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Human Rights Versus the Common Good in the African Constitutional Development and Democratisation Process: The Case of Tanzania

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Introduction

This article analyses the influence of communitarian political thinking on the African constitutional development and democratisation process. Examining the influence of communitarian political ideals in Africa's postcolonial political development is important for at least two reasons. First, it brings out the differences in the moral and social values between the traditionally more collectivist Southern cultures and the often more individualist Western political traditions. Secondly, it helps us to understand better how and why political ideals and practices in many African nations differ radically from those endorsed in Western traditions of democratic politics and, conversely, how socialist and democratic ideals go hand in hand with African political thinking.

In this article I discuss how the African interpretation of such concepts as democracy and socialism relate to communitarian social and political ideals. I shall first show how the African communitarian interpretation, based on collectivist values, differs from the Western formulation of communitarian political ideology, which is a product of the Western individualist political tradition. Secondly, I will examine the problems the African promotion of social duties and the common good faces in practice when it comes to the constitutional promotion of international human rights standards. I stress how the communitarian emphasis on collective rights, social duties and the common good (such as communal development, cultural integrity, and national security) can conflict with the development of a system of democratic governance that is based on constitutionalism and the protection of human rights. My core thesis is

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that while communitarian collectivist values offer solid moral and ethical foundations for a working democracy, bringing them into a legal system tends to turn them against their original purpose. It shifts the focus from the endorsement of 'the common good' of individual members of society, to the utilitarian maximisation of 'the overall good' of a nation.

The theoretical debate between communitarian and individualist democratic ideals is set within a practical framework of Tanzanian political and constitutional development. Tanzania is a good case study in this context, particularly because the ongoing change from *Ujamaa* (socialism) into a multiparty market democracy reflects an attempt to find a culturally sensitive form of democracy that respects traditionally communitarian rather than individualist political ideals.[1]

Communitarian Socialism and the Quest for Consensus Democracy

In order to understand why the processes of political development and democratisation in Africa has in many cases taken a different direction from that in the West (or from the expectations of Western donor powers), we need to discuss how and why the African model of democracy differs from Western democratic ideals. Thus, there is a need to set African democratisation and political development in a wider philosophical and political framework, which is represented by the debate between individualism and communitarianism as the basis of a working democracy.

In many parts of Africa the slogans for 'proper' development are based on the external demands for 'good governance', 'democracy', 'economic liberalisation' and the promotion of 'universal human rights'. For the most part, these mirror the requirements for democratisation and economic liberalisation set by Western donors and former colonial powers that are qualifications for their financial, technical, and other types of developmental support. Despite the fact that many newly independent African countries have accepted these externally pressured values and even agreed to promote them, at least in principle, political practice shows that their meaning is often quite different from the expectations held by Western powers with a more individualist cultural heritage. Part of this difference in the reinterpretations of the central values of democracy is based on an African attempt to exert its political and cultural independence, as well as the particular features of the African development process.

In the West, the democratisation process of any country is believed to go hand in hand with the promotion of individual rights and citizens'

autonomous choices. This promotion of individualism is usually directly related to political pluralism, and to the liberalisation of markets. It is theoretically justified by a rational self-interest that is thought to be an inherent feature of human nature. In more collectivist African cultures, democracy is not based on the fortification of the individuals' selfish interests, but rather on the promotion of the good of a community or the interests of a nation as a whole.

Western democracy is a form of governance based on competing voices and choices of individuals, from which the winner is chosen by the majority vote. In Africa, the goal of democratic practice is reaching the widest possible consensus within a community. Political philosophers like Kwame Nkrumah (1970), Julius Nyerere (1968) and Kwasi Wiredu (1996) promote this type of consensus-based democracy because it is intrinsic to the collectivist social order, and to the traditional, authentic personality of the African people. In their political writings, these philosophers present a form of the past or tradition that is oriented towards a communitarian line of reasoning. They claim that a political ideology for guiding African nations in the present has to have a strong link with the African past, and that it is this link that assures a bond with the African future (Ochieng'-Odhiambo, 1998: 84). Nyerere (1968), for instance, claims that if we went back in African history, we would find that both tradition and communitarianism were present in Africa, but were lost during colonisation and its aftermath. Nkrumah (1970), on his part, talked about an African personality that is itself defined by the cluster of humanist principles underlying traditional African Society.

Judging from this communitarian point of view, the Western form of democracy leads to the fragmentation of a society. It fosters rivalry between a number of competing and often conflicting values and interests. It creates conflicts over the benefits accrued to various pressure groups (which in the African context are based on tribal ties rather than on social classes). All in all, it disrupts social consensus and communal harmony. This results in the alienation of individuals from their communities, and citizens from the state. It disconnects people from the pursuit of the common good of their nation. Thus, democracy should not be based on the individuals' egoistic competition against each other, because this competition leads to social disharmony by encouraging anti-social self-centred behaviour. If Africa wants a working democracy capable of reaching a reasonable consensus, it should build societies on the virtues of

solidarity, shared values, and common goals. Thus, unlike in the Western individualist thought, in African political thinking—built on communitarian foundations—there does not have to be a conflict between the democratic and socialist principles. To the contrary, collectivist sharing is seen as the basis for a working democracy. A citizen's social responsibility is taken to be the cornerstone of political leadership; and the foundation for the reciprocal cooperation among individuals as members of various cultural, ethnic, tribal, and language groups. When African communitarianism is compared with the Western communitarian political thought, it becomes evident that it gives room to very different political arrangements—these can range from one-party socialism, to multi-party or non-party market-oriented democracies.

Liberal Communitarian-communalist Communitarian Debate

If we compare the Western2 and the African forms of the communitarian thought, ideas about the proper ways of life and values can be quite distinct. This follows logically since according to the communitarians our traditions inevitably affect our values and belief systems. Western communitarianism necessarily remains clearly more liberal, individualistic, and universalistic than communitarianism in the South or in the East. Western communitarianism finds the foundational basis for its social and political ideals in individualist tradition based on more atomistic metaphysics. Thus, it is not interested in collectivist values but rather it searches for the true or authentic meaning of the values of the Western individualist tradition. The leader of the American Communitarian Network, sociology professor Amitai Etzioni, for instance, explicitly notes that while communitarians in the United States demand more attention to social duties, they are ready to request better protection of individual rights in culturally more collectivist and politically more authoritative countries, such as China or Japan (Etzioni, 1996). African communitarianism, for its part, clearly rejects an individualist set of values and is reluctant to accept the individualist justification for the human rights protection. Instead, it attempts to find more collectivist foundations for human rights by emphasizing collective cultural and communal rights. In other words, while African communitarians do not deny the need to protect individual rights, they tend to draw the moral foundations for the protection of individual rights from the protection of different communities' rights of which individuals are valuable members. All in all, the normative agenda of African communitarian thinking is based on a more holistic, and metaphysical worldview (Tangwa, 1999:218-226).3

Western communitarians are in agreement with their African counterparts when they criticize modern Western liberal politics, and when they see subjectivist individualism as a threat to social consensus and harmony. Nevertheless, in Western communitarian thought the remedy for the failures of modern liberal democracy is not found in adopting traditional collectivist ways of life for their inherent value, or for their superiority over the individual values. Neither is it in the replacement of individual rights with social duties. Instead, the cure lies in the extension of the common values of the individualist tradition over the whole national community, as well as in achieving a balance between formal rights and duties. In other words, Western communitarians do not find the solution for social fragmentation and political egoism in either a socialist or communist political system.

Quite to the contrary, Western communitarianism strongly criticizes not only the communist political model, but also that of Central and Northern European welfare liberalism and social democracy for their tendency to create politically and socially passive citizens. In their place, they promote a libertarian market economy in which the citizens, who are morally committed to the good of their communities, work hard to provide for themselves as well as those socially (rather than politically) tied to them (Etzioni, 1993:163-206; 1996:196-200; Walzer, 1980:23-53) In order to gain citizen support for the political activities needed for direct participatory democracy, Western communitarians deny their connection to socialist ideals. They dig their own ideological foundations from the tradition of the early conservatism, and in the nostalgic sense of communities in which the individuals share the goals they are promoting together in a minimal-state without authoritarian interventions from the government. Thus, in Western political thought, communitarian goals are based on the individualist rather than collectivist ideals of democracy.

Following from the communitarian logic that values are products of our societies, Western communitarianism is inherently individualistic. However, African communitarian thinking tends to be more collectivist by its very nature. Both trends in communitarian thinking promote the ideal of the common good of a society. However, the goals that people actually share, the traditions they want to maintain, and the contents of the concept of good that is to be promoted in a society, in the end, may differ greatly between Western and African thinking. While Western communitarianism claims that direct democracy should be based on the authentic values of

the Western individualist tradition, African communitarians demand that democratic political system can better be realized when it is based on the collectivist values and traditional ways of life.

However, even if we may admit that African communitarian ideology relies on what has come to be called communalist tradition (Wiredu, 1996) of social solidarity, and that the communitarian ideals in the West draw their force from the individualist tradition, we still cannot draw conclusions on which – if either – way of understanding the needs of a just political order is superior to the other. In other words, the fact that the different formulations of political thought that are, in one way or another, derived from our traditions and communities, do not provide us with any plausible normative guidelines for comparing such African and Western traditions. There cannot be any *a priori* normative assumption whether individualist liberalism or collectivist communitarianism (or political thinking in general) *per se* is to be preferred in democratic practice. Thus, I want to next move on to study what type of political order the communitarian ideals are likely to underpin in the African context.

African socialism and its Communalist Foundations

The first post-colonial attempt to shape communitarian ideals into political practice can be found in the African formulation of socialist ideals. The communitarian element of African socialism is found in its emphasis on an individuals' traditional adoption of social responsibility and solidarity in providing well-being to a community (or in building a nation) with shared goals and common values. Hence, African socialism is not based on utopian ideals that are to be adopted for their own sake. Instead it takes them to embrace the authentic nature of the collectivist traditions that already exist in the African social order after the colonial intervention (which for the most part imported and enforced individualist values that were foreign to the African political tradition). Socialism as a political enterprise was then aimed at reviving the already existing communitarian values needed for building the proper political arrangement that promote egalitarianism (Nyerere, 1968; Wiredu, 1996).

When this cultural and historical setting is compared to the original Western formulation of socialism, there is a clear difference. African socialism focuses more on small-scale community management and self-reliance, rather than on a state-run economy and centralized governance where communities are in the long-run dependent on the state machinery.

Ideologically, power is disbursed in the community through cooperation and shared work not concentrated in centralized state institutions. Thus, African socialism was never meant to be socialist statism. Instead socialism in African political thought was community-oriented local-democracy, and social cooperation between people based on the African tribal traditions of solidarity and social responsibility.

Socialism in many parts of Africa is based on the nostalgia for the revival of the past collectivist communalist tradition. This line of thinking differs radically from the originally scientific and utopian, future-oriented Marxism. In Tanzania, for example, socialism was originally understood in a communitarian sense of solidarity of devoted and dutiful participation in social cooperation. The Tanzanian political philosopher, president and the founder of *ujamaa* (socialism), Julius Nyerere, referred to socialism as a state of mind and a way of life rather than as a formal and institutionalised political system. He designed the policy of *Self-Reliance* to harness individual talents for promoting community development as a whole (Nyerere, 1968).

For Nyerere, socialism as a political practice had 'nothing to do with the possession or non-possession of wealth' as it did for Marx. Rather, socialism was taken to be a traditional virtue of the African people that should be revived. On the other hand, capitalism was not about wealth as such either. Rather it was about competition for 'future wealth'. Nyerere saw that in a capitalist acquisitive society (as well as in a socialist society not based on the communitarian ideals and communalist civic virtues), wealth tends to corrupt those who possess it. According to Nyerere, wealth breeds a desire to live more comfortably than one's neighbours, to dress better, and to outdo others. This sets a spiral of personal competition, which aims to better only ones' personal future, and is thus (by nature) anti-social (Nyerere: 1968, 1-3; Wiredu, 1997:303-312). In a manner of speaking, wealth makes people live with the fashion rather than with the tradition (of sharing). According to Nyerere, living in the future (by focusing in the accumulation of personal wealth) had to be interpreted as a vote of 'no confidence' in the social system. It states that people are not happy with the present. If a society was organized so that it really cared about its individuals (provided they are willing to work), then no individual within that society would have to worry about what will happen to him tomorrow if he does not hoard wealth today (Nyerere, 1968:3). In his *Essays on Socialism* (1968), for instance, Nyerere notes that there is no need to worry about tomorrow in socialism because society itself looks after its individuals.

Socialist community draws its moral foundations from a traditional heritage and the recognition of 'society' as an extension of the basic family unit. The only clear change for Nyerere in this tradition of family solidarity was that in modern Africa, what should be considered as a no longer relevant are clan or tribal divisions, and maybe even national borders. Nyerere's modern Africa embraced the brotherhood of men beyond any social restrictions (Nyerere, 1968:3-4, 12). When Nyerere compares ujamaa to European socialism, he notes that European socialism was born out of conflict with its father capitalism. Thus, in a manner of speaking, socialism in the Western part of the world has to glorify capitalism as an inevitable step on the way towards communism (Nyerere, 1968:11). African socialism, for its part, does not merely present an opposite position to the capitalist attempt to build a happy society on the basis of the exploitation of man by man, it also criticizes the Western formulation of socialist doctrine in which a happy society is built on a philosophy of inevitable conflict between people (Nyerere, 1968:12; Ochieng'-Odhiambo, 1998:87-93).

For Nyerere, there was no need for people to be 'converted' to socialism. Neither was there a need for people to be 'taught' to be democratic. Both were rooted in the African pre-colonial past. The traditional African society was thought to produce people with the appropriate characteristics to be turned into civic virtues in a new political system of egalitarian ideals. In the traditional society, in which individuals took care of the community, the community took care of the individual, and everyone shared the same way of life (Nyerere, 1968:6-7). According to Nyerere, in order to reshape the political structure of modern African states, proper education was needed. Here again, education is defined in communitarian terms, as proper character education, which includes a national 'community' service (this is a type of communal participation that turned volunteerism into an obligatory social duty) in order to regain the former 'traditional' attitude of mind (Nyerere, 1968:6). Whether the traditional attitude of mind was achieved with the help of a one-party, non-party, or multiparty political system, did not make that much difference. If individual citizens were committed to solidarity, and if they shared 'the democratic state of mind', the political system *per se* would not matter.

The revival of the traditional African values had to come from within the society, from understanding and accepting social responsibility and social duties that people have towards each other and towards their communities. The Western individualist and liberal form of democracy,

based on a capitalist economic system, could not offer the foundation for such a communal morality since it was too egoistic and too atomist. It alienated people from the common goals and the common good, and detached citizens from the ideals of participatory and communal democracy. In addition, the main practical worry in building a democratic system in Africa was the fragmentation of an already multicultural and pluralist society. In post-colonial Africa, with its artificial national borders inherited from the colonial division of the land, political pluralism of the individualist tradition (particularly when based on individuals' self-interest) could too easily lead to the final disintegration of society. In other words, political pluralism could easily turn into social fragmentation, in which the rival tribal, religious, and other cultural interests could disrupt communal harmony and cause conflicts within the young and still weak African countries because the citizens had not yet formed clear 'nationalist feelings'. Without the feeling of belonging together, the commitment to common goals was also lacking.

In a manner of speaking, ideologically African socialism was supposed to work as the social and ethical base in the road towards the communal participatory democracy that would eventually be extended to the national level. African forms of socialism start from where the Marxist socialism ends: from a stateless community where everyone directly and equally profits from their own work and efforts. This stateless community is found in the traditional ways of life in which people had to work together and help each other to maintain the standard of living of these communities. This type of communal participation is in itself thought to be democratic, egalitarian, and just. Thus, there would be no conflict between communitarian values, socialist arrangements and democratic practice, since people help each other and make decisions about common matters together (Nyerere, 1968:1-29, Ochieng'-Odhiambo, 1998:59-94).

The Communitarian State of Mind and the State of Law in Tanzania

If we take the communitarian criticism of Western democracy seriously, we may accept that the communitarian democratic ideal, as such, is probably as desirable—and maybe even more desirable—than the individualist ideal of democracy, which sees the democratic order as a reciprocal social contract based on rational maximisation of one's own personal benefits. After all, we can rhetorically ask: who of us would not prefer to live in a democratic community based on sense of social responsibility and commitment to sharing and caring, than in a one based

on self-interest and rivalry over access to resources? Problems arise when the communitarian ideals are transferred into legal requirements and political norms. In other words, the communitarian values that promote collective forms of life and solidarity, can, no doubt, give strong and functional moral foundations for a working egalitarian democracy. However, when they are institutionalised, they lose their connection to spontaneous morality, and thus may lead into paternalistic and authoritarian practices.

When the ideal 'state of mind' of an authentic citizen is turned into 'affairs of the state', the communitarian promotion of the common good tends to turn into a utilitarian calculation that overrides the general good or benefit to the maximum number of people. The utilitarian calculation, for its part, does not necessarily promote direct participation. Instead, it favours central planning and administration of common affairs. It allows the state to sacrifice the individual citizen in the name of the overall good of a society. This distinction between 'the common good' and 'the overall good' has to be made clear, because it makes a big difference in practice whether we accept communitarian morality or utilitarian morality as a basis of the political system. In its idealistic formulation, the communitarian good means 'the good' that is shared by all individual members of a particular community. The utilitarian calculation, on the other hand, merely attempts to maximize the good for the greatest number (or the majority) of the members of a society. The fact that such maximisation may mean sacrificing the rights and the good for a few or more individuals, does not affect utilitarian policies.

If we settle for a political practice that accepts the utilitarian common good as its goal, we cannot presume that the citizens, and particularly the rulers, have themselves adopted (or have been successfully re-educated to adopt) the communitarian state of mind. The law alone cannot impose the self-realisation of one's inner morality, but it can offer a powerful means to advance one's self-interests. In such a setting the communitarian values can turn (or can be deliberately turned by self-interested leaders) against their original purpose. On the pretext of preserving the common good, individual rights can be ignored or refused. In the name of national consensus based on majority will, many intolerant policies and practices can be fostered. In the name of tradition, the individual members of different internal communities of society, i.e., cultural, ethnic, tribal, and religious groups can be suppressed.[4]

The Genesis of the Law and Communitarian Order in Tanzania

Let us now look at some practical examples of how communitarian ideals can lead to authoritarianism. The study case here is Tanzania and its political and constitutional transition from *ujamaa* to a pluralist market democracy. However, before taking a closer look at the Tanzanian Constitution (hereafter 'the Constitution'), there is need to make a distinction between four different types of situations in which a law that is based on communitarian values and the protection of individual human rights might clash.

First, there is a situation in which the law itself does not protect human rights; it either ignores individual's rights or directly violates them. The second is a situation in which the law might in principle promote individual rights, but it does not have any efficient means to protect these rights in a political practice based on collectivist goals. Third, there could be a situation in which collectivist cultural practices may keep on violating the human rights of individuals despite the existence of proper laws (since these laws may or may not be enforced). Fourth, is a situation in which the law itself may not actually openly violate an individual's rights (rather it might even formally promote them in one form or another), but it inherently justifies their violations in practice in the name of the common good. This is usually the case where the rhetoric of the common good might support the utilitarian policies that allow serious human rights violations.

It is particularly these latter two types of human rights violations on which I want to focus as I refer to the ethical and political problems that occur in Tanzanian constitutional development. I will show how its attempt to secure the rights of individual members of the society by the communitarian promotion of the common good fails to give individuals the protection needed to promote the communitarian ideal of participatory, active and socially responsible citizenship. Tanzania's failure to protect human rights at the constitutional level is partly due to the misinterpretation of the desired political values and communitarian ideals (such as equating the common good with the overall good of a nation), and partly it is a result of idealizing past practices and relying on an idealistic understanding of 'the human nature'. Instead of taking into account the egoistic tendencies that many individuals tend to have when in power (this is disregarding the fact that power tends to corrupt people instead of reviving 'the authentic tradition of solidarity').

In the case of Tanzania, it is interesting to note that historically the first formulation of the Constitution did not even include a *Bill of Rights*. This was justified by appealing to the good of the nation, i.e., granting inviolable rights to individuals was seen to clash with the interests of the new nation. Firstly, the protection of individual rights was taken to promote merely the rights of the ex-colonial powers (and particularly their remaining individual representatives and ex-patriots). Secondly, human rights were seen not only as imported Western political thinking but also as blocking local developmental goals. By enforcing the inviolable—suppressing the formal rights of those who already had higher social status and who were the well-offs in a poor nation—it was seen that this would prevent the nation from making radical changes in its distributional, legal, or political systems.

Here, again, the Constitution emphasized the communitarian ideal of social equality, and the development of the nation and its people as a social whole (rather in the utilitarian terms). Consequently, the rights of individual citizens had no constitutional protection; and the law actually allowed their violation in the name of the common good. In 1984, the Bill of Rights was introduced as an amendment to the Constitution. This change, however, did not actually improve the situation because the Constitution still emphasized that the laws of the land had to be upheld and enforced, and the rights (of citizens) were to remain subordinated to the laws of the land. Human rights cannot be properly protected when basic individual rights are not considered inviolable and are not protected by the Constitution. The communitarian promotion of the common good at the constitutional level thus contradicted the very rule of law it claims to promote (Makaramba, 1997).

In Tanzania, the ideal of a peaceful co-existence of socialist and democratic principles is reflected in the Constitution. According to the Constitution, the state policies have to be based on the principles of 'democracy and social justice' (Tanzanian 1977 Constitution, article 8). Through the ideals of 'Socialism and Self-Reliance', the constitutional norms, as well as other laws of the country, could remain subordinate to the communitarian ideological goals (See Articles 8, 9). Thus, the conflict between the promotion of the common good and the protection of the individual rights is embodied in the Constitution. The Constitution not only allows, but also actually justifies the use of the other laws in a manner that violates individuals' rights (Okoth-Ogendo, 1991; Shivji, 1981; Sirivastava, 1983).

While the collective values, such as solidarity, social consensus and a commitment to ones social duties, may provide very solid moral

foundations for a working democracy, their status as legal requirements or normative political guidelines is problematic. Even if individual rights were also mentioned in the *Bill of Rights*, they could be formally overstepped in the name of the protection of 'the common good' in the utilitarian sense of 'the overall good'. Individual rights can then legally and justifiably be disregarded when the interests and the development of the community or nation are taken to be at stake. Altogether, when the collective, rather than individualist (and/or liberal), ideological principles are the fundamental objectives mentioned in the Constitution as directives principles for state policies, the government is given forceful means to suppress or violate individual rights in the name of 'common goals' and 'national interest'. However, often in political practice the core motivation of the rulers is not the common good (the communitarian 'common good' as the good common to all the individuals of the community), or even the overall good (the utilitarian maximisation of the greatest good of the greatest number of people) as such, but their own self-interest. For the leaders who themselves are not committed to the authentic collectivist values, can then easily use the 'smoke screen' of the promotion of a common good as a disguise for advancing their own personal interests. What was not taken into account here was that the protection of individual rights can in itself be 'the common good' of any nation (whether new or old).

Human Rights and Human Wrongs in Tanzania

In this next example we show how human rights violations can happen almost unnoticed under a constitution based on the legalisation of the communitarian values and ideals. In this regard we shall study in more detail the development of Tanzanian constitutional and political developments after its independence from the British colonial rule in 1962.

After the economic failure of the *ujamaa* system, Tanzania has gradually made the transition to a capitalist economy, and moved from monopartism to multipartism. However, after the formal shift from a socialist to a market run economy, culturally the traditionally African (at least according to Nyerere) values remained respected. This cultural independence is also reflected even in the Constitution. In other words, the Constitution draws its moral foundations from the communitarian rather than the individualist values and democratic ideals. However, the attempt to combine a communitarian morality with the constitutionalist political system creates some problems. The Constitution and the *Bill of Rights and*

Duties (amended in 1977) both contain certain clauses and controversial principles that allow human rights violations in the name of the common good. A particular hazard to human rights comes when the idea of a common good is usually misinterpreted in the utilitarian terms of society's maximized utility or happiness (Shivji, 1990a, Shivji, 1990b).

The Tanzanian 1977 Constitution declares, under sub-article (2) of Article 30, that '...no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment if any law or the doing of any lawful act under such law...' This declaration can actually be used to justify virtually any breach of fundamental human rights and freedoms. Thus, the *Bill of Rights and Duties* does not provide an absolute guarantee for the protection of basic rights of the citizens against the state. Also, the ability to vindicate the basic rights guaranteed under the 1977 Constitution has been limited. In the section immediately following the enforceability of the *Bill of Rights and Duties*, there was no law regulating the procedure for the enforcement of these rights and duties.

It was not until 28th November 1994 that the Basic Rights and Duties Enforcement Act was passed. The purpose of the act was to regulate the procedure for enforcing human rights. The act makes a distinction between the consequences for unlawful denial of, and abolition or abridgment of, basic rights, freedoms, and duties. Normally, a petition challenging the unlawful denial of basic rights and freedoms, if successful, terminates with an order securing the enjoyment of such denied rights or freedoms. However, under the Act, if the High Court is satisfied that a law made or an action of the government or any authority abolishes or abridges the basic rights and freedoms conferred and duties imposed by the Constitution, instead of declaring such law or action invalid or unconstitutional, the High Court has to entrust the government to correct any defect in the impugned law or action within a specified period. And such law or action so impugned is deemed valid until the correction is made, or the time limit set by the High Court expires, whichever is shorter (Okoth-Ogendo, 1991; Peter, 1995).

The Constitution also lists some general provisions (29) to fundamental rights and duties (and limitations upon, and enforcement and preservation of basic rights, freedom and duties) (Act No. 15 of 1984 s. 6, Act No. 34 of 1994 s.6). These provisions demands that individuals should not exercise

their rights and freedoms in a manner that causes interference with, or curtailment of, the rights and freedom of other persons—or of the public interest. Article 29 (2) notes, for instance, that:

> It is hereby declared that the provision contained in this Part of this Constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purpose of - a) ensuring the rights and freedoms of other people or of the interest of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individual, b) ensuring the defence, public safety, public order, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals or the increase and development of property or any other interests for the purposes of enhancing public interest.

These caveats enable anything that promotes or preserves the national interest in general to be done (Makaramba, 1997).

In articles 7, 8 and 9, the Constitution in fact goes as far as state that any court cannot be considered competent to determine the question whether or not an action or omission by a person or a court, or a law or a judgment complies with the above mentioned provisions. This means that there is an open gate to override individual rights. Even after entering the *Bill of Rights and Duties* in the Tanzanian 1977 Constitution, there still is no guarantee that existing laws will be invalidated, or that the government will be prevented from enacting laws or performing acts that might go against the basic rights of individual citizens (Shivji, 1990a, 1990b.)

Individual Right to Freedom and the Collective Right to Limit Freedom

If we take a closer look at a few specific rights we can find similar problems. In the Constitution, the *right to live* guarantees *also* the *right to freedom*, and the *right to live as a free person*. This right to freedom includes freedom from arbitrary arrest, imprisonment, confinement, and deportation.[5] There are many examples that show the Constitution does not succeed in protecting an individual's right to freedom, either in principle or in practice. Instead, the contradictions between the *Bill of Rights* and the rest of the Constitution actually give the state the means to overlook or deny such rights from an individual. Again, most of these cases are justified by the communitarian appeal to the common good of the nation. For instance, under the *Preventive Detention Act*, the president still may order the arrest and indefinite detention without bail of any person considered dangerous to the public order or national security (Makaramba, 1997).

Another law that prevents the protection of human rights and contradicts the freedom of movement is the President's internal deportation power. Here, once more, the justification is the common good, or rather the overall good of the nation. *The Deportation Ordinance* (as amended by the *Deportations Ordinance Act*) provides the president with the powers to deport any person from one part of the country to another and to restrict him to that place of deportation when he considers that a person is: (i) a danger to peace and good order in any part of the Republic; (ii) endeavours to excite enmity between the people of the Republic; or (iii) intrigues against the Republic's power and authority. The Deportation Ordinance allows incarceration without trial (Makaramba, 1998:68-69).[6]

There is yet another law that can be used to contravene an individual's freedom of movement: the power of the executive to expel a person from Tanzania under the *Expulsion of Undesirable Persons Ordinance*. This Ordinance is used to supplement the powers granted to the president under the *Deportation Ordinance*.[1] Dating back to the colonial days, the *Deportation Ordinance* was initially designed to be used against 'natives', whereas the *Expulsion of Undesirable Persons Ordinance* was to be used for 'non-natives'. However, after independence, the distinction is now based on citizenship. That is to say that citizens who are not natives of Tanzania, may be (and have been) expelled. The Nyalali Commission observed that the *Expulsion of Undesirable Persons Ordinance* is unconstitutional as it interferes with guaranteed rights and freedoms because (i) it gives no reason for an order for expulsion, (ii) an ad hoc committee appointed by the president may review the order and make recommendations to him, (iii) it allows detention in custody of any person who has been arrested pending deportation, (iv) it denies right to bail, and (v) it does not stipulate the period for which such an order shall terminate, that is, it is an open-ended sentence.

The Tanzanian government has additional detention powers under the *Regions and Regional Commissioners Act* and the *Area Commissioners Acts* (of 1962). These acts permit regional and district commissioners to arrest and detain persons for 48 hours if they disturb public tranquillity. The category of persons who can be detained range from political troublemakers, persons who resist self-help projects, to suspected criminals and witches. A culprit under these acts has no right to challenge the legality of an order for arrest/detention in a court of law (Chapter of Laws 461, 1962 and 466, 1962). The *Regions and Regional Commissioners Act* was applied, for instance, in Zanzibar after the 1995 General Elections.[7]

The Right to Life, Equality and the Women's Position in the Community

Those who suffer most from the communitarian constitutional demands and communitarian political guidelines are those who are the most vulnerable in the community. In many African societies this means women and children, particularly female children.

Article 14 of the Tanzanian Constitution protects the *Right to Life* by stating that 'Every person has the right to live (life) and to protection of his life by the society in accordance with the law'. Under this article, the *Bill of Rights* also guarantees right to personal freedom, right to privacy and personal security, and right to freedom of movement. The *Bill of Rights* also prohibits the use of torture and inhuman or degrading treatment. However, oppressive and/or physically harmful old traditions and customs that discriminate against women and violate their individual rights still exist, and are not consistently condemned in law or directly dealt with by the courts. Thus, many women—and particularly old women and young girls—presently suffer and die as a result of inhuman traditional practices which could be prevented if the law would focus on the rights of individuals, rather than on the collective interests of the communities and/or cultural integrity.[8] Additionally, in poor countries with patriarchal social structures, women and children are usually the first to suffer the consequences of unequal distribution of scarce resources. Discrimination against women (as well as the mismanagement of vital resources) in the distribution of resources is easily overlooked by the law.

There have been some changes in laws that had earlier disadvantaged women, such as the *Land Bill* and the *Village Land Bill*. However, women are still not treated equally under all laws in Tanzania. Laws on property rights, such as land ownership and inheritance, have in many parts of the country discriminated against women. Presently, issues of inheritance are still often dealt differently under customary, Islamic, Zanzibar and statutory laws—with customary and Islamic laws being more discriminatory against women.

Another attempt to improve and protect women's basic rights was the enactment of *The Sexual Offences Special Provisions Act*, which now not only criminalizes but also heavily punishes the crimes of defilement and rape. However, for various reasons, it has been difficult for women to get information on their legal rights or take initiatives to use these laws properly. For instance, in Nzega District, the protection of women's rights

with the help of the new sexual offences act was reportedly 'paralysed', because of the lack of copies of the Act that were yet to be distributed to the people. In addition, there have been incidents of insensitive investigations and prosecution of cases concerning sexual offences and various forms of harassment of women seeking legal action (Kazimoto 1999: 7-8; Rwebangira, 1993).

In many cases the law itself might—directly or indirectly—justify discriminatory social practices. Women may be subordinated by the old customs and prevailing social hierarchies in the name of the protection of cultural traditions and the shared values of the communities. The law easily leaves too much room for the practice of oppressive and discriminatory customary laws. The problem for human right protection arises here, namely, because the communitarian political ideal draws its moral foundations from tradition, and tends to focus on collective rather than individual rights. Thus, the focus is on the protection of groups of people rather than individual members of these groups. Thus, the violation of the rights of particular members of particular communities—like the rights of women in patriarchal communities—can be easily overlooked.

In addition, due to the patriarchal social hierarchies, women in poor, rural areas are less educated, and are thus often not aware of their rights, or are afraid to stand up for themselves. Even formal constitutional protection of human rights seldom protects women. In addition, the Tanzanian legal system tends not to take gender-based violence as a serious offence against human rights. This is at least partly due to the fact that a large part of this violence is tied to cultural practices and old traditions, which can be seen as 'a common good' of a particular community. In order to maintain harmony on the national level, the different communal traditions can easily be accepted in the name of pluralistic tolerance of cultural groups and equality between different communities.

The protection of women's rights runs into a double jeopardy in Tanzania, as well as in many other African societies. On the one hand, the legal and political systems generally ignore women's particular needs under a universal human rights protection, and overlooks special types of human rights violations done that mostly target women (the violence and suppression related domestic matters, sex, and reproduction). Men, who still make the majority of the public decision-makers, easily justify these

types of gender-based human right violations as private rather than public affairs. In practice, women's cases can often be treated differently in local courts. Altogether, women are in a weak position, hesitant to even start claiming their rights. Without the proper education and economic independence that comes with a chance to be employed outside the household, 'the common good' frequently remains that of the men of these communities. This is because men can claim their 'traditional rights' by arguing that the maintenance of social harmony requires that different (tribal, cultural, religious, etc.) communities be allowed to maintain their traditional ways of life, even if these traditions may suppress some of their individual members. Thus, when based on communitarian ideals, even the *Right to Life*, which in general should be one of the least controversial rights protected by any constitution, can be undermined in the name of 'the common good'.

In general, in any society when the principles involved in the communitarian promotion of the collective rights of communal identities are brought in practice, they tend to further justify the suppression of women and their subordinate position in a society. Thus, a constitution with the emphasis on 'the overall good' as 'the common good' does not grant equal status to women before the law for two reasons. When the protection of tradition and social harmony comes first, despite the *Right to Equality* in the *Bill of Rights*, women are in general still not considered to be equal with men by all the ordinary or customary laws. Second, since laws of the land have priority over the individuals' rights to start with, women's basic rights can be systematically denied, overlooked, or violated by their communities. Thus, even if the *Right to Equality* is mentioned in the *Bill of Rights and Duties* even before the *Right to Life*, it still appears to be not well protected.[9]

When communitarian ideals are brought into political practice, the conflict between women's individual rights and collective rights is often due to confusion in the idea that collectivist values are valuable *per se*. After all, there are many collectivist traditions that do not respect 'intrinsic' collectivist values (such as solidarity, social responsibility, and equality). Instead they use collectivist practices to promote other goals by even maintaining oppressive cultural activities in the name of tradition.

In an ideal situation the individual citizens themselves would be personally committed to 'authentic' collectivist values. The promotion of

collectivist values could then advance democracy, endorse tolerance for cultural diversity, and encourage equal participation in social cooperation. In a less ideal situation, such as in authoritarian and patriarchal communities, communitarian ideals can be used to justify the maintenance of such collective ways of life and social hierarchies that do not respect collectivist values. There are other examples in the Tanzanian political development that could be used to show why the communitarian ideals might conflict with the protection of human rights when they are enforced by law.

Conclusion

This article showed that, while communitarian values, such as solidarity, social consensus and commitment to one's social duties, may provide an important moral basis for participatory and egalitarian democracy, transforming them into laws and legal requirements tends to jeopardize the protection of the rights of individual citizens. The communitarian appeal to the common good or tradition leaves too much room for contradictory principles and conflicting laws that give rulers a legally justified means of getting away with, or ignoring human rights violations. The main problem of implementing communitarian ideals in political practice is in making individual members of communities commit themselves to these ideals. With the lack of such commitment, communitarian political reasoning can provide the basis for egoistic rule, and equips incompetent rulers with the forceful legal means of misusing their position.

Thus, while communitarian values can offer a basis for egalitarian democracy, they can also easily be misused to advance the personal interests of those in power. If people do not identify with or are not committed to the ideal of communitarian democracy, and do not personally respect such values as equality, social justice, tolerance for cultural differences and social responsibility, these ideals and values lose their meaning and turn into vehicles of oppression. Altogether, while communitarian devotion to the common good is essential for any social cooperation, only 'one bad apple' is needed to turn communitarian ideals into their own worst ideological enemies. A leader who has personally adopted an egoistic rather than a communal ethical outlook can use communitarian ideological goals to promote his or her private interests at the expense of the protection of other rights of individuals.

The main problem is that while communitarian ideals can give a solid moral foundation for democracy, the idea of 'the common good' is too easily understood in utilitarian terms, either deliberately or fortuitously, which allows the calculation of 'the overall good' to become a pretext for sacrificing the individual in the name of the happiness or utility of many. However, the promotion of 'the common good' does not necessarily lead to conflict with the protection of individual rights. In fact, the protection of individual rights can be considered as an important part of 'the common good' of all.

Defining democracy as autonomous people governing themselves according to their own choices and interests means that the values promoted by democratic governance may vary from individualist to collectivist ones. Every democratic government needs to adjust to its society's political history, resources, and cultural background if it is to run the nation efficiently and justly. When Western powers judge democratic development in Africa, they should keep in mind the historic and current differences in circumstances and cultural trends between African and European or American societies. While turning communitarian ideals into legal requirements may hinder democratic processes, an individual's devotion to communitarian values may enhance democracy. Thus, there is a need to encourage a more interactive and open international dialogue. This might be found in attempts to work out guidelines for a democratic system which is, on the one hand, based on the legal and political protection of individual human rights, and which encourages, on the other hand, the virtues of social responsibility and solidarity instead of the egoistic promotion of one's own good.

Notes

1. Another reason for choosing Tanzania as my example is that for the past two years I have lectured at Tanzania's University of Dar es Salaam, where I taught human rights and democracy while also conducting research on African conceptions of democracy and human rights.
2. Western communitarian thought is itself divided according to major political and economic systems, which produce Northern and Central European, Eastern European, and Northern American communitarian ideals (Hellsten, 1997).

3. See Sakamoto (1999) on Asian communitarianism. In comparison see Etzioni 1993, 1996; Mulhall and Switft, 1992; MacIntyre, 1984; Taylor, 1989; Sandel, 1984; Walzer, 1983; and Hellsten, 1997.

4. For instance, when *ujamaa* (socialism) was transformed into state policy in Tanzania (following the Arusha Declaration of 1967), the idea of socialism as a state of mind turned became an ideological propaganda. The failure to fully revive the assumed past tradition of sharing led to the implementation of forceful policies of development to promote solidarity in the form of the good of the nation.

5. In practice, however, arbitrary arrest and detention are still problems in Tanzania and elsewhere in Africa. The Criminal Procedure Code, amended in 1985, requires that a person arrested for a crime – other than a national security charge under the Preventive Detention Act – be charged before a magistrate within 24 hours. In practice, however, the police often fail to comply. The 1985 amendments also restricted the right to bail, and imposed strict conditions on freedom of movement and association when bail is granted. Because of backlogs, an average case takes 3 years or longer to come to trial. Observers have estimated that only about 5 percent of persons held in remand are ultimately convicted, and in many cases those convicted have already served their full sentences before trial (U.S. Govt, 1999).

6. In protection of a citizen's rights, the same act introduces a provision for the treatment of a deportee similar to those under the *Preventive Detention Act*, and it requires that the deportee be informed of the reasons for his deportation within fifteen days of execution of the deportation order. The deportee must also be afforded an opportunity of making representations in writing to the President in respect of the order. He should be released if not informed of the ground of deportation within the prescribed period. Despite these safeguards, the deportation ordinance can still be used to deal, for instance, with strong political opponents who are popular with the masses by removing them from their political bases in order to undermine and quietly kill their popularity.

7. For more details on these suppressive laws see Makaramba (1997), TEMCO (1997) and U.S. Govt (1999).

8. In 1988 the government estimated that in Mwanza region alone at least 50 old women are killed every year by those who believe them to be witches. Even though the government criticizes and condemns these practices, only a few arrests have been made, and most perpetrators of witch killing still elude arrest. The Government has not succeeded in taking effective preventive measures to root out the practice. One problem is that, in general, these killings are not always seen as direct gender-based violence and violation of women's rights, which are caused by deeper social attitudes than mere superstition (such as disposing of the unwanted and useless members of society), but are 'accepted' as a sign of ignorance and superstition that can be cured with gradual education rather than prevented by strict legal actions. Also some out-dated laws still contain clauses

referring to witchcraft, which requires punishment, and thus hinder proper human rights protection. See, for instance, URT (1992), and Shaidi and Rugimbana (1999). See also U.S. Govt (1999).

9. Article 12 (1) states that all human beings are born free, and are equal; and 12 (2) adds that Every person is entitled to recognition and respect for *his* dignity. Article 13 (1) specifies that all persons are equal before the law and are entitled, without any discrimination, to protection by the law.

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