Implementing the Arusha Declaration—the Role of the Legal System

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PREFACE

This paper was originally written in order to generate discussion on "Law and its Administration" in Tanzania. It was discussed at an inter-disciplinary seminar held on 8 February, 1973, under the auspices of the Economic Research Bureau, University of Dar es Salaam. The reactions to the views expressed varied: at one extreme a small minority of participants thought that the courts should play the part of a bulwark between the Executive and Party and the people; at the other, a few acclaimed the inevitability of a "chaotic state of affairs" in the administration of law because Tanzania is in a "state of transition to socialism". On the whole there was consensus on the danger of a society substituting "expediency" for "legality" which is the central theme of the paper.

My case studies highlight at one level the dilemma of those who administer for the greater part colonial laws in the courts, and at another level, individual cases of injustices, using law as the yardstick of justice. Both shortcomings are because of the policy changes consequent upon the Arusha Declaration, but proximate is the inability of the Executive to devise laws in conformity with the new ideals while at the same time there is an anxiety on the part of the Party that its policies should be implemented. I have already referred to the first, i.e., Tanzania being in a state of transition; the second which flows from the first but which was raised as an independent issue, was that with a community moving towards national reconstruction, there should not be much concern with the comparatively abstract problem of legality. My reaction is to reiterate the point that law and legislation, in particular, are essentially instruments of social change and to state that the problem is abstract because as a general rule one can easily tolerate an infringement if it does not directly impinge on one's affairs. On the other hand, it is not abstract to the victims and there is a danger that isolated infringements, if long lasting and widespread enough, might set a pattern, establish a norm without exciting general alarm.

The paper does not only identify the problem, it establishes some causes. Foremost is that arising from the gap betweeen the laws of Tanzania and the policies of TANU. A popular view of participants at the seminar was that of a need for a "law revision committee" to bridge the gap. The paper establishes certain theoretical prerequisites.

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INTRODUCTION

There are various aspects of the Arusha Declaration and facets to its implementation which are relevant to law. One can devote chapters to attempts which have been made to give the Declaration legal form,[1] and the achievements realised in implementing it. Both aspects of the subject are fairly well documented in the daily newspaper as well as journals; the former more than the latter in legal literature.[2] There is to date no empirical legal study of the implementation of the Declaration, i.e., law in action. The most recent area where legislation was used to effect changes was the decentralisation process. The Decentralisation of Government Administration (Interim Provisions) Act, 1972,[3] effects the Cabinet's report on achieving the objectives of the Arusha Declaration through decentralisation. It is too early to assess the effectiveness of this process.

The purpose of this paper is not to add to the documentation of achievements but to highlight shortcomings in implementing the Declaration. It discusses issues culled from what might be designated land problems. These issues are legion and the problems raised are stated in the form in which they are presented in the courts. After a statement of the issues and problems, the paper discusses the state of the law before the Declaration and the political biases in resolving the issues after the Declaration. The latter poses a conflict with the existing laws. Thus the courts would be embarrassed in solving the disputes raised were they to adjudicate them according to law, for their decisions will conflict with the implications of the Arusha Declaration—a course of conduct which is not to be tolerated when every leader including the judges and magistrates are signatories to the documents of compliance with the Declaration.[4] The development in the conundrum is that since the judges and magistrates, by their oath, are also bound to apply the law of the land in adjudicating disputes, there is an attempt to stifle resort to the courts and the concept of non-justificability[5] looms large in fact, if not in law. This course must of necessity lead to the frustration of some litigants who are numerically not insignificant. They are left with rights but denied remedies to enforce them. I have, therefore, characterised the implementation of policy as based on expediency rather than law.[6]

1 Two areas where legislative action was found necessary to give teeth to the Declaration are: the Leadership Code and nationalisation.

2 See B. Rahim, "Legislative Implementation of the Arusha Declaration", *E.A.L.J.* (1968), p. 183; A. W. Bradley, "Legal Aspects of the Nationalisation in Tanzania", *E.A.L.R.* (1967), p. 119; D. D. Nsereko, "The Tanzania Nationalisation Laws", *E.A.L.R.* (1970), p. 1; R. W. James, *Land Tenure and Policy in Tanzania* (Nairobi: East African Literature Bureau, 1971), pp. 216 ff.

3 Act 27 of 1972.

4 Many of the judges and magistrates are TANU members; there is also a branch of TANU in the High Court.

5 For further insight into this concept see the chapter entitled "Justificability" by G. Marshall in A. H. Guest, ed., *Oxford Essays in Jurisprudence* (London: O.U.P., 1961).

6 Generally the study confirms Mohiddin's observation of a habit of the Tanzania leadership of "reacting to, rather than preparing for, a situation". He gives copious evidence in support of his proposition, see A. Mohiddin, "Reflections on Socialist Tanzania", *East African Journal* (November, 1972), p. 26.

This paper then raises and attempts to answer a number of questions, chief among which is the role of law and the courts in furthering the implementation of socialism in Tanzania. Are the legal prerequisites of the Western capitalist society necessary at this stage of development? Should there be development through law rather than expediency? The paper also raises questions about the rule of law in Tanzania.[7] Being particularly interested in policy implementation, historically, I attempt to place the experience documented here in the continuum of inability to break away completely from a tradition of involvement of the administration in the adjudication process, and bias against traditional laws and rights protected thereby.

The concern is motivated by questions of style obliquely referred to here and more apparent in *Saidi Mwamindi v. The Republic,*[8] the absence of discussion of the flaws which are apparent in the machinery for implementing the Arusha Declaration and the lack of debate of developments in the administration of justice. So in a sense, unlike those who see all obstacles in achieving rural socialism as opposition to socialism, and are prepared to brand the casualties as exploiters, capitalists, neo-colonialists and a hundred and one other foreign ideological names,[9] this essay focuses on the extremities in the legal machinery and the implementation process, an equally important factor contributing to the sluggishness of the transformation process.

ISSUES

1. *Compensation for development on land and other property taken and given to an ujamaa village.*

W filed an action against three villagers of the ujamaa village claiming the value of cashew nuts and trees which were taken from the plaintiff for the villagers when the area he occupied was declared an ujamaa village and the land with the improvements given to the villagers. The trial court was informed that the village comprised 27 males, 25 females and 73 children. It was established that the defendants in the action were leaders in the village and they gave the plaintiff a choice of joining the village but he did not accede to the request because "he said that he had another ujamaa village which he had agreed to join". The Primary Court Magistrate made an order

7 It is interesting to note that the public debate organised by the Dar es Salaam Society on "One party state is not inherently inconsistent with the rule of law" was called off because of opposition to the debate by a member of the judiciary.

8 Now reported at [1972] H.C.D. 212. One fact which is brought out both in the record of evidence and the judgment is the tactlessness of political leaders in getting people to accept the call to join ujamaa villages. This phenomenon was again raised by Hamis Swedi in his "Face the People" discussion, "The reasons ujamaa idea repelled so many of us", see *Sunday News,* 12 November, 1972. What is apparent is that the techniques used to get people "to go ujamaa" (to use Swedi's words) are a far cry from the elements of voluntariness, encouragement, explanation, persuasion and participation espoused by the President in "Socialism and Rural Development", (*Ujamaa: Essays in Socialism,* Dar es Salaam: O.U.P., 1968, p. 130) and the Presidential Circular on the "Development of Ujamaa Villages" (Circular No. 1/1969).

9 See, for example, A. Awiti, "Class Struggle in Rural Society in Tanzania", *Maji Maji* (Dar es Salaam), No. 2 (1972).

that he be paid Shs. 150/- as compensation for the improvements which the village took. The District Magistrate reversed that decision on the grounds that if the representatives of the village were to pay compensation they, in future, might well regard the compensation as a fee charged for the allocation of the land or as the purchase price of the land, and each would claim his piece of land. He advised the claimant to submit a petition to the Ministry of Rural Development through the following committees: Ward Development, District Development and Regional Development Committees. The appellant was dissatisfied with the judgment[10] and referred the matter to the High Court. It was placed in the pending file without a final determination, for it was felt that the payment of compensation for land or property involved in the establishment of ujamaa villages might prove beyond the villagers' purse and, as such, stand in the way of the Party and Government policy to build up socialism in the country. The fact that there is no machinery to register the villagers at an early stage, thereby giving them legal personality, does not help matters, for with no legal status the liability and obligations of the villages are, in law, ephemeral. Moreover, it is the view of many of the political functionaries that even if it were possible to pay compensation, this would not be permitted as the peasant, on receiving compensation, will use it to start on his own elsewhere thus making the goal of villagisation more difficult.[11]

As a result, such claims which got as far as the High Court are still pending. Those started in the Magistrates' Courts in recent times are referred to the High Court in compliance with the statement of the Chief Justice that cases involving individuals and ujamaa villages or vice versa should not be heard in the Primary or District Courts but should be taken directly to him before or after trial. The embargo is stated to be verbal and has reached the ears of most magistrates through hearsay evidence. This statement should be considered with the recently reported statements of the Chief Justice in mind. Espousing the need for the judiciary to identify itself with the policies of Tanzania and to do everything to further the aims of ujamaa, he is reported to have made the following significant remarks:

> Since Tanzania believed in ujamaa then, the interest of many people in land cases should over-ride those of some few individuals. The judiciary could not be used as a tool to oppose ujamaa.... As citizens and TANU members, the courts are duty bound... to further ujamaa.[12]

The Chief Justice, therefore, creates a dilemma for the judges and magistrates who are by the Oaths Act committed to solving disputes accord-

10 See *Rajabu Mwenyimadi v. Kibwana*, C.A. 16/70, Kisarawe D-C.

11 I am grateful to the following second year law students for information on this subject; they have made available to me their development studies essays on ujamaa villages: C. R. Mahalu, who researched in Sukumaland with special reference to Geita; V. F. Ileti on Rombo Village, Kilimanjaro Region; and A. B. P. Makalle on Ukerewe District, West Lake Region. They all found that compensation is not usually paid to the expropriated peasants.

12 "Put Ujamaa First", *Daily News*, 26 September, 1972.

ing to law.[13] The magnitude of this dilemma can best be appreciated after we have reviewed the law on this principle of compensation for unexhausted improvements.[14]

The principle derives from the notion of land as a national asset vested in the community. It applies only in a few countries with the right of occupancy system. In common law, by virtue of one's ownership of land one benefits from such improvements without any obligation of compensating the developer. For example, in *Ruanda Coffee Estate Ltd. v. Singh*[15] the licensee had spent over Shs. 27,000/- in putting up a building on the land, and when he vacated the premises he received no compensation for his development—his claim for compensation was dismissed in an action. Both the common law and civil law systems followed to the letter the maxim *quicquid plantatur solo, solo cedit*, the implication of which was stated to be the non-existence of an obligation on the part of the owner to compensate the builder.[16] One only has to read the judgment in *Ruanda Coffee v. Singh* to appreciate the speculative nature of the "licence coupled with an equity"[17] and the reluctance of the courts in these jurisdictions to depart from the principle of equitable grounds.

Although the principle of compensation for improvement in Tanzania is traceable to the pre-independence period and, therefore, open to being attacked as capitalistic by those who do not know its history,[18] it must be remembered that the President in his essay on "National Property" welcomed it as a necessary corollary to the nationalisation of land for which he argued. He said:

> When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need.... By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.[19]

It is interesting to note that even the act of clearance is recognised as having a monetary value for which compensation is payable. The collection

13 See Cap. 506, "I... do swear that I will well and truly serve the Republic of Tanganyika in the office of... and that I will do justice in accordance with the Constitution of Tanganyika as by law established, and in accordance with the laws and customs of the Republic without fear or favour, affection or ill will...."

14 In a claim by an occupier who was dispossessed of his land the Chief Justice held that "even if the claim were to succeed the appellant would not benefit at all, because the whole area has recently been declared an ujamaa village. What all parties have to do now is to join in this ujamaa village or quit the area and start a residence elsewhere. It may be that the land allocating authority would consider giving the appellant an alternative piece of land elsewhere so that he may go on with his grazing and cultivating as before", see *Ramadhani v. Mohamed* (1971) H.C.D. 89. The issue raised in these cases is not as to the right of the state to allocate lands to ujamaa villages, this has never been an issue, but one of compensation for the improvements.

15 [1966] E.A. 564.

16 See *Francis v. Ibitoye* (1936) 13 N.L.R. 11.

17 See also Poole, "Equities in the Making" (1968), Conv. 96.

18 I have reviewed the historical development of the principle in *Land Tenure and Policy*, Chap. 13, and in *E.A.L.R.*, 76 (1968).

19 Julius K. Nyerere, *Uhuru na Umoja* (*Freedom and Socialism*), (Dar es Salaam: O.U.P., 1968), pp. 53-54.

of cases by Fimbo and myself bears testimony to the judicial implementation of these principles in Tanzania to the point which might be characterised as slavish.[20] It is only recently that courts have been establishing a counteracting rule of "set off" based on benefits one has had on land whilst in occupation. This rule is, however, only available when A occupies land under a licence from B who later recovers his land. Although B must compensate A for the improvement he effected on the land, B is, nevertheless, credited with a fair amount for A's use of land. By section 5 of the Land Ordinance[21] the appropriate authority when exercising the power of disposition of land is enjoined "to have regard to the native laws and customs" in the district in which such land is situated.

Departures from the principle of compensation for improvements have been legislated increasingly since 1970. This has been mainly in the area of the statutory tenure not the traditional one. There are three instances to date: the occupier of a granted right of occupancy is not allowed compensation for improvements effected during the last five years of his term when his original grant did not exceed 33 years, or the last ten years of his term if it exceeded 33 years, and the improvements were effected without the prior consent of the Commissioner for Lands.[22] The President, on revoking a right of occupancy of an absentee owner, may direct that no compensation should be paid to him for unexhausted improvements,[23] and finally, on the acquisition of a building under the Acquisition of Buildings Act,[24] compensation is not normally payable if the building is ten or more years old. These are clear, obvious and justifiable departures from the compensation principle. There are no such inroads on the principle on the revocation of deemed rights, and, contrary to the view expressed by the learned District Magistrate,[25] the obligation of paying compensation is that of the incoming occupier, the person who benefits from the outgoing occupier's labour, and not that of the Ministry concerned with ujamaa villages. The Ministry does not even recognise a moral obligation to make an *ex gratia* payment.

The obvious question is why hasn't the legislature enacted laws to avoid the payment of compensation on the revocation of a deemed right when the land is given to an ujamaa village and thereby enhanced the chances of the successful development of such villages as is argued by the political functionaries? A number of reasons can be conjectured. It is, however, suggested in this essay that the cavalier attitude to the deemed right-holders is a carry-over from colonial times, when the deemed right was viewed as being nothing more than a licence. The colonial powers had conceded an obligation to pay compensation for unexhausted improvements on the revocation of the licence, when the land was taken in order that it might be granted

20 R. W. James and G. M. Fimbo, *Customary Land Law of Tanzania—A Sourcebook* (E.A. Literature Bureau, 1973).
21 Cap. 113.
22 S. 14A of Cap. 113.
23 S. 14C of Cap. 113.
24 Acquisition of Buildings, Act 13 of 1971.
25 Stated above.

to settlers.[26] The compensation included a claim for disturbance. In practice compensation was not forthcoming and there was so much bitterness that at independence one of the first Acts passed by the independent Government was the Land (Settlement of Disputes) Act[27] which allowed the Government, following upon an enquiry, to repossess the peasant or order the benefactor of the grant to compensate the former occupier for his improvements.

My argument does not espouse merit to the concept of compensation; that is not the issue; it establishes an obligation on the part of villagers who benefit from the labour of the previous occupier to compensate him for unexhausted improvements on the land. As stated, this principle is contained in section 5 of the Land Ordinance, implied by section 14[28] and finds recognition in the Preamble to the Constitution and TANU Creed.[29] The breach of this obligation is actively championed by those charged with implementing the Arusha Declaration and condoned by the courts which have effectively closed their doors to litigation to enforce these rights.

2. *Compensation of a member of an ujamaa village for his contribution in the village.*

A member of the village participated in the collective activities in the manner specified in the by-laws. After some time he resigned his membership and claimed Shs. 1,700/-, the sum due to him for work jointly performed with the other villagers. The case was started in the Primary Court but raised such political pressure that no judgment was given and it was, therefore, transferred to the High Court in conformity with the suggestion of the resident magistrate who, whilst on a casual visit to the district, informed the trial magistrate that the Honourable Chief Justice had verbally ordered such cases to be taken directly to him before or after trial. The argument raised in the Primary Court was that the villager was not entitled to share in the result of joint efforts of the villagers even though he had contributed his labour, because the by-laws of the village provided that, "A member who is expelled, resigns or absconds shall not get anything which is owned communally or be entitled to any dividends accruing from profit from work done communally". The counter-argument which supports the claim for compensation is that the provision in the by-laws is *ultra vires*, for it is stated

26 Government Circular No. 4 of 1953, entitled "Land Utilisation and Allocation of Individual Rights Over Land".
27 Cap. 524.
28 Which states that every certificate of occupancy shall be deemed to contain provisions to the effect that the occupier binds himself to pay to the President on behalf of the previous occupier, the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation. Although the occupiers under consideration have no certificate they are, nevertheless, deemed to hold a right of occupancy and come within the spirit of the Land Ordinance.
29 See p. 186.

in the Preamble[30] to the Constitution of the Republic that all men have a right to receive "a just return for their labours". This pledge is stipulated in no uncertain terms in both the TANU constitution and TANU creed, which provide that the principle of socialism is, "That every individual has the right to receive a just return for his labour". Even the by-law of the particular village under consideration stated as one of its objects, that the village will organise in order to "enable a member to work hard in the hope of making him receive the return for his labour". It should also be noted that the by-law denying a member accumulated rights on resignation, violates the policy paper on *Socialism and Rural Development*[31] which attempts to set out guiding rules on this subject and should have provided a basis for political action. The section dealing with distribution of surplus asks for just and simple principles for the distribution of returns of the community's endeavours, and states that the guiding rule should be "share according to work done". To an equity lawyer the by-law under consideration borders on being a penal provision[32] from which relief should be granted. With the doors of the courts being effectively shut to litigants who seek to establish their claims against an ujamaa village, the implementation of law and policy is defeated.

3. *The right of a landholder to recover land he allowed a stranger to occupy if he is prepared to compensate the stranger for the improvements.*

A asked for and was granted a licence by R's father to build a hut on part of the latter's large shamba and also to cultivate crops on the portion surrounding his hut. A built his banda and planted a number of permanent trees such as cashew nuts, oranges, mangoes and so on. R's father died and R sued to recover the land upon which A was growing permanent crops. She was successful in the Primary Court and A's appeal was dismissed in the District Court and ultimately by the High Court. The Chief Justice held that the appellant had violated the restrictive covenants and was trying to defraud the respondents of their lands.[33]

The fundamental rule recognised by various tribal communities is that if one clears virgin land and demarcates the boundary and allows a stranger to occupy a portion thereof, the landholder can recover possession of the land with only the obligation of compensating the occupier for improvements he was permitted to effect on the land or which are reasonably necessary having

30 The Interim Constitution of Tanzania, No. 43/1965. It is arguable that the Preamble offers protection comparable to a Bill of Rights, see P. T. Georges, "The Rule of Law: Definition and Safeguards", Chap. 3 of *Law and Administration in a One-Party State—Selected Speeches of Telford Georges*, R. W. James and F. Kassam, eds. (Nairobi: E. A. Literature Bureau, 1973). However, a contrary view seems to be supported by available Commonwealth authorities, see S. Mubako, *The Presidential System in the Zambia Constitution* (University of London Thesis), pp. 215-16.

31 *Ujamaa—Essays in Socialism*, op. cit., see in particular "Distribution of the Returns in an Ujamaa Village", p. 135.

32 The essence of a penalty is that it acts *in terrorem* of the offending party.

33 *Mkandawire v. Mwenyimvua*, Civ. App. 117 of 1971, judgment in High Court, 28 April, 1972.

regard to the nature of the land.[34] The occupier can only acquire permanent rights to the land in the following cases: (a) under the Customary Law (Limitation of Proceedings) Rules, 1963, by 12 years adverse occupation. These Rules were reaffirmed as recently as February, 1971, by the Law of Limitation Act[35] which provides that the former Rules shall continue in force as if they were made under this Act; (b) if the court found that the landholder had abandoned the land and in this context Georges, Chief Justice (as he then was) in *Iddi Juda Omari v. Abdallah*[36] was prepared to stretch the facts in order to find abandonment; (c) if the landholder is not able to pay the occupier compensation for his improvements; and finally, if the Customary Leasehold (Enfranchisement) Act,[37] 1968, was extended to the District, in which case the occupier is enfranchised.

However, in 1969 the 2nd Vice-President had stated in a rally in Upare that it is Government's policy that land rights should enure to the user of land, for it is an act of exploitation for an individual to claim land which is cultivated by a fellow-peasant on the basis of title in himself or his forebears. He then ordered all courts in the country to stop entertaining land claims unless the land claimed involves an actual plantation which the plaintiff alleges belongs to him, in which case the plaintiff will be allowed compensation but the occupier will not be disturbed. This desirable change is argued from the understandable viewpoint that there is no private ownership of land in Tanzania and the claimant can use the money he is prepared to apply to compensate the occupier, to open new lands elsewhere, rather than disturb the latter. It is important to note that in terms of the *Arusha Declaration* this argument cannot be faulted and the principle of "land to the tiller" is a necessary aspect of its implementation. Yet in 1971 when the legislature passed the Limitation Act, the opportunity to legislate this principle slipped away and we were given a concept of limitation no different from that which existed before the Arusha Declaration, a replica of the English 1939 Limitation Enactment. With these considerations in mind the courts have on this occasion disregarded Mr Kawawa's directive and applied the existing law—the attempted embargo on the courts being quietly ignored. In the

34 For example, one *Akilimali Rumisho v. Kisamo*, James and Fimbo, *Customary Land Law of Tanzania*, op. cit., p. 597, where J. Seaton expresses the rule as being fairly clear in Chagga law:

> The law applicable to this case is fairly clear. According to Chagga customary law, the disposition of usufructuary rights over unoccupied lands within his jurisdiction was the peculiar duty and function of the chief. The land thus acquired was called a *kihamba cha asili* and the title of those who acquired under such a disposition was acknowledged by all. Such a *kihamba* was inheritable by, for example, a man's sons or could be given out on lease for which payment of *Masiro* (customary rent) was usual. The tenant was obliged to surrender possession on the lease being terminated; but he might have a claim for unexhausted improvements. There was no limit of time after which a *kihamba* could be claimed *cha asili*. . . . These principles have been recognised in a number of cases including *Chief Kirita v. Salema Fumbi* . . . , *Yohanes Matsindiko v. Yohanes Moruwere* . . . , *Joseph Andrea v. Kitumanga* . . . and *Philip Mtuaha v. Stephen John*. . . .

He applied the rule in the case under consideration.

35 Act 10 of 1971.

36 L.C.C.A. 83/1965.

37 No. 47/1968.

Memorandum of Appeal to the High Court in *Mkandawire v. Mwenyemvua*,[38] the appellant did draw the attention of the Chief Justice to the contradiction and laid out clearly the policy of the Government, but to no avail. To quote from the memorandum:

> It is understood both by Tanzanian policy and usage regarding land that anyone has the right to use or occupy any land that lies idle. Further it is understood that when any person gives his land whether or not there are crops on it he/she renounces his/her own rights of title to and possession of it. That the one who actually uses and occupies it is the one who has title to the land and has the right to occupy it and use it. To say that the usage of the land given should be regulated by him/her or that one should be obedient to the landlord/ex-occupier is tantamount to feudal landlordism and to exploitation. This is the case here and it is evident that it does not depart from the 2nd Vice-President, the Hon Mr Kawawa's address and order of 10 October, 1969, at a rally in Upare where he deplored the tendency of landlordism and stated that it was an act of exploitation for an individual to leave a particular portion of land for many years and then come back to claim it from a fellow-peasant who made use of it during the years. He then ordered all courts in mainland Tanzania to stop hearing cases involving land claims "unless the claimed land involves an actual plantation which as the complainant alleges belongs to him or her"—see *The Nationalist*, October, 1969, as referred to by R. W. James in his book on *Land Tenure and Policy in Tanzania*, p. 87. The Hon. the 2nd Vice-President thus made it explicitly clear that the government's intention is to prevent a person from being dispossessed from the land on the basis that the claimant's forbears had title to the land.

The case brings me to the final issue I want to discuss.

4. *Limitations on the jurisdiction of the Customary Land Tribunals.*

A claims recovery of land he allowed B to occupy, offering B compensation for the improvements B effected on the land. B had begun to dig a road through the land and to assert a claim independently of A. What is clear from our discussion of the previous issue is that A is entitled to judgment. This was the opinion of the High Court which felt that it had no other choice than to confirm the decision of the Magistrate's Court in favour of A as none of the exceptions discussed above was established. On the establishment of the Customary Land Tribunal in the area, chaired by a Member of Parliament, B revived his claim to the land before the Tribunal, and sought to reverse the ruling of the High Court. The Tribunal gave judgment in his favour on the basis of his being the occupier of the land. The reasoning was to the effect that the High Court applied "capitalist laws" and the Tribunal is set up to implement "socialist principles" by enfranchising the tenants, defined by the Customary Leasehold (Enfranchisement) Act as "any person in occupation of a parcel of land where some other person is entitled to recover possession from him under customary law". The Chairman was undeterred by legal argument of *res judicata* and, of course, overlooked the fact that, apart from the special jurisdiction conferred upon him by the Enfranchisement Act,

38 See footnote 33 above.

Parliament, of which he is a member, only a year previously had confirmed "capitalist principles" in terms of the Law of Limitation Act.[39]

This conflict between the judiciary and the Tribunal is not new. It first arose in 1970. The then Chief Justice complained to the Attorney-General as to encroachment of the Tribunals in reversing decisions of the High Court. The Attorney-General in turn raised the matter with the Minister for Lands who hears appeals from the Tribunals. At this point the Minister acknowledged the propriety of the argument that matters which have been already adjudicated, prior to the formation of the Tribunals, were beyond the purview of the Tribunals. He, therefore, used his appellate jurisdiction to reverse these judgments of the Tribunals, which disregarded the principle of *res judicata*. That the Tribunals have in 1971 and 1972 resuscitated the issue and openly claim the power to reverse the courts' decisions has created an embarrassment for the judiciary.[40] This embarrassment is compounded by the fact that the decisions of the Tribunals are referred to the courts for enforcement, so that a court is asked to proceed against a party in whose favour it has decided. This is the present position and there are some decisions of the Tribunals of this nature before the courts for enforcement.

THE ADMINISTRATION OF JUSTICE: HISTORICAL PROFILE

These case studies highlight a confused state which may be summed up as "transformation by crises". On the one hand the doors of the courts are closed to litigants because an ujamaa village is a party to the dispute, notwithstanding the validity of the claim in law. The matter is then settled in a way violating existing legal norms, though expedient in terms of implementing the Arusha Declaration. If, however, the claimant is an individual, strict rules of law are applied and policy disregarded. On the other hand, with the establishment of Customary Tribunals, matters which are clearly adjudicated on are reopened with consequential confusion and interminable litigation.

My observation of the role the courts have been allowed to play in aiding the transformation process is a critical one—for the greater part it has been negative. It is thought that development is pursued through compulsion and punishment. It is a sad fact that courts have been used in order to frighten workers who strike illegally. One might recall the incident when 12 employees of the Tanganyika Planting Company were remanded in custody for either going on strike without complying with the requisite procedure or inciting others to strike. Immediately that it was clear that the workers had repented their misdeeds the Minister for Labour and Social Welfare (unsuccessfully) demanded their release. To the critical observer this is using the law system as an intimidating agent. These considerations to my mind present a challenge

39 See footnote 35 above.

40 See, for example, *Kiure v. Lengai* C.A. 58/65 judgment given by J. Kimicha for the plaintiff on 6 January, 1966, matter revised in the Land Tribunal, Same District (Suit 12/1971). The Tribunal held that (i) it had jurisdiction to hear the suit and (ii) judgment of the High Court was wrong. It then purported to reverse the High Court's judgment. See also *Mangachi Kisakeni v. Kikaho*, Land Tribunal, Same District, 7 August, 1972.

to the lawyer to re-examine the role of the courts and law and to define them clearly in the process of transformation. It is, however, necessary first of all to identify the cavalier approach to traditional land tenure and secondly, the cause of the continuing and increasing infringement of the State and Party functionaries in the actual decision-making process of the courts. The cue is in terms of historical perspective.

It is a truism which needs to be repeated that the colonial administration recognised customary law, and land tenure in particular, only in so far as they did not conflict with proper administration. If there was a conflict, the whole apparatus of government including the "administration of justice" would come to the aid of the administration. I may give two examples: the colonial policy of Kenya was one of "possessory segregation" in the distribution and occupation of lands. The Crown Lands Ordinance, however, provided for the auctioning of Crown land, therefore there was always the possibility that one of Asian origin might be the highest bidder. Thus the practice developed of introducing racial restrictive covenants in the notice of the auctions and as terms of the grants. Kaderbhai challenged the restrictions, a challenge which would be successful in an English court on grounds of public policy and as imposing restrictions on an owner in violation of his absolute powers of disposition. The Privy Council decided that the Crown could dispose of Crown land in any way and on any terms in its best interest.[41]

My second example is the famous Barth judgment[42] and cases of that type which in Eastern and Southern Africa decided that Africans had no conception of ownership of land; they owned trees and, therefore, could be no more than "tenants at will" of the Crown. As Mrs Dilley premised from the judgment, "administratively [and legally] the law was interpreted to mean that natives could be dispossessed.... There was no security for natives; they held land under a tenure no white man would accept".[43] The significance of these decisions was their total effect in bringing the land area of these countries under the control of the administration who could dispose of it ad lib and cheaply.

In Tanganyika, the administration did issue a circular[44] guaranteeing a dispossessed African a right to compensation for improvements when his land was taken away from him; compensation included a sum for disturbance. It is an established fact that these were hollow words and compensation was usually not forthcoming. It is in realisation of this colonial oppression that the independent Government was prompted to pass, as one of its first enactments, the Land (Settlement of Disputes) Act[45] which made it possible to

41 See *Commissioner for Local Government v. Kaderbhai* (1929) 12, *K.L.R.*, 12.
42 *Gathomo v. Murito, E.A.P.L.R.*, 9, 102. One interesting aspect of colonial administration is the fact that Sir Jacob Barth was a member of the Land Commission of 1905 which reported on the necessity for segregation of the races in Kenya; he was then asked to put on his judicial cap in order to aid the implementation of the policy under the guise of administering justice according to law.
43 M. R. Dilley, *British Policy in Kenya Colony*, see Chap. entitled "Native Land Policy", (London: Frank Cass, 1966).
44 See Footnote 26 above.
45 Cap. 524.

repossess those rights holders who had received no compensation on being deprived of their lands, alternatively the benefactors of the colonial alienation could be made to compensate the victims.

Two of my case studies have shown a continuing weakness in the administration of traditional rules: decisions are dictated by expediency and not sanctioned by law. A different and rather strictly legal approach to the subject is adopted when the title-holders hold under the statutory system. In that case new norms are translated into law and we have administration according to law. This is so, for example, in relation to the denial of compensation to "absentee owners". I have already mentioned other cases of such changes in the law.

It is no doubt arguable that unlike the colonial administration the present one is a national one with the interest of the people of Tanzania at heart. It is doubtful whether this argument is forceful enough to justify the continuation of a policy which was resented during the colonial era and bitterly opposed. It might be that the failure of the Party and Government to identify law as an instrument of social change is due to the absence of lawyers in the liberation struggle and in the post-independence National Assembly. To make matters worse the Bench and Bar in Tanganyika is traditionally ineffective, never really militant in defending principles of "administration according to law".

The encroachment of the Regional, Area Commissioners and other political functionaries in the sphere of the decision-making process of the courts is partly a carry-over from the activities of the former Provincial and District Commissioners whose powers were distributed among them without the responsibility for proper running of the courts and appellate jurisdiction from the Magistrate Courts.

Pressures on the judicial system from the political functionaries were discernible by P. T. Georges. The most notorious example during his term of office as Chief Justice was the detention of the District Magistrate at Nzega and Mr Kasella Bantu[46] when the former, in his judicial capacity, released the latter on bail pending his trial with 16 others for the murder of cattle thieves.[47] In an important essay in which he discussed the "Responsibility of the Bar",[48] Georges expressed the need for the judiciary to accept that one begins at a disadvantage by reason of such historical tradition. He saw a solution in terms of "a conscious effort to change the situation, to alter the tradition". He continued: "... traditions are mutable, they can be changed. But they do not change by accident. They change by conscious actions of human beings seeking to alter them in a particular way that seems at a particular time desirable".

So far so good, but I believe he glossed over the seriousness of the problem when he proceeded to discuss the need for the Bar to take an active

46 See the *Tanzania Standard*, 27 September, 1968.
47 Kasella-Bantu was later acquitted on the charge, see *R. v. Kasella Bantu and others* [1969] H.C.D. 170.
48 *Law and Administration in a One-Party State*, op. cit., Chap. 7.

role in the struggle for development. No one can deny this obligation of the lawyer in Tanzania but this does not solve the problem raised. For the issue is that of the reorientation of the administrator in his new role in law enforcement and inculcating respect for judicial independence so that the members of the judiciary can be assured that there will be no dictates from the Executive or political leadership as to how they should decide a case. It is with such consideration in mind that the writer is sceptical of the suggestion of the Attorney-General that the Customary Leasehold (Enfranchisement) Act might be amended to prevent the encroachment of the Tribunals on the affairs of the courts.[49] The problem is more endemic. Kanywanyi and I have highlighted a directive in 1964 from the Area Commissioner, West Lake Region, to the effect that all disputes concerning *nyarubanja* should be referred to the Area Commissioner.[50] We established that the Area Commissioner who set out to maintain the status quo of the landlord and tenant in order that confusion would not arise when the enfranchisement act was passed, arrogated to himself the role of determining a wider range of disputes, e.g., inheritance matters and those pertaining to boundaries. We summed up the section as follows: "What was intended to be administrative action based on a factual question of occupation or non-occupation came in practice to be purported judicial decisions, a too frequent example of administrative power seeming to get translated into judicial power."

I have already mentioned the embargo on the courts by the 2nd Vice-President[51] and hinted at a more serious phenomenon,[52] i.e., the claim by the political functionaries to be involved, behind the scene, in the final decisions in cases pending in court. To the critical observer there is an important task of articulating the clear limits of the administration's authority in the litigation process and judicial system, for too much concentration of power in one hand spells despotism, and may lead to a negation of the President's commitment that an obvious part of socialism in Tanzania is respect for the laws and the absence of arbitrary arrests or prosecution of the people by the servants of society.[53]

As a general rule neither the Party nor Executive is assigned a role in the "formal" litigation process. This position reflects the country's commitments to give effect to a concept of independence of the judiciary.[54] This

49 Conversation held in his chambers on Tuesday, 31 October, 1972. The Attorney-General informed me that the amendment was agreed upon in a meeting of representatives of the judiciary, the Ministry of Lands and the Attorney-General's chambers (representing the Prime Minister's Office).
50 "Land Distribution and Land Use: Land to the Tiller and away from the Neglectful", 6th Annual Symposium, East African Academy, 1968.
51 P. 187 supra.
52 In order to avoid embarrassment, I have avoided details of this phenomenon.
53 *Uhuru na Ujamaa*, op. cit., p. 8.
54 In the stream of adjudication outside the ordinary courts' structure, Ministers hear appeals from quasi judicial bodies, e.g., the Minister for Lands forms the final appellate body from the Customary Land Tribunals. These are statutory innovations.

concern has been the recurring theme in P. T. Georges' essays. He expressed this view as follows:

> I would conclude, therefore, that the framework of the one-party state in Tanzania is not geared to authoritarianism and dictatorship, and that the beliefs and principles of the party are such as to favour the development of free and impartial Courts of Justice.[55]

The Constitution of the Republic restates in no uncertain terms the same prerequisites for a socialist society, i.e., "free and impartial courts of law". Infractions into this principle are to be resisted.

However, the legal system is not isolated nor insulated from the Executive and Party. The appointment of judges is by the President, though after consultation with the Chief Justice.[56] The Chief Justice is himself appointed to office by the President.

TANU is increasingly being brought into the appointing process of other judicial officers; Primary Court magistrates are appointed by the Minister responsible for legal affairs on the advice of the Judicial Service Special Commission; the latter body would not, however, consider a candidate unless he was recommended by the Regional Judicial Board, a body chaired by the Regional Commissioner. The Regional Judicial Board in turn acts on the recommendation of the District Judicial Board. This Board is chaired by the District Chairman of the Party and all of its members save the District Magistrate are Party officials or their delegates.[57] Secondly, by the recently promulgated Primary Court (Assessors) Regulations, 1972, the primary nominations of assessors are by the TANU Branch Executive Committee and the final selection of the panel by the District Executive Committee. Assessors, it should be remembered, have equal voting rights with the Primary Court magistrates with whom they sit. Finally, on this subject of TANU's impact on the judicial system, one should mention the fact that the members of the Arbitration Tribunal are nominated by the TANU Branch Committee having jurisdiction over the ward in respect of which the Tribunal is established.[58]

Neither the assessors nor the members of the Arbitration Tribunals have security of office and the formers' appointment may be terminated by the Regional Commissioner, the latters' by the District Executive Committee, in both cases for any cause whatsoever.

The absence of security at this level would suggest a deliberate attempt at political impact on the system of administering justice and it raises serious questions of the conception of independence of the judiciary by any criterion used. However, it should be noted that the lack of tenure of members of the Arbitration Tribunals is not a matter of very serious consequence as their decisions are not binding on the litigants save by their agreement. If a party to the dispute is dissatisfied, reference would be made to the ordinary adjudication process. Further research is necessary to determine the impact of political

55 *Law and Administration in a One-Party State, op. cit.*, Chap. 1.
56 S. 57 (2) Interim Constitution of Tanzania.
57 See Administration of Justice (Miscellaneous Amendments) Act, 26 of 1971.
58 Government Notice 219/1969. The Arbitration Tribunal Regulations, reg. 4.

pressures in the decision-making process in the Primary Courts. A lot will depend on the rules which guide the appointing bodies in their choice of assessors and the exercise of the powers of removal by the District Executive Committee of TANU. It is as yet too early for one to form conclusions on whether there is domination in the decision-making process by the political functionaries or pressure groups at the lowest level of the judiciary. What is certain is that there could be because of the lack of safeguards against such pressures. In the context of an independent judiciary, there is serious cause for misgivings.

One can suggest various reasons for this trend of Party involvement in the legal system. The most important ones are: a need for the courts to be an instrument for implementing Party policies; a continuing suspicion on the part of the Party of independent courts as being stumbling blocks to policy implementation; fear that untrained members of the community, who are in any case poorly paid[59] and without other material resources, being brought into the judicial process with the opportunity to take bribes, and the temptation to arrive at decisions on the grounds of familial and clan considerations, might succumb to those pressures. Research elsewhere has highlighted that elders drawn from the society, if given judicial functions, are very often caught up in "rankling accumulation of grievance".[60] They might be so involved that their decisions when given are coloured. Party control over appointees, it might have been thought, is a safeguard against such abuses. On any of the above considerations the point to note is that this development reflects the theory that "every aspect of national life springs from the Party"[61] a theory deriving its validity from the *TANU Guidelines*.[62]

Magistrates and judges of the High Court do have tenure. The power to exercise disciplinary control over Primary Court magistrates and to terminate their appointment is vested in the Judicial Service Special Commission. There are regulations prescribing the procedure to be followed.[63] Other magistrates and the High Court judges are accorded special protection which guarantee them security.[64] However, it is apparent that institutional safeguards, although

59 Assessors in the Primary Courts are paid a subsistence allowance of Shs. 5/-a day in urban areas, see Georges, "Traditionalism and Professionalism", in James and Kassam, op. cit.

60 P. Brietzke, "Law and Witchcraft in Malawi", *E.A.L.J.* 8, No. 1 (1972).

61 See the editorial in the *Daily News*, 5 March, 1973.

62 Government Printer, Dar es Salaam, para. 11.

63 It has been reported in the *Daily News* that the President whilst in Musoma suspended two Primary Court magistrates for accepting bribes, the *Daily News*, 22 January, 1973; *Uhuru*, 25 January, 1973, p. 1. This action was justified in an editorial of the *Daily News* on grounds that corruption by members of the judiciary is apt to make the Government unpopular and an honest judiciary is the responsibility of the Party. The danger of the reasoning is its pervasiveness and the implicit acceptance of disregarding established procedures. It justifies the action of the Coast Regional Commissioner who *summarily* dismissed four butchery workers in Dar es Salaam for alleged "gross neglect of duties" by-passing the procedure laid down in the labour legislation. As the Regional Commissioner himself admitted subsequently, such dismissals are not a solution to the problems of inter alia, discipline and low morals of workers. See the *Daily News*, 3 March to 5 March, 1973. Such actions can have a negative effect.

64 James and Kassam, *Law and its Administration in a One-Party State—Selected Speeches of Telford Georges*, op. cit., Chaps. 1, 3 and 4.

an important factor in the development of an independent Bench, is not the end all, and much depends on the calibre of the personnel training, intellect and their professional competence; these are the chief sources of the strength of the judiciary. But practice must guarantee them freedom from harassment.

I would now like to pursue the subject of re-appraising the legal system in the struggle for development. It is a precondition of this task that we review the functions of the fundamental components of the law system, i.e., the adjudicative process and the dynamics of law. I do not attempt to discuss the part which should be played by the Bar and Bench in this process; obviously this is a related topic.

THE ADJUDICATION PROCESSES

Traditional Western Role

The determination of disputes by recourse to an independent tribunal according to the prevailing legal norms is important psychologically in that it assuages the sense of frustration and grievance the litigant might feel because of the action of a neighbour or the bureaucracy. Where the action is to vindicate a right, the court procedure provides an alternative to self-redress. But the bringing of an action might be for protection, to establish one's liberty or to remove doubts and fears emanating from the actions of others. Granted the proper degree of publicity and involvement of the people, the court process could be generally educative as to the goals of society. No doubt resort to the courts can be for improper motives by the obstinate, the self-opinionated and the maladjusted. Usually there are procedures to dismiss such actions summarily as being vexatious. There are even occasions when the court can penalise the frivolous or vexatious litigant by an order for compensation for the trouble to which he might have put the other party.

It is important to repeat that the litigation process in the traditional Western context does, *inter alia* make peaceful co-existence possible among the citizenry. It is, therefore, not enough for the bureaucracy which is an interested party in the dispute to dictate the final solution and some degree of Montesquieu's separation of power should be sought after not only *de jure* but also *de facto*, for a lot depends upon the composition of the tribunal and the training and forthrighteousness of its members if the loser is to be placated and self-redress restricted to the barest minimum. The principle of judicial separation is safeguarded by (i) giving judges security of tenure of office, (ii) a general acceptance of, and respect for, judicial independence both by the Executive and the Party in power, established mainly as a result of the conflict between the legislature and the judiciary during the eighteenth century in Britain. This conflict left a healthy tradition of mutual respect between the judiciary and Executive for each other's role,[65] (iii) a competent Bench, and (iv) an alert public opinion.

65 See Sir Kenneth Robert-Wray, "The Independence of the Judiciary in Commonwealth Countries", in *Changing Law in Developing Countries*, J. N. Anderson, ed., (London: Allen and Unwin, 1963), p. 72.

Traditional African Role

In contrast, a dispute settlement process with its informality remains an objective. Such machinery, common before the colonial period, implies a settled society whose members are related or bound together by ties of kinship, real or legendary, by other forms of association such as age or possibly by other circumstances of life. Lambert speaks of this process as "judgment by agreement"[66] rather than by adjudication; Bohannan characterised it as a "treaty-making process".[67] The primary aim is the preservation of a prior intimate relationship and not the vindication of rights. For example, very often in a land dispute the remedy might have been the division of the land between the contestants. The composition of the tribunals is by elders of the society who are familiar with the contestants and with inquisitorial powers pursuant to finding a solution to the problem.

Eclecticism

As society became complex, e.g., by the development of trade and the intermixture of people from different tribal groupings with different customs, the necessity for adjudication superseded that of settlement. The judicial system then played an important role in the reorientation of social norms and level of awareness. Post-revolutionary Russia aimed at the simplicity of the settlement procedure in adjusting social imbalances.[68] The model was the "Solomonesque" approach of the early society. The attempt to achieve the utopian was soon abandoned. What is clear from the Russian experience is that in a transitional society there ought to be more rules to be interpreted, more conflicts of norms and more usages and customs to change. I would think that that is the stage of our progress in Tanzania. There are, however, certain areas where a conciliatory approach to disputes might well be feasible. The obvious area is that of family relations. The effectiveness of the conciliatory boards established under the Law of Marriage Act, 1971,[69] is still to be researched. In established ujamaa villages which have achieved a high degree of communalism, the conciliatory procedure also stands a chance of success. One interesting development is that the recent practice of registering such ujamaa villages under the Co-operative Societies Act,[70] is to remove disputes "concerning the business of the society" from the courts in favour of the Registrar. Such disputes might be brought by a member against the society or against another member. The Registrar might resolve the dispute himself or refer it to arbitration.[71] This is an area where a conciliatory board (e.g., the Arbitration Tribunal)[72] at the local level might well assume some

66 See J. Matson, "Judicial Process in the Gold Coast", *I.C.L.Q.* (1953), 47.
67 P. Bohannan, *African Outline: A General Introduction* (Penguin, 1966), p. 187.
68 J. Hazard, *Settling Disputes in Soviet Society* (N.Y.: Columbia University Press, 1960), Chap. 2.
69 Act, 5/71, S. 102.
70 Act, 27/68.
71 See S. 99 (2) (m), and Rule 22 of the Co-operative Societies Rules.
72 For their establishment, see "Arbitration Tribunals Regulations", G.N. 219/1969. The objective of arbitration is stated in the regulations as being "to bring the parties to the dispute to an amicable settlement".

significance. These are the settled areas; outside of these the reconciliatory councils have proved unsuccessful in resolving disputes and reference to the courts is still cherished by aggrieved litigants or those who feel that they are aggrieved, notwithstanding the decision of these councils.

Bureaucratising Law Enforcement

Most discussions of the role of courts assume the necessity of concepts of "rule of law" and "independence of the judiciary". Gower,[73] although reluctant to define the former, stated as a necessary implication "respect for individual's human rights" safeguarded not by a bill of rights but by "enlightened public opinion" and "the tradition of centuries". Both concepts assume that no matter how politically charged an issue might be, legal process has a part to play and the law must be followed. Predominantly, therefore, the court in the Western world has been a defender of established order and of vested interests. In such a society the individual and corporate owners of property are the chief benefactors.

A legitimate question might be raised, whether Tanzania, the antithesis of such a society, can afford the luxury of the independent court. Shouldn't the judicial process participate actively in implementing the widening spectrum of economic and social plans irrespective of the state of the law? Shouldn't the Party interfere to ensure the implementation of this new role of the judiciary? Shouldn't strict observance of law give way to the political necessity of building socialism? Affirmative answers suggest the need for what Claire Palley calls "Rethinking the Judicial Role"[74] and an acceptance that pledges to uphold the principles of "rule of law" and "independence of the judiciary" are no longer valid. Such a radical view would suggest further rationalisation of the courts' system. Three possible areas of reorganisation spring to mind: the appeal structure, the composition of courts and the control system. In relation to the first two areas of reform one might argue that the three-tier hierarchical appeal structure is redundant, and the composition of the courts above the Primary Court level needs to assimilate principles implicit in the changes brought about in this respect in the Primary Courts.[75] The present three-tier hierarchical Appeal Court structure assumes the predominance of the correct legal norm over all other considerations—

73 E. C. B. Gower, *Independent Africa—The Challenge to the Legal Profession* (Cambridge: Harvard University Press, 1967), p. 22.
74 See her "Rethinking the Judicial Role", *Z.L.J.*, I, No. 1 (1969), p. 1.
75 The illogicality of the existing situation is brought out when two recent decisions of the courts are considered. In *Rioba Nyachanche v. R* (1972), H.C.D. 255, it was held on appeal to the High Court that assessors are entitled to participate in the decisions of sentence in the Primary Courts. "All matters before the primary court are to be decided by both the magistrate and assessors, and in the case of difference of opinion the matter is to be determined by a majority vote of the assessors and the magistrate." The East African Court of Appeal held, on the other hand, that assessors sitting in the High Court have no say in sentencing: "sentencing is a matter for the judge alone". *Solomon s/o Ulaya v. R* (1972), H.C.D. 233. Both decisions are correct on the interpretation of the relevant enactments; the total picture illustrates the irrationality of the system.

with the final Court of Appeal making the most authoritative pronouncement. As we have suggested, these assumptions are not necessary if the judicial process is primarily an extension of the implementation process of governmental and, therefore, Party policy—the conception of the professional judge or magistrate advising a panel of ideologically committed persons on the law but leaving the final decision to their wisdom in terms of political experiences would better promote this role of the judicial system as policy implementor. Given those changes Party control through appointments, removal and discipline of the courts' personnel becomes apparent.

However, one cannot leave the subject without a warning that to bureaucratise law enforcement on the lines discussed in this section is to augment existing authoritarian tendencies—evidence of which is presented in the paper. The old adage that power corrupts and absolute power corrupts absolutely, expresses accumulated wisdom. Although the principled neutrality of the Gallanter model[76] is inappropriate in developing countries as a jurisprudential premise, flexible uncertainty of the bureaucratic model saps the court of any creative role and opens a floodgate to arbitrariness.

European socialist countries avoided the bureaucratisation of law enforcement on this line by drawing a clear distinction between the Party and State organs and developing a clear concept of socialist legality which is defined as the precise observance and execution of the constitution and laws which are democratically enacted.[77] Socialist legality implies operative laws and guaranteed rights to the citizenry protected by a bill of right. It follows that there is no place for direct Party control through appointments, removal and dismissal of personnel. One of the basic principles in the organisation of the Soviet court system is the elective nature of the Bench through the local elective organ. The Party is only one of the many bodies that can nominate the candidates, other mass organisations can as well. There are no qualifications for election to the office of judge (including assessors) except the attainment of the age of 25 by the candidate. As a rule a nominated candidate for the Bench would have had law training. On election they have security of tenure and are accountable to the electors.[78]

On the whole one might generalise that socialist legality accepts the principle that judges and assessors are independent and subordinate to (only) the law and not subject to any external influence. Any attempt to put pressure on a judge or make use of one's Party position to induce a court to adopt a decision one way or another, is regarded as gross violation of legality and might lead to the removal of the guilty official. Concluding his discussion of the "independence of judges" in the Soviet Union, Chkhikvadze writes, "Every

76 See M. Gallanter, "The Modernisation of Law", in M. Weiner, ed., *Modernisation: The Dynamics of Growth* (N.Y.: Basic Books, 1966).

77 *The Soviet State and Law*, Institute of State and Law, Academy of Science of the USSR (ed. by V. M. Chkhikvadze), Chap. 5; R. David and John Brierley, *Major Legal Systems in the World* (Collier, MacMillan, 1968), p. 153.

78 However, it is stated that election of judges, like other elections in Soviet countries, is dominated by the Party and the voting is scarcely more than a ratification of the chosen candidates of the Party, see David and Brierley, *Major Legal Systems in the World*, op. cit., p. 183.

instance of unlawful interference in the activity of judicial organs is resolutely cut short and the guilty persons, regardless of their official position, are strictly called to account."[79]

DYNAMICS OF LAW

The history of ideas of European legal systems have elucidated a number of theories about law. When the emphasis was upon the juristic activity, a philosophical theory of law as declaratory of ascertainable principles was popular. When the growing point of law became legislation, a political theory of law as the instrument of one class to suppress another in its interest, prevailed.[80] These theories are stated rationally and as being immutable. Their real utility is, however, in helping us to understand the contemporary European institutions and to perceive the dominant concerns of the times. Individually each theory is susceptible to being faulted on grounds of its insufficiency. Collectively they depict the whole and, therefore, something of the truth.

Were we to examine the aim of law in traditional African society we would discern a conception of law, the mechanism of which is geared towards keeping the peace—maintaining the status quo.[81] The emphasis was on defending the relationship of a member in his group and his obligations towards other members of that group, and regulating the relations between one group and another.[82] Hence rules about allocation of the land area, about the rights

79 Chkhikvadze, *The Soviet State and Law*, op. cit., p. 304.

80 See R. Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1961), Chap. 1.

81 This is not to deny any changes whatsoever, but to emphasise the status components. Professor Ajayi, "African Universities and the African Culture", (1971), *East Africa*, Chap. 3, has argued that as a historical fact, there were changes in the societies; these changes went to make different epochs of African history. He, however, conceded difficulty in perceiving any clear indications of the nature of direction of the changes.

82 This concept of law and justice is clearly brought out in the study of Fimbo and myself: *Customary Land Law of Tanzania—A Sourcebook*, op. cit. J. H. Driberg in "The African Concept of Law", and M. Gluckman in *Ideas in Barotse Jurisprudence* (New Haven: Yale University Press, 1965) make the point.

> We speak of criminal and civil law, a distinction which is meaningless to the African and fruitful of misunderstanding, when he is pursued in our courts on a criminal charge for what he would consider a civil offence, involving a totally different penalty. If then they made the distinction—and certainly some distinction is implicit in their legal practice—they would speak of private and public law. To them law comprises all those rules of conduct which regulate the behaviour of individuals and communities, and which by maintaining the equilibrium of society are necessary for its continuance as a corporate whole. Private law deals with acts or situations which negate those conditions which make the maintenance of the equilibrium possible. —*Driberg*.
>
> Many writers have discussed the process of law in tribal societies in such phrases as restoring the social balance or equilibrium, securing the agreement of both parties to a compromise judgment and, above all, reconciling the parties. This is the main aim of Barotse Judges in all cases that arise between kins for it is a dominant value of the society that villages should not break up and that kins should remain united—*Gluckman*, p. 9.

of the family, the clan or tribe in land occupied by a group member of his family; rule about bad behaviour predominated.[83] Crimes were viewed from the point of view of disturbance of the equilibrium and the law sought to restore the pre-existing balance at all points.[84]

Contrary to the superficial analyses of colonial administrators[85] and some Marxists and neo-Marxists, who see in the African kingdom and culture a similarity with those of feudal Europe[86] and identify the group leader (e.g., the family head, the village headman, the chief and king) as a feudal overlord,[87] a desport,[88] with rights over and above the other members of the population. the law sought to define the limits to his powers and on the other hand his responsibilities and his place within the group. For example, in the West African cases of *Amodu Tijani v. The Secr. of Southern Nigeria* and *Oshodi v. Dakolo,* the courts held emphatically that the subjects were entitled to the main part of the compensation payable on compulsory acquisition of land and the chiefs' only personal claim was a small sum for the loss of seigneurial rights and not ownership of land which they did not have.[89] The rules governing their responsibilities are expressed in terms of "rules of primary administration" in Gluckman's analysis,[90] in other more strictly legal

83 The concept of "misbehaviour", I have developed in my thesis with reference to West Africa. See R. W. James, "The Customary Law of Southern Nigeria" (University of London Ph.D. Thesis, 1967), p. 285 ff. Misbehaviour includes indulging in making had medicine in witchcraft, adultery with the chief's wife or such conduct that brings the community into disgrace and would cause forfeiture of one's interest in land. Under Haya Law, and this concept has been enacted into the Customary Law Declaration, misconduct is grounds for disinheriting one's heirs, see James and Fimbo, *Customary Land Law of Tanzania—A Sourcebook,* op. cit., Chap. 7.

84 For example, A. a member of a family or community has been killed by a stranger to that group, the law steps in to restore the equilibrium which is disturbed by permitting the bereft community to demand someone, very often a wife, from the offending community. If one steals, restitution might maintain the equilibrium.

85 Cf. P. C. Lloyd, *Africa in Social Change* (Praeger, 1968), p. 38.

86 M. Gluckman who was neither a colonial administrator nor a Marxist also fell into the trap in his generalisation leading to his famous theory of hierarchy of estates based on his studies of the Lozi. See his *Essays on Lozi Land and Royal Property* (Manchester University Press, 1968). He has been taken to task for his superficiality, see C. M. White, "Terminological Confusion in African Land Tenure in Northern Rhodesia", (1959), *J.A.A.,* 1971; (1960), *J.A.A.* 3.

87 A recurring argument of the colonial administrators was that traditional rulers were owners of the lands and, therefore, they had power to make grants and concessions of such lands to British chartered companies. For example, it was argued that the Litunga as owner could make grants of mining lands to the B.S.A. Company.

88 For an analysis inspired by Marxism see Chodak, "Social Classes in Sub-Sahara Africa", *African Bulletin* (1966). The intention of the latter is to give an aura of omnipotence to Karl Marx.

89 See (1921) 2 A.C. 399 and (1930) A.C. 667, both cases are discussed by A. E. W. Park (1964), *N.L.J.,* 38.

90 M. Gluckman, *Ideas in Barotse Jurisprudence,* op. cit. Rules of primary administrations may be contrasted with rules of proprietorship; Bentsi-Enchill uses the expression "sovereignty" and "ownership". See "Do African Systems of Land Tenure Require a Special Terminology?" (1965), *J.A.L.,* Vol. 9 (Northwestern University Programme of African Studies, Reprint Series), No. 7.

literature, as "trustee duties".[91] They include an obligation on the office-holder to utilise his gains from office, in the case of chiefs, the stool or so-called royal estate, for the benefit of the group, e.g., on ceremonial occasions and for good government.[92] Violation of these obligations will no doubt lead to his unpopularity, and would have, in the words of J. Berkley, in *Inyang v. Ita*[93] "dictated two courses". These were ". . . either he went into exile or else he stayed and was put to death". Dwelling on the concept of democratic suffrage, as the issue raised was whether settled government under the colonial tutelage meant deposition by popular vote rather than two outdated modes, the judge commented:

> . . . it has been common ground . . . that it was quite possible for an exiled head to return. The one condition precedent to such a return being that he made his peace with the family . . . with the body of people who composed the family. His return was sanctioned or refused by democratic suffrage not by democratic decree. It is obvious that even before the advent of the government, the theory of election, though in a very rudimentary form was already inherent in the family system of the Efik people of Calabar.

The judge, therefore, concluded that a head, including the family head and chief, could be removed by popular vote.

In a society organised on the basis of kinship, in which the greater number of social wants are taken care of by kinship organisations, there are only two sources of friction: the clash of kin interest *inter se,* and that of the kin group and the non-kin member or his group. As a corollary the role

91 For some interesting essays see Ekow Daniels, "The Influence of Equity in West Africa", (1962), *I.C.L.Q.,* 31; Ekow Daniels, "Law of Trust in West Africa", (1962), *J.A.L.,* 164; S. Asante, "Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana", (1965), 14, *I.C.L.Q.,* 1144; M. Jegede, "The Position of the Head of the Family in Relation to Family Property. Is He a Trustee in the English Sense?" (1966), *N.B.J.,* 21. Some passages from a few *causes celebre* are pertinent. In *Omogbeni v. Numa* (1923), 5, *N.L.R.,* 17, where the descendants of the traditional ruler claimed title to lands under his control, J. Webber held: "Now the Olu never owned Jekri land as an individual. The land belonged to the community and the Olu was trustee. In him as trustee was vested the land." C. J. Verity in *Oyenkan v. Oba Adele II:*

> In my view, therefore, the grant of 1970 vested in King Docemo and his heirs an estate subject to the interest and restriction imposed thereon by native law and custom relating to what I described as "royal estates", that is to say, subject to the right of the Oba of Lagos during his term of office to hold the same in a representative and constitutional capacity as his official residence (1952), 14 *W.A.C.A.,* 209.

The former case dealt with communal lands, the latter with stool lands.

92 See *Apoesho v. Chief Awodya* (1964), *N.M.L.R.,* 8, which gives us some rare insight into what I regard a typical custom:

> In former times when a chief was the effective ruler of the area of his chieftaincy he obviously had to have the means of meeting the expenses of government, as well as looking after his family. There were no salaries then attached to chieftaincies and all these expenses had to be borne from income derived from what is now known as "Stool Land". But now the functions of a chief are mainly ceremonial and salaries are paid to them for the maintenance of the dignity of their office and for the care of their families, while local governments are responsible for the day-to-day expenses of administration. It is difficult, therefore, for the Courts to assume that property acquired by a chief while on the Stool from his own personal salary can be considered as Stool property without evidence that the custom which the learned Judge referred is still in existence in Western Nigeria.

93 (1929), 9, *N.L.R.,* 84.

of the court was one of dispute settlement rather than adjudication—this subject we have developed in the previous section.

Colonial rule superimposed colonial laws and administration. Law became not only a device to maintain the equilibrium but also an instrument of coercion to aid the colonial administration. Thus the legal system assumed a dynamic role in the oppressive machinery. Professor Gower[94] in the only close appraisal of law in colonial Africa, identifies the ends of colonial laws and institutions in terms of creating new values—his so-called legacies of the colonial era. He enumerated these legacies as *inter alia* "rule of law", "a civil service tradition" and "parliamentary democracy". Much more apparent however, were the "dual economy", the "racial restrictive covenants", the "reserves", "trespass, pass and forced labour laws". These were developments which indicate that the colonial legal system was another of the devices used to further the economic and social objectives of colonialism.

The economic theory of dual economy[95] legally expressed in terms of received laws and customary laws does not necessarily imply that the traditional enclave remained static and immune from the colonialists' objectives. Studies by White,[96] Asante[97] and others[98] have established a number of influences which have tended to disrupt the traditional group organisation and to promote individualism. Chief among them were the pax Britannica, the money economy, commercial crops and population and other ecological factors. One should not discount the influence of the received laws with their insistence on individual rights and the colonial judges who had to interpret customary law. These were all important in introducing new norms.[99] New chapters in traditional law defining individual rights in acquiring and controlling land and servitudes became apparent.[100] The *kihamba* took on new legal significance; a concept of disinheritance or free testamentary disposition gained universal

94 L. C. B. Gower, *Independent Africa the Challenge to the Legal Profession* (Harvard University Press, 1967).

95 See Ann Seidman (1970), *East African Journal*, VII, No. 4, pp. 7-13, and VII, No. 5, pp. 6-19; but see Mafeje, "The Fallacy of Dual Economies", (1972), *East Africa Journal*, IX, No. 2, 30, who seems to be making much ado about nothing or at least using a steam roller to crack a nut. A nodding acquaintance of colonial laws and policy would illustrate the fact that the traditional sector was retarded for the benefit of the export sector.

96 "A Survey of African Land Tenure in Northern Rhodesia", (1959), *J.A.A.*, 171; (1960), *J.A.A.*, 3.

97 "Interests in Land in the Customary Law of Ghana—A New Appraisal", 74, *Yale L.J.*, 848.

98 See K. Baldwin, "Land Tenure Problems in Relation to Agricultural Development in the Northern Region of Nigeria", in D. Biebuyck, ed., *African Agrarian Systems* (London: O.U.P., 1963), pp. 75 ff. T. R. Batten, *Problems of African Development* (London: O.U.P., 1960), Chaps. 4 and 5. A number of articles under the auspices of the E.R.B. provide useful studies. The most important ones are Rayah Feldman, "Custom and Capitalism: A Study of Land Tenure in Ismani, Tanzania", (1970); "Economic Differentiation in Ismani; A Critical Assessment of Peasants Response to the Ujamaa Vijijini Programme", by A. Awiti (1972). Awiti's article is published in *The African Review*, Vol. 3, No. 2 (1973), pp. 209-239.

99 See Julius K. Nyerere, "Socialism and Rural Development", *Ujamaa Essays*, (Dar es Salaam, O.U.P., 1968), p. 110.

100 James and Fimbo, *Customary Law of Tanzania—A Sourcebook*, op. cit., Part 4, entitled "Individual and the Land".

recognition with the urge to forge one nation by customary law declarations, much on the lines of the 12 Tables of ancient Rome; and procedures for buying and selling developed lands became established, more in some areas than others for the colonial practice of indirect rule was a restraining influence on greater developments in the law. At the twilight of colonialism, the colonial powers did actively champion changes in the traditional sector. This is particularly so in East and Central Africa following the Reports of the East African Royal Commission in 1955 and the Arusha Conference in 1957—the individualisation of traditional land tenure became a matter of official policy. In Tanzania the post-independence improvement strategy adopted from the Report of the World Bank Commission emphasised a policy of increased production of cash crops for the export market, and the village settlement had contributed to the development of agricultural capitalism in some areas.

The fact is that at independence modern customary law and practice had encompassed disharmonies, if you like conflicts, at the expense of group equilibrium, and at the time of the Arusha Declaration, the disharmonies were more pronounced. Case law defined clear rights and privileges in land, identified such roles as those of owner, buyer and seller, borrower and lender and lessor and lessee. In some areas the changes in this direction had taken strong roots. In other areas vestiges of a semi-feudal tenancy were perpetuated, economically unimportant but casting a shadow over the entire range of behaviour patterns in the areas concerned.[101]

If law is to be used in effecting a transformation of what had become a complex society its dynamism must be identified. This lies in the fact that law can be the embodiment of new norms and the creator of new institutional arrangements and structures—a device and instrument for organising social actions by establishing networks of duties, redefining rights in a way designed to bring about planned changes. I have touched on elsewhere[102] the idea of enhancing the role of law in elucidating the advantages of *a priori* regulations to the *ex posteriori control* of parastatals. Law, it is postulated, can define the powers status and functions of the parastatal organs. This technique of development is infinitely superior to the present-day system of *ex posteriori* controls, the issuing of the directives after the bonuses have been paid, for example, or after one parastatal had already impinged on the area of activities of the other. Similar considerations apply to the goal of rural socialism. It is not enough to proceed with the existing laws disregarding them when it is expedient. Development through bureaucratic expediency is fraught with the danger of alienation and allows uneven and deformed growth.

I suppose in a sense this is what is happening in the country in the context of practices in the ujamaa villages. There appear to be many instances of land redistribution under the guise of ujamaa. Again, a perusal of the by-laws which are being adopted by the villagers reflects the different ideas of socialism

101 "Land and People: An Essay on Traditional and Contemporary Land Tenure in Tanzania and Kenya", by Dusan Pokorny (mimeographed and circulated privately).

102 "Organisational Relationships and the Control of Parastatals in Tanzania", in the special issue of *E.A.L. Rev.*, 39 (1972).

in the country. Some by-laws, for example, provide for the expropriation of its member's share in the joint venture when he resigns or is expelled from the village. Others secure to their members remuneration on the basis of work units performed by the members and there is a monthly record of these; some provide for the distribution of food crops to members on the basis of completed work units, others on the basis of family. And finally, some provide for a record to be kept of the area and quality of land contributed by a member with an obligation on the village to find him land on the border of the village of equal size and quality when he leaves, others state categorically that a villager on leaving "shall not be refunded for anything he contributed to the village". To adopt Lenin's censure, "law cannot be Kaluga law or Kazan law, but it must be uniform . . . law", some fundamental principles can be decided upon and given universal application in regulations setting out model by-laws.

If a community wants to successfully put through a programme of drastic social and economic changes new legal models must be found. In this context we reject the historical viewpoint which denies the possibility or desirability of using law to bring about social changes. We welcome more of such enactments as the Law of Marriage Act,[103] which attempts a revolution in the status of women. The act of promulgating new laws is a manifestation of the seriousness and commitment of the leaders to the changes. Legislation allows for the establishment of some basic fundamental principles and contributes to the dissemination of the new norms and in the words of Olivecrona, their "psychological effectiveness".

There has been little research in the motivational system of the role occupants (law consumers) and the psychological processes by which legislative process commands obedience. There is, therefore, no evidence for the assertion of Dr Beyer[104] that, "Law makes definite ideals, rules and principles mandatory for all. Thus law once enacted influences social and individual consciousness and plays an ideological role in society". Until such time as we have more research from social psychologists we are left to conjectures. One certainty in our knowledge is, however, that promulgated laws if too far removed from the attitude and culture of a people, stand a good chance of being unsuccessful—legislation cannot always make mores. The reaction of the expatriate University staff members to the working of the University of Dar es Salaam Act, 1971, is an illustration of such a response to legislation which enacts radical views in terms of a concept of participatory democracy. The Act provides for the establishment of decision-making organs largely comprising representatives of national institutions at the expense of representation by members of the university community. Even when it allows representation of members of the teaching staff this is through a process which emphasises more political bureaucratic control than democracy. The

103 No. 5 of 1971.
104 K. H. Beyer, "Tasks of Socialist Legislation", *E.A.L.R.*, 231 (1971), at 235.

radical changes from the autonomous professor-run English model[105] University College were unacceptable to the majority of these members of staff most of whom are the products of foreign universities with traditional democratic decision-making structures—hence disruptions, disenchantment and the call to democratise the system and for control from within.[106]

A radical legislation stands a better chance of success in emotionally neutral and instrumental areas, given effective propagandisement and a machinery comparable to the challenges. Commercial dealings is an example of the former; expropriation is an example of the latter. The latter is the area where law has been most effective in Tanzania; we have expropriated the foreign private firms and the absentee owners and have enfranchised the tenants, but beyond this we have made only minor headway. There has been little institution-building[107] to transform the economy and less to establish long-term relationships. In the expressive and evaluative areas, apart from that of family relations, we have feared to tread. Such caution is largely justified from our ignorance of communication of law and how best to fulfil its ideological role.

It is in this area that Robert Seidman has been the avant garde. He raises questions for further study on the techniques of communication. In his "Law and Modernisation in the Developing World"[108] he asks such pertinent questions as, "how are rules of law communicated in developing countries?" "What new institutions must be forged if a new rule is to be effectively communicated to those whose activities it is hoped to change?" More work needs to be done on this important area of law-making which in my opinion, warrants recognition as a priority area because in developing countries we cannot afford the luxury of *ignorantia juris non excusat.* I think our social scientists who are probably better trained than lawyers in the art of communication are neglecting a crucial field of research. But obviously it is a significant field for interdisciplinary research.

105 This model is described by E. Ashby, *African Universities and Western Tradition,* (Cambridge: Harvard University Press, 1964), p. 66 ff.
106 Some African members of staff supported the call for the foreign imitations. As Ashby stated in his analysis, African scholars with their colonial background are not prepared for great changes from the Western tradition of universities and their aspirations do not transcend the concept of Africanisation. He continues, "these same university teachers who pursue the view of the university as a democratic autonomous corporation see nothing inconsistent in their reliance on the state for finance with their claim for exemption from control of the very state." He then enlightens:
> The universities of France, Germany, Sweden and the land grant universities of America manage (with occasional lapses, it is true) to maintain traditions of academic freedom although they are frankly organs of the state; only in Britain and countries which have imported their universities from Britain do the constitutions of universities deliberately confer immunity from day-to-day state control; and only in Britain and these countries is it assumed that constitutions of this pattern are essential for preserving academic freedom. pp. 70-71.

107 The important examples of institution building are the Ranch Associations and their Kenya counterpart the group corporation incorporated under Land (Group Representative) Act.
108 Mimeographed, Spring Semester, 1971-2.

In Tanzania, we have not yet developed institution-building for communication. We have, however, experimented with the two-step technique. Its most effective and successful use has been with reference to the Law of Marriage Act: the publication of the white paper on the Uniform Law of Marriage and a two-way flow of comments in the mass media.[109] The constraints of the two-step flow technique are that it presupposes that the issues raised are not very urgent and as such it is unsuitable in an emergency situation and that Government must be prepared to shelve important programmes if rejected by the role occupants; at best a modification might suffice. These limitations would appear to follow from the Party policy paper *TANU Guidelines*.

The other technique of some importance is the permissive legislation; the law is only implemented after approval by a majority of those to be affected by the new rules. The Range Development and Management legislation illustrates this technique. Under the legislation any ranching scheme must be accepted by not less than 60% of the cattle-owners before adoption. Acceptance is crucial for the role occupants are required to adopt new attitudes to cattle-rearing and new techniques of farm management, and without a thorough insight into the new and multiplex duties, a ranching scheme stands little chance of success.

Marxists appear to attach great importance to the development of the legal consciousness of the masses and the concept of socialist legal consciousness is given extended treatment in their writings. Soviet writers seem to accept as a major premise of successful policy implementation that legal relationships, being a form of social relationship, must before they actually take shape, pass through the mind and will of the people. Only then can they effectively influence the life of the society. The enhancement of legal consciousness of the general public is, therefore, a priority of the Communist Party and the Soviet State.[110] However, the concept of legal consciousness can only be a meaningful tool when there is recognition of a concept of legality.[111]

CONCLUSION

The theoretical essence of law and legality for socialist Tanzania was stated by President Nyerere in terms of the traditional concepts of rule of law and independence of the judiciary. The former, he asserts, is a part of socialism; "until it prevails socialism does not prevail".[112]

The rule of law stands for the view that decisions are made by the application of known principles or laws. In general such decisions will be

109 For some indications of the changes brought about by the Act and the reaction of the public to the white paper, see F. M. Kassam, "Comments on the White Paper", 1969, *E.A.L. Rev.*, 329.
110 V. Chkhikvadze, *The State, Democracy and Legality in USSR: Lenin's Ideas Today* (Progress Publishers, 1972), p. 298.
111 See the Conclusion.
112 See his "Introduction" to *Freedom and Socialism* (Dar es Salaam: O.U.P., 1968), p. 8.

predictable, and the citizen will know where he stands. On the other hand, if a decision is made in violation of existing rules or so as to frustrate the application of existing rules, this is arbitrariness and the antithesis of a decision taken in accordance with the rule of law. The independence of the judiciary can only mean that a decision is arrived at without political pressure or free from the dictates of pressure groups. The former has safeguards in the latter; the latter is largely a political decision to be taken by political leaders. In a State where the struggle is to transform a hitherto colonial society along socialist lines, the existence of the rules of law depends on the ability of the legislature (in reality the Executive) to translate new norms into legal principles. If this is not done then there will surely be a conflict of politics (i.e., objectives) and law, and in the reconciliation of the conflict, the latter stands in great jeopardy, for if the transformation process is not to be abandoned, the initiators of change (i.e., the Party) must ensure recognition of its policies in the adjudication stage. This, it is suggested, is the trend in Tanzania.

Alternatively, it is for the Executive to discharge its obligation of changing the law. European socialist legality highlights as a necessary component, this alternative. This assumption follows from their concept of "class state" which by controlling the law-making organs expresses its will in the form of universally binding rules. Lenin's writings show that for him legality meant firstly, the existence of legislation, i.e., a developed system of operative laws and other enactments based on these laws; and the precise enforcement and unswerving observance of such law by all Government and non-Governmental bodies, officials and individuals.[113] It is, therefore, obvious that in this framework, although the basis of legality is progressive legislation, its central element is in actual enforcement.

Thus both the modern Western formulation of rule of law and the socialists' concept of legality imply an active legislative body and effective methods of law communication and enforcement. I need not dwell on the Western manifestations but the Soviet insistence on legality could be further emphasised. One needs only quote from Chkhikvadze's *The State, Democracy and Legality in the USSR*. Dealing with the principle of the supremacy of the law, he postulates:

> Legality presupposes the application of the rule of Soviet law in accordance with its letter and spirit. Any departure from the strict observance of the law cannot be justified by reference to rapidly changing circumstances, the inability of the law to keep up with the rapid evolution of reality, the fact that it does not correspond to legal consciousness, etc. This cannot be permitted because the legislator himself, in issuing the law [rules of law], takes the fullest possible account of future changes in social life, of its variety and dynamics. If substantial changes which make necessary the establishment of a new rule or the amendment or repeal of an old one indeed take place, it is a matter for the legislator and not for the body enforcing the law. Until a law [or any other rule of law] has been repealed or amended in accordance with established procedure, it must be strictly observed by all.[114]

113 See V. Chkhikvadze, *The State, Democracy and Legality in the USSR: Lenin's Ideas Today*, op. cit.
114 Ibid., p. 328.

Later in the book he reiterates points worthy of repeating to a Tanzanian audience, and even to the common lawyer,[115] that "unswerving adherence to the law by the courts themselves is of fundamental importance in fulfilling the basic functional aim of the administration of justice—the safeguarding of legality"[116] and that "the infringements of socialist legality clearly cannot be justified on grounds of expediency".[117]

So far we have dealt with the concept of legality in Soviet Legal Science; the element which distinguishes it from "rule of law" is that of being "socialist" legality. The epithet "socialist" is a condition legitimising the obligation to obey laws and makes the principle meaningful. It directs attention to the content of the legal rules which must serve the interests of a socialist State. The affirmation of a principle of socialist legality in a one-party state such as Tanzania, is dependent on agreement in the Party of fundamentals and their communication to the Executive.

115 Predominating Anglo-American jurisprudence recognises law-making power in judges, e.g., Hart's concept of the "penumbra", see H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), Chap. 7; J. Stone, *Legal System and Lawyers' Reasoning* (Stanford: Stanford University Press, 1964), discusses a related theory of "judicial legislation". References can also be made to Pound, *An Introduction to the Philosophy of Law*, op. cit., Chap. 3, and Cardozo, *The Nature of Judicial Process* (New Haven: Yale University Press, 1921). The Marxist approach smacks very much of the old theory of mechanical jurisprudence.
116 Ibid., p. 358.
117 Ibid., p. 334.

Economic Differentiation in Ismani, Iringa Region: A Critical Assessment of Peasants' Response to the Ujamaa Vijijini Programme

ADHU AWITI*

PREFACE

My assessment of class differentiation and class struggle in Ismani Division begins in the 1950s when the capitalist mode of production was already established in the area as elsewhere in the country. I discuss neither the hitherto existing mode of production prior to colonial conquest and occupation nor the colonial historical process of establishing the capitalist mode of production. A study of the pre-colonial mode of production of African society, and why such societies were defeated by the colonial forces would be, to say the least, an important scientific contribution towards a correct understanding of present African society and its contradictions. Such a task—I dare say—is the fundamental duty of the African revolutionary intellectuals.

I have not, however, addressed myself to such a monumental and cardinal question in this report which is still in its preliminary stage. I have instead, addressed myself to the current pressing problems of rural development strategy in Ismani Division, Iringa Region. In attempting to analyse such problems, I have avoided the purely technical aspects of rural development. Nearly all the research studies of rural communities have concentrated on the study of rather technical subjects such as livestock development, rural water supply, the uses of extension service, co-operative movements, financing rural development programmes and so on. Those who have carried out such research studies have, to say the least, carefully and wittingly written their reports within the purview of bourgeois liberalism. I object to such an approach and presentation because I consider it to be unscientific.

I have instead attempted—notwithstanding my own theoretical confusion which arises mainly from my petty bourgeois background—to raise what I believe to be fundamental questions facing the rural development strategy in Iringa.

The material used in this report was collected from four ujamaa villages in Ismani, Iringa. Some comrades have made useful comments on the material collected and the method of presentation; friends have also offered useful comments and criticism, and I would welcome more of them for without such discussions and debate it is impossible for anybody to arrive at a correct

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