FORUM TO ASSESS DEVELOPMENT POLICIES OF TANZANIA

GOOD GOVERNANCE AND RULE OF LAW IN TANZANIA

Commissioned Paper

Sub-theme 5: Good Governance and the Rule of Law

By
Robert V. Makaramba
Commission for Human Rights and Good Governance, Dar es Salaam - Tanzania

Paper presented at the Inaugural Tanzanian Biennial Development Forum
24th – 25th April 2003 at the Golden Tulip Hotel, Dar es Salaam Tanzania

TABLE OF CONTENTS

GOOD GOVERNANCE AND RULE OF LAW IN TANZANIA

By Robert V. Makaramba

"Freedom and development are as completely linked together as are chicken and eggs! Without freedom you get no development, and without development you very soon lose your freedom."
Julius K. Nyerere, *Man and Development*, OUP (1974) at p.25

"For the truth is that development means the development of people. Roads, buildings, the increases of crop output, and other things of this nature, are not development; they are only tools of development."
Julius K. Nyerere, *op cit.* at p.26

"Development brings freedom, provided it is development of people. But people cannot be developed; they can only develop themselves."
Julius K. Nyerere, *op cit.* at p.27

Development, however, must have a purpose otherwise it becomes merely an excuse for keeping the bureaucrats in business. That purpose is man himself. He is both the object of development as well as its subject.
Abdul Rahman Mohamed Babu, *African Socialism or Socialist Africa*? TPH (1981) at p.150

1.0 INTRODUCTION

This Forum seeks to reassess the two development strategies that this country has adopted over the past forty years, that is, the socialist approach (the Policy of Ujamaa -Socialism and Self Reliance from 1967 (Arusha Declaration) - 1992 (Zanzibar Declaration) and the capitalist approach under the rubric of "free market" economy principles from 1992 onwards. Although the strategies have had some successes neither has managed to lead to socio-economic transformation. Forty years after independence, Tanzania is not yet free from the three enemies that is, hunger, diseases and poverty. Consequently, Tanzania, with half of its population living in abject poverty, remains dependent on foreign resources, fiscal, physical and human (expert ideas). When a poor nation as ours is over-dependent on external assistance it compromises its ability to determine its own future and ultimately to govern itself. This paper addresses the good governance - rule of law dimension in the development paradigm.

Despite the incorporation of a Bill of Human Rights and Duties in the Constitution since 1984, the human rights situation in the country has not improved much in many areas. Most of the despotic legislations earmarked in 1991 by the Nyalali Commission for either repeal and/or amendment are still in our statute books and continue to haunt our people. The enforcement of the human rights guaranteed in our Constitution is rather difficult given the existing constitutional limitations imposed on the courts. The procedure for vindicating human rights is cumbersome and remedies are hard to come by. The poor status of human rights in the country is exacerbated further by growing harshness by the police and growing incidences of mob justice.

Many developing countries in the 60's and 70's made a "false start" (Rene Dumond) in charting out their development strategies by believing that the "people" can only be developed and not develop themselves; that development is about structures not the "people" and that development is not for the people. Tanzania for example, promulgated a number of laws aimed at "bringing development" to the people. The settlements laws and the villagization laws are a case in point. The efforts of the Government to bring development through law failed basically due to two factors, which are essential in the development of people. The first is lack of leadership through education, and the second is lack of democracy in the decision-making process (Nyerere, 1974:29). In doing the reassessment we therefore need to look back and ask ourselves as to **what has been missing; what was done right; and what was**

done wrongly in the development process such that Tanzania as a nation has failed to advance as fast to make this country "the African lion to match the Asian Tigers."

The matrix of good governance and rule of law, which forms the basis of our discourse, is premised on the idea that law is one of the strongest tools for development that seeks to promote good public and corporate governance by holding its actors responsible for their actions. Law can provide the means by which to determine accountability, regulate conduct and general behavioural tendencies of our leaders. As a social control mechanism, law also boosts the role of institutions and individuals in the private and public sphere of life particularly in the provision and delivery of services and goods.

Part One of the paper lays the conceptual framework for our discourse through a discussion of basic concepts such as law, rule of law, justice and the constitution. In Part Two, the paper analyses the idea of human rights based approach and the efficacy of human rights promotion and protection mechanisms. Part Three of the paper deals with the question of good governance and in particular corruption and leadership ethics. Part Five is a conclusion and recommendations as to the way forward.

1.1 The Conceptual Framework

1.1.1 Good Governance and Bad Governance

There is no consensus as to what exactly the concept "good governance" means. There is however, some grain of agreement as to its five basic ingredients, namely, transparency; efficiency and effectiveness in the delivery of public services; accountability; legitimacy and predictability. Good governance takes place when the development process is conducted within the framework of a written constitution, constitutionalism, the separation of powers and the rule of law, and ethical codes of conduct and traditions of the people; when it responds to the basic needs, wishes and aspirations of the people; when it is based on sound, efficient organisational and operational principles and guidelines; and when the entire development process is transparent and accountable, whose consequences are understood and predictable.

Although the concept of "good governance" has recently been associated with the "development" language of international financial institutions, it was actually part of the driving forces of the *Ujamaa* ideology connoting "good policies" and "good

leadership" as formulated by the late Mwalimu Nyerere in his development quartet. According to what I am tempted to call the "Nyerere doctrine of development", this country needed four things to develop: people (*watu*), land (*ardhi*), good policies (*siasa safi*) and good leadership (*uongozi bora*). In our interpretation "people" represents the working masses, that is, the peasants and workers; "land" as the mother of all resources represents the abundant natural resources this country has been endowed with, good policies represent social, economic (macro, micro and meso), and cultural policies; and good leadership connotes good governance in the sense of its five ingredients namely, transparency; efficiency and effectiveness in the delivery of public services; accountability; legitimacy and predictability.

Governance is about the collective, democratic management of people's lives. It extends beyond government, but also includes reforming the state to make it efficient, effective, and democratic. Good governance ensures the involvement of civil society and business in the decision-making process and the development of society. Governance has to ensure that processes of mandating, developing and monitoring of the implementation of policies is inclusive and participatory. Good governance can be promoted by a strong government, led by good leaders backed by strong policies, work tradition, leadership ethics, morality and culture. Good governance should ensure the provision of basic services, management of resource allocation through re-prioritization, budget reform and the development of infrastructure. Dealing with illiteracy, poverty, crime, violence particularly against the most vulnerable groups in our society, and fighting HIV/AIDS and malaria are priorities of good governance for the Government of Tanzania.

The opposite of "good governance" is "bad governance." This occurs when the constitutional and legal provisions are flouted, law enforcement fails or is compromised, ethical and traditional codes of conduct are ignored or undermined; when accountability and transparency are lacking, appropriate organizational and operational principles are not applied, and the leaders are greedy, rapacious, corrupt, incompetent, and insensitive to the needs, wishes and aspirations of the people.

Globalization has exacerbated the problem of realizing good governance by creating a situation in which poverty and preventable diseases have become rampant, particularly in the rural areas and the urban slums where the poorest of the poor live and who cannot afford to share in the costs for health and social services. Consequently, there is widespread lack of basic services, few economic

opportunities, weak government institutions particularly at the local level, weak civil society organisations, increasing domestic violence and child abuse and neglect, authoritarianism, corruption, and general moral and social decay.

1.1.2 The Concept of Rule of Law

Rule of law is an important ingredient of good governance. The main element of rule of law is equality and protection of all people before the law. Dicey, the greatest British constitutional lawyer of all times was the first philosopher to ponder deeply over the concept of rule of law and its ramifications to civil governance (Dicey, 1960). The concept of rule of law has over the years come to represent an opposition to the rule of one man or a despotic king, which is highly inimical to good governance. In its evolutionary process during the transition period from feudalism to capitalism, the concept of rule of law became a necessary tool in the struggle for equality of all persons before the law. Considering the historical development of society at that particular point in time and the evolution of political principles, it is not surprising at all that the concept of rule of law has gained an upper hand in the administration of law in the emergent nation-state governed according with a constitution, comprising a set of basic rules for governing society became therefore the new social contract between the governing and the governed.

The rule of law simply stated is therefore governance according to the law. Law is regarded as a social behaviour norm but of a different form - it is enforceable (Kelsen, 1945). Law comprises of norms that are characteristic of human social life and indicate what is to be done by the majority in a given situation. Law has therefore taken on the quality of what ought to be done and if not obeyed sanctions attach. Law constitutes rules and standards, which are basic to understanding the functioning of a given society that have been adopted and accepted by that society as binding on everybody equally. Then too the economic activities of the social group must be regulated and deeds and acts inimical to the social group are also to be controlled by rules and standards.

The principle of rule of law finds expression in Article 13 of the Union Constitution,[1] that "*all persons are equal before the law" and entitled, without any discrimination, "to protection and equality before the law*." Furthermore, it is stipulated in the Constitution that "*the civic rights, duties and interests of every person and community*" are to be *"protected and determined by the courts of law or other state agencies established by or under*

[1] The Constitution of the United Republic of Tanzania of 1977 as amended from time to time.

the law." This means that each person is to be treated as being equal before the law and without any kind of discrimination.

1.1.3 State Power and People's Power

The constitution, or the *grundnorm* (Kelsen, 1934-35), which is the basic law of the land creates the three organs of the state, namely the Executive, the Legislature and the Judiciary and confers powers and authority on each one of them within their respective spheres of competence. Each organ has to function according to the powers accorded on the basis of the doctrine of separation of powers (Montesquie, 1748), as stipulated in Article 4 of the Union Constitution. The locus of power (sovereignty) agreeably resides in the subjects of the social contract, the "people" as articulated under Article 8 of our Constitution.

The government formulates development policies and oversees their implementation. It derives all its power and authority from the people. Development policies adopted by the Government must be of and for the people, not buildings or roads, which are tools of development (Nyerere, 1974: pp. 26-28). The "people" institutes the government through democratic means every five years, and not from one individual or a group of people and it must therefore be accountable to the people. This is the foundation of good governance – a government of the "people by the people for the people." It means that the people must be given an opportunity to fully, meaningfully and effectively participate in all the affairs of the Government either directly through their duly elected leaders – representative democracy or indirectly through civic organizations. The participation of the people in formulating policies and laws lies at the very root of good governance, democracy, rule of law and social justice.

1.1.4 The Idea of Justice: Precious than Gold

According to Plato's *Republic* justice, which has become one of the foundations of Western civilisation is the "proper virtue of man (and woman), more precious than many pieces of gold." However, according to one character in the same book, Thrasymachus, Socrates' antagonist, "justice is nothing else than the interest of the stronger" that is, "might makes right." It is one of the ironies of history that the term "justice", taken from the Greek word "nemesis" was also the name of the goddess whose function it was to direct the wrath of the gods against those who infringed on the rights of others! For, justice means the administration of the law enforced by the State in the interests of a dominant class! Traced to its root, "nemesis" goes back to

"*nomizo*", which means, "to observe the custom." Later on it was perverted to mean, "to judge."

The idea of justice also exists within African tribal societies. Within some of the African tribes, justice was and is still administered according to old customs based partly upon experience and partly upon superstition.[2] A large part of the customary norms of some of the patrilineal tribes in Tanzania form part of the "customary law" that is recognized and officially enforced by state courts[3], some of which have been challenged for discriminating against women and children particularly in matters of inheritance and ownership of property.[4] The continued discrimination of women in property rights bites at the very root of good governance and rule of law.

A great deal of trouble has arisen by confusing law, the formal demands of the State, with tribal custom, which is a method of interpreting justice in tribal society. And in the process representative democracy or liberal democracy has completely replaced participatory democracy or "village democracy" (Shivji). According to Engels in *The Origins of the Family, Private Property and the State*, within the tribe or clan there was no State to enforce social norms (F. Engels, 1948). It is the absence of such force, which to modern-minded theorists is one of the weaknesses of tribal society. Within tribal society justice was administered at a period prior to the rise of the State with its legal code and it was participatory in nature. Social administration in tribal societies was conducted by the tribal members in the elders' council, which have now been replaced by local government authorities.[5]

Enforceability is one of the main characteristics of law as a social norm. Custom though also a social norm, lacks such characteristic. Unless law can be enforced it

[2] The British colonial state enacted the Witchcraft Ordinance, Chapter 18 of the Laws prohibited people from using "instruments of witchcraft." The Ordinance defines "witchcraft" as including sorcery, enchantment, bewitching, or the purported exercise of any occult power, or the purported possession of any occult power." In the case of *Mwasegile Samuli v. Makanika Katatula* [1980] TLR 431 (HC) at Mbeya, Samatta, J. (as he then was) remarked that, "I am not a convert to an opinion that witchcraft is a science" and thus capable of being proved by "experts" under section 47 of the Evidence Act of Tanzania concerning opinion of experts. The *Witchcraft Ordinance* is still part of our laws.

[3] The Government of Tanzania declared the customary laws of patrilineal tribes in the *Customary Law (Declaration) Orders* of 1963, G.N Nos. 439 and 236 of 1963 respectively. As far as matrilineal tribes are concerned, their customary law has to be proved as a matter of fact by expert opinion under section 47 of the *Evidence Act* No.4 of 1967.

[4] In the case of *Ephraim vs. Pastory and Another*, High Court of Tanzania at Mwanza (PC) Civil Appeal No.70 of 1989, Mwalusanya, J., held the customary law of the Bahaya denying a woman the right to own clan property unconstitutional for being discriminatory. Reported in [1990] LRC (Const.) 757.

[5] In Tanzania Mainland local authorities consist of the "village government" (village assembly and village council) and district authorities, which are established and regulated by the *Local Government (District Authorities) Act* No.7 & the *Local Government (Urban Authorities) Act* No. 8 of 1982 respectively as both amended in 1999.

ceases to be law at all. Hence in a political society, with the rise of private property, the State became a requisite force to thrust the wishes of the propertied class upon the community (Hindess, et al., 1975). It seems therefore that the modern state has simply taken up the clan method of administering the custom and pressed it into the service of the ruling class backed up by force of the coercive instruments of the state, the judiciary, the police and the prisons. With the steady growth of the State, and the legal machine, the propertied interests had the power to stamp out the remnants of the clan spirit and the power of the tribal chiefs. It was because tribal society had no force to back up its decrees that private property had to smash the democratic administration of the tribe based upon kinship. That of course, only means that the State cannot co-exist with the tribe – one or the other must go under. And the Tanzanian state did exactly this in 1963 when it passed a law specifically outlawing all chiefdoms.[6] The "project" of marginalizing the "traditional" by replacing it with the "modern" is still going on as witness by the promulgation recently of "new" laws on natural resources management namely the *Mining Act*[7], the *Village Land Act*[8], the *Land Act*[9], the *Forest Act*[10] and the *Beekeeping Act*[11] to mention but a few.

1.4.1.1 "Justice Delayed is Justice Denied"

During the visits of the Commission for Human Rights and Good Governance to prisons throughout the country this year inmates complained to it about long delays by courts in either determining their cases or hearing their appeals. Not only inmates, people generally also complain a lot about long court delays. In the words of Lord Simon of Glaisdale, "delay will make it more difficult for the legal procedures themselves to vouchsafe a just conclusion – evidence may have disappeared and recollections become increasingly unreliable."[12] Courts in Tanzania have also been very keen in abdicating their role to adjudicate or in relinquishing their judicial review function on the simple pretext that the matter before them was unjusticiable. For example, in the case of *Rev. Christopher Mtikila v. Attorney-General*[13], the High Court refused to grant the prayer for a Constitutional Conference or Commission to draft a new Constitution and the prayer for a Referendum to decide

[6] The *Chiefs (Abolition of Office: Consequential Provisions) Act*, 1963, Chapter 535 of the Laws, Act No.53 of 1963. The Act abolished the office of chiefs, which had been established under the *African Chiefs Ordinance*, Chapter 331 of the Laws and granted immunity to Local Government Authorities (which replaced the Chiefs) against being sued by the chiefs whose offices had been abolished.
[7] Act No. of 1998
[8] Act No.5 of 1999
[9] Act No. 4 of 1999
[10] Act No. 14 of 2003
[11] Act No.15 of 2003
[12] In *Central Asbestos Co. Lt. V. Dodd* [1972] 2 All E.R. at p.1153
[13] High Court of Tanzania at Dodoma, Civil Case No.5 of 1988 (unreported)

about the fate of the Union because they were "political" in nature. Contending with the problem as to what is and is not "political" the Supreme Court of India had this to say in the case of *Kesavananda Bhrarati v. State of Kerala,*[14] "Every constitutional question concerns the allocation and exercise of power and so no constitutional question can fail to be political."

The legal provisions requiring the High Court to refrain from declaring a law or an action determined as abridging or abrogating human rights unconstitutional are a very serious limitation on the independence of the judiciary and an affront to the rule of law. Victims of violations of human rights have to endure the pain associated with being able to secure the three judges to hear their case; giving the Government a notice of ninety days before suing it; and waiting for the lapse of a specified time before a remedy for violation of human rights becomes effective. All these only add salt to the wound of violation and clearly stand in the way of justice. In this case it would therefore not be very amiss to ascribe to the adage that "justice delayed is justice denied."

1.1.5 Injustice, Unjust Laws and Personal Liberty

Can it be concluded that merely because state laws have been "validly" promulgated by the legislature, the state is necessarily being governed according to rule of law and thereby democratic even if the laws are manifestly unjust? South Africa during the apartheid era provided a classic case of a state governed by valid but manifestly unjust state laws. South Africa had in place the most unjust laws ever witnessed anywhere in the modern world, including pass laws requiring black people to carry identification cards; race laws prohibiting blacks from marrying whites etc. In the eyes of positivists such laws though manifestly unjust so long as they were promulgated by a legally competent authority, they were valid and courts of law were under obligation to apply them in "dispensing justice without fear or favour" between blacks and whites in South Africa! But this did not stop the people of South Africa from resisting the unjust laws.

The concept of unjust laws includes and goes beyond the concept of oppressive laws, though resistance to unjust laws first takes the form of the refusal to obey oppressive laws, that is to say, laws infringing human rights. Where human rights have been defined and guaranteed by the Union Constitution, unjust laws are equivalent to unconstitutional laws. Consequently, where a system of controlling the

[14] [1973] 4 S.C.R. 1

constitutionality of the laws exists and means of redress are available to the citizen, the refusal to obey unjust laws lose some of its justification, except in cases of flagrant intolerable or irreparable injustice.

But what does the term "subject to the laws of the land" really imply? In the case of *Pumbun and Another v. Attorney-General and Another*[15] the Court of Appeal of Tanzania had occasion to state that any law that restricts or abridges basic human rights must fulfil two conditions in order to qualify as a "lawful law." First, that law should meet the proportionality test, that is, the limitation imposed on the basic human right by such law must not be more than is reasonably necessary to achieve the legitimate object of the government. Secondly, the law should not be arbitrary – that is, it should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law.

1.4.1.2 The "Forty" Plus Despotic Laws[16] and Claw-back Clauses

Many brilliant ideas have explored and analysed the issue of "claw back" clauses in our Constitution.[17] Ideally rights should not be without limitations. But should the limitations be limitless? The two famous Reports on constitutional developments, constitutionalism and human rights this country has ever produced[18] made some very progressive recommendations regarding the promotion and protection of human rights in Tanzania. One of the Reports recommended that the "Juda's" of human rights, that is, the infamous "forty pieces of legislation" curtailing the enjoyment of human rights, some should be scrapped off our statutes books and some should be amended accordingly.[19] So far nothing much has been done in this

[15] Court of Appeal of Tanzania at Arusha, Civil Appeal No.32 of 1992. Reported in the [1993] 2 LRC 317. See also *Republic vs. Mbushuu Mnyaronje and Another*, High Court of Tanzania at Dodoma, Original Jurisdiction, Criminal Sessions Case No.44 of 1991, Mwalusanya, J. Reported in [1994] 2 LRC 335. The case also reproduced in (Peter, 1997:42-62. There was an appeal, *Mbushuu @ Dominic Mnyaronje and Kalai Sangula v. Republic*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No.142 of 1994. Reported in [1995] 1 LRC 216.

[16] The Presidential Commission on Single Party or Multiparty System in Tanzania, 1991, Volume One, *Report and Recommendations of the Commission on the Democratic System in Tanzania*, Government Printer, Dar es Salaam, 1992, "The Nyalali Report" dealt with about forty oppressive laws, which violated fundamental rights and freedoms.

[17] Mbunda, L.X., "Limitation Clauses and the Bill of Rights in Tanzania", Vol.4 No.2 *Lesotho Law Journal* (1988) p.57; Peter, C.M., (1998) "The Enforcement of Fundamental Rights and Freedoms in Tanzania: Matching Theory and Practice" in Peter, C.M., and I.H. Juma (eds.) *Fundamental Rights and Freedoms in Tanzania*, at p.54

[18] The UNITED REPUBLIC OF TANZANIA, *The Report and Recommendations of the Presidential Commission on Single Party System in Tanzania*, Dar es Salaam: Dar es Salaam University Press, 1992 "The Nyalali Report" and the *Ripoti ya Kamati ya Kuratibu Maoni Kuhusu Katiba*, Kitabu cha Kwanza, Pili na Tatu, Mpiga Chapa wa Serikali, Dar es Salaam, 1999, "The Kisanga Report"

[19] The 1992 "Nyalali Report" loc. cit.

regard. Instead of late the legislature has passed a number of legislation, some of which seemingly threatens the guaranteed rights and freedoms.[20]

The omnibus claw-back clause in our Constitution in essence seems to validate all the existing despotic pieces of legislation once strongly condemned in the Report of the 1991 *Presidential Commission on Single Party or Multiparty* (the Nyalali Commission) for being unconstitutional. The Nyalali Commission recommended that some of the laws, which concerned the Union government, about twenty eight of them, should be amended and some to be repealed (URT1992). A number of the despotic legislation reviewed in the Nyalali Commission greatly impact on personal liberty, rule of law and social justice. The Nyalali Commission recommended among other things that the *Societies Ordinance* for example, which is among the laws with a direct bearing on the function of non-governmental organizations, should be substantially amended so that the Principal Secretary in the Ministry of Home Affairs ceases to be registrar of societies and instead appoint a person specifically to do that job (URT, 1992). That particular recommendation has not been taken up by the Government to date. Instead the Government proceeded to adopt a more strict NGO law, which places all NGO matters under the office of the Prime Minister (LEAT, 2000). The NGO law is perceived by the NGO community to be a mechanism for exerting more control over the management and affairs of NGOs in the country.

Extrapolating the limitations imposed by positive law on the basic human rights guaranteed in the Union Constitution, it is hard for anyone to resist being convinced by the argument that "human rights in Tanzania have been given by the right hand and removed by the left hand" (Peter, 1997). The omnibus claw-back clause in Article 30(2) of the Constitution and a number of other specific limitations imposed on almost all of the provisions guaranteeing human rights, by subjecting their enjoyment to other "laws of the land", concretise this argument.

1.4.1.3 The "Temple of Justice"21: Of "Bold Spirits" and "Timorous Souls"

Courts cannot be spared the blame in the game of abuse of power. In many occasions courts have failed to invoke their powers to declare void laws inconsistent with the Constitution by invoking "generous and purposive construction"[22] when

[20] The *Regional Administration Act*, 1997; the *Basic Rights and Duties Enforcement Act*, 1994; the controversial *Non-Governmental Organization Act*, 2002; and the Prevention of *Terrorism Act*, 2002 to mention but a few.

[21] Mwesiumo, J. (as he then was) in *Joseph Kivuyo and Others v. Regional Police Commander Arusha and Another*, High Court of Tanzania at Arusha, Miscellaneous Civil Application No.22 of 1978 (unreported) described the position of the court in society as a "temple of justice" and that" no body should fear to enter it to battle his legal redress", quoted in Peter, C.M. et al. (1998) at p.51

[22] Lord Diplock in the case of *Attorney-General of the Gambia v. Jobe* [1985] LRC (Const.) 556 at p.565

interpreting the Constitution. Our judges have a duty to interpret the law which accords with "social and personal justice"[23] and not only to give decisions strictly according to law even if that decision is manifestly unjust, that is, our judges should "dispense justice according to law and not to enforce or administer law at the expense of justice."[24] Quite often one may come across judicial statements such as "the task of a judge is to interpret and apply the law to the case before the court and that it is for Parliament to change a law that turns out to be unjust or absurd." These are the type of judges that fall under the category of "conservative judges." Everyone agree that there is still a problem of lack of sufficient national jurisprudence on human rights to fall back on in deciding human rights cases in domestic litigation. However, our judges are not prevented from relying on international human rights standards and cases when deciding human rights cases.

1.1.6 Justice, Equity and Good Conscience

The contemporary version of justice is expressed in the Preamble to the Union Constitution in the following terms:

"WHEREAS WE, the people of the United Republic of Tanzania, have firmly and solemnly resolved to build in our country a society founded on the principles of freedom, ***justice****, fraternity and concord.*"

AND WHEREAS those principles can only be realised in a democratic society in which the Executive is accountable to a Legislature composed of elected members and representative of the people, and also a Judiciary which is independent and dispenses ***justice*** *without fear or favour, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged" (the emphasis is mine).*

The concept of justice, which is reflected in the Union Constitution, seems to be in accordance with state law and not customary or traditional norms or religious laws. The state in Tanzania recognizes both Islamic and customary law in personal status matters. However, custom cannot be said to be identical with law, even if it has been given a force of law by the State. Custom and law are entirely two different methods of social organisation. The latter has its roots in primitive communism and the former in private property. Custom presupposes equality and has no method of

[23] Lord Denning, M.R., *The Closing Chapter*, London: Butterworths, 1983 at p.41, where he makes a distinction between "judicial activists" and "conservative judges"
[24] Mwalusanya, op.cit. quoting Chief Justice Nyalali at p.127

enforcing its decrees; law arises because of class inequalities and therefore needs an engine of force to ensure obedience.

The concept of justice, which is reflected in the Preamble to the Union Constitution, echoes the most fundamental principles for realizing a democratic society. Apparently, it is not enough that a society should be governed only according to rule of law to qualify as "democratic." Such society must also be based firmly on the trio principle of "justice, equity and good conscience" – the three pillars of ethical behaviour (integrity), which informs good governance. The origins of this formula lie in the Romano-Canonical sources and go back to the sixteenth century. Aristotle took pains to explain that "*justicia*" needs and presupposes "*acquitas.*" The function of *acquitas* is to adjust the written statute to the particular circumstances of the case. And this is done in two ways: (1) to correct, modify and, if necessary, to amend the statute law; and (2) to supplement and otherwise remove the difficulties of the written sources of law. There is also a third sense of *acquitas* – it is where the judge while "dispensing justice without fear or favour", is to fall back upon his "office" to give a decision *ex bono et acquo,* which means "according to good conscience." Justice Wilson in the landmark case of *Gwao bin Kilimo vs. Isunda bin Ifuti*[25] observes that:

"*Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately, the standards of different communities are by no means the same. To what standard, then, does the Order-in-Council refer – the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality, which a British court n Africa can apply, is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery*."[26]

The above statement seems to suggest that every society has its own standard of justice and morality. Does this mean that there are no universally accepted standards of justice and morality? This question is particularly relevant to human rights, which are considered generally as being part of universal morality. However, there is still an unsettled controversy over the idea of relativity of human rights as opposed to universality.

[25] (1948) TLR 403
[26] Ibid. at p.405

The Bill of Rights and Duties enshrined in the Union Constitution ascribes more to the concept of relative human rights than universality. According to positivist thinkers, morality is not the province of positive law, but there could still be certain universally accepted standards by which justice and morality can be measured. And the yardstick for measuring justice and morality is rule of law. According to the leading positivist thinker, John Austin, famous for the "command theory" of law, so long as a law has been promulgated by a "politically superior" (the sovereign) it is valid and must be habitually obeyed by those "politically inferior" (the people) at pain of sanctions (Llyod, 1985). Going by this assumption it very possibly can be argued that so long as a particular piece of legislation such as for example, the *Non-Governmental Organization Act* or the *Anti-Terrorism Act* have been promulgated by the legislature, they are valid and hence "good law", which must be obeyed unquestionably by every citizen and steadfastly enforced by the courts even though they could be manifestly unjust. Such law becomes then a standard for measuring "social justice." This means for example, that a person charged with and convicted let us say on a murder charge, justice demands that he or she should be hanged until he or she dies as stipulated in our Penal Code. This is notwithstanding that our Constitution promotes the protection of certain basic human rights and freedoms including the right to life.

According to Article 64 of our Constitution, the National Assembly (Parliament) is the only body in the country vested with law-making (legislative) powers. The assumption is that the Parliament, a truly representative organ of the "people", has their mandate to make laws on their behalf, which will apply and protect them equally. As we noted earlier in the discourse, in principle, the "people" are the repository of sovereignty.[27] It should however, not to be assumed that all laws emanating from Parliament would necessarily ensure substantial justice when applied to specific situations. The Parliament can play a pivotal role in the legislative process by enacting laws to govern social and economic development (Mchome, 2002). Our legislature has not let us down in this regard. The National Assembly has over the past forty years or so been busy promulgating both "good" and "bad" pieces of legislation and constitutional provisions.[28] And according to Article 30(2) of our Constitution, the National Assembly can even promulgate laws that abridge or

[27] Article 8(1) of our Constitution stipulates that "*The United Republic of Tanzania is a state which adheres to the principles of democracy and* ***social justice*** *and accordingly – (a) sovereignty resides in the people and it is from the people that the Government through this Constitution derive all its power and authority*."

[28] The 1991 "Nyalali Commission" reviewed about forty pieces of despotic legislation made appropriate recommendations for either repealing and/or amending some to accord with human rights standards, democracy and rule of law.

abrogate guaranteed human rights and freedoms – which is a clear case of "rule of law without justice", "right-less laws" and "bad governance."[29]

1.1.6.1 The Makers are Interpreters of the Law

In Tanzania, of recent there has emerged a struggle for autonomy between Legislature and the Judiciary to the detriment of justice in general and human rights in particular. In its struggle to reclaim its lost supremacy, the National Assembly has gone to such great lengths as to pose a real threat to the powers of the Judiciary to check on abuse of power on the other two state organs. This came out clearly after the Court of Appeal declared a provision in the Electoral laws that required petitioners to deposit five million shillings as security for costs, unconstitutional.[30] The Speaker of the House embarked on a personal crusade to castigate the decision. The Honourable Speaker was not at ease with the fact that the Justices - the un-elected minority in society – took upon themselves to impugne a law validly passed by an elected body, representative of the people. Parliament re-asserted its supremacy and passed yet another law to restore the five million-security for costs fee with some modifications.[31] The principles of good governance and rule of require that decisions affecting rights be rendered by an independent and impartial body.

1.1.6.2 Abuse of Power and Governance Consent

"Abuse of power" means failure by the government and its agencies to act in accordance with the law in its governance of its people.[32] Abuse of power can be made by any of the three pillars of the State namely, the Executive, the Legislature and the Judiciary. Some instances of abuse of power in Tanzania by the executive include imposing a Constitution which is not made by the people; lack of sufficient checks on abuse of power in the existing constitution; lack of transparency on the part of the government; failure to manage the economy for the benefit of the people; and extra-legal acts by public officials who abuse of power. [33] Because the constitution creates state organs and charts out the exercise of state power, the use of

[29] For example, the *Regional Administration Act of 1997* does exactly the opposite of what was recommended by the Nyalali Report. In that Report it was recommended that the Regional Commissioners Act and the Area Commissioners Act both of 1962, which allow Regional and District Commissioners to detain a person without trial be repealed. The Government repealed the two legislations but the detention provisions were incorporated in the Regional Administration Act with the same effect!.

[30] *Julius Ishengoma Francis Ndyanabo v. The Attorney-General*, Civil Appeal No.64 of 2001 (Samatta, C.J., Kisanga, J.A., and Lugakingira, J.A) and appeal from High Court Miscellaneous Civil Cause No.2 of 2001 by Hon. Kyando, Ihema, J. and Kimaro, J. In the High Court decision, the Lady Judge Kimaro had delivered a dissenting opinion, which the Justices of the Court of Appeal concurred with.

[31] The *Written Laws (Miscellaneous Amendments) (No.3) Act* of 2002, which amends the *Elections Act* No.1 of 1985.

[32] Mwalusanya, J.L., (1998) "Checking the Abuse of Power in a Democracy: The Tanzanian Experience" appearing in Peter C.M., et al *Fundamental Human Rights in Tanzania* at page119.

[33] Ibid. pp. 120-125

this power must be controlled in order that it should not itself be destructive of the values it was intended to promote (Tumwine-Mukubwa, 2001). This is what is generally referred to as "constitutionalism." The constitution, which is an instrument of legitimising state power and ensuring sovereign existence as well as the exercise of that power must be created by consensus between the governing and the governed. Popular participation in constitution making has always been a bone of contention. Almost everyone now agrees that there is a need for a new constitution. What has not been agreed upon though is the mode of carrying out constitutional reforms. The factor of consent to be governed is an important one in the role that a constitution plays in resolving social conflicts. The process of constitution making must therefore be consultative and participatory enough so as to ensure high level of commitment to be governed, and governing according to, the constitution.

Abuse of power by the legislature has occurred where it has allowed itself to be used by the executive to pass laws for political expediency, contrary to the spirit of the Constitution, which enshrines the doctrine of separation of powers. We have witnessed a growing tendency by Parliament to pass various legislations and constitutional amendments that violate fundamental rights without critically debating them and sometimes even passing legislation ousting the jurisdiction of the courts – the so-called "paper tigers."[34]

The legislature in Tanzania has a history of curtailing fundamental rights by interfering with court decisions. For example in the case of *Reverend Mtikila v The Attorney-General* [35], the High Court declared that every citizen of Tanzania has the right to stand for an elective office as an independent candidate, that is, without political party sponsored and political parties have the right to call and hold public meetings without seeking permission from the District Commissioner. Immediately after the decision the an amendment was rushed through Parliament clarifying that "participation in the affairs of governing the country" which appears in the Constitution means doing so through a political party! The action of the executive to ignore the powers of the courts to strike out from a statute book a void law is rather disturbing and to a large extent undermines the efficacy of the judiciary as an independent and impartial arbiter of justice and protector of human rights. However, despite this gross interference by the executive with its powers, the

[34] *Lesinoi s/o Ndeinai v. Attorney-General* [1980] TLR 214. See also the case of *Attorney-General v. Lohay Akonaay and Joseph Lohay* [1994] 2 LRC 399.

[35] High Court of Tanzania at Dodoma, Civil Case No.5 of 1993 (unreported)

Judiciary in Tanzania has been quite active in upholding the rule of law and in particular by declaring certain laws unconstitutional.[36]

1.1.7 The Right to Petition the Government

The right to petition the government to vindicate one's human rights is clearly stipulated in our Constitution.[37] The Government can also be sued either under the omnibus provision of Article 26 of our Constitution, which requires every person to observe and abide by the Constitution and the laws of the country, and to take legal action to ensure its protection, or under Article 30(2). The constitutional provisions on "standing right" are crucial as a means of compelling public leaders to conduct their activities and behave in accordance with the known and established legal principles and norms. The basic law of the land and other written laws provides for how state power should be exercised. They power to deal with the subjects of the state – the people, is itself subject to legal control. If challenged the government should be able to identify the legal source of powers, which, furthermore must be such that they exist to protect, guide and provide adequate safeguards against the abuse of power for all the people in society.

The procedure for suing the government is provided in the *Government Proceedings Act*[38] and the *Basic Rights and Duties Enforcement Act*.[39] The former deals with purely tortuous or civil wrongs committed by the Government and its agencies against its citizens. The latter is more specific for human rights cases. According to Article 30(2) of our Constitution, any person alleging violation of his or her human rights may institute proceedings for redress in the High Court[40] according to the procedure contained in the 1994 *Basic Rights and Duties Enforcement Act.* According to the Act, human rights cases are to be filed only in the High Court and not any other court. And such cases have to be heard by a panel of three judges. Considering that Tanzania is a large country of about 940, 000 square kilometres and with a population of more than 30 million people, with only eleven High Court zones for the whole country, access to courts by victims of human rights violations becomes an

[36] See Prof. Chris Peter Maina treatise on *Human Rights in Tanzania: Selected Cases and Materials*, Koln, Germany: Rudiger Koppe Verlag, 1997

[37] Article 26 and Article 30(2) respectively

[38] Act No.16 of 1967 as amended by Act No.40/74; Act No.3/94

[39] Act No.33 of 1994

[40] Complains against violation of human rights can also be lodged with the Commission for Human Rights and Good Governance, whose work compliments that of the Judiciary and the procedure for lodging complaints is less cumbersome

extremely tricky business. A large part of the population will not therefore have access to justice, and even for those managing to have their cases filed in court, delay would be uncommon. Not only that, a person wishing to sue the Government is also required to follow the procedure provided under the 1967 *Government Proceedings Act*, as amended according to which the Government has to be given a notice of ninety days before being sued.

The procedure for suing the Government is very cumbersome. It is fraught with legal technicalities. Paradoxically in Tanzania it is much easier to hang a murderer than it is to adjudicate on a case of violation of human rights! For example, only one judge is required to decide a murder case and sentence a person to death but three judges are required to determine whether there has been a violation of human rights! Not only that, according to Article 30(5) of our Constitution and section 13 of the *Basic Rights and Duties Enforcement Act*, even if after the High Court has been satisfied that a law or an action has violated guaranteed human rights, it is not to pronounce so and declare such law or action void immediately. The Court is to require the violator to rectify the wrong within a specified time. It is only after the rectification or the expiration of the time so prescribed, whichever comes earlier, that the victim would be entitled to the remedy! This is clearly one of the most controversial provision in the Constitution and it provides further ammunition to critics of human rights in Tanzania who all along have been complaining that human rights guaranteed in the Constitution have been given by the "right hand and taken away by the left hand." Article 30(5) of our Constitution and section 13 of the 1994 *Basic Rights and Duties Enforcement Act*[41] therefore make the remedy for violation of human rights highly uncertain and even more unpredictable.

The powers of courts of law to pronounce laws and actions violating human rights void are limited by the very Constitution, which establishes the courts! The presumption is that, the Judiciary – an independent, impartial and unrepresentative body entrusted with powers to interpret and apply the law, will balance the various conflicting societal interests to ensure that "justice is not only done but seen to be done." But this has not always been the case as there have been some instances in the past where Parliament or the Executive has interfered with court decisions.[42]

[41] Act No.33 of 1994

[42] For example, the High Court at Dodoma in the case of Rev. *Mtikila vs. The Attorney General*, Civil Case No.5 of 1993 had declared that independent presidential candidates are allowed under the Constitution but the Government rushed through Parliament an amendment to the Constitution barring such candidates by imposing a condition that contestants for Presidential and Parliamentary seats have to be members of and nominated by political parties only.

Victims of violations of personal liberty in Tanzania would have a very hard time trying to bring court actions against state authorities for violation of their liberty. Perhaps the establishment of the *Commission for Human Rights and Good Governance*[43], will somehow alleviate the situation. The establishment of the Commission in itself was a milestone for the "Third Phase" Government, which has as its Vision respect for human rights and support for Good Governance Institutions (GGIs). The Commission, which is a constitutional and a statutory creature, has a much wider functions than courts of law as far as the violation of human rights and the contravention of principles of good governance are concerned. The Commission has powers to resolve disputes involving violation of any fundamental right in any manner including mediation, conciliation or negotiation.[44] Access to the Commission has also been made much easier as there is no legal technicalities required in the procedures for bringing complaints before it and any person or institution may bring complaints before the Commission on behalf of victims of violations of human rights.

[43] The Commission was established by the 13th Constitutional amendment in 2000 and the law creating the Commission, the *Commission for Human Rights and Good Governance Act* No.7 of 2001 became operational on the 9th of May 2001.

[44] Ibid. Section 28(4)

2.0 A HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT

2.1 Perspectives on and Controversies in Human Rights Discourse

In human rights theory, there are two types of human rights, those respected simply through non-intervention, such as the right to worship, and those that require resources in order to be realized such as the right to education, food, clothing and shelter. Some people question whether the latter are rights at all. So there is a sharp distinction between a narrow interpretation, for example, the right to obtain food unhindered through one's own efforts, and a broad interpretation such as the right to be supplied with food when one cannot obtain it.

In the human rights discourse rights are regarded as claims or entitlements that inhere in human beings simply because of their humanity. This is an appeal to a higher authority that, in the sense that human rights are not given by anybody, not even the government. Further to this is the argument that human rights belong only to individuals and not groups. The basic assumption in the human rights discourse is that human beings exist as isolated individuals who make claims against the state or possess entitlements in isolation.[45] This is the traditional notion of human rights, that they are protected only against the state. But human beings are social beings. They live in society and interact with each other as individuals or in groups.

The concept of human rights is fairly contentious in which different, and often contradictory, perspectives representing different interests in national and international society, seek dominance or hegemony.[46] The double standards in human rights discourse for example, and the unequal power relations which underlie it, is not fully appreciated if human rights are presented as *apolitical*, asocial and *ahistorical* values inherent in us all because we are human beings. The language of rights and different perspectives on human rights talks about "promoting", "protecting" but in whose interest and in which direction we are never told.[47] What we need to realize is that the values and principles that underlie the human rights discourse have been constructed historically in the course of social struggles.

[45] Shivji, I.G., (1998) "Human Rights and Development: A Fragmented Discourse" in Peter, C.M., et al *Fundamental Rights and Freedoms in Tanzania*, Mkuki na Nyota Publishers, Dar es Salaam, Tanzania.
[46] Ibid.
[47] Ibid.

One of the problems encountered in the human rights discourse is the belief that human rights are moral norms of universal value. This belief is rooted in the Enlightenment era and the pundits of the human rights discourse have remained faithfully committed to the concept of universal human rights. Humankind has lived through three “generations of rights” – that is, “first generation rights” - civil and political rights; “second generation rights” - social, economic and cultural rights; and “third generation rights” - such as development and environmental rights. There are even some calls that women's rights should be considered a "fourth generation of human rights."[48]

The global system of human rights consists of various components, three of the most important components of which are: the different levels at which rights are defined and protected; the various beneficiaries and guarantors of rights, and the methods and machinery to implement, supervise and enforce rights**.** The global system of human rights is constituted at the international, regional and national level. However, in our discourse emphasis is placed on the national level. This is the most important level for giving legal effect to human rights norms and can be done through constitutional guarantees of human rights by way of entrenched bill of rights and complimentary laws, and by giving effect to international or regional treaties.

The contemporary framework for human rights has produced a definition of a 'human' as one who embraces capitalist ideology and who no longer needs social and economic rights to be guaranteed by states.[49] Tanzania has, beginning the 90s, embraced the ideology of “free market” with all its individualistic tendencies and ramifications after having gone through decades of the policy of Socialism and Self Reliance. The basic ingredient of a free market ideology is the liberalization not only of the economy but also politics. Tanzania reverted back to multiparty politics in 1992 and liberalized its economy by embarking on attracting foreign investments and privatising non-performing public corporations. The efforts of the Government to liberalize the economy and politics were backed up by law. The 8th Constitutional Amendment ushered in multipartysim. This was later followed by the enactment of the *Political Parties Act* in 1992.

---

[48] Coomaraswamy, Radhika, Reinventing International Law: Women's Rights as Human Rights in the International Community, in *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA* London, Routledge, 1999, at page 167

[49] Otto, Dianne, “A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women”, in *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW VOLUME 1* Vol.1, Ardsley, Transnational Publishers Inc, 1999, at page 115

2.2 A Human Rights Based Approach: An Overview

The orthodoxy of the regime of human rights, endorsed numerous times, including in the World Conference on Human Rights in 1993, is that all types of rights – civil, political, cultural, economic and social – are interdependent and indivisible. The synthesis of rights implicit in "indivisibility and interdependence" is most fully elaborated in the Right to Development, with its location of the human being at the centre, and as the agent, of development. Neither economic nor political rights are complete by themselves; the realisation of human potential requires both – establish a balance between different, and what may seem competing, entitlements. There is a need to adopt a human rights based approach to development that is, taking people as being at the centre of development, and human rights being both the means and the end of development.

The human rights based approach gives priority to human rights over other claims, and sets them as the yardstick by which to judge the worth, and even the legality, of laws, policies and administrative acts. The rights based approach does not attribute responsibility to the impersonal and intangible market, but directly attributes responsibility to a variety of duty-holders.[50] Development policies and allocations of resources, which are not based on the framework of human rights, are unlikely to advance human welfare or enhance social stability. As it is, rights remain something lawyers' talk; and development remains something that economists and politicians talk about. What is required is captured in the rather ugly word "mainstreaming" discussed elsewhere in this paper. Human rights as a framework for poverty eradication must be used as a measure of performance and as a mode of critique, of all policies and actions. Human rights based approach to justice – an approach to justice that rallies on a bedrock of rights, alerts us to the real purpose of development, which is the achievement of all aspects of human development – the protection of entitlements to work, food, health care, literacy, participation, a life in freedom, association and solidarity.[51] These we cannot claim to have been very successful.

2.3 The Genesis of Human Rights in Tanzania: A Brief Account

When Tanganyika gained her independence in 1961 from the British colonizers, it was bequeathed a "Westminster model constitution" with all semblances of liberal

[50] CHRI Millenium *Report, Human Rights and Poverty Eradication* (2001) at page 44

[51] Ibid. at page 40

democracy but without a bill of human rights, which would have guaranteed personal liberty and freedom. This is hardly surprising for a country like Britain, which itself had no tradition of cataloguing human rights in a bill of rights or even a written constitution. The Preamble to the 1961 Constitution however, recognized certain ideals such as the inherent dignity and equality and inalienable rights of all members of the human family as being the foundation of freedom, justice and peace and mentioned certain rights including freedom of conscience, expression, assembly and association and the need to protect them in a democratic society. During the colonial and the post-colonial period preceding 1984, when a Bill of Rights and Duties was incorporated in the country's constitution personal liberty and freedoms were being and are still protected under other written laws such as the *Penal Code.*

Human rights were given an international stature in the aftermath of the Second World War in 1948 when the United Nations adopted the Universal Declaration of Human Rights, which was not legally binding on States. Later in 1976 following the adoption by the international community of the International Covenant on Political and Civil Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), human rights became part of the binding international human rights law. Tanzania being a member of the United Nations and having ratified both the ICCPR and the ICESCR has an international obligation to promote and protect minimum international human rights standards incorporated in the two instruments, which together with the Universal Declaration of Human Rights (UDHR) constitutes what has come to be regarded as the International Bill of Human Rights.

Personal liberty and freedoms became part of guaranteed human rights in Tanzania only in 1984 when the Bill of Rights and Duties was incorporated in the country's constitution for the first time. The adoption of the Bill in itself was another great milestone in the Government's efforts to promote and respect fundamental rights and freedoms as an avenue for development. The Bill was however, suspended from operation for three years apparently because of what the Government said was to allow itself "to clean its house" by ensuring that all the laws violating human rights have either been amended or repealed to conform to the new yardstick for social justice brought about by the entrenched basic human rights. The Bill became enforceable three years later, which meant that now the "people" could bring actions against the State for violations of their basic rights. It is worthwhile to note however, that a Bill of Rights is about minimum rights; it is not intended to suggest that other

rights do not exist. So the legal right to protection of personal liberty under the Penal Code and other laws of the country continue to apply.

Making an assertion that the language of human rights permeated our legal tradition almost more than thirty years after the Universal Declaration of Human Rights and twenty years after independence does not mean that Tanzania did not have rights somehow resembling human rights. The 1965 Interim Constitution had some rights that were stated as ideals in the Preamble[52], and the TANU Constitution, which was scheduled to the national constitution, had some provisions guaranteeing individual rights similar to those appearing in the Preamble.[53] Tanzania got her first permanent constitution in 1977 following the merger of TANU and ASP to form CCM, but without a Bill of Rights and Duties. However, after 1984 religious liberty became part of the basic human rights guaranteed in our Constitution and enforced by courts of law.

A human right when it is entrenched in a Bill of Rights in a country's constitution carries with it both a *positivus* and *negativus* status. It gives the people the right to protect their religion against encroachment by the state. The right is however, limited only to the profession, practice, worship and propagation of religion, things, which are considered to be the private affair of citizens. It means that the conduct and management of religious communities are not part of the functions of the State (Makaramba, 1991). This does not mean that the State cannot have partnership with religious organization in bringing social development by allowing them to make some contribution in the provision of social services such as education, health care and water services. The state for example can do this by granting tax exemption to not-for-profit religious organizations engaged in social and development projects in the country.

2.4 "Domesticating" International Human Rights Standards

Although the Government of Tanzania has signed and ratified quite a good number of human rights instruments, it has not been able to domesticate them all fully. Furthermore, women, children, persons with disabilities, indigenous peoples and minorities have been left out of the human rights protection mechanisms. The

[52] In the case of *Hatimali Adamji v. E.A.P.& T Corporation* [1973] LRT 6, Biron, J., stated that, "the preamble to a constitution does not in law constitute part of the law of the land."

[53] In the case of *Thabiti Ngaka v. Regional Fisheries Officer (Morogoro*) [1973] LRT 24 the High Court held that the party (TANU) Constitution, which was scheduled to the Interim Constitution, was part of the constitution.

Government of Tanzania has to a certain extent managed to localize and apply international human treaties at the national level such as the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child.* Recently, the National Assembly ratified the two Optional Protocols to the *Convention on the Rights of the Child* and the *African Charter on the Rights and Welfare of the Child* (ACRWC). However, still there are a number of problems and issues to be tackled with regard to women and children's rights. The normative and universal standards of these two Conventions have been accepted, but have yet to be fully translated to the specific social and cultural context of our country. It seems as if our policy and decision makers have "pleaded for a sensitive approach to the understanding of women and children's rights within the context of legal pluralism, cultural relativism and customary and traditional imperatives."[54] Consequently, women in particular continue to be regarded as "objects" and not "subjects" of rights[55] despite great strides, which have been made both at the international[56] and national level to protect their rights.

Together with a liberalized economy, respect for and preservation of human rights is also an important ingredient of a free market economy. It is now close to eighteen years since a Bill of Human Rights and Duties was incorporated in our Constitution.[57] Despite this it seems as if guaranteeing human rights in the Constitution has frozen them as enforceable rights of individuals so as to stabilize the *status quo.*[58] It is also true that "the most elegantly drafted human rights are worth nothing if only the wealthy can enforce them or if the remedies are subject to inordinate delays."[59] We say this because our legal system is by and large still inaccessible to many particularly the poorest of the poor especially those in the rural

[54] Ncube, Welshman, "Prospects and Challenges in Eastern and Southern Africa: The Interplay Between International Human Rights Norms and Domestic Law, Tradition and Culture", in *LAW, CULTURE, TRADITION AND CHILDREN'S RIGHTS IN EASTERN AND SOUTHERN AFRICA* Brookfield, Vermont: Ashgate, and Aldershot, U.K., Dartmouth, 1998, at page 1

[55] Mtenget-Migiro, Rose, "Legal Development on Women's Rights to Inherit Land under Customary Law in Tanzania", Vol.24 No.4 *Verfassung und Recht in Ubersee*, 1991, p.362

[56] *Beijing Declaration and Platform for Action*, to which Tanzania ascribes fully and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which Tanzania has ratified.

[57] Peter, C.M., "Five Years of Bill of Rights in Tanzania: Drawing a Balance Sheet", in Vol.4 Part 1 (1992) *African Journal of International and Comparative Law* (1992), London, U.K. at pp.131-167 and also Vol. 18 No.2 of *Eastern Africa Law Review* (1991) pp.147-226

[58] Mughwai, A, (2002) "Forty Years of Struggles for Human Rights in Tanzania: How far have we travelled?" in Mchome, S.E. (ed.) *Taking Stock of Human Rights Situation in Africa*, at p.49

[59] Nelson Mandela, former President of the Republic of South Africa addressing a human rights education workshop in Durban in September, 1994

areas; legal services are unaffordable by the majority of the population; the system is highly inefficient; and is to a large extent tainted with corruption.[60] Often, however, the existence of a law that guarantees fundamental human rights is not enough if that law does not also provide all the legal powers and institutions necessary to ensure the effective realization of those rights. It is important for Tanzania, which is committed to human rights, to establish and support a national infrastructure, including relevant institutions, which can promote and protect human rights.

The Government of Tanzania has adopted a policy on women development,[61] created a ministry for women and children affairs[62] and passed some gender-based laws geared specifically at addressing sexual abuse[63], property rights[64] and other forms of discrimination.[65] But still there are a number of Tanzanian laws, which continue to discriminate against women.[66] One case worth mentioning in this regard is the question of nationality and citizenship laws. Citizenship laws in Tanzania deny citizenship to children born in wedlock to women citizens of Tanzania while granting it to children born to male citizens and those born out of wedlock to citizen mothers. So far the constitutionality of citizenship laws has not been challenged in courts in Tanzania. However, the jurisprudence emerging from neighbouring countries might persuade our courts in taking a more active role in interpreting the equality clauses in our Constitution creatively.

In the famous case of *Unity Dow v. Attorney-General of Botswana*[67], Unity Dow successfully challenged provisions of the Citizenship Act of Botswana that denied citizenship to children born in wedlock to women citizens of Botswana, while granting it to children born to male citizens and those born out of wedlock to citizen

[60] *Presidential Commission on Corruption*, the "Warioba Report" 1999
[61] The Ministry prepared and adopted two policies – the *National Policy on Women Development* (1992) and the *National Policy on Women Development and Gender* (NPWD) (2000). The former policy has been superceded by the latter.
[62] Ministry of Community Development, Women Affairs and Children.
[63] The *Sexual Offences (Special Provisions) Act*, 1998 adopts a new definition of rape with enhanced punishment; creates the offence of "statutory rape" and criminalizes female genital mutilation (FGM).
[64] The *Land Act* No.5 of 1999 and the *Village Land* Act No.5 of 1999 state categorically that women and men have equal rights to property.
[65] The 13th Constitutional Amendment of 2000 incorporated "gender" as a ground for discrimination. Similarly the Land Act of 1999 states categorically that women have equal rights as men in owning land.
[66] The *Local Customary Law (Declaration) Order*, 1963, which denies property rights to women, the *Law of Marriage Act* of 1971, which practically legalizes "child marriages" because it allows marriages of girls fourteen years of age.
[67] High Court and Court of Appeal (Botswana), affirmed by the Court of Appeal of Botswana and reported in [1992] *Law Reports of the Commonwealth* at p. 623. See also the Zambian case, that of *Nawakwi v. Attorney General of Zambia*[67][1993] 3 *LAW REPORTS OF THE COMMONWEALTH* 231-239 (Zambian High Court where the petitioner successfully challenged the requirements that as an unmarried woman she had to swear affidavits and get the father's permission in order to have her children included on her passport. See also the *Kohlhaas v. Chief Immigration Officer, Zimbabwe SOUTH AFRICAN LAW REPORTS* 1142-1149, 1998 (6) BCLR 757 (Zimbabwe Supreme Court), which involved a female citizen of Zimbabwe whose foreign spouse was denied a work permit. See also the case of *Salem v. Chief Immigration Officer, Zimbabwe, and Another*, 1995(4) *SOUTH AFRICAN LAW REPORTS* 280-284 (Zimbabwe Supreme Court).

mothers. At both the High Court level and on appeal, the Court used international human rights instruments as an aid to constitutional and statutory interpretation. The Court of Appeal, in particular, discussed the use of international instruments in interpreting difficult provisions of the Constitution and their status as the backdrop of aspirations and values against which the Constitution of Botswana was drafted. The Justices of Appeal also noted that Botswana, as one of the few liberal democracies in Africa, couldn't insolate itself from the progressive movements going on around it.

2.5 Poverty Alleviation Strategies as a Development "Project"

The Government of Tanzania has undertaken various initiatives towards poverty reduction and attainment of social and economic development. Towards this end the Government adopted the Vision 2025, which stipulates the vision, mission, goals and targets to be achieved with respect to economic growth and poverty eradication by the year 2025. To operationalize Vision 2025, the Government formulated the National Poverty Eradication Strategy (NPES), which provides overall guidance and framework for coordinating and supervision of the implementation of policies and strategies of poverty eradication.

The causes and consequences of poverty and prescriptions to overcome it has become "another project" for the International Financial Institutions. The Poverty Reduction Strategy Paper (PRSP), like the previous structural adjustment and stabilization policies (SAPs) of the 1970s and 1980s, is yet another World Bank conditionality for developing countries. The Government of Tanzania prepared and initiated its Poverty Reduction Strategy (PRS) in 2000, which is in the third year of implementation. The process of preparing and implementing the PRS however has been criticised for being non-participatory and top down. Furthermore, although the "people" are central focus in the PRS, its content lack a human rights based approach. The PRSP was eventually expected to contribute to the longer-term aspirations of Vision 2025, which are broadly in line with the Millennium Development Goals. The PRSP aims to halve the proportion of the population living below the poverty line by 2010, both for the food and basic needs poverty lines and both in urban and rural areas (URT, *Poverty and Human Development Report*, 2002 at p.7).

What is obvious is that the ranks of the poor or economically or socially marginalized in our society have swollen. They are also the least able to enjoy civil

and political rights. They have little physical security; cannot influence public opinion or policies; are unable to have access to the law or the courts to protect themselves from exploitation or wrong dealing; and have little prospects of participation. Even if when they are apprehended for breaching the law they face the risk of dying before they access justice.[68] The very poor amidst us have very clear ideas of what amounts to good governance and a good society, but they don't think that anyone is listening. For them human rights can form the basis of social and political mobilisation. For communities, which have been deprived of the basic necessities of life, the appeal of the idea of entitlements to a decent life is tremendous, and empowering.[69] The idea of economic, social and cultural rights can play a legitimising role for claims to equal opportunities and the basic necessities of life. Far from being a ragbag of miscellaneous interests, human rights constitute a coherent, complex system, grounded in these universal values.[70] At the core of the consensus on rights is the agreement that the purpose of human rights is to protect human dignity, even if there are different views on the source of that dignity. A human rights approach keeps human dignity in the forefront, and since dignity is so closely connected with the satisfaction of the basic necessities of life and autonomy, it is inevitably concerned with the causes and the eradication of poverty.[71]

But one question we have to ask ourselves is this: respect, fulfilment, promotion and protection of human rights - whose duty? The first duty lies at the international level – the moral and legal obligation of the global society to ensure a just and equitable social, political and economic order in which all people and persons can live in dignity. The second level of the duty is at the national level – the duty of the state to ensure that human rights are enjoyed fully without hindrance and that the policy and legal environment is conducive for the fulfilment and enjoyment of those rights. Tanzania is still a very poor developing nation. Human rights law alone cannot reverse the traditional subordination of nations by other nations because it involves a dialectical relationship with politics, economics, and culture. The promotion and protection of human rights is therefore intrinsically linked to the development debate and may very well be the decisive factor not only in achieving a radical

[68] The Mbarali incident of suffocation to death of around 17 remandees who were waiting for their cases to be heard but there was no magistrate available. The police custody in which they were remanded had a capacity of only about 44 remandees but at the time of the incident it was packed with about 120 remandees! The issue of congestion is even more worse in the prisons, most of which were constructed during the colonial period with a capacity of about 21,000 inmates but currently housing double this number.
[69] Ibid. at page 40
[70] Ibid. at pages 43
[71] Ibid. at page 42

transformation in the role of nations but in altering the global inequities of the development crisis which now faces the world community.[72]

2.5.1 The "Feminization" of Poverty

Structural adjustment and stabilization policies (SAPs) undertaken in developing countries to receive condition-based loans from the World Bank and the International Monetary Fund (IMF) have exacerbated conditions of poverty and deprivation for large sections of the population. These programmes have had a disparate impact on women, which has resulted into the unacceptable "feminisation of poverty" in many countries with economies in transition.[73] The disproportionate cost of adjustment borne by women violates their right to development guaranteed in national and international conventions, and makes these economic reforms unsustainable in the long run. Approaches utilizing good governance and human rights principles to achieve gender justice and equality in economic restructuring have not yet had the intended impact of alleviating poverty particularly among the poorest of the poor and the most vulnerable members of society such as women, children and the youth.[74] "Poverty alleviation" interventions can only be successful if a gender dimension is integrated in all related programmes, that is, to have an equitable and gender-responsive development. A society enmeshed in abject poverty cannot achieve its target of protecting and promoting human rights because poverty itself is the greatest violation of human rights. We as developing nations need first of all to address the question of poverty reduction seriously so as to give meaning to the enjoyment of human rights.

2.5.2 Gender Mainstreaming Development Processes

The Government of Tanzania through the Civil Service Reform Programme has tried to mainstream gender in the policy and law making processes. However, this has not been entrenched fully and appreciated. There is still a need therefore for an effective institutionalisation of "gender mainstreaming" in all the development processes, policies and programmes at all levels. According to the Agreed Conclusions (1997) of the UN Economic and Social Council, "*mainstreaming a gender perspective is the process of assessing the implication for women and men of any planned action, including legislation,*

[72] D'Sa, Rose M, *Women's Rights in Relation to Human Rights: A Lawyer's Perspective*, 13 COMMONWEALTH LAW BULLETIN, (1987) at page 666.
[73] Sadasivam, Bharati, "The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda", 19 *HUMAN RIGHTS QUARTERLY*, (1997) at page 630.
[74] Ibid. at page 635.

policies or programmes in any area at all levels." It is a strategy for making women's as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality. Equality between women and men is first of all a matter of human rights and social justice. Although the Government of Tanzania has made a tremendous effort in gender mainstreaming various sectors still it leaves a lot to be desired as there are certain areas particularly in the administration of justice where gender inequality is vividly clear.

2.5.3 Taking Economic, Social and Cultural Rights Seriously

Tanzania has yet to give economic, social, and cultural rights a legal force. The right to education, health and social welfare are found in the unenforceable part of the Constitution.[75] It means that no one can go to court and claim these rights against the Government in case of violation.[76] Articles 22 and 23 of the Constitution of Tanzania protect the right to work and equal pay but does not guarantee work to anyone. Similarly, the right to property is protected under Article 24 of the Constitution but the state can still deprive a person of his or her property subject to a "fair and adequate compensation."[77] If this is to happen there needs to be a change in the paradigm for evaluating compliance with the norms established in the 1966 *International Covenant on Economic, Social and Cultural Rights*, which Tanzania has happily ratified.

The International Covenant on Economic, Social and Cultural Rights adopts the "progressive realization", which is the current international standard used to assess state compliance with economic, social, and cultural rights. This standard is inexact and renders these rights difficult to monitor. There is a need to invoke a "violations approach" to monitoring compliance with economic, social and cultural rights, which focuses on three types of violations: (1) violations resulting from actions and policies on the part of governments; (2) violations related to patterns of discrimination and (3) violations taking place due to a state's failure to fulfil the

[75] Part II of Chapter One "Fundamental Objectives and Directive Principles of State Policy" under article 11.
[76] Article 7(2) states that "The Provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter."
[77] Article 24(2)

minimum core obligations contained in the Covenant.[78] There remain different interpretations of the importance of each kind of right, just as there are different visions of the good governance or society. These competing paradigms sometimes make the whole terrain seem contested, largely because the general recognition of the interdependence and indivisibility of human rights has in practice failed to give economic, social and cultural rights the same status and institutional support as certain civil and political rights because of the power of vested interests.[79]

One of the thornier questions in the promotion and protection of human rights is the correlation between rights and duties. Adding the notion of duties to human development thinking connotes that not only human beings have rights, but also that others have the duty to respect, fulfil and promote those rights. To say that there are duties (responsibilities) has the corollary that if the rights have not been achieved, then culpability lies somewhere.

The *African Charter on Human and People's Rights* (the Banjul Charter) recognizes individual rights as well as group rights and duties towards society. Similarly, the Constitution of the United Republic of Tanzania, guarantees individual rights and freedoms and emphasizes on duties.[80] The concept of fundamental rights and duties enshrined in the Banjul Charter and the Constitution of Tanzania respectively is clearly a departure from the Western concept of human rights, which is basically constructed on "the philosophical foundation of the human being as an individual, and not as a social being."[81]

2.5.4 Fundamental Objectives and Directive Principles of State Policy

Unfortunately, fundamental objectives and directive principles of state policy, though enshrined in our Constitution, they are not enforceable.[82] Indian courts however, have taken up some broader socio-economic and converted them into legal issues by expansive construction of human rights and Directive Principles of State Policy provisions in the Indian Constitution – what Indian academics and activists call "social action litigation."[83] The Constitution of Tanzania however, obliges state

[78] Chapman, Audrey R, *A* "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights", 18(1) *HUMAN RIGHTS QUARTERLY*, 23-66 (1996).
[79] Ibid.
[80] Art. 25, 26, 27, 28 and 29 respectively,
[81] Shivji, I.G., loc. cit.
[82] Fundamental objectives and directive principles of state policy appear in Part II of Chapter One of the Constitution.
[83] Cottrell, Jill, "Third Generation Rights and Social Action Litigation" in Adelman, Sammy and Abdul Paliwala (eds.), *Law and Crisis in the Third World*, London: Hans Zell, 1993, p.11 and Baxi, Upendra "Judicial Activism, Legal Education and Research in India – I", *Mainstream* (New Delhi) 12th February, 1966, p.12.

authority and all its agencies to direct the policies and programmes towards ensuring among other things that, the use of national resources places emphasis on the development of the people and in particular the eradication of the three national enemies namely, poverty, ignorance and diseases.[84] Of recent a fourth enemy has emerged – international debt, which has placed an enormous burden on the government. A good part of our national wealth is being channelled towards servicing this debt instead of being utilized in the provision of essential public services such as education and medical care, thus exacerbating our poverty as a nation.

[84] Article 9(i) of the Constitution

3.0 CORRUPTION AND LEADERSHIP ETHICS

3.1 Introduction

In the last two decades the Government of the United Republic of Tanzania (URT) has embarked on far reaching economic and political reforms. The public sector and civil service has been re-organized and new structures of governance have been put in place. As part of the efforts to improve the structures of governance the URT established the Prevention of Corruption Bureau (PCB) to reduce and, if possible eradicate corruption.

The new strategy for good governance, national prosperity and honour envisaged for Tanzania and contained in various documents including the Development Vision 2025, the Public Service Reform Programme, the Local Government Reform Programme and the Poverty Reduction Strategy Paper demand a transformed public service, which is truly transparent and accountable to the public with zero tolerance for corrupt behaviour. One of the anticorruption strategies adopted by the URT was the adoption of a Code of Conduct for Public Leaders requiring declaration of their assets and limiting the value of gifts they can receive. In 1999 the Civil Service Department in the Government of Tanzania issued a Code of Ethics and Conduct for the Public Service and in 2002 the Public Service Act No.8 was enacted.

In addition systems of revenue collection and reformed procurement procedures have been strengthened with the enactment of the Tanzania Revenue Act, which established the Tanzania Revenue Authority (TRA) with mandate in Zanzibar and the Public Procurement Act and the Financial Administration Act. Despite all these efforts corruption is still endemic.

3.2 From the Warioba Report and Beyond: The Corruption Saga Continues

3.2.1 Introduction

The 1996 *Report of the Presidential Commission of Inquiry Against Corruption* (The Warioba Report) made very detailed evaluations of the Government delivery systems and made a number of recommendations on how to fight corruption in Tanzania. Most if not all of the recommendations in the Warioba Report are as relevant today as they were then. The Warioba Report outlined a number of causes of corruption in the 1970's and 1980's. These still hold true today. They include poor

implementation of laws and regulations; administrative laxity; bureaucracy in accessing public services; low salaries; lack of "political will" and managerial weaknesses of state organs; closeness between corrupt businessmen and the leaders; lack of transparency in the economy; erosion in the integrity of leaders; changes in the country's democratic structure and the emergence of competition in conspicuous consumption. (Ibid.pp.6-7).

On leadership and ethics the Warioba Report made some very valid and pertinent comments in so far as good governance is concerned. The Report noted that although the poor state of our economy and low salaries could be a source of corruption, but the greatest source is laxity of leadership in overseeing the implementation of established norms. The absence of clear guidelines on accountability of leaders in their respective positions – be it in political leadership or senior administrative or management positions is part of that weakness. The Report emphasized that one important condition of good management systems is that there should be clear operational guidelines to enable leadership to take quick and just decisions. Moreover, good management systems of any institution, which caters for the public, must be easy to understand and implement and therefore must not be a burden on the ordinary citizen. The greatest challenge for the Revolutionary Government of Zanzibar and the people of Zanzibar is therefore to ensure leadership is entrusted on people who believe in and respect ethical standards.

The Government of Tanzania also established a watch body - the Secretariat for Leadership Ethics vide Article 132 of the Union Constitution and in 1995 it enacted the Public Leadership Code of Ethics Act No.13. Under the Act, the Ethics Commissioner has mandate to enforce the code of ethics, which apply to a specified group of public leaders and politicians.

3.2.2 Legal Aspects of Corruption

The Constitution of Tanzania enjoins all state agencies to direct their policies and programmes towards ensuring that all forms of injustice, intimidation, discrimination, **corruption**, oppression and favouritism are eradicated.[85] The anti-corruption drive in Tanzania began way back in 1940 when the British colonial state enacted the first anti-corruption legislation for the Territory.[86] Ten years after

[85] Article 9(h) of the *Constitution of the United Republic of Tanzania* of 1977
[86] The *Prevention of Corruption Ordinance*, Cap. 400

independence a new law on the prevention of corruption was promulgated, the *Prevention of Corruption Act*.[87] This Act is the main legislation on corruption in Tanzania. It does not define "corruption" directly but it creates two offences, "corrupt transactions" and "being in possession of property corruptly acquired" respectively. Corruption is classified as an "economic sabotage" offence under paragraph 2 of the first schedule to and sections 56(2), and 59(2) of the *Economic and Organized Crime Control Act*,[88] and carries a maximum jail term of fifteen years.

In its drive to fight corruption, the Government established the Prevention of Corruption Bureau (PCB) vide the *Written Laws (Miscellaneous Amendments) Act*[89], amending the *Prevention of Corruption Act* of 1971. The PCB replaced the Anti-Corruption Squad, which had been established under the 1971 corruption law. The PCB consists of a Director-General, who is appointed by the President and a number of Directors and other officers. The PCB is a public department under the control and supervision of the President with three basic statutory functions:
(1) to take necessary measures for the prevention of corruption in the public, parastatal and private sectors;
(2) to investigate and, subject to the directions of the Director of Public Prosecutions, to prosecute for offences involving corrupt transactions;
(3) to advise the Government and other parastatal organizations on ways and means to prevent corruption.

The PCB has regional offices in all of the twenty regions of Mainland Tanzania. The Act establishing PCB does not extend its operations to Zanzibar. Save for the Union public leaders and public officers in Union offices and parastatals organizations, the PCB does not have legal powers to deal with corrupt public officials in the Zanzibar government or its corporations. Zanzibar has a unit called *Kikosi Maalum cha Kuzuia Magendo* (KMKM) – Special Anti-Smuggling Squad – which was established to deal specifically with clove smuggling.

The passing of the anti-corruption legislation and the creation of an anti-corruption institution were high score marks for the Government in fulfilling the quest for good governance particularly ain so far as the issue of integrity and transparency are concerned. The presence of a Prevention of Corruption Bureau (PCB) in the highest

[87] The *Prevention of Corruption Act*, No 16 of 1971. It repealed and replaced the *Prevention of Corruption Ordinance* of 1940. The Act has been amended several times by: Act No.23 of 1973; Act No. 13 of 1990; Act No.27 of 1991; Act No.1 of 1993; Act No.5 of 1995; Act No.9 of 1996
[88] *Act No.13 of 1983* as amended
[89] Act No 27 of 1991

office in the land - the President's office[90]; the fact that the PCB has same powers as the police in terms of arrest, seizure, investigation and prosecution of corruption cases[91]; the fact that the PCB deals with both public and private sector corruption and the fact that the PCB and Police assist the Ethics Tribunal with its investigation in matters of breach of the Public Leaders Ethics Code[92] are strong points for the Government efforts to wage war against corruption. However, there are a number of problems, which stand in the way of the war on corruption. These include but are not limited to problematic legal provision such as the Criminal Procedure Act, 1985, under which the DPP's consent is required before prosecuting corruption cases.[93] This may lead to unnecessary delays and bureaucratic red tape. Furthermore the DPP does not have direct control over Public Prosecutors (police) and PCB prosecutors. The wide powers of the DPP to commence, or even stop criminal prosecutions, by entering *nolle prosecui* could slacken the war against corruption.

Most instances of corruption concerns abuse of power by people in leadership position. The Ethics Secretariat, which deals with certain categories of public leaders, does not have powers to take legal action against leaders found to have breached public leadership ethics law by engaging in corrupt practices. The presence of parallel institutions to investigate allegations of corruption against public leaders also slows down the speed for processing corruption charges. The Police, the PCB and the Ethics Tribunal of the Ethics Secretariat each have a role to play in that process. It seems also that there is generally lack of effective enforcement of the existing corruption laws due to financial constraints, inadequate manpower facing the PCB and political manipulations.[94] Consequently, only the "small fish", involved

[90] Section 2A(1) of Prevention of Corruption Act, 1971 inserted by the *Written Laws (Miscellaneous Amendments Act* No.27 of 1991 states that "The President shall establish the Prevention of Corruption Bureau which shall consist of a Director-General, a number of Directors and other officers as the President may determine."

[91] Section 2A of the *Written Laws (Miscellaneous Amendments) Act* No.31 of 1997 conferred upon the members of PCB similar powers as those of police officers of or above the rank of Assistant Superintendent of Police and made the provisions of the Police Force Ordinance conferring upon police officers powers for prevention, investigation and prosecution of offenses; of arrest, entering premises, detaining suspects and seizure of property applicable to PCB members.

[92] Article 70(3) of the Constitution directed that "Parliament may enact legislation for the purposes of making provisions designed for the protection of the statement of property submitted by a Member of Parliament in accordance with the provisions of this Article and to ensure that persons unauthorized or not concerned do not get the opportunity to see the statement of property or to know its contents." According to section 21(2) of the *Public Leadership Code of Ethics Act* No.13 of 1995, the register of property is available for inspection by members of the public at any reasonable time.

[93] Section 2A(10) of the *Written Laws (Miscellaneous Amendments) Act* No.31 of 1997 stipulates that notwithstanding section 99 of the Criminal Procedure Act, 1985 relating to private prosecution, no prosecution against any person for a corruption offense shall be instituted except with consent in writing of the Director of Public Prosecution (D.P.P)

[94] The "Warioba Commission" unearthed a number possible of corruption channels and even mentioned the responsible institutions but so far only one case has been taken to court, involving Naila Kiula, a former Minister of Works together with some few senior officials in that Ministry. Could this be a case of the "sacrificial lamb?" After a long and ardous court

in petty corruption are being caught and prosecuted but not the "sharks" in big corruption scandals. The legalization of "takrima" (political hospitality) in the electoral laws has eroded further the idea of rule of law and good governance.

3.2.3 Presidential Powers and War against Corruption

Wide constitutional powers conferred on the President of hiring and firing public servants for "public interest" could be invoked to deal with corruption cases lacking strong "evidence" to secure a conviction in a court of law. Last year the President used these powers to retire a number of "corrupt" TRA officials in the "public interest." A public official retired on this ground normally looses all his or her retirement benefits.

The President also has powers of prerogative of mercy. Under article 45 of the Constitution the President can pardon "any person convicted by a court of law of any offence." These powers can be misused as was the case during the Second Phase government, when one Azizi, an Air Tanzania pilot who had been netted at the Dar es Salaam International Airport trying to smuggle about 70 grams of gold out of the country was "pardoned" by the President on the basis of a plea made by his mother to the President on the ground that his mother was too old to look after herself and Azizi was the only hope for her. This case was interesting because the President exercised his powers wrongly because Azizi had not yet been "convicted by a court of law" to qualify for presidential mercy as required under the Constitution.

3.2.4 The Judiciary and Corruption Cases

Although courts generally have jurisdiction in corruption cases, an election court can only certify that a person has been found guilty of "corrupt practices" to the Director of Elections. It is left upon the DPP to institute criminal proceedings if he wishes. In corruption cases the most problematic thing is the adduction of evidence to prove such cases. Evidence adduced in court concerning corruption cases revolves mainly around the issue of the credibility of the witnesses. The difficulty in coming by credible evidence arises from the secretive nature of corrupt transactions. In most cases PCB officials are forced to lay traps in order to catch the culprits and this kind of evidence brings controversy in court. The Judiciary itself featured high in the Warioba' Report as one of the "most corrupt" institutions in the country.

---

sessions the Resident Magistrates Court at Kisutu in a very lengthy judgement (about 160 pages!) finally acquitted Mr. Kiula of all corruption charges he was facing and set him free on the 17th April 2003.

3.2.5 The Role of the Police in Corruption Cases

The Police assist PCB officers with the investigation of allegations of corruption. Public Prosecutors who normally prosecute cases in subordinate courts except in primary courts are police officers appointed by the DPP. The police therefore arrest, investigate and prosecute cases. State Attorneys from the Attorney-Generals Chambers handle criminal cases in superior courts. The law also confers PCB officials with "police" powers and can therefore investigate and prosecute corruption cases in court but under the direction of the DPP. Quite often corruption cases are lost in courts over lack of adequate evidence as a result of poor investigative and prosecutorial techniques. Apart from the fact that police officers are not adequately trained to handle graft cases, they themselves have been accused in the Warioba Report as being corrupt.

*3.2.6 "***Takrima***" and Electoral Corrupt Practices*

Electoral corrupt practices[95] became high on the agenda in the immediate past of the 1995 general elections. Before the second general multiparty elections in 2000 the *Elections Act*[96] was amended to exempt certain matters from "corrupt practices." According to electoral laws in Tanzania, "an act of a candidate, his agent or another person done in good faith as a formal or traditional hospitality" and "normal or ordinary expenses spent in good faith by a candidate, his agent or another person in furthering the candidate's election campaign", no longer constitute "corrupt practices"[97] for election petition purposes. This is clearly legitimizing "political corruption" and does not speak well of good governance or rule of law either.

Previously the *Elections Act* had exempted persons found guilty of "corrupt practices" where the DPP had not taken up the matter. Parliament had deliberately retained the reference to "illegal practice" in section 114 of the Election Act to empower the election court to deal with persons found guilty of that offence where the Director of Public Prosecutions did not institute criminal proceedings. During the 1995 first General Multiparty elections corrupt practices became rampant and a

[95] *The Prevention of Corruption Act* No.20 of 1990 which was repealed by the *Written Laws (Miscellaneous Laws) Amendment Act* No.5 of 1995 had created and made provision for dealing with offences of electoral corrupt practices such as bribery, treating or undue influence which attracted a fine of 20,000/- or a jail term of not less than five years or both. Electoral corrupt practices were removed from the corruption laws by the *Written Laws (Miscellaneous Amendments) Act* No.5 of 1995

[96] Act No.1 of 1985 as amended by the *Electoral Laws (Miscellaneous Amendments) Act* No. 4 of 2000

[97] "Treating" had been defined under section 9D of the Prevention of Corruption (Amendment) Act No.20 of 1990 as including expense of giving or providing food, drink, entertainment for the purpose of influencing people to vote or refrain from voting. This Act was repealed by the *Written Laws (Miscellaneous Amendments) Act* No.5 of 1995, which deleted in its entirety the part dealing with "electoral corrupt practices" from the corruption laws.

number of election petitions were filed in courts, one such petition being that of *Joseph Warioba vs. Stephen Wasira.*[98]

During the 1995 first general multiparty elections in Tanzania, Mr. Stephen Masatu Wassira, was elected Member of Parliament for Bunda constituency, but subsequently his election was nullified by the High Court on the ground that Mr. Wassira had committed an act of corrupt practice. The Court however, declined to certify so to the Director of Elections in terms of section 114 of the Elections Act because "corrupt practice" was not made the subject for certifying to the Director of Elections under the section. Section 114 provided for certifying to the Director of Elections the finding of illegal practice only, not corrupt practice.

The Court of Appeal of Tanzania construing section 114 of the *Elections Act*, 1985 was satisfied that the omission by Parliament to re-introduce corrupt practices in the law was through inadvertence and interpreted section 114 as including or extending to corrupt practices. Following the decision of the Court of Appeal in *Warioba's case*, the Government rushed an amendment through Parliament to "restore" corrupt practices as a ground for certifying to the Director of Elections by courts upon finding a person guilty of that offence where the Director of Public Prosecution did not institute criminal proceedings.

The amendment to the election law also allowed, "canvassing", that is, door-to-door election campaigns, a sure way of ensuring that "treats" reach the would be voters thus legitimising what previously was considered an illegal practice. Furthermore, the law has also restricted the category of people who can contest election results and introduced a requirement to deposit a "security for costs" of Tshs. 5,000,000/- before a petition can be filed in court. This provision was a subject of a human rights case filed by Ndyanabo in the High Court of Tanzania on the grounds that the law violates the right of access to justice and discriminates against the people by creating rich and poor classes of petitioners. The Court decided in the affirmative and struck out the provision for being unconstitutional, restoring the previous provision in the electoral law, which requires petitioners in electoral petitions to deposit with the courts only five hundred (Tshs. 500/=) as security for costs when filing an electoral petition. This created a hot debate among certain notable politicians in the country who were claiming that the Court in reaching that decision had in fact usurped the powers of the legislature, in clear violation of the mundane and long cherished doctrine of separation of powers as understood and practiced in the Commonwealth.

[98] [1997] T.L.R 272

At the forefront of the debate was the Speaker of the House. The court chief did not respond and advised that anyone dissatisfied with the court decision should request for a review. This never happened but subsequently the Government tabled before Parliament a Bill for an Act to restore the impugned provisions with some minor modifications. The Bill was passed unanimously and became law thus in effect making the House the Supreme Court of Appeal all in the name of rule of law!

3.3 "Bad Governance" and Leadership Code of Conduct

3.3.1 Leadership Ethics Law

Leadership, competence, political will, integrity and capacity are critical to the promotion of good governance. Leadership without integrity, transparency and accountability is a recipe for "bad governance." This occurs when among other things ethical and traditional codes of conduct are ignored or undermined, the leaders are greedy, rapacious, corrupt, incompetent, and insensitive to the needs, wishes and aspirations of the people.

In order to ensure that "bad governance" does not become the norm of governance, the Government of Tanzania established the Ethics Secretariat in 1995 to take the place of the Commission for the Enforcement of Leadership Code.[99] The Ethics Secretariat is enshrined in the Union Constitution vide article 132. The Secretariat is an extra-ministerial department of Government under the Office of the President[100] with a very broad constitutional mandate. The Secretariat inquires into the behaviour and conduct of any public leader to ensure that the provisions of the law concerning the ethics of public leaders are duly complied with. The Secretariat consists of the Ethics Commissioner and other employees as specified by the *Public Leadership Code of Ethics Act*.[101] The Act applies to Tanzania Zanzibar as well as Mainland Tanzania in respect of public officers under the Union Government. [102]

Part III of the *Public Leadership Code of Ethics Act* contains a "Code of Ethics" applicable to all "public leaders"[103], the breach of which results in vacation of

[99] The Commission replaced the Committee for the Enforcement of Leadership Code, which had been established by the Committee for the Enforcement of Leadership Code Act No. 6 of 1973 and amended by the Committee for the Enforcement of Leadership Code (Amendment) Act No.5 of 1987, which was repealed by the Written Laws (Miscellaneous Amendments) Act No.1 of 1993

[100] Section 19(1) of the *Public Leadership Code of Ethics Act* N0.13 of 1995

[101] Act No.13 of 1995

[102] Ibid. s.3

[103] According to section 4 of the Act the following are categorized as "public leaders" (i) President of the United Republic; (ii) Vice-President of the United Republic; (iii) President of Zanzibar' (iv) Prime Minister; (v) Chief Minister of Zanzibar; (vi) Speaker and Deputy Speaker; (vii) Chief Justice of the United Republic; (viii) Minister, Deputy Minister and Regional

office.[104] Every public leader is required to submit to the Ethics Commissioner a written declaration of all property or assets owned by, or liabilities owned to him, his spouse or unmarried minor children.[105] Failure to make a declaration or making a false declaration amounts to breach of the Code of Ethics.[106] The Ethics Commissioner has powers to make preliminary investigation into allegations or complaints of breach made against a public leader.[107] If the investigation discloses a *prima facie* case and they concern the President, then the Commissioner has to submit them to the President and the Speaker.[108] The law is silent on what will happen next. But if the case concerns any other public leader, the Ethics Commissioner notifies the President and the Speaker, and after consulting with the Attorney General and the Chief Justice, he "appoints" a tribunal to investigate the allegation.[109] The Ethics Tribunal may make such recommendations as to administrative actions, criminal prosecutions or other further actions to be taken as it thinks fit.[110]

The Ethics Secretariat seems to be a toothless ethics watchdog to say the least because it does not have any legal powers to sanction public leaders proved to have breached the leadership code. It is interesting to note that even after taking lengthy and painstaking efforts to investigate allegations of breaches of ethics and a *prima facie case* has been established, and even after the Ethics Tribunal has concluded its work, the Secretariat ends up only making recommendations to the President! It seems as if the Secretariat was established to serve as a safety valve for a certain category of public leaders involved in breaches of the Code of Ethics. In a way this is an avenue for shielding corrupt public leaders against possible criminal proceedings.

The Ethics Secretariat has a direct working relationship with the Speaker of the National Assembly. The Speaker is required to submit to the Ethics Commissioner of the Ethics Secretariat two types of declarations made to him by Members of

---

Commissioner; (ix) Attorney-General; (x) Judge and Magistrate; (xi) Member of Parliament; (xii) Ambassador or High Commissioner representing Tanzania abroad; (xiii) Chief Secretary, Principal Secretary, Regional Development Director and District Commissioner; (xiv) Controller and Auditor-General; (xv) Clerk of the National Assembly; (xvi) Chief of Defence Forces; (xvii) Inspector-General of Police; (xviii) Chief of National Service; (xix) Principal Commissioner of Prisons; (xx) Director-General of Intelligence; (xxi) Director-General of Prevention of Corruption Bureau; (xxii) Mayor, Chairman, Member or chief executive officers of a local government authority; (xxiii) Governor, Chairman, Managing Director, General Manager or Director-General of a bod corporate in which the Government has a controlling interest; (xxiv) Chairman and Members of all commissions appointed on fulltime basis; (xxv) Public Officers in charge of independent Government Departments.

[104] Ibid. s.8
[105] Ibid. s.9(1)
[106] Ibid. s.15
[107] Ibid. s.23(1) & (2)
[108] Ibid. s.23(2)(a)
[109] Ibid. s.23(4)
[110] Ibid. s.27(8)

Parliament. The first one regarding a declaration by an MP thirty days after taking oath of allegiance that he has not lost the qualifications for election[111] in terms of the Constitution,[112] and the second one relating to formal statement regarding MP's and their spouses property.[113] The Ethics Secretariat also has a direct working relationship with the Police and the Prevention of Corruption Bureau as it can request assistance from these organs and can use them to conduct investigations on behalf of the Ethics Secretariat.[114]

3.3.2 The Peculiarity of the Presidency

The President is immune from criminal prosecution while in office. However, after leaving office, criminal and civil proceedings can be instituted against him. Article 46(3) of the Constitution protects the President only against criminal and civil actions "for anything he did in his capacity as President" while in office. However, if the President himself engages in "corrupt transactions" or is "found in possession of property suspected to have been corruptly acquired" he cannot therefore claim immunity within the ambit of "anything done in his capacity as President." Violation of the Constitution or the law concerning ethics of public leaders constitutes a ground for impeaching the President.[115] There is no constitutional provision requiring the President to declare his wealth upon assuming office. He does so under the provisions of the *Public Leadership Code of Ethics Act*. It is not very clear under the Act as to the legal consequences of non-declaration of wealth by the President.

The Constitution and the *Public Leadership Code of Ethics Act* both require certain categories of public leaders to declare their property upon assuming office. However, non-declaration does not entail any legal sanctions apart from being a ground for making a contestant in elections ineligible or making an incumbent MP lose his seat in the National Assembly. It seems that the requirement for public leaders to declare their wealth on assuming office was intended to serve as yardstick for measuring differences in "corruption levels" among the leaders by comparing their wealth before holding public office and after relinquishing power or office. Any unexplained wealth would therefore constitute a ground for requiring them to

[111] Article 69(1) & (3) of the Union Constitution
[112] According to Article 67(2)(d) of the Constitution, a person shall not be qualified to be elected or appointed Member of Parliament if within a period of five years preceding the date of a General Election has been convicted and sentenced to imprisonment for an offence involving dishonesty or for contravening the law concerning ethics of public leaders.
[113] Ibid. art.70(1)
[114] Section 27(7) of *Public Leadership Code of Ethics Act* No.13 of 1995 empowers the Ethics Tribunal to request assistance from investigative organs which are empowered to provide it with information and conduct investigations on its behalf.
[115] Article 46A(2)(a) of the Union Constitution

account and probably forming a basis for criminal proceedings against them. It was envisaged also that non-declaration of wealth would in itself lead to loss of civil rights but this has so far not been the case. Up and until now only a fraction of the top state leadership have declared their wealth.

3.3.3 The Paradox of "Declarable" and "Undeclarable" Wealth

One of the basic rules of ethics for public leaders under Article 132(5) of the 1977 Constitution of the United Republic of Tanzania as amended, is to make a formal declaration from time to time concerning their income, assets and liabilities. Every Member of Parliament is required to make two types of declarations, the first one under article 69(1) of the Constitution showing that he has not been convicted and sentenced to imprisonment for an offence involving dishonesty or for contravening the law concerning ethics of public leaders.[116] The second declaration falls under article 70(1) of the Constitution regarding his property and the property of his spouse. The Speaker then has to submit copies of the declarations to the Ethics Commissioner who enters them in a register, which is available for inspection by members of the public at all reasonable times.[117] Failure by a Member of Parliament to submit a declaration to the Speaker is a ground for vacating his seat in the National Assembly.[118] And where the Ethics Tribunal[119] makes a decision confirming that a Minister has contravened the law concerning ethics of public leaders, such Minister has to vacate office.[120]

Parliament was to enact a law stipulating basic rules of ethics for public leaders[121], which would have among other things prescribed penalties to be imposed for breaches of the code of ethics and provide for the dismissal or removal of a person from office for breaches of ethics regardless of whether the office is elective or appointive. The *Public Leadership Code of Ethics Act*,[122] which was enacted by Parliament in 1995, does not prescribe penalties for breach of the code of ethics.

[116] The law concerning leadership ethics is the *Public Leadership Code Ethics Act* No.13 of 1995.
[117] Ibid. section 21(1) & (2)
[118] Article 71(1)(g) of the Union Constitution
[119] The Ethics Tribunal is to be appointed by the President under section 27(1) of the *Public Leadership Code of Ethics Act* No.13 of 1995. Part IV of the Act constitute part of the Code of Ethics for Ministers
[120] Ibid. Article 57(2)(g)
[121] Ibid. Article 132(4). Parliament enacted the *Public Leadership Code of Ethics Act* No.13 of 1995 section 4 contains a list of 25 "public leaders" who are subject to the Act.
[122] Act No.13 of 1995

4.0 CONCLUSION: THE WAY FORWARD

At the beginning of this discussion we noted that in doing the reassessment we need to look back and ask ourselves what has been missing; what was done right; and what was done wrongly in the process of development. The discourse has attempted to make a critical analysis of a number of policy and law initiatives. As a way forward we recommend the following:

- A process for making a New Constitution should be initiated to ensure broad participation of the people. The new constitution should have sufficient checks and balances, declare that it is supreme; do away with unnecessary claw-back clauses and derogation clauses sand remove all the fetters put on the Judiciary to exercise its duty to check abuse of power.
- Bad laws, which operate against personal liberty and freedom should be repealed and / or extensively amended.
- The Government should steadfastly strive to incorporate a human rights based approach in all of its development processes and policy and law initiatives.
- A new Free Access to Public Information Act should be enacted to legitimise the right to receive official information that is of public interest.
- The Judiciary and other institutions of good governance should be given enough resources and logistics to enable them carry out their statutory functions more effectively.
- The Leadership Ethics law be amended to state that all assets of leaders should be declarable and all leaders should publicly declare their assets without differentiating between “declarable” and “non-declarable” assets; to provide that all top public leaders should declare their assets publicly, explaining how they were acquired and arrangements should be made to verify the accuracy of the declaration; and to prescribe penalties for breaching the Code of Conduct.
- Leaders discovered to have been a source of injustice and breach of established rules and regulations should be severely punished by confiscation and forfeiture of their property in accordance with the law.

REFERENCES

AUSTIN, J., (1954). *The Province of Jurisprudence Determined*, edited by Hart, George Weidenfeld & Nicholson Ltd.

ANDERSON, J.N.D., (1960). "Colonial Law in Tropical Africa: The Conflict Between English, Islamic and Customary Law", XXXV *Indian Law Journal* No.4 (1960) p.436

BABU, A.M., (1981). African Socialism or Socialist Africa? Tanzania Publishing House, Dar es Salaam

BAILEY, M., (1973). *The Union of Tanganyika and Zanzibar: A Study in Political Integration*. Syracuse Maxwell School of Citizenship and Public Affairs

COUPLAN, (1947). "The Exploitation of East Africa" in *Tanzania Notes and Records*, No.3 April 1947

DENNING, The Right Hon. Lord, (1990). *The Influence of Religion on Law*, the Starling Press Ltd., Risca, Newport, Gwent

DICEY, (1960) *Introduction to the Study of the Law of the Constitution*, 10th edn. Macmillan, London

ENGELS, F., (1948). *The Origin of the Family, Private Property and the State*, in the Light of the Researches of Lewis H. Morgan, Progress Publishers, Moscow

HART, H.L.A., (1958) "Positivism and the Separation of Morals: (1958) 71 *Harv. L. Rev*. 593

HINDESS, B. & P.Hirst, (1975). *Pre-Capitalist Modes of Production*, Routledge & Kegan Paul, London, Boston and Henley

KOPONEN, J., (1994). *Development for Exploitation: German colonial policies in Mainland Tanzania, 1884-1914*, Finnish Historical Society, Studia Historica 49, Lit Verlag, Studien zur Afrikanischen Geschichte 10, Helsinki / Hamburg

KELSEN, H., (1934-35). "The Pure Theory of Law" (trans. Max Knight) Vol.50 and 51 *L.Q.R* (1934-35) (originally published by the University of California Press)

KELSEN. H., (1945). *General Theory of Law and State*. Translated by Anders Wedberg, Russel & Russel, New York

LORD LLOYD OF HAMPSTEAD and M.D.A Freedman, (1986) *Lloyd's Introduction to Jurisprudence*, Stevens and Sons Ltd., London

LEAT, (2000). *Repackaging Authoritarianism: NGO Policy Reform and the Freedom of Association and Expression in Tanzania*." A Report prepared by Tundu Antiphas Lissu, LEAT Research Report Series No.1 May, 2000, Dar es Salaam.

LOFTCHIE, M., (1965). *Zanzibar: Background to Revolution*. Princeton University Press

MAITLAND, F.W., (1908). *Constitutional History of England*, Cambridge: Cambridge University Press.

MAKARAMBA, R.V., (1997). *A New Constitutional Order for Tanzania? Why and How*, Friedrich Ebert Stiftung and Tanganyika law Society, Dar es Salaam

MAKARAMBA, R.V., (1999). "Legal Aspects of Not for Profit Organizations in Tanzania" a research paper written for the John Hopkins University Civil Society Project

MAZRUI, A.A. (1989). "Post-colonial Society and Africa's Triple Heritage of Law: Indigenous, Islamic and Western" in Neil MacCormick and Zenon Bankowiski (eds.) *Enlightenment, Rights and Revolution: Essays in Legal and Social Philosophy*, Aberdeen University Press

MORGAN, L.H., (1967). *Ancient Society* (1877), New York: Meridian Books

MORRIS and READ, (1962). *Indirect Rule and Search for Justice: Essays in East African Legal History*, Clarendon Press, Oxford

NYERERE, J.K., (1974) *Man and Development*, Oxford University Press, Dar es Salaam, Nairobi, London, New York

PETER, C.M., (1997). *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag, Koln

TIERNEY, B., (1982) *Religion, Law and the Growth of Constitutional Thought* 1150-1650

UNITED REPUBLIC OF TANZANIA (URT), (1992). The Presidential Commission on Single Party or Multiparty System in Tanzania, (Nyalali Commission), Vol. One: *Report and Recommendations of the Commission on the Democratic System in Tanzania*, Government Printer, Dar es Salaam

UNITED REPUBLIC OF TANZANIA (URT), (1999). *Hotuba ya Rais Benjamin William Mkapa Kwenye Mkutano Mkuu wa Taifa wa Baraza Kuu la Waislamu wa Tanzania – BAKWATA*, Dodoma Julai 29, 1999, Government Printer, Dar es Salaam

UNITED REPUBLIC OF TANZANIA, (2002), *Poverty and Human Development Report* 2002, Mkuki na Nyota Publishers, Dar es Salaam