THE LEGAL CONTENT OF THE RIGHT TO BASIC EDUCATION UNDER THE LEGAL REGIME OF TANZANIA

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Dated June 10, 1999

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A Scope and Purpose-

To examine impediments existing towards full implementation of the Right to Basic Education under the Legal and Constitutional framework in Tanzania through:

- Evaluating the legal content of the Right to Basic education in order to highlight any impediments by the law against the realization of the objectives of the right to basic education in Tanzania;
- Examining the Constitutional provisions to see whether education is to be provided as a human right according to international law, and what priority is therefore accorded to it:
- Examining whether Primary education has been sufficiently safeguarded as a primary legal right of every child by the statutory law. as a 'right; providing equal access or opportunity to all. or simply as a differential right.
- To make recommendations regarding necessary improvements in the law of education in Tanzania: (a) for better securing the right to education under the law in terms of content. and (b) for rationalizing the domestic law to meet the international standard.

B Preliminaries-

i. An overview of Human Rights

The three main characteristics of the right to basic education are, first that it has a definite period of application; second that it involves simultaneously three key players i.e. the pupil, parent and government, and third that, next to the right to life, the right to basic education is the key and gateway to the meaningful enjoyment of all other human rights, including that of life itself. As the very credibility of life and of the

institution of government both depend increasingly on global equilibrium between peace, democracy and sustainable development, human rights provide the pre-conditions as crucial links as well as binding element to maximizing individual human potential as well as in maximizing the primary responsibility of states for creating enabling conditions conducive to human development and human dignity.[1] Human rights and development are, therefore, complementary twins. Yet, human rights are also an important ingredient in terms of a rights-based approach to global peace-building as well as in breaking the perversive cycle of impunity relating to human rights abuses which so often undermine the individual as well as the social dignity. With all this in mind, the right to basic education inarguably holds a most fundamental position in the complex scenario of human international challenges today.

ii. Nature and concept of the Right to Education

The right to basic education is not just a right to receive education as a tool for socialization of the child. It is also a demand upon the state to provide a potent 'right-based' education. While it is obviously true to say, for instance, that no one is necessarily better educated simply because their basic education was provided as a 'human right', it certainly is true that prescribing basic education as a human right **does** strikes a practical level of commitment to observe certain definite and internationally recognised standards as well as obligations, both for the planning and management of education, and also in its implementational as well as functional aspects. We will examine below the nature as well as extent of such commitment and obligation with regard to the Tanzanian law and Constitution, as the main purpose of this paper, but first a few remarks as to what may represent a human rights approach to the provision of basic education.

In recent paper titled: 'Concept Paper on Development, Participation and Protection Rights of children and adolescents', UNICEF (Tanzania) enumerates the following rhetorics characterizing the human rights approach:

a) the child is treated as a subject, not an object
b) rights imply achievable goals at 100% rate
c) children out of school have their right to education violated
d) rights must be realized with sustainability
e) rights cannot be hierarchically classified as basic and non-basic rights
f) rights imply duties
g) rights have corresponding obligations
h) rights are universal

Some brief discussion on at least one of the above **rhetorics** may throw some light into the human rights approach to the dispensation of basic education, and also, hopefully, to the conceptual nature of the right to education itself.

iii **Whether a Child is a 'subject ' of the Human Rights law –**

Generally, the conception as well as definition of international law as propounded by legal scientists has had a profound influence on the question as to who are the **subjects** of international law.[2] Since, according to classical definition of international law as the body of rules governing the conduct of states in their relations with one another, states were the only **subjects** of international law, an individual person within the state was not the subject, but only the object of international law. However, as international law underwent progressive change, contemporary

international law has become also increasingly concerned with international institutions and with the individual. Nevertheless, to be a 'subject' of a system of law, or to be a legal person within a legal system implies three essential elements:

(1) a subject has correlative duties which impose responsibility as well as accountability as prescribed within the particular legal system;

(2) a subject is eligible to claim the benefit of rights on merit, rather than simply as beneficiary to a right;

(3) a subject acquires the legal capacity to enter into contractual or other legal relations with other legal persons recognized by the particular system of law. Under the classical international law, an individual did not have any of the attributes of a 'subject' of international law. It must be noted, however, that the child's rights to enter into personal contractual relations under the municipal law is a restricted one e.g. restrictions relating to contracting marriage or employment.

Yet, to assert that a child is a 'subject' of international law is also deliberately to deny another old concept which regarded children as Non-persons or chattels. According to this old concept otherwise known as the **'nurturance orientation'**[3] concept, society as a whole provided presupposedly all beneficial objects, environment, services, experiences and other necessities to children in what came to be accepted as giving children what was good for them. In other words, children could not have their own rights, but simply derivative or beneficial rights through adults. Children could not, therefore, claim rights as subjects of those rights, or in fact, at all.

Even in the context of international human rights, the question as to whether children possessed constitutional rights was not taken just for granted in certain jurisdictions. Thus, for instance the right to Children's rights was a debatable issue even in the United States as late as 1969. In that year, the United States

Supreme Court under the distinguished Justice Douglas was called upon to decide whether a student aged 16 years was a 'person' possessing any fundamental rights under the United States constitution (**TINKER v Des MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT 393 U.S. 503).** The Supreme Court held that students even aged 14 were, indeed, **'persons'** possessing fundamental rights under the Constitution, adding that they were not **'closed-circuit recipients of only that which the state chooses to communicate'** (i.e. through the school syllabus).

In a latter case in which a student constitutionally challenged through a guardian ad litem legislation on compulsory attendance to a public school in preference for private education under the Amish religion, which was contrary to the Wisconsin state legislation, the same Justice Douglas in a dissenting judgement this time would hold that the child's right to the freedom of thought could not be compromised particularly considering that the Amish society had over a period of 200 years developed a competent system of instruction which was sufficiently equivalent or comparable as an alternative to the public school system. He said: **'It is the student's judgement, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny' (WISCONSIN V YODER, 406 U.S. 205 91972).** Hence, the very right to Children's rights had first to be wrestled in the highest Court in America by 1970. Is the right to children's rights clearly recognized under the Constitution of the United Republic of Tanzania 1977? (henceforth, 'constitution;).

To begin with, Article 26 of the Universal Declaration of Human Rights did not use the term 'child' in reference to the right to education. That article says in part: **'Everyone has the right to education .....'** There was no definition of the term 'everyone', and it is reasonable to conclude that the article did not target specifically on 'children' as subjects of the right to education, but rather more on

the aspect of 'universality' of the right to education to pre-empt wanton discrimination, as on gender or nationality lines.

Under the Tanzanian Constitution, the state is under obligation to make adequate provision for securing, among other things, the right to education (s.11 (I). Sub-section (2) of section 11 provides: '**Every person has the right to education; and every citizen shall be free to pursue the field of education of his choice up to the utmost standard subject only to his merit and ability'.** (translation) . Again, there is an aspect of '**universality**' attached to the right of education, probably to exclude discrimination on gender or nationality or against minorities or on geographical lines. Hence the term **'every person'** . The distinction between **'every person'** as to the enjoyment of the right to education, and **'every citizen'** as regards the continued right to the pursuit of further education generally, must be seen in terms of the obligation of the state to provide free public education in terms of primary education on universal basis. But there is no assistance under the Constitution to suggest that the term **'every person'** legally includes or means a child.

Therefore, it may be pertinent even here to warn against hasty conclusions that sub-section (2) of section 11 of the Constitution already and sufficiently provides education as an individual constitutional right of the child. It must further be remembered that whatever the international human rights instruments, especially those coming after the Universal Declaration of Human Rights, 1948 may provide, they are subject to the interpretations assigned to them under the national laws of the states parties thereto. So, the theoretical question remains: is the child a **'person'** under the Tanzanian constitution having the legal capacity to possess individual rights as the subject of the international law of education?

A glance at the concept of Human Rights generally as expressed in a Bill of Rights would suggest that human rights are based on the twin notion of Liberty and Equality. The notion of Equality would suggest equal treatment and

protection under the law,[4] and would include the concepts of equal opportunity and non-discrimination. Significantly, in the United States, demands by individuals for greater educational benefits outstrip by far what the state is able to give. Thus, demands for greater access have, since 1950's[5] usually been decided by the Supreme Court on the basis of the Equal Protection clause of the American Constitution. By interpretation, however, the right to education in America has been grounded on the Equal protection clause only when:[6]

a) a state maintains a tax-supported school system; and
b) an individual's right to Equal Protection has been infringed by a state legislation.

Significantly, therefore, a claim may not be based directly on the right to education per se, especially if there was any doubt as to whether a child was properly a 'subject' of such right under the Constitution.

To recapitulate, there is no question that the Tanzanian Constitution recognises the right to education. The question is whether specifically a 'child' could claim it directly as a personal right. In other words, it is whether the Constitution also recognises a child as a legal person.

The Tanzanian equivalent to the American Equal Protection clause (**14th Amendment: 'No State shall deny to any person within its jurisdiction the equal protection of the law'**) is section 29 (2) of the Constitution. It provides: **'Every person resident in the United Republic shall be entitled to be afforded equal protection under the laws of the United Republic'** (translation). Under sub-section (2) of section 13 it is provided: **'No law in the United Republic shall make any provision that is discriminatory either of itself or in its effect'** (translation). A further look at the relevant provisions of the American Constitution, however, reveals that the Equal Protection clause does not limit the Federal government since the 14th Amendment specifically refers to the Federal

states laws. Only the 5th Amendment **(the due process clause)** would, therefore, seem to limit the actions of the Federal government. In essence, the effectiveness of the Equal Protection clause would be to pre-empt any classification of **'subjects'** of the human rights on a hierarchical or exclusion basis. While the grant of legal personality is clearly within the gift of the State[7] such that it may be refused to certain natural persons, or it may not in certain circumstances be simply automatically achieved (e.g. juristic personality for Associations) without compliance with certain formalities, it may be argued that the essence of the Equal Protection clause would be to treat all humans as if they had equal legal personality for protection of their interests.

We can, therefore, say that if the right to education in terms of section 11 (2) of the Constitution did not confer a personal right on the child as a 'subject' of the human rights law, but merely professed 'universality' of the right to education simply to exclude preferential treatment in the provision of basic education, or to exclude mass exemptions from compulsory public education at that level, the Equal Protection clause under the same constitution provides the alternative means to claim the right in terms of equality of opportunity for both access as well as quality, though not necessarily in term of 'quantum' of the basic education as a pre-condition to both. This approach would seem to avert any possibility of interpreting restrictively section 11 (2) of the Constitution as excluding a 'child' from its definition by reason that a child was not a 'subject' personally to possess or claim certain constitutional rights such as that of education. With some inspiration from the borrowed decisions of Justice Douglass, above, as well as others (and it is for the lawyers and judges to evolve the technique), **'the right to the Right to Education'** might just be sufficiently secured in favour of the child as a 'subject' of the human rights law. One must remember that in mainland Tanzania, for instance, the spectrum of basic education now includes pre-primary education[8] whose candidates are no more than immature[9] little creatures of 5 or 6 years of age, caring more about biscuits and mother's love than about a bunch of so-called human rights.

Furthermore, to conclude this part, it may be recalled that under the classical theory that the individual was not touched by international law, it was possible to conclude, therefore, that he could not commit international crimes, such as piracy, hijacking, trafficking or, indeed, crimes of war. The absurdity of the result became apparent when these crimes began to happen with a certain frequency. It would no longer make enough sense simply to hold responsible for the resulting damage the culprit's state for failing to restrain him. On August 8, 1945 the governments of France, the Soviet Union, United Kingdom and USA signed an Agreement in London, making provision for the prosecution and punishment of major war criminals of the European Axis Powers, whose offences had no particular geographical location, and also on the basis of the Charter of the International Military Tribunal, annexed to the London Agreement. The effect was to make individual perpetrators of war crimes and crimes against humanity criminally responsible under the international law. It was thus possible on 30 September 1946 for the Nuremberg Tribunal to deliver its judgement in which the concept of individual responsibility was recognized under international law,. rejecting defence submissions to the contrary. In the famous words of the Tribunal:

'That international law imposes duties and liabilites upon individuals as well as upon States has long been recognized ..... crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can provisions of international law be enforced'.

Hence, an international criminal may be punished even if his home state is not State Party to the relevant international Convention, and the actual procedure may be carried out under the domestic jurisdiction of the State having custody of the offender. The Nuremberg judgement thus underscores a new concept in relation to the individual as the 'subject' of international law. But it remains to each state

to determine the extent of application of the principle in regard to areas other than international crime, and we can say that the Tanzanian Constitution is definitely **not** specific on this subject.

C. The Legal Content of the Right to Basic Education under Tanzanian legislation –

At the outset, it was stated that no suggestion was made that basic education could not be provided otherwise than as a human right. In corollary to that, lack of direct reference to international law or international human rights instruments as binding upon the state may not necessarily prevent the dispensation of basic education as a 'human right' in terms of approach or content, except that a strained interpretation of the existing legislation might then be necessary to determine the precise legal status of the education service in light of the international law. Apart from that, however, a clear statement as to the applicability or otherwise of the international law of education as a human right constitutes, in the former case, a commitment to observe the standard as well as obligations that the international community has laid down for purposes of uniform performance. For this reason, equivocation attracts international disapproval. The Tanzanian legislation for its part, does **not** make the situation clear either way, and it is therefore, the purpose of this paper to investigate this problem.

The provision of basic education purely as a matter of law, outside the international human rights instruments of 1966 and beyond, was secured, in terms of the current law, under the National Education Act, 1978 as amended for mainland Tanzania, and the Education Act, 1982 for Zanzibar, respectively, and Rules and Regulations made thereunder. For purposes of clarity, references to the Zanzibar Act will be made only sparingly if at all, as a recent copy of that Act was not available at the time of writing. The term **'child'** has not been defined under the Act (M), but the amending Education (Amendment) Act, 1995 includes a reference to 'children' of five and six years of age as eligible recipients of pre-

primary education before entry into primary education prescribed at the age of seven and for compulsory enrolment under section 35 (1) of the Act (M).

Under **35 (1)** of the Education Act (M), it shall be **compulsory** for **every child** who has attained the age of **seven** years to be enrolled for primary education. The term 'primary education' is defined to mean 'full time formal education given for seven years after completion of pre-primary education' in accordance with the syllabus approved by the Commissioner for National Education. Accordingly, this section reproduces the international standard of **compulsory and universal** basic education, but fails to reproduce the third element of a 'free' such education when provided under the public system of education. However, whether this lacuna represents a diminution of the right to education or a failure of compliance under the international human rights instruments, depends on whether that aspect of international law is, in fact, **binding** law upon the state in Tanzania. For the moment, it suffices to assume that the local legislation does **not** meet the international standard.

Let us first try to examine briefly whether Tanzania, in fact, does at least meet the standard of a universal and compulsory education as contemplated by the international law. For this purpose, let us assume that simply by the act of **ratifying** the relevant international human rights Conventions, as it has, the state in Tanzania is **bound** legally to observe the requisite international standard.

First, it is correct to say that the concept of a universal compulsory education has been so well integrated that its underlying assumptions are rarely questioned. In the USA, for instance, since the first state compulsory education law was passed in Massachusetts in 1852, long before any of the human rights instruments came along, conflict between the law enforcing compulsory public education and the individuals' right to access as well content of the curriculum, has always raged. Accordingly, American school Boards as well as the Supreme Court, have been constantly bombarded by parents and arguments are still issuing. This raises the

question as to what Constitutional **limits** are imposed upon the power of the government to regulate basic education, or what **presumptions** can be read into the Constitution as necessary pre-conditions for a **universal** and **compulsory** education. Some of the constitutional issues might be:

(i) what justification did a government have by forcing children to accept instruction from public teachers only?

(ii) What justification did a government have in demanding that all children of a specific age, and not below, must enroll at school?

(iii) What guarantees would government give that public teachers would be of good moral character and patriotic disposition, or that certain subjects essential to good citizenship must be taught, or that nothing will be taught that will be inimical to public welfare?

(iv) What reason could government give to support the view as well as attitude that impartation of subject matter under the school syllabus was necessarily better than instilling of worthy habits and attitudes based on appreciation as well as early acquisition of techniques and skills necessary for effectively intelligent participation in the political, economic and social life needed for the preservation of affluence, freedom and independence?

(v) What justification did a government have by providing a regular, undifferentiated system of education which routinely lumped together a child genius and the most unintelligent pupil without distinction?

Available education statistics[10] education that Primary school enrolment reached 4,057,965 pupils in 1997, all of it basically public as only 6,252 pupils were in the private sector. Net enrolment ratio was 56.6, showing a decline from 70 per cent in 1980. A gross enrolment ratio of 77.9 showed an improvement from 71 per cent in 1980, but suggested that there were many average children who had not been timely enrolled and remained outside the school system which is incapable

of absorbing them. The current transition rate from lower to secondary was only 14.8 per cent in 1997 out of 42,943 students who sat the final examination (compare 52 per cent in Kenya, and 29 per cent in Uganda in 1998).

At the upper end of the scale, for comparison, there was a mere 5 per cent gross enrolment at secondary level, and just 0.27 per cent in University education. These percentages are stated to be very low by all standards, showing a decline at the primary level or a stagnant posture at the higher levels. Furthermore, primary schools are generally staffed by fellow primary school leavers to the tune of 70 per cent (secondary schools by secondary school leavers by 81 per cent)! In terms of funding, Primary and secondary levels are getting only 2.5 per cent of the annual government budget, resulting in low capitation and poor supply of key education inputs, including text books and teaching technologies. The staff-student ration is also very low at 1:37 at Primary level, and the drop-out rate is high. In addition more than 40 per cent of school age children are out of school. While definite interventions are already in place to improve the situation as well as capacity building (e.g. Education Sector Reform and Development Programme funded by UNICEF), these statistics show that implementation of a universal and compulsory education system is far from satisfactory. But this is not to single out Tanzania, since the problems of implementation are also world-wide. Yet, since part of the problem for this investigation is to explore whether primary education has been sufficiently safeguarded as a primary legal right of every child, a glance at the nature of the problem cannot be avoided.

The Education Act together with its subsidiary legislation in the form of Rules and Regulations promulgated thereunder, is certainly the vehicle providing the machinery of implementation of the human right of education, whether the Act say so or not. Apart from setting the standard, the Act also makes provision for compulsory regular attendance as well as completion. A duty is also imposed upon the parent and, presumably guardian, to ensure that the child regularly attends the primary school at which he is enrolled until he completes primary education. These obligations are enforced by rules providing for punishment of

offences under the Act (**section 35 (1), (2), (3), (4).**). Furthermore, the relevant Regulations provide for maintenance of school discipline, admission rules, classification and registration of school generally, inspection, registration and licensing of teachers, approval of the school curriculum, and also include new areas of school management and regulation as well as health regulation (still in draft form). The proposed Regulations will also put more emphasis both on access as well as quality of the product and in terms of teachers. Thus, for instance, new section 59 (1) (j) provides, that any person who denies any child access to pursue formal education due to sex, creed, political persuasion or socio-economic status, shall be guilty of a punishable offence. New paragraph (c) to sub-section 1 of section 14 imposes a duty upon owners and managers of all schools to ensure that standard infrastructure, facilities, equipment and instructional materials necessary for 'effective and optimum teaching and learning are of good quality, available in adequate quantities and are regularly maintained'. Furthermore, by a new amendment to the Act in section 23 the government has assumed the regulation and control of non-government (i.e. private) primary and post-primary schools which, therefore, receive recognition for the first time as regards the provision of basic education.

Nevertheless, apart from these improvements in the law relating to basic education, the following **shortfalls** in the existing laws may be said to create **impediments** towards the realization of the objectives of the right to basic education in Tanzania.

First, the legislation is silent about whether the international human rights instruments can be applied as part of the domestic law of Tanzania. In contrast, for example, the Diplomatic and Consular Immunities and Privileges Act, (No. 5 of 1986), which, incidentally extends to Zanzibar (s.2), the Vienna Convention on Diplomatic Relations, 1961 as well as the Vienna Convention on Consular Relations, 1953 apply to the United Republic as part of the law. By this method, the two Conventions or Treaties have become incorporated into Tanzania law by

an Act of Parliament. Another example of this method was the enactment by the Parliament in February 1961 (before the granting of independence on December 9, 1961) of a law incorporating the Bretton Woods Agreements into the domestic law. By this Act both the World Bank (IBRD) and the International Monetary Fund (IMF) acquired domestic privileges and immunities and also the legal capacity to enforce international monetary regulations in the domestic Courts against individuals or the government. Although in the case of the IMF, for instance, the main reason was to protect the personal property of the colonial officers against wanton manipulations of the exchange rate as well as against restrictions on capital transfers in respect of current international transactions, which the new nationalistic government might impose, and also further, to regulate the Balance of Payments to avoid chronic maladjustments, the effect was not only to incorporate the Treaty law under the domestic system, but also to create '**new**' legal rights in respect of individuals under the particular Treaty law.

Once so incorporated, however, the international law would normally take precedence over the ordinary laws in case of any conflict, but the Constitution would normally take precedence over the treaty or Covenant law if conflict arose between the two. Since the Education Act does not incorporate the international human rights instruments, it remains to see how far the Constitution adopts those international instruments. But it will be fair to repeat the suggestion that insofar as the Act fails to adopt the international standard of education, such deficiency must be seen as an impediment to the realization of the objectives of the particular international standard.

But we have also to face the specific question as to what would be the legal position in cases where a violation of the particular international Covenant does not constitute an infraction under the Tanzanian law. An example of this is that while the Covenant law provides for 'free' provision of primary education in the public education system, the Tanzanian law does not. The international Covenant provisions for this purpose are contained in Article 13 (1) and (2)(a) of

the International Covenant on Economic, Social and Cultural Rights, 1966 (coming into effect on January 3, 1976) and Article 28 of the Convention on the Rights of the Child, 1989 (coming into force in 1990). These are reproduced below:

1. **International Covenant on Economic, Social and Cultural Rights -**

Art. 13 (1) - 'The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace'.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be **compulsory** and available **free** to **all**

2. **Convention on the Rights of the Child –**

Art. 28 (1) - States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education **compulsory** and available **free** to **all;**'

In attempting to answer the above question, a distinction must be made between the **omission** of the requirement of providing **'free'** education from the domestic law, and the provision for the **'progressive implementation'** of the right to education in terms of Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights, as well as under Article 28 (1) of the Convention. The so-called **'deliberate speed'** clause would seem properly to avail a State which had **adopted** the international standard without omission under its domestic law, but not otherwise. It is, there fore,doubtful whether the government of Tanzania could successfully benefit from the **'escape'** clause should a parent challenge the apparent derogation. For this reason, it would seem proper to suggest that the law be suitably amended to include **free** primary education in public schools on the basis that the parents are already paying tax. To argue that government resources were inadequate to provide such free education would simply aggravate the violation of the right to free education as the assumption for the requirement to provide free education was not legally contingent on the budget, but on a **binding** commitment to provide. Consequently, government expenditure might be reduced in other areas to offset the cost of education. In fact, the right to education cannot and should never be subordinated to overall economic development. Since both these are human rights demands, it can never be correct to give them preferential inequality, because human rights are indivisible as well as complementary, and cannot meaningfully be promoted on a hierarchical basis. Item (e) of the rhetoric's characterizing human rights as listed by UNICEF above emphasizes this point.

Second, on the basis of the above provisions of the Covenant and also Article 29 of the Convention on the Rights of the Child, certain guarantees have been enumerated as achievement values of the primary education to be provided. These have **not** been sufficiently reflected if at all, under the domestic legislation and they include the following:

nor undermine the core of the human rights concept. What was important always was simply the manner as well as extent of implementation.

Incidentally, the drafters of the Universal Declaration of Huiman Rights included General Romulo (Philippines); Dr. P.C. Chang (China); Mr. Omman Obeid (Egypt); Mrs Hansa Mehta (India); Dr. Ghassema Ghani (Iran); Dr. Charles Malik (Lebanon-reporter); Dr. Jose' Mora (Uruguay) and Mr. Herman Santa Cruz (Chile). In short, even the membership of the Commission on Human Rights of 1946 drew representatives from Australia, France, USSR, USA, UK, India, China, Chile, Byelorussia SSR, Iran, Lebanon, Philippines, Uruguay, Yugoslavia and Egypt. A wide corss-section of world cultures was, therefore, represented. Any argument that the content of human rights was a **'foreign'** or **'western'** set of values must thus be viewed with suspicion. Furthermore, records of the drafting Sessions show conclusively that the representatives from the **developing** countries including Egypt made valuable contributions. For instance, amongst his many suggestions, Mr. Obeid from Egypt recommended the inclusion of **duties** of the individual as a corollary to his rights, while the towering **Article 1** to the Declaration was proposed jointly by France and the Philippines. Also, India influenced the inclusion of the principles of **liberty, freedom of worship, opinion, assembly and association,** obviously from close experience, and added the rights to work, health, property, participation in government and the right to **education.** The drafters of the Universal Declaration also used constitutional provisions from the Constitution of 55 countries, including India, the Union of South Africa, Ethiopia, Liberia and Egypt. This spectrum bears out not only the universality of human rights, but also the fact that human rights are part of the collective intellectual patrimony of humankind secured on the pantheon of international instruments.

Third, the Education Act does **not** define the **components** constituting or implied under the international standard of education as prescribed by the international human rights instruments. In the view of the present writer, this is a major

impediment which can affect the systematic implementation of the right to education. For practical purposes, the very act of implementation presupposes actual awareness of **content** in regard to the right to be implemented. When states accept human rights on the basic of the 'international Bill of Rights', they still need to deal with the difficult and delicate task of **interpreting** and applying those rights in the local context,[12] bearing in mind that historical, cultural and social diversities of individual countries concerned MAY condition the manner of applying each particular right without, however, distorting its essential purpose. Obviously, the international law of education as a human right did not itself define such concepts as content and quality of the delivery of education, or whether a particular entry age was necessary, or duration of the education, or whether marriage was a bar to schooling, or the curriculum. These unresolved issues deserve detailed attention, and it is the function of legislation to define these areas. This the Education Act does **not** do to a satisfactory degree.

Fourth, although the Education Act, 1978, 1995 could do no more than make provision for basic education as its purpose, it is submitted that the Act as a whole, nevertheless, does **not** properly focus on the general purpose of the provisions relating to the right to education according to the spirit of the international instruments. Without doubt, the international provisions under the Universal Declaration of Human Rights, the Covenant as well as the Convention, all proclaim education as a whole as a **'human right'**, and then proceed to single out basic education as an **element** of universal compulsion as a matter of law. The reason for this is to ensure literacy for all in order to guarantee that children will not become a liability to society and that the purposes of government may become rationally viable. The Education Act, on the other hand, seems to contemplate the provision of basic education simply as an **end** in itself. No wonder that before a new Education Policy was produced in 1995, the previous Education policy clearly stated under its **'Education for self-reliance'** slogan that primary education was a rural-oriented and excursion **terminal**, thereby lending emphasis on the syllogistic ambiance to be found under the 1978 Act.

Even so, the new Education Policy of 1995 appears to be speaking only to itself when it itemizes the preparation of the child for second level education (i.e. secondary, vocational, technical and continuing education) (including University education?) under its 'aims and objectives of primary education' (p.5), because this does not take into account the **stagnant** position of the Education Act. It is, therefore, submitted that to the extent that the Education Act is silent on the theme of basic education being an integral part of a fuller structure of education, it will tend perceptively to **curtail** the full meaning of the right to education in its proper context.

Fifth, the Education Act does not clearly specify whether a parent opting for **private** education is necessarily bound by the provisions of section 35 of the Act. Clearly, under the international instruments relating to the right to basic education, the element of free as well as compulsory education can only make sense in terms of a public system of education. No doubt, however, no private education can be provided freely,but this should have been the only exception. It is, therefore, argued that a clear statement would have been necessary as to whether or not a parent opting for private education under the Act was also required to observe the statutory age of enrolment. Furthermore, would such parent also be liable to prosecution of his child because a truant or deserter in the course of the education contrary to sub-sections (2) of section 35 of the Act? For purposes of clarity, it is suggested that section 35 of the Act should be **amended** either expressly to extend compulsory enrolment and relevant consequences to **private** education or to exempt the same. This is necessary because the amending Act of 1995 amends section 31 of the principal Act (1978) to include in the category of schools, non-government schools, and also grant-aided schools consisting of all community schools owned or managed by a non-government organization but gets subvention or grant-in-aid from a governmental organization. However, if the condition for compulsory enrolment is not extended to cover private instruction, the effect under the Education Act might be to **curtail** the early or uniform application of the right to education.

As an adjunct to the above, the regulation for the minimum statutory age of enrolment at primary school under section 35 (1) of the Act is modified in two ways. Firstly, under section 2 (2) of the Act, power is given to the Minister to **extend** the period of primary education to any number of years not more than seven, as he may deem desirable in the public interest. Secondly, under the proposed [13] Regulations for Admission to government schools, made under section 60 (m) of the Act, an exception to the statutory age of enrolment is to be made (in para 4) in order to empower the District Education Officer to allow a child who is below the age of seven years on the 31st day of March of the year of such admission to be admitted to a government primary school.

Dealing first with the powers of the Minister under section 2 (2) of the Act, two points may be raised:

(i) considering the possibility as well as need to transit to higher education, the admission age of seven years is certainly too high. Generally, at seven years, a child is already quite late. Under the colonial education system the enrolment date was five years, and this is certainly the better choice. A late enrolment will affect the performance of an older child, especially a fast growing one who might resent being treated below his age.

(ii) A power to extend primary school to another seven years should be qualified and the necessary conditions specified by law. The Act provides elsewhere for a temporary closure or suspension of schooling functions for certain reasons, but this is different from extending the duration of primary education. If it is bad enough to start late, it certainly should be worse to have to spend up to fourteen years at primary level, unless the extension is expressed otherwise. The right to basic education would, in such case, **conflict** with the higher ideal for a general and unimpeded right to education in terms of the international law of education.

The power of the District Education Officer to lower the enrolment date for a child is limited to public schools. Unless the general statutory provisions for compulsory enrolment at the age of seven years do not apply to private primary schools, the power of the District Education Officer in this case would be a **discriminatory** power and liable to be challenged under the Constitution. Furthermore, such powers should be clearly defined in order to prevent abuses of the right to education in terms of preferential treatment in favour of parents who simply sought to pre-empt the statutory provisions as to minimum age. In any case, the statutory minimum age would itself become meaningless if it did not apply to private schools, as this would mean that the implementation of the right to education at the level of the State was only haphazardly done and without uniform application. Yet, the very Constitutional basis either of the restricted application of the minimum age in the sense of public schools alone, or, indeed, any extension of its application to include private primary schools, is already a potential area of constitutional **challenges.**

Sixth, under the **compulsory** conditions in section 35 (1) and (3) (or equivalent sections 19 and 20 under the Zanzibar Education Act, 1982), it is mandatory for the parent to ensure consistent attendance as well as completion. On the mainland, a further obligation is placed directly upon the child regularly to attend and to complete the period of his education for the **particular** school. On first reading, these provisions would seem to preclude pupil **transfers,** in addition to making both parent and child both liable to prosecution for default. However, under sub-section (4) of section 35, the Minister may make 'rules' for the better carrying out of the purposes of section 35. An identical provision under section 60 (m) enables the Minister to make 'regulations' for admission to schools generally. Now, under **new** proposed Regulations for Admission to Government Schools (1998, in draft) intended to replace Admission Regulations of 1982, it is to be provided in para 8 that no pupil shall **repeat** in any standard (grade) in a public school except with the permission of the Regional Education Officer in his

area of jurisdiction. At first glance, it seems to be a **contradiction** to require mandatory completion of the prescribed education under the main Act, and yet to remove that principle under the Regulations. Surely, the Regulations are intended only to enhance, but not to override the provisions of the Act. Even on an apologetic pretension requiring the 'permission' of the Regional Education Officer, the regulatory aspect should not becloud the affrontery of taking away that that right to receive a complete primary education otherwise than an account of death or serious disease or incapacity. The very fact that permission would be required, is sufficient to relegate this right to a' **conditional**' right, plus the entire prospect of losing it altogether. A distinction has to be made between this right to complete the education, and the option of surrender, although the latter would also seem to have been extinguished by the agency of compulsory education.

Permission to repeat should, however, be provided for as an exception to section 39 in the event of a **pregnant** pupil seeking to re-enter the classroom at the end of her ordeal.

Seventh, although the international human rights instruments target all children as **subjects** of the right to education, the Education Act, per se, makes **no** reference to the provision of this right in the following cases-

- Children deprived of their family environment or care (Art. 20 and 26 CRC);
- Sexual exploitation within the school jurisdiction (Art. 34, CRC)
- Sale of unlicensed foodstuffs in school premises
- Child labour (Art. 32, CRC);
- Protection from teacher violence within the school jurisdiction (Art. 19, CRC);
- Protection from inappropriate, harmful and distorted instruction of information (Art. 17,CRC);
- Freedom of thought (Art 14 and 12, CRC) Birth registration as a basis for compulsory enrolment (Art. 7, CRC);
- School discipline.

The following guiding provision under the Convention on the Rights of the Child, 1990 help to throw new light on areas of silence under the Education legislation, Article 3 provides that in all actions concerning children, the best interest of the child shall be paramount. The same article

also alludes to suitability of facilities as well as staff in all institutions caring for children. Article 4 enjoins States Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights of the child as envisioned under the Convention, which is already ratified by the United Republic of Tanzania.

National laws generally provide protection measures for children on subject-matter basis. Tanzania is no exception. Hence, individual legislations exists in regard to health care, food licensing,, birth registration, sexual violence, child labour, child marriage, and juvenile justice, to mention only a few. The focus of attention being urged in this paper is that the Education legislation should do more than just relegate some of these issues to Regulations to be promulgated by the Minister under the Education Act. Indeed, a cursory look at the current list of subjects for which the Minister is empowered to make Regulations shows that only the first item above is touched on. This leaves the implication that the Education Act as a whole has not yet responded to the demands of the Convention on the Rights of Children at least by focusing on the new areas of child protection in particular reference to the school environment. The implications of this gap are as follows:-

- There is no provision for absorbing children deprived of their family environment and care into the ambit of the right to education through a system of public social security. Trustees could be statutorily appointed to manage the fund which would also attract charitable contributions. An education Trust Fund of this kind should be established under the Act for that purpose.

- Many items of food, including ice creams find a ready market in school premises. Children endangered by these foods may suffer diseases which may interfere with their right to consistent attendance,, concentration and also undermine their confidence when they cannot afford to buy them as other do, and while they are hungry. Sale of unlicensed foods of this kind should be prohibited by Regulation under the Act.

- Problems occur within the school jurisdiction where adolescent female pupils have become a target of sexual attraction to some bachelor teachers. School Regulations should make the head of the institution accountable for teacher behaviour in addition to teachers' professional code of conduct where it exists. Should this problem, in fact, influence the government to lower the minimum age of enrolment and to amend the Act accordingly.

- The incidence of child labour transcends the family, but within the school jurisdiction, Regulations should be made to contain teacher/pupil contact outside the classroom and to prohibit child exploitation. Teachers especially in the rural areas are known to keep school children many hours outside the classroom, doing domestic chores for them. In urban schools, certain, teachers have used school children to sale bans and sweets for them outside the school gate instead of attending class. School Regulations should regulate teacher conduct in this regard.

- Teacher violence is rampant. In some cases, this includes the use of abusive and obscene language against the children, abusive conduct, intimidation, cruel beatings, disrespect towards the children, lack of supervision and even the use of corporal punishment (prescribed under s. 60 (o) of the Education Act) but already prohibited by Art. 19 of CRC). To remedy the situation, the National Education (Expulsion and Exclusion of Pupils from Schools) Regulations, 1979 should be streamlined to provide a comprehensive list of punishable offences, and to abolish corporal punishment, including any other inhuman or degrading punishment. It is true that young children in a child-unfriendly atmosphere may feel threatened and unable to focus properly on their education once the teacher has turned into a menace against them Hence, the need for a rights-friendly school system. To some degree the

upward drop-out rate has been influenced by teacher violence, thus **diminishing** further the right to education.

- Existing school Regulations do not guarantee the child any protection from inappropriate, harmful or distorted instruction or information inside the classroom and also on the wider teacher/pupil interractional sphere outside the classroom. There is nothing preventing a teacher from introducing any topic outside the ambit of the syllabus or even curriculum in a manner harmful to the children. It is also hard to carry out enough performance reviews aimed at teacher evaluation. Perhaps the school inspectorate system should include a simple **questionnaire** to be filled by the children as a monitoring tool. This is necessary in order to ensure the right of the child to receive **appropriate** instruction or information.

- Respect for the views of the child is a cardinal principle in matters of instruction as well as in any judicial or administrative proceedings. A child who has been denied this right cannot be reasonably expected to respect another person's opinion. Teachers generally tend to shout children down. This tendency has also perverted teaching styles and methodologies which have made teaching a one-way traffic system. This system stultifies the mental as well as psychological growth of the child and is prone to undermining the child's self-confidence. The Education Act should therefore include provision to the effect that the child is a **person**, imbued with natural competences and a thinking mind (see Art. 1 CRC).

- The Education Act makes no reference to **registration** of births. This gap makes the statutory minimum age of enrolment a matter of guess work. In the rural areas, birth registrations are almost unheard of. Furthermore, public school enrolment becomes impossible to plan ahead in terms of provision of additional facilities including teachers, and also in terms of quality and access. Last minute enrolment also causes an unnecessary panic which may

encourage corruption, but also contribute to the problem of over-aged children who have missed the earliest opportunity to enroll. The low net enrolment rate of about 50 per cent may have been also influenced by this phenomenon, as demand always exceeds the facilities. It is suggested that **amendments** should be made under section 35 of the Act to include provision for (a) birth registration for purposes of planned admission to school and (b) notification of movements from one location or town to another for children who may be eligible to enroll within one year, and (c) applications for enrolment to be made to an appropriate monitoring authority at least one year before the due date, giving all the details deemed to be necessary. Such details or applications should include information as to destitute families as well as children deprived of their family environment.

- School discipline is a thorny issue which should deserve detailed regulation. A lack of a clear disciplinary code and levels of punishment, matched with appropriate procedural rules is a serious **encroachment** upon the right to education. Because of this, punishment has been irrational and pregnant girls have been expelled without hope of resumption of schooling, although there is no law, allowing such expulsions. The National Education (Expulsion and Exclusion of Pupils from Schools) Regulations, 1979 made no reference to school pregnancy as a ground for expulsion. Yet, expulsion was ordered on the pretext that it constituted a **'serious misconduct'** as a ground to sustain an expulsion order. No provision exists as to the **right** to be heard, or the **right** of the parents to attend a hearing. The school Committee virtually exercised its own discretion. Generally, it was left to the wonderment of the imagination as to whether, indeed, pregnancy was procured on the expensive ticket of 'serious misconduct' as opposed to the momentary if illusory, delight of the heart in most cases.

Admittedly, the Education Act in its section 60 does provide that the Minister should make Regulations to 'prescribe the conditions of expulsion or

exclusion (presumably rest or suspension) from schools of pupils on the ground of age (sic!) , discipline or health and control the administration of corporal punishment in schools'. To worry about '**age**' in this way contradicts the power of the same Minister to extend Primary education by a further 7 years! However, those Regulations do not cover the entire scope of school discipline, which might also include teacher discipline. Teacher discipline should be under the initial jurisdiction of the local School Committee or School Board, as the case might be.

Recently, there exists in **draft** form The Education (Education Committee) (Establishment, Constitution and Procedure) Order, 1991, made under section 11 (2) of the Education Act, 1978 as amended by Act. No. 10 of 1995. Curiously, however, the draft order merely seeks to constitute the School Committee and its meetings procedure, but fails under its functions to include **disciplinary** powers in accordance with section 54 of the Act, which provides –

(1) Any person aggrieved by a decision given under this Act may appeal to the appropriate Appeals Board against that decision if it relates to-

(a) the rejection by a School Committee of an **application** for the admission of a pupil;

(b) the confirmation by a School Committee of the dismissal of a pupil;

(c) the imposition of the punishment of suspension on a pupil by a School Committee.

(2) The Minister may, by notice published in the Gazette, provide for other matters in relation to which appeals may be made by aggrieved persons to the appropriate Appeals Board and to the Minister.

Similar comments may be generally made in respect of the **draft** The non-Government School Board (Establishment) Order, 1998, made under section 60 of the Education Act, 1978, as amended by Act. No. 10 of 1995. In concluding this part, it may be argued again that a lack of **definition** of disciplinary powers in the hands of the School Committee, coupled with a lack of governing procedures, is a serious omission which may expose the school child to **arbitrary punishment** in excess of jurisdiction, contrived under haphazard procedures. This would constitute serious **violations** of the child's right to education. This situation definitely is an **impediment** towards the realization of the right to education.

- **Other Legislation –**

In addition to the **shortcomings** of the Education Act, a few other old pieces of legislation also tend to limit the implementation of the right to education. However, these laws, such as the Law of Marriage Act, 1971: the Law of inheritance, and the Employment Ordinance, are among the list of revised laws already examined by the Law Review Commission. Draft amendments of these are awaiting Parliamentary approval once the Attorney – General's office has scrutinized them. The main area of contention regarding these old laws as regarded their individual negative intrusions into the child's right to education, was in relation to a low age of marriage for girls (15 years with parental consent), and employment age. In general, provisions of the Employment Ordinance in that respect would also have contravened the International Labour Organization's principles, especially the abolition of child labour and slave labour. For instance, the ILO Convention Concerning Minimum Age For Admission to Employment, as adopted by the General Conference of the ILO on 26 June 1973, prohibits child labour (Art. 1), and urges every ILO member who has ratified the Convention to declare a minimum age of employment within its territory (Art. 2).

Since the contentious laws are now in the process of amendment, nothing more needs to be said concerning them in this paper.

To conclude the discussion on the legal content of the right to basic education under the education legislation, let us briefly refer to section 56 (1) of the National Education Act, 1978, as amended in 1995.

Section 56 (1) lays down the principle that 'every citizen of the United Republic' shall be 'entitled' to receive education of such category, nature and level as his ability may permit him. On the face of it, this section is **unconstitutional and void** in that by its sweeping reference to 'every citizen' it purports to legislate extra-territorially to include Tanzania citizens of **Zanzibar** origin and to the extent that primary education is a **non-union matter,** and contrary to section 64 (3) and (4) of the Union Constitution, 1977 and also contrary to section 4 of the Interpretation and General Clauses Act, 1978. This might have been the end of the subject, but for a few points of interest it also raises. Coming closely on the heels of the Union Constitution, 1977, the above provision of the Education Act, 1978 is a carbon copy for section 11 (2) of the Union constitution. Presumably, therefore, this is the closest that the Education Act came in an attempt to adopting the concept of education as a **human** right. Yet, in doing so, the drafters of the Education Act could only beg the question i.e. whether, in fact, the Union Constitution itself did or does **recognize** education as a human right on the basis of the international human rights instruments. The Constitution would seem to avoid the question. We will encounter that problem below. But in parting with the intricacies as well as some of the comical aspects of the Education Act, 1987, 1995 it may be fair to say, in respect of section 56 (1), that at least it adds some missing if also comic, sense to section 35 (1) (universal compulsory education) in that once could not be **compelled** to acquire anything without first being lawfully **entitled** to it!

D. Whether the Constitution recognizes the Right to Education in the sense of the International Human Rights Instruments –

The Union Constitution, 1977 is **silent** on whether the provisions of the International Human Rights instruments, or any of them, are to apply to Tanzania.

To appreciate this point, it is well to remember that other Constitutions do adopt those instruments or such of them as may have been ratified by the particular State.

The Constitution, however, in section 9 (f), pledges itself to the maintenance and upholding the dignity of man through full compliance with the provisions of the Universal Declaration of Human Rights (interpretation). While this declaration of intent is a noble one, nevertheless, it must be realized from the outset that legally, the Universal Declaration of Human Rights does **not** bind as law because that historic document has no Treaty status, i.e. it is not subject to ratification in accordance with international law, and its provisions are therefore not legally enforceable as law.

By a Constitutional amendment[15] in 1984 to the 1977 Constitution, however, a **Bill of Rights** has been introduced into the Constitution. Basically, The Bill of Rights adopts many of the provisions of the international bill of rights, including that of the right to **education**. But the legal **status** of the international human rights instruments themselves is not mentioned under the Constitution. It is, therefore, difficult to say whether the Constitution **recognizes** the right to education in the precise context of the international human rights instruments or inspite of them. The next question that follows from this is whether and how those instruments can **apply** in Tanzania as part of the international law.

To constitutionally recognize and **incorporate** the international human rights instruments into the national law would mean that Tanzania has agreed to implement human rights as an international obligation, and education in particular as a **human right** to which certain conditions attach as incidents of international law. Such incidents would include the obligation to apply the full international **standard** of implementation, including goals and monitoring indicators prescribed or implied by the international standard. Contrariwise, merely to dispense education without reference to the international standard could not be

said to implement a **human** right, regardless of the result being nearly the same. A human right implies demands as well as obligations for the enjoyment of the incidents of that right, including guarantees against government derogations. Furthermore, it would also be nearly impossible for the government to accord different priority to some rights but not others in a hierarchical way.

The position under the Constitution raises some **doubt** as to whether, in fact, education is to be dispensed as **'human right'** in Tanzania, and this could rightly be a cause for concern.

Recalling from the above, Part B, the Constitution in its section 11 (1) imposes a legal obligation upon the government to secure, among other things, the **'right'** to education. It would seem, therefore, that education was to be certainly provided as a human right. Similarly, immediately under sub-section (2) of the same section 11 the **right** to education is granted to every person. The sub-section then goes on to extend the right to the unlimited pursuit of education only to 'citizens' .

It must be observed, however, that recognition of a human right, if indeed it is, is one thing. The more important and crucial thing is whether that right has been substantially **'guaranteed'** under the national law. Supposing, for instance, a human right has been only **partially** recognized (otherwise than in terms of placing a 'reservation' against it, or otherwise than by refusing to adopt a Protocol made under it), how would an aggrieved party seek to take **full** advantage of it by resort to its counterpart provision under the international law? Turning therefore to the right to education as implementable under the Education Act, how can one take full advantage of a **'free**'education, which is **not** provided for under the Act? On the other hand, can one argue that since the Constitution provides for the 'right to education', the **omission** of the component of **'free'** education from the Education Act was therefore,

(a) a violation of the Constitutional right; and

(b) a violation of the relevant international Covenant law of human rights?

Presumably, in order to succeed on point (a), one would have first to define the right expressed under the Constitution to see whether the component of 'free' education was implied. On point (b), there would be no violation of any international Covenant unless such an instrument had been expressly adopted under the law in Tanzania. Furthermore, if the decision was to say that the Constitution was not violated because the 'right' to education expressed in Section 11 of the Constitution was, in fact, that defined under the Education Act, (re minus 'free' education) what would the aggrieved party do? Obviously, the alarming fact might be that an aggrieved party had no remedy under the law, and all because the Covenant law was not expressed to **apply** to Tanzania.

An example of this situation is the 1957 Irish case popularly known as the 'LAWLESS' case (matter of O'LAIGHLES, 1960, Ir. R. 93, 124-26). So dubbed on account of its hapless victim. In that case, the Petitioner in Habeas Corpus proceedings alleged that the law under which he was being held **'conflicted'** with the European Convention on Human rights, 1953. The Irish Court held that even if there was a conflict as alleged, yet the Convention did NOT have the force of law in the Irish Republic and could not therefore affect the validity of the domestic law in the Irish Republic. The reason for this decision was that the Convention had **NOT** been **incorporated** under the domestic law through an enabling legislation.

We thus come to the question: what **link** is therefore available between the International Law of Education and the domestic law of education; but first, a brief review of the initial attitude of the Tanzanian government to an early introduction of the human rights package.

- **Tanzania's initial reaction to the Human Rights package –**

Admittedly, Tanzanian's record in the formal adoption of international human rights as a whole has been one of hesitant reflection, if somewhat peculiar. But this is not to suggest that human rights were anthema to Tanzania.

At the dawn of independence in 1961 but not before, the British colonial government did try to get the incoming administration to accept the introduction of 'Bill of Rights'. Already, countries like Nigeria had adopted a Bill of Rights. Nigeria did this on 24 October, 1959 just prior to her independence (1960). The main reason behind the colonial push was for the protection of private colonial property, although there was also the fear that an inexperienced government coming suddenly into power might generally become unruly and autocratic, and therefore much more likely to threaten international trade, international current transactions and capital transfers as well as democracy.

The response of the incoming government, however, was a flat **refusal.** Generally, in reference to human rights as whole, the new government now in power would not want to compromise the potency of the Preventive Detention Act, 1962 not so much as a terror weapon but in order that the priorities of development should not become hamstrung on a treacherous balance of values. In theory, this was similar to declaring a 'state of emergency' in regard to the economy, although to have actually done so might have scared all investment away. From this point of view, however, the **'right to education'** also fell victim. Even its application as a mere legal 'privilege', and only so in part, had to await the National Education Act in 1978. Nevertheless, if this sounds strange, let us also be sobered by the statement of Mr. Oliver Lyttelton, Colonial Secretary, that he made at Nigeria's Constitutional Conference in 1953 at Lancaster House in London. He said that he had 'the prestige of Nigeria too much at heart to wish that general aspirations should be attached to the laws of the country'.[14] So had President Julius Nyerere, presumably!

- **Establishing a Link between the International Law of Education and the Domestic Law of Education**

The '**right to education**' is a creature of international law. In order for it to become binding as part of the national law, however, a definite **procedure** of adoption is necessary. Thus, for instance, although before independence (1961) Tanganyika was bound under the previous Trusteeship Agreement, 1946 (between the Colonial government and the Trusteeship Authority) to adopt **any** international Conventions **then or subsequently** in existence, including a system of **elementary** education, vocational and technical training for the inhabitants, no legal procedure was provided for this to come about. Furthermore, it would have been ludicrous, in any case, to imagine that a party to a present agreement could contract to be legally bound by any future agreements before their existence. At best, therefore, the Trusteeship Agreement was merely a political expression of a **desire** to observe the international law of Treaties. Our task is, therefore, to find out how and whether Tanzania is already legally **bound** to apply the 'right to education' as a system of international law, before we can begin to inquire whether education is to be provided as a 'human right'.

Historically, the purpose of the Colonial Education Ordinances since 1927 was merely 'regulatory' in nature. The law did not seek to establish education as a 'right', although people were entitled to it as a'**privilege**'. It was, therefore, sufficient to establish a compulsory elementary system of education for reason of 'socialization', even though it was neither universal nor free. The major task of the post-independence education legislation was to enforce equality of access to education by removing racial discrimination, streamlining the curriculum and to introduce a devolution of authority in the management of education. Hence , any possible **link** with the international law of education would have had to come later. This would have had to be

sought under the international law so long as the particular international law did not apply to Tanzania!

Now, the first question above. What would be the effect of the ratification on the national law from the date of ratification? Theoretically, each ratification would change the national law only to the extent of the Education Act, but not necessarily the Constitution. This is so because upon ratification of an international instrument, generally the Treaty law would take precedence over the domestic legislation in case of conflict, although the Constitution would take precedence over the Treaty law. However, this latter presumption would probably hold water **only** if the Treaty law had been already **incorporated** to become part of the domestic legislation. This would have been the case, if, for instance, the Education Act had incorporated the provisions of the international instruments relating to education as a **human right** as per international law. In that case, however, **no** conflict would arise under the Constitution because it would have been natural to see the Constitution in its section 11, as already providing for education as a human right whose interpretations would now be those of the incorporated international law. But let us just remember that the Education Act, 1987, 1995 does **not,** in fact, incorporate the international instruments.

We are, therefore, left to see how the ratifications affect **only** the Constitution. For this purpose, it will be assumed that the content of the international instruments, ratifed after the Constitutional amendment, did not conflict with the counterpart provisions of the already amended Constitution, as otherwise a further amendment to the counterpart provisions of the Constitution, would have become necessary,. But this is not necessarily also to say that merely because of the apparent parity, the international instruments would apply automatically. The **question** that now emerges is whether the Constitutional provisions in section 11 should then be interpreted according to the Education Act. i.e. with the result that

the right to education in Tanzania does NOT include free education and does NOT therefore include the incidents of a human right) **or** in accordance with the international instruments (with the result that education was human right).

As regards the constitution, as opposed to the Education Act, the question of 'incorporation' of the provisions of the international instruments takes a different legal dimension. The legal presumption is that a Treaty does not acquire the status of the domestic law **merely** through the process of ratification and this is the position in many jurisdictions.[16] (as already stated, no mention is made under the Constitution of the international human rights instruments). Yet, there no doubting also the fact that once ratified, a Treaty becomes binding international law upon the state. These two points are different. In the latter event, it is improbable to suggest that the Constitution could be used as an instrument of equivocation to deny the effect of the particular international law upon the state. For this reason, and because through the act of ratification the state has agreed to undertake serious obligations under the international law, including those emanating from **membership** to the Charter of Rights under the Constitution should be in accordance with those of the international instruments. Accordingly, therefore, the domestic law would be interpreted in accordance with the international law. By this circuitous means, it is submitted, the provisions of the Education Act, in so far as they constituted a denial of the **full** value of the right to education, must be seen to be in **violation** of the human rights standard.

- **Whether the provisions of the Constitutions accord sufficient PRIORITY to education as a human right -**

  This issue can be examined briefly in at least two ways:

  (i) from the **positional** point of view in which the right to education is made to appear in the Constitution making it appear separately from all the other rights;

(ii) whether the right to education can be said to be an 'entrenched' right in the sense of it being a **'fundamental'** right.

The element of **'priority'** may relate to the degree of measures of implementation as well as to mechanisms of enforcement. If the right is challenged, will the State **enforce** it? Enforcement by the legal process has normally, though not necessarily, been said to be the **sine qua non** of a legal right. Rights which the law recognizes but without enforcing them have sometimes been called **'imperfect'** rights. Generally speaking, fundamental rights are **guaranteed** rights. Generally speaking, fundamental rights are **guaranteed** rights to the extent that they are said to have been entrenched in the Constitution. Such rights, as many constitutional lawyers agree, can only be altered, replaced, suspended, re-enacted or modified by at least two-thirds of votes of all members in Parliament. By **section 98 (1)** of the Constitution, this procedure applies to all the provisions of the Constitution, other than:

i. certain sections of Cap. 500, The Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962;
ii. certain sections of Cap. 509, The Civil Service Act, 1962
iii. Cap. 508, The Judicial Service Act, 1962;
iv. Cap. 512, The Citizenship Act, 1961 – the whole act
v. Cap. 557, The acts of Union between Tanganyika and Zanzibar – the whole act.
vi. Matters concerning e.g. continuance of the united Republic; continuance of the office of the President of the United Republic; the executive authority of the united Republic; Union matters and few other matters all requiring a two-thirds majority of Members each of the Parliaments of the mainland and Zanzibar.

Entrenched rights could be suspended only during an **emergency** as defined in section 32 (1) of the Constitution itself. However, these

Emergency powers are definitely so wide that they are not in conformity with international obligations under Article 4 of the International Convenient on civil and Political Rights, 1966 as regards the right to life and to the dignity of the person, from which no derogations are possible under the international law. Furthermore, the grounds under which the President may declare an emergency are too broad, and the powers of the President in such an emergency are too sweeping. Under emergency regulations, for instance, an imminent danger threatening public order or public safety in almost any section of the community may be sufficient to cause a state of emergency to be declared. In this wide context, human rights, including that of education stand the risk of indcriminate derogations.

No one has perhaps expressed the essence of constitutionally **entrenched** provisions better than the late Sir Abubakar Tafawa Balewa, the first Prime Minister of Nigera, who gave the reason for Nigeria's entrenchment in these words in 1957:

> 'We feel so strongly on this matter that it was agreed unanimously that the whole of this chapter should be entrenched. Perhaps you would wonder at these precautions; it is not that we mistrust ourselves, but that elsewhere we have witnessed all too frequently the ease with which Governments .... Have been able to twist and change the shape of their laws, and to deprive a majority of their citizens of their rights. In some cases this deprivation of rights has been carried out methodically ..... but in other cases resort has been had to the excuse that Government security justifies the action'.[17]

However, it may be one thing to have the entrenched provisions, but perhaps quite another thing to accord equal priority to the rights already

entrenched. This is what appears to have happened in the case of the **right to education** under the amended Constitution, 1977.

Positionally, **section 11** of the Constitution, providing for the right to education, has been **segregated** to Part II, while all the other human rights provisions are placed in Part III of the Constitution. The reason is to subject all the other rights to a different **enforcement** procedure from that applicable to the right to education. The effect is that the right to education is to be adjudicated upon by **non-judicial** bodies or administrative agencies as per section 7 **(1) and (2)** of the Constitution. Under **sub-section (1)** above, the enforcement agencies have not been identified and they may consist of several such organs. No particular qualifications are envisaged and it would seem quite possible, probably as in the case of the School committees under the Education Act, to commit the enforcement of the right to education to non-professional persons who may not necessarily appreciate the technicalities of the applicable law. This would clearly be a case of the constitution not being able to accord **sufficient** or equal priority to education as a human right.

Yet, there is also reason to think that the framers of the Constitution aimed not just at **pre-empting** the jurisdiction of the local Court (High Court) from the perview of the right to education. It has thus been shown that if an aggrieved party were to petition the court, alleging a '**conflict**' between the Education Act and the Constitution, which has caused him injury to the right of education, the likely result would have been that the Court might have ruled against him, on the basis that in so far as the Education Act provided 'interpretation' of the right envisaged under section 11 (2) of the Constitution, there could, therefore, be no conflict in the law and hence no violation of the right. The decision would have been authorize had the Covenant law been incorporated under the domestic law because the former , would then take precedence over the domestic legislation. But

the framers of the Constitution may also have contemplated the **effect** of such decisions. Accordingly, one may assume, not only would it be necessary to exclude the jurisdiction of the domestic Court and the applicability of the international law from the domestic Court, but also to try to exclude the jurisdiction of an **international Court** if or when it existed. To achieve this level of exclusion, it would certainly be necessary to avoid incorporating the international Covenant law of education under the local legislation or any direct adoption of the particular Covenants by the Constitution. Hence, an aggrieved party could **not** allege **'conflict'** between the local legislation and the **covenants** concerned, as the Court would only have to rule that the Covenant law did not apply as part of the domestic law. This was the result in the 'LAWLESS' case charestically so dubbed to ridicule the thoughtless scheming of the drafters of the laws! Can the drafters of the laws in Tanzania avoid this possible interpretation of their work in relation to the right of education? Perhaps this is a bit far fetched, yet in terms of result, the right to education cannot easily be said to have been accorded with any sufficient priority in terms of legal enforceability. On the contrary, it would seem to have been at least interpretations ~~ناقص~~ **emasculated.**

In other words, it might be possible to 'entrench' a particular human right under the Constitution but also to proceed surreptitiously to **'retrench'** it by purging its enforcement value or its spartial or positional hegemony and therefore its putative character to give it only **surrogate** value like a King dressed in borrowed clothes!

As compared to all other human rights under the same constitution, elaborate provision has been made under the Basic Rights and Duties enforcement Act, No. 33 of 1994, which came into force on 18 January 1995. Thus, all the other human rights are enforceable by **petition** to the High Court. We may, therefore, conclude this section by suggesting that

if any government feels threatened by normal implementation of human rights, the basis of ratifying the international human rights instruments is clearly defeated and the impulse to undermine these rights may not have been extinguished merely by virtue of the act of **ratification** or even by the **entrenchment** of human rights, contrary to the excellent hope of Sir Abubakar Tafawa Balewa, quoted above. Article 5 (2) of the International Covenant on Economic, Social and cultural Rights, 1966 provides, for instance:

> 'No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom, shall be admitted on the pretext that the present Covenant does not recognises such rights or that it recognizes them to a lesser extent''

E. The right to Primary Education as a 'right' to Equal Access and Equal opportunity for all or merely as a 'differential' right –

The general concept of **non-discrimination** underscores the principles of equality of opportunity as well as equal access to the right to education. Article 2 (1) and (2) of the convention on the rights of the Child, for instance, sets out the fundamental obligations of states Parties to respect and ensure the rights in the convention to each child within the jurisdiction without discrimination of any kind, and also to ensure that the child is protected against all forms of discrimination.

From such basis, the Human Rights committee proposes that the term 'discrimination' should imply 'any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other states,

and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal fasting, of all rights and freedoms'.

Nevertheless, the principle of non-discrimination does not condemn **affirmative** action requiring a balancing preferrential act, or the **legitimate differentiation** in the treatment of individual children.

The effect of the principle of non-discrimination is, among other things, to require that this principle is included as a binding principle in the Constitution or in the domestic legislation specifically for children. Secondly, the principle requires the elimination of areas of discrimination. However, it is not enough merely to state the principle but without also spelling out all the grounds enumerated under Article 2, above. Since the convention (also the International Covenant on civil and political Rights, 1966, Art. 2) does not 'define' non-discrimination, the expressions of the Human Rights Committee, above, may form the intended scope and meaning.

Under the Constitution of the United Republic of Tanzania, the principle of **Equal Opportunity** appears in section 13 (1), while that of **Equal Protection** appears in section 13 (1), while that of Equal Protection appears in section 29 (2). Furthermore, section 13 (5) defines discrimination generally and largely covers the scope of the Human Rights Committee, but not fully enough. Both the above sections, however appear in Part III of the Constitution which, as already stated, is NOT the home of the provisions relating to the right of the child to education. However, the nearest application of the principle of non-discrimination to children is found in the form of an obligation upon the government in section 11(3) in Part II of the Constitution to secure equal ACCESS in the acquiring of education. Left to itself, this equality to Access does not seem to be guaranteed immediately with any palliatives pertaining to non-discrimination and, therefore, the question of equal protection under it would seem to be fairly wide open. If this interpretation is correct, that it would appear that at least under the

Constitution, no deliberate efforts appears to have been made in order to bring the principle of **Equal Protection** particularly to the child, in terms of protection from non-discrimination, although the right to Access in terms of Equal Opportunity if also available to non-citizen children under section 11 (2) as already discussed above.

Turning to the Education Act, in particular, the right to Access has been limited in section 39 (4) paragraph (a). It provides as follows:

> '(4) Every School Committee shall perform the following functions –
>
> (a) to consider and accept or reject applications for the ADMISSION of pupils to the school;

Apparently, this provision is likely to come in **conflict** with a proposed new regulation made under section 60 (m) of the Act, titled The Education (Admission to Government Schools) Regulations, 1998. Paragraph 3 of this Regulation guarantees the right to ACCESS on equal opportunity basis to every child entitled to enrolment. It provides –

> '3. No child shall be refused admission to any Government School on grounds of race, creed, sex, political or ideological belief provided the Minister shall in his discretion determine the number of non-citizens who may be admitted to post-primary schools'.

Obviously, in view of such conflict between the Act and the regulation, the Act would prevail in its section 39 (4) (a). Yet, the result would then be that the right to Access was definitely **curtailed** and, hence, contrary to the constitutional provisions on non-discrimination!

Presumably, in such muddle the onus would be on the Minister to show that the power to reject the application at School Committee level was not discriminatory and did not amount to an unreasonable classification (although the Education Act did not foresee the need to make such defences). But in view of the **mandatory**

provision for 'compulsory' enrolment in section 35 (1) of the Act, the power to **'reject'** an application for enrolment would clearly be a derogation of the right to equal opportunity and access into school. Furthermore, in terms of the constitutional provisions for equal opportunity, and non-discrimination, the exercise of that power by a School committee is an **illegal** act. And to make things even worse for the Minister, also the procedure for rejecting the application for enrolment would be illegal insofar as the Act does not prescribe the right to be heard. It is, therefore, suggested that section 39 (4) (a) of the Act should be repealed.

A more interesting question, perhaps, might be this: Does the right to Education in terms of equal opportunity necessarily reduce the right to access into schools? Hence, it would be a case of the worse of two evils. Definitely, occasions might arise in which in the course of implementation of a particular human right, certain complementary components of that right might clash. It would be difficult in those circumstances to speak strictly in terms of derogation of one component as against the other, unless there were measures specifically **intended** to produce a such effect. The incidence of a rising population and a higher rate of children of school age may, for instance produce a clash between universal enrolment and equal opportunity in terms of access and quality. Presumably have, the conciliatory provisions such as in Article (2) (3) to the International Covenant on Economic, Social and Cultural Rights, 1966 to the extent of their affection education might be considered, especially for the developing countries:

'Developing countries, with due regard to human rights and their national economic may determine to what extent they would guarantee to economic rights recognized in the present Covenant'.

Certainly, the only justification for a system of compulsory primary education would be that the right as well as the opportunity to exercise it was available to **all** in terms of access. But if this is not possible, and only less than 100% enrolment

is achieved in the process, this factor alone cannot be taken to mean provision of such an education as a 'preferential' or even 'differential' rights. The mere fact that the education legislation, in such situation, had a differential impact on some children as opposed to others would not of itself, establish that the law was, therefore, unconstitutional. In a recent Court decision in USA, in which a **differential impact** of a law was alleged on people of a different race or sex, raising ground for a constitutional challenge on the basis of discrimination, the Supreme Court rejected the claim, saying in part:

> 'The invidious quality of a law claimed to be racially discrimination, must ultimately be traced to a racially discriminatory purpose' – WASHINGTON Vs DAVIS 426 U.S. 229 (1975); also HUNTER Vs UNDERWOOD, 417 U.S. 522 (1985).

In other words, it is not enough to show that the law has produced a differential impact which undermines a human right, but an '**intent** to discriminate. That is USA law. Since the Education Act and the constitution do not lay down a standard of proof to establish a claim of discrimination, it is doubtful whether a claim for a differential impact, such as in regard to equal access into the school could be considered, except on other grounds as recognized by the Constitution.

To sum up on our eventful little excursion, we may say in one short sentence that the 'Right to Basic Education' as an incident of the law of international Human rights stands outside in the courtyard shyly holding hands through the open window with the Tanzanian Legal corpus like furtive lovers who dare not wake grumpy old grandfather from yesterday's sleep!

have been provided as a '**human right**', and the element of compulsory enrolment as well as attendance had no correlation with 'demands' implicit as a **human** right of the child. Primary education was thus provided as a mere dispensation of the government. Furthermore, prior to the amending Act of 19909, Primary education was to be provided only in public schools, thereby severely restricting the right to access as well as the parental right to choose.

In this paper, recommendations have been made towards making the law more responsive to the standard of the international education as a human right, including necessary amendments to the Constitution and the Education Act, and also to certain Regulations made under it. It was also the task of this paper to search for a '**link**' between the international law of education as a human right and the domestic law. In the course of this investigation, several '**conflicts**' have been discovered as between the Education Act and the international law of education, as well as between the Education Act and the Constitution.

This investigation has led to the conclusion that since by virtue of the government having ratified the relevant international Human Rights instruments under which the Right to Education has already been established, those instruments '**bind**' Tanzania as Treaty Law, Primary education must therefore, be consistently delivered as a '**Human Right**' under the domestic law. In consequence, recommendations have been made accordingly to streamline the law. Further recommendations pertain to infusing appropriate interpretations of the components as well as implicit demands envisaged under the international law into the domestic law, as well as to remove any tendency towards hierarchical differentiation of the Human Rights as a whole.

RECOMMENDATIONS

A. Rationalizing the domestic law towards the International standard –

Constitutional recommendations for amendment:-

- adopt international Human Rights Instruments following ratification to resolve issue on non-applicability of relevant international law;

- remove positional segregation of right to education in Constitution to secure parity – s.11 (2);

- re-state right of education to mean a human right as recognised under the relevant international instruments –s.11 (2);

- change s.7 (1) and (2) to make provision for an ombud for children Rights and/or a Human Rights Tribunal with full jurisdiction to decide matters on the Right to Education:

- enlarge provisions for non-discrimination to facilitate right to access to education and equal opportunity s.11 (3); s.13 (1);

- include in the definition of 'persons' recognition of child as a person for purposes of Bill of Rights;

- provide proviso under emergency regulations (s.32) to obligate government-owned public media to provide alternative instruction by radio and television, cassettes, etc) to primary school children stranded in their homes;

- Resolve inconsistency under First Schedule to the Constitution, item 16 giving National Examination Council extra-territorial jurisdiction in setting Primary school examinations for mainland and Zanzibar although Primary education is not a Union matter.

B. **Recommendations for statutory amendments to respond more favourably to the international standard of the right to Education –**

- Amend National Education Act to provide for 'free' education (s 35 (1) as an obligation, but deposit an appropriate 'reservation' to the appropriate authority if possible to take into account the element of cost. But it should be necessary to devise a time table of implementation as opposed to leaving the situation vaguely to future probability;

- Under new Regulations to the Act provide an interpretational framework to 'content' and 'goals' of right to education (s. 60).

- Provide disciplinary Code and Procedures for Hearing and Punishment

- Abolish corporal punishment and define punishable offences (s.60 (o);

- Reconcile areas of 'conflict' in the law as per recommendations in this investigation;

- Prepare Teachers disciplinary rules and provide for school inspectors to monitor teacher behaviour and competence through periodic questionnaire to be filled by each class;

- ensure that Human Rights instruction is provided to children but as a 'preventive' mechanism rather than as uniform for 'combat'. Aim should be humanization of the individual;

- make Regulations for pre-registration of eligible children at least one year prior to enrolment date as planning strategy;

- include birth registration as conditional to enrolment but not as basis for disqualification;

- prohibit sale of unlicensed foods, sweets and ice-creams in school premises by new Regulation (s.60).

- amend enrolment age to below 7 years to enhance appropriate transition age and extend legal concept of the right to education to higher education as per international Human Rights instruments.

- establish Social Trust Fund to cater for children without home and parental environment (as per CRC Art. 20) by amendment to Education Act to place obligation on government.

- abrogate power of School Committee to reject an application for enrolment as unconstitutional (Act, s.39 (4) (a); 51 (1)(a)).

- Repeal provision allowing Minister to extend Primary education for a further seven years or provide statutory conditions for the provision (Act s.2 (2);

- Act to clarify whether compulsory enrolment age under s.35 (1) coversprivate schools and whether penalties for defaulted attendance under paragraphs (2) and (3) cover parents of and children attending

private schools, and whether term 'private' school includes instruction given purely or substantially for religious purposes;

- Review whole draft Regulations for Admission to Government Schools, 1998 for inconstencies and conflict with Education Act;

- New draft Education committee Establishment, Constitution and Procedure (Order) 1991 to be made under s.11 (2) might be consolidated under s.39 (2) (d) and (4), (5) to include Disciplinary Powers and Procedure. This power might also include Teacher discipline;

- New Regulations to provide for the ambit of the rights of the Child within the school jurisdiction, to embrace provisions of CRC 1990;

- Delete reference under s. 56 (1) to 'every citizen' as unconstitutional for extra-territorial legislation.

THE END

FOOTNOTES

1. Human Rights Today: UN Briefing Papers, 1998

2. Max Sorensen: Manual of Public International Law, 1968 p. 249

3. M.D.A Freeman: (LL.M): The Rights of Children in the International Year of the Child, (1980) Current Legal Problems, 1

4. Peltason & Cronin, 1990: The Concept of human Rights, in Government by the People.

5. i.e. since the epic Supreme Court decision outlawing busing regulations in BROWN v BOARD OF EDUCATION, 347 U.S. 483 (1954).

6. Education and the Law, State interests and individual rights: 74 Mich. Law Review (1976) No. 7.

7. See generally: Nature of Legal (Corporate) Personality in A Textbook of Jurispudence, 3rd ed. By G.W. Paton, 365 ff.

8. Education (Amendment) Act. 1995 (No. 10 of 1995) s. 35A

9. Eg: Under the Criminal Law legislation, for instance, a child aged 10 is not criminally responsible for any act or omission – per s.4 Sexual Offences Special Provisions Act, 1998, repealing s.15 of the Penal Code, Cap. 16. Furthermore, a person under 12 is not criminally responsible for any act or omission, unless it is proved that at the material time he had CAPACITY TO KNOW that he ought NOT to do the act or make the omission - per s.15 (2) of the Penal Code. And under sub-section 3, a male person under 12 is presumed to be incapable of having sexual intercourse.