United Republic of Tanzania

by
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I Origins and Historical Development of the Constitution

The United Republic of Tanzania, often shortened to 'Tanzania', came into being as a result of the union between the former states of Tanganyika and Zanzibar which took place on 26 April 1964. The two states have distinct legal histories. In pre-colonial Tanganyika the legal system was based on community customs and practices which were enforced by elders or clan leaders whose powers were determined by community members. The elders and clan leaders were entrusted with civic as well as spiritual duties. Some of their functions included ensuring peace, performing rituals, settling disputes, protecting shrines and gods, and combating disasters such as drought and famine. In some communities with non-centralized leadership systems, there were communal approaches to settlement of disputes where the entire community (such as a clan) participated in the process.[2] Although customary law was partly retained, colonialism introduced a new system of laws and courts which became dominant in Tanganyika.

Germany gained control of Tanganyika in the 1880s and in 1891 it declared the area to be a protectorate as part of German East Africa, which was comprised of the modern-day territories of mainland Tanzania, Rwanda, and Burundi. The Germans reigned over Tanganyika by decrees through a system of direct rule. One of the important decrees passed was the Imperial Decree of 1885 which declared all land, occupied and unoccupied, as unowned crown land vested in the German Empire except where chiefs, native communities, or private individuals could prove ownership. The principle of vesting land in the state (radical title) was also practiced by the British and later found its way into the legal system of post-colonial Tanzania. As far as constitutional history is concerned, not much can be linked to the German colonial era as Germany was not the immediate colonizer of Tanganyika.

Following the defeat of the Germans in the First World War, Tanganyika came under British rule in 1919through the mandate of the League of Nations. In 1920 the British issued the Tanganyika Order in Council of 1920,[3] which provided for the administration of Tanganyika. It provided for,

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[2] See http://katiba.humanrights.or.tz/assets/documents/katiba/tanganyika/articles/doc/Historical%20Background-Pre%20Colonial%20East%20Africa/Historical%20Background-Pre%20Colonial%20East%20Africa_2373_en.pdf (accessed on 29 October 2018).

[3] Issued at Buckingham Palace on 22 July 1920, available at: http://www.kituochakatiba.org/sites/default/files/legal-resources/THE%20TANGANYIKA%20ORDER%20IN%20COUNCIL%201920.pdf (accessed on 20April 2018).

among other things, the powers of the governor, applicable laws, land management, judicial institutions, and appointment of judges. The Order remained in force throughout the British colonial period in Tanganyika. A movement for independence, spearheaded by Julius Nyerere, gained momentum in 1954 when the Tanganyika African Association (TAA)—a social organization of African civil servants formed in 1929—was transformed into a political party with the name Tanganyika African National Union (TANU).[4] Under the leadership of Nyerere, TANU and its supporters (mostly civil organizations, such as cooperatives and trade unions) led the liberation movement.

In 1961 Tanganyika was granted independence by the British through the Independence Constitution of 1961.[5] As in many other former British colonies, the Independence Constitution was based on the Westminster model except that it did not contain a bill of rights.[6] It designated a Governor General as the representative of the Queen of England and the formal Head of State. The government (executive) was led by a Prime Minister[7] who was elected from the party with majority seats in Parliament. The Independence Constitution gave Tanganyika a 'dominion status'[8] and therefore made it a dominion state. In TANU's view, this constitutional arrangement and system of government did not make Tanganyika fully independent and therefore efforts were taken to change it.

In 1962 the government prepared a white paper (Proposals of Tanganyika for a Republic) which was published and later discussed and adopted by the National Assembly. In 1962 the Parliament, composed of representatives from TANU, converted[9] itself into a Constituent Assembly and adopted a new constitution, the Republican Constitution of 1962.[10] The Republican Constitution abandoned the Westminster model and created a strong presidential system. The President assumed the powers held by the Governor General and the Prime Minister under the Independence Constitution. He became the Head of State and Government and Commander in Chief of the armed forces. The President also became part of the Parliament in

[4]Other political parties that were formed prior to independence are the United Tanganyika Party (1958) and the African National Congress (1958).

[5] The Constitution was granted through the Tanganyika (Constitution) Order in Council of 1961 and was published in the Tanganyika Official Gazette as Government Notice Number 415 of 1 December 1961, available at: http://www.kituochakatiba.org/sites/default/files/legal-resources/THE%20Tanganyika%20%28CONSTITUTION%29%20ORDER%20IN%20COUNCIL%2C%201961.pdf (accessed on 10 April 2018).

[6] R.Hahn, 'Commonwealth Bills of Rights: Their Nature and Origin', Ph.D. thesis, Lincoln College, University of Oxford, 1986, p. 41, available at: https://ora.ox.ac.uk/objects/uuid:e06f65b7-9340-4d95-9c53-4f37bffa377f/download_file?safe_filename=602328594.pdf&file_format=application%2Fpdf&type_of_work=Thesis (accessed on 27 October 2018).

[7] The first Prime Minister was Julius K. Nyerere.

[8] The concept 'dominion status' was commonly used during the era of British colonialism. British colonies were given an opportunity to form their own 'independent' government. The autonomy granted was however conditional in that the government still had to owe allegiance to the British Crown. Under this arrangement, such states were called dominion states.

[9] This was done through an Act of Parliament.

[10]Enacted on 23 November 1962.

that his assent was needed to turn bills passed by the National Assembly into laws. The Republican Constitution also reserved security-related powers which were formerly exercised by the Governor General. Moreover, it created a Cabinet of Ministers and provided for independence of the judiciary. The Republican Constitution created a system with elements of the parliamentary and presidential systems but concentrated more powers in the presidency. The overall effect of the Republican Constitution was to transfer sovereignty from the Queen of England as Head of State to the independent state of Tanganyika under its own President. In other words, it replaced the 'dominion status' with a 'republican status'. The Republican Constitution remained in force until 1964. In the same year important events took place in the neighboring island of Zanzibar which had a substantial impact in constitutional history.

Zanzibar was under British colonial rule until 1963, when independence was granted, similar to Tanganyika, through the Constitution of the State of Zanzibar of 1963. This Constitution, among other things, retained the Arab Sultanate's reign in Zanzibar. A local party, the Afro Shirazi Party (ASP) that 'represented' the interests of the majority Africans, did not find a place in the new constitutional order. On 12 January 1964 the ASP, in collaboration with other parties, staged a revolution which overthrew the Arab Sultanate. After the revolution, the Peoples' Republic of Zanzibar was established. Legislative, executive, and judicial power was vested in the Revolutionary Council. During this transitional period, the President ruled by decrees. One of the decrees[11] committed the transitional leadership to adopt a new constitution within one year of the revolution. This did not happen because the process was later put in abeyance *sine die* by another presidential decree.

Again in 1964, the President of the Republic of Tanganyika, Julius K. Nyerere, and the President of Zanzibar, Abeid Amani Karume, resolved to unite their two independent states. This was done by the signing of the Articles of Union on 26 April 1964. The Articles, which are a treaty in the eyes of international law, were later ratified (and became the Acts of the Union) by the respective Parliaments of Tanganyika and Zanzibar[12]; this marked the official birth of the Union. The Articles of Union provided, among other things, that the President of the United Republic, in agreement with the Head of the Executive of Zanzibar, would: (i) appoint a commission to propose a new constitution of the United Republic; and (ii) constitute a constituent assembly composed of representatives from Tanganyika and Zanzibar to consider the proposals and adopt a constitution for the United Republic within a period of one year. The Articles also provided that during the interim period pending the appointment of the commission and constituent assembly, the Constitution of the Republic of Tanganyika as modified to accommodate the Union would be the Constitution of the United Republic. In less than a year the law was amended with the effect of postponing (to an 'appropriate time') the appointment of the commission and the constituent assembly.

[11] Constitutional Government and Rule of Law Decree No. 5 of 1964.

[12] However, the fact that the Acts of Union were ratified by legislation in Zanzibar remains controversial because records indicate that such legislation was not published in the Gazette as required by the law.

The Articles of Union gave the President of Tanganyika power to make constitutional changes which would accommodate the Union structure. By virtue of these powers the President of Tanganyika modified the Constitution of the Republic of Tanganyika to accommodate the Union. The modified constitution was called the Interim Constitution of the United Republic of Tanganyika and Zanzibar of 1964. In essence this Interim (or Union) Constitution was made by the President of Tanganyika and was essentially a modification of the Constitution of the Republic of Tanganyika of 1962.

The Acts of the Union had three key features. First, they were a tool for controlling both the Constitutions of the Union and of Zanzibar. Second, they established a union of two governments under which structure eleven matters—Union Matters—were reserved for the jurisdiction of the Union Government (the executive and the legislature), while non-Union Matters were left under the control of the Government of Zanzibar. In relation to Zanzibar, the Union executive was responsible for handling Union Matters through the President of Zanzibar, who was the *ex officio* Vice President of the Union. Third, the Acts of the Union provided for a procedure of adopting a permanent constitution of the Union within a period of one year. The procedure was such that a constitutional commission would be formed followed by a constituent assembly. The one year promise was not honored; the constitutional commission and constituent assembly were formed thirteen years later. Although the process of adopting a permanent constitution initially envisaged peoples' participation, citizens did not get a chance to deliberate on the letter and spirit of the constitution.

In 1965 a modification was made to the Interim Constitution to the effect that a one political party system was formalized. The changes related to the Union were also re-enacted and the Afro-Shirazi (for Zanzibar) and TANU (for Tanganyika) parties were declared in the Interim Constitution as the only political parties in Zanzibar and Tanganyika respectively. Interestingly, the Constitution of TANU was made a schedule to the Interim Constitution; this marked the legal recognition of a one-party state. The making of the 1965 Constitution was done by an Act of Parliament which had the effect of repealing the former Constitution (of 1964) and replacing it with a new one.

Between 1965 and 1977 the Constitution was amended several times. Two amendments are notable. The first was to increase the number of Union Matters, which meant consolidation of more power in the Union Government and less autonomy for the Government of Zanzibar. The second aimed at strengthening the one-party state and vesting more power in the National Executive Committee of the ruling party over the National Assembly. An amendment of 1975[13] was to the effect that state organs were to perform their functions under the ambit of the ruling party. This meant the ruling party's supremacy was officially declared; of course this was already the *de facto* situation before the amendment.

[13] Through Act No. 8 of 1975.

On 5 February 1977 the two political parties existing in Tanganyika and Zanzibar (TANU and the ASP respectively) were merged to form one party, *Chama cha Mapinduzi* (CCM), which in English means the Revolutionary Party. Following this merger of the parties, on 16 March 1977 the President of the United Republic of Tanzania appointed a twenty-member joint party committee under the chairpersonship of Mr. Thabit Kombo for the purposes of coming up with a proposed constitution. On 25 March 1977 this committee was constituted as a Constitutional Commission in line with the Acts of the Union. The Commission submitted its proposals to the National Executive Committee of CCM within a short period, and they were adopted in camera within a day. Later, the President of the Union appointed a Constituent Assembly to enact the new constitution. A bill for this purpose was prepared and published seven days before the first meeting of the Constituent Assembly. On presentation, the bill was discussed and passed within three hours. This marked the adoption of the 1977[14] permanent Constitution of the United Republic of Tanzania.[15] The making of the 1977 Constitution and previous constitutions was not driven by the people and because of this, there have been calls from different circles for meaningful participation of the people in constitution-making. Efforts to achieve this and the progress thereof are discussed under Section VIII of this report.

II Fundamental Principles and Objectives of the Constitution

The Constitution is founded on certain principles which underpin its objectives. It is a tool for building a society of equal and free people founded upon the principles of freedom, justice, fraternity, and concord and realized through the pursuit of the policy of socialism and self-reliance.[16] The realization of these principles hinges upon the existence of a democratic society and state structure composed of an executive accountable to the legislature and an independent judiciary, all of which should work towards ensuring protection of human rights and discharge of duties by every person.[17]

Moreover, the Preamble to the Constitution provides that Tanzania will continue to be a secular state and that in conducting its affairs, the government should adhere to the principles of democracy and socialism.[18] Apart from the Preamble (which according to Tanzanian law is not binding), socialism is provided for in a substantive part of the Constitution. Article 3(1) provides that 'the United Republic is a democratic, secular and socialist state'. Socialism was introduced

[14] During the 1984 amendment to incorporate the Bill of Rights in the Constitution, the 1977 Constitution was substantially written anew, but since it was not adopted by a Constituent Assembly, it retained the 1977 year in its title.

[15] For constitutional making and history in Tanzania, from which the author drew substantially, see I.G. Shivji *et al*., *Constitutional and Legal System of Tanzania: A Civics Source Book* (Mkuki na Nyota Publishers, 2004), pp. 47-56. See also C.P. Maina, 'Constitution-Making in Tanzania: The Role of the People in the Process', available at http://repository.out.ac.tz/1646/1/CONSTITUTION_MAKING_IN_TANZANIA_%28Chris_Maina_Peter%29%5B1%5D.pdf (accessed on 13 April 2018).

[16] First recital of the Preamble and Article 9.

[17] Second recital of the Preamble.

[18] Third recital.

by the late Julius Nyerere, who drew inspiration from the Chinese socialist system. In Tanzania socialism was given the Swahili name '*Ujamaa*' (African Socialism). Nyerere's hold on socialism was shaken by liberal economic forces that forced many African countries to embrace Structural Adjustment Programmes (SAPs) in the 1980s. Following Nyerere's resignation in 1984, Tanzania opened its economy to liberalization from the mid-1980s and this, in practice, marked the abandonment of the socialist policy. Because of this reality, the retention of the principle of socialism in the Constitution has been criticized for its irrelevance.

A further elaboration of the objectives of the government (which functions through the Constitution) is found under Part II, which covers the Fundamental Objectives and Directive Principles of State Policy (Directive Principles). The Directive Principles stipulated under Part II should be the cornerstone of all government activities: i.e., legislative, judicial, and executive power should be exercised in line with the requirements of Part II. However, nothing in this part of the Constitution can be enforced in the courts of law. Moreover, the government is bound to adhere to the principles of democracy and social justice and should derive its authority from the people. In this regard the government shall be accountable to the people who should participate in various affairs of the government. Furthermore, the government's structures should be organized in such a manner that embodies the Union and promotes national unity and the dignity of all people.[19]

The Constitution declares that sovereignty lies with the people and that the government, through the Constitution, derives all of its authority and power from the people. On this broad basis, the welfare of the people is the government's primary objective. Moreover, the government, in exercising its power, shall be accountable to the people and ensure that the people are given a chance to participate in the affairs of the government.[20]

Although there is no strict separation of powers, either in theory or in practice, the Constitution recognizes the importance of this principle in ensuring an effective and efficient system of government. The first and second recitals of the Preamble to the Constitution provide:

> WHEREAS WE, the people of the United Republic of Tanzania, have firmly and solemnly resolved to build in our country a society founded on the principles of freedom, justice, fraternity and concord:
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> AND WHEREAS those principles can only be realised in a democratic society in which **the Executive is accountable to a Legislature composed of elected members and representative of the people, and also a Judiciary which is independent and dispenses justice without fear or favour**, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged. (Emphasis added.)

[19] Article 8.
[20] Article 8(1)(a)-(d).

Moreover, human rights are recognized as an essential component necessary for achieving the kind of society contemplated by the Constitution. The affirmation of the importance of human rights in the Constitution is meant to ensure that the human rights of every person are protected and preserved and that every person discharges his/her duties faithfully.[21] One of the objectives of the Constitution is to see to it that government policies and programs aim at ensuring, among other things, protection of human dignity and human rights.[22] Another indication is the establishment of the Commission for Human Rights and Good Governance under Article 129 and the inclusion of a specific Bill of Rights in Part III, which is examined below.

III. Protection of Fundamental Rights

The traditional British propensity of demanding the inclusion of a bill of rights in independence constitutions did not succeed in Tanzania.[23] The British insisted on this but the leadership of TANU under Julius Nyerere rejected the idea. In TANU's view, the inclusion of a bill of rights in the Independence Constitution would impede development activities. It was also argued that a bill of rights would be used by the white-dominated judiciary to nullify or challenge government actions.[24] The Prime Minister of the time, Rashid Kawawa, conceived a bill of rights 'as a luxury which merely invites conflicts.'[25] The government's stand on human rights was also expressed in the government's proposals for a republican constitution as follows:

> The determination of Government to maintain the Rule of Law has already been emphasized in the introduction to these proposals. The Government believes that the Rule of Law is best preserved not by formal guarantees in a Bill of Rights, but by independent judges administering justice free from political pressure.[26]

In the absence of a bill of rights the government had almost unlimited powers to take actions and enact laws[27] that violated basic human rights.[28] In short, between 1961 and 1984 the question of human rights was not on the government's 'list of priorities'. A bill of rights was for the first time included in the Constitution through a constitutional amendment in 1984 following internal and external pressures.

[21] See second recital of the Preamble.
[22] Article 9(a).
[23] For more on this practice see J. Read, 'Bills of Rights in the Third World – Some Commonwealth Experiences', (1973) Vol. 6 Verfassung und Recht in Übersee.
[24] See R.Hahn (n 6), p. 41.
[25] L. Kalunga, 'Human Rights and Preventive Detention Act, 1962 of the United Republic of Tanzania: Some Operative Aspects', (1978-1981) Vols. 11-14, Eastern Africa Law Review, p. 281.
[26] Proposals of the Tanganyika Government for a Republic, Government Paper No. 1, 1962, p. 6.
[27] Examples are the Preventive Detention Act of 1962, the Deportation Ordinance of 1921, the Area Commissioners Act of 1962, and the Regional Commissioners Act of 1962.
[28] See C.P. Maina, *Human Rights in Tanzania: Selected Cases and Materials* (Koppe Verlag Koln, 1997), p. 3.

A. Scope of Rights in the Constitution

The Bill of Rights forms Part III of the Constitution, which is entitled 'Basic Rights and Duties'. The inclusion of duties in the Bill of Rights underscores the fact that the enjoyment of rights entails necessary reciprocity, a reality which few constitutions and international human rights instruments recognize.

A: Rights	
Right	**Article**
Equality	12
Equality before the law	13
Life	14
Privacy and personal security	16
Freedom of movement	17
Freedom of expression	18
Freedom of religion	19
Freedom of association	20
Participation in public affairs	21
Work	22
Just remuneration	23
Ownership of property	24
B: Duties	
Duty to participate in work	25
Duty to abide by the laws of the land	26
Duty to safeguard public property	27
Duty to defend the Nation	28

The rights in the Bill of Rights are mostly civil and political; there is limited coverage of what are traditionally categorized as social, economic, and cultural rights. These are the right to work, ownership of property, and just remuneration. Some 'rights' are mentioned in Part II of the Constitution, which covers the Fundamental Objectives and Directive Principles of State Policy. They include the right to education, the right to development, the right to equality and non-discrimination, and the right to respect of one's dignity. Save for the rights to education[29] and development, which ought to have been included in the Bill of Rights, the other rights are covered by the Bill of Rights. It should be recalled that by virtue of the Constitution,[30] the

[29] The Directive Principles use the language 'access to education' and not 'right to education'. This technically renders the right to be a negative right which does not in itself impose an obligation on the state to ensure its fulfillment.
[30] Article 7(2).

Directive Principles are not enforceable and the courts' power to question them is ousted. However, practice shows that the courts can invoke the provisions of the Directive Principles in the course of determining peoples' rights in other cases. In the case of *John Mwombeki Byombalirwa v. The Regional Commissioner, Kagera and Another*,[31] in deciding the legality of government action to seize personal property for economic sabotage reasons, Judge Mwalusanya made reference to the Universal Declaration of Human Rights, which guarantees the right to own personal property. The Judge justified this by making reference to the Directive Principles, which require the state authority and its agencies to act in 'accordance with the spirit of the Universal Declaration of Human Rights.'

Human rights on paper and in reality are two different things. One way to understand how rights look in reality is by examining how the courts of law have dealt with them. Judge Mwalusanya rightly stated in the case of *Augustine Masatu v. Mwanza Textiles Ltd*[32] that 'everyone should always remember that the law is not what the statute puts down but it is that one given out by the judges.'

We turn to examining the nature and scope of the rights and duties in the Bill of Rights, particularly in the light of judicial application and interpretation by the High Court and the Court of Appeal.

1. Right to Equality

The right to equality is provided in Article 12 as follows: '(1) All human beings are born free, and are all equal. (2) Every person is entitled to recognition and respect for his dignity.'

The right contains two important components, namely freedom and equality on the one hand and recognition of and respect for human dignity on the other. This right is expounded by Article 13, which covers equality before the law. Article 13 is loaded with a number of aspects aimed at ensuring equal protection of the law without any form of discrimination; rights and duties are determined by established courts; and other institutions and state officials must discharge their functions without discrimination. Moreover, equality before the law means the following: a fair hearing; the right to appeal or provision of another available remedy; presumption of innocence; non-retrospectivity of offences and penalties; protection of everyone's dignity in the course of criminal processes, including execution of sentences; and protection against torture and inhuman and degrading punishment or treatment.[33] A number of cases have been determined by the courts on the basis of Article 13. On the right of access to justice, the case of *Kukutia Ole Pumpun and Another v. Attorney General and Another*[34] offers important insights. The plaintiffs wanted to sue the government. In terms of the Government Proceedings Act of 1967, they were required to

[31] High Court of Tanzania, Miscellaneous Civil Cause No. 22 of 1986, (unreported). Reproduced in C.P. Maina (n 28), p. 254.
[32] Civil Case No. 3 of 1986, High Court of Tanzania at Mwanza (unreported). Reproduced in C.P. Maina (n 28), p. 173.
[33] Article 13(6)(a)-(e).
[34] 1993 TLR 159 (CA).

first seek consent to sue the government. They applied for consent but did not receive any reply. They then filed an application in the High Court seeking a declaration that the consent requirement prevented them from accessing justice and was therefore unconstitutional. The High Court refused to declare the consent requirement unconstitutional and proceeded to dismiss the application on the basis that it was incompetent for want of consent from the government. The plaintiffs appealed to the Court of Appeal. The Court of Appeal found the consent requirement to be unnecessary and unjustified and therefore unconstitutional because it violated Articles 13(3) and 30(3) of the Constitution, which guarantee the right of access to justice. Following this judgment the law was changed to replace the consent requirement so that before suing the government, a complainant is required to submit a notice of intention of not less than ninety days.

The question of non-discrimination has featured in the courts, especially with regard to gender discrimination. One case concerned the inheritance of clan land by women under Haya[35] customary law. In *Ephrahim v. Pastory and Another*,[36] a woman named Holaria Pastory inherited a parcel of clan land from her father who wrote a valid will to that effect. Holaria later sold the land she had inherited to Gervazi Kaizilege, who was not a member of her clan. A member of the clan, Bernado Ephrahim, filed a suit in the Primary Court to challenge the sale of the land as void by virtue of Haya customary law. The relevant customary law, the Haya Customary Law (Declaration) (No. 4) Order of 1963, provided under paragraph 20 that '[w]omen can inherit and acquire a usufruct right but may not sell [clan land].' The Primary Court ruled in favor of the applicant. Holaria, not satisfied with the decision, appealed to the District Court at Muleba in Tanzania, which quashed the decision of the Primary Court on the basis that the relevant customary law was inconsistent with the Bill of Rights in the Constitution which prohibits discrimination on the basis of sex. Bernado appealed to the High Court. The High Court upheld the decision of the District Court and firmly declared that the practice under the Haya customary law was discriminatory against women and therefore unconstitutional in light of Article 13(4) of the Constitution.

2. Right to Equality before the Law

The right to equality before the law under Article 13 has also featured in election cases. In *Julius Ishengoma Francis Ndyanabo v. The Attorney General*[37] the issue of access to justice arose. Ndyanabo contested for the Parliamentary elections in 2000 and lost. The Elections Act of 1985 required him to deposit five million Tanzanian shillings as security for costs before the Registrar of the High Court could fix a hearing date. This amount was previously set at five hundred Tanzania shillings. Ndyanabo filed a petition to challenge the requirement on the basis that it

[35]One of the tribes in Tanzania.
[36]High Court of Tanzania at Mwanza, Civil Appeal No. 70 of 1989. Reported in [1990] LRC (Const) 757.
[37]Civil Appeal No. 64 of 2001, Court of Appeal of Tanzania.

violated his right to access justice by virtue of Article 13 of the Constitution. He lost in the High Court and appealed to the Court of Appeal, which quashed the decision of the High Court and ruled that the amount set in the Act as security for costs was unnecessarily high and thus violated the right of access to justice. The rules were declared to be unconstitutional and the Court ordered the previous amount (five hundred shillings) to remain in place.

3. Right to Life

The right to life is now widely recognized as the mother of all rights, for a person cannot enjoy any other right if he/she is not alive. In the Constitution the right is provided for in Article 14 as follows: 'Every person has the right to live and to the protection of his life by society in accordance with the law.'

It is clear from the above provision that the right to life is not absolute; its protection is to be realized 'in accordance with the law'. This specific limitation is compounded by the general limitation clause under Article 30 and the derogation clause under Article 31. The most pronounced manifestation of the limitation to this right is the existence of capital punishment in the statute books. According to the Penal Code,[38] there are two offences which attract the punishment of death, namely murder[39] and treason.[40] However, with regard to sentencing, there are two exceptions. A woman who is proved to be pregnant at the time of conviction shall be sentenced to life imprisonment,[41] while a person who was under the age of eighteen years at the time of committing the offence shall be detained 'during the President's pleasure' through prescribed procedures.[42]

Courts of law have been sentencing people to death. However, no execution can be carried out unless the President issues a death warrant.[43] Although information on executions is not usually published, it is reliably known that many were carried out during the colonial period, a few after independence, and none since President Benjamin Mkapa took office in 1995.[44] This means Presidents have not been issuing execution warrants since then. When swearing in Professor Ibrahim H. Juma as Acting Chief Justice of Tanzania in January 2017, the President of Tanzania

[38] Chapter 16, Revised Edition of 2002.
[39] Section 197 *ibid.*
[40] Section 39(1) *ibid.* However, misprision of treason is punishable by life imprisonment. See section 41 *ibid.*
[41] Section 26(1) *ibid.*
[42] Section 26(2) *ibid.*
[43] By virtue of Section 325(3) of the Criminal Procedure Act, Chapter 20 Revised Edition of 2002, the President can, after receiving court records relating to trial, either: (i) issue a death warrant; (ii) issue an order commuting the death sentence; or (iii) issue a pardon.
[44] Leonard P. Shaidi, 'The Death Penalty in Tanzania: Law and Practice',
available at https://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf (accessed on 1 April 2018).

expressed his unwillingness to issue death warrants in the following words[45]: 'I am aware of the difficulties in implementing such sentences, so I have directed the court not to submit names of prisoners who are in line to be hanged to death.'[46]

The death penalty has been a subject of heated debates in Tanzania, including in the courts.[47] It was constitutionally challenged in the famous case of *Republic v. Mbushuu and Dominic Mnyaroje and Another*.[48] The accused persons were convicted of murder in 1994 and were therefore to be sentenced to death by virtue of Section 197 of the Penal Code. Before the sentence was imposed, counsel for the accused persons objected to the imposition of the penalty, claiming that it was unconstitutional. He raised three grounds to support his argument: (i) it offended the right to dignity in Article 13(6)(d) of the Constitution; (ii) it was a cruel, inhuman and degrading punishment contrary to Article 13(6)(e); and (iii) it offended the right to life in Article 14. In his decision Judge Mwalusanya held that the death penalty was inherently a cruel, inhuman and degrading punishment and therefore unconstitutional. Instead of sentencing the accused persons to death as required by the Penal Code, the Judge sentenced them to life imprisonment. Later the accused persons appealed to the Court of Appeal against conviction, while the government appealed against sentence. Interestingly, the Court of Appeal[49] concurred with the Trial Judge that the death penalty was a cruel, inhuman, and degrading punishment. However, it further observed that the right to life in the Constitution is not absolute and that the law prescribing the death penalty is lawful in terms of Article 30(2) of the Constitution, which imposes a general limitation to the right to life. Finally, the Court held that the law prescribing the death penalty was not arbitrary and was therefore constitutional. Because the Court of Appeal is the highest in the hierarchy, the legality of the death penalty cannot be further challenged domestically. International avenues such as the African Court on Human and Peoples' Rights are the possible supra-national steps to further challenge the death penalty in Tanzania.

On another occasion the High Court of Tanzania, in *Joseph D. Kessy v. The City Council of Dar es Salaam*,[50] ruled that the right to a safe and clean environment is part of the right to life. The City Council used to dump waste collected from the City at the Tabata area in Dar es Salaam. On 1 September 1999 the residents of this place sought, and successfully obtained, an order from the High Court to stop the City Council from dumping waste in their area. The Court directed the Council to construct a dumping site in a designated area where dumping would not endanger people's lives. The City Council applied to the High Court requiring it to reverse its order. Judge

[45] See the Daily News, Rodgers Luhwago, 'The Death Penalty 'here to stay'', 1 October 2017, http://www.dailynews.co.tz/index.php/home-news/53293-death-penalty-here-to-stay (accessed on 15 April 2018).
[46] This is rather an 'impracticable' direction to the Court because the Court is required by the law to do so. See section 325(1) of the Criminal Procedure Act.
[47] For more on the death penalty in Tanzania see L.P. Shaidi, 'The Death Penalty in Tanzania: Law and Practice', available at https://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf (accessed on 20 April 2018). See also C.P. Maina (n 28), p. 27.
[48] 1994 Tanzania Law Reports 146 (High Court).
[49] *Mbushuu Alias Dominic Mnyaroje and Another v. Republic* 1995 Tanzania Law Reports 97 (Court of Appeal).
[50] High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 90 of 1991. (unreported).

Lugakingira dismissed the application and made strong remarks to the effect that a negligent attempt to pollute the environment in a manner that endangers people's lives violates the right to life, which is guaranteed by the Constitution under Article 14. In his own words the Judge said:

> I will say at once that I have never heard it anywhere for a public authority, or even an individual, to go to court and confidently seek for permission to pollute the environment and endanger people's lives regardless of their number. Such wonders appear to be peculiarly Tanzanian but I regret to say that it is not given to any Court to grant such a prayer. Article 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the Court in this infringement.

4. Right to Just Remuneration

The right to just remuneration is provided for in Article 23 of the Constitution as follows:

> (1) Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work.
> (2) Every person who works is entitled to just remuneration.

The content of the right includes the key aspects provided in international human rights instruments. However, according to the Universal Declaration, states should go the extra mile to ensure that just remuneration is something capable of sustaining a dignified life and where necessary, social protection systems should be used to supplement remuneration. The right to just remuneration was constitutionally tested in the case of *Attorney General v. N.I.N. Munuo Nguni.*[51] An advocate, Mr. Munuo, was suspended by the High Court following a suit filed by the Attorney General alleging that he had refused dock briefs on the basis that the remuneration given to him was not commensurate to the task that was assigned to him. Following the suspension, the advocate appealed to the Court of Appeal alleging that the Legal Aid (Criminal Proceedings Act)—in particular Section 4(2)—was unconstitutional because it prescribed unjust remuneration. The payment in question was 500 Tanzanian shillings for each dock brief. The provisions of Section 4(2) partly read 'remuneration payable shall not be less than 120 and not more 500 Tanzanian shillings.' Accepting the application, the Court of Appeal held that the amount that was payable to the advocate under the Act violated the right to just remuneration in the Constitution. After the Court of Appeal's decision, the law was amended and now the Legal Aid (Criminal Proceedings) Act[52] provides under Section 4(2) that remuneration to advocates shall be at least 40,000 Tanzanian shillings and at most 60,000 Tanzania shillings for each

[51] Civil Appeal No. 45 of 1998, Court of Appeal of Tanzania (unreported). The case is referred to and briefly explained in 'URT, The second to tenth consolidated periodic report submitted by the United Republic of Tanzania under the African Charter on Human and Peoples' Rights, 2006', available at http://www.achpr.org/files/sessions/43rd/state-reports/2to10-1992-2008/staterep2to10_tanzania_2006_eng.pdf (accessed on 23 April 2018).
[52] Chapter 21 of the Laws of Tanzania, Revised Edition of 2002.

proceeding. Furthermore, advocates are allowed to claim reimbursement if additional expenses are incurred in the course of a trial.

5. Right to Freedom of Religion

The right to freedom of religion provided for in Article 19 of the Constitution protects everyone's free will and choice of faith, including the freedom to change one's religion or faith. This right is not without limits; its enjoyment is subject to law. One of the challenging issues pertaining to the enjoyment of this right is the question of interference with other people's faiths. In *Hamisi Rajabu Dibagula v. the Republic*[53] the courts were confronted with this issue. A Muslim preacher was convicted by the High Court for 'injuring the religious feelings' of Christians. In the course of preaching he remarked in public that Prophet Issa (Jesus Christ) was not a son of God but a mere prophet. Following his conviction, Dibagula appealed to the Court of Appeal which quashed the conviction for the reason that the preacher was only exercising his religious freedom and had no deliberate intention of injuring the feelings of Christians.

6. Freedom to Participate in Public Affairs

Freedom to participate in public affairs as provided for in Article 12 has been a subject of controversy, especially in relation to conditions pertaining to the election of certain political leaders. An important and interesting constitutional case involving Article 12 concerned the question of independent candidacy in general elections in Tanzania. In 1992, the Eighth Constitutional Amendment[54] amended Article 39 of the Constitution to the effect that for a person to contest a presidential election, he/she must be a member of and sponsored by a political party. This requirement, which also applied to parliamentary and local council elections by virtue of Articles 67 and 77, was not previously in place. Following the amendment, Reverend Mtikila filed a case in the High Court (*Rev. Christopher Mtikila v. Attorney General*[55]) to challenge, among other things, the prohibition of independent candidates. Mtikila's argument was that such prohibition violates Article 21(1) of the Constitution which guarantees citizens' right to participate in public affairs pertaining to governance of the country. Judge Lugakingira ruled that it should be lawful for independent candidates to contest in local, parliamentary, and presidential elections. However, he did not declare the said amendments to be unconstitutional as sought by Mtikila. In other words, independent candidates could run in elections despite the presence of the exclusionary provisions in the Constitution and relevant election laws. After this judgment was delivered, the Attorney General filed an appeal in the Court of Appeal but later withdrew the appeal and submitted to Parliament the Eleventh Constitutional Amendment,[56] the effect of which was to nullify the declaration and the direction given by Judge Lugakingira in

[53]Criminal Appeal No. 53 of 2001, Court of Appeal.
[54] The amendment was made through the Eighth Constitutional Amendment Act of 1992.
[55]Miscellaneous Civil Cause No. 5 of 1993. Reproduced in C.P. Maina (n 28), p. 674.
[56] Act No. 34 of 1994.

1993. Again in 2005 Reverend Mtikila filed a new case in the High Court[57] to challenge the Eleventh Constitutional Amendment which amended Articles 39 and 67. He also sought a declaration that he had a constitutional right to contest elections as a private candidate in terms of Article 21(1). The High Court granted Mtikila's prayers and ruled as follows:

> We are of the settled view that the amendments to Articles 21(1) Article 39(1)c) and Article 67(1)(b) introduced by Act No. 34 of 1994 or popularly known as the 11th Amendment are unnecessary and unreasonable restrictions to the fundamental right of the citizens of Tanzania to run for the relevant elective posts either as party members or as private candidates. We thus proceed to declare the alleged amendments unconstitutional and contrary to the International Covenants to which Tanzania is a party.

Since the amendments were part of the Constitution, the meaning of the High Court's finding is that certain sections of the Constitution were unconstitutional. The High Court then directed the Attorney General to enact legislation that would regulate the participation of independent candidates. Aggrieved by the decision, the Attorney General appealed to the Court of Appeal in *The Honourable Attorney General v. Reverend Christopher Mtikila Petitioner*.[58]

The Court of Appeal finally observed that it had no mandate to declare a section of the Constitution as unconstitutional unless the relevant section was not enacted through the prescribed procedure (i.e. Article 98(1)(a) and (b) of the Constitution). In the end, the Court, acting apparently evasively, said it was not in position to declare that independent candidates are allowed but this, it said, was rather the mandate and responsibility of Parliament to amend the Constitution to that effect. The effect of the decision was that the system of excluding independent candidates should remain in place until Parliament, which represents the will of the people, decides to change it. The Court, in a way, invoked the counter-majoritarian difficulty to avoid giving substantive answers to the substantive questions raised in the case. Critics argued that the Court failed in its responsibility to dispense justice without fear as required by the Constitution. The fact that the case was considered during an election year might have contributed to the Court's reasoning, given its political and legal implications. Interestingly the matter in this case did not end here; efforts to use supra-national avenues were taken, culminating in what came to be the first case to be decided on merit by the African Court on Human and Peoples' Rights.

On 2 June 2011 the Tanganyika Law Society and the Legal and Human Rights Centre filed a joint application in the African Court to challenge the prohibition of independent candidates in Tanzania. Coincidentally, Reverend Mtikila filed a similar application on 10 June 2011. The African Court consolidated the two applications[59] and ruled that by prohibiting independent

[57]Miscellaneous Civil Cause No. 10 of 2005.
[58]Civil Appeal No.45 of 2009, Court of Appeal of Tanzania.
[59]*Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre v. The United Republic of Tanzania* (Application No. 009/2011) and *Reverend Christopher Mtikila v. The United Republic of Tanzania* (Application No. 011/2011).

candidates from participating in general elections, Tanzania had violated Articles 10 and 13(1)[60] of the African Charter on Human and Peoples' Rights. The Court directed Tanzania to take constitutional, legislative, and other necessary measures to remedy the violations within a reasonable time. To date this matter has not been addressed by the government of Tanzania.

B. Limitation and Derogation of Rights

1. Limitation of Rights

Some rights in the Bill of Rights are subject to specific limitations. Further, all the rights are subject to general limitation and derogation clauses. The specific limitations use the language of 'subject to law', and 'according to other laws'. This means that Parliament has the power to make laws which may erode (or create room for abuse of) the rights contained in the Bill of Rights. The specific limitations are found in the following rights. The right to life is to be enjoyed and protected 'in accordance with the law'; the right to personal freedom can be interfered with 'under circumstances and in accordance with procedures prescribed by law'; the right to privacy and security of the person is to be exercised in accordance with procedures and conditions laid down by state authorities; the right to freedom of movement is subject to other laws and may be lifted to safeguard the public interest in general or to preserve certain special interests or a certain section of the public; the right to freedom of religion is subject to other laws which are necessary in a democratic society for the purposes of maintaining national unity, peace, and integrity; the right to participate in public affairs is to be enjoyed in accordance with law and prescribed procedures; and the right to ownership of property is to be protected in accordance with the law.

Article 30(1) and (2) of the Constitution contains the general limitation clause. First, the rights and freedoms in the Bill of Rights should be exercised in a manner that does not interfere with or curtail the rights and freedoms of other persons or the public interest. Second, the incorporation of the Bill of Rights in the Constitution is not meant to (and does not) prevent the state authority from making laws for the purpose of: (i) protecting the rights and freedoms of people and the public interest, (ii) enhancing public benefit through ensuring defense, public health and safety, peace, morality, rural and urban development, exploitation and use of minerals, and expansion and development of property; (iii) facilitating the execution of court judgments or orders; (iv) safeguarding the rights and freedoms of others and the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority, and independence of the courts; (v) imposing restrictions, supervising, and controlling the formation, management, and activities of private societies and organizations in the country; and (vi) enabling any other thing to be done which promotes or preserves the national interest in general.

According to modern constitutionalism and international human rights law, limitation of human rights should be necessary, acceptable, and justifiable in a democratic society, not undermine the

[60] Besides, by majority the Court also found Tanzania in violation of Articles 2 and 3 of the Charter.

essential content of the right in question, and not have the effect of causing greater negative effects than those which it is intended to prevent—the proportionality test.

The specific limitations and the general limitation clause in the Constitution can be said to be arbitrary because the Constitution does not set boundaries for dealing with the limitation of rights. In other words, the limitations are not subject to any test for establishing their validity. A fraction of the required standards can be seen in Article 19 on the right to freedom of religion. Article 19(2) provides that laws enacted to safeguard the right should be 'of importance to a democratic society for security and peace in the society, integrity of the society and national cohesion.' However, in interpreting the Bill of Rights, the courts have insisted that any person who relies on a limitation to curtail a right must be able to justify the validity of the limitation. In *Kukutia Ole Pumpun and Another v. Attorney General and Another*,[61] the Court of Appeal of Tanzania observed that:

> [a] law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will not be declared unconstitutional if it satisfies two requirements:
>
> (a) that it is not arbitrary; and
> (b) that the limitation imposed by such law is not more than is reasonably necessary to achieve the legitimate objective.

The phrase 'public interest' is not defined in the Constitution; it therefore remains an omnibus expression which can be interpreted to include a lot of things, some of which may render the content of the rights guaranteed in the Constitution meaningless.

2. Derogation of Rights

Apart from general and specific limitation clauses, the Constitution contains a general derogation clause in Article 31 of the Constitution.

Different from limitation of rights, which essentially means limits imposed on the enjoyment of guaranteed rights, derogation of rights has the effect of suspending rights. According to the Collins Dictionary, derogation means 'curtailment of the application of a law or regulation'. In other words, derogation of rights allows the total denial of the rights prescribed in the Bill of Rights under prescribed circumstances, as provided for in Article 31. Derogation of rights may occur during a state of emergency or in normal times. Measures that derogate from Articles 14 and 15 of the Constitution can be taken against persons whose actions endanger the security of the nation during a state of emergency or in normal times. Any law passed by Parliament to facilitate the taking of such measures shall not be void.[62] However, these measures must be necessary and justifiable.[63] Another limit is to the effect that derogation of rights should not lead to deprivation of a person's right to life except when the death is associated with acts of war.[64]

[61][1993] Tanzania Law Reports. 159.
[62]Article 31(1).
[63]Article 31(2).
[64]Article 32(3).

This limitation appears to be contrary to the provisions of Article 31(1), which expressly permits derogation from Articles 14 (on the right to life) and 15 (on the right to personal freedom). Moreover, the main provision on derogation, which is Article 31(1), shows that derogation is permitted from two rights only, namely the right to life (Article 14) and the right to personal freedom (Article 15). It is not clear whether this impliedly means that derogation from other rights is prohibited. In fact no state of emergency has ever been declared in Tanzania since the coming into force of the Bill of Rights and therefore attempting to offer an appropriate answer to this question is undoubtedly far-fetched.

3. Enforcement of Rights

Incorporation of the Bill of Rights into the Constitution in 1984[65] did not automatically make it enforceable. By virtue of subsequent legislation, the Constitution (Consequential, Transitional and Temporary Provisions) Act[66], enforcement (or operationalization) of the Bill of Rights was suspended for a period of three years to 'allow the Government to put its house in order': i.e., to review laws to ensure their conformity with the Bill of Rights. Section 5(2) of the Act provided:

> Notwithstanding the amendment of the Constitution and, in particular, the justiciability of the provisions relating to basic rights, freedoms and duties, no existing law or any other provision in any existing law may, until after three years from the date of the commencement of the Act, be construed by any court in the United Republic as being unconstitutional or otherwise inconsistent with any provision of the Constitution.

Nevertheless, some Judges had begun to apply the Bill of Rights even before the designated time for justiciability. An example is the case of *John Mwombeki Byombalirwa v. Regional Commissioner, Kagera and Another.* [67] Although the Bill of Rights had not yet become justiciable, the Judge observed that implementation commenced on 1 March 1985 by virtue of Act No. 16 of 1984 and therefore all government organs were bound to implement it.

Eventually the Bill of Rights became enforceable in March 1988. However, there was no specific law prescribing the procedure to enforce the rights in the Bill of Rights. In the absence of a procedural law, the High Court resorted to invoking its inherent powers and 'wisdom' when dealing with human rights petitions. In *Director of Public Prosecutions v. Daudi Pete*[68] the Court of Appeal held, among other things, that 'until Parliament enacts the procedure for the enforcement of those rights and freedoms, the same may be enforced using the procedure available in the High Court in the exercise of its original jurisdiction.'

In 1994 a procedural law for enforcing the Bill of Rights —the Basic Rights and Duties Enforcement Act—was eventually passed. Part of the procedural aspects are also provided for in

[65]Fifth Amendment by Act No. 15 of 1984 which came into force on 15 March 1985.
[66]No. 16 of 1984.
[67] High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 22 of 1992 (unreported). The case is reproduced in C.P. Maina (n 28), p. 254.
[68]1993, Tanzania Law Reports, 22 (Court of Appeal).

Article 30(3),(4), and (5) of the Constitution. By virtue of the Act and the Constitution, original jurisdiction to determine human rights petitions is vested in the High Court.[69] However, if a matter arises in a lower court other than the Primary Court, the presiding magistrate shall refer the same to the High Court unless the parties agree otherwise. If the matter arises in the Primary Court, the magistrate shall refer it to the Magistrates' Court which shall then ascertain if it should be referred to the High Court.[70]

A 'person' who claims that his rights or a duty owed to him has been, is being, or is likely to be violated can seek redress from the High Court. The Constitution does not define the word 'person' and this raises a question as to what it includes. In *Legal and Human Rights Centre, Lawyers Environment Action Team and National Organisation for Legal Assistance v. The Attorney General*[71] (popularly known as 'the Takrima case'), a petition was filed by three non-governmental organizations (NGOs) against the Attorney General alleging that particular sections of the election law violated parts of the Bill of Rights. The respondent (the Attorney General) raised the issue of *locus* and argued that it was restricted to natural persons. The Court of Appeal, making reference to the Interpretation of Laws Act[72] which defines the word 'person' to include legal persons, dismissed the argument and ruled that even legal persons can file petitions alleging violation of the Bill of Rights in terms of Article 30(3) of the Constitution.

The prescribed procedure makes it a requirement that a case involving the Bill of Rights must be heard by three judges.[73] This means that if the required quorum is not met for any reason, there are likely to be unreasonable delays in handling the cases. However, for the purposes of determining whether a case brought before the High Court has merits (that it is not frivolous or vexatious), a single High Court Judge can decide it.[74] Undoubtedly the three judge requirement is in practical terms unfriendly.

With regard to the outcome of cases, an even a stranger legal position exists, both in the Constitution and in the Act. In the course of determining cases concerning the Bill of Rights, the High Court (or the Court of Appeal in the case of an appeal) may find that a particular law or government action is unconstitutional. In the event that this happens, the High Court is given the power and discretion, after considering the circumstances of the case and the public interest, to allow Parliament or the government authority to correct the law or action concerned within a specified period of time rather than declaring the law or action unconstitutional or void, respectively. If this occurs, the law or action found to be inconsistent with the Constitution will be deemed to remain valid until such correction is made or the time set by the High Court

[69]Section 4 of the Act.
[70]Section 9 of the Act.
[71] Miscellaneous Civil Cause No. 77 of 2005.
[72] Chapter 1 of the Laws of Tanzania, Revised Edition of 2002.
[73]Section 10 of the Basic Rights and Duties Enforcement Act.
[74]Section 10 *ibid.*

expires, whichever happens earlier.[75] In practice the High Court and the Court of Appeal have not shown interest in using the power and discretion granted to them.

IV. Separation of Powers

The Preamble[76] to the Constitution provides that the foundational principles of the Constitution can only be realized in a democratic society in which a system of checks and balances among the executive, the legislature, and the judiciary exists. In other words, the legislature should be able to hold the executive accountable and the judiciary should function independently in the course of dispensing justice. The Preamble stresses the importance of the separation of powers in ensuring the existence of a society contemplated by the Constitution. In terms of substantive provisions, Article 4 clearly states that executive, legislative, and judicial powers shall be exercised by the respective organs of the Union Government vested with such powers. The Article provides:

> (1) All state authority in the United Republic shall be exercised and controlled by two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers over the conduct of public affairs.
>
> (2) The organs vested with executive powers shall be the Government of the United Republic and the Revolutionary Government of Zanzibar; the organs vested with judicial powers shall be the Judiciary of the United Republic and the Judiciary of the Revolutionary government of Zanzibar; and the organs vested with legislative and supervisory powers over public affairs shall be the Parliament of the Untied Republic and the House of Representatives.

The general stipulation under Article 4 is subject to other specific constitutional provisions which clearly indicate that separation of powers in the United Republic is, both in principle and practice, not strict. The nature of separation is more about creating a system of checks and balances, which in some situations is not very effective. The Constitution itself creates space for erosion of the spirit of separation of powers. Some examples are considered. First, Judges of the High Court and Justices of the Court of Appeal, including the Chief Justice, are appointed by the President after 'consulting' the Judicial Service Commission.[77] Members of the Judicial Service Commission are all appointees of the President.[78] A critical look at the procedure for disciplining Judges of the High Court and removal of Justices of Appeal shows that the President has a lot of power in determining the outcome of the process.[79] Second, administratively, the judiciary of mainland Tanzania falls under the Ministry of Constitutional and Legal Affairs, which is an executive department. Third, all ministers must be members of Parliament; the Attorney General is an *ex officio* member of Parliament; the President is allowed to appoint up to ten members of Parliament;[80] the President is part of but not a member of Parliament; the President has the power

[75] Article 30(5) and Section 13(2) of the Basic Rights and Duties Enforcement Act.
[76] Second recital.
[77] Articles 109(1),
[78] Articles 112(1) and 118(3).
[79] Articles 110A and 120A.
[80] Article 66(1)(e).

to dissolve Parliament under certain circumstances, and on the other hand the National Assembly has the power to impeach the President, the Vice President, and the Prime Minister; and members of Parliament are allowed to hold executive positions such as that of Regional and District Commissioner.[81]

1. The Executive

Chapter Two of the Constitution covers the executive. Part I deals with the President, Part II with the Vice President, and Part III with the Prime Minister, the Cabinet, and the government. The executive is headed by the President, who is the Head of State and Government and the Commander in Chief.[82] Much of the executive power is concentrated in the Presidency, in part because of the colonial legacy which was carried over after independence and was especially consolidated in the Republican Constitution of 1961 all the way through to the Union Constitution of 1977. Among other things, the President: (i) appoints the Chief Justice, judges, ministers and their deputies, permanent secretaries, heads of public corporations, chancellors of public universities, police and army chiefs, up to ten members of Parliament, the Attorney General, directors of municipalities, and so on, (ii) is the chairperson of the ruling party, (iii) is the custodian of all the land, (iv) can dissolve Parliament under certain circumstances, (v) can constitute and abolish offices, (vi) can declare war, (vii) can grant pardon to certain categories of prisoners, and (viii) is immune from criminal and civil proceedings. The President can exercise most of these powers on his own motion.[83] To qualify for president, a person must be a be a Tanzanian citizen by birth, at least forty years old, of sound mind, belong to a political party, be qualified to be a member of Parliament or House of Representatives and has, within the past period of five years before the elections, not been convicted of any offense relating to evasion of tax. The President is elected directly by the people through the first-past-the-post system which was introduced in 2000 through a constitutional amendment. The President is elected for a period of five years and may run again for one further and last term of five years.[84] However, the Constitution provides that the President shall remain in office until his/her successor is sworn in.[85] This suggests that the President may, under certain circumstances, hold office for a longer period in the event that there are election or swearing in problems or war.[86] The term limit was included in the Constitution after Nyerere's departure in 1984. Since then, subsequent Presidents have each served for a period of ten years. Once the President is elected, his/her election cannot be questioned by any Court.[87]

The immediate and principal assistant to the President is the Vice President. The qualifications for president apply *mutatis mutandis* for vice president. However, there is an additional

[81] Article 66(3).
[82] Article 33.
[83] Article 37(1).
[84] Article 42(2).
[85] Article 42(3)(a).
[86] Article 42(4).
[87] Article 41(7).

requirement that if the President hails from mainland Tanzania, the Vice President must come from Zanzibar, and vice versa.[88] The Vice President is elected through the 'running mate' system which was introduced in 1995—the party nominating a presidential candidate also nominates a person to run with him for vice president; he/she is not voted. The election of a presidential candidate automatically means the election of his/her running mate. The Constitution requires that if the presidential candidate is from mainland Tanzania then the running mate for vice president must be from Zanzibar, and vice versa.[89]

The Prime Minister is an appointee of the President. After general elections the President nominates a member of the National Assembly to be the Prime Minister. The person nominated must come from a political party with majority seats in Parliament, and if no party has majority seats, the nominee must appear to have the support of most Members of Parliament. The President's nomination is subject to approval by the National Assembly by way of majority votes. The Prime Minister is accountable to the President, is responsible for controlling, supervising, and executing the day-to-day functions of the government, and is the leader of government business in the National Assembly.

The Cabinet is composed of the Vice President, the Prime Minister, the President of Zanzibar, and all ministers. The President attends and chairs the meetings of the Cabinet but is not a member. Likewise, the Attorney General attends all meetings of the Cabinet but cannot vote. The Cabinet is the chief organ that advises the President regarding the execution of his duties and exercise of his powers under the Constitution. The President may also seek general or specific advice or assistance from the Cabinet on any matter.

2. The Legislature

The Parliament of Tanzania is unicameral and is made up of two parts: the National Assembly and the President. [90] The President is not a member of, but part of, Parliament.[91] A bill passed by the National Assembly must receive presidential assent before it can become law. For a person to qualify for the position of Member of Parliament he/she must:

(i) be a citizen of Tanzania;
(ii) be at least 21 years old;
(iii) be able to read and write Kiswahili or English; and
(iv) be a member and a candidate proposed by a political party.

Parliament is composed of the following categories of members:

(i) members elected from constituencies;
(ii) women members;
(iii) five members elected by the House of Representatives of Zanzibar;

[88] Article 47(3).
[89] Article 47(3).
[90] Article 62(1).
[91] Article 66(6).

(iv) the Attorney General (*ex officio*); and
(v) up to ten members nominated by the President.

The National Assembly, which is the peoples' representative organ, is the principal organ that oversees and advises the government.[92] In discharging its oversight and advisory authority the National Assembly may pose questions to ministers on issues under their mandate, deliberate upon the performance of ministries, discuss various government plans and enact implementation laws thereof, enact needed laws, and deliberate and ratify international agreements.[93]

Law-making is the main function of Parliament. A bill must be introduced in the National Assembly for discussion. A bill can either be introduced by the executive (an official bill)[94] or by a Member of Parliament (MP) who is not a minister or the Attorney General (a private member's bill). An official bill must be published in the official Gazette twice. If the bill is subject to a certificate of urgency, the publication requirement is dispensed with. Private bills must also be published. After the publication process the bill goes through a first reading. The clerk merely reads the short title and no discussion will take place at this stage. The speaker then refers the bill to the appropriate standing committee to be considered. The standing committee cannot change the bill but may advise the minister or the person responsible for the bill to amend it. Once the committee has finished its job, it reports through its chairperson to the speaker, who will order a second reading. The person responsible for the bill then provides detailed explanations. This is followed by a statement of the chairperson of the standing committee that considered the bill. Thereafter the spokesperson for the opposition will address the House and give the views of the opposition on the bill. After this, the debate of the whole House will follow, after which the Assembly will resolve to convert itself into a committee of the whole House. The clerk then mentions the number of each clause and any amendment that may have been made. At the same time the chairperson (who is the speaker) will put a question to members of the House as to whether they approve the clauses. After this stage the Assembly resumes. The person in charge of the bill reports to the Assembly that the committee has considered the bill clause by clause and has approved the same. Thereafter he requests the Assembly to concur with the findings of the committee. At this stage the Assembly votes, and if the majority of the MPs give their consent, the bill has been passed by the House. If the majority of MPs say 'no' then the bill has been rejected.

A bill passed by the National Assembly is sent to the President for his/her assent after which it becomes law.[95] If the President refuses to give his/her assent, he/she returns it to Parliament with the reasons. Parliament will then have to send it back to the President after the expiration of six months. In the event that it is sent back before the expiration of six months, it must be supported

[92] Article 63(2).
[93] Article 63(3).
[94] An official bill can be introduced by a Minister or the Attorney General.
[95] Article 97(1).

by at least two-thirds of all members. If it is so re-sent, the President must either assent to the bill within twenty-one days or dissolve the Parliament.[96]

In exercising its law-making power, Parliament: (i) cannot make any law that applies to Zanzibar unless it concerns Union Matters; (ii) cannot enact a law that conflicts with the Constitution; (iii) must strictly follow the prescribed procedure for making laws; and (iv) cannot enact legislation that has the effect of changing the essential features or structure of the Constitution.

The National Assembly has various standing committees with different mandates. The committees are established by the Assembly itself and they function in accordance with the Standing Orders of the National Assembly.[97]

Parliament's life is five years. It can be dissolved by the President under the following circumstances:

(i) when it completes five years;
(ii) if the National Assembly refuses to pass a budget proposed by the government;
(iii) when the National Assembly, supported by a two-thirds majority, resends a bill to the President and he refuses to assent to it;
(iv) when the National Assembly refuses to approve an important policy by the government; or
(v) when the President thinks that the government has lost legitimacy.

3. The Judiciary

Chapter Five of the Constitution deals with the dispensation of justice in the United Republic of Tanzania. In dispensing justice in criminal and civil matters the judiciary is bound to observe several principles.[98] These are:

(i) impartial treatment of the parties to disputes;
(ii) expeditious consideration of cases;
(iii) the award of reasonable compensation to victims of wrongdoing;
(iv) promoting and encouraging amicable dispute resolution among the parties; and
(v) avoiding technicalities that may cause obstruction of justice.

By virtue of the structure of the Union, the judiciary is not a Union Matter, save for the Court of Appeal of the United Republic. Mainland Tanzania and Zanzibar have separate judiciaries. In mainland Tanzania the judiciary is composed of:

(i) the Court of Appeal;
(ii) the High Court;
(iii) the Resident Magistrates' Court;

[96] Article 97(2)-(4).
[97] Article 96.
[98] Article 107A(2).

(iv) the District Court; and
(v) the Primary Court.

From the Independence Constitution of 1961 until 2000, the independence of the judiciary was mentioned in the preambles. In 2000, following the 13th Amendment, an express clause on the independence of the judiciary was included in the Constitution.

By virtue of the Constitution, the ultimate authority to dispense justice is vested in the judiciary, which is composed of the Primary Court, the District Court, the Resident Magistrates' Court, the High Court, and the Court of Appeal. The authority and the independence of the judiciary are provided for in Article 107A and 107B of the Constitution. The mechanisms used to promote independence include the establishment of the Judicial Service Commission, dismissal and removal of judicial personnel through a prescribed procedure (i.e. security of tenure), payment of judges' remuneration and other benefits from the Consolidated Fund, and enactment of a specific law for judges' remuneration and terminal benefits. There have been calls from different circles that the benefits available to judges should also be extended to magistrates, to ensure independence of the judiciary at its lowest levels, as there has been an impression that independence of the judiciary is all about the High Court and the Court of Appeal.

Despite a strong constitutional provision on the independence of the judiciary and its authority as the final dispenser of justice, there are laws which contain ouster clauses, including the Constitution itself. For example, Article 8 ousts the jurisdiction of courts insofar as the Directive Principles are concerned, and election of the President cannot be questioned by any court.[99] Moreover, there are quasi-judicial bodies under various government departments that perform quasi-judicial functions, including determination of cases. Most of the laws establishing these bodies provide that their decisions shall be final and conclusive. Of course in some cases it is possible to challenge the decisions through judicial review and actions of *mandamus* and *certiorari* and courts have, on certain occasions, ignored ouster clauses. In *Attorney General v. Lohay Akonaay and Another*,[100] the Court of Appeal dealt with Section 5(1) and (2) of the Regulation of Land Tenure (Established Villages) Act of 1992 which, among other things, prohibited access to courts on specified land matters. The Court said:

> We are satisfied…that the entire section is unconstitutional and therefore null and void, as it encroaches upon the sphere of the Judicature contrary to Article 4 of the Constitution, and denies an aggrieved party remedy before an impartial tribunal contrary to Article 13(6)(a) of the same Constitution.

The High Court is established under Article 108(1) of the Constitution. High Court judges are appointed by the President in consultation with the Judicial Service Commission. Administratively the High Court is headed by the Principal Judge, who assists the Chief Justice

[99] Article 41(7).
[100] Civil Appeal No. 31 of 1994, Court of Appeal.

in managing the affairs of the High Court.[101] The Court of Appeal is established under Article 117(1) and is headed by the Chief Justice, who is also head of the judiciary. Zanzibar has a separate judiciary which is composed of the High Court of Zanzibar, the Regional Magistrate's Court, the District Court, and the Primary Court. The Court of Appeal serves both parts of the Union and therefore appeals from the High Court of Zanzibar go to the Court of Appeal. However, through a constitutional amendment to the Zanzibar Constitution, appeals related to Islamic law and the interpretation of the Constitution of Zanzibar are restricted from going to the Court of Appeal. Appeals from the High Court of Zanzibar on constitutional matters are entertained by an Appellate Bench of three High Court Judges.

All other courts other than the Court of Appeals are established by and function in accordance with the Magistrates' Courts Act.[102]

V. Decentralization

Tanzania is a union of the two independent states of Tanganyika and Zanzibar. The Union was forged on 26 April 1964 and has two parts: mainland Tanzania and Tanzania Zanzibar/Zanzibar. This means that the state of Tanganyika 'disappeared' with the Union, while Zanzibar has remained as a semi-autonomous part. The Union is often described as unique—especially in the eyes of international law—due to its distinctive and complex structure. In the case of *S.M.Z. v. Machano Khamis Ali and Others* ('*Machano's Case*')[103] the Court of Appeal of Tanzania observed that 'the constitutional set-up of the United Republic [of Tanzania] is unique. It is a union but with some elements of federalism.'

Within the Union there are two executives, two judiciaries, and two legislatures. Article 4(1) and (2) of the Constitution provides:

> (1) All state authority in the United Republic shall be exercised and controlled by two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers over the conduct of public affairs.
>
> (2) The organs vested with executive powers shall be the Government of the United Republic and the Revolutionary Government of Zanzibar; the organs vested with judicial powers shall be the Judiciary of the United Republic and the Judiciary of the Revolutionary Government of Zanzibar; and the organs vested with legislative and supervisory powers over public affairs shall be the Parliament of the United Republic and the House of Representatives.

The demarcation of power among the organs mentioned in Article 4 is primarily determined by what are called Union Matters, listed in the First Schedule of the Constitution. Any matter which does not appear in the list is automatically a non-Union Matter.[104] The Union Government has

[101] Article 109(1) and (2).
[102] Chapter 11 of the Laws of Tanzania, Revised Edition of 2002.
[103] Criminal Application No. 8 of 2000. The case is a revision of the ruling of the High Court of Zanzibar in *S.M.Z. v. Machano Khamis Ali and Others*, Criminal Case No. 279 of 1997, High Court of Zanzibar.
[104] Article 4(3).

jurisdiction over all Union Matters, while the non-Union Matters fall under the mandate of the Government of Zanzibar.[105] This means that the authority of the government of the United Republic of Tanzania (URT) in Zanzibar is primarily confined to Union Matters.[106] However, there are circumstances where such authority may extend to Zanzibar beyond the listed Union Matters.[107] First, there are matters which do not appear in the list of Union Matters but apply to both parts of the Union by virtue of the Constitution. Examples are the audience of the Attorney General of the URT in the courts of the United Republic,[108] the Commission for Human Rights and Good Governance,[109] and the Special Constitutional Court.[110] Second, the Constitution[111] gives the Union Parliament power to enact legislation that may apply to mainland Tanzania and Zanzibar. An example is the Elections Act of 1985 which applies across the URT, despite the fact that 'elections' is not on the list of Union Matters.

Zanzibar has autonomy over non-Union Matters only and these are governed by the Constitution of Zanzibar and other laws of Zanzibar. Within the Union structure, Zanzibar is not a state in the eyes of international law because it is not sovereign internationally. In fact, on whether Zanzibar is a state in international law, the Court of Appeal firmly stated in *Machano's Case* that:

> we have no difficulty at all to answer that question in the negative. The International Persons called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the Articles of Union. The two states merged to form a new international person called the United Republic of Tanzania.

Having considered the nature of the Union, it is clear that within the Union there are two Constitutions, two judiciaries (sharing one Court of Appeal), two legislatures, and two executives. Moreover, mainland Tanzania wears two faces in the Union: it is part of the Union and at the same time a sovereign United Republic.

The Constitution provides for the existence of the central government and local government authorities. Local government authorities are therefore a constitutional creation. The Constitution establishes local government authorities in each region, district, urban area, and village in the United Republic.[112] The purpose of establishing the authorities is to transfer power to the people through involving them in the planning and execution of development programs.[113] Each local government authority is required to perform the general functions of local government within its area of jurisdiction which include, among others, ensuring law enforcement and public safety

[105] See for example Article 78(1) of the Constitution of Zanzibar, Article 102(1) of the Constitution and the case of *Haji v. Nungu and Another* [1987] LRC.
[106] See Article 34.
[107] See the case of *Haji v. Nungu (supra).*
[108] See Article 59(4).
[109]Established under Article 129(1).
[110]Article 125.
[111] Article 64(4)(a).
[112]Article 145(1).
[113]Article 146(1).

and strengthening and applying democracy in bringing about and speeding up development processes.[114] Each party of the Union (mainland Tanzania and Tanzania Zanzibar) has separate laws on local government authorities which are made by virtue of the Constitution.[115] In mainland Tanzania, local government authorities are governed by two laws, the Local Government (Urban Authorities) Act[116] and the Local Government (District Authorities) Act.[117] In Zanzibar the governing law is the Regional Administration Authority Act.[118]

VI. Constitutional Adjudication

There are three possibilities for constitutional adjudication under the Constitution. First, a petition based on Part III (Articles 12-29) of the Constitution, which contains the Bill of Rights, can be filed in the High Court by virtue of Article 30(3), which provides that:

> [a]ny person claiming that any provision in this Part [III] of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.

This provision makes it clear that a petition can be based on violation of the Bill of Rights or any other law that prescribes rights or duties. The High Court is vested with original jurisdiction to hear and determine petitions based on the Bill of Rights.[119] Article 30(4) also directs the state authority (Parliament) to make a law detailing the procedural aspects of enforcing the Bill of Rights. This is the Basic Rights and Duties Enforcement Act, which was enacted in 1994. A number of cases have been brought before the High Court and are discussed under Section III of this report, covering Protection of Fundamental Rights.

Second, Article 64(5) declares the supremacy of the Constitution. In case there is a conflict between any other law and the Constitution, the Constitution shall prevail and that other law, to the extent of its inconsistency, will be void. This means that a law that conflicts with the Constitution may be challenged in court through appropriate procedures. Most cases have been brought on the basis of the Bill of Rights. Examples are the *Ndyanabo* and the *Holaria Pastory's* cases. Another example is the case of *Daudi Pete*. In that decision the High Court declared Section 148 of the Criminal Procedure Act, which prevented accused persons from being given bail, to be unconstitutional. Another case which was partly based on Article 64(5) is *Legal and Human Rights Centre (1st Petitioner), Lawyers Environmental Action Team (2nd Petitioner), National Organisation for Legal Assistance (3rd Petitioner) v. The Attorney General (Respondent)*, famously known as the *Takrima* case. In this case the provisions of Section 119(2) and (3) of the Elections Act of 1985, as amended by the Electoral Law (Miscellaneous Amendments) Act, No. 4 of 2000, were challenged for violating Articles 13, 21, and 29 of the

[114] Article 146(2).
[115] Article 145(2).
[116] Chapter 288 of the Laws of Tanzania, Revised Edition of 2002.
[117] Chapter 287 of the Laws of Tanzania, Revised Edition of 2002.
[118] No. 8 of 2014.
[119] Article 30(4).

Constitution. The National Elections Act was amended by Act No. 4 of 2000, which had the effect of allowing election candidates to give anything to their voters in good faith as an act of hospitality. The petitioners claimed that the amendment created a loophole which candidates could use to corrupt voters in the name of hospitality and this therefore violated the right against discrimination, the right to equality before the law, and the right of the citizens of Tanzania to participate in fair and free elections. Specifically, it was alleged that the amended law violated Articles 21(1) and (2), 13(1), and 29(1) of the Constitution. Ultimately the Court declared the provisions of Section 119(b) and (c) of the National Elections Act of 1985 as amended by Act 4 of 2000 to be unconstitutional for contravening Articles 13(1) and (2) and 21(1) and (2) of the Constitution.

The third avenue for constitutional adjudication is the Constitutional Court. The Constitution establishes a special Constitutional Court under Article 125. The only function of this Court is to hear matters concerning the interpretation of the Union Constitution in the event that a dispute over interpretation or application arises between the Government of the United Republic and the Revolutionary Government of Zanzibar. After considering the matter the Court is supposed to reach a conciliatory decision, which shall be final with no possibility of any further appeal.[120] One half of the members of the Court shall be appointed by the Government of the United Republic and the other half by the Government of the Revolutionary Government of Zanzibar.[121] The Constitution is silent on the number of members of the Court and the specific appointing authority. However, it is reasonable to presume that reference to the Governments as appointing authorities means the President of the URT and the President of Zanzibar. A person who has held the position of Justice of Appeal, Judge of the High Court of Tanzania or of Zanzibar, or whose ability and experience make him/her qualify for appointment as a Judge or Acting Judge may be appointed as a member of the Court. The rules of procedure are to be determined by a law enacted by Parliament and in the absence of such a law, the Court shall determine its own procedure. In case members of the Court cannot reach a consensus where the Court is to determine its own procedure, then the procedure shall be decided by the Union Government and that of Zanzibar.[122]

Although it is constitutionally established, this Court has neither been constituted nor yet sat. It is said that the Court was about to be constituted when, in 1983-84, the then President of Zanzibar, Aboud Jumbe, wanted the Court to determine whether the Articles of the Union provided for a three or two-government union structure. The matter was resolved politically and the Court never sat.[123] Perhaps another occasion that would have been appropriate for the Court to sit was for *Machano's Case*, which involved pertinent constitutional matters between the Constitution of the URT and that of Zanzibar and was determined by the Court of Appeal. It is one of the particularly historic and controversial cases of the country. The main issue was whether Zanzibar

[120]Article 126(1) and (3).
[121]Article 127(1).
[122]Article 128(4).
[123]I.G. Shivji *et al.*. (n 15) p. 72.

is a state. Eighteen persons were charged with committing treason contrary to section 26 of the Penal Code Decree.[124] When the matter was being entertained by the High Court of Zanzibar four preliminary issues were raised by the accused persons: that (i) the charge was defective; (ii) the charge was time-barred; (iii) treason could not be committed against the Government of Zanzibar because it is not a sovereign state; and (iv) they were entitled to bail, which is a constitutional right. Of these four issues the most controversial was the question of whether Zanzibar is a state. The High Court of Zanzibar found the accused persons guilty after deciding that Zanzibar is a state and that indeed treason can be committed against the Government of Zanzibar. The accused persons appealed to the Court of Appeal of Tanzania. The appeal was heard but judgment was delayed because the Court said it needed time to research and prepare a thorough judgment, given the fact that the case raised grave constitutional issues for the first time in history. The judgment was written but before it was delivered, on 9 November 2000 the accused persons were discharged by the High Court of Zanzibar following a *nolle prosequi* that was entered by the Principal State Attorney. The Court of Appeal then decided to review the decision of the High Court of Zanzibar. The Court said:

> However, despite the *nolle prosequi*, the decision of the High Court of Zanzibar to the effect that the offence of treason can be committed against the Revolutionary Government of Zanzibar remains intact, and might be relied upon in future by the High Court. We are satisfied that that decision ought to be revisited and that it cannot be allowed to stand. In view of the changed circumstances, therefore, we decided to revise that decision under section 4(3) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993.

The Court examined the offence of treason and concluded that a charge alleging treason must prove four things: that (i) an act has been committed; (ii) the act was treasonable; (iii) the act was against a sovereign or a state; and (iv) the act was done by a person who owes allegiance to the sovereign or the state. Of interest to the Court of Appeal was the third issue. In determining the statehood of Zanzibar, the Court examined the nature of the Union and the distribution of power between the Union Government and the Government of Zanzibar. It came to the conclusion that in the eyes of international law Zanzibar lacks sovereignty and is therefore not a state. The Court stated: '[t]he International Persons called Tanganyika and Zanzibar ceased to exist as from 26th April, 1964 because of the Articles of Union. The two states merged to form a new international person called the United Republic of Tanzania.'

The Court observed that within the Union, Zanzibar's authority is limited to non-Union Matters and therefore has full authority over them. However, for non-Union Matters Zanzibar is not autonomous and therefore not sovereign. The next question was then whether 'treason' is a Union Matter. In examining the list of Union Matters the Court made reference to item 3, which covers defence and security. The Court further noted that because the word 'security' is not defined in the Constitution, it could not be assumed that the issue of treason is within the ambit

[124]Chapter 13 of the Laws of Zanzibar.

of security. The Court made reference to the Tanzania Intelligence and Security Services Act[125] which applied to the whole United Republic. Section 3 defines security as'[t]he protection of the United Republic from acts of espionage, sabotage and subversion, whether or not it is directed from or intended to be committed within the United Republic.'

The section further defines 'subversion' to mean:

> Attempting, inciting, counselling, advocating or encouraging –
> *(a)* the overthrow by unlawful means of the Government of the United Republic or of the Revolutionary Government of Zanzibar.
> *(b)* the undermining by unlawful means of the authority of the State in the United Republic.

The Court equated 'subversion' with 'treason' and on the basis of the Act concluded that treason is a Union Matter in terms of the list of Union Matters and therefore not within the exclusive jurisdiction of the Government of Zanzibar. Ultimately the Court held that treason can only be committed against the United Republic. In other words, Zanzibar is not a state when it comes to treason.

The decision in this case affirms that Zanzibar is not and cannot be a sovereign state internationally because it is part of the United Republic. On the other hand, within the Union, Zanzibar is only sovereign when it comes to non-Union Matters and for all Union Matters, sovereignty lies with the United Republic. *Machano's Case* has been the subject of heated debate, especially in academia.[126]

VII. International Law and Regional Integration

1. International Law

The relationship between international law and domestic law is an area of controversy in many jurisdictions, in part because of the absence of clear and adequate provisions on the status of international law in domestic legal orders. Some constitutions contain clear provisions, some provide inadequate provisions, and some are silent. The Constitution of Tanzania does not set out the status of international law, including customary international law, in the domestic legal system. It merely provides, in not very express terms, that Parliament may ratify all treaties to which Tanzania becomes a party.[127] This also shows that Tanzania follows the dualist system, in that for an international agreement to have legal effect domestically, it must first be domesticated by an Act of Parliament. With regard to domestication there are two approaches. First, an entire treaty can be incorporated without modification. An example is the Arbitration Act, which domesticates the Protocol on Arbitration Clauses and the Convention on the Execution of Foreign Arbitral Awards in its third and fourth schedules, respectively. Second, the provisions of

[125] 1996 (Act No. 15 of 1996).
[126] For a critique of the decision see I.G. Shivji, 'Sovereignty and Statehood of Zanzibar in the Union: Critical Comments on S.M.Z. v. Machano Khamis Ali and 17 Others', paper presented to the Zanzibar Law Society Conference, Zanzibar 23 April 2005 on the occasion of the Union Day, available at https://hakinaumma.wordpress.com/2008/08/16/sovereignty-and-statehood-of-zanzibar-in-the-union-critical-comments-on-smz-v-machano-khamis-ali-17-others/ (accessed on 10 April 2018).
[127] Article 63(3)(e).

the treaty can be put into specific or different legislation. Examples are the Law of the Child Act[128] and the Persons with Disabilities Act,[129] which partly domesticate the international conventions on the rights of the child and persons with disabilities, respectively. Although the Constitution does not direct the courts to use international law in interpreting domestic law, this has been done by the courts on select occasions, especially when interpreting basic rights in the Constitution.

2. Regional Integration

The Constitution does not contain any express provision on issues of regional integration, membership to international organizations, or foreign policy and international relations, save for Article 131(2)(b). The Article provides that in discharging its functions, the Commission for Human Rights and Good Governance shall not inquire into 'any matter concerning relationship or cooperation between the Government and a foreign Government of any country or international organisation.' Obviously this constitutional requirement constitutes one of Tanzania's foreign policy principles.

Tanzania is a member of a number of sub-regional, regional, and global organizations, including the East African Community (EAC);the Southern Africa Development Community (SADC);the African Union (AU);the United Nations (UN);the Commonwealth; the International Organization for Migration (IOM); the World Trade Organization (WTO);the African, Caribbean and Pacific Group of States (ACP);the African Development Bank (AfDB); the East African Development Bank (EADB);the Extractive Industries Transparency Initiative (EITI);the Food and Agriculture Organization (FAO); the Group of 77 (G-77); the International Atomic Energy Agency (IAEA); the International Bank for Reconstruction and Development (IBRD);the International Civil Aviation Organization (ICAO); the International Criminal Court (ICC);the International Red Cross and Red Crescent Movement (ICRM); the International Development Association (IDA); the International Fund for Agriculture Development (IFAD); the International Finance Corporation (IFC); the International Federation of Red Cross and Red Crescent Societies (IFRCS);the International Labour Organization (ILO); the International Monetary Fund (IMF);the International Maritime Organization (IMO); the International Mobile Satellite Organization (IMSO); the International Criminal Police Organization (INTERPOL);the International Olympic Committee (IOC); the International Organization for Standardization (ISO); the International Telecommunications Satellite Organization (ITSO); the International Telecommunication Union (ITU);the International Trade Union Confederation (ITUC); the Multilateral Investment Guarantee Agency (MIGA); the Non-Aligned Movement (NAM); the Organization for the Prohibition of Chemical Weapons (OPCW); the United National Conference on Trade and Development (UNCTAD); the United Nations Educational, Scientific and Cultural Organization (UNESCO); the United Nations Refugee Agency (UNHCR); the United Nations Industrial Development Organization (UNIDO); the World Tourism

[128]No. 21 of 2009.
[129]No. 9 of 2010.

Organization (UNWTO); the Universal Postal Union (UPU); the World Customs Organization (WCO); the World Federation of Trade Unions (WFTU); the World Health Organization (WHO); the World Intellectual Property Organization (WIPO); and the World Meteorological Organization (WMO).

VIII. Amendment of the Constitution and Constitutional Review

The procedure for altering the Constitution is provided for in Article 98. An alteration can be made by way of ordinary legislation passed by Parliament.[130] 'Alteration' is defined to mean 'modification or correction or repeal and replacement or the re-enactment or modification of the application of provisions.'[131] With regard to the number of votes needed to pass a bill altering the Constitution, there are three situations. First, if the bill alters any law mentioned in List One of the Second Schedule[132] it must be supported by at least two-thirds of all Members of Parliament. Second, if the bill alters any provision of the Constitution or any other law relating to the matters listed in List Two of the Second Schedule,[133] it must be supported by at least two-thirds of all Members from mainland Tanzania and two-thirds of all Members from Tanzania Zanzibar. Third, if the bill alters any other provision of the Constitution, it must be supported by at least two-thirds of all Members of Parliament.[134]

Since its promulgation in 1977, the Constitution has undergone a number of amendments. There have been four major amendments:

(i) the Fifth Amendment of 1985:a Bill of Rights was included in the Constitution for the first time;

(ii) the Eighth Amendment of 1992:a multi-party democracy system was recognized, which in theory marked the end of the single party and party supremacy political system in Tanzania;

(iii) the Eleventh Amendment of 1995, under which, first, the system of electing the Vice President through voting was changed to the 'running mate' system, and second, the President of Zanzibar was made a member of the Union Cabinet; and

(iv) the Thirteenth Amendment of 2000, in which four changes were made. First, the system of electing the President by absolute majority was changed to simple majority. Second, up to 30 percent of the seats in Parliament were reserved for women. Third, an express provision providing for the independence and powers of the judiciary was included in the

[130] Article 98(1).
[131] Article 98(2).
[132] (i) The Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962 Sections 3, 17, 18, 23 and 26; (ii) the Judicial Service Act, 1962, [Repealed by Act No.2 of 2005]; (iii) the Immigration Act, 1995 [the whole Act]; (iv) the Citizenship Act, 1995 [the whole Act]; (v) the Civil Service Act, 1962, [Repealed by Act No.8 of 2002]; and (vi) the whole Act of Union between Tanganyika and Zanzibar of 1964.
[133] (i) The existence of the United Republic; (ii) the existence of the Office of President of the United Republic; (iii) the Authority of the Government of the United Republic; (iv) the existence of the Parliament of the United Republic; (v) the Authority of the Government of Zanzibar; (vi) The High Court of Zanzibar; (vii) the list of Union Matters; and (viii) the number of Members of Parliament from Zanzibar.
[134] Article 98(1)(a) and (b).

Constitution. Fourth, the Commission for Human Rights and Good Governance was established.

Because it has been amended many times, some critics argue that the Constitution is full of 'patches'. There have been calls, especially from civil society opposition political parties and academia, for review of the current Constitution because, among other things, its drafting did not involve the people, it does not provide for a fairly balanced system of separation of powers, it concentrates much power in the presidency, it is silent on key issues such as management and control over land and natural resources, and there is a need for a clearer structure of the Union. Chris Maina Peter has remarked that 'it is our submission that Tanzanians need a new constitution that will take stock of current changes in our society. Any constitution needs continual renewal to accommodate changes that are taking place.'[135]

In 2011 the government under Jakaya Kikwete's presidency heeded the call and initiated a constitutional review process. The core of this move was to ensure that the views of the people inform the letter and spirit of the Constitution and address issues relating to the Union. To drive the process, Parliament enacted the Constitutional Review Act[136] which, among other things, provides for the procedure of collecting public opinion on what should be included in the new constitution. President Kikwete appointed a constitutional review commission chaired by former Attorney General and Prime Minister Joseph Warioba. It collected views from the people and developed the First Draft Constitution in June 2013 which significantly took account of public opinion.[137] The First Draft Constitution was published in the Government Gazette and thereafter discussed by the people in formally constituted constitutional forums (in Swahili, '*Mabaraza ya Katiba*'). Following discussions on the First Draft, the Review Commission produced the Second Draft Constitution with amendments and additions. The Second Draft was presented to the President of Tanzania and the President of Zanzibar in December 2013 and was later published in the Government Gazette with a statement that it would be presented to the Constituent Assembly. The Constituent Assembly was convened on 18 February 2014 and in March 2014 the Chairperson of the Constitutional Review Commission presented the Second Draft Constitution before it. On 8 October 2014, after heated debate, especially on the structure of the Union, the Constituent Assembly passed the Second Draft Constitution by the required two-thirds majority of the total members from mainland Tanzania and Zanzibar.

The next step was to conduct a referendum for the purposes of validating the Draft Constitution. To date this has not been done. The current government has not shown interest in ensuring that the constitutional review process is completed. On 9 November 2017, during a Parliamentary session, the Prime Minister was asked to provide a statement regarding the government's plan to

[135] C.P. Maina (n 28) p. 656.
[136] Chapter 83, Revised Edition of 2012.
[137] The major issues raised by the people were: reduction of the powers of the president, room for challenging election of the president, establishment of a three-tier government union structure and restoring the government of Tanganyika, reduction of Union Matters, the president not to be part of the Parliament, having a fully independent parliament, and allowing independent candidates to contest in general elections.

finalize the constitutional review process. His response was that the process was too costly given the government's limited revenues and other important issues, which include provision of social services to the people.[138]

IX. Concluding Remarks

The content and spirit of the Constitution is largely a product of colonial imprints, post-independence political ideology, the Union between Tanganyika and Zanzibar, and partly external and internal pressures for change. In theory, it contains constitutional principles which conform to modern constitutionalism. They include sovereignty of the people, supremacy of the Constitution, separation of powers, representative democracy, independence of the judiciary, the rule of law, and respect for human rights. However, the manner in which these principles are implemented in practice still renders them a star shining far in the horizon. Some of the challenges that have been facing Tanzania include limited participation of the citizenry in public affairs (including in drafting the Constitution), questionable elections which are yet to become truly free and fair, the absence of meaningful and reasonable separation of powers, and limited independence of the judiciary, especially at the Court of Appeal level. Recently the country has witnessed the violation of basic human rights, especially the rights to freedom of expression, freedom of association, and freedom of assembly. The enjoyment of these rights has been curtailed by the passing of laws limiting freedom of the press, speech, and internet use. Moreover, multi-party democracy is at stake because the political space for opposition parties to conduct their activities has been unnecessarily squeezed. There have also been instances of unnecessary use of force by the police and state actions, and decisions which erode the principle of the rule of law. This is in part a result of the concentration of too much power in the presidency and the absence of an effective system of checks and balances among key government organs. This experience shows that a change of government in Tanzania can mean anything for the state of constitutionalism, and this calls for a stronger constitutional foundation upon which the government operates to ensure that leaders govern within the framework of established laws and institutions. One of the ways to resolve some of these challenges is for Tanzania to finalize the constitutional review process and adopt a new constitution that will reflect the people's will and establish stronger systems of accountability.

With regard to the Union, there have been challenges and tensions between the two sides that form it. Some of these challenges are in relation to taxation arrangements, foreign policy, Zanzibar's quest for more autonomy, the management of general elections, trade arrangements, and ownership and management of natural resources. There is a special office in the Vice President's Office—the Vice President's Office (Union Affairs and Environmental)—which is responsible for, among other things, addressing challenges relating to the existence and operation of the Union. Another age-old issue is the need to have a clearer structure of the Union. The

[138]See generally, Parliament of Tanzania, 'Parliamentary Proceedings Report of 9 November 2017', 12, available at http://parliament.go.tz/polis/uploads/documents/1511526401-HS-09-03.pdf (accessed on 24 September 2018). For a counterargument, see a statement by the Legal and Human Rights Centre, available at http://www.humanrights.or.tz/assets/images/upload/files/scan0007.pdf (accessed on 24 September 2018).

peculiar aspect of the Union is that when Tanganyika and Zanzibar united in 1964, the Republic of Tanganyika 'disappeared' or was submerged in the Union, while Zanzibar remained with its institutions—the executive, the judiciary, and Parliament. Given this situation, there has been a call for the restoration of the state of Tanganyika and the establishment of a separate Union government which will only be responsible for Union affairs. During the unfinished constitutional review process which began in 2011, the issue was heavily debated between two major extremes—those calling for a three-government Union structure, and those in support of a two-government structure. A simple conclusion would be the fact that the Union's structure and existence mostly reflects the aspirations of the ruling class and not the will of the people: a position which is yet to be reversed. Generally, as far as constitutionalism is concerned, much is left to be desired to fully achieve it in theory and practice.

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