a civil service wage increase. Ultimately, OTTU called a three-day civil service strike in March 1994. The strike was not a success, but it helped to project OTTU's resolve to be free from government control. The government can still threaten it or any of its branches with dissolution or closure. But in the new climate of greater freedom and confidence in asserting people's rights, it is doubtful if the government would take such a step.

Meanwhile, the Women's Organisation and the Youth League remained under the control of the party. But from the Youth League, university students soon regained the right to form their own autonomous organisations.

Dar es Salaam University students became increasingly disillusioned by MUWATA, the campus extension of the CCM Youth League formed in 1979, and by 1989 they proposed to establish their own organisation. This move gained momentum after the World Youth and Students Festival held in North Korea in July 1989. During the festival, the student leader attending the festival was put in seclusion under "hotel arrest" guarded by Korean security men in Pyongyang, apparently for his persistent

questioning of a number of things, including why the Tanzanian delegation to a festival of "Youth and Students" had only 8 students and 18 not so youthful party officials, and how the funds for the delegation were being spent. On return home the student leader, Ludovick Bazigiza, and his deputy, Adolf Mkenda, wrote a "protest report" about the experience at the festival and circulated it widely.[48]

Then Bazigiza was suddenly picked up by state security agents and detained for 3 weeks at an unknown place, where he was subjected to humiliating treatment, including being photographed naked![49] As part of the administrative efforts made to secure his release, a meeting was arranged at the CCM Youth League headquarters involving the Vice-Chancellor of the University of Dar es Salaam, the deputy student leader (Adolf Mkenda) and one Paschal Mabiti, an official of the party believed to have been behind the confinements both in Pyongyang and in Dar es Salaam. The meeting never took place. Instead, Mr Mabiti brought security men who arrested Mkenda before everybody's eyes, hurled him into a waiting car and disappeared without any explanation. He was released two weeks later, along with his colleague Bazigiza.

Rather than intimidate them, these experiences made the students even more determined to have their own autonomous organisations. The government did not suppress them further and their first autonomous students' organisation was set up in 1991 by students

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[48]The report was dated July 17, 1989.

[49]Account by the victim himself after release.

of the University of Dar es Salaam. Similar organisations were soon established in other institutions of higher learning.

Generally, after 1990 the political climate would no longer support state control of or patronage over every organisation. Even the monopoly over politics enjoyed by the single ruling party, through which the control of civil organisations was most effectively exercised, came under challenge. Thus the emergence of new professional associations, like the Junior Doctors Association and the Association of Journalists and Media Workers, could not be suppressed.

Besides professional associations, there also emerged organisations formed by indigenous communities to defend their particular rights and interests. Among these were KIPOC, mentioned earlier (section 6.3.3), and the *Inyuat e-Maa* (ole-Ngulay), both formed by pastoralists' communities. The government may have wished to contain their activities sometimes, as indeed it tried to act against KIPOC. But in the new political climate of freedom of association guaranteed under the *Constitution 1977*, the government could not ban them, as it did the RDA in 1969.

7.3.3: The Struggle for Political Expression and Organisation

The one-party state Constitution severely restricted the right to participate in political activity. Even the Bill of Rights did not mitigate this restriction because the freedom of association it guaranteed under s.20 of the Constitution was

"subject to the laws of the land", some of which prohibited political activity outside the ruling and only political party. The Constitution established certain institutions and organs of state which included the one-party system, and as a matter of construction:

> ...no provisions of the Constitution can reasonably be interpreted or applied in a manner which effectively abolishes or diminishes the existence or the role of any such institution or organ. Articles 3 and 10 of the Constitution establish the one-party state in this country. So it cannot be abolished or diminished by interpretation of any other provision of the Constitution. Thus the freedom of association guaranteed by article 20(1) does not include any freedom to form political parties apart from *Chama cha Mapinduzi* established by the Constitution itself. (Nyalali 1991:5)

Thus freedom of political association and expression was not advanced, certainly not directly, by the Bill of Rights as such.

But in the "changing political climate" of less government control and greater freedom of expression and civil organisation generally, political views sought ways of expression outside the only lawful political party. Perhaps the absence of a statutory provision expressly prohibiting the expression of views not endorsed by the party was the basis for some determined individuals, non-party members, to speak out their minds.

A significant early attempt was in September 1984 when James Mapalala wrote an 18-page petition to the Chairman and NEC members of CCM asking them to initiate changes to end the one-party system, which he accused of denying the people the right to political participation, removing the necessary checks against tyranny and injustice, exalting the Executive to supremacy, reducing Parliament to a sham, and of being undemocratic,

oppressive and corrupt; those evils, Mapalala argued, could only be properly countered by allowing opposition parties.[50]

On account of that petition, James Mapalala was detained without charge for almost a year. Two academicians in the Department of Political Science at the University of Dar es Salaam, apparently consulted by Mapalala in writing his petition, were also arrested and then released shortly afterwards after united action by the entire academic staff of the university.

After his release, and following the adoption of the Bill of Rights, an end to the one-party system became Mapalala's obsession. He started collecting signatures, which soon ran into thousands, of people subscribing to his views. In October 1986, he was detained again. An application was filed in the High Court challenging his detention.[51] It would probably have succeeded because already the *Preventive Detention (Amendment) Act 1985* allowed a detention order to be questioned in court "on any ground." But before the date of hearing, the detention order was revoked and Mapalala was instead deported and confined to the island of Mafia for almost two years.

After his release, Mapalala continued collecting signatures in support of his crusade. In 1989 he conceived a civil rights organisation and in 1990 applied for its registration as the

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[50]"Appeal for Revocation of the One-Party Law," dated September 28, 1984, signed by James Mapalala.

[51]*Re: An Application by James Mapalala & Athumani Upindo*, High Court of Tanzania, Dar es Salaam, Misc. Criminal Cause No. 30 of 1986.

"Civil and Legal Rights Movement." Its constitution declared that it was "not a political party" and was not to "be used by any person or group to gain or secure any political office or political purpose." But it was obvious that Mapalala wanted to use the organisation to advance his views which aimed ultimately at changing the Constitution to allow him to form his own political party. Thus, although there was nothing irregular in its constitution or other records, the Registrar of Societies simply kept quiet, neither expressly rejecting the application nor registering the movement. The effect of non-registration was to cripple the movement and disable it from meaningful operation.

In September 1991, a group of Mapalala's youthful supporters staged a demonstration in Dar es Salaam, protesting against the refusal to register their movement. They were arrested for holding an unlawful assembly and remanded in custody pending trial. But after a few weeks they were released, and the charges against them withdrawn. Already, a Presidential Commission was at work reviewing the one-party system, and it was only a matter of time before opposition parties would be allowed.

On another front, there was the fiery Rev Christopher Mtikila of the little known Full Salvation Church.[52] The said church also had a "unit" for human rights issues called the "Liberty Desk", also headed by Rev Mtikila and operating from his flat at Ilala in Dar es Salaam. From early 1990 or thereabouts, Mtikila began

[52]The following of that church in Tanzania is unknown and its minister, Mtikila, is more renowned for his political activism than religious service.

using his Liberty Desk to write and circulate a number of pamphlets strongly criticising the government and the one-party system. Occasionally, he also addressed well-attended press luncheons, organised through the otherwise inactive Dar es Salaam Press Club, making similar criticism, and his addresses were published in detail by the emerging free press. Press luncheons became a new feature associated with the emerging opposition (Mmuya & Chaligha 1992:133) as James Mapalala and Mabere Marando also addressed them on separate occasions in 1990; the latter is a lawyer who soon proved to be an eloquent political crusader.

By 1990, however, the debate on whether the one-party system was still appropriate started. The Tanganyika Law Society organised a one-day seminar on the subject in September 1990. It was addressed by Marando and some other prominent lawyers, including one from CCM Headquarters who defended the system against overwhelming opinion opposed to it. Significantly, this seminar was widely reported, even by the state owned media.

Then the problem of the multi-party advocates turned out to be not their suppression as individuals but the lack of an organisation through which to express and propagate their views, without such organisation being seen as a political party and being proscribed. All existing organisations were either indifferent or, at least officially, opposed to those views. Nyerere's encouragement of a public debate and a re-assessment of the one-party system (*infra*, 7.4.1) may have given them a feeling of confidence that an organisation of their own was

justified. In February 1991 they formed a "National Committee for Constitutional Reform"; they claimed it was merely a steering committee for coordinating views from people committed to constitutional reform.[53] The committee was chaired by Abdulla Fundikira with James Mapalala as his deputy, and Mabere Marando its secretary; it did not seek registration and the government took no direct action against it.

In March 1991 the committee sought to hold a public seminar under the auspices of the Tanzania Legal Education Trust, a hitherto dormant trust of which Marando was vice-chairman. The Trust was immediately served with a notice to cancel its registration for engaging in political activities, and the seminar could not be held (McHenry 1994:64). Subsequently, President Mwinyi issued a stern warning against groups organising themselves for political purposes and reminded that the country was still a one-party state.[54] But later on, the government made a U-turn and allowed any group, whether registered or not, to hold seminars and discussions on the party system. And in June 1991, that seminar was finally held, organised directly by the self-appointed committee itself (McHenry 1994:64-5), and given wide publicity (Mmuya & Chaligha 1992:143-7).

This was a breakthrough in independent political organisation. From then on the committee existed and, though unregistered for well over a year, it received tacit recognition as representing

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[53](1991) 28 *Africa Research Bulletin*: 10043A-C.

[54](1991) 28 *Africa Research Bulletin*: 1004A-C.

the future opposition. When opposition parties were finally allowed to register and operate lawfully from July 1992, it registered itself as a political party styled "National Convention for Construction and Reform" (NCCR). By then its leadership had changed. James Mapalala had resigned early from the committee, and Abdulla Fundikira was removed for attempting to present it, while on a trip abroad in 1991, as if it was already a political party. So by the time it registered as a political party, NCCR was chaired by Mabere Marando. Mapalala and Fundikira each formed their own political parties.

7.4: TOWARDS MULTI-PARTY POLITICS

Political pluralism returned to Tanzania with the *Eighth Constitutional Amendment Act 1992* which took effect in July 1992. The events and developments analysed in this chapter generally contributed to the process towards that change in various way. By 1990 the one-party system was certain to end soon, and much of that year and 1991 was dominated by a big debate on the issue of a multi-party system being both desirable and inevitable.

In both neighbouring Zambia and Kenya, developments towards that change saw some serious clashes in July 1990 between the governments in those countries and people demanding change. By contrast, Tanzania was relatively incident free. This is partly because from early 1990 people were encouraged to debate the issue and, on his re-election in November 1990, President Mwinyi promised to set up a commission to collect views, including views

from the debate, upon which a decision would ultimately be made. Unlike direct suppression, this had a pacifying effect.

We now look briefly at both the "debate" and the Presidential Commission, which recommended the return to a multi-party system.

7.4.1: The Big Debate 1990-92

Although the debate on political pluralism intensified in 1990 and 1991, it was there, albeit quietly, much earlier. James Mapalala's "petition" mentioned above, written in the first person *plural* and signed by Mapalala "for and on behalf of the appellants", shows that views in support of political pluralism were raised much earlier, even if only discreetly.

Julius Nyerere is often credited with initiating, while still CCM Chairman, the debate on multi-parties (Bagenda:7-9). Firstly, he told the press in February 1990 that it was not taboo to question the one-party system. Secondly, in an address to the CCM Youth League Conference held in Mwanza in June 1990, he warned that multi-parties were ultimately inevitable as the reasons that had supported the one-party state in 1965 could hardly stand in the conditions of the 1990s. The most important thing is that by that initiative, Nyerere effectively disarmed those elements in the party (of which he was still Chairman) and the government who were still inclined to suppress the demands for change (Mmuya & Chaligha 1992:130).

The debate went on in various ways and forums. Newspapers, especially the new private media, actively carried out the debate by publishing a continuous flow of "Readers' Letters" and regular feature articles. Even the government-owned *Daily News* joined in. Some of the newspaper contributions were subsequently compiled in a book (Bagenda). The debate was also conducted through seminars organised by the Tanganyika Law Society, the Faculty of Law and other departments of the University of Dar es Salaam, and various other institutions. There was a general proliferation of seminars on this debate during 1991-92; even those organised for other purposes tended, in their proceedings, to gravitate to the debate on multi-parties. The debate also went on through informal discussions even in casual and spontaneous gatherings in leisure centres and beer clubs, where it readily captured Tanzanians' exuberance for talking.

What dominated the debate was an overwhelming desire for change. Even those who wanted the one-party state to continue also insisted on major changes in the role of the single party. Some of the one-party supporters, for example, wanted the party to have no power over Parliament, and to allow non-members to campaign and contest in elections for political office at all levels. Others, the unsophisticated rural peasants unable to distinguish the party from the government, complained that already with one party they were getting enough problems, like not being paid for crops (often grown at the insistence of local party leaders) and compulsory contributions to party functions and projects, and feared that multi-parties would multiply those

problems (Tanzania 1992a:68-9).

The proponents of multi-parties argued that one-party rule had lost touch with the people, was corrupt, undemocratic and concerned only with securing and preserving leadership positions for a select oligarchy serving its own interests. A multi-party system, they argued, would restore parliamentary supremacy and make the government more responsible to the people. Others advocated change to enhance democracy even for members of the ruling CCM because the one-party state Constitution, they argued, denied CCM members control over their own party: it was a state party created by the Constitution and its members had no power, even by a unanimous resolution, to dissolve it. Yet others demanded change for the sake of democracy which, they insisted, could be achieved only through autonomous civil organisations at grass-roots level (which the one-party state had inhibited), not merely political parties which they suspected would be another set of institutions from above (Sandbrook & Halfani:30).

The problem of the one-party system breeding complacency was behind Nyerere's initiatives in the debate. In 1986, while on a trip to Zambia, he had warned against that problem,[55] and in 1990 he repeated the same warning (Bagenda:7-9). For him it was mainly, if not only, for that purpose that he favoured multi-parties: to keep the ruling party, CCM, constantly awake and sensitive to the interests of the people, responding promptly to

[55](1986) 23 *Africa Research Bulletin*: 8113C-8114A.

their needs and demands. Only that way could the CCM government indeed be responsible and would Tanzanians enjoy democracy (McHenry 1994:62-3). For that reason, Nyerere advised that the introduction of a multi-party system should not wait until a majority of Tanzanians demanded it (Sandbrook & Halfani:28). His aim was not just to enhance democracy but rather, in that process, to enable CCM to retain office by being more democratically vigorous, and not by using law and the constitution to suppress dissent.

There were also those just fed up with CCM in office, and simply wanted an opportunity to replace it, or so it appeared, even if there was little further change in constitutional structures because once in office, they would not be as bad as CCM! They were inclined to press for no more than the immediate liberalisation of politics, followed immediately by multi-party elections in which they were confident of defeating CCM. These were possibly many among the multi-party advocates,[56] but they ingeniously employed the more sophisticated argument of advancing democracy to render themselves more credible.

And there were others opposed to change because they wanted to safeguard national unity, peace and tranquillity; a multi-party system, they argued, would encourage ethnic, regional and religious conflicts. They also argued that a multi-party system was too expensive for Tanzania's poor economy and that it was in

[56]James Mapalala expressed such confidence at a seminar held at the Gogo Hotel in Dar es Salaam, January 27-28, 1992.

any case demanded by only a few power hungry elites.

The ruling party defended its political monopoly. In spite of Nyerere's warnings, the CCM Youth League ended its June 1990 conference with a resolution strongly supporting the continuance of the one-party system. During the next 18 months party branches all over the country competed in organising rallies in support of the one-party system and condemning the proponents of change. Some Dar es Salaam local party leaders sponsored a cripple who made a spirited 120 miles journey on his (hand propelled) tricycle from Dar es Salaam to Morogoro in support of one-party rule.

All the views were collected by the Commission set up by the President in February 1991, which in its report in 1992 recommended an end to the one-party system, and the recommendation was adopted. An absurd irony is that immediately after this decision was announced, CCM branches went into renewed competition, organising rallies in support of introducing multi-parties! This cast doubts over the sincerity of the organisers of the various rallies.

7.4.2: The Nyalali Commission

When in November 1990 President Mwinyi promised to set up a commission to collect and analyse the different views in the multi-party debate, the debate was given definite objectives. Unlike the 1983 Constitutional Debate, this one had started

rather spontaneously and intensified without its direction and ultimate end being clear. The promised commission gave it a definite purpose and direction.

The commission was then appointed in February 1991. It had a very long name in Swahili[57] but, conveniently, it has also been known as the *Nyalali Commission*, in reference to its chairman, Mr Francis Nyalali, the Chief Justice of Tanzania. Established because of the debate, the Commission also became briefly the subject of debate. Questions were raised regarding the necessity for, and logic of, setting up a commission to find out whether indeed people wanted freedom. And as it was rather common for reports of commissions and probe teams to be ignored or treated casually, this move was also suspected as a mere government ploy to delay action on inevitable changes (Bagenda:28, 76-9).

Some people questioned the Commission's integrity and impartiality especially as its members were mainly CCM members, currently or previously in responsible positions. Mabere Marando was appointed to the Commission but he declined the appointment, questioning the relevance of the whole exercise and the honesty of the government, especially as initially the Commission was given only 3 months to do its work. His place was given to Wolfango Dourado, who had served as Attorney General of Zanzibar and was now a known critic of the establishment. But the time frame for the commission was extended to one year thanks,

[57]"Tume ya Rais ya Mfumo wa Chama Kimoja au Vyama Vingi vya Siasa Tanzania, 1991."

possibly, to Marando's public reaction.

The terms of reference required the Nyalali Commission to collect and coordinate the public views on the on-going debate and then recommend whether to continue with a one-party system or to change to a multi-party system, giving appropriate advice on the implications of either option, and how best to implement it without prejudice to the fundamental objectives of state policy, or to the basic rights and duties contained in the Constitution. The Commission was also required to take into account the need to maintain and strengthen the union (of Tanganyika and Zanzibar), to promote national unity and cohesion, and to recommend ways of strengthening democracy and developing a democratic culture in the country (irrespective of the political system), and to recommend necessary amendments to the Constitution and other laws.

In its work the Nyalali Commission visited all the districts of Tanzania, holding a total of 1,061 public meetings, gathering people's views. Opinions were also given in private meetings with the Commission, in writing by submitting letters and reports, and by responding to a questionnaire drawn by the Commission from the terms of reference. Using those same methods, opinions were also received from Tanzanians living abroad. Opinions published in the local press were also collected. The Commission also had sessions with the former President, Julius Nyerere, and former President of Zanzibar, Aboud Jumbe, for their views. Members of the Commission also

made study visits to 12 countries.

On February 17, 1992, the Commission submitted its final report,[58] showing that of the 36,299 people who gave their opinions, 28,018 or 77.2% expressed support for the one-party state, and 7,817 or 21.5% wanted a multi-party system [60-1].[59] But the Commission nevertheless recommended a multi-party system because 55.6% of those one-party supporters also wanted major reforms which, in the opinion of the Commission, were impossible to implement within a one-party system [4]. Also the Commission found that ultimately, a multi-party system was inevitable because the one-party system was inherently restrictive of freedom and democracy, a fact often admitted, albeit indirectly, even by the ruling party itself [104-5]. And a multi-party system was considered desirable and appropriate, as it was already demanded by a substantial number of people, albeit a minority [107].

In its recommendations the Nyalali Commission emphasised that the Rule of Law and respect for Human Rights as contained in the Universal Declaration of Human Rights were absolute essentials for a democratic society, and should never be left to the discretion of politicians [91-3].

On the organs of state the Commission recommended [99-100] a

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[58]Tanzania 1992a.

[59]In this section, references in square brackets refer to pages in Volume One of the report, Tanzania 1992a.

representative parliament with supreme legislative authority, subject only to the Constitution, to consist of elected members only and not to be interfered with or controlled by any other organ or institution in its work. It insisted that ministers should be appointed only from amongst the elected members because the practice of appointing nominated MPs as ministers undermines democracy. The Commission also recommended that the President may continue appointing only the most senior officials like principal secretaries, and leave the appointment of middle and low level executives like district directors to appropriate commissions. It also emphasised the importance of the independence of the Judiciary, and the role and function of the High Court to defend human rights and the Constitution and, for that purpose, pointed out the need to devise a way of making it more easily accessible to ordinary citizens [100].

The Nyalali Commission also recommended that the Permanent Commission of Enquiry (PCE) should be appointed by Parliament and report to Parliament, and further that it should be empowered to conduct prosecutions, to ensure that its decisions are carried out. It also recommended that the PCE should consist of a number of such commissions, each dealing with complaints relating to its own particular sector [100].

The Commission also warned that the mere constitutional designation of separate organs of state, each with its specific powers and functions, was in itself not enough. Democracy also required freedom for popular institutions like trade unions, the

cooperative movement, local government authorities, and civil organisations (commonly known as NGOs), to operate without unnecessary constraints or interference by the state, which was not the case in Tanzania [100-2]. For that reason the Commission welcomed the *Cooperative Societies Act 1991* as signalling a new era in the cooperative movement, but was critical of the local government legislation and the new trade union law for inhibiting freedom and democracy by subjecting popular institutions to excessive government control [46-51]. The Commission traced a number of other laws similarly restricting freedom and democracy and, in Volume Three of its report, listed them as requiring either to be repealed or to be amended.

On the whole the Nyalali Commission has been widely praised for its work. But some of its recommendations have not been accepted by the government.[60] Implementation of the accepted recommendations began in 1992 with a number of amendments to the *Constitution 1977*. Before looking at those changes, we look briefly at the contribution of external factors to these changes.

7.5: THE EXTERNAL FACTOR

External events and developments have certainly played an important role in the constitutional changes and developments in Tanzania, as well as Africa generally. One example easily cited in recent years is that of the dramatic changes which brought

[60]A notable example is the recommendation to adopt a federal structure for the Union, which the government rejected.

liberal democracy to Eastern Europe and the collapse of the former Soviet Union; they have had a big effect upon constitutional and other developments in Africa. But those changes did not mark any beginning or end in external influence on African constitutional practice. The influence of Western Europe and North America has always been dominant and decisive, both before and after the events in Eastern Europe, in either maintaining or changing the constitutional structures in Africa.

Indeed the events in Eastern Europe and the former Soviet Union had an immense global impact. But while those changes are largely associated with the *perestroika* and *glasnost* policies initiated by Mikhail Gorbachev who came to power in the Soviet Union in 1985, in Tanzania James Mapalala had written his petition demanding changes the year before. Clearly, therefore, the demands for change in Tanzania were not merely imitating Eastern Europe, and there is need to locate properly how external influence, not just the events in Eastern Europe, has operated.

7.5.1: The Changes in Eastern Europe

The year 1989 saw rapid changes in the state structures and constitutions of East European countries which were often referred to as the "Communist Block" countries: Bulgaria, Czechoslovakia (which then split into the Czech and Slovak republics), German Democratic Republic (or East Germany which then reunited with the Federal Republic of Gernmany), Hungary, Poland, Romania and the Soviet Union. The last mentioned was the

undisputed leader of the block with a measure of influence and control over the affairs of the others. They were all committed to communist or socialist policies and development, and the "changes" referred to here affected both their constitutional and their policy orientation.

Besides their communist orientation, those countries were also governed by one-party regimes with highly centralised structures increasingly detached from the people they governed and insensitive to their actual needs. Encouraged by Gorbachev's policies of *perestroika* and *glasnost*, the people in those countries rose up in popular uprisings which enabled democracy to triumph over one-party dictatorships. In some of the countries, the changes were effected by popular elections; in others the old regimes were overthrown first and elections held subsequently confirmed the legitimacy of the changes. In the Soviet Union the wave of democratisation and, in this case, self determination, saw the dissolution of the Communist Party and the disintegration of the Soviet Union itself in 1991.

Tanzania, and some other African countries, had one thing in common with those countries of Eastern Europe. Both had one-party regimes, with all the restrictions to democracy they implied. It was therefore logical to regard the events in Eastern Europe as signalling a similar fate to similarly undemocratic regimes in Africa.[61] Indeed, even Nyerere's warning in February 1990 not to ignore the events in Eastern

[61]"Babu Warns Nyerere," in *New African*, February 1990.

Europe was summed up in the Swahili saying that "when you see your colleague being shaved, better get your head ready for your turn" (Sarungi:43-4; Mmuya & Chaligha 1992:23-4).

The saying was relevant in so far as Tanzania was a one-party state, even though the party in Tanzania was not an elite or "vanguard" party like many of the parties in Eastern Europe. The other relevant factor is that Tanzania was not only a one-party state but also, like the East European states, had a party committed to socialism. There were cordial relations with, and support from, most East European countries either at governmental level or through "party protocols". Many "cadres of the party" in Tanzania had their training in Eastern Europe. Kingunge Ngombale-Mwiru, the Head of the Ideological Department of the NEC of *Chama cha Mapinduzi* came back from a visit in Romania "with friendly greetings" from the party in that country only two weeks before the fall of Ceausescu

For Tanzania, therefore, the warning was even more ominous because the passion for democracy had also exhibited a rejection of socialism. Even if the new regimes in Eastern Europe would tolerate a one-party state, they were unlikely to continue their support and sympathy for a socialist party, like CCM, and its government. The changes in Eastern Europe, therefore, reduced the scope of international support enjoyed by African one-party regimes like Tanzania.

But the most important support to African one-party regimes which was indeed affected by changes in Eastern Europe was from the liberal democracies of Western Europe and North America. Most African countries had links with the West, often maintained through the former colonial power. Tanzania, despite commitments to socialist policies, has all along relied heavily on external aid from the west. One reason for the west maintaining assistance to Africa was to "protect" the African countries from communist influence and domination. Thus it was part of the then international politics of the Cold War.

Now, the changes in Eastern Europe also ended the Cold War. The attention of western aid donors was directed away from Africa to their eastern neighbours which had much of the necessary infrastructure, lacking in Africa, giving a better hope and promise of returns for investment. Also the industrialised west had a moral obligation to support a fast capitalist development and prove that abandoning socialism was just the right thing. Thus the end of the Cold War replaced confrontation with cooperation in East-West relations and, in the event, maintaining assistance to Africa lost some of its importance.

During the Cold War the western powers supported even dictatorial and undemocratic regimes in Africa simply to check the spread of communism. Such was the case for Siad Barre in Somalia, Banda in Malawi, Moi in Kenya and Mobutu in Zaire. With the end of the Cold War that policy had to change. Firstly, communism as the enemy was no longer there; there was thus no reason to continue

supporting despotic regimes in Africa. Secondly, the electorate in the western countries supported changes in Eastern Europe because they had brought democratic governments into office; that same electorate would certainly not support assistance to undemocratic regimes in Africa.[62]

This meant that African undemocratic regimes would not be supported to maintain themselves in office against any (presumably democratic) challenges. And accordingly, in their policies to Africa, western donor countries started emphasising a reduction in military expenditure.[63] Certainly, the big defence budgets incurred by the African regimes, with western support, was not incurred so much in defence against communism as it was in "self-defence" against democratic forces within the countries themselves.

But the withdrawal of support for military expenditure was not enough to bring about immediate change and soon donor countries demanded democratic reforms as a condition for all forms of assistance. This is part of the continuing influence of the donor countries on constitutional practice in Africa.

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[62]*New Political Criteria: The German Concept*, Statement by Dr Volker Ducklau, Federal Ministry for Economic Cooperation, to a visiting delegation from Tanzania, Bonn, December 3, 1992.

[63]Address by Dr Helmut Kohl, Chancellor of the Federal Republic of Gernmany, to the Diplomatic Corps, Bonn, December 3, 1992, Translation of Advance Text: 5-6; also *German Development Policy*, Memorandum of the Government of the Federal Republic of Germany for the DAC Annual Aid Review 1991/92, Bonn, October 25, 1991: 2-4.

7.5.2: The Role of the International Donor Community

In recent years western donor countries have simply required individual African regimes to initiate political reforms and democratisation or suffer reductions in aid. By 1990 African economies were in such desperate condition that most governments could not run without donor funds; therefore, they had to comply with donor conditions in order to survive.

As a result, Zambia returned to a multi-party constitution in 1991. In June 1990 there had been a coup attempt and some serious rioting (in which 29 people died)[64] sparked by the removal of subsidies on the price of maize meal, Zambia's staple food. President Kaunda had been resisting political reforms and for that reason donor funds, which could have provided for some subsidies, were with-held. He finally yielded to the demands for political reforms, accepted the enactment of a new Constitution, lost the November 1991 multi-party election, and was replaced by a leadership ready to comply with all conditions imposed by the donors.

Meanwhile, in 1990 the United States threatened Kenya with a reduction in aid unless there was political reform.[65] But the regime in Kenya resisted the pressure. A mass demonstration organised in Nairobi by a pro-reform movement in July 1990 was

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[64]*New African*, August 1990.

[65]*New African*, July 1990.

violently crushed by the government, killing more than 10 people.[66] President Moi continued to resist change, arguing that multi-parties would lead to bloody civil conflicts. Finally, in November 1991 it was announced that the major donors of Kenya would with-hold further aid for at least six months unless reforms were introduced (Ripley:545). And in December 1991 the regime announced a change in the Constitution to allow other political parties. A year later, multi-party elections returned President Moi in office, with a fairly powerful opposition in Parliament.

By contrast, the appointment of the Nyalali Commission seems to have resulted in sparing Tanzania from such direct external pressure:

> Unlike situations in the neighbouring country of Kenya where directly and publicly the British Minister for Overseas Development, Lynda Chalker, presented to the Kenyan head of state her government demands that Kenya go multiparty, in Tanzania the message often was presented tacitly through statements of encouragement and sometimes praise by representatives of western foreign missions that Tanzania was moving towards "the right direction", ...clear messages to the Tanzanian Government and CCM regarding what they were supposed to do... The harsher statements to government leaders in a neighbouring state concretized the order for the Tanzanian government to also hasten to go multiparty. (Mmuya & Chaligha 1992:22)

And while the Nyalali Commission went on with its work, the donor community was clearly indicating to the government that political reform was expected irrespective of what the Commission would recommend. Indeed, some of the commissioners did complain in private that they were under severe pressure to finish up their work and report, so that the government could announce major political reforms. Obviously, the changes had already been

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[66] *Africa Events*, August 1990.

decided upon and the report of the Commission was required only as a formality.

On the other hand international donor pressure or support was behind most of the internal developments analysed in this chapter as being part of the changing political climate.

Besides demands within the country, international pressure by human rights organisations and donor countries was also behind the adoption of the Bill of Rights in 1984. Developments that led to an independent cooperative movement had been demanded by the International Cooperative Alliance, which even threatened Tanzania with expulsion unless control of the apex organisation was transferred from the state to the member unions.[67] The setting free of James Mapalala, detained and deported for petitioning against the one-party system, had been incessantly demanded by the Scandinavian countries, Tanzania's greatest benefactors.

When the High Court ruled in favour of the students of the Institute of Development Management, Mzumbe, who had petitioned against their wrongful expulsion from the institute,[68] the government wanted to appeal against the decision. But subsequently the intended appeal was abandoned because the Norwegian Agency for Development (NORAD), whose funds support the

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[67]see McHenry 1994:119, fn.74.

[68]*Felix Bushaija & Others v. Institute of Development Management & Another*, High Court of Tanzania, Dar es Salaam, Misc.Civil Cause No.89 of 1991

institute, insisted on compliance with the court order and the return of the expelled students. The Principal of the institute felt so humiliated by the turn of events that he resigned in protest.

James Mapalala's young supporters, arrested in September 1991 for demonstrating against the refusal to register their movement, were released and charges against them withdrawn due to donor pressure, and not just because the President was, as a father, pardoning his misguided children as the official statement said (Mmuya & Chaligha 1992:140). Also, we referred above to the formation of a self appointed National Committee for Constitutional Reform in 1991, and that its first attempt to hold a seminar failed and provoked a stern warning from the President. Later, again thanks to donor pressure, the government made a U-turn and allowed the committee and any other groups to hold seminars if they wished.

The seminar was finally held in June 1991, attended by well over 800 people, jointly funded by Denmark, Norway and Sweden, among other donors. Most other public seminars which were held on political reforms were also externally funded. The Legal Aid Committee of the University of Dar es Salaam conducted its legal literacy campaign with funds from diverse sources: CUSO, DANIDA, Oxfam, USAID, etc. It was also external donor funds which enabled the Nyalali Commission to do its commendable work. Even the costs of the first multi-party election since independence, to be held in October 1995, are being met from various western countries. Thus there is hardly any single development that has occurred without external support or pressure.

As a general rule, the international donor community now insists upon the recipient states to ensure, among other things, respect for Human Rights and the Rule of Law, and popular participation in the political process. Failing in that may lead to necessary assistance being with-held or reduced.

This is a new phenomenon and should be analysed critically because external influence, even if it reduces the dominance and control of the government, may not necessarily enhance popular participation and control. Previous trends in donor policies supported a dominant government. The whole development strategy of Tanzania for almost two decades gave the state total control over all popular institutions: cooperatives, trade unions, village councils, and the entire economic sector relied on state initiative and control through parastatal organisations (McHenry 1994:129-44), all with massive external support for well over a decade.

State control began to recede when the liberalisation of the economy came in, especially after 1986, as a result of IMF pressure. That pressure continues to-date, with donor countries also insisting on privatisation of business and industry, and allowing market forces complete freedom to dominate the economy. These pressures do reduce the dominance of the government. But they do not necessarily mean more control and decision making powers by the people. Even the agreement itself between the Tanzania Government and the IMF, which brought the liberalisation policies, was far from democratic:

> All the discussions on the terms of the IMF agreement were held in secret at the point that even members of the Cabinet and the Central Committee of the National Executive of the party were unaware of the specific conditions. Moreover there was a lack of clarity of the content of negotiations. The...party gave its consent to the Minister of Finance to come to an agreement with the IMF. [But] even the discussion in the National Executive was constrained by a lack of information. (Campbell & Stein:17)

And the government went on to implement the agreement while the people remained ignorant of its terms (Tegambwage:9-14). It has therefore been a case of external pressure reducing the dominance of the government without enhancing democracy.

Some of the programmes for the public seminars on political reform, which the government was forced to allow by donor pressure, were sometimes presented to identified local institutions complete with details of subject content, venue, and even numbers and identities of some of the participants already determined by the donors; the local groups holding or "organising" the seminars had themselves little control. Many of the seminars were held in exclusive hotels, and were not open to the general public. Clearly some of the donor organisations have had their own agenda which their offices in Dar es Salaam are required to implement and report on back home.

Thus, although the cases referred to here indicate that the pressure of international donors sought, in one way or another, to make the government less dominant and less restrictive of people's interests, they should not be indiscriminately taken for granted as advancing the cause of democracy and popular control of government institutions. There is need to guard against the

danger of replacing the dominance of the government with that of some international institutions without enhancing democracy.

7.6: THE CONSTITUTIONAL AMENDMENTS OF 1992

The Nyalali Commission submitted its preliminary report on January 16, 1992, and its final report on February 17, 1992. Immediately after the preliminary report, the recommendation to adopt a multi-party system was accepted by the Cabinet, and during the same month the NEC of the ruling CCM unanimously adopted it. Finally, an extra-ordinary National Conference of the party held on February 18-20, 1992, also unanimously endorsed the termination of its own monopoly of politics, and directed that the necessary constitutional amendments be made to facilitate the changes.

The decision for a multi-party system was the dominating concern, tending to obscure other important issues related to the changes. It was effected by Parliament through the *Eighth Constitutional Amendment Act 1992* (hereinafter the "Eighth Amendment"), which took effect on July 1, 1992. Further changes came with the *Ninth Constitutional Amendment Act 1992* (hereinafter the "Ninth Amendment"), enacted in December 1992. Also relevant is the *Eleventh Constitutional Amendment Act 1994* (hereinafter the "Eleventh Amendment), enacted two years later but inextricably linked to the changes begun in 1992.

7.6.1: General Content

The Eighth Amendment amended s.3 of the *Constitution 1977* to declare Tanzania a "democratic and socialist state with a multi-party political system", and to remove provisions that had given "final authority" to the ruling CCM. The amendment also repealed s.10 of the Constitution which had given the party monopoly over political activity and supervision over public institutions, provisions in s.37(1) which had required the President to observe "the policies and directives of the Party", and s.63(4) which had made the National Assembly "a committee of the National Conference of the Party." Other provisions giving responsibilities to the NEC or any other organ of the party were also repealed.

The Eighth Amendment also excluded regional commissioners from membership of Parliament and terminated the power of the President to appoint MPs. Now the National Assembly is to consist of: directly elected constituency members (one from each constituency), five members indirectly elected by (and from amongst the members of) the Zanzibar House of Representatives, and fifteen women members indirectly elected (by the former two categories) from a list submitted by political parties represented in the Assembly by members in the first two categories. The Attorney General, now an *ex officio* MP, is the only member appointed by the President. The number of constituencies and their boundaries is to be determined by the Electoral Commission subject to the approval of the President.

The Commission is required to review them from time to time and in any case must review them every ten years. For the October 1995 general election there are no less than 220 constituencies for the whole country.

Qualifications for membership of Parliament have been reduced to citizenship, age (21 years) and literacy (in Swahili or English), and the new condition relating to party membership is that a contestant must be a member of, and nominated by, a registered political party. Conditions of leadership which had bound MPs from 1967 were now repealed, along with the Commission for their enforcement. One reason for the repeal is that the conditions were the "Leadership Code" originally promulgated by and for the ruling party, and could not now be extended to leaders and members of other parties. But another (and more practical) reason is that even within the ruling CCM, the Leadership Code was abandoned by the Zanzibar Resolution made in February 1991 (McHenry 1994:22-3, 32).

Corresponding changes were made to local government laws,[69] and to election laws for both national and local government elections.[70] A new law, the *Political Parties Act 1992* was passed with detailed provisions regarding the terms, conditions and procedure for the registration and operation of political parties. In the meantime the *status quo* was retained, with CCM

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[69]*Local Government Laws (Amendment) Act 1992.*

[70]*Elections (Amendment) Act 1992* and *Local Authorities (Elections) (Amendment) Act 1992.*

remaining the ruling party until next election, and all institutions were retained lawful as constituted until the expiration of their terms.[71]

Within a year, over half a dozen political groups had completed the necessary procedure and were fully registered political parties. By June 30, 1994, the number had almost doubled. The first opportunity for a multi-party contest in an election came up in the Kwahani constituency in Zanzibar, where there was a parliamentary by-election in early 1993; but it was boycotted by all opposition parties except one, giving an easy victory to CCM (Mmuya & Chaligha 1993). There have since been by-elections in Ileje, Kigoma Urban, Igunga and Tabora North constituencies; in each of them the contest was fairly stiff but CCM won in all. In Kigoma Urban, where the contest was strongest, the CCM victory was nullified by the High Court following a successful petition by the leading opposition candidate.[72] CCM had an equally resounding victory in the 1994 civic elections.[73]

Following the Eighth Amendment executive power continues to vest in the President who will now be elected from among contestants nominated by the various political parties taking part in the elections. The qualifications for election are the same as for parliamentary candidates except that a presidential candidate

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[71]*Constitution (Consequential, Transitional and Temporary Provisions) Act 1992.*

[72]*Attorney General & Two Others v. Aman Walid Kabourou*, Tanzania Court of Appeal, Civil Appeals Nos. 32 & 42 of 1994.

[73]*Bulletin of Tanzanian Affairs*, Janauary 1995: 9-10.

must be a citizen by birth, aged at least 40 years. Rather curiously, the amendments make no attempt to ensure that the President belongs to the party with the majority in the National Assembly; it is just assumed that he will be enjoying the support of the majority of the MPs.

The Ninth Amendment brought some very important new provisions in the *Constitution 1977*. It brought a new s.46A empowering the National Assembly to impeach the President for acting in breach of the Constitution or for bringing disrepute to the Office of the President. The procedure is that a notice for the motion of impeachment, supported by at least 20% of the MPs, must be submitted to the Speaker at least 30 days before presentation to the Assembly. Then a Special Committee of Enquiry is formed if two thirds of the Assembly votes in support of the motion. The Committee is headed by the Chief Justice, and the Chief Justice of Zanzibar and seven MPs appointed by the Speaker are its members.

The Committee investigates the allegations against the President, giving him a hearing, and reports to the Speaker within 90 days. The Assembly then discusses the report and gives the President another hearing before deciding on the matter by a vote. The President is removed if a resolution to that effect is passed by a two-thirds majority. A President removed from office by impeachment loses his retirement benefits, as well as the immunity from court proceedings otherwise enjoyed under s.46(3) of the *Constitution 1977*.

The Ninth Amendment also replaced s.90(2) of the *Constitution 1977*, which had empowered the President to "dissolve Parliament at any time," with a new provision setting out circumstances in which the President may dissolve Parliament. These are: when the National Assembly refuses to pass the annual budget proposed by the government; when a Bill already refused assent by the President is presented to him a second time after being re-passed by a two-thirds majority in less than 6 months; when the government is defeated on an important motion concerning basic policy; when the government loses its majority support in the Assembly; and at any time during the last 12 months of the tenure of Parliament. But in the last mentioned case the President cannot dissolve Parliament if a notice of motion to impeach him has been submitted to the Speaker.

The Ninth Amendment also replaced s.51 of the *Constitution 1977* with a new one requiring the President to appoint as Prime Minister only an elected constituency MP belonging to the majority party or likely to command the majority support of the National Assembly. The appointment of the Prime Minister must be approved by the National Assembly to take effect.

Another new provision, s.53A of the *Constitution 1977*, restores the power of the National Assembly to censure the government by passing a resolution of no confidence in the Prime Minister. The motion for that resolution is also started by a notice, supported by 20% of the MPs, submitted to the Speaker at least 14 days before presentation to the Assembly. In this case there is no

"Special Committee" involved; the motion is debated straight away and a simple majority is enough to carry the resolution. The Prime Minister must then resign within two days of the resolution, and when the Prime Minister vacates his office, for whatever reason, all the other ministers also vacate their offices with him.

Thus, led by the Prime Minister, the ministers are indeed collectively responsible to the National Assembly. The full cabinet, however, consisting of the Prime Minister and the other ministers, also includes the Vice-President and is headed by the President himself. But the President and the Vice-President are not members of the National Assembly.

The Eleventh Amendment introduced new provisions for the Vice-President which take effect in the coming elections and under which the Vice-President is no longer appointed by, but is elected simultaneously with, the President, as "running mate" similar to the American system. The Vice-President cannot be removed from office by the President either; he can only be removed by the National Assembly following impeachment proceedings similar to those against the President and, for that purpose, the President can also initiate the impeachment process by a submission to the Speaker. In the event of the office of the President falling vacant, for any reason, before the term expires, the Vice-President automatically becomes President for the remainder of the term. In such an event the (new) President appoints another person who, subject to the approval of the

National Assembly, becomes the (new) Vice-President.

The amendments make no change in the establishment and composition of the Judiciary, or in the tenure of judges and magistrates. But the Eleventh Amendment prohibits all judges and magistrates from membership of political parties, a prohibition also applied to members and officers of the Electoral Commission, and of all Defence and Police Forces. Regarding jurisdiction, however, s.5 of the Eleventh Amendment brought a new provision to the effect that instead of declaring any law null and void for contravening the Bill of Rights, the High Court may allow a specified time for the government to make necessary changes to make the law conform with the Constitution, and during that specified time the impugned law continues to be valid.

In itself, that amendment seems to derogate nothing from the power of the High Court. But the *Basic Rights and Duties (Enforcement) Act 1994* which was assented to in January 1995 and re-enacts that provision, now requires the High Court to sit with 3 judges when determining petitions on the Bill of Rights. The Act also requires the High Court to dismiss summarily any application seeking to restrain the enactment of a law likely to contravene the Bill of Rights. In addition, s.8(4) states that in all cases of alleged contravention of the Bill of Rights:

> The provisions...which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress.

It is not very clear what effect this Act has had in practice but

it would seem to be a serious derogation of the powers of the High Court. Judicial review is the most effective means of exercising control over government powers by the High Court, and prerogative orders the remedies which make it effective. Precluding their use in the enforcement of basic rights makes the High Court powerless in defending those rights against violation by the executive.

7.6.2: A General Assessment

It may still be too early to assess the full extent of these changes and their effect. But one overall effect is that the authority and status of Parliament has generally been enhanced. Its sovereignty is no longer doubtful, following an end to the inhibiting concept of "Party Supremacy." By depriving the President of the power to appoint MPs, the amendments have reduced his power and influence over the National Assembly, especially considering that there will now be members belonging to parties other than the President's. Also the Parliament is more secure; the President can no longer dissolve it at any time. On the other hand, while the President's Office becomes vacant each time Parliament is dissolved,[74] Parliament can by impeachment remove the President (and Vice-President) from office without, in so doing, terminating its own tenure.

The National Assembly now approves and confirms the appointment of the Prime Minister, as well as the Vice-President when there

[74]Section 38(2)(a) of the *Constitution 1977*.

is a mid-term vacancy in the latter office. It is also empowered to dissolve the Cabinet by passing a resolution of no confidence in the Prime Minister. The fact that now MPs can remove from office the Prime Minister, the Vice-President, and even the President, without themselves terminating their tenure thereby, is an enormous step forward in democratic control of executive powers.

An early remark about the power of impeachment was that the procedure has so many "hurdles" that impeaching the President is extremely difficult (Shivji 1994a:89-90). This is deliberate and, possibly, desirable. The Office of the President is the highest office of the land and its holder, once democratically elected, should be free to govern according to law, without unnecessary inhibitions. He should not be removed with casual simplicity, but only upon grounds compelling enough to overwhelm the hurdles in the impeachment procedure. In any case, although the President remains extremely powerful, simplifying the impeachment procedure may not necessarily lead to the powers vested in him being exercised more properly.

Apart from the new limitations in appointing the Prime Minister or the Vice-President, the President has retained all his previous powers over the civil service, including the power to constitute and to abolish offices under s.36 of the *Constitution 1977*. His discretion to act without (or even in disregard of) advice is also retained under s.37(1) of the Constitution. The Nyalali Commission had recommended that the President should stop

appointing middle and low level government executives [99],[75] but this recommendation has been ignored.

Many other recommendations of the Nyalali Commission have been ignored while others have been contradicted, either directly or in effect, by the 1992 changes. The Commission recommended a system for the electorate to recall their MPs where appropriate [133]; it recommended the formal establishment of the "State Intelligence Services (or National Security) Department", which is there in fact but not in law and the public hardly knows about it [148]; it also recommended that a number of laws, listed in Volume Three of its report, be amended or repealed because they inhibit human rights and democracy [143-8]. But all those recommendations have been ignored.

On the other hand, while the Nyalali Commission emphasised the right of every citizen to stand for election, the 1992 amendments deny the right of "independents" to contest elections by requiring membership and sponsorship of a registered political party as a necessary condition for every elective office, including membership of village councils![76] The Commission recommended a Code of Ethics for political leaders and government executives to be retained, and suggested the Permanent Commission of Enquiry to be charged with enforcing it [131-2,140]; but the

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[75]In this section, references in square brackets refer to pages in (Volume One of) the report, Tanzania 1992a.

[76]The *Constitution 1977*, ss.39 & 67, as amended by ss.13 & 19 of the *Eighth Amendment*, and the *Local Authorities (Elections) Act 1979*, s.39, as amended by the *Local Authorities (Elections) (Amendment) Act 1992*, s.9.

1992 amendments simply repealed the previously existing Leadership Code and replaced it with nothing. Also the Nyalali Commission recommended that both the Electoral Commission [141-2] and the Permanent Commission of Enquiry [100] should now be appointed by the National Assembly, but they continue to be appointed by the President.[77]

Finally, the Nyalali Commission recommended a comprehensive programme or time-table for a smooth transition to a multi-party system [161-3], including the setting up of a Constitutional Commission, having a public debate and a referendum on a new constitution. This would have enabled the public to take part in constitution making. But the government proceeded by patchwork constitutional amendments without involving the public, despite frequent demands for either a constitutional conference or a constitutional commission and a referendum.

In *Rev Christopher Mtikila v. Attorney General*,[78] one of the petitioner's prayers was for an order to the government to either call a constitutional conference or set up a constitutional commission and hold a referendum. But the High Court held:

> I know that the question of a new constitution and even a referendum is a burning issue at the moment. And I venture to say that it would be impolitic to turn a blind eye and a deaf ear to this reality. Yet I do not see how the court can make the order prayed for in the present state of the law without appearing to infringe on the spheres of other organs of government... The High Court cannot...adjudicate on matters that are purely political as distinct from legal issues.[79]

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[77]*Eighth Amendment*, s.24, and the *Elections (Amendment) Act 1992*, s.4.

[78]High Court of Tanzania, Dodoma, Civil Case No. 5 of 1993.

[79]Ibid., preliminary ruling made on September 22, 1994.

The prayer was rejected; but both the filing of the petition and the statement of the court show that there was public demand for such a democratic exercise. So far it has gone unheeded.

Another remark relates to the requirement to belong to a political party in order to contest for political office. The requirement gives undue importance to political parties, almost equating them with democracy, an equation which, ironically, was soundly rebutted by Nyerere when advancing the case for a one-party state in the early 1960s. In its final judgment in the above case the High Court ruled that it was a denial of a basic right to "independent" citizens and therefore unconstitutional. But the government has been so persistent with it that it brought amendments enacting that requirement in the Constitution itself.[80] This move has been severely criticised (Mvungi 1993:27-8; Nyerere 1995:7-11). It amounts to using the legislature to overrule a court decision, a practice not uncommon in Tanzania, and which tends to treat the Judiciary with contempt.

Contempt for the Judiciary could possibly be traced too in the motives behind enacting the *Basic Rights and Duties (Enforcement) Act 1994*. Its disapplication of the power of the High Court to issue the prerogative orders of certiorari, mandamus and prohibition renders the High Court virtually impotent in protecting basic rights against infringement by the government. The Act is in direct contradiction with the recommendation of the

[80]The *Eleventh Constitutional Amendment Act 1994*, ss.4, 8 & 13, amending ss.21(1), 39 & 67(2) of the *Constitution 1977*.

Nyalali Commission that human rights should not be left to the discretion of politicians [91-3]. By requiring the High Court to sit with three judges in determining cases of breach of the Bill of Rights, the Act also contradicts the recommendation that the High Court, as the defender of human rights, should be made more easily accessible to ordinary citizens [100].

Also a matter of concern are the numerous laws recommended for repeal or amendment by the Nyalali Commission. The laws listed allow the executive to impose arbitrary punishment, to restrict personal liberty as well as freedom of movement, freedom of association and expression, and so on. A selection from the list is given in Appendix C to this study, with a brief statement following each law. There is no doubt that the continued presence of those laws in the statute books is a great inhibition to freedom and democracy. But the government has done absolutely nothing to repeal or amend those laws, thus raising doubts about its commitment to democracy.

Thus the overall assessment is that despite their apparent democratic content, the 1992 changes have not been effected very democratically, and they have still left some unjustified restrictions to democracy and the enhancement of people's power.

CHAPTER EIGHT

Conclusion:
The Achievement of Responsible Government

8.0: INTRODUCTION

This study set out to review the developments in the constitutional practice of Tanzania since independence relating to the composition and use of executive powers. In particular, the aim has been to focus upon and analyse the extent to which those developments have succeeded, or not, in securing a responsible democratic government.

In this final chapter we make a concluding assessment of the trends in the constitutional developments given in the preceding chapters. The assessment is made against the notions of responsible government identified in Chapter One. They include the requirement that the government must be accountable to a representative organ of the people which is democratically constituted; that the government must be "responsive to public demands" and opinion, willing to act as a servant, and not just as the all-knowing master, of the people (Birch:17-8); that the government must always be subject to the law which in turn must observe justice; and that the government should be held liable for all its actions or omissions in breach of the law.

We begin with a brief highlight of the main features and landmarks in the developments presented in this study. Then we

assess the achievements made towards a responsible democratic government, and point out what may be regarded as the shortfalls and limits in that regard. Finally, we give an outlook of what may be useful points of consideration for future developments.

8.1: LANDMARKS IN THE CONSTITUTIONAL DEVELOPMENTS

The *Independence Constitution* of 1961 was a compromise between the departing colonial power and the nationalist leaders who led the campaign for independence. It imported the institutional framework of the Westminster model of parliamentary government, along with the principles of separation of powers, independence of the Judiciary and a supreme Parliament with power to control and hold the government to account. As we saw in Chapter Two, that framework was hurriedly adopted as part of the independence package, in spite of doubts about its suitability expressed by former governors (Twining:23; Kirk-Greene:157) as well as by Nyerere himself (Nyerere 1966:103-6, 133-4, 195-203).

One may even doubt whether the parties to the independence "pact of compromises" did indeed expect that constitution to achieve much beyond the mere provision of a juridical basis for the formal transfer of power to end colonial rule. It was replaced, after only a year, by the *Republican Constitution* of 1962. This Constitution established the office of Executive President, combining in him the roles and powers of the former Prime Minister and those of the crown (until then exercised by the Governor-General). The President, a constituent part of the

legislature, was empowered to appoint up to 10 members to the National Assembly, the other part of the legislature, which he could dissolve at any time. The National Assembly lost its power to censure the government; the Cabinet now became accountable to the President who appointed its members and was not bound by advice from it or from any other body. The President was also given the power to appoint judges and other public officials, and he had virtually absolute control over the civil service. This was the first landmark.

Next was the *Interim Constitution of Tanzania 1965*, which introduced the one-party system. The move was initiated by President Nyerere, who argued that democracy and the one-party system were not incompatible; he was aided in that move by the use or threatened use of the immense powers vesting in him as President to suppress all opposition to it, scant though it was. The union (of Tanganyika and Zanzibar) which formed Tanzania shortly before the one-party state constitution took effect gave the President powers to appoint an additional 52 MPs to represent Zanzibar, where, following the January 1964 Revolution, there were no elections until after 1980.

The one-party system made membership of Parliament conditional upon membership of the party, and party policies and directives were placed beyond the competence of Parliament to question. This made the party superior to Parliament, a position subsequently asserted by the *Interim Constitution of Tanzania (Amendment) Act 1975* (the 1975 Amendment), and followed in 1977

by the unequivocal declaration of the concept of "Party Supremacy" in the *Constitution 1977*. Among other things, the 1975 Amendment altered the composition of the National Assembly and made the directly elected constituency members a minority to those appointed by the President and those indirectly elected from party organisations. The changes were re-enacted by the *Constitution 1977*, which also made the National Assembly a committee of the party.

Besides those constitutional enactments, the 1967 Arusha Declaration is one of the most important events in Tanzania's political and constitutional history. Through it, the supremacy of the party was demonstrated, even before it was expressly stated in the Constitution, when nationalisation measures were taken by the government pursuant to it, a mere party resolution, without even waiting for parliamentary authorisation. Also the passionate appeal of its *ujamaa* socialist ideology, with its emphasis on equality and social justice and the stringent Leadership Code it imposed on political leaders and government bureaucrats, projected the party as a true champion of the genuine interests of the people. Linked with the Arusha Declaration were the *TANU Guidelines 1971* which strengthened the ideological basis for the concept of "Party Supremacy" promulgated subsequently.

The next important landmark was the *Fifth Constitutional Amendment Act 1984* (hereinafter the "Fifth Amendment"). It was initiated by President Nyerere and virtually bequeathed by him

as a legacy before vacating the Presidency. The Amendment incorporated the Bill of Rights in the Constitution for the first time. It also laid such a great emphasis on the supremacy of law and the Constitution that even the party, though still proclaimed supreme, was nevertheless enjoined to observe the law. It also limited a person's eligibility for the Presidency to two five-year terms only, reduced the number of MPs appointed by the President and required him to consult the Prime Minister in appointing ministers and regional commissioners.

The Fifth Amendment contributed much to the growth of a new atmosphere of greater freedom and confidence in demanding and asserting basic rights. This led, ultimately, to the end of the one-party state in 1992, following a big wave of popular demand for change within the country, supported by strong external pressure. Those 1992 reforms are the latest landmark in the continuing process of constitutional developments in Tanzania covered by this study.

8.2: NYERERE AND THE DOMINANT ROLE OF THE EXECUTIVE

The constitutional developments presented in this study have occurred, by and large, in response to popular aspirations and demands for some form of democratic control over the government. But they also show that after independence the executive was progressively strengthened while Parliament, as the instrument for democratic control of the government, was made weaker and replaced by the Party. But the Party was itself dominated by the

executive. As such, executive dominance has been the main feature of constitutional practice in Tanzania; the main constitutional changes and developments have all been controlled by the executive.

It must be emphasised here that even under the Westminster model of parliamentary government which was adopted by the *Independence Constitution*, the executive is an extremely powerful institution. But in the United Kingdom, from which the model was adopted, the immense powers of the executive can be checked by institutions which, in their own right, are very powerful as well. There is an active and well established supreme Parliament with a wholly elected lower house, and an independent Judiciary. In addition there are strong, independent and influential pressure groups and civil organisations, and a free press constantly monitoring the opinion of an informed and alert public.

By contrast, in the newly independent African countries of the early 1960s, the checking mechanisms constituted by all those bodies and institutions were weak or absent. In Tanzania, specifically, there was a one-party Parliament, most of whose members had been returned unopposed, and its sessions were sometimes complacently "lifeless." The High Court, through which judicial control of the executive could be exercised, could only play a marginal role. The general population was overwhelmingly illiterate; a free press, even if there had been one, would not have been of much democratic use; and the radio was state owned. There were no independent pressure groups; even the trade union

and cooperative movements were still allied to TANU, the nationalist movement which formed the independence government, as part of the then anti-colonial alliance.

On the other hand, the *Independence Constitution* inherited the extremely elaborate and powerful structure of colonial administration, heavily biased in favour of executive might. As we saw in Chapter Two, not even a democratic local government system had been established; local administration was carried out through a network of Native Authorities, directly controlled by the central executive through its district and provincial commissioners. Soon after independence these commissioners, until then civil servants, were replaced by political commissioners, designated district and regional commissioners, to perform the function of local political executives appointed by the President, responsible to him, and holding office at his pleasure. This reinforced the dominant position of the central executive that had existed under colonial rule. The executive then went on to take over control of the trade union and cooperative movements, and to ban opposition parties, all with relative ease.

The greatest significance of the *Republican Constitution* of 1962 was not so much the severing of links with the British crown, but the "crowning of the executive" by establishing the office of Executive President, vesting it with extensive powers and virtually removing all restrictions to their use. The justification for this development was presented in Nyerere's

powerful speech in Parliament in June 1962, extracts of which are attached to this study as Appendix A.

In short, Nyerere never shared the view that regards power as evil (Ghai 1972:419). He argued that once democratically elected, the government should be free to govern, and should have enough power to mobilise all resources for economic development.[1] On the dangers of misuse of such powers, he argued in his 1962 parliamentary speech that there can never be designed a fool-proof constitution to guard against misuse of power; rather, he said, mutual confidence between the people and their democratically elected government, the political leaders' sense of decency, and the extra-juridical "National Ethic" were the best safeguard against abuse of power. It was the strength of that argument that led to the acceptance of the dominance of the executive as the main feature in the constitutional practice of Tanzania.

But that acceptance of a strong executive in Tanzania was also due to the personal influence of Julius Nyerere, then the obvious choice for the Presidency, as we saw earlier (*supra*, 3.2). His charm, wisdom, proven ability and overall personality had such a disarming effect that even the few who warned against vesting too much power in the President readily conceded that Nyerere could certainly be trusted not to misuse such power.[2] And ever since, Nyerere has decisively influenced constitutional

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[1] *Observer*, July 3, 1962; also Nyerere 1961c: 340 and Nyerere 1968: 5.

[2] *Parliamentary Debates*, June 28, 1962: cols.1101-2.

developments in much the same way as the executive as a whole has dominated Tanzania's constitutional practice. Almost every other institution has been acting in response to the dictates of the executive which, in turn, has been acting largely in accordance with his mandate. Thus most of the constitutional changes under review bear the mark of Nyerere's influence.

From the beginning, Nyerere's concept of a responsible government gave paramount importance to the right to vote. In his 1962 parliamentary speech, he justified the powers of the President over the civil service by the fact that the executive would have the mandate of the electorate to implement the policies and programmes upon which it was voted into office, and that such powers were necessary for effective implementation. In the same speech he defended the provision that in case of an impasse in the legislative process due to differences between the President and the National Assembly, both (and not just the President) should seek a fresh mandate from the electorate because "the final judge in a democracy is the voter."[3]

Nyerere also based his decision to adopt a one-party system, to a great extent, on the argument that it would give the citizens an opportunity to vote for their leaders and representatives. He has repeated this argument in subsequent statements emphasising that the decision had been "demanded not by philosophy but by reality:"[4] the multi-party system in one-party

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[3]*Parliamentary Debates*, June 28, 1962: cols.1110-1.

[4]*Africa Now*, December 1983:108-13; also see Sandbrook & Halfani: 28.

Tanzania had denied most citizens the right to vote! And to prove the point, Nyerere's one-party system came with an extremely elaborate and thoroughly involving electoral scheme, and elections have been held with impressive regularity. This has had the effect of giving the system in Tanzania a degree of credibility and respect not readily accorded to some other one-party states.

Also, despite its dominant role, the executive has not had a reputation for despotism or extreme oppression. We have attributed this to the *ujamaa* ideology and its declared commitment to equality and social justice. We should add here that the government in Tanzania has also been spared the threats to national unity and cohesion within the state boundaries, which in other countries have often been used as the justification for repression by many African governments. The sheer number of ethnic groups, over 120, and a common national language, Kiswahili, understood all over the country but not belonging to any particular ethnic group, have all worked in favour of a common identity and national unity. And after the 1964 army mutiny, a new army, highly politicised, was established under party surveillance and an organisational structure closely linked with that of the party that the possibility of a military take-over became remote.

But in that too the executive owes much to Nyerere's personal skills and ability. One of his greatest assets, which has been used with maximum effect, has been his ability to keep himself

constantly in touch with the people, and to react promptly and appropriately to changing political situations, moods and attitudes in society. His ability to address large crowds and to appeal to all people and make himself understood by even the illiterate and most unsophisticated poor citizens hardly finds any parallel. That, together with his clear commitment to equality and social justice as expounded by his highly appealing *ujamaa* ideology, have been largely responsible for the popular support which the executive always enjoyed under his leadership. He succeeded in cultivating public confidence in the executive, enabling it to implement its schemes and policies with public support generally, and with relatively little oppression.

It was Nyerere who initiated the one-party system, with widespread public acceptance at the time. It restricted freedom, but there were some among his colleagues who would have had a worse state, with no elections at all (Pratt 1976:187-8). The Arusha Declaration, which introduced the *ujamaa* ideology with all its effect on the conduct of government and government leaders, was his initiative. He even gave a silver lining to the now discredited concept of "Party Supremacy" by using it, after uniting the ASP with TANU to form *Chama cha Mapinduzi* in 1977, gradually to extend elections to Zanzibar, where Karume, the first leader after the 1964 Revolution, had decreed that there would be no elections.

In 1977 Nyerere came out strongly in public condemnation of spreading dictatorial tendencies among his colleagues and

assistants in the political leadership (Nyerere 1977:43-5; Scope:9-10). In 1980 he deliberately postponed his earlier intention to vacate the Presidency, and he used the extended lease of office to initiate the changes effected by the Fifth Amendment in 1984, which included the enactment of a Bill of Rights and limiting the presidential tenure to only two five-year terms. In 1985 he voluntarily vacated the Presidency; but he continued to exert influence as Chairman of the ruling party. And in 1990, while still Party Chairman, he deliberately undermined possible resistance to change (from hardliners in the party and the government) by encouraging a multi-party debate.

Even after relinquishing his position as Party Chairman in 1990, Nyerere continued to command unparalleled respect as the "Father of the Nation." His continuing influence was demonstrated in late 1994 when he published a scathing attack on John Malecela, the Prime Minister, and Horace Kolimba, the Party Secretary General, for giving misleading advice to the President for the sake of their personal ambitions, and refusing to take blame and political responsibility for their misleading advice by resigning, even after being advised to do so (Nyerere 1994). In December 1994, immediately after the formal launching of Nyerere's latest book, President Mwinyi dissolved the Cabinet and reconstituted it with a new Prime Minister. That move defused some of the pressure from mounting public criticism of the government.

Thus, all in all, Nyerere has played a role that enabled the

executive to manage and control constitutional developments without being driven to the wall by popular pressure.

One effect of that dominance of the executive in constitutional practice in Tanzania, and Nyerere's role in it, is that the extent of public participation and involvement in constitution making has been quite limited. Constitution making has been an exercise in which the executive, especially after 1965, has been very free to effect changes as it chooses, in a remarkable parallel with the colonial government; even the practice of having some MPs appointed by the executive is in fact a carry over from the colonial era. Most constitutional changes, even where there was some input from the public, have been initiated from the top. The 1992 changes were a result of popular demands for change; but the executive responded quickly and easily managed to take over and proceed in command of all key developments. This dominance of the executive is largely responsible for the limits and shortfalls in the achievement of democratic control and popular influence over government powers.

8.3: ESTABLISHING A FRAMEWORK FOR RESPONSIBLE GOVERNMENT

The developments reviewed in this study are part of an on-going process. As we write, Tanzanians are getting ready for the October 1995 presidential and parliamentary elections which will be contested by several parties and will put to test for the first time some of the changes examined in Chapter Seven above. It is not possible, therefore, to make an authoritative

assessment of their overall achievement in securing a responsible democratic government. But it is possible to indicate what steps have been made in that direction.

To start with, independence in 1961 was in itself a fundamental achievement. It restored political sovereignty by putting an end to colonial rule which had negated responsible democratic government, both in principle and in practice. It enabled the establishment of a sovereign parliament elected by the people to represent them, and to which the government was responsible. A year later, the *Republican Constitution* reinforced that achievement by declaring a "sovereign republic." The *Republican Constitution* also retained from the *Independence Constitution* those provisions securing the tenure of office for judges and magistrates. Subsequently, the *Magistrates Courts Act 1963* completed the establishment of an independent judiciary.

There have been many reservations about the one party system. But in Tanzania, it should be assessed on the basis of the objective conditions obtaining in the country at the relevant time. While it is true that the right to vote was achieved for all adults with independence in 1961, the practical realisation of that right only came with the one-party *Interim Constitution of Tanzania 1965*. The previous (multi-party) election had returned 80% of the MPs unopposed, making a sham of the claim that the government was responsible to "a freely elected

Parliament representative of the people."[5] Rather the government was responsible, if at all, to a body composed of members selected by the ruling party. The right to vote is absolutely essential for any democratic government and in Tanzania the one party system extended its realisation to all adult citizens, and it has been exercised regularly ever since.

The party was open to all citizens; it was not an elite party for a few people with proven ideological commitment. Despite its centralised structure, the elaborate party organisation network enabled to keep national leaders aware of what went on at grass-roots level through information coming up from party branches. Within the party structure members had the right to give their views and criticise their leaders, and to vent their grievances, provided they did not attempt to challenge or otherwise tamper with key issues of policy. The party was thus a medium for monitoring public opinion and enabling the government to act according to demands from the people. And despite its limitations, the Permanent Commission of Enquiry was a welcome innovation made under the one-party state.

Some very important steps towards a responsible democratic government were effected by the *Fifth Constitutional Amendment Act 1984* (the "Fifth Amendment") which was enacted due to, among other things, dissatisfaction with the concentration of too much power in the President, started by the *Republican Constitution*

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[5]Statement in the preamble of both the *Independence Constitution* and the *Republican Constitution*.

and reinforced by subsequent developments. By limiting the Presidential tenure to only two five-year terms, the Fifth Amendment emphasised that presidents are not pre-ordained and indispensable masters of the people, and should not be allowed to stay in office indefinitely. Rather, the people should have a reasonably frequent opportunity to exercise their right, as the masters, to choose another person to *serve them* as President.

The Fifth Amendment also sounded, for the first time, a tacit warning against notions of "Presidential Infallibility" by specifically requiring the President to consult his Prime Minister, before appointing any person a minister or a regional commissioner.

The requirement that ministers, both collectively and individually, shall be responsible to the National Assembly is a cardinal principle of government responsibility which was introduced by the *Interim Constitution*. Subsequent constitutions did not contain specific provisions to that effect. In practice, however, ministers always defended government policies and actions as a team before the National Assembly, and always sought its sanction for raising and spending public funds, even if sometimes this may have been done as a mere formality. But the Fifth Amendment expressly declared this principle again in s.53(2) of the amended Constitution.

The Fifth Amendment also enhanced the status and authority of Parliament by reducing the number of MPs appointed by the

President, thus reducing his power over it, by increasing the number of elected members, and by expressly according absolute privilege to its proceedings. The parliamentary privilege was later supplemented by the right, and the power, of MPs to hold public meetings in their respective constituencies without any hindrance. This widened the base from which public opinion could be monitored, beyond the party structures, for purposes of enabling the government to be responsive to public demands.

Another achievement of the Fifth Amendment was in its express declaration of the separation of state powers and functions into three separate organs, an important principle for avoiding tyranny. The amendment also affirmed the supremacy of law, a necessary requirement of government responsibility.

The incorporation of a justiciable Bill of Rights in the Constitution ensured that the supremacy of law was not an empty declaration. It enhanced the role and power of the Judiciary over executive powers by enabling the High Court to censure government actions which infringe constitutional rights. The enhanced role of the Judiciary became even more evident with the holding that the procedural requirement of the *Government Proceedings Act 1967* which the government had conveniently used to avoid the institution of legal proceedings against it was unconstitutional and therefore null and void.[6] This finding made a reality of the legal liability of the government for its actions and omissions.

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[6]*Kukutia Ole Pumbun v. Attorney General*, [1993] 2 L.R.C. 317.

The Bill of Rights enabled many individuals to assert, by court action, their rights and freedoms against restriction by the government, and made it difficult for the government to suppress this new wave of demand for freedom. It encouraged the emergence of a number of independent publications and organisations operating free of state control and patronage, thereby widening the scope and sources of public opinion. Finally, the Bill of Rights was also the source of confidence and inspiration to various groups and individuals who then stood up to question the legality of the one-party state system.

The 1992 amendments went a step further in subjecting the executive to popular control, exercised through the National Assembly. The reintroduction of multi-party politics enlarged the base for recruitment to the National Assembly, widening the scope of the sources and channels of public opinion which a responsible government must take into account. All traces of subservience to the executive were terminated as the President lost both his power to appoint any MPs and his power to dissolve Parliament at any time.

On the other hand the National Assembly was strengthened by the new power to approve the appointment of the Prime Minister, and the power to remove him and his team of ministers from office by a vote of no confidence. These developments meet several requirements of government responsibility. Firstly, the President is compelled to appoint as Prime Minister only a person who enjoys the support of the people's representatives in

Parliament. Secondly, the Prime Minister is constantly reminded of the need to conduct the affairs of the government in a manner that ensures continuing parliamentary support. And thirdly, because of their collective responsibility, the ministers have always to work not only to win the favour of the Prime Minister and the President, but also to ensure that the confidence of the National Assembly remains undented.

Finally, the *Ninth Constitutional Amendment Act 1992* now empowers the National Assembly to remove the President by impeachment for breaching the Constitution or for bringing the office of the President into disrepute. Thus, although the President remains free to "act in his own discretion" and is not obliged to follow advice tendered by any body, Parliament can still hold him to account for his actions as President. It is a development which emphasises both the supremacy of law and the supremacy of the people as represented by Parliament.

These developments emphasise further the notion of government responsibility which projects the government as the servant, not the master, of the people. How far that notion may be realised in practice as a result of these recent developments remains to be seen. A point to be emphasised, though, is that "government as a servant of the people" remains, practically all over the world, more of an ideal than a reality.

8.4: IMPEDIMENTS TO RESPONSIBLE GOVERNMENT

We have already mentioned that the *Independence Constitution* imported to Tanzania a powerful executive, characteristic of the Westminster system of government, in conditions of an almost complete absence of the usual mechanisms for checking executive powers in that system. The system adopted from the start, therefore, had inadequate means of ensuring a responsible democratic government. The *Republican Constitution* removed even the bare minimum formal requirement of government responsibility to the National Assembly. The Cabinet was responsible to the enormously powerful President, who was accountable to nobody. That position continued under the one-party state system.

A clear attempt of the one-party system, especially the concept of "Party Supremacy", was to replace Parliament with the Party as the centre of authority exercising control, on behalf of the people, over the government and other state institutions and holding them to account. But since 1962 Parliament had lost its might to the executive; there was thus little authority in it to replace. Moreover, the supreme organs of the Party and the Executive were, for most part, constituted alike, making the Party not well placed to hold the government to account.

Besides enabling all people to vote, the one-party system did nothing to enhance people's control of the government. Within Parliament, freedom to debate was stifled by the requirement to support and observe party policies and directives. Parliament lost much of its role and function of representing the general

will of the people. For purposes of control, it almost became redundant as the government began seeking, and readily obtaining, the sanction of party organs (instead of Parliament) to give legitimacy to its actions. With "Party Supremacy", Parliament lost its sovereign status and became a party committee, chaired by the Prime Minister (the Leader of Government Business in Parliament), required to meet before each session of Parliament, and which could also meet between sessions.[7]

Through those "party committee" meetings, which were held in camera, the government was able to overcome all parliamentary opposition to its proposals. Significantly, after instituting "Party Supremacy" the President never again used his constitutional power to address the National Assembly at any time to secure support for government proposals, as he had done over the Income Tax Bill in 1973. Instead, whenever MPs strongly resisted a government proposal, the Prime Minister called them into a meeting constituting the "party committee" to deal with the resistance.

Popular institutions and organisations were brought under the control of the party by coopting or affiliating them into its organisational structure. As a result, Tanzania hardly had any independent pressure group outside the party structure. Freedom of expression also suffered generally because of a repressive media law regime; only mass media owned by the government and the party were certain of survival. In the event, the party was more

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[7] *Tanzania Parliamentary Rules 1987* (1990 Edition), Rules 81-82.

effective in subjecting the whole civil society to state control. The whole idea that the government should be responsible to the people it governs was, in effect, reversed, with the government hardly listening to the people. The supremacy of the party proclaimed by the Constitution, and the *ujamaa* socialist ideology which was largely responsible for mobilising the popular support enjoyed by the government, were often used as pretexts for overriding the need for democracy and popular participation, and sometimes even legality.

The absence of a Bill of Rights from the Constitution undermined possible endeavours to hold the government liable for its actions which contravened some universally acknowledged basic human rights. The *Government Proceedings Act 1967* also gave the government an unfair protection from legal proceedings. Thus although judges and magistrates at all levels had a secure tenure of office, for a long time the role of the Judiciary in controlling government powers was deliberately marginalised. Other organs of control, the Permanent Commission of Enquiry and the Commission for the Enforcement of the Leadership Code, have had no powers of their own and have depended entirely on the discretion of the President to act according to their recommendations, with no recourse if he refuses to act. As a result the two Commissions served to enhance, rather than to check, the powers of the Chief Executive.

Many of these limitations were removed by the Fifth Amendment, which incorporated the Bill of Rights in the Constitution, and

the 1992 amendments, which brought back a multi-party system. But these changes too came with limitations of their own.

The Fifth Amendment restored ministerial collective responsibility to the National Assembly but excluded the President, the Head of Government, from this responsibility, placing him above it. It also gave the National Assembly no powers of censure. As such the "collective responsibility" it declared was virtually an empty one, still leaving effective control in the hands of the President, who had power to dissolve the National Assembly at any time. Also, while guaranteeing the right to freedom of association, the Fifth Amendment still retained the restrictive provisions of the one-party state.

Those shortcomings were apparently rectified by the 1992 amendments which gave to the National Assembly powers to censure the government and to impeach the President, making the supremacy of Parliament, and the corresponding responsibility of the government to it, indeed a reality. But membership of the National Assembly still excludes persons who are not members of registered political parties. The return of multi-parties only replaced the former "one party monopoly" with "a multiparty monopoly" (Mvungi 1993:27), and still disqualifies a majority of Tanzanians from contesting for political office, shutting off their voice and opinion. The changes, therefore, are short of establishing a government that "belongs to all the people" as once cherished by Nyerere (1958:87); they set up, instead, a government belonging to political parties. The right of

political parties to operate is conditional upon satisfying the Registrar of Political Parties that the *Political Parties Act 1992* is complied with; he can cancel the registration of a political party with no right of appeal against such action.

This results from the dominant role of the executive in the constitutional developments in Tanzania. The executive has not listened to all sections of society and now seeks to deliberately exclude from political activity persons who are not identified with institutions it has sanctioned and can control, like political parties.[8] Demands for a new Constitution, with the public involved in its making, have been ignored. The laws recommended by the Nyalali Commission to be repealed or amended because they inhibit freedom and democracy are still in the statute books.[9] Many of those laws could be successfully challenged for contravening some basic constitutional rights. But until that happens they can be invoked by the government, and its reluctance to repeal or amend them shows its intent to use them. This makes it doubtful whether the government indeed accepts the supremacy of the Constitution and is willing to be always subject to it.

Those doubts are heightened by a renewed reluctance by the government to be bound by certain laws and court verdicts not to its liking. After the High Court declared the whole *Deportation*

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[8]The Registrar of Political Parties is appointed by the President and holds office at the pleasure of the President.

[9]A selection of those laws is listed as Appendix B to this study.

Ordinance unconstitutional and therefore a nullity, the government introduced a Bill which was passed and which amended the said Ordinance to make it consistent with the Constitution.[10] It raises the question whether Parliament can amend a law which has been declared null and void by a court of competent jurisdiction, as the Ordinance was at the time of the purported amendment. But of greater concern here is the government's disregard of judicial authority demonstrated by that step. Also in 1991 the government secured an amendment[11] re-enacting into the *Criminal Procedure Act 1985* the same provisions relating to bail which had been declared null and void by the courts, by simply putting them under a different subsection.

In December 1992, the controversial *Regulation of Land Tenure (Established Villages) Act 1992* was rushed through Parliament; it extinguished customary land rights in villages established under the Villagisation Programme. The law went further: it prohibited the payment of compensation, as of right, for the resultant loss of those rights; it terminated all pending court cases instituted on the basis of those rights; and it prohibited the execution of any court decree already made in respect of the same. It provoked widespread public concern and subsequently many of its controversial provisions were declared null and void by the Court of Appeal in *Akonaay and Another v. Attorney General*.[12] Finally, in December 1994 the government secured an

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[10]The *Deportation Ordinance (Amendment) Act 1991*.

[11]*Written Laws (Miscellaneous Amendments) Act 1991*.

[12][1994] 2 L.R.C. 399.

amendment to the Constitution to exclude independent candidates from standing for elections, thereby overruling the decision of the High Court in *Rev Christopher Mtikila v. Attorney General*.[13]

Until now the government has refused to have the State Intelligence Services Department (popularly known as the "National Security Department") established by a specific law which should also govern its operations. Presently, that department exists and operates by executive fiat; its functions are hardly known. The Nyalali Commission recommended that a law should be enacted for its formal establishment and to govern its activities so as to avoid possible misuse of power and violations of the Rule of Law, a common complaint against such departments in some countries (Tanzania 1992a:148). In Tanzania too, the department is not blameless. Its officers were involved in the 1976 murders on account of which two ministers resigned in early 1977. The arrests and detentions of student leaders in 1989 (*supra*, 7.3.2) were also made by that department.

The reluctance to enact a specific law for it as recommended by the Nyalali Commission indicates that the government wishes to reserve an area of freedom for executive action without being restrained by the law. The same can be said regarding the *Basic Rights and Duties Enforcement Act 1994* which, as we have already mentioned (*supra*, 7.6), makes the High Court less accessible for purposes of enforcing the Bill of Rights and also precludes the use of prerogative orders to enforce basic rights; it may render

[13]High Court of Tanzania, Dodoma, Civil Case No. 5 of 1993.

the High Court virtually powerless against the government.

The overall position shows a government determined to have its way regardless of the law, to obey only the laws it chooses, and not to be restrained in any way, even to the extent of expecting the Constitution to obey it, rather than the other way round. It shows a government refusing to be subject to the law, and in effect refusing to be responsible.

8.5: RESPONSIBLE GOVERNMENT: FUTURE DEVELOPMENTS

In 1975, President Nyerere had this to say about Tanzania's achievements:

> We call ourselves a democratic and socialist state. In reality we are neither democratic nor socialist... Democracy and socialism require a mature and popular awareness of the dignity and equality of men and women; a dynamic and popular intolerance of tyranny; a degree of maturity and integrity in those entrusted with responsibility for the institutions of State and Society; and a level of national and personal affluence [all of] which Tanzania and Tanzanians do not possess... We have the village tyrant and the insensitive bureaucrat. We have the habits of arbitrariness... We have judicial procedures which, to say the least, leave a lot to be desired. We have a law on the Statute Book under which an individual may be detained without trial. We have the traditional prejudice and discrimination against women. We still have a love of exerting authority, and an intolerable degree of submission to authority....[14]

Some steps have since been taken to improve the situation. There is now a Bill of Rights checking against "the habits of arbitrariness"; detention orders can now be questioned in court; and various parties are now competing for seats in a representative Parliament, with a reserved number of seats for women, which has power even to remove the President from office.

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[14] *Bulletin of Tanzanian Affairs*, December 1975 & January 1995; Vol.8 *Africa Contemporary Record 1975-1976*: B315.

But democracy is a living and dynamic concept, not a static virtue that can be won or achieved once and for all. For that reason Nyerere's assessment may be just as valid today as it was twenty years ago.

The Nyalali Commission recommended the establishment of a special commission for purposes of re-writing an entirely new Constitution in whose making the public should be involved. That recommendation has received wide public support; but the government so far appears to have rejected it. Instead, the Constitution has been amended five times over the past three years without any public involvement.

There is now this pertinent question: is the writing of a new constitution really necessary in order to ensure, among other things, an adequate framework for a responsible government?

The need for a new constitution for Tanzania is evident from a number of factors. It is not just that there has been a wide public demand for a new constitution, including one failed attempt to get a court order requiring the government to set in motion the constitution making process.[15] But it seems to be a logical argument that amendments cannot make a constitution initially designed for a one-party state work effectively well for a multi-party system. Therefore, there is need for a completely new constitution; the amendments enacted from 1992 can

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[15]*Rev Christopher Mtikila v. Attorney General*, High Court of Tanzania, Dodoma, Civil Case No. 5 of 1993.

only serve to provide for a transitional framework.

Since its hurried enactment in 1977 up to 1995 the *Constitution of the United Republic of Tanzania 1977* has been amended 11 times.[16] There are very few original 1977 provisions now remaining unaffected by the subsequent amendments. As such, the Constitution has in effect been replaced by a series of amendments on the basis of which the government now operates. Not all the amendments have been very successful either; some of them, especially the most recent ones, have raised new problems calling for yet some more amendments. On the other hand, some of those amendments are so fundamentally different from the purposes of the original Constitution that writing a new one is more than justified.

The question of enacting a new Constitution has to be taken soon. It is important that the people should be involved in making a new Constitution. The people have a right to participate in making the supreme law of the land which binds even Parliament. Also a wide public consultation brings forward a wide range of alternative ideas to choose from, both in considering new forms and institutions and in revisiting previous experiences. For, it would be a mistake to dismiss the experiences under the one-party system as irrelevant and devoid of any forms, or even ideas, to be usefully modified and adopted into the new order.

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[16]Going by their official citations, one would say there have been 12 amendments. But the 4th Amendment was by default named as the 5th Amendment and has been known that way ever since.

From the experiences of Tanzania, one important institution is the Permanent Commission of Enquiry (PCE), which was adopted specifically for checking abuse of power under the one-party system. But abuse of power is a problem transcending political party systems and the intrinsic benefits of an ombudsman institution are evident from its spread to divergent political systems in Africa (and elsewhere); it has been operating in single-party, multi-party and even (no-party) military regimes (Hatchard:256-7, 260). The Nyalali Commission recommended that the PCE should now be answerable to Parliament, which seems logical now that Parliament has superior authority over the President. But the amendments made so far have left the PCE entirely as it was under the one-party state.

Another institution whose role and function should be fully addressed in considering a new Constitution is a code of ethics for political leaders and executives.[17]

During the 1990-92 debate on the multi-party option, frequent warnings were given against equating democracy with political parties. It should similarly be emphasised that the reformed institutional structures for controlling government powers do not, in themselves, guarantee a responsible government. Thus, although the 1992 reforms make the power of the National Assembly over the executive greater than ever before, the practical effect of those reforms may still be minimal.

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[17]It is understood that following a private member's motion in 1994, such a code has recently been enacted; see *Bulletin of Tanzanian Affairs*, September 1995: 21-2.

After 1992 the National Assembly seemed to have acquired some new confidence and became extremely critical of the government (Simbakalia:57-8). But it has still been unable to censure the government and has left it to the discretion of the President to act against the ministers singled out for particularly severe criticism: the Foreign Minister and the Minister for Natural Resources and Tourism in 1993, and the Prime Minister and the Minister of Finance in December 1994. The President made changes affecting those ministers in the Cabinet[18] after they had come under severe public criticism. In fact the 1994 reshuffle was mainly the result of Nyerere's intervention with the publication of his book, in the case of the Prime Minister, and pressure from the international donor community, in the case of the Minister for Finance. Otherwise the National Assembly itself failed to force any minister to resign, much as it had failed to remove Joseph Mungai from office as Minister for Agriculture in 1981.

The power to censure the government by a motion of no confidence in the Prime Minister does not necessarily require sitting MPs to belong to two or more different parties; members of the National Assembly can move and carry the motion against a Prime Minister belonging to their own party. The passing of such a motion, like that of impeaching the President, does not lead to dissolution of Parliament; members do not have to worry, therefore, about the possibility of immediately losing their seats as a result of censuring the government. Yet it required the intervention of a retired President and pressure from

[18]All the ministers were nevertheless given other Cabinet posts.

external donors for the President to take censorial measures against his ministers. This shows that with all its new powers of censure, Parliament alone is still not enough to ensure effective control of the government.

With a strong opposition party in Parliament it may be easier to invoke the powers of censure and thereby keep the government alert, lest it be replaced for unsatisfactory performance. A major preoccupation of an opposition party is to watch out for failures and point them out as evidence of poor performance by the government in the hope of replacing it. But a good system of responsible government should have more than merely the provisions for sanctions against unsatisfactory performance; it should also make it possible to expect and compel the government to improve its performance, while still in office, by ensuring that it responds to the actual needs and demands of the people as its duty, and not just in wooing votes for the next election. And for that purpose, the formal organs of state, the legislature and the judiciary alone, are not enough.

There are other factors and institutions whose role is also vital. They include a free press, a diversity of pressure groups and civil associations organised variously, both formal and informal. They also include autonomous local government authorities, not mere outposts of the central executive. Those are the makers of public opinion. Political parties are interested in changing governments at general elections. Civil associations and other interest groups, on the other hand, are

interested in good performance as a continuing concern; they are not interested in changing governments as such, but in changing government performance. They thus play an important role in ensuring a responsible government. It is for that reason that the recommendation of the Nyalali Commission to repeal or amend those laws that restrict freedom, including freedom of association and expression, should be taken as an important constitutional agenda.

Finally, it is important to develop a culture of respect for the Constitution. The ease and frequency with which the Constitution has sometimes been amended does not exhibit that respect. Certainly, a Constitution is not so sacred that it cannot be amended even if it fails to function effectively. But frequent amendments to a Constitution raises doubts about the seriousness of the constitution-making process itself. The executive can take advantage and secure amendments to suit its convenience as easily as it does with other laws; after all the Constitution is amended by Parliament in the same way as passing other laws, except that a constitutional amendment is passed by a two thirds majority in the House.

A successful constitution, and any successful law for that matter, is one which can survive a long time without needing an amendment. Julius Nyerere correctly pointed out in his 1962 parliamentary speech (see Appendix A) that "no constitution is ever perfect." And in 1995 he stated, correctly again, that the success of any country's constitution depends on two factors:

> Firstly the integrity, the commitment to democracy, and the loyalty of the Leaders of that country; and secondly the vigilance of the people -and their chosen representatives - in defence of the Constitution's provisions and especially its basic principles. (Nyerere 1995:3)

Both logic and experience tend to show that a constitution, and any law for that matter, is likely to be more successful if the people have been involved in its making. Leaders who lack integrity and commitment to democracy can be removed by the people (or their representatives) exercising their democratic right to that effect, if the Constitution provides for such a right. In so doing, the people will be defending the Constitution. Logically, the people's vigilance in defending the Constitution and their commitment to its basic principles will be greater if they know and understand the Constitution and its basic principles.

There is no better way of ensuring that the people know the basic principles of a law than involving them in making it. One practical example is that of the Bill of Rights and other related principles which were enacted under the *Fifth Constitutional Amendment Act 1984*, after a public debate which took a whole year; until now nobody has called for their change, and they have remained virtually unchanged.

Another example is the *Law of Marriage Act 1971* which, initially, would have been passed in November 1969. But at the start of that session of Parliament the UWT organised a mammoth demonstration by Dar es Salaam women demanding, among other things, the prohibition of polygamous marriages. The government

withdrew the Bill, took a year to gather more views from the public, and then modified the Bill before presenting it to Parliament in April 1971. Although it did not prohibit polygamy as demanded by the women, the Act has been a remarkable success: it has not been amended ever since.

It cannot be expected, nor is it being suggested, that a similar procedure should always be followed in making other laws, just to ensure their success. Law making should be left as the regular function of Parliament. But constitution making *is not* a regular function of Parliament; and constitution making does include, in our view, enacting constitutional amendments. We would recommend, therefore, that future constitutional amendments should not be made by Parliament as easily as they have been so far, using the regular legislative process, only slightly modified. In any case, the Constitution should not be amended without involving the people in the process of amendment. This will ensure the success of the Constitution and emphasise that it is indeed supreme, and not to be easily tempered with, even by the legislature.

The success of all future constitutional developments will thus depend largely on the extent to which the people are involved in constitution making. Ultimately, therefore, it is a question of democratic participation. And that, in effect, is what responsible democratic government is all about.

EPILOGUE

At the time of submitting this thesis Tanzanians were about to go to the polls, on October 29, 1995, in the first multi-party elections since independence. In actual fact, this is going to be the first election ever to be held in Tanzania (Zanzibar excepted), in which there is going to be a real contest between both individuals and political parties; the pre-independence elections presented no contest as TANU had no challenge.

About a dozen political parties, including the ruling CCM, are contesting for more than 240 seats in the Union Parliament; four of the parties are also contesting for the presidency. The contest is expected to be extremely close. Elections for the Zanzibar President and the Zanzibar Legislature, held a week earlier (on October 22, 1995), have been described as a "dress rehearsal" for those of the United Republic. The results, just announced, give victory to the ruling CCM by the narrowest of margins: 26 seats in the House of Representatives going to CCM and the other 24 going to the opposition Civic United Front, while the incumbent Zanzibar President (CCM) obtained 50.2% of the presidential votes.

While in Zanzibar the ruling CCM faced only one opposition party, for the union elections there are several of them. But the NCCR-*Mageuzi*, led by the popular Augustine Mrema, who was in President Mwinyi's Cabinet until February 1995 when he joined the opposition, seems to pose the greatest challenge. The CCM Presidential Candidate is Ben Mkapa. One of these two is likely to be the next President of the United Republic of Tanzania.

Whoever and whichever party wins will still face the need for a new Constitution. It can only be hoped that the winner will take it as a mandate to initiate the process of making a new Constitution with the active involvement of the people as we have argued for in this thesis.

Appendix A

GOVERNMENT POWERS AND THE IMPORTANCE OF THE NATIONAL ETHIC

Mr Julius Nyerere: Mr Speaker, Sir, ...I will not try to say that Government has devised a perfect constitution. Government was not even attempting to devise a perfect constitution. No constitution is ever perfect. Fears that may have been raised about the constitution are fears concerning the power of the president. His powers over the civil service, powers of appointment and other powers which, I must admit, are a lot of powers. The problem, Sir, which confronts all people who frame constitutions is not a problem of trying to frame a constitution which is going to be foolproof against a potential tyrant. It is extremely difficult if not impossible to frame a constitution that makes tyranny impossible. There are some beautiful constitutions on paper in the world, some of the most beautiful constitutions that have ever been devised. Sir, some of us here who have taken the trouble to study constitutions and who have taken the trouble to find out what is happening in various countries, constitutions or no constitutions, know that the constitutions in themselves are not safeguards against tyranny. We know some countries which have no written constitutions and, Sir, they have some of the best administration in the world. We have some constitutions very carefully drafted to prevent this or that happening but they have not completely succeeded to remove a bit of corruption in the administration. Now, Sir, why am I saying this? I am saying this, Sir, because the point must be made that ultimately the safeguard of a peoples right, the peoples freedom and those things which they value, ultimately the safeguard is the ethic of the nation.

When the nation does not have the ethic which will enable the Government to say: "We cannot do this, that is un-Tanganyikan". Or the people to say: "That we cannot tolerate, that is un-Tanganyikan". If the people do not have that kind of

ethic, it does not matter what kind of constitution you frame. They can always be victims of tyranny.

Sir, let us take the present constitution as it is, without any change at all. This Parliament, Sir, can make any law, as it is now, any law. They can pass a law today, without any change in the constitution, that nobody should become the President of Tanganyika unless he had proved that he is a potential tyrant. (Laughter.) They can. They can! This Parliament has perfect power to do that. They can pass a constitution, they can pass a law now, and they have complete power, Sir, that nobody in Tanganyika should have the right to vote except bachelors and polygamists. (Laughter.) Because they have perfect power to do that, they are the supreme legislature of the nation. They can do it.

Why are they not doing it? Two reasons: one because they are not insane, they are not mad, Sir. The other one, if they were mad enough to try and do it, they know that the people of Tanganyika are going to give them a most determined "NO". These two reasons, Sir, and ultimately the last one --that the people won't take it, are the safeguard of the rights of any people.

So, I am saying, Sir, whatever we try to do -- we can sit here and look at this constitution, and say that we are giving too much power to the President -- let us sit here for two years and devise the most foolproof constitution. I am saying, Sir, we will never succeed. What we must continue to do all the time, is to build an ethic of this nation -- all the time to build an ethic of this nation, which makes the Head of State, whoever he is to say, "I have the power to do this under the Constitution, but I cannot do it, it is un-Tanganyikan." Or for the people of Tanganyika, if they have made a mistake and elected an insane individual as their Head of State, who has the power under the Constitution to do X Y Z if he tried to do it, the people of Tanganyika would say, "We won't have it from anybody, President or President squared, we won't have it".

I believe, Sir, that is the way we ought to look at this constitution. We have got to have a little amount of faith, although I know that some Members have been questioning this idea of faith. But, Sir, democracy is a declaration of faith in human nature, the very thing we are struggling to safeguard here, the very idea of democracy is a declaration of faith in mankind. And every enemy of democracy, every enemy of democracy, is some person who somewhere has no faith in human beings. He doubts. He thinks *he* is all right, but other human beings are not all right. *He* will be perfectly all right.

Democracy itself, Sir, is a declaration of faith in human beings. I am told, it was Sir Winston Churchill, who said Democracy is a very bad form of Government, but every other form of Government that has been tried is worse. Democracy, Sir, is a declaration of faith in the human being, and there must be that amount of faith somewhere, because if you don't have it, then we have to get a tyrant or a semi-God somewhere to come and run our business. Otherwise we will have to have some faith in some fellow-human being. It is risky, but what is the alternative? And, Sir, the quotation I have just mentioned indicates this faith is in most cases justified. That is why we still stand and defend democracy, defend this faith in man. And constitutions, democratic constitutions are aimed at getting the people to declare this faith in some individuals. It is also a declaration of faith by those individuals in the wisdom of the common people in choosing the persons who are going to be vested with these extremely important powers. It does not matter what authority it is. This very Government here, as I said, has very far-reaching powers.

Any government in the world is a dictator. When people use the word "dictator" it is one of those colourful words which they interpret as they please, but every government, Sir, in the world is a dictator. It has all the coercive means, it has the police, it has the armed forces; and it is incredible when one thinks of it, how it is that governments have these means and yet freedom

is still there. And yet an individual can push these people out of power, and elect someone else to go and control the armed forces. It is incredible, Sir, but it is a declaration of faith in human beings; it is justified by the very practice itself, and, Sir, if democracy does not have that faith in the leaders it will never succeed. And if the leaders do not have that faith in the people, there cannot be any democracy. There must be mutual confidence between leaders and the people, in any democracy. A tyrant, Sir, is usually a person who is frightened of the people. It is incompatible with popular leadership, because popular leadership is never frightened of the people --it is a contradiction in terms. The tyrant is usually one who is frightened of the people, and so uses power, because he can no longer rely upon the faith of the people....

Then there is the problem of power -- how [much] power do you invest in this Head of State. Again, Sir, we have difficulties here. Some of the difficulties are difficulties of understanding, other difficulties are practical.

The difficulties of understanding again. Take the matter of the Civil Service. The President, or let us say the Government, is the Government of the country. There are civil servants who work for the Government. They execute the policies of Government. And then you go and try to explain to our own people that the Prime Minister has no power, no power at all to appoint even an office boy. Even on this question of understanding, we would be asking too much from our people if we expected them to understand that Government has no power to appoint a civil servant. That, they cannot understand. This is the question of understanding, Sir, but I am saying also the practical problem, simply practical problems. Here is the Government, Sir, elected to fulfil a function. We go to the people, we promised the people that we are going to do X Y Z. "If you think we are sensible to do X Y Z, and if you think X Y Z are so important that people who are capable of doing X Y Z ought to get into power, then elect us."

We are elected, Sir, on the basis of going out to do X Y Z. Well, Sir, one would expect that when you get into position of power and say to somebody, "Look here, friend, I have come here with a mandate from the people to do X Y Z, your function is none but to help me to fulfil this pledge to the people", now, Sir, supposing this gentleman said, in so many words, "Well, that is your own business, I don't really think these things are important, Sir" --he can be polite, usually they are very polite-- "I don't really think these things are as important as you think, Sir". What do I do? Just smile and say, "You go and do your best, Sir" or say to him quite seriously, "You have an alternative: do what I am telling you, or out, because this is what I am here for"? Now, Sir, we talk about this thing and we say that this is giving the President too much power. And I am not even arguing this on the basis that "because we are a young country" and all this business. I don't accept the whole theory. A manager of any business has the necessary power over the employees of that business --(applause)-- and we really cannot see this mystical theory which deprives the manager of a business of a nation of the power even to say, "That fellow is good enough to be an office boy". This, Sir, we cannot understand. We realize the the practical necessity to continue a Civil Service, not to play about with this power; to have men of experience in the Civil Service, not to go in the Civil Service and wipe out everybody and start with a completely new broom, completely inexperienced people. That we realize. But that is a completely different matter, Sir, from the idea, the philosophy, of a Constitution, that the Executive should have no say at all in the building of the Civil Service. This, Sir, we do not accept.

The practical necessity of having people of experience in the Service, this we see, but when it is necessary for the Executive to say, "I think that person could do that job very well" the Executive must have that power, and when you deprive the Executive of that power, you are depriving the Executive of a necessary power to carry out a mandate for which it has taken responsibility from the electorate. ("Hear," "Hear" and

Applause.) And for that reason we are saying that the President ought to have these powers.

Now, again, Sir, there is this. I go back to the use of the powers as distinct from the powers themselves. Now, there is no doubt, Sir, that the President having been given the powers over the whole Civil Service, there is nothing illegal that we can do as far as employing people in the Civil Service is concerned. He has full powers under the Constitution. So that if all that mattered was the Constitution, and commonsense was ruled out, decency was ruled out, intelligence was ruled out, good sense was ruled out; it is just the powers. Sir, this President would have the power: we have about 13 Ministers here -- if he had 13 sisters he could make all of them Permanent Secretaries. He could, and it would be legal! (Laughter.) He has the power under the Constitution to make each of his sisters a Permanent Secretary in each one of the Ministries if he wanted to.... He could, Sir. Under the Constitution he has a perfect right to do it. Let us use a bit of common-sense. Would he really try? If he tried, the people of Tanganyika would simply say, "No". He would not do it and I am saying that in the last resort that "No" is really what is going to be a safeguard against these powers, which I do accept are terrific powers. The ultimate safeguard is how long a list the nation of Tanganyika will draw, how long is this list going to be, or the things to which they are going to say, "No, Bwana, you cannot do that. That is un-Tanganyikan and we cannot accept it from anybody". So, Sir, this question of power: again, I say that we have -- the Government has-- decided that the Executive must have these necessary powers. A long list of powers. Commander-in-Chief -- most frightening powers! Commander-in-Chief of the Armed Forces. Sir, he could tyrannise, he could tyrannise everybody! (Laughter.) But, Sir, the Governor-General is also Commander-in-Chief of this country....

Sir, I say again that no constitution is perfect. You cannot think of a Constitution without thinking of individuals, of people, of human beings. We are going to carry out this

constitution, although I think there are some people here who have been trying to frame a constitution without human beings. You cannot frame a constitution without human beings. A constitution is framed to be worked by human beings and I hope the evil of human beings is not to be over exaggerated in this consideration. We must consider people and we are going to entrust them with very important decisions and we will know that they have some sense of decency.

....Sir, I want to end on the same note on which I started. If we really want to spend our time devising something that we can offer the people of future generations, something of which they will be really proud, it is not a constitution, Sir. Constitutions have been treated in many countries just like a piece of paper. If we really want to build something that we can hand over with pride to future generations we will have to build ethics of our nation. (Applause.)

(Extracts from *Parliamentary Debates*, 28 June,1962, cols.1103-14)

Appendix B

A SELECTED LIST OF LAWS WHICH RESTRICT FREEDOM AND DEMOCRACY

1. *Preventive Detention Act 1962*, Cap 490
   This law empowers the President to detain a person in custody without a trial or a charge in court. It violates the right to personal freedom.

2. *Deportation Ordinance*, Cap 38
   Empowers the President to order a person to be deported to a particular area, usually a district, and to remain there until the order is lifted. A deportee is confined in custody while waiting to be, and when being, deported. It restricts freedom of movement and personal liberty.

3. *Regions and Regional Commissioners Act 1962*, Cap 461 and the *District Commissioners Act 1962*, Cap 466
   The two laws empower Regional and District Commissioners, respectively, to detain any person in custody for up to 48 hours without charge or trial. It violates personal freedom.

4. *Collective Punishment Ordinance*, Cap 74
   Empowers the President to impose collective punishments, by way of fines, upon whole or part of villages or any other identifiable group or community. It contravenes the principles of presumption of innocence and equality before the law.

5. *Townships (Removal of Undesirable Persons) Ordinance*, Cap 104
   Empowers District Commissioners to order removals of persons, usually unemployed, from urban areas to rural areas. It restricts freedom of movement.

6. *Human Resources Deployment Act 1983*

Empowers the Minister to make arrangements for urban unemployed to be compulsorily put to work or repatriated to rural areas. Denies the right to choice of work, and freedom of movement and residence.

7. *Registration and Identification of Persons Act 1986*

Requires all persons, aged 10 years and above, to be registered and issued with identity cards to be carried at all times, and failure to carry an identity card is an offence. It has been compared to the notorious "Pass Laws" of apartheid South Africa [but the operation of this law has so far been kept in abeyance].

8. *Societies Ordinance*, Cap 337

Empowers the President to ban any organisation (including company, partnership, cooperative society or any other firm) by declaring it an unlawful society; empowers the Minister to require any organisation (company, partnership, cooperative society or other firm) to register itself under this Ordinance or cease operation; and the registrar may refuse (or cancel) registration of any society or organisation (including one required to register by the Minister), and thereby render it unlawful. By this law the right to freedom of association is there at the pleasure of the government.

9. *Newspapers Act 1976*

Minister may prohibit the publication of any newspaper and the President may prohibit the importation of any publication. The law creates offences, including sedition and incitement to violence, for which the penalties it prescribes include confiscation of all machinery and printing facilities of the publication concerned. It is a threat to a free press, the right to information and freedom of expression.

10. *Tanzania News Agency Act 1976*

Creates the Tanzania News Agency and gives it exclusive right collect and disseminate news in the country; other people can only do so with the Agency's authorisation, which can be withdrawn at any time. It violates freedom of expression, right to information and a free press.

11. **Local Government Laws:** *Local Government (District Authorities) Act 1982, Local Government (Urban Authorities) Act 1982, Local Government Finances Act 1982, Local Government Service Act 1982,* and *Urban Authorities (Rating) Act 1983*

Under these laws the Minister responsible for local government as well as other central government institutions have exclusive powers of appointment, discipline and control over all employees of local government authorities; extensive and detailed control over local government finances; and overriding powers over all decisions of local government councils. They are an affront to local democracy and responsible local government.

12. *Organisation of Tanzania Trade Unions Act 1991*

Creates a single trade union for the whole country and prohibits workers' organisations except as branches or otherwise affiliates of this union which in any case can be de-registered by the Registrar of Societies, or disbanded by the President at any time. The law restricts freedom of association and the right of workers to organise.

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