FOOTNOTES

1. Eckstein, Harry, 1963, "The Impact of Electoral Systems on Representative Government", in Eckstein, Harry and David E. Apter, eds., 1963, Comparative Politics: A Reader, p. 247.
2. Ibid., p. 247.
3. Such tinkering happens very often in Third World Countries, but it is not unknown in the older democracies.
4. In Britain, the method of multi-member constituencies with each elector having one vote for every seat to be filled is used for local government elections, especially in the Metropolitan Boroughs. For elaboration, see Lakeman, Enid and James D. Lambert, 1959, Voting in Democracies: A Study of Majority and Proportional Electoral Systems, London, Faber and Faber.
5. For a discussion of "catch-all" parties, see M. Duverger, 1954, Political Parties, Their Organization and Activity in the Modern State, London, Methuen.
6. Lakeman and Lambert, op. cit., pp. 34-35.
7. For elaboration, see Eckstein, op. cit, p. 249 and Lakeman and Lambert, op. cit., pp. 85-91.
8. See his book, Considerations on Representative Government, 1861, especially Chapter 7.
9. For the argument relating to mobilization and political decay, see Samuel Huntington,1968 "Political Development and Political Decay," in World Politics, Vol. XVII, No. 3 (1965), pp. 386 - 430.
10. Lakeman and Lambert, op. cit., pp. 53-54.
11. Ibid, pp. 54-55.
12. Ibid., p. 65.
13. Ibid., see footnote 1 at p. 96.
14. Ibid., p. 66.
15. Ibid, p. 78
16. Ibid., p. 79
17. As summarized by Eckstein, op. cit., at p. 249.
18. For further details, see Lakeman and Lambert, op. cit., pp. 98-118.

Civil and Political Rights in Tanzania: The Bill of Rights of 1985

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It is my recognition and deep appreciation of the important role played by the judiciary in the enhancement of the freedom and rights of the people. It is through the courts of law that the people can defend their rights whenever they feel, for one reason or the other, that such rights have been violated.

Ali Hassan Mwinyi [1].

"If the judiciary cannot come to the aid of a poor citizen when oppressed, then its existence is questionable. We can do without it and perhaps create other institutions for that noble purpose."

Justice Mwalusanya [2].

1. INTRODUCTION

Civil and political rights of the citizen are the pillars of any democratic society. They are a safeguard against authoritarianism and arbitrary use of power by the authorities.

Under normal circumstances, civil and political rights are provided for in the constitution of the country in a form of a bill of rights. These rights are taken so seriously that a Constitution that does not contain a Bill of Rights is said to be so faulty that it does not deserve to be characterized as a Constitution at all.

II. BACKGROUND TO HUMAN RIGHTS IN TANZANIA

1. Refusal to Have a Bill of Rights

During the negotiations for independence around 1960, the British, the departing colonial power was insisting, as usual,[3] on the incorporation of a Bill of Rights into the Constitution of independent Tanganyika, not so much for their love for the indigenous population but, rather, for the protection of the interest of their remaining subjects.

The Nationalists led by the Tanganyika African National Union (TANU) refused to have a Bill of Rights entrenched into the Constitution. They gave two basic

reasons. Firstly, the priority of the new government was economic development of the country and it thus wanted a Constitution which would not hinder it in this endeavour. A Bill of Rights would stand on its way in the attempt to execute its developmental plans for the people. Secondly, the judiciary in the country at that time was still staffed by expatriates, mainly whites engaged by the colonial government. These judicial offers could have taken the advantage of the presence of a Bill rights new in the Constitution to frustrate the efforts of the new government by declaring many of its actions illegal.[4] It is in this context that the then Prime Minister Rashid Kawawa characterized a Bill of Rights as a luxury which merely invites conflicts.[5]

As a result, the Bill of Rights was shelved. Instead, the government came up with two strategies for the protection of fundamental rights and freedom in the country. First, the rights which are usually contained in a Bill of Rights were enumerated in a loose form in the preamble to the Interim Constitution of 1965. The effect was that the citizen could not enforce such rights as the preamble is not part of the Constitution.[6] Second, the government established the Permanent Commission of Enquiry (PCE),[7] a form of Ombudsman to deal with complaints from the citizens against government and Party bureaucrats and report the same to the President. The Commission, whose jurisdiction has now been extended to Zanzibar as well [8] has a variety of limitations [9] and even its performance over the years cannot justify equating it with a Bill of Right. [10] It is a poor substitute.

2. Forces for a Bill of Rights

The Bill of Rights was incorporated into the Constitution of the United Republic of Tanzania of 1977 in 1984 following the Fifth Amendment of the Constitution.[11] These changes came into operation in March, 1985.[12]

The inclusion of the Bill of Rights into the Constitution was basically against the will of the State. The National Executive Committee (NEC) of the ruling Party *Chama Cha Mapinduzi* (CCM) had already prepared a package of what was to be amended in the Constitution. The package was tight and specific. The people were therefore being confronted with a *fait accompli* without being given an opportunity to say what changes they felt were necessary in their Constitution.[13] A Bill of Rights was not in contemplation.[14]

It is a protest by the people which forced the Party to bow and agree to the incorporation of a Bill of Rights into the Constitution. That is to say, the people decided, in the debate that followed the publication of the NEC proposals, to go beyond the dictates of the Party.

To some extent this background explains the behaviour of the CCM government and its various organs on the promotion and protection of fundamental rights and freedoms in the country since the incorporation of the Bill of Rights into the Constitution.

As the Party published its proposals for the amendment of the Constitution in 1983 there were three forces for inclusion of a Bill of Rights. Firstly, people who were airing their views through the radio, newspapers and other forms of communication wanted the basic rights incorporated into the Constitution. Secondly, there were pressures from Zanzibar, the other part of the United Republic. Zanzibar had a different history on Bill of Rights. Its independence Constitution contained a Bill of Rights.[15] It was however short-lived and fell on 12th January, 1964 following the Revolution.16 After the Karume era and the liberalization of the economy, the Zanzibaris wanted a Bill of Rights back in their Constitution in order to guard the rights already won against the State and to ensure that there was no return to authoritarianism. Their representatives were very articulate in various forums including the Party itself and thus managed to move the conservative elements to concede to the inclusion of a Bill of Rights in the Constitution. In addition, the Zanzibaris had a trump card in that if the United Republic refused to have a Bill of Rights in the Union Constitution, then they were going to enact one in the Constitution of Zanzibar. Having fundamental rights and freedoms guaranteed only in one part of the United Republic was going to be embarrassing to the Union government.

Thirdly, there was pressure from the developments that were taking place in the continent in the area of Human Rights at that time. In 1981 the Organization of African Unity (OAU) had adopted the African Charter on Human and Peoples' Rights in Nairobi.[17] This historical document was open for signature and Tanzania had taken a very active part in its formulation.[18] Absence of a Bill of Rights in its Constitution was raising questions on its sincerity in its human rights campaigns in the continent[19].

All these factors in their totality contributed to the enactment of the Bill of Rights in Tanzania in 1984, that is 23 years after independence.[20] Due to the accumulation of oppressive legislation in its statute books and the likelihood of their being declared unconstitutional, the government felt it necessary to suspend the justifiability of the basic rights for a period of three years allegedly in order to put its house in order[21].

III UNCONSTITUTIONAL LAWS IN THE STATUTE BOOKS

1. The Proposed Solution

It was expected that during the three-year grace period various government agencies would be busy checking which of the laws in the statute books offended the new provisions of the Constitution and repeal or amend them.

However, after three years not a single legislation had been touched. Therefore, there were two options open to the Government in handling this issue.

(i) to extend the suspension of the justifiability of the fundamental rights; or

(ii) to allow the constitutional provisions on the basic rights to come into effect.

The Government took the second option, that is, to allow the constitutional provisions on the Basic Rights to be fully justiciable. That had one consequence, namely, to shift the burden to the judiciary. It was now up to the courts of law, and the High Court to be specific, to determine the constitutionality of various laws. This would again depend on whether a particular law was a subject of litigation before the court. It was up to the parties to raise the matter or the court itself in the exercise of its inherent jurisdiction could raise the matter *suo motu*. That also meant that the laws which were not challenged in the courts, unconstitutional as they might be, would remain in the statute books.

In fact this is exactly what has happened. Five years after this decision was taken, we still have many laws, whose constitutionality is questionable in our statute books.[22] The Nyalali Commission on the political system in the country did identify more than forty laws of this nature and suggested their amendment or repeal..[23]

2. Amplification of Oppressive Laws: Corporal Punishment Back

Interestingly, instead of repealing laws which were offending the Constitution, the State has decided to amplify and revive laws which have been dormant and out of use. A case in point is the Corporal Punishment Ordinance, 1930.[24] This legislation which had been is disuse for quite some time has now been activated vide Written Laws (Miscellaneous Amendment)Act, 1989.[25] The amendments effected are twofold. First, the discretion of the courts of law contained in Section 12 of the Ordinance to determine the number of strokes to be inflicted on a convicted person has been removed and replaced with a specification of the punishment which is 12 strokes. Second, the number of offenses which were scheduled as those calling for infliction of corporal punishment have been partly re-defined and increased.

Surprisingly, this is happening when in other countries corporal punishment has been discouraged and characterized as torture, inhuman and degrading punishment. For example in Zimbabwe the constitutionality of this form of punishment in the statute books was tested in three different cases. These are *Stephen Ncube vs. The State;*[26] *Brown Tshuma vs. The State;*[27] and *Innocent Ndhlovu vs. The State.*[28] In a consolidated judgement the Supreme Court of Zimbabwe declared the sentence of whipping unconstitutional.

It is hoped that the courts in Tanzania will not continue applying this law blindly and that in an appropriate case, the High Court will address itself to the question of the constitutionality of this form of punishment which is also being combated internationally in various fora. Indeed there are resolutions and conventions prohibiting this form of punishment.[29]

IV. THE JUDICIARY AND THE BILL OF RIGHTS

A high Court judge who has now left the Bench to join active politics once described the court in the following words:

> This is a temple of justice and nobody should fear to enter it to battle his legal redress as provided by the law of the land.[30]

The judiciary, which has been at times attacked for its pro-State and conservative attitude[31] has taken the challenge seriously and particularly the High Court. In opportune situations judges have managed to address several aspects of the Bill of Rights. As we shall soon illustrate, courts have not hesitated to declare offending legislation or part thereof unconstitutional and thus null and void.

In this part we intend to examine some of the cases decided by both the High Court and the Court of Appeal which clearly illustrate how judicial activism can be exploited in furtherance of fairness and justice. The cases cover such diverse subject-matters like deportation, bail, gender equality, sungusungu, and the right to work etc.

(a) Internal Deportation Unconstitutional

The case that took the legal world in Tanzania by storm and jerked the State back to life is that of *Chumchua s/o Marwa vs. Officer i/c of Musoma Prison and the Attorney-General.*[32] This case took place exactly three weeks after the coming into operation of the Bill of Rights in 1988. The facts of the case itself are simple and straight forward.

On 29th September, 1987, the President of the United Republic of Tanzania had made an order of deportation in respect of one Marwa Wambura Magori and 155 others so that they be deported from Mara Region in north Tanzania to Lindi Region in the southern part of the country. The ground of the deportation was that

their continued residence within the Mara Region and the contiguous regions was dangerous to peace and good order. While arrangements were being made to transport the deportees, they were all detained in the Musoma prison. The son of deportee, Chumchua Marwa, filed an application for an order of *habeas corpus ad subjiciendum* in respect of his father.

Citing various authorities from the common law system and the available principles of interpretation of Bills of Rights, Mwalusanya, J. granted the application and declared the Deportation Ordinance, 1921,[33] unconstitutional, void and being of no effect as it directly interferes with the freedom of movement of the individual which is guaranteed in the Constitution.

Interestingly, the government has prepared a bill to amend the Deportation Ordinance.[34] The cosmetic changes being suggested are already being criticised and opposed.[35] As the High Court decision still stands, one may ask whether it is proper for the Parliament to meet and debate to amend a law which has already been declared *null* and *void* by a competent court of law.

(b) Bail is a Right and not a Privilege

The next case is that of Daudi s/o Pete vs. The United Republic.[36] The accused in this case Daudi s/o Pete was charged with robbery with violence contrary to Section 286 of the Penal Code before the Musoma District Court. According to Section 148 (5) (e) of the Criminal Procedure Act, 1985,[37] the offense under which the accused was charged which involved threat of violence is not bailable.

The State Attorney appearing for the United Republic was not objecting to bail. He simply contended that the law was very clear that the offense was not bailable.

The question before Justice Mwalusanya was whether bail for an accused person in Tanzania Mainland was a right or a privilege. He answered the question in the positive, that is to say, bail to an accused person is a right and not a privilege. Granting bail to the accused, the judge held that Section 148 of the Criminal Procedure Act, 1985 was unconstitutional as it replaces the doctrine of presumption of innocence of the accused and removes the judicial discretion of the courts in

matters of bail and in so doing offends the doctrine of separation of powers.[38] He held further that objection to bail has to be satisfactorily substantiated by solid reasons and not vague fears or apprehension or suspicions.[39] This decision was upheld by the court of Appeal of Tanzania.[40]

(c) Discriminatory Customary Law Against Women Unconstitutional

The question of equality between men and women as proclaimed under the Constitution came before Justice Mwalusanya in the case of *Bernado Ephraim vs. Holaria Pastory and Gervazi Kaizilege.* [41]

This was a case on the right to inherit clan land. A woman, one Holaria d/o Pastory inherited some clan land from her father by a valid will. Finding that she was getting old and senile and had no one to take care of her, she sold the clan land on 24th August, 1988 to one Gervazi Kaizilege for Shs. 300,000/=. The buyer was a stranger in that he was not a member of the clan.

The next day, that is, on 25th August, 1988, Bernado Ephraim, a member of the clan filed a suit at Kashasha Primary Court in Muleba District, Kagera Regional, praying for a declaration that the sale of the clan land by her aunt was void as under the Haya customary law females have no power to sell clan land.

The relevant law, i.e., the Haya customary law is contained in the Local Customary Law (Declaration) (No. 4) Order, 1963.[42] Paragraph 20 of this law provides:

> Women can inherit, except for clan land, which they may receive in usufruct but may not sell. However, if there is no male of that clan, women may inherit such land in full ownership.

In other words, females can inherit land which they can use in usufruct - that is, for their life time. However, they cannot sell it.

The Primary court agreed with the applicant and declared the sale void and ordered the seller to refund the Shs. 300,000/= to the purchaser. On appeal to the Muleba

District Court, the decision of the Primary Court was quashed on the basis of the Bill of Rights in the constitution which guaranteed equality for both men and women.

On the appeal to the High Court of Tanzania at Mwanza, Justice Mwalusanya agreed with the District Court and declared the offending portion of the law void.

In the course of his very elaborate judgement, his lordship indicated surprise that:

> It has taken a simple, old rural woman to champion the cause of women in this field but not the elite women in town who chant jejune slogans years on end on women's liberation but without delivering goods.

With this decision the judge hoped that the woman has been elevated to the same plane as man, at least in respect of inheritance of clan land.

(d) Sungusungu Activities Illegal

The total failure by the State to provide the population with reliable security to both life and property can be said to be the source of the re-emergence of various forms of traditional armies. The people had decided to take care of themselves because the State had failed them.[43] These traditional armies which originally began in the cattle breeding regions of Mwanza, Mara, Shinyanga and Tabora[44] have now developed into a national phenomenon. According to one academic these armies have ceased to be a "Nyamwezi / Sukuma affair."[45] They are known by different names such as Sungusungu, Wasalama etc.[46]

Notwithstanding their original noble aims, over time, not all activities of the Sungusungu have remained within the four corners of the law. Some Sungusungu groups have become professional terrorists, trespassing on other people's property, torturing people and punishing them at will. In short they have decided to take the law into their own hands and establish a parallel legal and judicial system.

This is illustrated by the case of Misperesi K. Maingu vs. Hamisi Mtongori & 9 Others.[47] The defendants in this case were members of the Sungusungu traditional

army of Mwenge Village, Nyamatare ward in Musoma District. On 22nd September, 1987, the plaintiff and a colleague were summoned before the Mwenge village Sungusungu. They were tried for the offense of swindling one of the members of the Sungusungu of Shs. 85,000/= sometime in 1981. Each one of them was ordered to pay back Shs. 42,500/= and on top of that they were to pay a fine of Shs. 10,000/=.

The plaintiff failed to pay both the compensation and the fine. On 28th November, 1987 the defendants seized his property worth Shs. 190,000/=. His attempts to have his property restored through district authorities totally failed. On 11th December, 1987 for no apparent reason the plaintiff was arrested by the members of the traditional army and kept in lock-up at the Musoma police station for one day. He was later released without being formally charged.

Wanting to celebrate his Christmas in peace, on 24th December, 1987 the plaintiff paid the fine of Shs. 10,000/= in the hope that his property would be restored to him. Instead, the Sungusungu sentenced him to 25 strokes of corporal punishment or a fine of Shs. 2,500/= in lieu of the strokes. He paid the fine.[48]

He then filed a case claiming damages of over one million shillings against the ten defendants for trespass on his person and property.

Awarding Shs. 353,150/= as damages to the plaintiff, Justice Mwalusanya held that the traditional army was illegal and their assumption of judicial and police powers was unconstitutional. He went further to castigate the Party organs and leaders for sanctioning the operations of the traditional armies outside the rule of law.[49]

To frustrate the work of the courts in this area, the government and in particular the President has been pardoning members of Sungusungu who have been convicted for various crimes and are now serving jail sentences in the country.[50] This can only be said to be a bad omen to the rule of law and independence of the judiciary in the country.

(e) The Right to Work

In the case of *Augustine Masatu vs. Mwanza Textiles Ltd.*,[51] the court was confronted with the question of right to work. It had to decide whether it is a reality or a fiction in the Tanzania of today.

In this case the defendant, Mwanza Textile Ltd., had refused to implement the order of the Minister for Labour that they should reinstate the plaintiff in the employment. instead, they wanted to terminate his employment and pay him statutory compensation and a sum equal to 12 months wages as provided by Section 40A (5) of the Security of Employment Act, 1964 as amended by Act No. 1 of 1975. The question was whether the employer has the option not to obey the Minister's order and instead terminate the services of the employee and pay the compensation. On this issue the High Court is divided. There are authorities to the effect that the employer can do so[52] and others who say that the order of the Minister has to be obeyed.[53]

Justice Mwalusanya basing his argument on both interpretation of the Security of Employment Act and Article 22 of the Constitution which entrenches the right to work in Tanzania held that the employer has no choice. The order of the Minister has to be obeyed. In his own words, he observed:

> "Be that as it may I agree on principle that when an employee is ready and willing to work for the employer but the employer does not allow him, then the employer does it at his own risk."

He thus declared the purported termination of the plaintiff by the defendant unlawful and ordered his reinstatement with full right to arrears of salary.

In the case of *Obadiah Saleh vs. Dodoma Wine Company Ltd.*, the High Court went further than that. In that case provisions of Section 40A (5) of the Security of Employment Act, 1964 were declared void and thus making it an obligation on the part of the employer to reinstate an employee when that is ordered by the relevant authority.

Notwithstanding this very clear jurisprudence from our courts, some public institutions continue to violate the law by insisting on use of the old provisions which have been declared void by the Courts. A case in point is the *University of Dar es Salaam vs. Ephraim Irhe*.[54] Mr. Irhe, who was an Assistant Development Engineer with the Institute of Production Innovation of the University of was terminated from Employment in January, 1992. He appealed to the Conciliation Board of the Ministry of Labour. He won and an order of reinstatement was made. The university of Dar es Salaam appealed against that decision to the Minister for Labour and lost. Currently, the University has adamantly insisted on using Section 40A of the Security of Employment Act, 1964 which has been modified by the High Court and has actually referred the matter to the Resident Magistrate's Court in Dar es Salaam. Incidentally, the University is using the services of another member of staff who is a lawyer to fight Mr. Irhe in Court against all rules of ethics.

(f) Freedom of Peaceful Assembly

In the case of *Christopher Mtikila and Three Others vs. The Republic* [55] the issue was freedom of peaceful assembly in the country. Mtikila and his co-appellants were charged with *inter alia*, holding an unlawful assembly contrary to Section 74 and 75 of the Penal Code on 18th July, 1992 at Bahi Road within Dodoma Municipality. In the course of the unlawful assembly they had used abusive language and insulting words, likely to cause a breach of peace to wit (a). President Mwinyi is a thief who has bankrupted the United Republic of Tanzania to Zanzibar; (b). The retired President Nyerere has sold Tanzania; (c). Police are dogs of Chama Cha Mapinduzi; and (d) Chama Cha Mapinduzi was a party of thugs.

It was contended that Mtikila and his colleagues had refused a lawful order by Police Officer to disperse. They, on their part argued that was a private gathering and was allowed under the law. The issue was the constitutionality of Section 41 of the Police Force Ordinance which purports to empower policemen to prevent even private meetings or assemblies. It was held that that section was void as it restricted the freedom of peaceful assembly of the citizens.

There are reported cases of restrictions of the freedoms of peaceful assembly in Zanzibar. The State in Zanzibar is using all means available to control the activities of the powerful opposition party - Civil United Front (CUF)which is seen as a threat to the ruling party. It has reached a point of burning their offices.[56]

(g) Consent to Sue the Government

The most conspicuous and frustrating among the rights which used to be denied to the citizen is the right to sue the government. The government had resolved to protect itself. This protectionist attitude of the government was codified through the Government proceedings Act, 1967.[57] This strategic legislation insulated the government from all claims in a feudalistic manner. According to this law, anybody wanting to sue the government had first to seek the permission from the same government through the Attorney-General to sue it.[58]

To get such a permission was a tussle which took time. In some cases it has taken years to get the holy permit. This was not an accident, it had a meaning. The time factor was intended to wear out the claimant and force him or her to settle the matter out of court with the government. If the claimant insisted on proceeding with the case, then the time would take its toll and it was likely that some of the key witnesses will have died, transferred or have simply forgotten what transpired in relation to the issue being litigated. In some cases, applicants have died while still waiting for the permission from the Attorney-General to sue the Government. This legislation was quite irrational.[59]

This is now history as the provision of the law requiring consent, that is, Section 6 of the Government Proceedings Act, 1867 as amended by Act No. 40 of 1974, has been declared unconstitutional by the High Court and thus null and void. This was in the case of *Peter Ng'omango vs Gerson M.K. Mwangwa and Attorney-General.*[60] This position has now been confirmed by the highest court in the land, the Court of Appeal of Tanzania in *Kukuitia Ole Pumbun and Leshau Ole Lemurt vs. The Hon. Attorney-General and the United Republic of Tanzania.* [61]

VI. DENIAL OF DEMOCRATIC RIGHTS BY THE STATE

The adoption of the Bill of Rights in 1984 did not mean anything to the State in Tanzania. Its various institutions, particularly the coercive ones continue operating as if there had been no changes in the Constitution of the country. Their behaviour is a testimony to this.

In various ways, the State in Tanzania, notwithstanding the presence of basic rights in the Constitution has been adamant on provision of certain fundamental rights and freedoms enshrined in the constitution to the people. In this part we examine some areas where fundamental rights and freedoms of the individual are completely disregarded and trampled upon by the agents of the regime.

(a) The Restriction of the Right to Strike

At a general level, the right to work which is guaranteed vide international,[62] regional[63] and national legislations includes the right to strike. Withholding labour power is one of the most valuable arsenals of the working people against the employer.

Due to the increased hardships, teachers of Primary and Secondary Schools, as well as several other institutes in Dar es Salaam tried to negotiate with the government over improvement of their working conditions and general welfare.[65] They presented their demands to the President of the United Republic both orally and in writing.[66]

However, negotiations with the government collapsed due to the inflexibility on the part of the government. As a result, the teachers decided to go on a strike in January, 1994.[67] They were joined by others in various parts of the country. The reaction of the government was quite surprising. Excessive force including deployment of paramilitary personnel was used against the peaceful teachers. Thereafter followed suspensions,[68] intimidations[69] and charges and detentions in custody in which teachers were humiliated. The national trade union in the country protested seriously against the teachers humiliation and suspension[70].

The same happened when the Organization of Tanzania Trade Unions (OTTU) could not agree with the government on pay rise in February,1994.[71] OTTU called on a strike.[72] What followed was a war on the press with the government insisting that the strike is illegal[73] and those involved would be punished[74] and OTTU defending the strike.[75] After the strike the same pattern followed. While the government on its part said it was a flop;[76] OTTU hailed the strike as a success[77] and that it has helped to send the message to the government.[78] The government and the Association of Tanzania Employers were at the same time calling for disciplinary action against those who participated in the strike.[79]

The way this whole issue was handed by the government indicates that the right to strike is still heavily restricted in the country.[80] Also, there is a clear tendency on the part of the government to prefer using the stick instead of dialogue in labour dispute settlement.

(b) Restriction of the Freedom of the Press

The Constitution provides for the right to freedom of conscience which entitles the individual to the freedom of opinion and expression and the right to seek, receive and impart information and ideas through any media regardless of frontiers.[81] In addition, every citizen has a right to be kept informed of developments in the country and in the world which are of concern for the life of the people and their work and of questions of concern to the community.[82]

On of the ways of actualising enjoyment of these rights is through guaranteeing the existence of a free press in the country. In Tanzania, it is not only the law which is restrictive of dissemination of information, but also the State has been very intolerant to freedom of the free press which it has recently allowed. Giving all forms of pretext, the government has been attacking the so-called *Magazeti ya Mitaani* (street newspapers), meaning private papers that have not been singing the song of the State. The very early victims were two weeklies, *Michapo* and *Cheka*, which were banned.

The biggest blow to the freedom of the press in Tanzania in the recent times is the arrest, detention and later charging of the Editor of *The Express*, Mr. Paschal Shija

in March, 1994.[83] The big "crime" which Mr. Shija had committed in the eyes of our law enforcing agencies was to ask the burning question whether Tanzania was a big garbage dump in one of his editorials.[84] The editorial ran in part:

> "But above all there is the garbage of leadership. The reason the country has become a big garbage dump is because we have a leadership which finds garbage good company. Our government, both national and local, is overloaded with the least able, the most unpatriotic, the least talented and the greediest possible leaders that the country could produce."

That was too much for those holding reigns of power. Therefore, Mr. Shija and his boss, the Managing Director of Media Holdings, the proprietors of the *Express and Mwananchi* Mr. Riyaz Gulamani had to spend some hours at the Central Police Station in Dar es Salaam "helping the Police." It is alleged that their quizzing was ordered by the office of the Prime Minister.[85] At present their case is still in court. This is a real threat to the freedom of conscience in the country.

(c) Restriction of the Freedom of Movement

One of the basic freedoms under the Bill of Rights is the freedom of movement of the individual. This is provided under Article 17 of the Constitution which says:

> Every citizen of the United Republic is entitled to freedom of movement and residence, that tis to say, the right to move freely within the United Republic and to reside in any part of it, to leave and to enter into it, and immunity from expulsion from the United Republic."

Yet the State has at various times, used its coercive apparatus to restrict individuals movement for political reasons. Calling for serious concern is the case of Rev. Christopher Mtikila, the leader of the unregistered opposition Democratic Party (DP). On Friday 11th February, 1994, Mr. Mtikila was arrested by police in Dar es Salaam as he prepared to go to the Airport to catch a flight to Kigoma to campaign for the opposition against the ruling Chama Cha Mapinduzi.[86] There was a fracas as the police did not even have an arrest warrant.87 It is believed that his arrest is connected with the fact that the ruling party had nominated a Tanzanian of

Asia origin to stand for the parliamentary elections in the Kigoma Constituency. Knowing Mtikila's anti-Asian position and his eloquence, it was clear that he was going to up-set the situation if he was allowed anywhere near Kigoma. He was therefore detained without any charge and released after elections in Kigoma. In fact, the Police assured him while in custody that "his problems will end after the elections in Kigoma on Sunday."[88] Definitely this is bad politics and it has to be condemned.[89]

(d) Violation of Rules of Natural Justice

Public institutions continue to copy the example set by the government in total disregard to law and other rules governing fair treatment of citizens. Very recently, the Senate of the University of Dar es Salaam expelled 211 Engineering students allegedly for failure to take an examination.[90] The students took the matter to court.[91] In their case *Sylvester Cyprian and Five Others (As Representatives of 205 Others) vs. The University of Dar es Salaam,*[92] they argued among other things failure by the University authorities to adhere to rules of natural justice and failing to afford them the right to a hearing in a due process before expelling them. This, it was argued further offends the Constitution of the United Republic of Tanzania which guarantees the right to a fair shairing. It provides:

> "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 another legal remedy against the decisions of the courts of law and other bodies which decide on his right or interests founded on statutory provisions.[93]"

The court agreed with the students and ordered their reinstatement. The University intends to appeal against this ruling by the High Court. This case is just one of the many examples of the general tendency of lack of respect for law and procedure by those holding offices which in one way or the other touch on the lives of other people.

VII. CONCLUSIONS

As we have indicated above, the Bill of Rights if entrenched into he Constitution is a very effective method of checking abuse of the fundamental rights and freedoms of the population. This is because it gives the courts a venue to come in and question the validity of laws and actions or omission of the executive branch of the government and its various agencies.

This also presupposes existence of a serious judiciary which will not hesitate to take the executive to task in appropriate cases. Judges and other functionaries of the judiciary should be bold in the defence of the Constitution. The executive should also be made up of people of high integrity. It should be people who will preach rule of law, good governance, transparency etc. and practice the same. People who preach water and drink wine, typical of most African regimes are a liability to democracy.

In Tanzania, practice and experience gained in the last nine years since the inclusion of the Bill of Rights into the Constitution of the United Republic of Tanzania indicate very clearly that it had had very little effect on the part of the behaviour of the State and its various organs. The high-handedness of the old one-party days is still prevalent although we have deeply moved into multi-party politics. Old habits take time to die.

However, it is important to keep on reminding those in power the importance of developing a culture of respecting human rights and the fundamental rights and freedoms of the people. It is not enough to talk of rule of law, good governance and transparency. All these phrases are useless if they are not made part of our lives by practice. Let us preach water and drink water - not wine.

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FOOTNOTES

1. President of the United Republic of Tanzania in a speech while opening the Judges and Principal Magistrates Seminar at Arusha on 27th August, 1986. Quoted in MWALUSANYA, James L., The *Judiciary in Tanzania*, Dar es Salaam: Court of Appeal of Tanzania. 1988, p. 36.

2. See *Chumchua s/o Marwa vs. Officer i/c of Musoma Prison and the Attorney-General*, High Court of Tanzania at Mwanza, miscellaneous Criminal Cause No. 2 of 1988.

3. On this practice by the British see READ, J. S., "Bills of Rights in the Third World - Some Commonwealth Experiences," Volume 6 *Verfassung und Recht in Ubersee*, 1973, p. 21.

4. See PETER, Chris Maina, *Human Rights in Africa: A Comparative Study of the African Human and People's Rights Charter and the New Tanzanian Bill of Rights*, New York - Westport, Connecticut - London: Greenwood Press, 1990, p. 2.

5. See Parliamentary Debates (Hansards), National Assembly 3rd Meeting, 1088, 28th June, 1962. He is also quoted in KALUNGA, Leopold T., "Human Rights and Preventive Detention Act, 1962 of the United Republic of Tanzania: Some Operative Aspects," Volumes 11-14 *Eastern Africa Law Review*, 1978 - 1981, p. 281.

6. In the words of Kisanga, J.A. in *Attorney-General vs. Isinoi Ndeinai and Two Others*, (1980). T.L.R. 214 .

7. The Permanent Commission of Enquiry was originally established under Chapter VI of the Interim Constitution of 1965. For its jurisdiction, powers and functions see the Permanent Commission of Enquiry Act, 1986 (Act No. 25 of 1966). See PERMANENT Commission of Enquiry, *The Law of the Permanent Commission of Enquiry*, Dar es Salaam: Government Printer, 1983.

8. See Chapter Seven Part 1 (Section 60 of the Constitution of the Revolutionary Government of Zanzibar).

9. Among its serious limitations is the fact that all its investigations following a complaint end up in the President's office. It is the President who is to decide whether or not to pursue a matter reported to him.
See Section 14 of Act 25 of 1966.

10. On the performance of the PCE see MCAUSLAN, J. and GHAI, Y., "Constitution Innovation and Political Stability in Tanzania: A Preliminary Assessment." Volume 4 No 4 *Journal of Modern African Studies*, 1966, p. 474; NORTON, P.M., "The Tanzanian Ombudsman," Volume 22 *International and Comparative Law Quarterly*, 1973, p. 603; and OLUYEDE, P., "Redress of Grievances in Tanzania," Public Law, 1975. p. 8.

11. See Fifth Amendment of the State Constitution of 1984 (Act No. 15 of 1984).

12. The exception was the justifiability of the provisions of the basic rights in the courts of law which was suspended for a period of three years as per The Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 (Act No. 16 of 1984).

13. The proposals by the National Executive Committee of the Party were contained in CHAMA CHA MAPINDUZI, 1983 NEO Proposals for Changes in the *Constitution of the United Republic and the Constitution of the Revolutionary Government of Zanzibar*, Dodoma: CCM Department of Propaganda and Mass Mobilization, 1983.

14. The areas specifically pin-pointed by the NEC for amendment were the Powers of the President; Consolidation of the Authority of the Parliament, Strengthening the Representative Character of the National Assembly; Consolidation of the Union; and Consolidation of the Peoples Power.

15. See Chapter II of the Constitution of the State of Zanzibar, titled "Protection of Fundamental Rights and Freedoms of the Individual" (Article 14-31). This Constitution is reproduced in Bill Supplement to the Official Gazette extraordinary of the Zanzibar Government, Volume LXXII No. 4315 of 14 November 1963.

16. On the Zanzibar Revolution see LOFCHIE, M.F., *Zanzibar: Background to the Revolution*, Princeton: Princeton University press, 1965.

17. This Charter is reproduced in Volume 21 *International Legal Materials*, 1982, p. 58 and in No. 27 *Review of the International Commission of Jurists*, 1981, p. 76.

18. Tanzania ratified the Chapter on 31st May, 1982 and it came into force on 21st October, 1986. See "Africa Charter in Force," No. 12 *Amnesty International Newsletter*, December, 1986, p. 1.

19. On Tanzania's campaign against human rights violations in the Continent see WELCH, C.E. Jr., "The OAU and Human Rights: Towards a New Definition," Volume 19 No. 3 *Journal of Modern African Studies*, 1981, p. 401.

20. The Bill of Rights was incorporated into the Constitution vide Fifth Amendment of the State Constitution of 1984 (Act No. 15 of 1984). As indicated earlier, this law came into operation in March, 1985.

21. This justification was given by the then Minister for Justice and Attorney-general, D.Z. Lubuva, in a public talk on the future of the Bill of Rights in Tanzania at the Faculty of Law of the University of Dar es Salaam on 16th October, 1987. This speech is reproduced in volume 14 No. 2 *Commonwealth Law Bulletin*, 1988, p. 853.

22. Interestingly, this was contended by the government itself in a statement by the Minister of State in the Prime Minister and First Vice President's Office Mr. Edward Lowassa in Parliament in Dodoma recently. See "Oppressive Laws May be Scrapped." Daily News (Tanzania) 5th February, 1991, p. 3.

23. These laws include: Area Commissioners Act, 1962 (Cap 466); Collective Punishment Ordinance, 1921 (Cap. 74); Corporal Punishment Ordinance, 1930 (Cap. 17); Deportation Ordinance, 1921 (Cap 38); Expulsion of undersirables Ordinance, 1930 (Cap 39); Government Proceedings Act, 1967 (Act No. 16 of 1967); Preventive Detention Act, 1962 (Cap 490); Regions and Regional Commissioners Act, 1962 (Cap. 461); Resettlement of Offenders Act, 1969 (Act No. 8 of 1969); Societies Ordinance, 1954 (Cap 337); Stock Theft ordinance, 1960 (Cap 422); Townships (Removal of Undesirable Persons)

Ordinance, 1954 (Cap 104); Witchcraft Ordinance, 1928 (Cap 18): Registration and Identification of Persons Act, 1986, (Act No. 11 of 1986); Economic and Organized Crime Control Act, Deployment Act, 1983 (Act No. 6 of 1983); and Emergency Powers Act, 1986 (Act No. 1 of 1986).

24. Chapter 17 of the Laws.

25. Act No. 10 of 1989.

26. Criminal Appeal No. 202/87.

27. Criminal Appeal No. 287/87.

28. Criminal Appeal No. 292/87

29. See for instance the Universal Declaration on Human Rights, 1948 (Articles 3 and 5).

30. This was Mwesiumo, J. (as he then was) in *Joseph Kivuyo and Others vs. Regional Police Commander, Arusha and Another*, High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 22 of 1978.

31. See SHIVJI, Issa G. (ed). *The State and the Working People in Tanzania, Dakar:* CODESRIA: Book Series, 1985, p. 7.

32. High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988.

33. Chapter 38 of the Laws.

34. See "A Bill for an Act to Amend the Deportation Ordinance," UNITED REPUBLIC OF TANZANIA, *Bill Supplement to the Gazette of the United Republic of Tanzania*, No. 53 Volume 71 of 21st December, 1990, p. 13.

35. See "MPS Debate Deportation Bill," *Daily News* (Tanzania), 8th February, 1991, p. 1.

36. High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 80 of 1989.

37. Act No. 9 of 1985.

38. See MULISA, M., "Judge Queries Status of Bail," *Daily News* (Tanzania) 14th February, 1990.

39. This case is the subject of a Master of Laws thesis done at a Canadian university. See HOSEA, E., *A study of the Judiciary and the Rule of Law in Tanzania with Particular Reference to Bail*, A Thesis Submitted to the Faculty of Law in Conformity with the Requirements for the Degree of Master of Laws, Queen's University Kingston, Ontario, Canada, December, 1989.

40. See *The Director of Public Prosecutions vs. Daudi Peter*, Court of Appeal of Tanzania at Dar es Salaam Criminal Appeal No. 28 of 1990. See KULEKANA, J., "Appeal Court Nullifies 'Bail barrier' Provision," *Daily News* (Tanzania), 17th May, 1991, at p. 1.

41. High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989.

42. Government Notice No. 436 of 1963.

43. See CAMPBELL, H., "Popular Resistance in Tanzania: Lessons From Sungusungu," A Paper presented at the International Seminar on Internal Conflict held at Makerere University, Uganda in September, 1987.

44. See KERNER, D., "Witches, Cows, Thieves and Party Politics: An Examination of the Sungusungu Movement," A Paper presented at the department of education, University of Dar es Salaam, 1983.

45. See BUKURURA, S.H. "The Party, Government and Sungusungu: The Missing Link, Development Research Seminar held at the Institute of Continuing education - Sokoine University of Agriculture, Morogoro, Tanzania on 27th September, 1989, p. 1.

46. On Sungusungu See BRAHAMS, R. "Sungusungu: Village Vigilante Groups in Tanzania," No. 179. *African Affairs*, 1987. p. 192.

47. High Court of Tanzania at Mwanza, Civil Case No. 16 of 1988 (Unreported).

48. The facts of this case have been take from SHIVJI, Issa G., *State Coercion and Freedom in Tanzania* (Human & Peoples' Rights Monograph Series No. 8), Institute of Southern African Studies, National University of Lesotho, 1990.

49. Notwithstanding this very clear position of the High Court, the Inspector-general of Police, Harun Mahundi, who is a trained lawyer, is reported to have hailed the so-called Sungusungu scheme for its high anti-crime value,. See "Improve 'Sungusungu' Operations," *Sunday News* (Tanzania), 27th January, 1991, p. 4.

50. See for instance "Rais Atoa Msamaha Kwa Walinzi Wa Jadi 14," *Uhuru* (Tanzania), 24th December, 1993.

51. High Court of Tanzania at Mwanza, Civil Case No. 3 of 1986.

52. This line of argument is taken for instance by Kisanga, J. (as he then was) in *I.M. Mahona vs. University of Dar es Salaam*, High Court of Tanzania at Dar es Salaam, Civil Case No. 83 of 1977 reported in (1981) T.L.R. 55.

53. See *Juma Ally Kaziabure vs Tanzania Post & Telecommunication Corporation*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 94 of 1985 (unreported), as per Msumi, J; and Biron, J., in *General Marketing Co. Ltd. vs. A.A. Shariff* (1980) T.L.R. 61.

54. Dar es Salaam Resident Magistrate's Court at Kisutu, Employment Cause No. 78 of 1993.

55. High Court of Tanzania at Dodoma (Apeallate Jurisdiction), Criminal Appeal No. 90 of 1992.

56. See "Isles Political Scene: CUF Warns of Another Rwanda." *The Express* (Tanzania), 12th - 15th June, 1994, p. 1.

57. Act No. 16 of 1967. This Act has to be read together with Government Proceedings (Amendment) Act, 1974 (Act No. 40 of 1974.)

58. See SHIVJI,, Issa G., "State and Constitutionalism in Africa: A New Democratic Perspective," Volume 18 *International Journal of the Sociology of Law*, 1990. p. 381.

59. See WAMBALI, M.K.B., "The Enforcement of the Bill of Rights Against the Government," A paper presented at the Seminar to Commemorate 25th Years of the Faculty of Law held from 20th to 25th October, 1986 at the University of Dar es Salaam.

60. High Court of Tanzania at Dodoma, Civil Case No. 22 of 1992.

61. Court of Appeal of Tanzania at Arusha, Civil Appeal No. 32 of 1992.

62. See Article 23 of the Universal Declaration of Human Rights of 1948 and Article 6 of the International Covenant on Economic, Social and Cultural Rights of 1966.

63. See for instance Article 15 of the African Charter on Human and Peoples' Rights of 1981.

64. The right to work is provided in Article 22 and 23 of the Constitution of the United Republic of Tanzania.

65. Experts had for a long time noted that the teaching profession was no longer attracting motivated people and those who joined did so out of desperation and failure to get employment elsewhere. See "Improve Teachers Working Conditions, Govt Told", *Daily News*, 18th December, 1993.

66. See "Teachers' Demands on State Confers," *Daily News* (Tanzania), 7th January, 1994, p. 7,

67. See "Teachers Crisis," *Sunday News* (Tanzania), 6th February, 1994, p. 6.

68. " Waalimu 318 Wasimamishwa Kazi," *Uhuru* (Tanzania), 27th January, 1994, p. 1,; and Schools Crisis: government Suspends 318 Teachers," Daily News (Tanzania), 27th January, 1994, p.1.

69. "Sasa Walimu Wapewa Fomu," *Majira* (Tanzania), 27th January, 1994, p. 1.

70. See "OTTU Lashes at Government over Teachers' Suspension," *Daily News* (Tanzania), 28th January, 1994, p. 1.

71. See "Mjadala wa Nyongeza ya Mishahara: OTTU Yatoka Kapa,"*Majira* (Tanzania) 19 February, 1994, p. 1.; and "Mwinyi Asks OTTU to Call off Strike," *Daily News* (Tanzania), 25th February, 1994, p. 1.

72. See "Mgomo Upo Leo? . . ... OTTU Yasema ndiyo," *Majira* (Tanzania), 1st March, 1994, p. 1.; "OTTU Yawaambia Wafanyakazi: Msitishwe na Serikali - Kwenda Kazini ni Kukubali Kula Makombo,"*Mwananchi* (Tanzania), 28th February - 3rd March, 1994, p,. 1.

73. "OTTU Planned Strike Illegal, Government Warns," *Daily News* (Tanzania), 26th February, 1994, p. 1; and "Serikali Yaonya Wafanyakazi: Mgomo in Batili," *Uhuru* (Tanzania), 26th February, 1994. p. 1.

74. See "Strikers Will Be Sacked," *Daily News* (Tanzania), 1st March, 1994, p. 1. In fact some workers were eventually sacked because of the strike. See "Workers Sacked as OTTU Praises Strike." *The Express* (Tanzania) 3rd - 5th March 1994, 1994, p. 1.

75. "Mgomo sio Batili - OTTU," *Majira* (Tanzania), 27th February, 1994, p. 1.

76. See "OTTU Strike a Flop," *Daily News* (Tanzania), 2nd March, 1994, p. 1.; OTTU Strike Fizzles Out," *Daily News* (Tanzania), 3rd March, 1994, p. 1.; and "Wafanyakazi Waheshimu Kauli ya Serikali ... Mgomo Washindikana," *Uhuru* (Tanzania), 2nd March, 1994, p. 1.

77. See "Mgomo Umefanikiwa," *Mfanyakazi* (Tanzania), 5th March, 1994, p. 1.; and Mgomo Waenea Mikoani: Vitisho vya Serikali Vyashindwa Kuuzima," *Mfanyakazi* (Tanzania), 2nd March, 1994, p. 1.

78. See "Mgomo Umefikisha Ujumbe Serikalini,"*Mfanyakazi* (Tanzania), 9th March, 1994, p. 1.

79. See "Executive Acting on Strikers Told: Exercise Fairness," *Sunday News* (Tanzania), 6th March, 1994, p. 1.,; and "The Strike of 1st - 3rd March, 1994: Disciplinary Action," *Daily News* (Tanzania), 14th March, 1994.

80. See the analysis of the strike given the Secretary-General of OTTU in MPANGALA, B., "the Workers' Strike of 1st - 3rd March, 1994: A Success or a Failure?" A paper presented at a public meeting at the University of Dar es Salaam on 18th March, 1994.

81. Article 18 (1)

82. Article 18 (2)

83. See "Waandishi Wapinga Polisi Kumhoji Mhariri wa Express," *Mwananchi* (Tanzania), 14th - 17th March, 1994. p. 1.

84. See "Is Tanzania a Big Garbage Dump?" *The Express* (Tanzania), 10th - 12th March, 1994, p. 8.

85. See (Premier Ordered Quizzing," *The Express* (Tanzania), 17th - 19th March, 1994, p. 1.

86. See "Mtikila Arrested: He was to Campaign for Opposition in Kigoma," *Daily News* (Tanzania) 12th February, 1994, p. 4; and "Mtikila Akamatwa,"*Mfanyakazi* (Tanzania) 12th February, 1994, p. 1.

87. See "Mtikila Atiwa Ndani Dar: Alikuwa Njiani Kwenda *Kigoma*,"*Majira* (Tanzania), 12th February, 1994, p. 1.

88. See "Baada ya Kutiwa Ndani Asiende Kigoma: Mtikila Ahubiri Askari Rumande," Rai (Tanzania), 17th - 23rd February, 1994, p. 3.

89. See "Freedom From Arbitrary Arrest," *The Express* (Tanzania), 20th - 23rd February, 1994, p. 8.

90. "Exams Boycott: Dar Varsity Discontinues 211 Students," *Daily News* (Tanzania), 4th June, 1994, p. 1; and "Wanafunzi 211 Wasimamishwa Chuo Kikuu," *Uhuru* (Tanzania), 4th June, 1994, p. 1.

91. See "Discontinued Varsity Students go to Court," *Daily News* (Tanzania) 6th June, 1994, p. 1.

92. High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Application No. 68 of 1994.

93. Article 13 (6) (a).

IN DEFENCE OF CLOSER UNION AND GREATER AFRICAN UNITY

By

Mwesiga Baregu

I was in the grounds of Karimjee Hall on the historical day of August 24th, 1993, when the CCM Parliament resolved to dissolve the union government as presently constituted. All who were on the grounds could not have failed to notice the emotions and passions the debate evoked among the members in the House and the audience outside the parliment. I recall one member of the House from Zanzibar who, on rising to express a dissenting view, was shouted down by fellow parliamentarians and virtually routed out of order by the Deputy Speaker; to the delight of the audience. Clearly the die was cast; a Tangnyika government had to be formed. Indeed, at some point, I even got the feeling that the parliament would move to proclaim the existence of the Republic of Tanganyika right on the floor and convert the house into a parliament of Tanganyika.

The purpose of this paper is to analyse and explain this incident and to comment upon the nature and dynamics of political unions in general and the Tanzanian one in particular. Now that the dust has settled and the euphoria has subsided, it behoves us to temper our passions with reason and reflect on the full meaning and implications of that decision. I choose to do this to try and clarify the issues involved. As matters stand now, in my view, people are either talking at, and not to each other, or past each other or we could indeed, all be talking past the problem. The latter, I believe, is the case.

Let me, first of all, point out that there emerged important differences in the understanding and considerable confusion in the interpretation of this decision. The Deputy Speaker of the house was at the centre of this sorry state of affairs. He had to perform a series of political summersault over the issue. In the first round he categorically stated and was correctly reported to have said that the resolution of the parliament was final and binding on the government. The government was