

The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania

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Abstract

This article re-assesses the means available for the effective enforcement of human rights in Tanzania based on the valid assumption that the proclamation of human rights in legal instruments, be they at the domestic or international level, is meaningless without the entrenchment of effective enforcement procedures. Particular attention is directed towards the re-examination of the capacity and ability of the courts to meet the challenges posed by human rights and political discourses in their ongoing transformation. The issue is whether they can be said to be adequately providing effective avenues for the promotion, protection and enforcement of human rights.

INTRODUCTION

This article re-assesses the means available for the effective enforcement of human rights in Tanzania based on the valid assumption that the proclamation of human rights in legal instruments, be they at the domestic or international level, is meaningless without the entrenchment of effective enforcement procedures. Particular attention is directed towards the re-examination of the capacity and ability of the courts to meet the challenges posed by human rights and political discourses in their ongoing transformation. The issue is whether they can be said to be adequately providing effective avenues for the promotion, protection and enforcement of human rights. This article comprises two parts. Part one critically analyses the provisions of the Basic Rights and Duties Enforcement Act 1994 (act no 33 of 1994) pointing out its weaknesses, in particular the fact that it was enacted at the instance of the main actors in government to discourage the fast pace of the positive enforcement of the Bill of Rights provisions in the High Court of Tanzania. To say the least, it will be shown that this law is counterproductive to the smooth operation of the Bill of Rights and the general promotion of human rights in this country, which must be discouraged and halted. Indeed it requires a very activist judiciary in Tanzania effectively to combat the negative effects of this law. Part two of this article considers the issue of whether the Tanzanian judiciary is sufficiently activist to be able to perform that task adequately.

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THE ENFORCEMENT OF BASIC RIGHTS AND FREEDOMS IN TANZANIA

Background information

It is now common knowledge that the Bill of Rights was introduced for the first time in the permanent constitution of the United Republic of Tanzania¹ by the Fifth Constitutional Amendment Act of 1984 (act no 15 of 1984). Upon independence in 1961, the departing British colonialists in Tanganyika did not negotiate with the nationalists for the entrenchment of a Bill of Rights in the independence constitution, contrary to common practice in their other former colonies. But this constitution did set up a system of governance in the Westminster tradition, with government organs made accountable to an elected assembly. This was hastily abandoned only a year later by the introduction of the presidential system under the Republic of Tanganyika Constitution of 1962 (Constituent Assembly Act no 1 of 1962).

It was during the introduction of the republican constitutional order that, for the first time, the government officially considered and rejected the inclusion in the constitution of a Bill of Rights.² But, related to that omission was the gradual development of a centralized and generally unaccountable system of governance, similar to and using the same organs instituted earlier by the colonial system, with only minor modifications.

Several reasons have invariably been given in an attempt to explain why, after two decades of state-party rule without a Bill of Rights, the government reversed its decision and in 1984 conceded to popular demands for a Bill of Rights. These included: pressures from the Zanzibaris within the then only ruling party in support of the Bill of Rights in their bid to re-write the island's bleak human rights history; the failure of Tanzania mainland's conservatives to stop the Zanzibari campaign in view of winning bargains in the more complex and sensitive Tanzania union dispute; indirect pressure from the international human rights regime; and the founder of the nation, Mwalimu [teacher] Julius Kambarage Nyerere's, contribution in the wake of his imminent departure from active leadership, he having no confidence in the ability of his successors to manage the authoritarian state machinery he was about to bequeath to them, without moving to tyranny.³ It is not intended to dwell in detail on these aspects, the area having been over-researched.⁴ However it

1 In this article, unless otherwise stated, the term Tanzania excludes Zanzibar. "Tanzania" is intended here to be restricted to Tanzania Mainland (the former Tanganyika), because of the peculiarities of Zanzibar's political and constitutional history.

2 RB Martin *Personal Freedom and the Law in Tanzania* (1974, Oxford University Press) at 5.

3 As to Nyerere's fears, refer to his statement in an interview that, as president, he had the powers of a dictator; see RF Hopkins *Political Roles in a New State: Tanzania's First Decade* (1971, Yale University Press) at 26.

4 JT Mwaikusa "The genesis of the Bill of Rights in Tanzania" (1991) 3:4 *Journal of the African Society of International and Comparative Law* 680 at 692; CM Peter *Human Rights in Africa: A Comparative Study of the African Human and Peoples' Rights Charter and the New Tanzanian*

suffices to emphasize that, although the Bill of Rights resulted from a combination of factors, the effects of the economic crisis of the 1970s (which completely crippled the government in terms of its failing to provide the little it had been doing in social services including free education and medical care) were a significant contributory factor.⁵ The economic situation engendered unintended responses by the state to both internal and external pressures in that regard. It should be pointed out that the intensification of the state-party rule in the late 1970s had a backlash effect of alienating the ruling oligarchy from the masses suffering in poverty. The overall consequence was the gradual loss of people's support, which ironically had been the *raison d'être* of the party's strength and the political monopoly that it enjoyed. In brief, the ruling regime had to salvage itself from these difficult circumstances which were ushering in its political decline, by finding an alternative way out; it did so by introducing the Bill of Rights among other constitutional changes in 1984, marking the beginning of the road towards what Shivji refers to as the intra-legal state.⁶

Moreover, although there was full support for the Bill of Rights in the National Assembly which subsequently passed the amendments,⁷ it was obvious that the government had grudgingly conceded.⁸ The over-reliance on foreign aid by the country to resolve the economic crisis, had forced the leadership to submit itself to international financial institutions, having previously refused to do so for over a decade. This necessarily meant putting the house in order in the wake of the Carter doctrine,⁹ making foreign aid in any recipient country dependent upon a good human rights record.

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Bill of Rights (1990, Greenwood Press) at 5–6; CM Peter *Human Rights in Tanzania: Selected Cases and Materials* (1997, Rudiger Koppe Verlag); CM Peter and IH Juma (eds) *Fundamental Rights and Freedoms in Tanzania* (1998, Mkuki na Nyota Publishers); IG Shivji "Contradictory developments in the teaching and practice of human rights in Tanzania" (1991) 35 *Journal of African Law* 116–27; MKB Wambali "Democracy and human rights in Tanzania: The Bill of Rights in the context of constitutional developments and the history of institutions of governance" (PhD thesis, University of Warwick, England, 1998).

- 5 J Wagao "The changing face of Tanzania politics and its economic implications" in GM Fimbo and SEA Mvungi *Constitutional Reforms for Democratisation in Tanzania* (1993, Faculty of Law and Friederich-Nauman Stiftung, University of Dar Es Salaam) 46 at 48.
- 6 IG Shivji *A Legal Quagmire: Tanzania's Regulation of Land Tenure (Establishment of Villages) Act 1992* (1994, International Institute for Environment and Development) at 88.
- 7 The bill for the Fifth Constitutional Amendment Act 1984 was passed by a 100% majority of the members present (only one was absent) in the National Assembly, of whom 124 were from the Tanzania Mainland and 62 from Zanzibar. See Hansard *Majadiliano ya Bunge – Taarifa Rasmi* 25–30 October 1984 (1984, Government Printer) at 512.
- 8 Postponing the justiciability of it for three years. See sec 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984 (act no 16 of 1984).
- 9 It was part of US President Jimmy Carter's foreign policy for developing countries that American aid to the latter should be tied to some good human rights record. The policy is still operative to date.

The half-hearted acceptance by the government of the Bill of Rights was demonstrated in the letter of the provisions of the Bill of Rights themselves and it still does so in practice.

The courts and the Bill of Rights in Tanzania

The Tanzanian Bill of Rights categorically establishes the High Court of Tanzania as the main means by which human rights abuses may legally be vindicated by the victims. The relevant article 30(3) of the constitution states: "Where any person alleges that any provision of this part of this chapter (the Bill of Rights) or any other law involving a basic right or duty has been, is being or likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court."

It has already been clarified that article 30(3) gave the High Court full jurisdiction to hear and determine any complaint against human rights violations under the Bill of Rights. One of the preliminary issues considered in the case of *Chumchua s/o Marwa v Officer i/c of Musoma Prisons and the Attorney General*¹⁰ was whether the Bill of Rights could be enforced, when the procedure and rules of the High Court for the conduct of such cases were yet to be enacted by the government as indicated by article 30(4) of the constitution. The court answered the question positively, noting that the provisions of article 30(4) were after all merely optional. Therefore it was held that "by implication the High Court shall have power inherent in itself to issue directions or orders or writs in the nature of *habeas corpus* [ordering that someone be presented to the court], *mandamus* [ordering the performance of a public duty], prohibition, *quo warranto* [enquiring into the authority by which a public office was held] and *certiorari* [commanding proceedings to be moved to a superior court]".¹¹

The same position was taken by the judge in another case,¹² which subsequently gave the opportunity to the Court of Appeal to deliberate on this matter. Thus in the case of *Director of Public Prosecutions v Pete*, the Court of Appeal of Tanzania concurred with the position of the High Court stated above, saying:

"... art 30 sufficiently confers original jurisdiction upon the High Court to certain proceedings in respect of actual or threatened violations of the basic

10 High Court miscellaneous criminal cause no 2 of 1988, Mwanza registry (unreported) (*Chumchua Marwa*).

11 Id at 4, relying on the interpretation by an Indian court of a similar provision of the Indian constitution and the situation in *People's Union of Democratic Rights v Ministry of Home Affairs* (1986) LRC (const) 546–75.

12 *Daudi s/o Pete v The United Republic of Tanzania*, criminal cause no 80 of 1989, Mwanza registry (unreported) (*Daudi Pete*).

rights, freedoms and duties. We also concur that until Parliament legislates under para (4) the enforcement of the basic rights, freedoms and duties may be effected under the procedure and practice that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.”¹³

Indeed, that was the position in Tanzania for ten years after the entrenchment of the Bill of Rights in the constitution, until the Basic Rights and Duties Enforcement Act 1994 (BRDE Act)¹⁴ came into force on 17 January 1995. The issue which arises here is whether the High Court now only need follow the procedure and forms provided by this act, when entertaining matters under the Bill of Rights.

On the basis of the ruling of the Court of Appeal in the *Pete* case, it seems that all cases on the Bill of Rights will have to be heard and determined by the High Court, through the procedure set out by the BRDE Act. However the substance and real objectives of the BRDE Act leave a lot to be desired. The circumstances under which this piece of legislation came to be conceived by the government were suspect. Moreover, its overall content does not tend to enhance the whole process of human rights promotion in the country. One may even speculate that the Court of Appeal in the *Pete* case would have not decided in the way that it did on this issue, if their lordships could have possibly foretold that their words would in the future be a legitimizing feature of the government’s abuse of the legislature. Let us then first examine how this law came about and then proceed to sort out the substance and implications of its contents.

The objectives of the Basic Rights and Duties Enforcement Act 1994

First of all it is important to note that this statute was part and parcel of the government’s reaction at the end of 1994 against the High Court’s independent and progressive interpretation during the period following the drastic changes in the Tanzanian political system in 1992.¹⁵ The courts were seen to be working against any distortion by the executive of the original substance of the Bill of Rights. The legislative endeavours enshrined in the Eleventh Constitutional Act 1994 and related legislation were particularly related to the BRDE Act. These implicitly had reversed the judicial decisions in *Mabere Marando and Another v The Attorney General*¹⁶ and *Christopher Mtikila v The Attorney General*.¹⁷ The BRDE Act was to operate as a permanent solution aimed at deterring the excessive judicial activism of some known judges of

13 [1991] LRC (const) 553 at 561 (*Pete*).

14 Act no 33 of 1994.

15 Tanzania re-introduced the multi-party political system in 1992 after several decades of single party rule.

16 High Court civil case no 168 of 1993, Dar Es Salaam registry (unreported) (*Marando*).

17 [1995] TLR 31 (*Mtikila*).

the High Court.¹⁸ These endeavours are explicit when one takes a closer look at the main provisions of the BRDE Act.

Power of the High Court

Section 8 of the BRDE Act provides for the High Court's jurisdiction in Bill of Rights cases. Sub-sections 8(1)(a) and (b) generally grant to the High Court the jurisdiction to hear and determine any application made on the basis of section 4. However sub-sections 8(2) and (4) go on to outline some limitations as to the exercise of such jurisdiction. Moreover sub-section 8(2) further excludes the High Court's exercise of its powers in this regard, in cases where "it is satisfied that adequate means of redress for the alleged contravention are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious". Furthermore section 8(4) compels courts to dismiss any application which tends to seek an injunction against the passing by parliament of a bill alleged to contravene the provisions of the Bill of Rights. This section also excludes the exercise by the High Court of the power to issue prerogative orders in respect of all applications based on the Bill of Rights. The issue is whether these provisions relating to the limitation of the jurisdiction of the High Court are constitutional.

The answer has to begin with the holding of the Court of Appeal of Tanzania in the *Pete* case, that the High Court does have unlimited original jurisdiction to adjudicate upon the enforcement of basic rights, freedoms and duties, subject only to the provisions of article 30(3) and (4) of the constitution.¹⁹ Let us at this juncture test the jurisdictional limitations of the High Court stipulated in sub-sections 8(2) and (3), against the subject matter of article 30 of the constitution, beginning with the limitation in sub-section (2).

This sub-section contravenes article 30(3) of the constitution. Article 30(3) expressly provides that a person so aggrieved may institute proceedings in the High Court as is required by the article. The provisions of sub-section 8(2) of the BRDE Act bring about a serious problem of mixing public with private law remedies. The act was supposed to provide for public law remedies, since it is through such remedies that a victim of an unconstitutional breach or action can effectively be vindicated. One wonders for what purpose the

18 In particular the now retired Justice James Mwalusanya, who was the pioneer and creative judge as a number of his judgments on human rights bear witness. According to reliable information (preferring anonymity) from the headquarters of the Chama Cha Mapinduzi (CCM – Tanzania's ruling political party), the early judgments of this judge in the *Chumchua Marwa* and *Daudi Pete* cases had prompted the anger of the CCM's National Executive Committee in one of its regular meetings. It was about to be decreed for the Bill of Rights to be removed from the constitution, but for the intervention of the former president and its chairman Julius K Nyerere. Also see IG Shivji "The changing state: From an extra-legal to an intra-legal state in Tanzania" in CK Mtaki and M Okema (eds) *Constitutional Reform and Democratic Governance in Tanzania* (1994, Friederich Nauman Foundation and Faculty of Law, University of Dar Es Salaam) 79 at 89.

19 *Pete*, above at note 13, at 562.

phrase “other action or remedy” was envisaged by the sub-section, if not private law remedies, which are legally undesirable in the field of public law.

As to whether an application may be refused by the court only on account of being frivolous or vexatious, it is strange to provide this as a criterion for the preliminary ouster of some matter from full consideration by the court. This is one way of avoiding the hearing of human rights cases on merit, which is detrimental to the promotion and development of the human rights discourse in this country. It may be difficult to foresee a situation whereby an individual will be vexatious of the state! It is indeed another unnecessary introduction into public law of purely private law procedural limitations. Of course, for an overzealous public official prone to the unhampered trespass into personal liberties of individuals, allegedly in the public interest, many such complaints would seem to be frivolous if not vexatious of the government’s efforts to work for the good of the people in general. This is the negative culture which section 8(2) of the BRDE Act is likely to promote, and the courts are expected jealously to guard themselves against it.

Now coming to sub-section (3), the ban on applications, intended to prevent the passing by the National Assembly of a potentially unconstitutional bill, also offends article 30(3) of the constitution. Article 30(3) allows the High Court’s jurisdiction to be exercised, not only for an actual contravention, but also for a contravention of the Bill of Rights “likely” to be done by “any person” in any part of the United Republic. Indeed there is nothing in the Constitution of the United Republic of Tanzania which excludes from the genre of contraventions, a bill of the National Assembly proposing measures which are obviously unconstitutional.²⁰ In any case the phrase “any person” appearing in article 30(3) of the constitution should encompass the government and all of its organs, including the National Assembly.

Lastly in respect of sub-section (4), the ouster of the power of the High Court to issue prerogative orders in this regard encroaches upon the independence of the judiciary. Prerogative orders are part and parcel of the inherent and discretionary powers of the High Court. Briefly, what the sub-section does is to attempt to take away through statutory law what the same did not provide for in the first place.²¹ But of more importance is the fact that, by excluding these basically public law remedies,²² the BRDE Act has effectively limited the scope of the court’s powers in this regard.

20 This was yet another government reaction against the previously successful pressure from members of the media which forced the government in 1994 to withdraw the Media Council Bill from the National Assembly, for none other than a threat of the media to institute proceedings in the High Court for an injunction restraining the bill from passing into law, for comprising provisions which were likely to contravene the right to freedom of expression under the Bill of Rights.

21 Sec 17(g) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act (Amendment) Act 1968 (act no 5 of 1968) only introduced orders of *mandamus*, prohibition and *certiorari* in substitution for the prerogative writs.

22 In Tanzania there is a tendency among lawyers to muddle public with private law

This also implies restricting Bill of Rights cases, which are in actual fact within the arena of public law, to the realm of private law remedies. Moreover, in view of the impact of the Government Proceedings Act 1967,²³ there are serious legal implications involved in this analysis, as is shown below. It should be borne in mind that, although section 3(1) of the 1967 act equated the government in civil proceedings to an adult individual of full capacity, the courts may only issue declaratory orders against the government and are precluded from making orders against it for injunction and specific performance.²⁴ Moreover when it comes to execution, section 15(3) prohibits any "execution or attachment or process in the nature thereof" against the government. Therefore, in the context of such limited scope of private law remedies against the government (the usual defendant in human rights cases), the exclusion of prerogative orders in this sense becomes double jeopardy, which the courts must resist.

The government's refusal to obey the constitution can therefore be seen in respect of the limitations in section 8 of the BRDE Act. Actually in some way or other, it demanded the submission of the constitution to its will and administrative or political convenience. Yet there are some other, more serious problems in the act. In order to take care of the radical and activist judges of the High Court, section 10 of the BRDE Act further limits the court's jurisdiction. It calls for a specially constituted panel of judges to try human rights cases:

- "10 (1) For the purposes of hearing and determining any petition made under this Act ... the High Court shall be composed of three judges of the High Court save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single judge of the High Court.
- (2) Subject to subsection (1) every question in a petition before the High Court under this Act shall be determined according to the opinion of the majority of the judges hearing the petition."

To say the least, parliament might have, under this provision, acted within the ambit of article 30(4)(b) of the constitution. However it seems clear that the provision's practical application in the circumstances of Tanzania will not

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remedies. See Financial Institutions and Legal Management Upgrading Project *Legal Sector Study: Administration of Justice* (1994, Ministry of Justice and Constitutional Affairs, Government Printer) at 7-12; *Mwakibete v The Principal Secretary (Establishments) and the Attorney General* Court of Appeal civil appeal no 27 of 1992 (unreported); *Mazutsi v The Registrar of Co-operatives* High Court misc civil application no 90 of 1992; and *Gordhan v The Director of Immigration* High Court misc application no 3 of 1991. On public remedies generally, see JF MacEldowney *Public Law* (1994, Sweet and Maxwell) and MP Jain and SN Jain *Principles of Administrative Law* (2nd ed, 1999, Wadhwa and Company Law Publishers).

23 Act no 16 of 1967.

24 Sec 11(1). MKB Wambali "Tort liability of the government in Tanzania: The impact of the Government Proceedings Act 1967 on the rights of individual claimants" (LLM dissertation, University of Dar Es Salaam, 1985).

satisfy the requirements of article 30(4)(c) to “ensur[e] the more efficient exercise of the powers of the High Court [and] the protection and enforcement of the basic rights, freedoms and duties” For a country of about 35 million inhabitants, to have a High Court for the whole nation manned by fewer than sixty judges²⁵ spread over 21 administrative regions, is inadequate to support the efficient operation of the scheme established by section 10 above.

In 1995 the author conducted some library research testing the effectiveness of section 10 of the BRDE Act on human rights promotion, protection and enforcement, taking into account the disposition of High Court judges, totaling then only 28 spread countywide throughout the 11 High Court districts.²⁶ The research showed that, for most High Court district centres, it would be a nightmare to convene a panel of three judges to dispose of human rights cases, at the expense of the urgency and sensitivity that this kind of litigation deserves. The conclusion was that the requirement in section 10 for a panel of three judges was, in practice, counterproductive. This could not be said to comply with the letter of article 30(4)(c) of the constitution, for its failure to provide for a procedure capable of ensuring the efficient exercise by the court of its powers in the enforcement of human rights.

This issue was also dealt with by the Presidential Committee for the Collection of Views on the Constitution, which was appointed in 1998 under the chairmanship of Hon Mr Justice Robert Kisanga of the Court of Appeal of Tanzania.²⁷ It came in as one of the recommendations arising from the government’s seventeenth proposal,²⁸ which had stated: “Human rights as provided in the Constitution have received limited application because the implementation thereof is subjected to the ordinary laws of the land”. The committee advised the government in this respect that the BRDE Act should be revised, especially the provision which states that such cases shall be heard by the High Court comprised of three judges. It insisted that this procedure is complicated, taking into account the inadequacy of judges and the budgetary constraints of the judiciary department. The committee concluded that the act should be amended to provide for a procedure which will simplify the submission of people’s petitions to the High Court without inconvenience and that such cases should be disposed of urgently. Then the committee called upon the legislature to refrain from passing laws

25 Immediately after the fourth phase government’s President Jakaya Mrisho Kikwete took office in December 2005, he appointed 20 new High Court judges in an unprecedented move, which pushed the total number from about 30 to about 50. In June 2008 he appointed 11 more judges of the High Court, making the total number about 60.

26 Wambali “Democracy and human rights in Tanzania”, above at note 4.

27 He subsequently became, immediately after its establishment, the chairperson of the Commission on Human Rights and Good Governance established by art 129(1) of the Constitution of the United Republic of Tanzania. See the Kisanga Committee Report, 1999. He has now retired from public service.

28 By virtue of government circular no 1 of 1998, commonly referred to as the “White Paper.”

strictly limiting without good cause the enjoyment of human rights. The recommendation relating to the removal from the Bill of Rights of claw-back clauses was implemented by the government by the Fourteenth Constitutional Amendment Act 2005²⁹ although the general limitation clauses under articles 30 and 31 remained intact. However, nothing has so far been done in respect of the committee's advice on the number of judges required to hear and determine a petition filed on the basis of the Bill of Rights provisions. Unfortunately the government is still adamantly maintaining its position almost a decade after receiving the committee's advice.

There are however worse provisions in the BRDE Act, namely sub-sections 13 (1) and (2) providing for the nature of the award capable of being granted by the court. They read:

- "13 (1) Subject to this section, in making decisions in any suit, if the High Court comes to the conclusion that the basic rights, freedoms and duties concerned have been unlawfully denied or that the grounds exist for their protection by an order, it shall have power to make all such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms and duties conferred or imposed on him under the provisions of sections 12 to 29 of the Constitution [Bill of Rights].
- (2) Where an application alleges that any law made or action taken by the government or other authority abolishes or abridges the basic rights, freedoms and duties conferred or imposed by sections 12 to 29 of the Constitution and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional then:
 - (a) the High Court shall instead of declaring the law or action to be invalid or unconstitutional, have the power and discretion in an appropriate case to allow Parliament or other legislative authority concerned, as the case may be, to correct the defect in the impugned law or action within a specified period, subject to such condition as may be specified by it, and the law or the action impugned shall until the correction is made or the expiry of the limit set by the High Court whichever be shorter, be deemed to be valid."

First, these provisions contradict each other. Whereas sub-section (1) stipulates for the court's exercise of its discretion in terms of determining what orders are appropriate and necessary for the applicant's enjoyment of human rights as comprised in the Bill of Rights, sub-section (2) goes on drastically to curtail the same discretion. Although paragraph (2)(a) refers to "discretion", the real substance of the provision is to transfer to the whims of executive power

29 Act no 1 of 2005.

through the instrumentality of parliament, the court's power to determine the appropriate remedy at the instance of some statute or executive action being held to be invalid and unconstitutional. In any case, one wonders how an invalidity or unconstitutionality may be deemed otherwise under whatever circumstances. Undoubtedly section 13(a) provides for a strange arrangement in constitutional law.

Section 13 of the BRDE Act standing alone would therefore be problematic. It was therefore imperative for article 30(4) of the constitution to be amended simultaneously to accommodate it. The above constitutional provision defines the High Court's original jurisdiction to hear and determine matters brought before it under the authority of sub-article (3). A new sub-article (5) was added to make provisions similar in content to section 13(2) of the BRDE Act. The only difference is the fact that the new sub-article (5) of the constitution sets out the criteria by which the High Court may exercise its discretion whether to allow the government through parliament to undertake corrective measures within some specified period of time. The same may only be done if the court sees it fit and where the interests of society demand so. The provision in the act simply refers to "appropriate cases".

However from the wording of both provisions, in certain cases which fall outside the ambit of the criteria of the new sub-article 30(5) of the constitution, the High Court still retains some discretion to declare as unconstitutional and therefore invalid at the first instance any piece of legislation or executive action. Yet the main handicap lies in the ambiguity in the set criteria themselves. It could be an intricate puzzle to decipher what amounts to appropriate cases or the demand for the interests of society in real case situations.

Considering the circumstances under which parliament made the provisions, one may assume that the government expects the courts to regard the interests of society as analogous to administrative and political convenience. It is here that the independence and judicial activism of Tanzanian courts will have to be tested in the future in real cases. For the sake of jealously serving the human rights cause, let the courts make effective use of the residual discretion still availed to them, by the new sub-article 30(5) of the constitution, to declare all statutory provisions and executive action unconstitutional and therefore invalid, at the instance of finding them to be so.

This indeed was recently done by a bold-spirited panel of three judges of the High Court of Tanzania (Manento JK (now retired), Massati and Mihayo JJ) on 5 May 2006 in the case of *Christopher Mtikila v The Attorney General*,³⁰ in which the petitioner had come back to the court for the second time to plead generally for orders that the constitutional provisions barring independent candidates in Tanzanian elections be declared to be

30 Misc civil cause no 10 of 2005, Dar Es Salaam High Court main registry (unreported).

unconstitutional. In 1993 he had succeeded in obtaining an order of the High Court to the same effect in the case of *Christopher Mtikila v The Attorney General*,³¹ when the trial judge, the late Hon Mr Justice Lugakingira declared that, "... it shall be lawful for independent candidates along with candidates sponsored by political parties to contest, presidential, parliamentary and local council elections".³² Unfortunately the government, instead of arguing an appeal before the Court of Appeal of Tanzania, withdrew its appeal and went on to place a bill which subsequently became the Eleventh Constitutional Amendment Act 1994³³ before the following session of the National Assembly. This effectively overruled the decision of the court in *Mtikila*, causing an obvious conflict between the legislature and the judiciary.

Indeed in the later *Mtikila* case the panel of judges of the High Court did not bother with the restrictions of section 13 of the BRDE Act, but stated:

"We thus proceed to declare the alleged amendment unconstitutional and contrary to the International Covenants to which Tanzania is party ... It shall be lawful for private candidates to contest for the posts of President and Member of Parliament along with candidates nominated by political parties ... we shall proceed to order the Respondent in the true spirit of the original Article 21(1) and guided by the Fundamental Objectives and Principles of State Policy contained in Part II of the Constitution, between now and the next general elections, to put in place, a mechanism that will regulate the activities of private candidates, so as to let the will of the people prevail as to whether or not candidates are suitable."³⁴

It can be seen quite clearly that the judges did not refrain from declaring the law complained of to be unconstitutional and neither did they give the legislature an opportunity to make good the impugned situation. Instead they ordered the government to put in place procedures for independent candidates in the next general elections. This is indeed what is meant by judicial activism.

This is also in view of the wider constitutional implications the provisions of the BRDE Act may have on, among others: "... the relationship between Parliament and the Judiciary based on the underlying principle of the sovereignty of Parliament under the Constitution and separation of powers between the Legislature, Executive and Judiciary".³⁵ The same could imply that the judiciary is directing the executive as to the manner of deliberating and proposing laws to parliament. This involvement of the judiciary in the direct law-making process is beyond its traditional and constitutionally recognized mandate. A serious constitutional crisis may arise if, for example, the

31 *Mtikila*, above at note 17.

32 *Id* at 68.

33 Act no 34 of 1994.

34 *Mtikila*, above at note 30 at 47.

35 Tanganyika Law Society "The statement of the Tanganyika Law Society on the eleventh constitutional amendment" (20 January 1995) *MZALENDU Sunday Newspaper* at 8.

government continues to refuse making the proposed amendments or, if it does, parliament in its sovereignty does not legislate to the same extent as was originally required by a particular court's direction. In the first instance would one say that the government was in contempt of the court's orders? Or would the court wish to force parliament to make the particular law as desired?

Similarly, if all goes well and ultimately parliament legislates in accordance with the wishes of the court, it would still be disastrous for the judiciary's independence, if and when the constitutionality of the same law were to be subsequently challenged in court. Undoubtedly it would sound strange for the same court which proposed the passage of the same law, later to sit and adjudicate upon its constitutionality. Apart from that, this anomaly goes to the roots of the main role of the courts: "The Judiciary is required by the Constitution to make decisions on matters properly brought before it. The Judiciary cannot postpone making a decision and instead give directives to the offending party to correct its laws or actions. Worse, it certainly cannot allow the offending provision or action which it is satisfied is a nullity to continue. In the eyes of the law, once a law is unconstitutional it simply does not exist."³⁶

One cannot therefore understand how a lawyer and let alone both a legally trained Attorney General and minister failed to see the conflict described above. Yet the fact that the then minister responsible for legal affairs publicly defended the constitutionality of these provisions shows the determination of the government to limit the scope of the enforcement of the Bill of Rights itself. Such a situation requires a highly active judiciary like that of India which, "since 1973 claims the power to nullify on substantive grounds even an amendment made to the Constitution by the amending body if it changes the basic structure or framework of the constitution".³⁷ Generally speaking, it is that kind of legal reasoning in the process of the adjudication of legal disputes which makes courts assume some active role in the development of new laws and rules, not otherwise expressly provided by statute. This is in spite of the accepted realism that courts are only meant to dispense justice, and indeed are not law makers. This power has only been assumed by the courts from their constitutional role of dispensing justice independently and without fear.³⁸ Besides that, part of the constitution's fundamental objectives and directive principles of state policy are "the maintenance of respect and due regard for the dignity and all other rights of men" and "the preservation and compliance with the requirements of the laws of the land".³⁹ By ensuring that all organs of state comply with the above principles, courts are therefore bound to assume a supervisory role, in defence of the rights of individual complainants.

36 Ibid.

37 Ibid.

38 See preamble to the Constitution of the United Republic of Tanzania 1977.

39 Paras 9(1)(a) and (b) respectively.

In India for example, the courts have assumed supremacy and primacy over all organs of state by riding on the back of the doctrine of constitutional supremacy. A former judge of the Supreme Court of India once stated:

“It is necessary to assess in the clearest terms, particularly in the context of recent history, that the constitution is *supreme lex*, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government be it executive or the legislature or the judiciary derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This court is the ultimate interpreter of the Constitution and to this power is assigned the delicate task of determining of what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits.”⁴⁰

The role of activist judicial review is therefore one which the courts in India have over time developed themselves as guardians of the constitution and defenders of human rights. The main issue in part two of this article is whether the judiciary in Tanzania has something to learn from its Indian counterpart, so as to be sufficiently activist to combat such problematic laws as the BRDE Act, which part one of this article has discussed in detail.

PART TWO: THE STATE OF JUDICIAL ACTIVISM IN TANZANIA

The nature and extent of judicial activism in Tanzania

Before continuing, it is important to attempt to describe what is understood in Tanzania by the term judicial activism and its antonym judicial restraint. “It is said that when a judge acts in a formal manner he is said to be restrained and where he acts in a grand manner he is said to be activist.”⁴¹ According to RW Tenga, an activist approach can be defined in constitutional law as one which:

“... views democracy instrumentally in that the judicial branch promotes ideals that go with a democratic system and in consequence serve justice. A utilitarian conception of justice is therefore part of an activist’s outlook. For the activist what is just may not be what the law necessarily implies The activist looks at the mischief designed to be cured in society and uses this evaluation to apply the supposed intention of the scheme into particular disputes. In

40 *State of Rajasthan v Union of India* 3 SCC 592–661; AIR 1977 SC 1361–413 (emphasis added).

41 RW Tenga “Revisiting judicial activism: The Mkomazi pastoralists’ case in the Court of Appeal” (2000, mimeo, Faculty of Law, University of Dar Es Salaam).

constitutional law the activists view the Constitution as a living dynamic document which needs broad interpretation to suit the needs of the times. The restrained jurist would only try to divine the meaning of the makers of the Constitution whilst the activist would give priority to the fundamental principles of the Constitution. Finally the activist separates himself from the restrained jurist in the treatment of case law as he uses precedent as a guide and does not hesitate to build upon it or reinterpret it to meet exigencies of the time."⁴²

Indeed, in the words of another Tanzanian jurist and prolific legal writer Chris Maina Peter:

"... society expects the judge to be calm, objective and neutral; at the same time some form of judicial activism is not only seen as permissible – but as a tradition within the common law. The tradition can only be sustained by judges and other officials of the judiciary who are not afraid of disturbing the *status quo*. It should be judicial officers who are prepared to uphold justice – *even if that means that heavens should fall*. The status quo does benefit some members of society in any class-divided society. To change it is to change 'their heaven'" ⁴³

In other words, judicial activism is "about giving societal oriented interpretation of the law and also to cover the lacunae available through what can be called judicial legislation ... [it] entails a clear political consciousness concerning the structure of the society and the forces at play; as well as an independent attitude on the part of the judge".⁴⁴ Moreover it involves "wielding the enormous powers and the discretion the judge has militantly for the promotion of constitutional values".⁴⁵

The American origins of the concept of judicial activism

It is common knowledge now that the concept and practice of judicial activism was first developed in the United States of America. It has been figuratively stated that: "Like blue jeans and other American products, it crossed the Atlantic to Europe and later to the other places of the world".⁴⁶ In the

42 Id at 1.

43 CM Peter "Judicial activism in Tanzania" (paper presented at the judges' workshop at the Faculty of Law, University of Dar Es Salaam, 21 September – 2 October 1998) at 29 (emphasis original).

44 Id at 4.

45 U Baxi "On the shame of not being an activist: Thoughts on judicial activism" in N Tiruchelvam and R Coomaraswamy (eds) *The Role of the Judiciary in Plural Societies* (1987, Frances Printers (Publishers) Ltd) 168 at 172.

46 T Koopmans "The roots of judicial activism" in F Matscher and H Petzold (eds) *Protecting Human Rights: The European Dimension - Studies in Honour of Gerald J Wiarda* (1990, Carl Heymanns Verlag KG) 317 at 318.

US the emphasis has always been on the effective employment of the judiciary's powers to check on the abuses of the powers enshrined in the other branches of the state: the executive and congress. In that country, judicial activism is said to have moved from the early days of the conservative outlook, when the Supreme Court used to impede progressive legislation such as the legislation passed by the congressional and state legislatures on social and economic affairs.⁴⁷

The progressive version was demonstrated first by the famous Chief Justice John Marshall in the 19th century and in modern times by Chief Justice Earl Warren. Chief Justice Marshall had in the case of *Worcester v Georgia*⁴⁸ declared all Georgia law dealing with Cherokee Indians unconstitutional and he issued a mandate ordering the Georgian Supreme Court to reverse it, thereby coming into conflict with Andrew Jackson, the then president of the United States of America.⁴⁹ As to the more recent tenure of Chief Justice Earl Warren, this was the time that complex social issues like school de-segregation were achieved through the decisions of the courts.⁵⁰

The refinement of the practice of judicial activism in India

As indicated above, the concept of judicial activism was transported through Europe to India where it has come to gain a lot of support and legitimacy. The Supreme Court of India has compassionately espoused the idea re-defining its boundaries within the context of India's local circumstances. This has been justified by the peculiar weaknesses of the Indian governance regime as vividly stated by one Indian legal practitioner: "It is the Executive's failure to perform its duty and the notorious tardiness of the legislatures that impel judicial activism and provide its motivation and legitimacy. When gross violations of human rights are brought to its notice, the judiciary cannot procrastinate. It must respond."⁵¹

The Supreme Court of India has made many landmark decisions touching on, among others, rights to travel abroad,⁵² to privacy,⁵³ of indigent persons

47 See for example the case of *Lochner v New York* 198 US S 45 (1905), where the Supreme Court invalidated legislation of the State of New York regulating the working hours of bakers for having violated the liberty of contract; as was cited by Peter "Judicial activism in Tanzania", above at note 43 at 5. See also MD Kirby "Judicial activism" (1997) 23, 3 and 4 *Commonwealth Law Bulletin* 1224 at 1226; and J Theodore and B Ginsberg *American Government: Freedom and Power* (1990, WW Norton and Company) at 375.

48 (1832) 6 Peters (US) 556–62.

49 Leading to the infamous presidential statement that, "Well, John Marshall has made his decision, now let him enforce it." See among others, DB Cole *The Presidency of Andrew Jackson* (1993, University Press of Kansas) at 114.

50 See for example *Brown v Board of Education* 347 US 483 (1954).

51 Peter "Judicial activism in Tanzania", above at note 43 at 5, cites Soli Sorabjee as quoted in Kirby "Judicial activism", above at note 47 at 1228.

52 *Satwant Singh Sawhney v D Ramarathnan APO New Delhi* AIR 1967 SC 1836.

53 *Govind v State of MP* AIR 1975 SC 1378.

to have legal aid,⁵⁴ to a speedy trial, against handcuffing, against custodial violence and against public hanging.⁵⁵

However, and more importantly because of India's vast poverty and legal illiteracy, the Supreme Court of India has remarkably employed the concept of judicial activism for the emancipation of the indigent people by the promotion of what has come to be known as public interest litigation. As the main proponent of this idea clearly states: "Any citizen [of India] may now activate the court by means of a letter which is treated as a writ petition: the traditional law relating to *locus standi* [right to bring an action] has thus undergone cataclysmic innovation".⁵⁶ What this practice entails is the fact that "... the higher judiciary in India has managed to introduce a considerable amount of informality in the judicial process. They do not insist on the 'interest' for the purposes of *locus standi*. Also formal petitions are not necessary for the purposes of instituting proceedings. Letters, telegrams, articles in newspapers etc are enough to set the court in motion".⁵⁷

Tanzania definitely has the same problems of governance as India does, resulting from the history of colonialism and therefore underdevelopment which the two countries share. It would have been most desirable for Tanzania to follow the same trends as those in India for the sake of struggles for wider democracy, human rights and civil society. This article will now discuss the state of judicial activism in Tanzania.

The state of judicial activism in Tanzania

In Tanzania, judicial activism invariably invites some direct conflict between the judiciary and executive, or even the legislature. The main problem involved is always the complex choice bound to be made between what are political questions, exclusively reserved for the other branches of state, and legal matters for the attention of the courts, whatever consequences they may have. These have already received the attention of Tanzanian courts.

For example, in the *Chumchua Marwa* case, the now retired Justice James Mwalusanya in the High Court had this to say on this complex question:

"A great judge is the one who is prepared to shoulder that burden and make decisions as articulate as possible, being the reflection of the conflict before him. It is tempting to seek refuge in such expressions such as 'it is a political question', or that I have to decide 'in public interest', but rationalizations can hardly take one far. Judges should not shamelessly exploit their personal

54 *MH Hoaskot v State of Maharashtra* AIR 1978 SC 1548.

55 *Attorney General of India v Lachma Dev* AIR 1986 SC 467.

56 U Baxi "On the shame of not being an activist", above at note 45 at 174.

57 Peter "Judicial activism in Tanzania", above at note 43 at 6, citing *People's Union for Democratic Rights and Another v Minister of Home Affairs* AIR 1985 Delhi 268 and LRC (const) 546.

prejudices instead of trying to base their decisions in accordance with their oath of office.”⁵⁸

While dismissing what he called the political question doctrine,⁵⁹ the judge went on to categorize judicial trends in this regard into two schools, the “judicial abstainers” and “judicial activists”. The judge pleaded commitment to the judicial activists school which according to him, “... defines political questions principally in terms of the separation of powers as set out in the Constitution itself for the answer to the question when the courts should stand hands-off”.

For its insistence in being limited to the letter of the constitution, this position cannot take us very far in situations of finding conflicts within the provisions of the constitution itself. However, the judge became more explicit when he reiterated the statement cited above in the context of human rights protection under the Bill of Rights, in the subsequent *Daudi Pete* case:

“It is submitted that with the advent of the Bill of Rights in 1984, the Judiciary in Tanzania and particularly the High Court is blinking under the glare of sustained appraisal of its role in society... . The Judiciary of late may have been receiving a bad image of a shoddy villain and never the fearless champion of truth and justice If the judges have hitherto taken a restrained approach instead of an activist approach, they should now change. For the judges to be able to capture confidence from the community, a whole new package of legal outlook should be cultivated which does not abandon standards and emphasizes judicial creativity with a social objective in mind.”⁶⁰

Specifically dealing with the issue of the legitimacy of the courts in getting involved with political activism, he further stated:

“Judges have therefore to be bold spirited. They should not fear making political decisions for law is after all a deeply political matter. Indeed laws are nothing but policies or political will of the ruling class couched in the most general will to impose and declare duties, liabilities, prohibitions and rights of particular groups of people or the general public. Courts and therefore judges for that matter are in the arena of politics from their inception.”⁶¹

The court was raising an important issue, that is, the extent to which courts should exercise political neutrality. Unfortunately the Court of Appeal in

58 *Chumchua Marwa*, above at note 10 at 11.

59 *Id* at 12, citing *Martin Personal Freedom and the Law in Tanzania*, above at note 2 at 135 and Henkin “Is there a political question doctrine?” (1976) 85 *Yale Law Journal* 597.

60 *Daudi Pete*, above at note 12 at 12. Relying on the retired judge of the Supreme Court of the USA, WO Douglas *The Court Years 1939–1975: The Autobiography of William O Douglas* (1981, Vintage Book) at 55–56 and Mr Justice Wilson of the Supreme Court of Canada in the case of *Operation Dismantle l/c The Queen* (1986) LRC (const) 421 and 440.

61 *Daudi Pete*, *id* at 13.

the same matter on appeal refrained from referring itself to the solid reasoning cited above. It only confirmed the decision for different reasons.⁶²

All the same, it is in the High Court where positions on this matter have arisen, and which it has partly decided to the contrary of the above. In the case of *Mwalimu Paul John Mhozya v The Attorney General*,⁶³ the plaintiff sought an interlocutory injunction restraining the former president of the United Republic of Tanzania, Ali Hassan Mwinyi (1985–95), from discharging presidential functions, pending the determination of the main case. The application involved pleadings for the court's order to the effect that the president was guilty of a constitutional offence, for having allowed the violation of the constitution following the unilateral joining of the revolutionary government of Zanzibar to the Organization of Islamic States Conference as a sovereign state; and that his continued presence would be unconstitutional and potentially dangerous to the well-being of the United Republic and her citizens. As a result of the preliminary objection at the instance of the Attorney General, Hon Samatta JK (retired chief justice as he then was) dismissed the application because of the absence of the court's jurisdiction to entertain such a matter under the constitution. Basing his reasoning on the availability of the constitutional procedure for impeaching the president, he held that:

"If Parliament had intended this court to exercise concurrent jurisdiction in dealing with *politico-constitutional offences* it could have easily said so when enacting s. 46A of the Constitution. The omission to provide such a provision in the Constitution would appear to strongly suggest that Parliament did not want judicial process to be used in removing or suspending the President from office. *It is not for this court to say whether this was a wise decision.*"⁶⁴

Similar positions were taken in the *Marando* and *Mtikila* cases. For example, in the *Marando* case, Justice Mackanja refused to question the validity of the constitution which, as he put it, he had sworn to "defend without fear or favor", when he had been called upon to declare that the present constitution should be totally overhauled to cater for the new multi-party era. The court impressed upon the plaintiffs that questioning the validity of the constitution was a political matter to be resolved exclusively by the political organs of the state. The same was underscored by the late Justice Lugakingira in the *Mtikila* case, when he struck out the plaintiff's petition, which included a paragraph calling for the court's declaration that there was a need for the formation of the transitional government, describing the pleading as "political bickering – turning the court of law into a political battleground". According to this judge:

62 *DPP v Pete* [1991] LRC (const) 553 at 572.

63 (1996) TLR 130 and (1996) TLR 229 (*Mhozya*).

64 *Id* at 9 (emphasis added).

"Not infrequently, therefore, courts will interfere in executive action or inaction to protect the rights of the individual citizen; they will also intervene for similar purposes in legislative action. In doing so they will not be interfering in the lawful policy, but for the purpose of ensuring the rule of law. Beyond that they cannot go. They cannot formulate government policy, for that is a political matter, nor will they compel legislation for that is a legislative matter."⁶⁵

It is therefore clear that there are at least two positions in the High Court of Tanzania, in respect of the role of courts in political litigation. The minority view is held by those who not only call for the court's independent and fearless determination of political disputes, but also do not see anything wrong with the court participating directly in the political process. The justification lies in the fact that the judicial process itself is essentially political. The majority view includes those who do not dispute that judges should be bold and fearless defenders of the constitution in all cases including political disputes, but who advocate for limitations as to the exercise of judicial discretion in this regard, to exclude disputes that are outright of a political nature. According to this view, it is out of the question for courts to participate directly in the political process as advocated by Mwalusanya.

The Court of Appeal of Tanzania has not been able to deal with this matter directly. Nevertheless Professor Chris Maina Peter has ably summarized the trends in the High Court and Court of Appeal of Tanzania.⁶⁶ He is of the view that the Court of Appeal compares badly to the High Court because it has derived "excellency in technicalities and double standards".⁶⁷

However there are on record relevant statements made by the former Chief Justice the late Hon Francis L Nyalali out of court, speaking on the anomalies in the eleventh constitutional amendments discussed above, and referring to them as "certain retrogressive steps which have taken place recently in the political field and which concern the constitutional role of the Judiciary in our country."⁶⁸ He stated:

"These ... are indicative of a failure to appreciate and accept the real nature and scope of the constitutional changes that have taken place in this country during the last few years. There is a regrettable failure to realize that just as Parliament has been empowered by these momentous changes to impeach the President, confirm the appointment of a new Prime Minister and remove

65 Mtikila, above at note 17 at 3–5 (ruling on the preliminary objections).

66 Peter "Judicial activism in Tanzania", above at note 43 at 8–12.

67 Ibid. Peter cites the cases of *Ukandi s/o Nanale v R* (1991) (unreported), *Leons Ngilai v Basil Mramba and the Attorney General* (1985 (unreported) and *National Agricultural and Food Corporation v Mulbadaw Village Council and Others* [1985] TLR 88 (CA), as decisions of the Court of Appeal where technicalities were used to avoid going into substantive matters.

68 Speech of the late Hon Mr Justice Francis Nyalali, former chief justice of Tanzania, on the occasion of the admission of new advocates on 15 December 1994, mimeo.

him or her from office on a vote of no confidence for the good of the people of this country, so has the Judiciary been empowered by these changes to enforce human rights and nullify unconstitutional laws for the good of the people of this country.”⁶⁹

The former chief justice continued, by suggesting what may be taken as an effective solution to the existing conflicts within the constitution and other laws. He sees the same in the prioritization of what he refers to as the principal goals and objectives of the nation, as are embodied in the various provisions of the constitution, the Articles of Union between Tanganyika and Zanzibar of 1964 and other statutes. The former chief justice saw it as the “sacred duty of the Judiciary and the legal profession to the people of this country”,⁷⁰ to articulate and disseminate the established national principles and objectives which underlie the constitution and other laws.

This position of the former chief justice seemed to have been echoed by his successor in office, now retired Chief Justice Hon Mr Justice Barnabas Samatta, about a decade later, in the Court of Appeal case of *Julius Ishengoma Francis Ndyanabo v The Attorney General*. The former chief justice stated:

“The Constitution of the United Republic is a living instrument, having a soul and consciousness of its own. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purpose for which its makers framed it. The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights. Our young democracy not only functions, but grows and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must therefore be strictly construed. So courts have a duty to interpret the Constitution, so as to further fundamental Objectives and Directives of State policy.”⁷¹

One sees that the two former heads of the judiciary in Tanzania were, at different times and occasions, advocating for the extension of the boundaries of judicial activism beyond ordinary legal parameters, unlike the positivist outlook of a section of the High Court and their peers in the Court of Appeal. Although they did not go as far as retired Justice Mwalusanya, the overall implications of their theses about the prioritization of the national principles and objectives, allow the court to enter, if necessary, into political considerations, in order to salvage the guaranteed rights of the citizenry. This is actually a departure from what Bell calls “passive political neutrality” which

69 Ibid.

70 Ibid.

71 Court of Appeal civil appeal no 64 of 2001, Dar Es Salaam main registry (unreported) at 17–18.

renders the court in political disputes only to behave as a “conduit pipe for changes in political values between political masters and citizens”.⁷² Instead, judicial officers are urged to espouse the ideal of “active” political neutrality, which, among others, “... involves taking responsible decisions, exercising discretion and making value judgments which are the product of the creative use of skills by the officials”.⁷³

There is no doubt that, in the practice of active political neutrality, “the judge is not very divorced from any government bureaucrat, as both are state officials with a general commitment to a particular role”, which requires them to be “dedicated to certain values associated with their role, both in its professional character and its social function”.⁷⁴ But does that reduce the judge’s role to a mere bureaucratic process? Certainly judges believe in and operate in accordance with certain principles such as the rule of law, judicial independence and human rights protection etc which, as former Chief Justice Nyalali stated, are among the well-guarded national principles and objectives. But the issue which arises is whether judges are some of the main actors in the formation of such principles and objectives. John Bell does not see sense in the Weberian modernist thinking which sees judges just like any other bureaucrat, as implementers of a pre-meditated and well-set regime of rules and procedures tailored and made by politicians. According to him, although the roles of both judges and bureaucrats are not free from the political process, “[t]he institutional independence enjoyed by judges enables them to promote values which it is their task to refine and balance against their objectives. *This task is marked more by its independence from the political process than its lack of political content.*”⁷⁵

This analysis may assist us to compromise the two positions of the High Court of Tanzania noted above on the issue of political neutrality. The ideal position is not for the courts to shy away from all litigation comprising any pleadings of an overtly political nature. The issue is how far they can go into the political domain to contradict the main actors in the political field. The criteria coined above by the two former chief justices, should be adhered to by Tanzanian courts in appropriate cases, in particular in questioning the encroachment on the constitution by the executive through parliament, as has been amply illuminated above.

Now, whether the judiciary in Tanzania is sufficiently active is another question altogether, which is considered briefly in the next section. The former chief justice of India Justice Bagwati has set the requisite standards of an activist judiciary in the third world, thus:

72 J Bell “The judge as bureaucrat” in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence* (1987, Clarendon Press) 33 at 53 (emphasis added).

73 Ibid.

74 Ibid.

75 Ibid (emphasis added).

"The modern judiciary in Third World countries cannot afford to hide behind notions of legal justice and plead incapacity when human rights issues are addressed to it. The judges must boldly and imaginatively resolve human rights issues It is to the judiciary that the task is assigned to positivise human rights; to spell out their contours and parameters; to narrow down their limitation and exceptions; and to expand their reach and significance by involving component rights out of them while deciding particular cases."⁷⁶

It has invariably been expressed in academic circles, based on the studies made on human rights decisions in Tanzania before and after the coming into operation of the Bill of Rights, that there is: "... a clear division between the High Court of Tanzania and the Court of Appeal of Tanzania. Whereas the High Court appears to be active, the Court of Appeal crawls about with significant conservatism. The general approach of the Judiciary, however, with very few exceptions, is positivist, interpreting legal provisions literally at times, even where such interpretation is against rules of criminal justice".⁷⁷

However, notwithstanding this obviously domineering positivist trend in our courts, after the Bill of Rights came into operation and in particular after the drastic political changes of 1992, there seems to have been some improvement in the cases decided on the rights to freedoms of association, peaceful assembly and political participation. They witness not only a more open-handed, liberal and purposeful interpretation, but also an imaginative and creative approach. Nevertheless, the court's involvement in the political process is yet to be settled. But one now sees the High Court as gradually being independent, fearless and determined to defend the constitution, even if this means going beyond the boundaries set by the constitution. This is not to mention the leading role that the courts took in refusing to apply the law relating to bail as had been introduced by the Criminal Procedure Act 1985 and thus causing the re-enactment of most of it.⁷⁸ Indeed the High Court has in some instances gone too far in the direction of judicial activism to the dislike of the Court of Appeal, as in the case of *Butambala v The Attorney General*.⁷⁹ The Court of Appeal disapproved of the High Court judge's initiation *suo motto* [on his own] of proceedings leading to the invalidation of a statutory provision. It condemned this as amounting to creating an "ambulance court", stating that, "... knocking down laws or portions of them should be reserved for appropriate and really momentous occasions". Yet the court warned itself against being taken as having

⁷⁶ Quotation borrowed from the *Chumchua Marwa* case, above at note 10 at 9.

⁷⁷ SA Bahroon "The judiciary and the protection of human rights in Tanzania: A critical examination of the legislation and judicial decisions on the right to liberty" (LLM dissertation, mimeo, Faculty of Law, University of Dar Es Salaam, 1993) at 114–15.

⁷⁸ For the full account of this development, see *id* at 115–71. For lack of space, this article excludes a detailed discussion of the cases.

⁷⁹ [1992] LRC (const) 495.

established a position which was “conservative in the negative sense” and it emphasized that: “We must not be understood to mean that judges should shy away from their function of construing the Constitution which is their proper and legitimate province. But there must be *occasion* for that. That is a *judicial* power reserved for judicial situations. When we are *moved* we move into judicial action and fulfil our responsibilities. Not otherwise. We are not knight errands.”⁸⁰

This case shows that, although it did not directly address the question of political neutrality, the Court of Appeal stood halfway the two High Court positions discussed above. Conclusively it can however be said that, in *Butambala*, the court did set boundaries of judicial activism beyond which lower courts cannot venture.

CONCLUSION

This article was concerned with the assessment of the role of the courts as the main implementers of human rights as enshrined in the Tanzanian Bill of Rights. Courts have been urged to embark on the active and creative interpretation of the law in favour of wider and effective enforcement of human rights inside and outside the Bill of Rights. This article has indeed pointed out that both the High Court and Court of Appeal of Tanzania are still committed to the conservative positivist approach, although there is significant improvement in the High Court.⁸¹ This may raise a query about the standards used to judge Tanzanian courts in this regard. Special mention has been made of the highly activist Supreme Court of India. This could imply employing Indian standards to Tanzania. In the modern human rights discourse this is permissible.

It should be noted that human rights are essentially universal in all respects and the content of Tanzania's Bill of Rights is deeply influenced by the international human rights regime and other norms of the globalized world. This fact must also invite the reception of a universalized human rights practice in Tanzania. Tanzanian courts actually often rely on judgments from other jurisdictions, especially those of Commonwealth countries.⁸²

The other reason for insisting that the courts should be activist or do what some writers have referred to as “creative use of legal resources”,⁸³ is based on the fact that the legal system in Tanzania, as in other countries of the third

80 Id at 498 (emphasis added).

81 See the recent High Court judgment in the case of *Christopher Mtikila v The Attorney General* miscellaneous civil cause no 10 of 2005, Dar Es Salaam main registry (unreported). In this case the full bench of the court (Manento JK, Massati and Mihayo JJ) took the opportunity openly to launch a vicious attack on parliament's powers to make and amend laws, while emphasizing that such powers are not limitless.

82 Indeed, this is the object of the publication of the Commonwealth Law Reports.

83 CJ Dias and JCN Paul “Lawyers, legal resources and alternative approaches to development” in CJ Dias, R Luckham, DO Lynch and JCN Paul (eds) *Lawyers in the Third World*:

world, is not home grown.⁸⁴ It “involved as a consequence the introduction of the European legal system through colonial governments, or ... through efforts of ‘modernizing’ rulers and the elite to import western legal structures”.⁸⁵

In the case of Tanzania and other former colonies, the legal profession was introduced and controlled by the government and indeed by the time of independence it was identified with the colonial state.⁸⁶ The continuation of this attitude in contemporary Tanzania must be abrogated, if lawyers and the courts are to be expected to play a leading role in the human rights crusade. Indeed, the most appropriate procedure should involve a combination of tactics. Whereas we are called upon to learn from and emulate other comparatively developed systems, such as that of India, we are also bound to carve our own system in accordance with local demands and circumstances. This can only be done by intentionally developing human rights norms and practice both within and outside the constitution, which depart from the limited Bill of Rights which Tanzania entrenched in its constitution in 1984. It is only an activist judiciary like that of India, which can lead the way in that direction. Such a judiciary will have to be constituted by lawyers who are not scared of getting into other disciplines, political or otherwise, indeed “development lawyers” according to Dias and Paul,⁸⁷ those who do not believe that the lawyers should confine themselves strictly to legal issues.⁸⁸

One can say conclusively that the way forward is still open. Using the available limited legal framework, the courts can liberate themselves from the cocoon of legalism, to chart the road towards a progressive view of rights. This is a view which sees rights as part of a larger political struggle. It is also one which sees the rights comprised in the Bill of Rights as only a framework open for further development.

contd

Comparative and Development Perspectives (1981, Scandinavian Institute of African Studies, Uppsala International Center of Law and Development) 363 at 368.

84 Y Ghai “Law and lawyers in Kenya and Tanzania: Some political economy considerations” in Dias et al (eds) *id*, 145 at 148.

85 *Ibid*.

86 *Id* at 156.

87 Dias and Paul “Lawyers, legal resources”, above at note 83 at 390.

88 *Ibid*.