THE HISTORY OF HUMAN RIGHTS IN TANZANIA

INTRODUCTION

Human rights in this context refer to those rights contained in treaties, the Constitution or written laws and those propounded by the judiciary when interpreting laws. These "sources" do not, however, create human rights as the latter existed before world order, state and law. Rather, they merely represent a recognition and commitment to respect, promote and protect human rights. Even ancient societies recognized, respected and enforced norms somehow similar to what are referred as human rights today. Ideas of equality and liberty, for instance, have existed for much of human history.

HUMAN RIGHTS IN PRE-COLONIAL AFRICAN SOCIETIES GENERALLY

Although coherent recorded proof is lacking, pre-colonial African societies recognized, respected and enforced human rights. However, in contrast to modern conception of human rights which stresses individual protection, pre-colonial African societies emphasized collective expression.[1] Basic rights and duties were protected and accepted in the framework of family, clan or kinship. Moreover, protection of human rights was based on ascribed status such as person's place of birth, tribe or social unit.[2] Human rights were protected by custom rather than by codes, but often involved well defined procedures.[3] These procedures had the character of conciliation, arbitration and mediation.

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[1] Claude E. Welch, Jr., "Human Rights as a Problem in Contemporary Africa" in *Human Rights and Development in Africa*, State University of New York Press, 1984, p. 11.
[2] Chris C. Mojekwu, International Human Rights: The African Perspective," in *International Human Rights: Contemporary Issues*, Human Rights Publishing Group, Earl M. Coleman Enterprises, 1980, p. 86.
[3] Yougindra Khushalani, "Human Rights in Asia and Africa," in *Human Rights Law Journal*, 4, No. 4 (1983), p. 416

Generally, the human rights concept was embodied in culture and religion. Culture and religion formed a sort of a legal system and a shared moral code that respected human rights without any formal acknowledgement of the concept. For instance, pre-colonial African societies respected and protected the rights to equality and non-discrimination. Pre-colonial African societies believed that all members of the society were born equal and were supposed to be treated as such regardless of age or sex.[4]

Moreover, pre-colonial African societies respected and protected the right to life. The right to life applied to human beings and animals. Killing of human being or animal was allowed only in specified situations: in self-defence, from necessity, to provide food, to perform a sacrifice, or to protect another person's life or possession. This is similar to modern perception of the right to life where certain killings are justified.

The perception of the right to life in the pre-colonial African societies was governed not only by negative rules, such as not to kill, but also by responsibilities. The right to life, for instance, implied an obligation to provide for those in need.[5] This perception has been adapted by the Human Rights Committee by requiring states to treat the right to life as possessing a negative duty not to kill, and the positive duty to support survival.[6]

Pre-colonial African societies observed freedom of religion. Every member of the society had the right to choose religion and to manifest it through ritual, taboos, sacrifices, liberations and regulations.[7] Prophets and spirit possession were a means of revelation. Some authors argue

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[4] Vincent Obisienunwo Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions*, Martinus Nijhoff Publishers, The Hague/London, 2001, p. 14

[5] Yougindra Khushalani, "Human Rights in Asia and Africa," in *Human Rights Law Journal*, 4, No. 4 (1983), pp. 415-416

[6] Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 1982

[7] Richard J. Gehman, *African Traditional Religion in Biblical Perspective*, East African Educational Publishers Ltd, pp. 399-400.

that foreign missionaries did not introduce religions to African societies, rather they perfected pre-existing religiosity similarly to how the Gospel perfected the Old Testament.[8]

Other rights recognized and respected by pre-colonial African societies include: freedom of movement, the right to work, the right to education, freedom of assembly, freedom of association, freedom of expression, the right to property, the right to culture, and the right to privacy.

Another important feature of the pre-colonial African perception was that rights derived from duties. Therefore, the enjoyment of rights and freedoms also implied the performance of duties on the part of every member of the community. Every member of the community had the duty to protect the community and to provide for those in need.[9] This has been maintained by the African Charter on Human and People's Rights (the "Banjul Charter"). The Preamble of the Banjul Charter provides that the enjoyment of rights and freedoms also implies the performance of duties by *everyone*. This means that although the primary duty to respect rights and freedoms lies with the State, the duty extends to private persons. Modern African duties include respecting the rights of others, collective security, morality and common interest.[10] A duty is also imposed on the individual towards his or her family and society, the State and other legally recognized communities and the international community.[11]

However, these positive norms and their institutions were destroyed by colonialism. The fight against colonialism is itself a proof that natives resisted the threat to their pre-existing dignity and humanity. The *Maji-Maji* Resistance (1905-1907) which was inspired by the spiritual leader, Kinjikitile Ngwale, was a rejection of indignity and inhumanity, and an attempt to restore native freedoms and values. Other intense resistances

[8] John Mbiti, *African Religions and Philosophy*, African Writers Series, Heinemann, 1969.
[9] Yougindra Khushalani, "Human Rights in Asia and Africa," in *Human Rights Law Journal*, 4, No. 4 (1983), p. 415.
[10] Article 27(2) of the Banjul Charter
[11] Article 27(1) of the Banjul Charter

were led by Mirambo of the Wanyamwezi, Mkwawa of the Wahehe, Mangi Meli of the Wachaga and Abushiri of Pangani.

Nationalist struggle for independence was also a crusade to restore pre-colonial African human rights. During the struggle for the independence of Tanganyika, Mwalimu Nyerere reminded TANU leaders that the struggle was based on the belief in "equality and dignity of all mankind."[12]

The Banjul Charter further proves the existence of norms and values in pre-colonial African societies that match with modern conception of human rights. The drafters of the Banjul Charter, for example, considered:

> … the values of African civilization which should inspire and characterize their reflection on the concept of human and people's rights.[13]

HUMAN RIGHTS DURING THE COLONIAL ERA

Colonialism itself is a violation of human rights. It infringes the right to self-determination of the colonized people. The colonized cannot freely determine their political status nor can they freely pursue their economic, social and cultural development. The colonialized are given a subordinate status whereas the colonizers assume a superior status. Since colonialism itself is a violation of human rights, development of a human rights culture undermines the purpose of colonialism. Therefore, it is a priority of every colonizer to suppress human rights in a colonial territory. In the colonial context, human rights will only be enjoyed if they do not compromise the overall colonial goal.

Tanganyika was colonized first by Germans (1880's-1919) then by the British (1919 to 1961). The name Tanganyika was given by the British in

[12] Colin Legum, et al (eds)., *Mwalimu: The Influence of Nyerere*, James Currey Publishers, 1995 p. 127
[13] Preamble of the Banjul Charter.

1920. Formerly, the territory was part of German East Africa.[14] During the colonial era, racism and discrimination were institutionalized. Laws entrenched inhumanity and indignity, and courts endorsed these practices. Legal framework categorized social status and individuals were treated according to status. For instance, a native had to get a licence to be permitted to drink European beer or to enter a European hotel or restaurant.[15]

Colonialism was mainly driven by the desire to obtain raw materials and cheap labour. Therefore, it was characterized by massive land alienation and displacement of natives in order to obtain arable land. This contravened the right to property and the right to movement. Natives were uprooted from their original localities and taken to work cheaply and in hard conditions in colonial plantations. For example, in a system commonly known as "Manamba", colonialists uprooted natives from Kigoma to work in sisal plantations in Tanga. This system violated the right to movement, the right to adequate remuneration, the right to found a family, the right to privacy and labour rights.

In some cases, the colonial judiciary undermined African values and traditions. For instance, the colonial judiciary equated African marriage to wife purchase.[16]

HUMAN RIGHTS IN INDEPENDENT TANGANYIKA

Tanganyika attained its independence on 9 December 1961. The Constitution of Tanganyika of 1961 (the "Independence Constitution") did not contain a Bill of Rights (a chapter in the Constitution providing for basic rights and duties as well as their enforcement). The Independence Constitution was passed by the British at Westminster. Under the Independence Constitution, the Queen of England was the

[14] German East Africa also included present day Burundi and Rwanda.
[15] Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag, 1997, p. 2.
[16] *Abdulrahman Bin Mohamed and Another v. R*. [1963] E.A 188 (CA).

Head of the State and Government of Tanganyika and the Commander-in-Chief of its Armed Forces.

During the independence negotiations, the British propagated for the inclusion of the Bill of Rights in the Independence Constitution. However, this hypocritical move intended to protect the remaining British subjects, rather than native Tanganyikans. Britain itself did not, and still does not, have a written Bill of Rights.[17] The idea was rejected by the leadership of the Tanganyika African National Union (TANU), the party that struggled for independence. The rejection was premised on the idea that human rights would frustrate developmental measures. The concept of human rights was considered a luxury and an allurement of conflicts.[18] There was also a sense of suspicion on the judiciary, which was then predominantly white, that it would use the Bill of Rights to undermine developmental strategies.

However, although the Independence Constitution did not contain a Bill of Rights, fundamental freedoms were acknowledged in the Preamble. Moreover, the Constitution conferred upon the Legislature the power to make laws for the peace, order and good governance.[19]

On 9 December 1962, Tanganyika became a Republic vide the Constitution of Tanganyika of 1962 (the "Republican Constitution"). This constitution declared Tanganyika a sovereign Republic. It thus transferred the sovereign power vested in the Crown (Britain) to the Republic of Tanganyika. Under this constitution, the President replaced the Queen as the Head of the Government and State and the Commander-in-Chief of the Armed Forces.

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[17] Prof. Issa Shivji, *Towards New Constitutional Order: The State of the Debate in Tanzania*, p.6: Paper presented at the Symposium on the Constitution and Electoral Laws, the British Council, 4-5 July 1996

[18] Leopold T. Kalunga, "Human Rights and Preventive Detention Act, 1962 of the United Republic of Tanzania: Some Operative Aspects, Volumes 11-14, *Eastern Africa Law Review*, 1978-1981, p. 281.

[19] The Legislature was composed of the Queen of England and the National Assembly.

The Preamble of the Republican Constitution recognized people's fundamental freedoms. However, like its predecessor, it did not contain a Bill of Rights. Instead, the then President, Mwalimu Julius Kambarage Nyerere proposed the creation of the National Ethic, a kind of moral and political obligation restraining the abuse of power by the Executive.

Following the union between Tanganyika and Zanzibar on 26th April 1964, the Constitution of Tanganyika and Zanzibar of 1964 (the "Union Constitution") was passed.[20] The Union Constitution resulted from the Articles of the Union between Tanganyika and Zanzibar. The Articles of the Union were signed by the then President of Tanganyika, Mwalimu Julius Kambarage Nyerere and the then President of Zanzibar Sheikh Abeid Amani Karume. The Articles of the Union consisted of an agreement to unite two sovereign states (Tanganyika and Zanzibar) in one sovereign Republic. Being a treaty, Articles of the Union required ratification by the Legislature of Zanzibar and the Legislature of Tanganyika.[21]

It was agreed that during the interim period (26 April 1964 until immediately before the commencement of the anticipated permanent constitution) the Union was to be governed in accordance with the provisions of the Constitution of Tanganyika of 1962 (the Republican Constitution). In light of this, the President of Tanganyika passed the Interim Constitution Decree, 1964 (G.N 246 of 1964) modifying the Republican Constitution to accommodate the Union. The Decree renamed the Republican Constitution to the Interim Constitution of the United Republic of Tanganyika and Zanzibar of 1964. This Constitution contained no Bill of Rights, neither did it make an explicit recognition of fundamental freedoms.

[20] The application of the name Tanzania commenced on 29th October 1964. However, it was legally but retrospectively adopted in December 1964 vide the United Republic (Declaration of Name) Act No. 61 of 1964.

[21] The Parliament of Tanganyika ratified the Articles of the Union and passed the Union of Tanganyika and Zanzibar Act, 1964 (Cap. 557 R.E. 2002). Zanzibar also passed the Union of Zanzibar and Tanganyika Law, 1964

In 1965 the Interim Constitution was adopted. The Interim Constitution declared Tanzania a democratic society. However, it declared Tanzania a one-party State.[22] This declaration was controversial because it acknowledged the presence of two parties – TANU in Mainland Tanzania and Afro-Shirazi Party (ASP) in Zanzibar.

The Preamble of the Interim Constitution contained constitutional guarantees equivalent to the Bill of Rights. The Preamble of the Interim Constitution provided, *inter alia,* that:

> WHEREAS freedom, justice, fraternity and concord are founded upon the recognition of the equality of all men and of their inherent dignity, and upon the recognition of the rights of all men to protection of life, liberty and property, to freedom of conscience, freedom of expression and freedom of association, to participate in their own government, and to receive a just return for their labours […]

However, this was a mere aspiration because such guarantees could not be enforced in courts of law. Although the Interpretation of Laws Act (Cap. 1 R.E. 2002) considers a preamble part of a written law,[23] the judiciary has consistently insisted that a person cannot bring a complaint under the Constitution in respect of violation of any of the rights provided in the Preamble.[24] This is not inconsistent with the rule under the Interpretation of Laws Act because the legislation refers to "written law" meaning any Act of Parliament, subsidiary legislation or applied law, but not the Constitution.[25]

The Constitution of TANU was appended to the Interim Constitution as a schedule. The Constitution of TANU contained beliefs and guarantees

[22] See Article 3(1) of the Interim Constitution of 1965.
[23] Section 25 of the Interpretation of Laws Act No. 4 of 1996
[24] *See Attorney General v. Lesinoi Ndeinai & Joseph Selayo Laizer and Two Others* [1980] TLR 214 (Separate judgement of Kisanga, J). Also see *Hatimali Adamji v. East African Posts and Telecommunications Corporation*, 1973 LRT No. 6.
[25] See Section 4 of the Interpretation of Laws Act No. 4 of 1996.

similar to those found in Bills of Rights. Since a schedule is considered part of the Constitution, these guarantees could thus be enforced. This move implies that the government deliberately decided to enforce some freedoms to a certain extent. The omission to include the Constitution of ASP as a schedule to the Interim Constitution further explains that intention because the Constitution of ASP did not contain guarantees to fundamental rights.

In another development, the government established the Permanent Commission of Enquiry (PCE) and included it as a part of the Interim Constitution.[26] The PCE was established as a measure to cure the absence of the Bill of Rights in the Interim Constitution. The PCE was the first Ombudsman in Africa.[27] The work of the PCE was governed by the Permanent Commission of Enquiry, Act No. 25 of 1966.

The PCE was incepted, *inter alia,* to check the misuse and abuse of power by public officials. However, the PCE had its own shortcomings too. Firstly, the PCE was not independent.[28] It had to report all its investigations to the President, and the latter had to decide whether or not to pursue the matter reported to him. Secondly, the President had powers to stop any investigation conducted by the PCE, and could bar the PCE accessing certain information.

The interim Constitution was replaced by the Constitution of the United Republic of Tanzania of 1977 (the "Constitution"). The latter did not, at its inception, contain the Bill of Rights. The adoption of the Constitution was thus a setback for the protection of fundamental rights in Tanzania.

However, during all this time, human rights, especially those related to principles of natural justice, could be enforced through judicial review.

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[26] The PCE was incorporated in Part VI of the Interim Constitution.

[27] Ernest T. Mallya, *Promoting the Effectiveness of Democracy Protection Institutions in Southern Africa: Tanzania's Commission for Human Rights and Good Governance,* EISA Research Report No. 40, 2009, p. 23.

[28] Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag, 1997, p. 10.

However, the scope of judicial review is narrower compared to justiciability of a Bill of Rights. First, a right must relate to principles of natural justice, or in case of the writ of *Habeas Corpus,* to the right to liberty. Second, the remedies thereof are discretionary; Third, remedies are limited to quashing a decision, prohibition or compelling a person or authority, and do not include such remedies as compensation; and forth, the proceedings only examine procedural matters and not substantive matters.

THE INCLUSION OF BILL OF RIGHTS IN THE CONSTITUTION

In 1984, the Bill of Rights was included in the Constitution vide the Fifth Constitutional Amendment Act No. 15 of 1984 (entitled in Kiswahili "*Sheria ya Marekebisho ya Tano Katika Katiba ya Nchi, ya Mwaka 1984*"). The latter came into force on 16th February 1985.

The Bill of Rights was a result of pressure from sources outside the Union Government.[29] First, Zanzibar, which at the time was making its new constitution, insisted that it was going to include the Bill of Rights in its upcoming constitution. This would imply double standards in two parts of the same country, one guaranteeing basic rights and the other ignoring them. This would have been embarrassing. Second, Tanzania had taken an active role in the formulation of the African Charter on Human and People's Rights (the "Banjul Charter"). Tanzania signed the Banjul Charter on 31 May 1982, and ratified it on 18 February 1984. The instrument of ratification was deposited with the Secretary General of the then Organisation of African Unity on 9 March 1984 as required by Article 63(2) of the Banjul Charter. Like the Zanzibar's scenario, it would be embarrassing for the Government to promote fundamental rights at the regional level and not including same rights in its Constitution.

[29] , Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania: Selected Judgements and Writings of James L. Mwalusanya and Commentaries*, Legal and Human Rights Centre, 2005, p. 33

Third, there was a popular demand for the inclusion of the Bill of Rights during the debates on the fifth amendment of the Constitution.[30]

The justiciability of the Bill of Rights was, however, suspended for three years (1st March 1985 – 16th March 1988). During this grace period, courts in Tanzania were barred to construe any law or provision as being unconstitutional or otherwise inconsistent with the Bill of Rights.[31] The suspension of justiciability of the Bill of Rights gave the state time to put its house in order by abolishing bad laws.[32] There was a bundle of laws that could not stand the test of the Bill of Rights.[33]

The delayed justiciability partly explains the unpreparedness of the state to protect basic rights on one hand, and unwillingness to ensure the effectiveness of the Bill of Rights on the other. The inclusion of the Bill of Rights in the Constitution was rather a product of external factors, than internal motivation. Therefore, the state was caught by surprise and needed time to put its house in order. However, the Government never showed a genuine concern over bad laws. The Government did not amend or abolish any bad law; instead it left the task to the judiciary. This trend persisted during and after the grace period. In 1991 for instance, the Nyalali Commission identified more than forty laws in Tanzania which were offending fundamental rights and freedoms, and

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[30] Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag, 1997, p. 11.

[31] Section 5(1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act No. 16 of 1984.

[32] Anton Bosl & Joseph Diescho (eds), *Human Rights in Africa: Legal Perspectives on Their Protection and Promotion*, Konrad-Adenauer-Stiftung, 2009, p.363.

[33] Some of these laws were latter considered "bad laws" by the Nyalali Commission including the Area Commissioners Act of 1966 (Cap. 466); Collective Punishment Ordinance of 1921; Corporal Punishment Ordinance of 1930; Deportation Ordinance, 1921; Expulsion of Undesirables Ordinance, 1930; Government Proceedings Act, 1967; Preventive Detention Act, 1962; Regions and Regional Commissioners Act, 1969; Societies Ordinance, 1954; Resettlement of Offenders Act, 1969; Stock Theft Ordinance, 1960; Township (Removal of Undesirable Persons) Ordinance 1954; the Witchcraft Ordinance, 1928; Registration and Identification of Persons Act, 1986; Economic and Organized Crime Control Act, 1984; Human Resources Deployment Act, 1983; Emergency Powers Act, 1986; senior Civil Service Appointments Decree, 1970 (Zanzibar) and the Special Court Decree, 1966 (Zanzibar).

recommended for their repeal or amendment.[34] However, the Government rejected the recommendations and decided to handle the laws in its own way.[35]

Some authors considered this reluctance as a creation of conflict between the Executive and the Judiciary. According to this view, the conflict could be avoided if the government reviewed, amended or repealed bad laws before they were declared null and void by the judiciary.[36]

However, during the three-year grace period, courts and any other competent authority could modify, adapt, qualify or exempt any law as may be necessary to bring it in conformity with the Bill of Rights.[37] Therefore, courts were prohibited from declaring any law unconstitutional, but could take measures to ensure laws conform to the Bill of Rights. The only condition was that the measure had to be necessary.

Similarly, the President of the United Republic of Tanzania (the "President") was empowered to amend any law so as to bring it in conformity with the Bill of Rights.[38] The conditions relating to this power

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[34] These laws included the Area Commissioners Act of 1966 (Cap. 466); Collective Punishment Ordinance of 1921; Corporal Punishment Ordinance of 1930; Deportation Ordinance, 1921; Expulsion of Undesirables Ordinance, 1930; Government Proceedings Act, 1967; Preventive Detention Act, 1962; Regions and Regional Commissioners Act, 1969; Societies Ordinance, 1954; Resettlement of Offenders Act, 1969; Stock Theft Ordinance, 1960; Township (Removal of Undesirable Persons) Ordinance 1954; the Witchcraft Ordinance, 1928; Registration and Identification of Persons Act, 1986; Economic and Organized Crime Control Act, 1984; Human Resources Deployment Act, 1983; Emergency Powers Act, 1986; senior Civil Service Appointments Decree, 1970 (Zanzibar) and the Special Court Decree, 1966 (Zanzibar).

[35] Chris Maina Peter, *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag, 1997

[36] Hon. Mr. Justice James L. Mwalusanya, *The Bill of Rights and the Protection of Human Rights: Tanzania's Court Experience,* A paper presented at the International Conference on the Bill of Rights jointly organized by the Legal Resources Foundation; Zimrights; and Catholic Commission for Justice and Peace (Zimbabwe), held at Victoria Falls, Zimbabwe between 10-14 December 1994.

[37] Section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act No. 16 of 1984.

[38] Section 5(3) of the Constitution (Consequential, Transitional and Temporary Provisions) Act No. 16 of 1984.

included: (a) that the order of amendment had to be exercised before 30 June 1985; and (b) that the order had to be published in the *Gazette*. This power was discretionary, and the test thereof was subjective. Therefore, the President could exercise this power where he opined that any amendment was necessary or expedient for bringing the law into conformity with the Bill of Rights. No any other fact had to be considered and the President was not obliged to consult any other authority.

Time-frame differentiated the power of the court from that of the President in bringing any law into conformity with the Bill of Rights. Whereas the court could take such measure at any time during the three-year grace period, the President could only take the measure before 30 June 1985. Both power of the court and that of the President applied only in respect of laws enacted before the inclusion of the Bill of Rights in the Constitution. Laws enacted after the inclusion of human rights in the Constitution were not applicable.

However, the power of the President to amend any law in this respect contravened the doctrine of separation of powers. The power to amend laws rests in the domain of the Parliament, not of the President. Therefore, the power of the President to amend laws usurped the legislative powers of the Parliament. Worst still, the power was discretionary and could be exercised without the Parliament being consulted.

The justiciability of the Bill of Rights commenced in 1988. Article 30(3) of the Constitution conferred original jurisdiction upon the High Court over any complaint alleging that any provision in the Bill of Rights has been violated, is being violated, or is likely to be violated. The High Court applied ordinary civil practice and procedure, including that a case was presided by a single judge.

However, in 1994 the Parliament enacted the Basic Rights and Duties Enforcement Act (BRADEA) to regulate justiciability of the Bill of Rights.

BRADEA introduced new procedure and practice in litigating human rights cases, including that cases were to be presided by three judges and initiated by way of petition or originating summons.[39] Some authors view the introduction of the requirement of three judges as an attempt to tame bold judges.[40] At the time BRADEA was enacted, the late Justice Mwalusanya had declared some laws and acts of government officials unconstitutional and this, according to some authors, displeased the Government.[41] Therefore, the Government enacted the law to tame him and the like.

In the same session that the Parliament enacted BRADEA, the Parliament also introduced a controversial provision in the Constitution. Vide the Eleventh Constitutional Amendment Act No 34 of 1994 (titled in Kiswahili *Sheria ya Mabadiliko ya Kumi na Moja Katika Katiba ya Nchi, ya Mwaka* 1994), Article 30(5) was introduced in the Constitution.[42] According to the provision, where the High Court finds violation of the Bill of Rights, instead of declaring the violating conduct or law null and void, it may give time to the particular authority or person to rectify the law or conduct. This provision has been subject of criticisms including that: (a) it transfers the court's power to determine appropriate remedy to administrative organs; (b) it endorses wrongs by allowing an offending law or conduct to continue operating; and (c) it defeats the doctrine of separation of powers.

Article 30(5) of the Constitution is identical to section 13(2) of BRADEA. It is noteworthy that the Eleventh Constitutional Amendment Act and BRADEA entered into force on the same date (17 January 1995). However, although BRADEA and the Eleventh Constitutional Amendment Act were discussed in the same session, the former was discussed earlier than the latter. This suggests that the Parliament aimed

[39] See sections 4, 5&6 of the Basic Rights and Duties Enforcement Act, 1994.
[40] See, for example, Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania: Selected Judgements and Writings of James L. Mwalusanya and Commentaries*, Legal and Human Rights Centre, 2005, pp. 33-34.
[41] *Ibid.*
[42] See section 4 of the Eleventh Constitutional Amendment Act, 1994.

at giving the statutory provision a constitutional backup. It was the motive behind the enactment of BRADEA, not the needs of the Constitution that dictated the substance of the provision. Actually, the provision was included in the Constitution by chance. The eleventh amendment of the Constitution basically aimed at addressing matters relating to Vice-President, members of parliament and related matters. This may be construed from the long title of the Eleventh Constitutional Amendment Act which reads in Kiswahili:

> *Sheria kufanya mabadiliko katika Katiba ya Jamhuri ya Muungano ili kuweka masharti yanayohusu Makamu wa Rais, kuongeza aina za Wabunge* ***na mambo mengineyo yanayohusiana na hayo*** (literally meaning the Act to amend the Constitution of the United Republic of Tanzania to provide for matters relating to Vice President, to add types of Members of National Assembly and for **related matters**) (emphasis added)

However, the procedure for enforcement of the Bill of Rights is not a matter relating to the office of Vice President or types of members of National Assembly. One may, therefore, argue that Article 30(5) of the Constitution only serves the overall purpose of BRADEA and was introduced in the Constitution as a matter of coincidence, mainly because BRADEA and the Eleventh Constitutional Amendment Act were tabled for parliamentary discussion at the same session.

ADJUSTMENTS TO ACCOMMODATE POLITICAL ATMOSPHERE

In 1992, multi-partism was re-introduced in Tanzania. As a result, major adjustments were made in the Constitution to accommodate this system. Major changes were made on government structure and the mode of conducting elections. These adjustments did, however, slightly touch the Bill of Rights. However, the political atmosphere created by multi-partism sparked open clashes between the Judiciary and the Legislature, and extensive interpretations on the right to association and the right to take part in public affairs. Remarkable aspects include the validity of

independent candidates, *Takrima* provisions, and deposit of security for costs in election petitions.

The Eleventh Constitutional Amendment Act No. 34 of 1994 removed the right of independent candidates to contest presidential, parliamentary and local government elections, in disregard of the decision of the High Court of Tanzania finding the bar a violation of the rights of association and the right to take part in public affairs.[43] The amendment was purposely done to render the decision of the High Court moot. The High Court again held this amendment violative of democratic values and of the doctrines of basic structures, as well as of constitutional principles.[44] These findings were, however, reversed by the Court of Appeal of Tanzania.[45] On application, the African Court of Human and People's Rights intervened, and held the bar of independent candidates a violation of the Banjul Charter.[46]

The judiciary has also declared statutory provisions that allowed candidates to offer voters anything in good faith (*Takrima*) a violation of the right to equality and the right to take part in public affairs.[47] The *Takrima* provisions were held discriminatory on two grounds: (a) they place high-income earner candidate at a more advantageous position to win election than low-income candidate; and (b) they legalize conducts which, if done by another person (not a candidate), constitute an offence. As a result, the High Court held them null and void.

In another development, the Court of Appeal has held a mandatory statutory requirement to deposit five million shillings as security for costs for election petition to be heard a violation of the right to equality and access to justice.[48] The court found that the requirement was not

[43] See *Rev. Christopher Mtikila v. Attorney General*, Misc. Civil Cause No. 5 of 1993.
[44] See *Rev. Christopher Mtikila v. Attorney General*, [2006] TLR 279.
[45] See *Attorney General* v. *Rev. Christopher Mtikila*, Civil Appeal No. 45 of 2009.
[46] *Reverend Christopher Mtikila v. The United Republic of Tanzania*, Application No. 011/2011.
[47] Legal and Human Rights Centre and Two Others v. Attorney General, [2006] TLR 240.
[48] *Julius Ishengoma Francis Ndyanabo v. Attorney General*, [2004] T.L.R. 14.

justified because there was no similar requirement in litigations not arising from elections.

THE FORMATION OF THE COMMISSION FOR HUMAN RIGHTS AND GOOD GOVERNANCE AND THE REMOVAL OF CLAW-BACK CLAUSES

The Bill of Rights contained claw-back clauses. A claw-back clause is a constitutional provision which subjects an enjoyment of a human right to the confines of a law. However, a claw-back clause does not apply automatically. The judiciary has insisted that any law that limits the enjoyment of human rights must meet three conditions: it must not be arbitrary; it must be reasonable and proportionate; and it should not offend rules of natural justice.[49] Despite these safeguards, claw-back clauses largely affected effectiveness of the Bill of Rights. As a result, there was a wide outcry for their removal in the Bill of Rights. In response to this outcry, the Presidential Committee for the Collection of Views on the Constitution (the "Kisanga Committee") was formed, *inter alia,* to address this issue. The Kisanga Committee supervised the collection of public views on the previously issued White Paper.[50]

Among the issues that the Kisanga Committee addressed and recommended on, was the formation of an effective human rights commission. There was a need for a more effective commission to replace the Permanent Commission of Enquiry (PCE). The PCE had many limitations. Its independence was questionable and its *modus operandi* was less effective.

In the year 2000 the Commission for Human Rights and Good Governance was established following the Thirteenth (13th) Amendment of the Constitution, replacing the PCE whereas claw-back clauses were removed in the Bill of Rights following the Fourteenth (14th) Amendment of the Constitution in 2005.

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[49] *Kukutia Ole Pumbun v. Attorney General*, Civil Appeal No. 32 of 1992, Court of Appeal of Tanzania.

[50] The Government of the United Republic of Tanzania Paper No. 1 of 1998.

HUMAN RIGHTS IN THE PROPOSED CONSTITUTION

In 2011, Tanzania started the process of making a new constitution with the enactment of the Constitutional Review Act No. 4 of 2011. As a result, the Constitutional Review Commission (the "Warioba Commission") was formed. The Warioba Commission collected views from Tanzanians of all walks of life and incorporated their views in the First Draft Constitution. The first draft was again returned to the public and experts for comments. The comments were incorporated in the Second Draft Constitution of the United Republic of Tanzania of 2013 commonly referred to in Kiswahili as *Katiba ya Warioba*, literally meaning the "Warioba Constitution".

The Second Draft Constitution introduced in its Bill of Rights new rights which are not featured in the Constitution of the United Republic of Tanzania, 1977. These rights include the right to freedom of slavery;[51] freedom of the press (media);[52] rights of employers and employees;[53]the right to nationality;[54]rights of the accused and prisoners;[55]rights of the persons in custody;[56] the right to clean, safe and healthy environment;[57] and the right to education.[58]

The Bill of Rights of the Second Draft Constitution featured group rights. It provided for the rights of children;[59] rights of youths; [60]rights of persons with disabilities;[61] rights of minorities;[62] rights of women;[63] and

[51] Article 26 of the Second Draft Constitution.
[52] Article 31 of the Second Draft Constitution.
[53] Article 36 of the Second Draft Constitution.
[54] Article 38 of the Second Draft Constitution.
[55] Article 39 of the Second Draft Constitution.
[56] Article 40 of the Second Draft Constitution.
[57] Article 41 of the Second Draft Constitution.
[58] Article 42 of the Second Draft Constitution.
[59] Article 43 of the Second Draft Constitution.
[60] Article 44 of the Second Draft Constitution.
[61] Article 45 of the Second Draft Constitution.
[62] Article 46 of the Second Draft Constitution.
[63] Article 47 of the Second Draft Constitution.

rights of the elderly.[64] This was very progressive because the current Constitution does not guarantee rights of specific groups. The only protection that cuts across all groups is the principle of non-discrimination.

Another unique feature of the Second Draft Constitution was that it explicitly directed the courts to consider the right to equality and dignity, international human rights instruments, social justice and public interest when enforcing the Bill of Rights. Unlike the current Constitution, the Second Draft Constitution vested the High Court with the power to grant prerogative orders as a remedy to a violation of the Bill of Rights.[65]

The Second Draft Constitution was tabled before the Constituent Assembly for deliberations. The question whether the Constituent Assembly could alter the Second Draft Constitution was hotly debated, and the nation was deeply divided. In the end, the Constituent Assembly extensively altered the Second Draft Constitution, provoking those opposing to boycott the remaining process. After deliberations, the Constituent Assembly adopted the Proposed Constitution in October 2014 (the "Proposed Constitution"), now awaiting its approval or disapproval in the Referendum. However, President John Pombe Magufuli has consistently insisted that making a new Constitution is not a priority of his regime.

The Bill of Rights in the Proposed Constitution builds on that of the Second Draft Constitution. It maintains all individual and group rights stipulated in the Second Draft Constitution and adds more individual and group rights, namely the right to health,[66] the right to clean water,[67]

[64] Article 48 of the Second Draft Constitution.
[65] Article 54(3) of the Second Draft Constitution.
[66] Article 51 of the Proposed Constitution
[67] *Ibid.*

rights of farmers, fishers, livestock keepers, and miners,[68] and the freedom of profession, art, discovery and invention.[69]

Inclusion of social rights in the Proposed Constitution is a very commendable progress. A few constitutions in the world contain social rights in their Bill of Rights. The Proposed Constitution subjects the enjoyment of some of these rights to the availability of resources.[70] This, also, is a common trend. International human rights instruments and domestic constitutions subject enjoyment of socio-economic rights to the availability of resources.[71]

Like the Second Draft Constitution, the Proposed Constitution explicitly directs the courts to consider international human rights instruments, social justice and public interest when enforcing the Bill of Rights.[72] It has also widened the *locus standi* in human rights litigations. It allows the Attorney General, victims of violations, personal representatives, and group or societal representatives to institute a human rights cause in the High Court to seek redress for violation of the Bill of Rights.[73]

Like the Second Draft Constitution, the Proposed Constitution empowers the High Court to grant prerogative orders as a remedy to a violation of the Bill of Rights.[74] It may also declare a law unconstitutional. It has, however, adapted the provision of the current constitution allowing the High Court, instead of declaring the violating conduct or law null and void, to give time to the particular authority or person to rectify impugned the law or conduct.[75] Where the High Court gives this order the impugned law or conduct shall be deemed to be

[68] Article 46 of the Proposed Constitution
[69] Article 59 of the Proposed Constitution
[70] Article 51(2) of the Proposed Constitution in respect of the right to health and the right to water.
[71] See, for example, Article 2(1) of the International Covenant on Economic Social and Cultural Rights, and Article 20(5) of the Constitution of Kenya, 2010.
[72] Article 65 of the Proposed Constitution. It is noteworthy that the Second Draft included also the right to equality and dignity in this respect.
[73] Article 65(4) of the Proposed Constitution.
[74] Article 65(3) of the Proposed Constitution.
[75] Article 65(6) of the Proposed Constitution.

valid until it is rectified or the period set by the High Court for rectification lapses, whichever is earlier. This procedure has been subject of criticisms including that: (a) it transfers the court's power to determine appropriate remedy to administrative organs; (b) it endorses wrongs by allowing an offending law or conduct to continue operating; and (c) it defeats the doctrine of separation of powers.

Despite its progressive features, the Proposed Constitution subjects the enjoyment of some rights to the confines of the laws to be enacted by the Parliament.[76] This trend has long been criticized for making human rights meaningless, because a law may itself infringe human rights. Although the judiciary has set safeguards if any law limits the enjoyment of human rights, the validity of the law will only be tested if a matter is brought to court. Moreover, having a provision that allows the Court to order rectification instead of declaring a law void, may further justify laws that wrongly restrict human rights until they are rectified.

[76]Article 67 of the Proposed Constitution.