# TOWARDS SEPARATION OF POWERS IN A NEW DEMOCRACY: TANZANIA

*By*

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## INTRODUCTION

This paper discusses the operationalisation of the political concept of separation of powers in a society attempting to erect democratic institutions; it adopts an institutional approach: thus the focus is on the executive, the legislature and the judiciary. The concern of the paper is to examine the applicable rules and changes thereof in order to determine whether the above institutions within the state act as independent centres of power in order to check and balance the excessive use of executive authority characteristic of one party regimes.

Separation of powers is enshrined in the Constitution of the United Republic of Tanzania (hereinafter referred to as "the Union Constitution"). Article 4 (enacted by the 5 Constitutional Amendment, Act No. 15 of 1984) states that:

> 4 (1) All executive authority of the United Republic shall be vested in, exercised and controlled by two organs exercising executive power, two organs exercising judicial power and two organs exercising legislative and supervisory powers over the discharge of public affairs.



> (2) The two organs vested with the exercise of executive power shall be the Government of the United Republic and the Revolutionary Government of Zanzibar, the two organs vested with the exercise of judiciary power shall be the Judiciary of the Government of the United Republic and the Judiciary of the Government of Zanzibar; and the two organs vested with the exercise of legislative and supervisory powers over the discharge of public affairs shall be the Parliament of the United Republic and the House of Representative of Zanzibar.

In terms of the above article 4 of the Union Constitution there is separation of powers among executive organs, judicial organs and legislative organs. While the above concept is contained in a substantive article of the Union Constitution, the second concept, independence of the judiciary, is ignobly relegated to the Union Constitution preamble which states in part:

> AND WHEREAS those principles are only best realised in democratic society the Government of which is responsible to a freely elected legislature representative of the citizens and whose Judiciary is independent and dispenses justice without fear of partiality of any kind, thereby securing the maintenance and protection of all human rights and the equitable discharge of the duties of all persons:

This preamble was enacted in 1984 (5th Constitutional Amendment). I say 'ignobly' because the preamble to a Constitution does not in law constitute part of the constitution. In ATTORNEY-GENERAL V. LESINOI NDEINAI & JOSEPH SALEYO LAIZER AND TWO OTHERS, (1980) TRL 214 Kisanga, J.A. stated in the Court of Appeal of Tanzania at p. 247.

> ...It is true that a number of rights have been enumerated on the preamble to the Constitution. These include the right of freedom to the individual. But this amounts only to a declaration of our beliefs in those rights. It is no more than just that. The rights themselves do not become enacted thereby such that they could be enforced under the Constitution. In other words one cannot bring a complaint under the Constitution in respect of a violation of any of those rights as enumerated in the preamble.

See also HATIMALI ADAMJI V. EAST AFRICAN POSTS AND TELECOMMUNICATIONS CORPORATION, LRT NO. 6). The justification for this conceptual approach is that the premise of this paper is that the extent to which deconcentration of powers in the hands of the Executive is being undertaken and power sharing is becoming acceptable as normal is an indicator of orientation change.

My point of departure is the advent of multipartyism in Tanzania, that is to say, July 1,1992 when the 8th constitutional Amendment, (Act No. 4 of 1992) came into force. My focus, therefore, shall be legislative and judicial activities as well as political practice since that date. However, references to the immediately preceding period is inevitable in order to explain any change.

This paper is divided into two sections. Section 1 examines the relationship between the Executive and the Legislature and section 2 discusses the role of the Judiciary. The following hypotheses will be tested, namely,

(i) Constitutional rules and other rules made by the political leadership enable the Executive branch of government to subordinate the Legislature.

(ii) The Legislature hardly asserts autonomy vis-a-vis the Executive branch;

(iii) preponderance of rules and procedures undermine separation of powers between the Executive and the Judiciary and undermine the independence of the Judiciary.

## THE NATIONAL ASSEMBLY: CONTROLLER OF ITS OWN DESTINY OR SUBSERVIENT TO THE EXECUTIVE?

Under the one party arrangement the National Assembly (N.A.) had no control over the Executive branch. It was liable to be dissolved by the President at any time. Further, it was a committee of the single party, CCM. Thus it was described as a rubber stamping organ (Amin: 1993, 71). The purpose of this section is to assess the current institutional position of the Assembly vis-a-vis the Executive.



For this purpose I shall examine dissolution of the Assembly and its traditional functions, that is to say, legislation and supervision of government activities and, more specifically, putting questions to the executive in the Assembly. I shall in addition, examine the Assembly's new functions, that is to say, passing a vote of no confidence in the Prime Minister and the impeachment of the President.

### Dissolution of the National Assembly

The 9th Constitutional Amendment (Act No. 20 of 1992) has circumscribed the power of the President to dissolve the N.A. Under this amendment he can dissolve it on the following grounds:

(a) if the duration of the N.A. has expired;

(b) if the N.A. has rejected the Government budget;

(c) if the N.A. has rejected a Bill under article 97 (4);

(d) if the N.A. rejects a motion on government policy;

(e) if he is of the opinion that the Government has lost legitimacy in the N.A.

In my submission except for grounds (a) and (e) above the other three grounds are unacceptable. In those three situations the President is assuming the role of arbiter in political battles between or among political parties.

### Legislation

Legislative power is vested in the Parliament (article 64 of the Union Constitution). The Parliament consists of the National Assembly and the President (article 62). A bill does not become law unless it is assented by the President (article 97). Accordingly, legislative power is shared between the National Assembly and the top executive. In addition, Ministers exercise legislative power extensively through delegation by the National Assembly under article 97(5) which states:

Nothing in this section or in section 64 of this Constitution shall preclude parliament from enacting laws and making provisions delegating on any person or department of Government the power to make subsidiary legislation having the full force of law or conferring the force of law on any subsidiary legislation made by any person or department of Government.

Under the above provision, the Parliament delegates to Ministers in every Act of Parliament the power to make subsidiary legislation. Whereas the phenomenon of subsidiary legislation is inevitable it cannot be a substitute for legislation by Parliament. In my submission laying before the Parliament of such subsidiary legislation is an illusory form of control.

Even in the ordinary legislative process, the Executive seems to have an upper hand. Two instances may be cited in this respect. Firstly, bills relating to financial matters must be introduced in the National Assembly by Ministers acting on behalf of the President (article 99). It should be noted that all ministers must be appointed from amongst members of the N.A. (article 55). Secondly, the President has power to dissolve the National Assembly in the event he refuses to assent a bill. The circumstances are that if the President withholds his assent he returns the bill to the N.A. together with his reasons. If within six months of its being so returned the bill is supported by the votes of not less than two thirds of all the members of the N.A. and presented to the President, the President must assent to the bill within twenty one days or dissolve the N.A. (article 97 contained in the 5th Constitutional Amendment). This provision was criticised by the Presidential Commission on Multiparty or One-Party System (Nyalali Commission). It recommended that when the bill is presented to the President on the second occasion, the President should be obliged to assent to the bill within twenty-one days (Government Printer: 1992, para 523). The implication is that the bill comes law after the expiration of the specified period if the President does not assent to the bill on the second occasion. If enacted, this recommendation will disable the President from obstructing a legislative programme in the event the President and Prime Minister belong to different political parties.



**The New and elevated role of the National Assembly.**

The 9th Constitutional Amendment and recent practices of the N.A. have elevated the role of the Assembly. Let me begin with the role of supervising and advising the government in the exercise of its functions (article 63). For this purpose members of the N.A. are divided into committees. The more known practice of putting questions to ministers is an exercise of the Assembly's power under article 63(3) of the Union Constitution. Owing to the free press members of Parliament are more informed and are able to ask pertinent, bold and imaginative questions although all MPs are currently members of the ruling party, CCM. The topics have rained from policies of the government to personal conduct of ministers and parastatal executives. Likewise the institution of member's motion in the N.A., has gained prominence. The list of topics for members' motions now knows no bounds - land (Steyn land issue, February, 1994 - see RAI Magazine No. 15, February, 10-16, 1994); membership of Zanzibar in the Organization of Islamic Countries (OIC) as well as establishment of government of Tanganyika (November 1993 - see RAI Magazine No. 003 November 18-24, 1993, p. 7).

I shall now discuss changes contained in the 9th Constitutional Amendment as they relate to the N.A. The first change is on the vote of no confidence in the Prime Minister (article 53A). The Prime Minister (P.M.) is appointed by the President from constituency members of the N.A. He must come from the majority political party in the N.A. and his appointment must be approved by a resolution of the Assembly (article 51 contained in the 9th Constitutional Amendment, article 9). The Prime Minister is the leader of Government business in the N.A. and Ministers led by the P.M. are collectively responsible to the N.A. (article 52 and 53 contained in the 5 Constitutional Amendment). Under the 9th Constitutional Amendment the N.A. now has power to pass, by a simple majority, a vote of no confidence in the P.M. When that happens the P.M. must resign and the President is obliged to appoint a new P.M. (article 53A).

The same constitutional amendment introduced a provision for the impeachment of the President by the N.A. (article 46A). The procedure is as follows:

(i) the president can be impeached only for gross breaches of the Constitution or for bringing the office of President into disrepute,

(ii) the motion recommending formation of a committee of enquiry to investigate the President should be supported by twenty per cent of all MPs and should be delivered to the speaker thirty days before presentation to the N.A.

(iii) Once the speaker is satisfied that the motion has followed all the required procedures he presents it to the Assembly which votes on it without any deliberation;

(iv) If the motion is carried by two thirds of all MPs the committee is formed consisting of the Chief Justice of the United Republic as Chairman, the Chief Justice of Zanzibar and seven MPs.

(v) The committee investigates, affords the president an opportunity to be heard and reports to the Assembly which, in turn, affords the president an opportunity to be heard. If two thirds of the MPs resolve that the allegations against the president have been made out the president must resign within three days of the resolution.

It seems the President has no power to dissolve the N.A. while impeachment is in progress (article 90). However the impeachment process is not likely to be invoked frequently or at all since it is long and complicated. The hurdles are such that procedural errors are likely to be committed in the process; such errors may motivate the president to challenge the impeachment in the High Court of the United Republic which has inherent and unlimited jurisdiction (article 108). And article 26(2) declares that every person is entitled to institute proceedings for the protection of the Constitution and legality. It may be opportune, therefore, to embark on an analysis of the judiciary's role which is now emerging.

## THE JUDICIARY AND THE EXECUTIVE : NEW HORIZONS

In the process of adjudication courts in older democracies interpret the constitution, enforce the bill of rights and undertake judicial review of administrative action. Superior courts of Tanzania have done likewise even under the one-party system. In the course of interpreting the constitution or enforcing the



bill of rights superior courts have power to declare Acts of Parliament to be unconstitutional and, therefore, void (article 64 (5)). Recent judicial practice is exemplified by the case of KUKUTIA OLE PUMBUN AND LESHAU OLE LEMURT V. THE HON. ATTORNEY-GENERAL, Court of Appeal declared that section 6 of the Government Proceedings Act 1967 as amended by Act No. 40 of 1974 is unconstitutional and, therefore void. The said section 6 demands that consent of the Minister for Legal Affairs should be obtained before any person institutes civil proceedings against the government. The Court found that the said section is violative of article 13 (1) of the Union Constitution on equality before the law. The decision is dated 23 July 1993. In LOHAY AKUNAY & JOSEPH LOHAY V. ATTORNEY-GENERAL, High Court of Tanzania at Arusha, Misc. Civil Cause No. 1 of 1993 the High Court declared section 3 to 5 of the Land Tenure (Established Villages) Act, 1992, Act No. 22 of 1992 to be unconstitutional and, therefore void.

Further, while engaged in judicial review the courts can declare acts of the executive to be unlawful. In PATMAN GARMENTS INDUSTRIES LTD V. TANZANIA MANUFACTURERS LTD (1981) TLR 303 the Court of Appeal of Tanzania held on 8 March 1982 that the revocation of the appellants' right of occupancy by the President was unlawful. In an earlier constitutional case, ATTORNEY GENERAL V. LESINOI NDEINAI & JOSEPH SALEYO LAIZER AND TWO OTHERS, (9180) TLR 214 the Court of Appeal of Tanzania held that a detention order under the hand of the Vice-President and which is not affixed with the Public Seal as required by the provisions of section 2 of the Preventive Detention Act, 1962, Cap. 490 is a complete nullity and therefore illegal.Recently Samatta J. K. has outlined principles of general application. In MWALIMU PAUL JOHN MHOZYA V. THE ATTORNEY GENERAL, High Court of Tanzania at Dar es Salaam, Civil Case No. 206 of 1993 he stated at p.2.

In performing my task in this application I must make it perfectly clear that I bear in mind, *inter alia*, the following principles:-

1. A court will not be deterred from a conclusion because of regret at its consequences: Hornal V Nueberger Products Ltd. (156) 3 All E.R. 970 at 978.

2. It is wrong for a court of law to be anxious or appear to be anxious to avoid tracing on executive toes.

3. A constitution is a living instrument which must be construed in the light of present day conditions. The complexities of our society must be taken into account in interpreting it. A workable constitution is a priceless asset to any country.

4. A constitution should be given a generous and purposive construction: Attorney-General of the Gambia v. Momodou (1984) 3 W.L.R. 174. Respect must, of course, be paid to the language used in the instrument.

5. The balance power between (sic) three branches of government, namely, the executive, the legislature and the judiciary, and the relationship of the courts to the other branches must be maintained. Any statutory alteration of that balance must be in unmistakable terms. One branch of government should not usurp the powers of another branch. (The other two principles stated by the learned judge are not immediately relevant to the present discussion; they are, therefore, conveniently omitted here).

The above named case was an application for an interlocutory injunction restraining His Excellency Ali Hassan Mwinyi, the President of the United Republic from discharging presidential functions pending the determination of Civil Case No. 206 of 1993, fild in the High Court in which the applicant, Mwalimu Mhozya, sought, *inter alia*, the following declarations:

(1) The Constitution of the United Republic of Tanzania was violated by Zanzibar joining an organisation known as the Organization of Islamic Countries (OIC).

(2) The President is guilty of allowing or enabling that violation to take place and is therefore personally answerable for the violation.



(3) His Excellency Ali Hassan Mwinyi's continued exercise of presidential powers is unconstitutional as well as a potential danger to the well being of the United Republic and its citizens.

The above application for interlocutory injunction was rejected. Uppermost in the mind of the J.K. was the principle that functions of one branch of government should not encroach on the functions of another branch. He opined that it is one of the principles which ensure that the task of governing a state is executed smoothly and peacefully. The learned J.K. characterised the case as involving politico-constitutional offenses. He held that since article 46A of the Constitution lays down the procedure to be used in removing or suspending the President, the attempt to remove or suspend him by a procedure other than that would not be legal. He stated at p. 9.

> If Parliament had intended this court to exercise jurisdiction of dealing with politico-constitutional offences it could easily have said so when enacting S. 46A of the Constitution. The commission to provide such a provision in the constitution would appear to strongly suggest that Parliament did not want judicial process to be used in removing or suspending the President from office....
>
> The right granted by S. 26(2) to institute proceedings for the protection of the Constitution and legality cannot, in my considered opinion, be regarded as providing an authority to this court to grant a relief which, according to the Constitution itself, is a remedy available only through a parliamentary procedure.

In my submission this is an unduly narrow construction of article 26(2) of the Union Constitution. Moreover article 46 A does not contain an ouster clause similar to article 117(2) which states

> The Court of Appeal shall not have jurisdiction in respect of any mater which is to be dealt with in accordance with the provisions of section 126 of this Constitution relating to disputes between the Government of the United Republic and the Revolutionary Government of Zanzibar.

I shall say no more about the decision in this case since I do not know if an appeal has been instituted by Mwalimu Paul Mhozya.

**Ouster of Courts Jurisdiction**

The issue at hand, therefore, is whether under multipartyism the courts' role has been or should be elevated to a higher pedestal in this regard. A careful study of post multiparty legislation enacted by National Assembly reveals two patterns. One pattern is reminiscent of the one party system whereby jurisdiction of the courts in certain areas is severely restricted or ousted entirely. The Nyalali Commission properly directed itself on this pattern and recommended that all adjudictory functions should be the province of the judiciary. It added that where such functions are performed by administrative tribunals such tribunals should be supervised by the judiciary (paras 566 and 569). It follows that the following pattern of legislation which was enacted after the publication of the Nyalali Commission report in 1992 is unacceptable.

i) The Broadcasting Service Act, 1993, Act No. 6 of 1993, passed by the N.A., on 23 April 1993;

Section 11-(5) Any person aggrieved by a decision of the Commission granting or refusing an application may appeal to the minister in the form and manner to be prescribed in regulations.

ii) The Open University of Tanzania Act 1992, Act No. 17 of 1992, passed by the N.A., on 14 December 1992;

Section 42-(1) Where a student has been punished for any disciplinary offense and he wishes to appeal, he may, while carrying out the punishment, appeal to the Disciplinary Appeal Committee within thirty days of the decision of the disciplinary authority.



44 Subject to the provisions of section 42 relating to appeals to the Disciplinary Appeals Committee, no decision of an Inquiry Officer or the Disciplinary Committee shall be subject to review by any court.

iii) The Regulations of Land Tenure (Established Villages) Act 1992, Act No. 22 of 1992, passed by the N.A., on 14 December 1992;

Section 9-(1) Any person who is dissatisfied with any decision of the Tribunal may appeal to the Appeals Tribunal having jurisdiction over the area in which the dispute arose.

Provided.....

(2) Any person who is dissatisfied with the decision of the Appeal Tribunal may further appeal to the Minister whose decision shall be final and conclusive and shall not be reviewed by any court.

**Enhancing the role and independence of the judiciary**

The second pattern of legislation extols and broadens the jurisdiction of the courts and upholds the independence of the judiciary. This patterns is exemplified by the following statutes;

(a) The Elections Act, 1985, Act No. 1 of 1985 as amended by Act No. 6 of 1992, passed by the N.A., on 11 May 1992;

Section 108-(1) The election of a candidate as a member shall not be questioned save on an election petition.

110-(1) Every election petition shall be heard and determined by the court in accordance with the provisions of this Act.

(b) The Tanzania Telecommunications Act, 1993, Act No. 18 of 1993, passed by the N.A. on 19 November 1993:

Section 20-(2) Any person who is aggrieved by any decision of the Commission under this section may, within fourteen days after such a person has been given the notice in writing referred to in subsection (1), appeal to the High Court on procedural issues, or on grounds that the decision of the Commission was based on extraneous factors. The decision of the court shall be final.

(c) The Local Authorities (Elections) Act, 1979, Act No. 1 of 1979 as amended by the Local Government Laws (Amendment) Act 1993, Act No. 4 of 1993, passed by the N.A. on 23 April 1993;

Section 109-(1) Every election petition and application under this Act shall be tried by the Resident Magistrate's Court.

(2) All appeals under this section shall be to the High Court.

The pieces of legislation in the two patterns above cannot be distinguished or explained on the basis of subject matter. Nor can they be explained on the basis of period or time of enactment since statutes passed in the same session of the N.A., exhibit these two different and contradictory patterns (Act Nos. 6 and 4 of 1993). I



wish to submit that legislation in the first pattern while meeting the requirements of article 13(6) of the Union Constitution on equality before the law is violative of article 13(4). For the sake of clarity let me reproduce the relevant clauses of article 13 (enacted by the 5th Constitutional Amendment and as amended by the 8th Constitutional Amendment);

13(1) all persons are equal before the law and are entitled, without any discrimination, to equal opportunity before and protection of the law.

(2) Subject to this constitution, no legislative authority in the United Republic shall make any provision in any law that is discriminatory either of itself or in its effect.

(3) Not applicable

(4) No person shall be treated in a discriminatory manner by any person acting by virtue of any law or in discharge of the functions of any state office.

(5) For the purposes of this section the expression "discriminatory" means affording different treatment to different persons attributed only or mainly to their respective descriptions by nationality, race, place of origin, political opinions, colour, station in life or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(6) For the purpose of ensuring equality before the law, the state shall make provisions:

(a) that every person shall, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned and be guaranteed the right of appeal or to another legal

remedy the decision of courts of law and other bodies which decide on his rights or interests founded on statutory provisions..

In my submission, act No. 6 of 1993 is discriminatory in its effect contrary to article 13(2) of the Union constitution. I shall explain it in this way. A Tanzania citizen applying for a licence to transmit or receive and transmit or operate a broadcasting service under Act No. 6 of 1993 is treated differently from another citizen applying for a licence for the running of telecommunications systems or services under Act No. 18 of 1993. The former is denied liberty to appeal to a court of law in the event of an unfavourable decision. In other words, the applicant under Act No. 6 of 1993 is treated in a discriminatory manner with regard to access to courts, unlike the applicant under Act No. 18 of 1993.

## CONCLUSIONS

The above discussion may be summarized as follows:-

1. The concept of separation of powers is concretized in the Union Constitution.

2. The Union Constitution pays lip service to the independence of the judiciary in its preamble.

3. Constitutional amendments and recent legislation exibit a tendency to liberate the National Assembly from the tutelage of the Executive.

4. Preponderance of rules being churned by the National Assembly undermined the independence of the judiciary. However, a visible progressive tendency in recent legislation is to foster the role and independence of the judiciary.



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## ABBREVIATIONS

J.K. = Jaji Kiongozi (Prencipal Judge)

LRT = Law Reports of Tanzania

N.A. = National Assembly

TLR = Tanzania Law Reports.



# MERITS AND DEMERITS OF ALTERNATIVE ELECTORAL SYSTEMS

By

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## INTRODUCTION

Modern liberal democracies are representative governments whose main feature is "open and regular competition for offices", and "it is through the electoral system that such competition is conducted and by it that its basic outcome is decided."[1] Thus electoral systems and electoral procedures may have significant effects on democracy (e.g. who participates and how), the functioning of the government (e.g. the extent of accountability to the electorate), parliament-electorate relations (e.g. the extent of representation and representativeness), etc.

By deciding who gets to be represented, electoral systems do affect the chances and fortunes of competing parties and may in the long-run also determine the number of parties in the political arena. Electoral systems also affect the character of party organizations and the modality of political competition.

In much of pre-war Europe, details of electoral arrangements were contained in the national constitutions. However, many post-war constitutions simply provide broad guidelines and leave the particulars of electoral arrangements to ordinary law. This flexibility permits a certain amount of experimentation with electoral procedure over a period of time. Most of the reconstructed West European democracies favoured this method, and have had numerous electoral laws since their post-war reconstruction.[2] However, the flexibility may be abused by those who choose to tinker with election laws for selfish motives (e.g. to win a particular election).[3]

In this discussion we shall focus on three electoral systems, namely (1) the plurality system, (2) the proportional representation (PR) system, and (3) various