

## ANALYSEN UND BERICHTE

### The Directive Principles of State Policy versus Duties of the Individual in East African Constitutions<sup>1</sup>

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#### **Introduction**

In East Africa it is only the two constitutions in Tanzania, that is the Constitution of the United Republic of Tanzania, 1977 and the Constitution of the Revolutionary Government of Zanzibar, 1984 which have provisions providing for the fundamental objectives and directive principles of state policy<sup>2</sup> and duties of the individual towards the state and the community.<sup>3</sup> The constitutions of Kenya and Uganda do not have such provisions. However, the Draft Constitution of Uganda which is still being discussed by the constituent assembly contains an elaborate part entitled "National Objectives and Directive Principles of State Policy and the Duties of the Individual".<sup>4</sup> But even in the case of the two constitutions in Tanzania the inclusion of such provisions is a recent development. The introduction of such clauses was effected in 1984 by the Fifth Constitutional Amendment Act, 1984<sup>5</sup> as far as the Constitution of the United Republic of Tanzania, 1977 is concerned, and in Zanzibar by promulgation of a new constitution in 1984 which replaced the Constitution of the Revolutionary Government of Zanzibar, 1979.

The introduction of such provisions came as a surprise to many Tanzanians for the following reasons. The 1984 constitutional changes in Tanzania were a culmination of a nine

<sup>1</sup> Überarbeitete Fassung der Herbert-Krüger-Gedächtnisvorlesung auf der 20. Tagung des Arbeitskreises für Überseeische Verfassungsvergleichung vom 23.-25. Juni 1995 in Hamburg.

<sup>2</sup> Entitled in the Constitution of Zanzibar as "Fundamental objectives and Directive principles of Zanzibar policy".

<sup>3</sup> Cited in the Constitution of Zanzibar as "Obligation of the people towards the society and state".

<sup>4</sup> Republic of Uganda, The Report of the Uganda Constitutional Commission: The Draft Constitution, Kampala, 1992.

<sup>5</sup> Act No. 15 of 1984.

month vigorous and lively constitutional debate initiated in 1983/84 by the then only political party in Tanzania, Chama cha Mapinduzi (CCM).<sup>6</sup> The National Executive Committee (NEC) of the CCM published proposals in areas in which it envisaged changes in the two constitutions of Tanzania.<sup>7</sup> In these CCM proposals which were the basis of the debate and later of the changes in the constitutions there was no mention at all of the need of including provisions on the directive principles of state policy, nor of duties of the individual towards the state and the community. But even during the constitutional debate, the need of introducing such clauses in the constitutions was not among the issues which were raised up and introduced for discussion by the people themselves in the course of the debate.

It is, however, significant to note that during the 1983/84 constitutional debate, the public refused to confine itself to the four corners of the CCM proposals. Among the issues which were not part of the CCM proposals but later introduced by the public and fervently discussed was the need of including a bill of rights in the constitutions.<sup>8</sup> This had consistently and persistently been refused by the government of Tanzania Mainland since independence in 1961 and in Zanzibar since the revolution of 12th January 1964. In the arguments of both the protagonists and those opposing the enactment of a bill of rights in Tanzania there was no mention at all of the directive principles of state policy or duties of the individual or the community. As much as the motives of the government including fundamental objectives and directive principles of state policy were not given, the inclusion in the Constitution of clauses on individuals' duties and obligations to the community and state has been interpreted as an attempt to whittle down the effect of the basic rights of the individual.<sup>9</sup> These clauses have mainly been borrowed from the African Charter on Human and Peoples' Rights which also enumerates individuals' duties to the community and state.<sup>10</sup>

<sup>6</sup> *Kabudi, P.J.A.M. / Mvungi, S.E.A.*, The Party System and Socialism in Tanzania, in: *Hartmann, J.* (ed.), *Re-Thinking the Arusha Declaration*, Copenhagen, Centre for Development Research / Axel Nielsen & Sons A/S, 1991, p. 88.

<sup>7</sup> *Chama cha Mapinduzi*, 1983 NEC Proposed Amendments to the Union Constitution and the Zanzibar Revolutionary Government Constitution, Dar es Salaam, Government Printer, 1983.

<sup>8</sup> *Kabudi, P.J.*, The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms, VRÚ 24 (1991), p. 272.

<sup>9</sup> *Shivji, I.G.*, *The Concept of Human Rights in Africa*, Dakar, Codesria Book Series, 1989; *Peter, C.M.*, *Human Rights in Africa: A Comparative Study of the African Charter of Human and Peoples' Rights and the New Tanzanian Bill of Rights*, Westport, Greenwood Press, 1990.

<sup>10</sup> For a detailed analysis of the Charter see *Kunig, Ph. / Benedek, W. / Mahalu, C.R.*, *Regional Protection of Human Rights by International Law: The Emerging African System*, Baden-Baden, Nomos Verlagsgesellschaft, 1985.

As far as the inclusion of fundamental objectives and directive principles of state policy in the two constitutions of Tanzania is concerned, most likely the impetus originated from Zanzibar as it was in the case of the bill of rights. The pressure bearing on the party and the government to accept the inclusion of the bills of rights in both the Constitution of Zanzibar, 1984 and the Constitution of the United Republic, 1977 as amended in 1984 has also been attributed, among others, to Zanzibaris. The constitutional debate also witnessed, among other issues, the demand of the Zanzibaris for more autonomy within the Union. The demand for more autonomy forced the then President of Zanzibar and Vice President of Tanzania, Aboud Jumbe, to take political responsibility by resigning from office for what was interpreted as anti-union campaign in the government of Zanzibar.<sup>11</sup>

However, it is believed that the strong reason was that delegates from Zanzibar in the NEC meeting, citing the tyranny they had suffered under the revolutionary government, insisted in the inclusion of a bill of rights in their constitution instead of leaving the individual in the hands of a benevolent and wise leader who is assumed to restrain himself from misusing his powers.<sup>12</sup> And since it would have been embarrassing for Tanzania, if the Constitution of Zanzibar had a bill of rights whereas that of the United Republic had none,<sup>13</sup> the NEC of the CCM directed the two governments to include bills of rights in the two constitutions operating in Tanzania.<sup>14</sup>

## **1. The Background of the Fundamental Objectives and Directive Principles of State Policy in the Commonwealth**

The inclusion of statements of national goals and directive principles in some of the constitutions of Commonwealth countries is contrary to the traditional Anglo-American view of what constitutes a constitution.<sup>15</sup> In that traditional concept a constitution is enacted for

<sup>11</sup> *Kabudi, P.J.*, The United Republic of Tanzania After a Quarter of a Century: A Legal Appraisal of the State of the Union of Tanganyika and Zanzibar, *La Revue Africaine de Droit International et Comparé (RADIC)* Vol. 5, 1993, pp. 310-339; *Kabudi, P.J.*, The Union of Tanganyika and Zanzibar: Examination of the Treaty of a Political Legal Union, *MWAZO Journal*, Vol. 6, No. 2, 1985, pp. 1-18; *Shivji, I.G.*, The Legal Foundation of the Union in Tanzania's Union and Zanzibar Constitutions, Dar es Salaam, Dar es Salaam University Press, 1990.

<sup>12</sup> *Shivji, I.G.*, Right-struggle and the Bill of Rights in Tanzania, *Zimbabwe Law Review*, Vol. 7 (1987); *Peter, C.M.*, Human Rights in Africa, op. cit. (fn. 9), pp. 5-6.

<sup>13</sup> *Shivji, I.G.*, op. cit. (fn. 8), p. 8.

<sup>14</sup> *Zanzibar Revolutionary Government*, Hoja ya Serikali ya Marekebisho ya Katiba ya Mwaka 1984, Majadiliano ya Baraza la Wawakilishi (Hansard), Baraza la Pili, Mkutano wa Kumi na Tatu, 9 Oktoba, 1984, Zanzibar, Al-Khariya Press Ltd., 1984, p. 21.

<sup>15</sup> *Lynch, C.J.*, Styles in the Drafting of some Pacific Constitutions, in: *Ghai, Y.H.* (ed.), *Law, Politics and Government in the Pacific Island States*, Institute of Pacific Studies, University of South Pacific, 1988, p. 209.

the sole purpose of establishing structures of government and its institutions and prescribing judicially enforceable rules of law. Such a constitution is classified as being "prescriptive".<sup>16</sup> Statements of national goals and directive principles are not part of the traditional Anglo-American view of constitutions because they are programmatic in nature, in the sense that they provide for a programme of a political, socio-economical and cultural development and ethical principles to be pursued by the government and other organs and they are normally non-justiciable, that is, they cannot be enforced in a court of law. A constitution containing such clauses is classified as "programmatic".<sup>17</sup>

As pointed out by Lynch, most of the constitutions in the Anglo-American tradition are generally "prescriptive" and rarely "programmatic" to the extent that most of the lawyers schooled in this tradition tend to consider that there is no real place in a constitution and constitutional law for statements of a programmatic kind.<sup>18</sup> If at all they were to be included in a constitution then they would have to be placed in the preambular clauses and not in the main provisions of the constitution.

It is this traditional view which was strictly adhered to by the United Kingdom of Great Britain and Northern Ireland in the writing of the independence constitutions to her former colonies with the exception of Ireland and India which emerged with independence constitutions incorporating directive principles of state policy. The Irish Free State (Saorstát Eireann) Act of 1922,<sup>19</sup> was the first country under British colonial domination

<sup>16</sup> Ibid., p. 212.

<sup>17</sup> Ibid., p. 213.

<sup>18</sup> Ibid.

<sup>19</sup> However, the enunciation of such principles incorporating social and economic rights found a distinctive place in the constitution of Ireland which came into force on December 29, 1937. Article 45 provides that: "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognizable by any Court under any provisions of this Constitution:

1. The state shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which justice and charity shall inform all the institutions of the national life.

2. The State shall, in particular, direct its policy towards securing – (i) That the citizen (all of whom, men and women equally, have the right to adequate means of livelihood) may through their occupation find means of making reasonable provision for their domestic needs. (ii) That the ownership and control of material resources of the community may be so distributed amongst private individuals and the various classes as the best to subserve the common good. (iii) That, especially, the operation of free competition shall not be allowed so to develop as a result of concentration of the ownership or control of essential commodities in a few individuals to the common detriment. (iv) That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole. (v) That there may be established on the land in economic security as many families as in the circumstances shall be practicable.

3. (i) The State shall favour and, where necessary, supplement private initiative in industry and commerce. (ii) The State shall endeavour to ensure that private enterprise shall be so conducted as to

that introduced a whole part on fundamental objectives and directive principles of state policy as part of the constitution. In the Commonwealth the Irish example was later followed by India in 1947,<sup>20</sup> by Pakistan in 1962<sup>21</sup>, by Sri Lanka in 1972<sup>22</sup>, by Bangladesh in 1972<sup>23</sup> and in Africa by Nigeria in 1979.<sup>24</sup> The constitutions of the Pacific Island states of Papua New Guinea, Tuvalu, Solomon Islands, Kiribati, Vanuatu, Belau and Western Samoa have provisions incorporating fundamental goals and directive principles of state policy.<sup>25</sup>

The fundamental objectives and directive principles of state policy cater for different fields such as political, economic, social, health, environment, education and culture. They also cohere with the notion of welfare state and welfare society, concepts which became more pronounced after the Second World War advocating an active participation and intervention of the state in social and economic sectors and supported the need for creating and maintaining such a state.<sup>26</sup> This is what before the recent changes in Eastern Europe was explained to be the 20th century bias towards socialism, no matter what that means.<sup>27</sup> As a result of that bias, according to de Smith, it became fashionable to "incorporate ideological pronouncements – principles by which the state ought to be guided or to which it ought to aspire (...)".<sup>28</sup> The role which is supposed to be played by the fundamental objectives and directive principles of state policy in India, and which may

ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation.

4. (i) The State pledges itself to safeguard with special care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan and the aged. (ii) The State shall endeavour to ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter a vocation unsuited to their sex, age or strength."

<sup>20</sup> *Markandan, K.C.*, Directive Principles of State Policy in the Indian Constitution, Jalandhar, ABS Publications, 1978, especially chapter 1 entitled "Directives: Origin, Content and Form" for the reasons of incorporation of such a chapter in the constitutions of the two states.

<sup>21</sup> *Wedel, H.*, Staatszielbestimmungen als Mittel der Verfassungsvergleichung, VRÜ 10 (1977), p. 85.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Read, J.S.*, The New Constitution of Nigeria, 1979: The Washington Model?, [1979] *Journal of African Law*, Vol. 23, No. 2, p. 148.

<sup>25</sup> *Ghai, Y.H.* (ed.), *Law, Politics and Government in the Pacific Island States*, op. cit. (fn. 15). In this region it is only the constitutions of Nauru, Federated States of Micronesia and the Marshall Islands with no such provisions.

<sup>26</sup> *Swarup, J.*, *The Constitution of India*, Vol. 1, Allahabad, Dandewal Publishing House, 1984, p. 540; *Markandan, K.C.*, op. cit. (fn. 20), Chapter 1.

<sup>27</sup> *Srivastava, P.B.*, *The Constitution of the United Republic of Tanzania 1977: Some Salient Features – Some Riddles*, Dar es Salaam, Dar es Salaam University Press, 1983, p. 1.

<sup>28</sup> *de Smith, S.A.*, *Constitutional and Administrative Law*, 2nd ed., 1973, London, Longman, p. 20.

be valid to those countries which followed the Indian precedent is articulated by two judges of the Indian Supreme Court, Hedge and Mukherjee, JJ., when they stated that:

"The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such social revolution the constitution seeks to fulfil the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense. Without faithfully implementing the Directive Principles, it is not possible to achieve the Welfare State contemplated by the Constitution."<sup>29</sup>

This bias of trying to build an egalitarian society and welfare state is also reflected in the Constitutions of Tanzania and Zanzibar in art. 8 (1) (b) and art. 9 (1) (b), respectively, stating that the welfare of the people shall be the primary purpose of government.

Actually, it is the Constitution Drafting Committee of Nigeria which came out with a long statement on the reasons and need for a constitution of a country not to include only provisions on division of powers and governance, but also principles, ideals and objectives of the social order it wants to achieve. In its report the Committee argued that:

"A Constitution should not be simply a code of legally enforceable rules and regulations; it is a charter of government, and government involves relations and concepts that are not amenable to the test of justiciability or capable of enforcement only in courts of law. The objectives may be in the nature of immediate specific policy goals or of long-term ideals (...). Unless the goals and the fundamental attitudes and values that should inform the behaviour of its members and institutions are clearly stated and accepted, a new state is likely to find itself rudderless, with no sense of purpose and direction. By defining the goals of society prescribing the institutional forms and procedures for pursuing them, a statement of fundamental objectives and directive principles in our constitution seeks to direct and concert the efforts and actions of the people towards the achievement of these goals. In this way it seeks to unite the society into one nation bound together by common institutions and procedures, and above all an acceptance of common objectives and destiny."<sup>30</sup>

For newly independent states, the inclusion of fundamental objectives and directive principles of state policy was aimed at describing the most urgent obligations of the new governments and goals on matters which the society had not yet attained and requiring implementation by the government.<sup>31</sup> Now even in constitutions of some long established democracies the inclusion of such goals and objectives is not only becoming acceptable

<sup>29</sup> (1973) 4 SCC 225.

<sup>30</sup> *Read, J.S.*, *The New Constitution of Nigeria*, op. cit. (fn. 24), p. 136.

<sup>31</sup> *Wedel, H.*, op. cit. (fn. 21), pp. 83-85.

but is also slowly becoming a normal practice in the drafting of constitutions. The most common objective included in such constitutions, which is also not controversial in the discussion about fundamental objectives and directive principles of state policy, is that of the protection of the environment.<sup>32</sup> The inclusion of other objectives of state policy enumerating economic and social rights, such as the right to work, is controversial and has attracted criticism from some legal scholars on the ground that, although it is a good idea to have such noble goals in the constitution, it is nevertheless difficult to realize them in practice.<sup>33</sup> This may be one of the reasons why in most constitutions of countries following the common law system such provisions are declared to be non-justiciable in courts of law.

Lynch identifies three main ways which have been used to incorporate provisions on fundamental objectives and directive principles of state policy in different constitutions.<sup>34</sup> These ways are first by simply incorporating them in a preamble, with no special effect being given; second is by incorporating them into a preamble, but with substantive provisions as to their effect, and third is by incorporating them in the body of the constitution, with or without substantive provision to their effect.

## **2. The Status of the Preamble and the National Ethic in the Constitutions of Tanzania**

Despite the fact that Tanzania introduced for the first time provisions on fundamental objectives and directive principles of state policy in her constitutions in 1984, the need of having ethical principles in the politics or the Constitution of Tanzania was already raised in 1964 by the first president of Tanzania, Julius Kambarage Nyerere.<sup>35</sup> In the following year, by the enactment of the Interim Constitution of the United Republic of Tanzania of 1965, Tanzania turned into a *de jure* one-party state. The decision to turn Tanzania into a one-party state was taken by TANU leadership without consulting its members or the people of Tanzania.<sup>36</sup> After the then ruling political party in Tanzania Mainland, TANU

<sup>32</sup> Graf Vitzthum, W., Auf der Suche nach einer sozio-ökonomischen Identität? – Staatszielbestimmungen und soziale Grundrechte in Verfassungsentwürfen der neuen Bundesländer, VBfBW 1991, pp. 404-414.

<sup>33</sup> v. Münch, I., The Concept of Constitution, in: Mtaki, C.K. / Okema, M., Constitutional Reforms and Democratic Governance in Tanzania, Dar es Salaam, Faculty of Law, University of Dar es Salaam / Friedrich-Naumann-Stiftung, 1994, p. 17.

<sup>34</sup> Lynch, C.J., op. cit. (fn. 15), p. 213.

<sup>35</sup> Nyerere, J.K., Guide to the One Party State Commission, in: Freedom and Unity, Dar es Salaam, Oxford University Press, 1966, pp. 261-290.

<sup>36</sup> Mlimuka, A.K.L.J. / Kabudi, P.J.A.M., The State and the Party, in: Shivji, J.G. (ed.), The State and the Working People in Tanzania, Dakar, Codesria Book Series, 1986, pp. 60-61; Mwansasu, B.U., The

had decided that Tanzania should be a democratic one-party state, the President appointed a Presidential Commission for the Establishment of a One Party State<sup>37</sup> which solicited and received views and recommendations from different people and institutions with clear terms of reference not to ask the people on whether Tanzania should or should not be a one-party state, but to ask them on how to implement the decision of transforming it into a one-party state.

In the Presidential guidance entitled "Guide to the One-Party State Commission",<sup>38</sup> the then President of Tanzania, Julius Nyerere, instructed the Commissioners, during their deliberations to observe the following principles, *inter alia*, Tanganyika shall remain a Republic with an executive Head of State; the Rule of Law and the independence of the Judiciary shall be preserved; there shall be complete equality for all Tanganyikan citizens and there shall be the maximum political freedom for all citizens within the context of a single movement.<sup>39</sup>

The Commission was further instructed to observe the "National Ethic" drafted by Nyerere and which has been characterised by some scholars as "another characteristically brilliant idea" of Nyerere.<sup>40</sup> The National Ethic was conceived as a convention providing for certain ethical principles which were the basis of the Tanganyika nation permeating the whole political, economic and social organisation of the state. Indeed, although it has not been said, the idea was influenced by the typical Anglo-Saxon attitude towards conventions and customs, which are not enacted by the Parliament, but after usage for a long time acquire such a status of law that no one can abrogate them.

Indeed, the National Ethic was supposed to be a "kind of compelling moral and political obligation restraining the Government from excessive use of its powers, and instilling in the people a corresponding power and confidence to resist any excessive exercise of executive power."<sup>41</sup> It was believed by the Commission that, once the National Ethic was

Changing Role of TANU, in: *Mwansansu, B.U. / Pratt, C.* (eds.), *Towards Socialism in Tanzania*, Dar es Salaam, Tanzania Publishing House, 1979, p. 172; *Pratt, C.*, *The Critical Phase in Tanzania*, London, Oxford University Press, p. 187.

37 Government Notice No. 200 of 1964.

38 *Nyerere, J.K.*, *Freedom and Unity*, op. cit. (fn. 35), pp. 261-290.

39 *Ibid.*, pp. 261-262.

40 *Mwaikusa, J.T.*, *Genesis of the Bill of Rights in Tanzania*, in: 3 *RADIC* (1991), p. 682.

41 *Mwaikusa, J.T.*, *Government Powers and Human Rights in Africa: Some Observations from the Tanzanian Experience*, in: *Rembe, N.S. / Kalula, E.* (eds), *Constitutional Government and Human Rights in Africa*, *Lesotho Law Journal*, Vol. 6, No. 2, p. 87; *Nyerere, J.K.*, *Freedom and Unity*, op. cit. (fn. 35), pp. 174-175 and 261-261.

instilled "in the moral imagination of the people",<sup>42</sup> they would be able to resist misuse of power and dare to utter in the words of Nyerere, "We won't have it from anybody, President or President Squared, we won't have it".<sup>43</sup>

However, the National Ethic remained a pious wish of its framer as neither him nor the Commission came out with any proposals as to the means and mechanism of how the National Ethic was to be inculcated in the people and its objectives achieved.<sup>44</sup> It is this National Ethic, which the Presidential Commission adopted while it rejected the inclusion of a bill of rights in the Constituion, that has remained a dead letter and has seldom been referred to. The gist of the arguments advanced by the Presidential Commission in support of its decision was that a bill of rights limits in advance the measures which the Government may take to protect the young nation from threats and disorder.<sup>45</sup> The National Ethic has been seldom referred to by politicians, with exception of Nyerere himself, or by the courts. Actually, it is only once that the Court of Appeal referred to the National Ethic. This was in the case of *Godfrey James Ihunya and Others v. Republic*<sup>46</sup> on charges of torture committed by police and security officers during interrogation of suspects of witchcraft, in which Nyalali, CJ., strongly stated that those acts:

"grossly contravened and undermined the National Ethic and Belief of our country which are based on respect for human dignity and liberty to life."

Together with the adoption of the National Ethic as a means of developing a tradition of respect for freedoms and rights of the individual, the Commission recommended that these ethical principles should be included in the constitution in the form of a preamble.<sup>47</sup> Signifying the idea of a national ethic which morally binds both the people and their leaders, the Preamble of the Interim Constitution of the United Republic, 1965 provided, *inter alia*, that:

"Whereas freedom, justice, fraternity and concord are founded upon the recognition of the equality of all men and 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:

<sup>42</sup> Report of the Presidential Commission on the Establishment of a Democratic One-Party State, op. cit., p. 30.

<sup>43</sup> *Nyerere, J.K.*, Freedom and Unity, op. cit. (fn. 35), p. 174.

<sup>44</sup> *Mwaiikusa, J.T.*, Genesis of Bill of Rights, op. cit. (fn. 36), p. 682.

<sup>45</sup> *Cliffe, L.* (ed.), One Party Democracy: The 1965 General Elections, Nairobi, East African Publishing House, 1968, p. 461.

<sup>46</sup> [1980] TLR 197.

<sup>47</sup> *Ibid.*, p. 463.

And when men are united together in a community it is their duty to respect the rights and dignity of their fellow men, to uphold the laws of the State, and to conduct the affairs of the State so that its resources are preserved, developed and enjoyed for the benefit of its citizens as a whole and so as to prevent the exploitation of one man by another:

And whereas such rights are best maintained and protected and such duties are most equitably disposed in a democratic society where the government is responsible to a freely elected Parliament representative of the People and where the courts of law are free and impartial:"

However, the preamble somehow changed with the adoption of a new constitution for Tanzania. The preamble to the 1977 Constitution is not as elaborate as the previous ones.<sup>48</sup> The Preamble provides, *inter alia*, that:

"Whereas we, the People of the United Republic of Tanzania have firmly and solemnly resolved to found in our country a socialist society which adheres to the principles of freedom, justice, fraternity and concord:

And whereas those principles are only realised in a democratic society the Government of which is responsible to a freely elected legislature representative of the citizens and whose judiciary is independent and dispenses justice without fear or partiality of any kind, thereby securing the maintenance of all human rights and the most equitable discharge of the duties of all persons."

Despite the existence of such a noble preamble in the Constitution of Tanzania, and the recommendation of the Commission that "everything possible should be done to win for these principles a strong commitment from the citizens",<sup>49</sup> the courts maintained a common law tradition that preambles do not form a justiciable part of laws or constitutions.

<sup>48</sup> The Tanganyika Independence Constitution was introduced by a long preamble to the Constitution in the following terms: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace: And whereas the said rights include the right of the individual, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to life, liberty, security of the person, the enjoyment of property, the protection of the law, freedom of conscience, freedom of expression, freedom of assembly and association, and respect of his private and family life: And whereas the said rights are best maintained and protected in a democratic society where the government is responsible to a freely-elected Parliament representative of the people and where the courts of law are independent and impartial..." The same preamble was retained in 1962 when Tanganyika adopted a Republican constitution.

<sup>49</sup> *Ibid.*

Both the High Court and the Court of Appeal of Tanzania have given their opinion on the status of the preamble in the Constitution. In the case of *Hatimali Adamji v. E.A.P. & T*,<sup>50</sup> a Tanzanian national of Asian origin who was retired in order to facilitate Africanisation in the Corporation, challenged that decision on the ground that it was based on racial discrimination and thus repugnant to the basic rights guaranteed in the Preamble to the Constitution. In the High Court the late Biron, J., held that "the preamble to a constitution does not in law constitute part of the law of the land." During the hearing, Mr. Bishota, who was the counsel for the plaintiff in this case, had strongly, but in vain, submitted before Judge Biron that:

"The preamble to the Interim Constitution states in no uncertain terms that all human beings are equal. The preamble is of course part of the Interim Constitution and therefore it is a fundamental piece of our national legislation."<sup>51</sup>

The same position as that of the High Court, that a preamble to a constitution is not part of the constitution was reiterated by the Court of Appeal in the case of *The Attorney-General v. Lesinai Ndeinai and Two Others*,<sup>52</sup> where Kisanga, J.A., held that:

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

However, there are those who believe that the position taken by the courts in Tanzania on the status of the preamble to the Constitution was not correct. They argue that, despite the fact that common law considers preambles to be ancillary to a particular piece of legislation and of moral rather than legal effect,<sup>53</sup> still practice in East Africa, as evidenced in case law, has been different. They have argued that courts in East Africa have considered marginal notes to a section of a legislation and introductory part of a legislation to be law,<sup>54</sup> therefore, the preamble to the constitution in their argument forms part of it and is not merely declaratory or explanatory in nature.<sup>55</sup>

<sup>50</sup> 1973 LRT n. 6.

<sup>51</sup> *Ibid.*, p. 16; cf. Kenyan decision in *Madhwa v. City Council of Nairobi* [1968] E.A. 406 in which the provision on non-discrimination was in the bill of rights and it succeeded.

<sup>52</sup> [1980] TLR 214.

<sup>53</sup> *Martin, R.*, *Personal Freedom and the Law in Tanzania*, Nairobi, Oxford University Press, 1974, pp. 43-44.

<sup>54</sup> *Kalunga, L.T.*, *Human Rights and the Preventive Detention Act 1962 of the United Republic of Tanzania: Some Operative Aspects*, *Eastern Africa Law Review*, Vol. 11-14, 1987-81, pp. 309-312, citing the following cases: *Sanga v. Baya* [1973] E.A. 312; *D.T. Dobie & Co. (U) Ltd. v. Commis-*

The status of the preamble to the constitution in the French legal tradition is different to that in the common law system. Following the French legal tradition, in African countries which were former French colonies the preamble to the constitution is taken to be a justifiable part of the constitution. In their part the preamble reiterates the principles promulgated by the French Revolution of freedom, justice and fraternity as part of the fundamental objectives of state.<sup>56</sup>

### 3. Fundamental Goals and Directive Principles of State Policy in the Tanzanian Constitutions

The provisions contained in the fundamental objectives and directive principles of state policy in the constitutions of the United Republic of Tanzania have been influenced in their word import from the National Ethic as issued by Nyerere. However, in the case of Zanzibar the precedent adopted in the drafting of its fundamental goals and objective principles of state policy seems to be the Constitution of the Federal Republic of Nigeria of 1979.<sup>57</sup> Actually, the provisions are *in pari materiae* except that in the case of Zanzibar they stress the need to follow the policy of socialism and self-reliance, whereas the Constitution of Nigeria emphasizes unity and faith, peace and progress.<sup>58</sup>

Fundamental objectives and directive principles of state policy are contained in chapter two of the respective constitutions of Tanzania and Zanzibar. In the case of the United Republic of Tanzania they are not enforceable in a court of law as expressly provided under article 7 (2) of the Constitution of Tanzania. It clearly states that:

"The provisions of this part in this Chapter shall not be enforceable by any court; no court shall have power to determine any issue or question as to whether any action or

*sioner of Customs and Excise* [1976] E.A. 304 and *Abdas v. Republic*, Court of Appeal of Tanzania (Unreported.).

<sup>55</sup> *Kalunga, L.T.*, op. cit. (fn. 54), p. 311.; cf. *Häberle, P.*, Präambeln im Text und Kontext von Verfassungen in: *Rechtsvergleichung im Kraftfeld des Verfassungsstaates: Methoden und Inhalte, Kleinstaaten und Entwicklungsländer*, Berlin, Duncker & Humblot, 1992, p. 188.

<sup>56</sup> *Krüger, H.*, Brüderlichkeit – das dritte fast vergessene Ideal der Demokratie, in: *Festgabe für Th. Maunz*, München 1971, p. 251, quoted in *Wedel, H.*, op. cit. (fn. 21), p. 83.

<sup>57</sup> *Mlimuka, A.K.L.J.*, *Democratization and the Constitutional Development in Zanzibar 1964-1984*, LL.M. Dissertation, University of Dar es Salaam, 1986, pp. 327-328, and p. 361.

<sup>58</sup> *Ibid.* Article 13 of the Constitution of Nigeria, 1979 resembled article 8 of the Constitution of Zanzibar; art. 14 (1) to art. 9 (1); art. 14 (2) (a) to art. 9 (2) (a); art. 14 (2) (b) to art. 9 (2) (b); art. 14 (2) (c) to art. 9 (2) (c); art. 14 (3) to art. 9 (3); art. 15 (3) (a) and (b) to art. 10 (1); art. 15 (5) to art. 10 (2); art. 16 (1) (a) and (b) to art. 10 (3); art. 16 (1) (c) to art. 10 (4); art. 17 (1) (a), (b) and (c) to art. 10 (5); arts. 18 and 20 to art. 10 (6).

omission by any person or authority or as to whether any legislation or any judicial decision is in conformity with the provisions of this part of this Chapter."

The Constitution of Zanzibar, under article 8, which enjoins the government and all its organs to apply and observe the principles, is silent on whether its provisions can be enforced or not. Therefore, despite their nature and the position in constitutions of other countries, it may theoretically be safely assumed that they are justiciable in Zanzibar, although up to now there is no case their enforcement has been filed in the Zanzibar courts.

Despite their non-justiciability in the Constitution of Tanzania, still under article 7 (1) of the Constitution, all organs of the state, i.e. the Executive, Legislative and Judicative, are required to take cognizance of that chapter, observe and apply all its provisions. The article stipulates that:

"Notwithstanding the provisions of sub-section (2), it shall be the duty and responsibility of the Government, all its organs and all persons or authorities exercising executive, legislative or judicial functions to take cognizance of, observe and apply all provisions of this Part of this Chapter."

A set of objectives and directive principles are enumerated in articles 8 and 9 of the Constitution of Tanzania. Those of Zanzibar are contained in articles 8, 9 and 10 of the Constitution. They provide for political, economic, social, health, educational and cultural objectives. Living to the ideological aspirations of the time when they were drafted, both constitutions state categorically that the state will be based on the principles of *Ujamaa na Kujitegemea*, that is, African Socialism and self-reliance,<sup>59</sup> and on the principles of democracy and social justice.<sup>60</sup>

Article 9 of the Constitution of Tanzania reproduces, with minor amendments to include aspects of *Ujamaa*, most of the principles enunciated in the National Ethic, and is exactly the same as the objectives and goals contained in the Constitution of the CCM. It is to be seen whether in future, with the introduction of the multi-party system in Tanzania, the policy of *Ujamaa na Kujitegemea* will be retained in the two constitutions as the policy of the state. The removal or retention of *Ujamaa na Kujitegemea* as state policy enshrined in the Constitution was debated in Parliament in April, 1992 during the debate of the Eighth Constitutional Amendment to the Constitution of Tanzania, 1977 which ushered into the multi-party system.<sup>61</sup> The Parliament decided that the words *Ujamaa na Kujitegemea* should remain in the constitution reflecting the continued pursuance of that policy in

<sup>59</sup> Article 9 (1) and article 9 (1) of the Constitutions of Tanzania and Zanzibar, respectively.

<sup>60</sup> *Ibid.*

<sup>61</sup> United Republic of Tanzania, Bill Supplement, No. 1, 3rd April, 1993.

Tanzania. The only sub-article which was amended was (j) in which the words "and that the Government owns or controls major means of production" were repealed. This conforms with the policy of economic liberalisation introduced as part of the Economic Recovery Plan initiated at the behest of the International Monetary Fund and the World Bank.<sup>62</sup>

Article 9 of the Constitution of Zanzibar and article 8 of the Constitution of Tanzania provide for the sovereignty of the people and the relationship between the government and the people as one of the fundamental objectives and directive principles. Article 8 (1) of the Constitution of Tanzania, which is *in pari materiae* with article 9 (1) of the Constitution of Zanzibar, except that the latter contains the words "based on the principles of socialism and self-reliance", states that:

"The United Republic of Tanzania is a state pursuing the principles of democracy and social justice and accordingly –

- (a) sovereignty belongs to the peoples and it is from them that the Government, through this Constitution, derives all its powers and authority;
- (b) the welfare of the people shall be the primary purpose of Government;
- (c) the Government shall be responsible and accountable to the people; and
- (d) the people shall participate in the affairs of their Government in accordance with the provisions of this constitution.

Under sub-article (2) of the same provision both constitutions stipulate that the government of the United Republic of Tanzania and the Revolutionary Government of Zanzibar and their organs need to be structured and composed and conduct and discharge their affairs taking into account the need to promote national unity and secure the national dignity.

This provision is followed by clauses specifically dealing with political, economic, social, health, educational and cultural objectives as well as human resources utilisation objectives. In the case of the Constitution of Zanzibar each item is placed in a separate clause whereas the Constitution of Tanzania places all under one clause. Under political objectives, the Constitution of Zanzibar mentions the need for promoting national integration by the government providing adequate facilities for and encourage free mobility of the people, goods and services throughout Zanzibar and to secure full residence rights for every Zanzibari in all parts of Zanzibar.<sup>63</sup> Political objectives also include the duty of the Revolutionary Government of Zanzibar to abolish all corrupt practices and abuse of

<sup>62</sup> Campbell, H. / Stein, H., Tanzania and the IMF: The Dynamics of Liberalization, Boulder, Colorado, Westview, 1992.

<sup>63</sup> Article 10 (1) of the Zanzibar Constitution.

power.<sup>64</sup> On economic objectives the constitution emphasises the need for the state to control the national economy in such a manner as to secure the maximum welfare of the people and for the state to manage and operate the major sectors of the economy.<sup>65</sup> It includes the government being required to direct its policy towards ensuring the promotion of a planned and balanced economic development, and that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of the few individuals or a group.<sup>66</sup>

The social objectives provided for by the Constitution of Zanzibar resemble some of the fundamental rights and freedoms of the individual contained in the bill of rights part of the constitution. Some of them like the independence of the judiciary in fact fit to be considered as political objectives rather than social objectives as designated by the Constitution of Zanzibar. It is stated under the provision on social objectives that, in furtherance of its policy, the government "shall ensure that every citizen shall have equality of rights, obligations and opportunities before the law; that the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced and that the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained."<sup>67</sup>

In the implementation of health, educational and cultural objectives, the state is required to direct its policy towards ensuring that there are adequate medical and health facilities for all persons, equal and adequate educational opportunities at all levels and that Zanzibar culture is enhanced and protected.<sup>68</sup>

In what has been termed as human resources utilisation objectives, the state is supposed to ensure that every able bodied person does work, and that provision is made for public assistance in deserving cases or other conditions of need including the aged, the sick, the children and the crippled.<sup>69</sup>

The Constitution of Tanzania on the other hand provides for all the objectives in one article, that is article 9 (1). The article provides in extenso that:

"The object of this constitution is to facilitate the building up of the United Republic as a nation of equal and free individuals enjoying freedom, fraternity and concord,

<sup>64</sup> Article 10 (2) of the Zanzibar Constitution.

<sup>65</sup> Article 10 (3) of the Zanzibar Constitution.

<sup>66</sup> Article 10 (4) of the Zanzibar Constitution.

<sup>67</sup> Article 10 (5) of the Zanzibar Constitution.

<sup>68</sup> Article 10 (6) of the Zanzibar Constitution.

<sup>69</sup> Article 10 (7) of the Zanzibar Constitution.

through the pursuit of the policy of Ujamaa and Self reliance, which is the creative application of socialist principles to the conditions prevailing within the United Republic. Consequently, the state authority and all its agencies are required to direct all their policy and business towards securing –

- (a) the maintenance of respect and due regard for the dignity and the other rights of man;
- (b) the preservation and compliance with the requirements of the laws of the land;
- (c) the conduct of public affairs in a manner designed to ensure that the national resources and heritage are harnessed, preserved and applied toward the common good and the prevention of the exploitation of one man by another;
- (d) the promotion of centrally planned and balanced development of the national economy;
- (e) that every able bodied person has opportunity to work, work being lawful activity whereby a person earns his livelihood;
- (f) the maintenance and upholding of the dignity of man through full compliance with the provisions of the Universal Declaration of Human Rights;
- (g) that the Government and all public institutions provide equal opportunities to all citizens, men and women alike, irrespective of the colour, race, tribe or religion of a person or his station in life;
- (h) that all forms of injustice, intimidation, discrimination, corruption, oppression or favouritism are eradicated;
- (i) that the material resources of the nation are harnessed and exploited as to accord priority to the development of the people and, especially, to the eradication of poverty, ignorance and disease;
- (j) that the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals;
- (k) that the country is governed in compliance with the principles of democracy and socialism."

Article 9 (1) of the Constitution of Tanzania, 1977 enumerating the fundamental objectives and directive principles of state policy is to a great extent influenced by some of the principles enunciated in the National Ethic of which some deal with freedoms and rights of the individual and the remaining are policy directives and fundamental objectives directed to the state. The National Ethic provided in extenso that:

- "1. The fundamental equality of all human beings and the right of every individual to dignity and respect.
2. Every Tanganyika citizen is an integral part of the nation and has the right to take an equal part in government at local, regional, and national level.

3. Every individual citizen has the right to freedom of expression, of movement, of religious belief, of association within the context of the law, subject in all cases only to the maintenance of equal freedom for all other citizens.
4. Every individual has the right to receive from the society protection of his life, and of property held according to law, and to freedom from arbitrary arrest. Every citizen has the corresponding duty to uphold the law, constitutionally arrived at, and to assist those responsible for the law enforcement.
5. Every individual citizen has the right to receive a just return for his labour, whether by hand or brain."<sup>70</sup>

It was further provided in the guidance issued to the Commission, *inter alia*, that:

- (i) The object of Government shall be to establish complete equality of opportunity for all Tanganyika citizens in all fields of endeavour.
- (ii) There shall be no discrimination against any Tanganyika citizen on grounds of race, tribe, colour, sex, creed, or religion. Temporarily this shall not preclude the Government or any other appropriate authorities, from taking steps to correct imbalance which results from past discrimination on any of these grounds.
- (iii) There shall be no propagation of group hatred, nor of any policy which would have the effect of arousing feelings of disrespect for any race, tribe, sex or religion.
- (iv) All Tanganyika citizens shall be equally subject to the laws of the country, and no one whatever his political, social or economic position should be able to claim or obtain exemption from their implementation.
- (v) All Tanganyika citizens shall have the right to fair trial by an impartial judiciary whose responsibility is the upholding of the laws constitutionally enacted."<sup>71</sup>

#### **4. The Attitude of the Judiciary towards the Directive Principles of State policy**

Although fundamental objectives and directive principles of state policy are not justiciable, this part of the Constitution has played a significant role in the development of human rights jurisprudence in Tanzania. The attitude of both the High Court and Court of Appeal towards the application of the fundamental objectives and directive principles of state policy in relation to the furtherance of the rights and freedoms of the individual has so far been positive.<sup>72</sup> Article 9 (1) (f) of the Constitutions incorporates the Universal Declaration of Human Rights (UDHR) to be part of the Constitution of Tanzania. The

<sup>70</sup> Nyerere, J.K., op. cit. (fn. 35), p. 262.

<sup>71</sup> Ibid.

<sup>72</sup> See judgments of Mwalusanya, J. in the High Court and those of Nyalali, C.J. and Makame, J.A. in the Court of Appeal.

Court of Appeal was the first to affirm in case law that the UDHR is part of the Constitution of Tanzania by virtue of this article and, therefore, applicable in municipal law. In its judgment in the case of *Director of Public Prosecutions v. Ally Haji Ahmed and 10 Others*<sup>73</sup> the Court of Appeal applied the provisions of UDHR in interpreting article 13 of the Constitution of Tanzania. The same has been reiterated in the High Court, by Mwalusanya, J., in the case of *Ephrahim v. Holaria Pastory*.<sup>74</sup> Article 9 (1) (f) stipulates, *inter alia*, that:

"The state authority and all its agencies are required to direct all their policy and business towards securing the maintenance and upholding of the dignity of man through full compliance with the provisions of the Universal Declaration of Human Rights."

The courts in Tanzania, both the High Court and the Court of Appeal, have used this article of the Constitution to invoke the provisions of the UDHR in the application and interpretation of the Tanzanian bill of rights. Unlike the Constitution of Tanzania, the provisions of fundamental objectives and directive policy in the Constitution of Zanzibar do not incorporate the UDHR as part of it. However, under the article 10 (5) which provides for social objectives, it is stated, *inter alia*, that the government shall ensure that every citizen shall have equality of rights, obligations and opportunities before the law, and that the sanctity of human person shall be recognised and human dignity shall be maintained and enhanced. Nevertheless, in practice, the High Court of Zanzibar has applied the UDHR for example in a case of *Asha bint Khamis Thuey v. Abdissalaam Haji Dau*<sup>75</sup> dealing with the rights of a child. This was an appeal to the High Court from the judgment of Kadhi's Court which applied Islamic law in determining the custody of children after divorce. In his judgment in this appeal the Chief Justice of Zanzibar, Hon. Augustino Ramadhani (as he then was), applied without any reservations or qualifications the provision of UDHR on the rights of a child, especially emphasising that in any decision the welfare of the child is paramount and comes first.

But it is imperative to note that this is only one provision in this part of the constitution upon which the courts have aired their positions. Probably they may adopt the same or a different position when they are deliberating with other provisions for example on social, educational and human resources utilisation objectives, and especially if they conflict with the provisions on basic rights and freedoms of the individual.

Turning to India where a number of cases dealing with directive principles have been decided, initially, the general attitude of the judiciary was that the directives should not

<sup>73</sup> Criminal Appeal Case Nos. 44 and 45 of 1985 (Unreported).

<sup>74</sup> [1990] LRC (Const.) 757 where he held that "the Universal Declaration of Human Rights (1948), which is part of our Constitution by virtue of art. 9 (1).."

<sup>75</sup> Civil Appeal No. 40 of 1983.

only be subordinated to the fundamental rights but could not be given effect in a conflict, in particular case, with the operation of any other provision of the Constitution for the mere reason that the directives were not enforceable in a court of law.<sup>76</sup> The courts have further held that the state has a limited power to make laws, in accordance with the directive principles, subject to the powers conferred on the Executive and the Legislature and also to other provisions of the constitution.<sup>77</sup>

In recent decisions the judiciary has somehow modified its position by stating that, although the directive principles should conform to and run subsidiary to the chapter on fundamental rights, it would not reject the directive principles but would give it a harmonious interpretation, provided the executive and the legislature, while implementing the directive principles, did not take away or abridge the fundamental rights.<sup>78</sup>

Talking *ex-cathedra* to members of the Faculty of Law of the University of Dar es Salaam in 1985, the Chief Justice of Tanzania, the Hon. Francis Nyalali dwelt at length on the similarities and parallels between the directive principles of state policy in the Indian Constitution and the fundamental goals and operative principles of state policy in Tanzania.<sup>79</sup> Showing his preferences, the Chief Justice quoted with approval views of Justice Ray<sup>80</sup> and the Chief Justice of India in 1985<sup>81</sup> that the directive principles are also fundamental. In summing up the envisaged position in Tanzania in the light of the Indian jurisprudence on the matter, Chief Justice Nyalali stated that:

"These views of the Supreme Court of India can be applied *mutatis mutandis* to our Fundamental Goals and Operative Principles of State Policy in conjunction with our Bill of Rights. It follows therefore that the provisions of the Universal Declaration of Human Rights, which is one of the Goals and Operative Principles of State Policy under our constitution, are required guide and motivation for all the activities of organs of state, including the courts. It can thus be said that although the failure by

<sup>76</sup> *Markandan, K.C.*, Directive Principles of State Policy in the Indian Constitution, op. cit. (fn. 20), p. 259.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, p. 299.

<sup>79</sup> *Nyalali, F.*, The Bill of Rights in Tanzania, a Public Lecture delivered on the 5th September, 1985 at the Faculty of Law of the University of Dar es Salaam, p. 8.

<sup>80</sup> *Ibid.*, Nyalali, CJ., quotes Mr. Justice Ray saying : "The Directive Principles are also fundamental. They can be effective if they are to prevail over fundamental Rights of a few in order to subserve the common good and not to allow economic system to result to the common detriment".

<sup>81</sup> *Ibid.*, quoting the then Chief Justice of India, by then an ordinary justice of the Supreme Court who stated: "Our constitution aims at bringing about a synthesis between 'Fundamental Rights' and the 'Directive Principles of State Policy', by giving to the former a pride of place and to the later a place of permanence. Together, not individually, they form the core of the Constitution. Together, not individually, they constitute its true conscience".

any person or state organ to observe any provisions of the Universal Declaration of Human Rights will not attract legal censure or invalidation in courts, I have no doubt that the courts are required to be guided by it in applying and interpreting the enforceable provisions of the Bill of Rights as well as the other provisions and all other laws. I find support for this proposition from the recent decision of the Court of Appeal of Tanzania in the case of the *Director of Public Prosecutions vs Ally Haji Ahmed and 10 others* (Criminal Appeal Case Nos. 44 and 45 of 1985 – not yet reported)."

## 5. Background to the Duties of the Individual in Tanzania

The African Charter on Human and Peoples' Rights (Afr.CHPR) has had an impact in the changes made in 1984 to the two constitutions in Tanzania. It seems to a certain extent to have influenced some of the provisions on duties of the individual in the Constitutions of the United Republic of Tanzania and the Revolutionary Government of Zanzibar, respectively. The Charter which came into force on 21st October, 1986 has already been ratified or acceded to by 41 African countries, making it the largest regional human rights system.<sup>82</sup> It provides for both aspects of furtherance of human rights, that is the promotion and protection of human rights. Welch explains that while "promotion" involves steps to bolster awareness of human rights, their "protection" means acting directly on behalf of its individuals whose rights have been abridged.<sup>83</sup> Thus the "promotion affects rights, promotion effects them."<sup>84</sup>

The Charter, which contains an elaborate preamble and 68 articles is divided into three parts. Part one is on rights and duties (articles 1-29). It is subdivided into two chapters, with one of the chapters providing for human and peoples' rights (arts. 1 to 26). The rights are also divided into three categories: civil and political rights (arts. 1-12), economic, social and cultural rights (arts. 15-18), and peoples' rights (arts. 19-24). The duties (arts. 27-29) which are enumerated in the charter are also divided into two groups. These are the duties of states (arts. 25 and 26) and the duties of individuals (arts. 27 to 29). Part two of the charter addresses itself to measures of safeguard which are subdivided into four chapters dealing with, *inter alia*, the establishment and organisation of the Commission

<sup>82</sup> *D'sa, R.*, The Domestic Application of the African Charter on Human and Peoples' Rights, in: *Human Rights Unit, Developing Human Rights Jurisprudence, Vol. 2, A Second Judicial Colloquium on the Domestic Application of International Human Rights Norms*, London, Commonwealth Secretariat, 1989, p. 101.

<sup>83</sup> *Welch, C.*, The Organisation of African Unity and the Promotion of Human Rights, in: *Journal of Modern African Studies*, 16, 4 (1978), p. 536.

<sup>84</sup> *Ibid.*

on Human and Peoples' Rights, the mandate of the commission, the procedure for the commission, and the applicable principles.

The Charter contains classical rights and freedoms of the individual as other regional and international human rights instruments, and it has much in common with these instruments,<sup>85</sup> of course with some modifications and variations. In some cases it omits certain rights which are provided in other instruments and includes some which are not contained in such instruments.<sup>86</sup> The entrenchment of the civil and political rights in the Charter affirms the importance attached to them despite the fact that unlike other regional instruments, the Afr.CHPR includes other categories of rights. The inclusion of civil and political rights as well as economic and social rights is analysed to affirm the indissoluble link between the two categories of the rights as reflected in their universal conception rather than dissolution of the former.<sup>87</sup> It is argued that in these two fields, the Afr.CHPR does not create completely new rights which are not known in international human rights declarations. The basis remains to be the UDHR and, as pointed by Sieghart, the Afr.CHPR brings all the rights together in one instrument.<sup>88</sup> Despite the UDHR being the instrument from which the Afr.CHPR draws its inspiration, the following rights in the UDHR do not appear in the African Charter: the right to privacy, the right to nationality, the right to social security, the right to leisure and rest, and the right to marry and find a family.<sup>89</sup>

The African Charter itself has been applied by the courts, for example in Algeria and Tanzania in interpreting their respective bills of rights. In the case of Tanzania the courts have unqualifiedly referred to the Charter in establishing whether a customary law conforms to the bill of rights.<sup>90</sup>

<sup>85</sup> *D'sa, R.*, Human and Peoples' Rights, op. cit. (fn. 85), p. 75; *Kunig, Ph.*, Regionaler Menschenrechtsschutz im interkontinentalen Vergleich, in: *Konrad, H.-J.*, Grundrechtsschutz und Verwaltungsverfahren, unter besonderer Berücksichtigung des Asylrechts, Berlin, Duncker & Humblot, 1985, p. 260.

<sup>86</sup> *Kunig, Ph.*, Human Rights Protection by International Law in Africa, op. cit. (fn. 10), pp. 153-155.

<sup>87</sup> *Rembe, N.S.*, Africa and Regional Protection of Human Rights: A Study of African Charter of Human and Peoples' Rights: Its Effectiveness and Impact on African States, Rome, Leon Editore, 1985, p. 118.

<sup>88</sup> *Sieghart, P.*, International Human Rights Law, in: *Blackburn, R., et al.* (eds.), Some Current Problems in Human Rights in the 1990's – Legal, Political and Ethical Issues, London, Mansell, 1991, p. 126.

<sup>89</sup> *Nguema, I.*, Human Rights Perspectives in Africa: The Roots of a Constant Challenge, Human Rights Law Journal 1990, Vol. 11, No. 3-4, pp. 262-3; *Rembe, N.S.*, op. cit. (fn. 87), p. 118.

<sup>90</sup> See the judgment of the High Court of Tanzania in the case of *Bernado Ephrahim v. Holoria Pastory and Gervazi Kaizelege* [1990] LRC (Const) 757. For a case note on this decision see *Kabudi, P.J.*, The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms, VRÜ, 24 (1991), pp. 271-281

## 6. Duties of the Individual in Tanzania

One of the distinguishing features of the bill of rights in the Constitutions of Tanzania and Zanzibar is the inclusion of detailed duties of the individual which go hand in hand with individual rights. The Constitution of Tanzania uses the term duties to the society while that of Zanzibar uses the words obligations of the people. These duties or obligations, unlike fundamental objectives and directive principles of state policy, are justiciable. This peculiarity of the bill of rights of Tanzania is a subject of a long *obiter dicta* by the Court of Appeal of Tanzania in the case of *The DPP v. Daudi Pete*.<sup>91</sup> Nyalali, CJ., in his *obiter dicta* explained that:

"...the Constitution of United Republic recognises and guarantees not only basic human rights, but also, unlike most constitutions of countries of the West, recognises and guarantees basic human duties. It seems that the framers of our constitution realised that the individual human beings does not exist or live in isolation, but exists and lives in society."<sup>92</sup>

It is, however, important to note that, the inclusion of the duties of the individual is not exclusively found in the constitutions of Tanzania or Africa for that matter, but also in constitutions of other countries in Asia and Latin America. Among the other Commonwealth states, as also pointed out by the Court of Appeal of Tanzania in Daudi Pete's case, it is the Constitution of India, which also includes a chapter on fundamental duties of the individual in a detailed and imperative manner. Despite this similarity, the Court of Appeal of Tanzania has gone at length to show the differences. Nyalali, CJ. points out that:

"There is however a significant difference between our (Tanzania) situation and that of India on this point. First, the fundamental or basic duties recognised by our (Tanzania) Constitution are attributed to human beings, whereas those under the Indian Constitution are attributed to Indian citizens only."<sup>93</sup>

The second difference between the provision on duties of the individual as provided in the Constitution of India and that of Tanzania as pointed out by the Court of Appeal of Tanzania is their placement in the Constitution. In the Constitution of India fundamental rights are placed in a separate part of the Constitution, whereas in the case of Tanzania the situation is different in the sense that both, fundamental rights and duties, are dealt with in one single part of the Constitution. The location of both basic rights and duties in

<sup>91</sup> Criminal Appeal No. 28 of 1990.

<sup>92</sup> *Ibid.*, p. 11.

<sup>93</sup> *Ibid.*

one single part of the Constitution has been explained by the Court of Appeal to be both symbolic and significant. The Court elaborated this aspect by stating that:

"It is a symbolism and an expression of a constitutionally recognised co-existence of the individual human being and the society, as well as the co-existence of rights and duties of the individual and society."<sup>94</sup>

However, it is the African Charter on Human and Peoples' Rights which most influenced the inclusion of duties in the constitutions of Tanzania and Zanzibar and their placement in the same part with rights and freedoms of the individual. This fact is given judicial notice by the Court of Appeal of Tanzania in *Daudi Pete's case*. Thus Nyalali, CJ., held that:

"Tanzania signed the Charter on 31 May 1982 and ratified it on 18 February 1984. Since our (Tanzania) Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of Rights and Duties (...). It seems evident in our view that the bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and Peoples' Rights as stated in the Preamble to the Charter."<sup>95</sup>

The African Charter on Human and Peoples' Rights enumerates in detail the duties of the individual to the family, parents, society, state and Africa as a whole.<sup>96</sup> Another group of duties are mainly social, cultural and economic, as well as duties which are mainly on defence, national security and unity. The need of having a chapter on duties of the individual in the African Charter of Human and Peoples' Rights was voiced by the then President of Senegal, Leopold Sedar Senghor, to the drafters of the charter. Senghor argued that, in doing so, the Charter will retain the African tradition of giving every one in the society a number of rights and duties.<sup>97</sup> It is said that the inclusion of duties in the Char-

<sup>94</sup> Ibid.

<sup>95</sup> Ibid., p. 12. The ratification of the Charter in "3rd Activity Report of the African Commission on Human and Peoples' Rights" adopted on 28 April 1990 as reproduced in: Human Rights Journal 1990, Vol. 11, No. 3-4.

<sup>96</sup> *Kodjo, E.*, The African Charter of Human and Peoples' Rights, in: Human Rights Law Journal 1990, Vol. 11, No. 3-4, pp. 276, 278; *Kunig, Ph.*, Regional Protection of Human Rights: A Comparative Study, op. cit. (fn. 10), p. 159, explains that although art. 32 of the American Convention on Human Rights provides for responsibilities of the individual to his family, etc., it does so not in a less detailed and imperative manner as the African Charter.

<sup>97</sup> *Kunig, Ph., et al.*, Regional Protection of Human Rights by International Law: The Emerging African Systems, op. cit. (fn. 10), Annex, p. 123.

ter or in this case the constitutions of Tanzania conforms to the so-called "African-community-oriented approach to human rights."<sup>98</sup>

The Charter provides that the individual has duties to the family and society, the state as well as other legally recognised communities and the international community.<sup>99</sup> Furthermore, the individual is under duty in exercising his rights and freedoms to pay due regard to rights of others, collective security, morality and common interest.<sup>100</sup> Another provision elaborates further on the rights and freedoms of others, which the individual is under obligation to observe. The individual is under duty to respect and consider others without discrimination, including maintaining relations aimed at promotion, safeguarding and reinforcement of mutual respect and tolerance.<sup>101</sup>

This list of duties has been criticised as leaving "an exceptionally large scope for placing limits in particular cases",<sup>102</sup> and that they are generally phrased and heavily qualified which "enlarges the risk of abuse."<sup>103</sup> The part on duties in the Charter includes a long list of what are termed as solidarity duties owed to the family, parents and the national community.<sup>104</sup> Other duties include the duty not to compromise national security, duty to preserve and strengthen national independence and territorial integrity of a country and to defend one's country in accordance with law.<sup>105</sup> The individual is under duty to work to the best of his abilities and possibilities, to pay tax imposed by the law in the interests of the society.<sup>106</sup> He is further obliged to preserve and strengthen African culture and values and moral well being of the society.<sup>107</sup> The promotion of African unity is among the duties imposed upon the individual by the Charter.<sup>108</sup>

The Constitution of Tanzania and that of Zanzibar place the duty on the individual to participate in work. Article 25 of the Constitution of Tanzania which provides for the duty

<sup>98</sup> *Benedek, W.*, in: *Kunig, Ph., et al.*, op. cit. (fn. 10), pp. 85-88. See also *Marasinghe, L.*, Traditional Conceptions of Human Rights in Africa, in: *Welch, C.* (ed.), *Human Rights and Development in Africa*, Albany, State University of New York Press, 1984, p. 33.

<sup>99</sup> Art. 27 (1).

<sup>100</sup> Art. 27 (2).

<sup>101</sup> Art. 28.

<sup>102</sup> *Kunig, Ph., et al.*, op. cit. (fn. 10), p. 160.

<sup>103</sup> *Benedek, W.*, op. cit. (fn. 10), p. 87.

<sup>104</sup> Art. 29.

<sup>105</sup> *Ibid.*

<sup>106</sup> Art. 29 (5).

<sup>107</sup> Art. 29 (7).

<sup>108</sup> Art. 29 (8).

to work starts with a general statement of glorification of labour by stating that: "Labour alone creates the material wealth of society, and is the source of well-being of the people and the measure of human dignity." The reference to the well being of the people and human dignity as the basis for requirement of the obligation to work is also made in article 22 of the Constitution of Zanzibar which stipulates obligations of the people. It is on the basis of that the individual is obliged to "voluntarily and honestly" participate in what is termed as "lawful and productive" work. The voluntary requirement in participating in work is watered down by another clause in the same provision which stipulates that an individual is obliged to observe labour discipline and to strive to achieve the individual and communal production targets as required or prescribed by law.<sup>109</sup>

In an effort to conform with international and regional human rights and labour instruments, the Tanzanian Constitutions hasten to provide in art. 25 (2) that there shall be no forced labour in the United Republic of Tanzania. The same guarantee against forced labour is also found in art. 22 (2) of the Constitution of Zanzibar. This provision is not only contradicted with what has been stated above, but also with a long list of exceptions in art. 25 (3) to what is considered as forced labour by the constitution. Therefore, no work is deemed by the constitution to be forced labour, compulsory labour or inhuman service, if it is part of a sentence or order of a court or if it is reasonably necessary in a case of emergency or calamity. Labour required by members of discipline forces, i.e. the military and police, as part of their duties is also exempted from the categorisation of forced labour. The exemption includes such labour or service which the state thinks that it is normal service or civil obligation required for the well being of the society, compulsory national service required by law and the mobilisation by the state of human resources for what it considers to be necessary for national social and economic survival, progress or advancement of national productivity.<sup>110</sup>

Under art. 26 the individual is obliged to comply with the Constitution and abide by the laws of the country. This article provides further that every person, which means that also a non-citizen, is entitled to institute proceedings for the protection of the Constitution and legality. However, this obligation is subjected to the procedure provided for by law in instituting such proceedings. Together with the obligation to obey the constitution and the laws of Zanzibar the provision article 23 (1) requires the individual "to uphold the honour and dignity of the constitution and other laws of Zanzibar."

The Constitution provides for the duty to safeguard public property. Articles 27 (1) and 23 (2) of Tanzania and Zanzibar, respectively, place the duty of safeguarding and protecting

<sup>109</sup> Art. 25 (1) (b).

<sup>110</sup> For further discussion of forced labour and this constitutional provision see *Shivji, I.G., Rights-struggle and the Bill of Rights in Tanzania*, op. cit (fn. 12).

natural resources, state property and all property jointly owned by the people, as well as respecting another person's property to every person. The duty to safeguard state and communal property is amplified under article 27 (2) of Tanzania and article 23 (3) of Zanzibar to include the duty to combat all forms of misappropriation and wastage of such properties. The provision in the Constitution of Tanzania includes also an obligation to run the economy of the nation assiduously, with the attitude of people who are masters of the fate of their own nation. While that of Zanzibar in its provision on this duty of the individual adds the phrase "to promote the economy of Zanzibar conscientiously as future decision makers of their state." The Constitution of Zanzibar provides in article 23 (4) for the obligation to protect nature and preserve its riches and to respect the national dignity to maintain public order.

One of the duties which is extensively provided for in the constitution of Tanzania is that dealing with national defence. The provision on this subject in the Constitution of Zanzibar is formulated in a precise manner. This duty is restricted to citizens only and is provided also as a right of an individual. Article 28 (1) stipulates that every citizen has the inalienable and inviolable right and duty to defend, protect and promote the independence, sovereignty, territorial integrity and unity of the nation. The article empowers the parliament to enact appropriate laws for facilitation and regulation of the service by the people in the armed forces and in the defence of the nation. This article deals with issues connected with national defence such as capitulation and treason. The inclusion of these items may be among other things a reaction to the events which took place in Tanzania few years before the bill of rights was incorporated in the constitution. These are the occupation of a piece of land of Tanzania by armed forces of fascist Idi Amin of Uganda and the ensuing war against him which was waged by Tanzania in 1978 as well as the treason trial on some soldiers and civilians who tried to overthrow the government by unconstitutional means. Therefore, article 28 (3) stipulates in no uncertain terms that:

"No person shall have the right to acknowledge or sign an act of capitulation, nor accept or recognise the occupation or division of the United Republic or any part of its national territory and, subject to this Constitution and any other law, no person shall have the right to prevent citizens of the United Republic from fighting against an enemy who has launched an attack upon the country."

On treason article 28 (4) provides that:

"The offence of treason as defined by law shall be the gravest crime against the United Republic."

## 7. Rights of the Community vis à vis Rights of the Individual

This aspect of societal or communitarian rights as a limiting factor in the enjoyment of individual rights and exercising of individual freedoms has received considerable attention among Tanzanian academics and the Tanzanian bench. While one of the High Court judges who has been in the forefront in delivering bold decisions relating to the bill of rights and, therefore, giving article 30 which introduces the concept of rights of the community in the Tanzanian constitution a very restrictive interpretation, to the contrary the Court of Appeal, and especially the Chief Justice seem to a certain extent more inclined in favouring communitarian rights. Mwalusanya, J., in the case of *Daudi s/o Pete v. R*<sup>111</sup> restricted the application of this provision by holding that:

“(...) the overriding of rights of the individual by rights of the community does not entail ‘arbitrary action’ on the part of the community or its institutions. The restriction to protect communal rights has to be done according to law.”<sup>112</sup>

In appeal against the judgment of Mwalusanya, J., the Court of Appeal was availed an opportunity in the case of *The D.P.P. v. Daudi Pete*<sup>113</sup> to deliberate on article 30 of the Constitution. In its judgment the Court of Appeal pointed out that one of the important principle to be taken into consideration when interpreting the Constitution of Tanzania is the corollary of the reality of co-existence of rights and duties of the individual, and also of the rights and duties of the individual on the one hand, and the collective or communitarian rights and duties of the society on the other.<sup>114</sup> Referring to article 29 (5) of the African Charter on Human and Peoples' Rights<sup>115</sup> which is *in pari materiae* to the Tanzanian provision, Nyalali, CJ., concluded that:

<sup>111</sup> Miscellaneous Criminal Cause No. 80 of 1989 (unreported).

<sup>112</sup> *Ibid.*, p. 28.

<sup>113</sup> Criminal Appeal No. 28 of 1990 (unreported).

<sup>114</sup> *Ibid.*, p. 12; see also *Nyalali, F.L., The Bill of Rights in Tanzania*, op. cit. (fn. 79), p. 2 where he presents the same position by arguing that: "(...) it is recognized that human beings do have two basic capacities, that is – every human being exists both as an individual and as a member of the community to which he or she belongs. In the capacity of an individual, every person is construed to have basic rights against all others; but as a member of the community, such person is seen to have basic duties towards others in the community. The corollary of this position is that the community on its part also has basic rights and duties towards its members. In other words, rights and duties are inter-dependent and there is inter-independence between rights and duties of every individual person on the one hand and rights and duties of the community to which he or she belongs on the other hand".

<sup>115</sup> Art. 29 (5) states that: "For the purposes of the better enjoyment by all persons of the rights and freedoms specified in this Constitution, every person shall so conduct himself and his affairs as not to prejudice the rights and freedom of others or the public interests."

"In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa."<sup>116</sup>

Chief Justice Nyalali in his judgment further argued that:

"Thus the merits and demerits of any legal system in so far as the question of Human rights is concerned depend upon the extent to which a particular legal system succeeds or fails to harmonize the basic rights and freedoms of the individual on the one hand, and the collective or communitarian rights and duties of society on the other".<sup>117</sup>

However, in its judgment the Court of Appeal, has not given or outlined any criteria which may be used in harmonisation of rights and freedoms of the individual with those of the community. It is only stated in the judgment that:

"We accept the proposition that any legislation which falls within the parameters of article 30 is constitutionally valid, notwithstanding that it may be violative of the basic rights of the individual. But, and this is the crucial part, such legislation must fit squarely within the provisions of the article. Any statute which is so broad as to fall partly within and partly outside the parameters of the article would not be validated (...)"<sup>118</sup>

The fear that in situations of conflict between these two sets of rights and freedoms it is the later which will prevail are made plausible by statements that have been made *ex cathedra* by Chief Justice Nyalali. Addressing the First Commonwealth Africa Judicial Conference held in The Gambia in 1986, Nyalali, CJ., submitted that:

"Whenever such conflicts arise, the institutions charged with the responsibility for resolving them should, as far as possible, seek to reconcile the conflicting interests in a manner in which satisfaction of the needs or interests of the individual results in the satisfaction of the needs or interests of the community. Where such reconciliation is impossible or impractical for one reason or other, then the communal interests should override those of the individual. This is because, a community in need or in danger puts everybody in need or danger, whereas as individual in need or danger is alone in need or danger."<sup>119</sup>

<sup>116</sup> Criminal Appeal No. 20 of 1990 (unreported), p.12.

<sup>117</sup> Ibid., p.13.

<sup>118</sup> Ibid., p.20.

<sup>119</sup> *Nyalali, F.L.*, The Challenge of Development to Law in Developing Countries viewed from a Perspective of Human Rights, Rule of Law and the Role of the Courts in Preserving Freedom, in: *The Supreme Court of The Gambia, The Challenge of Development to Law in Developing Countries*, Report of Proceedings, First Commonwealth Africa Judicial Conference, 5th - 9th May 1986, p. 70; see also *Nyalali, F.L.*, Bill of Rights in Tanzania, op. cit. (fn. 79), p. 4, who said that: "The justification for this paramountcy of rights and duties of the community over rights and duties of the

Although Chief Justice Nyalali hastens to qualify his position by arguing that the overriding of rights and duties of the individual towards the state and the community does not, however, entail arbitrary action on the part of the community or its institutions, is not enough to guarantee the rights of the individual which are supposed to be paramount. Nyalali points out arbitrary action is also prohibited by article 30 (2) which emphasises that it must be done according to law, meaning that the rights of an individual can only be taken away by an existing law.<sup>120</sup> Left at that level the statement "according to law" does not assist much in ensuring that laws which sanction arbitrary actions are not passed by the legislature touching on items outlined under art. 30 (2) of the Constitution.

The position of Chief Justice Nyalali on this aspect is contradictory, especially when he introduces what he terms to be the logical and commonness qualification to the overriding nature of communal rights and duties. In a very compounded and circumlocutory fashion he argues that:

"A basic right or duty of the individual stipulated under the Constitution cannot be overridden by a non-constitutional right or duty of the community, because the constitution is the basic or fundamental law of the land and cannot therefore be overridden by any other law of the land".<sup>121</sup>

It is imperative to note the warning by Wade that parliament can pass a law which is wide enough to justify a dictatorship based on the tyrannical but perfectly legal principle *quod principi placuit legis habet vigorem*.<sup>122</sup> What is required is more than compliance to a law. As pointed out by Mwalusanya, J.:

"But it is not enough for the party supporting the legislation to be able to point to "a law" in the sense simply of an Act duly passed by the legislature. If the Act relied on should itself be declared inoperative as violating a fundamental constitutional right it is not "law".<sup>123</sup>

The Attorney General of the United Republic represents an extreme position in interpretation of article 30, which, if it was adopted by the courts, will not only make the bill of

individual flows from this premise that a community in danger or need puts everybody in danger or need, whereas an individual in danger or need is alone in danger or need".

<sup>120</sup> This has been the position of the Court of Appeal even before the Bill of Rights was enacted. In the case of *Attorney General v. Lesinai Ndeinai & Others* [1980] T.L.R. 214, 239 the late Mwakasendo J.A., said that: "The liberty of the individual is so precious and fundamental to the concept of the Rule of Law that the Courts are duty bound to see that it is not taken away except under express provisions of the law of the land".

<sup>121</sup> *Ibid.*, p. 4.

<sup>122</sup> *Wade, H.W.R., Administrative Law*, 4th ed., Oxford, Clarendon Press, 1977, p. 37.

<sup>123</sup> *Chumchua s/o Marwa v. Officer i/c of Musoma Prison and The Attorney General*, Miscellaneous Criminal Cause No. 2 of 1988 (unreported).

rights an empty shell, but will completely nullify it.<sup>124</sup> The Attorney General recently invoked article 30 in justifying the re-introduction of mandatory corporal punishment in Tanzania by arguing that it is in the interest of the community at large.<sup>125</sup> It has become the practice of the office of the Director of Public Prosecution in the Attorney General Chambers to invoke article 30 in any challenge on a piece of legislation deemed to be violative of the bill of rights.<sup>126</sup>

The position of some academics is that the respect for individual rights and freedoms in Tanzania has not been in any way affected with the recognition of community rights. They are of the opinion that the recognition of the rights of the society as a whole has strengthened the rights and freedoms of the individual, in the sense that he enjoys rights at both the personal level and community level.<sup>127</sup> Representing this position, Mwakyembe concludes that:

"Experience in democratic societies has not been that of substituting individual rights and freedoms for the community rights, but rather of building the latter *mutatis mutandis* upon the former. Primary constitutional respect continues to be accorded to individual rights and freedoms which essentially constitute the basis for realisation and enjoyment of other general rights and freedoms".<sup>128</sup>

May be that is the only logical and plausible way of interpreting the provisions of articles 30 and 24 of the Constitution of Tanzania and Zanzibar, respectively, if at all the rights and freedoms of the individual are to be meaningful. The rights and freedoms of the individual are not only basic or fundamental, but also primary and paramount.

These provisions, when compared to some of the clauses included in the part of the Constitution providing for limitation and derogation from the basic rights and freedoms guaranteed by the constitution, leaves a lot to be desired. These are for example the limitation of rights and freedoms necessitated by ensuring the interest of development planning of the towns and villages, the development and utilisation of mineral resources, and the utilisation of any other property in such a manner as to promote the public benefit. It

<sup>124</sup> Lubuva, D.Z., The Future of Bill of Rights in Tanzania, Public Talk given to the Faculty of Law, University of Dar es Salaam, 16th October, 1987, p. 8.

<sup>125</sup> Radio Tanzania report on the National Assembly Debate on the Written Laws (Miscellaneous Amendments) Bill, 1989 (now Act No. 2 of 1989) aired on 24th April 1989; also reported in Daily News (Tanzania), 25th April 1989, quoted in Shivji, I.G., State Coercion and Freedom in Tanzania, Human and People's Rights Monograph Series No. 8, Roma, Institute of Southern African Studies, National University of Lesotho, 1990, p. 11.

<sup>126</sup> *Daudi Pete v. D.P.P.* at both the High Court and the Court of Appeal stage.

<sup>127</sup> Mwakyembe, H.G., The Challenge of the Judiciary in a One-Party Constitutional System, LL.M. Thesis, Hamburg, 1991, p. 22.

<sup>128</sup> Ibid.

covers also imposing restriction, supervision and control of the establishment and management of the functions of co-operatives and body corporate of individuals in Tanzania. The articles emphasises that, the existing laws providing for items outlined above and laws which may be enacted in the future in that effect are lawful and they cannot be challenged that they are violative of the bill of rights. Read literally, these provisions seem to encompass wide and cumulative limitations on rights and freedoms guaranteed by their respective constitutions. This justifies fears of some of the Tanzanian lawyers that the bill of rights has been "rendered an empty shell"<sup>129</sup> by the constitution itself by giving rights by one hand and taking them away by the other hand. It requires ingenuity and boldness from the judges in deciding whether a given societal value is more important than one or the other of the granted rights and freedoms of the individual.

### **Concluding Remarks**

It has been shown how the courts in Tanzania have applied, in a positive way, the clause of fundamental objectives and directive principles of state policy which incorporates the UDHR in the interpretation of the bill of rights. At the same time it has also been shown how the provisions on duties of the individual to the state and community, if not strictly interpreted, may lead to the erosion of even those rights already guaranteed in the bill of rights.

The fundamental objectives and directive principles of state policy remain to be significant both to the constitution and in the development a new culture of constitutionalism and accountability in Tanzania, especially after the recent re-introduction of pluralism in politics. It is desirable after the introduction of a multi-party system after three decades of a one-party system to conduct a discussion involving all the people, the political parties and different groups on what are the required or essential fundamental objectives and directive principles of state policy. Such a debate is necessary as part of the process of building a national consensus on various fundamental issues. The refusal of the ruling political party and its government in Tanzania to convene a constitutional conference or a national convention to discuss and adopt a new constitution after the re-introduction of a multi-party system<sup>130</sup> has denied the people a chance of deliberating among other things on the type of fundamental objectives and directive principles of state policy needed to meet the new challenges confronting the society.

<sup>129</sup> *Mwakyembe, H.G.*, The State and the Electoral Process, in: *Shivji, I.G.* (ed.), *The State and the Working People in Tanzania*, op. cit. (fn. 36).

<sup>130</sup> See *Uhuru Newspaper* of 9th June, 1993 reporting on a statement by the Minister of Justice and Constitutional Affairs to the Parliament refusing to convene a constitutional conference on the reason that there is no dictator who has been overthrown nor a revolution arising out of war in Tanzania.

As far as the inclusion in the constitutions of Tanzania and Zanzibar of clauses on individuals' duties and obligations to the community and the state is concerned, they do give an authoritarian government a legal justification upon which it can trample on individuals' rights with impunity. It needs a bench of judges who are very sensitive to the inviolability and primacy of rights and freedoms of the individual to draw the necessary limit for the duties. Otherwise the conflicts of interest which are inherent between the duties and rights may lead to whittling down all of the rights and freedoms secured by the constitution. The individual must remain in the centre of the bill of rights and duties, and the duties are not meant to signify the suppression of the individual and its inalienable rights.

## ABSTRACTS

### **The Directive Principles of State Policy versus Duties of the Individual in East African Constitutions**

By *Palamagamba John Kabudi*

In East Africa it is the Constitution of the United Republic of Tanzania, 1977 and the Constitution of Zanzibar, 1984 which introduced for the first time in 1984 provisions on fundamental objectives and directive principles of state policy. However, in the traditional Anglo-American view, a constitution is an instrument promulgated for the sole purpose of establishing structures of government and its institutions and prescribing judicially enforceable rules of law. Such a view does not see the relevancy of incorporating such objectives or directive principles of state policy, which in their nature and as provided for in the constitution, are not enforceable in a court of law. Despite that scepticism of the traditional view, following the precedent of Ireland and India, a number of Commonwealth countries have now added provisions on fundamental objectives and directive principles of state policy in their constitutions.

Although the fundamental objectives and directive principles of state policy in the Constitution of the United Republic of Tanzania are non-justiciable, the Constitution obliges the state and all its organs to take cognizance and apply them when exercising their functions. As a result of that, both the Judges of the High Court and the Court of Appeal have applied a provision in that part of the constitution which obliges the state authority to comply fully with the provisions of the Universal Declaration of Human Rights in their interpretation of the Tanzanian bill of rights. This has resulted in a progressive development of human rights jurisprudence in Tanzania in matters relating to the prohibition of discrimination of women and on the promotion and protection of the rights of a child, emphasizing that the welfare of the child is paramount and comes first.

Another distinguishing feature of the constitutions in Tanzania is that they also include a detailed catalogue of duties of the individual to the state and the community, which go hand in hand with rights of the individual. Duties, like rights, are justiciable in courts of law. As a result, the duties of the individual have in certain cases been applied in a manner which has led to the erosion of the efficacy of individual rights as guaranteed by the same constitution. In such a conflicting situation, a bench of judges is needed who are very sensitive to the inviolability and primacy of rights and freedoms of the individual to be able to draw a required limit on the duties imposed on the individual. Hence, the individual must remain in the centre of the bill of rights and the duties need to be applied so as not to signify the suppression of the individual and his inalienable rights.