

# The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms

By *Palamagamba John Kabudi*

## I. Introduction

The Tanzanian Bench has been characterized as "more executive than the executive"<sup>1</sup> when dealing with cases challenging the abuse of power by the executive or habeas corpus cases.<sup>2</sup> A recent judgement of the High Court of Tanzania, delivered by Justice J. L. Mwalusanya declaring parts of customary law as being in contravention of the Bill of Rights, and therefore null and void, stands out as towering example of the emerging bold judicial position of interpreting the recently introduced Bill of Rights in Tanzania. In this article I am dealing with one of Justice Mwalusanya's recent trail blazing decisions in the case of *Bernado Ephrahim vs. Holoria Pastory and Gervazi Kaizelege*.<sup>3</sup>

Living up to what has been explained as "Anglo-Saxon scepticism" or "pessimism" towards "constitutional affirmation of human rights"<sup>4</sup>, Tanzania (then Tanganyika), unlike other Commonwealth countries received, in 1961, an Independence Constitution<sup>5</sup> from the United Kingdom of Great Britain and Northern Ireland without a bill of rights. The same position was retained in 1962 when Tanganyika became a republic.<sup>6</sup> Efforts mainly by lawyers to try to include a bill of rights in the Interim Constitution of the United Republic of Tanzania of 1965, which turned Tanzania into a *de jure* one-party state did not succeed as it was opposed by the Government.<sup>7</sup> Various reasons were advanced by the Government in support of its persistent refusal. The gist of the arguments was that a bill of rights would invite conflict between on one side the executive in a haste in nation building and in a hurry

<sup>1</sup> Legal Aid Committee, Faculty of Law, University of Dar es Salaam, *Essays in Law and Society*, Dar es Salaam, 1985, p. 32.

<sup>2</sup> *Quigly, John*, "Cases on Preventive Detention: A Review", *East African Law Review*, vol. 11 - 14, 1978 - 81, p. 326 et seq; *Kalunga, L. T.*, "Human Rights and the Preventive Detention Act, 1962", *East African Law Review*, vol. 11 - 14, 1978 - 81, p. 281 et seq.

<sup>3</sup> (PC) Civil Appeal no. 70 of 1989, in the High Court of Tanzania at Mwanza (unreported).

<sup>4</sup> *Zimba, L. P.*, *The Zambian Bill of Rights*, Nairobi: East African Publishing House, 1984, p. 30.

<sup>5</sup> Tanganyika Independence Act, 1961, 10 Eliz. C.2 in Halsbury's *Statutes of England*, 3rd ed., vol. 4, London: Butterworths, 1968, p. 419.

<sup>6</sup> Act to Declare the Constitution of Tanganyika, C.A. no. 1 of 1962.

<sup>7</sup> Report of the Presidential Commission on the Establishment of a Democratic One-Party State, Dar es Salaam: Government Printer, 1968, pp. 30-32.

to bring development to the people and, on the other side, a judiciary mainly composed of expatriates.<sup>8</sup> Furthermore citing the British precedent, it was argued that human rights are more effectively guaranteed in state practice and national ethic rather than in written provisions entrenched in a constitution.<sup>9</sup>

Finally, Tanzania introduced a bill of rights in her Constitution in 1984. This was by the enactment of the Sheria ya Tano ya Mabadiliko katika Katiba ya Nchi, 1984.<sup>10</sup> Indeed, the inclusion of a bill of rights was a result of people's pressure during the nine month constitutional debate in 1983/84. The debate was initiated by the only ruling party in Tanzania, Chama cha Mapinduzi (CCM).<sup>11</sup> Although the CCM proposals did not contain a recommendation on the inclusion of a bill of rights in the Constitution, it is significant to note that the public refused to confine itself to the four corners of the CCM proposals. It went beyond items that were brought up by the CCM for public discussion. The public introduced new items. One of the new items that was fervently introduced by the public was on the need of inclusion of a bill of rights in the Constitution and discussed it vigorously. At the end of the constitutional debate, the Party and the Government had no alternative except to accept the will of the people<sup>12</sup> by incorporating a bill of rights in the Constitution of the United Republic of Tanzania, 1977 and the Constitution of Zanzibar, 1984, respectively.<sup>13</sup>

However, even after the incorporation of a bill of rights in the Constitution, it was argued by many lawyers that the government did so with its tongue in the cheek. Lawyers were not satisfied with the formulation of the various provisions of the Bill of Rights in the Tanzanian Constitution.<sup>14</sup> This is one of the reasons why they received it with a lot of scepticism arguing that the Bill of Rights "is so well punctured with numerous savings and

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid.*

<sup>10</sup> (Fifth Constitutional Amendment Act) Act no. 15 of 1984.

<sup>11</sup> *Mwakyembe, H. G.*, "The State and the Electoral Process", in: *Shivji, I.G.* (ed.), *The State and the Working People in Tanzania*, Dakar: Codesria, 1986, p. 50.

<sup>12</sup> *Mwakyembe, H. G.*, "The Tanzanian Bill of Rights: An Overview", A paper presented at the Faculty of Law, University of Dar es Salaam, Silver Jubilee Seminar on the Bill of Rights, 20-25 October, 1986, p. 27; also see *Shivji, I. G.*, "Rights struggle and the Bill of Rights in Tanzania", *Zimbabwe Law Review* 5 (1987) ad passim, and *Peter, C. M.*, "Respect for Fundamental Rights and Freedoms: A New Bill of Rights in Tanzania", *Revue de Droit International de Sciences Diplomatiques* 4 (1989), p. 259.

<sup>13</sup> Zanzibar enjoys autonomy in all matters that are classified as non-union matters. Zanzibar has a separate legislature, executive and judiciary. The Constitution of the United Republic of Tanzania, 1977, applies to Zanzibar only on Union matters. For further discussion on this aspect see *Kabudi, P. J.*, "The Treaty of Union of Tanganyika and Zanzibar: A Politico-Legal Interpretation", *MAWAZO, Journal of the Faculties of Arts and Social Sciences, Makerere University, Kampala*, 1985, vol. 6, no. 2, December 1985, pp. 1-18.

<sup>14</sup> *Mwakyembe*, supra note 12.

exemptions"<sup>15</sup> that in the final analysis it has "been rendered an empty shell".<sup>16</sup> It is a fact that the Tanzanian Bill of Rights is laden with a lot of limitation clauses of a "claw-back" nature<sup>17</sup> to the extent that, if they are not strictly interpreted, little of substance is left.<sup>18</sup> It is this state of affairs that prompted a seminar on the Bill of Rights in Tanzania convened to commemorate the Silver Jubilee of the Faculty of Law, University of Dar es Salaam, in 1986, to recommend that limitation clauses be narrowed and replaced by an accepted formulation used in international conventions on human rights, which provides that rights shall be "subject to laws which are necessary in a democratic society".<sup>19</sup> Another aspect which has caused displeasure is the inclusion in the Constitution of clauses on individuals' duties and obligations to the community and state.<sup>20</sup> It is argued that such clauses do give an authoritarian government a legal justification upon which it can trample on individuals' rights with impunity.<sup>21</sup> These clauses have mainly been borrowed from the African Charter on Human and People's Rights which also enumerates individuals' duties to the community and state and contains a lot of limitation clauses.<sup>22</sup>

The suspension of the justiciability of the Bill of Rights for three years<sup>23</sup> fortified the then already existing scepticism on the sincerity of the Government on enacting a bill of rights. The Government justified the suspension on the ground that a transition period was required after the enactment of the Sheria ya Tano ya Mabadiliko katika Katiba ya Nchi, 1984<sup>24</sup>, in order to allow the Government to "keep its house in order"<sup>25</sup> by examining the existing laws in order to have them amended or repealed "so as to avoid conflicts with the

<sup>15</sup> *Mwakyembe*, supra note 12, pp. 50-51.

<sup>16</sup> *ibid.*

<sup>17</sup> See for further discussion on claw-back clauses, *Gittleman, R.*, "The Banjul Charter on Human Rights and People's Rights: A Legal Analysis", in: *Welch, C. E. / Meltzer, R. I.* (Eds.), *Human Rights and Development in Africa*, Albany: State of New York Press, 1984.

<sup>18</sup> *Mbunda, L. X.*, "Limitation Clauses and the Bill of Rights in Tanzania", *Lesotho Law Journal*, vol. 4, 1988, no. 2, p. 156.

<sup>19</sup> Resolution on Tanzanian Bill of Rights, Silver Jubilee Anniversary Seminar, op. cit., Resolution IV.

<sup>20</sup> See *Shivji, I. G.*, *The Concept of Human Rights in Africa*, Dakar: Codesria, 1989, ad passim, and *Peter, C. M.*, *Human Rights in Africa: A Comparative Study of the African Charter of Human and People's Rights and the New Tanzanian Bill of Rights*, Westport: Greenwood Press, 1990, ad passim.

<sup>21</sup> *Mwakyembe*, supra note 12.

<sup>22</sup> For a detailed analysis of the African Charter of Human and People's Rights 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.

<sup>23</sup> The Constitution (Consequential, Transitional and Temporary Provisions) Act No. 16 of 1984.

<sup>24</sup> Public Talk given by the Chief Justice of the United Republic of Tanzania, Hon. Francis L. Nyalali, on "The Bill of Rights in Tanzania", Faculty of Law, University of Dar es Salaam, 5th December, 1985, p. 10.

<sup>25</sup> Act No. 15 of 1984.

provisions of the basic rights".<sup>26</sup> Despite that noble intention, with exception to the amendment (rather than repealing it as demanded by the people) of the Preventive Detention Act, 1962<sup>27</sup>, such exercise was not carried out by the Government as promised.<sup>28</sup> As a result all the notorious pieces of legislation that flagrantly offend the Bill of Rights have been left intact in the Statute Books of Tanzania up to date.<sup>29</sup> Since the coming into force of the justiciability of the Bill of Rights on 1st March, 1988, after the expiry of the suspension period, this enormous task of cleansing the Statute Books from all the laws that are contrary to the Bill of Rights has fallen on the Courts of Law and its officers. This task lies especially on the High Court which has been conferred with original jurisdiction in matters concerning the infringement of the Bill of Rights by Article 30(4) of the Constitution of Tanzania. The same burden, of course, lies on the Court of Appeal of Tanzania which is the highest and final court in the land, its decisions being valid law binding the High Court and all the subordinate courts.<sup>30</sup> In carrying out this important task, as correctly pointed out by Justice Mwalusanya, the courts need to go further than just finding out whether a law exists in the Statute Book and whether it has been duly passed by the Parliament from a Government bill claiming that the law is for the protection of the interests of the community and the state. Justice Mwalusanya urges the courts when interpreting laws to apply creatively the principle of Rule of Law as a standard measure in determining the constitutional acceptability of such pieces of legislation.<sup>31</sup> As he correctly points out, "the Rule of Law means more than acting in accordance with the law".<sup>32</sup> To him it "must also mean fairness in the Government".<sup>33</sup> He elaborates further that:

"Rule of Law should extend to the examination of the contents of the law to see whether the letter conforms to the ideal; and that the law does not give the Government too much power. The Rule of Law is opposed to the rule of arbitrary power. The Rule of Law requires that the Government should be subject to the law rather than the law subject to the Government. If the law is wide enough to justify a dictatorship, then there is no Rule of Law. Therefore, if all the Rule of Law means is that the Government will operate in accordance with the "law", then the doctrine of Rule of Law becomes a

<sup>26</sup> *Nyalali*, op. cit., p. 10.

<sup>27</sup> Public Talk given by the Attorney General of the United Republic of Tanzania, Hon. Damian Z. Lubuva, on "The Future of Bill of Rights in Tanzania", Faculty of Law, University of Dar es Salaam, 16th October, 1987, p. 5.

<sup>28</sup> *ibid.*, p. 6.

<sup>29</sup> For example the Deportation Ordinance, the Stock Theft Ordinance, the Witchcraft Ordinance, the Prevention of Corruption Act, 1971, the Emergency Powers Act, 1986, the Economic and Organized Crimes Control Act, 1984, Human Resources Deployment Act, 1983, etc.

<sup>30</sup> Article 117 of the Constitution of Tanzania, 1977.

<sup>31</sup> *Chumchua s/o Marwa vs. Officer I/C of Musoma Prison and the Attorney General*, Mwanza, Misc. Criminal Cause No. 2 of 1988, High Court at Mwanza (unreported), p. 7.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.*

betrayal of the individual, if the laws themselves are not fair but are oppressive and degrading. The courts have to bridge the yawning gap between the letter of the law and reality in the field of Rule of Law."<sup>34</sup>

Indeed, the courts will be required to do so frequently taking into account that even after the inclusion of the Bill of Rights in the Constitution, the Parliament has passed laws which appear to offend the Bill of Rights, i.e. The Identification and Registration of Persons Act, 1986.

## **2. Facts of the Case**

The first respondent in this case was a woman who inherited some clan land from her father by a valid will. Finding that she was getting old and senile, and no one to take care of her, she sold that piece of land to the second respondent, who is not a clan member. The appellant first filed a suit in the Primary Court praying for a declaration that the sale of the clan land by his aunt to the second respondent was void. The appellant argued that under the Haya Customary Law which is also codified in the Laws of Inheritance of the Declaration of Customary Law<sup>35</sup> and included in the book by Cory and Hartnoll entitled "Customary Law of the Haya Tribe"<sup>36</sup>, females are only entitled to usufructuary rights on clan land and have no power to sell it. His prayer was upheld by the Primary Court and the first respondent was ordered to refund the purchase price to the purchaser in order to redeem the land. The first respondent appealed to the District Court against the order of the Primary Court. Her appeal was allowed on the ground that the piece of customary law applied was discriminatory against women and was, therefore, contrary to the Bill of Rights. It was against the decision of the District Court that the appellant appealed to the High Court. Justice Mwalusanya dismissed the appeal with costs on the ground that inheritance aspects of Haya Customary Law discriminates women, and it is, therefore, inconsistent with Article 13(4) of the Constitution of Tanzania which bars discrimination.

## **3. Significance of the Case**

The judgment is significant, *inter alia*, in three aspects of which it can be safely said that Justice Mwalusanya is the pioneer in the Bench of the High Court of Tanzania.<sup>37</sup> These

<sup>34</sup> *ibid.*, p. 7.

<sup>35</sup> Government Notice No. 436 of 1963.

<sup>36</sup> *Cory, Hans / Hartnoll*, Customary Law of the Haya Tribe, in: *James, R. W. / Fimbo, G. M.*, Customary Land Law of Tanzania: A Source Book, Nairobi: East African Literature Bureau, 1973.

<sup>37</sup> The High Court of Tanzania Bench consists now of 28 judges after the appointment of Justice Josephat Mackanja in August 1990 - see Daily News (Tanzania), August 9th, 1990.

aspects are the application of human rights standards established in the International Bill of Rights and other international and regional conventions in interpreting the Tanzanian Bill of Rights, and a liberal approach in the interpretation of the Bill of Rights i.e. by refusing to allow procedural technicalities to shut the avenue of justice to those who feel that their rights have been infringed upon. Justice Mwalusanya urged the courts to pay more attention to the substance of the case. In this particular case the Judge deserves to be commended for applying judicial activism in enhancing rights of women in Tanzania. Women's rights is an area in which a lot remains to be done to remove oppressive relicts of the past in customary law and infusing them with a new spirit of social justice and equality of all people as clearly enshrined in the Constitution of Tanzania. The same applies also to other legislation affecting women either inherited from the colonial government or passed by the Parliament after independence. This article addresses itself only with the first aspect, i.e. application of international human rights norms in the interpretation of the Tanzanian Bill of Rights.

In all his judgments dealing with the Bill of Rights<sup>38</sup>, Justice Mwalusanya has used without qualification or hesitation international and regional conventions on human rights in order to establish and apply standards accepted by the international community in the interpretation of the Bill of Rights. This practice is laudible as it conforms with the recommendations of the Bangalore Principles on "The Domestic Application of International Human Rights Norms".<sup>39</sup> These principles were enunciated in a meeting attended by judges from the Commonwealth reiterated in the Harare Declaration of Human Rights<sup>40</sup> adopted at a Colloquium of senior African Commonwealth Judges on "The Domestic Application of International Human Rights Norms". These principles have no legal force. However, they stand for a new positive trend in the field of domestic application of international standards on human rights. This trend which is gaining roots in many of the Commonwealth countries is also reflected in the recent judgments of the Court of Appeal of Tanzania and those of Justice Mwalusanya in the High Court of Tanzania.

The Bangalore Principles recognize that "international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms".<sup>41</sup> However, the Bangalore Principles are aware that "in most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law".<sup>42</sup> Tanzania also follows that practice. In Tanzania it is the prerogative of the President to sign

<sup>38</sup> See *supra* note 31.

<sup>39</sup> "Judicial Colloquium on the Domestic Application of International Human Rights Norms", Bangalore, India, 24-26 February, 1988, *Nordic Journal of International Law*, vol. 57, 1988, Fasc. 1, pp. 47-48.

<sup>40</sup> "Harare Declaration of Human Rights", *The Parliamentarian*, October 1989, LXX, No. 4, p. 218.

<sup>41</sup> See *supra* note 39.

<sup>42</sup> *ibid.*

international agreements or treaties. That executive act by the President or his duly appointed representatives does not give an agreement or a treaty a force of law unless it is incorporated or adopted in domestic legislation.<sup>43</sup> This position was affirmed by the then Court of Appeal for Eastern Africa in the cases of *Okunda vs. Republic* and *East African Community vs. Republic*<sup>44</sup> where it was expressly decided that "the provisions of a treaty entered into by the Government ... do not become part of the municipal law ..., save in so far as they are made such by laws of that country". Being aware of this legal reality in most of the Commonwealth countries, the Bangalore Principles emphasize that:

"It is within the proper nature of the judicial functions for national courts to have regard to international obligations which a country undertakes whether or not they have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law. However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national laws in no way mitigates a breach of an international legal obligation which is undertaken by a country."<sup>45</sup>

The first decision in Tanzania to establish the above discussed positive trend was the Court of Appeal decision in the case of the *Director of Public Prosecutions vs. Ally Haji Ahmed and 10 others*.<sup>46</sup> In its judgment the Court of Appeal invoked the provisions of the Universal Declaration of Human Rights for guidance in the application and interpretation of the Tanzanian Bill of Rights. The contentious issue before the Court of Appeal was on whether the High Court of Tanzania when sitting in its ordinary capacity has jurisdiction to grant bail pending trial to persons accused of economic crimes under the Economic Crimes Control Act, 1984.<sup>47</sup> The DPP was of the view that the Act vitiates that jurisdiction of the High Court. The Court of Appeal was, however, aware of the possibility of bail being granted by the High Court sitting as an economic crimes court after formal charges had been filed against the accused persons. The Court of Appeal, however, observed that such differences of practice would violate the basic principle of equality before the law as stipulated under Article 13 of the Constitution, particularly when interpreted in light of relevant provisions

<sup>43</sup> *Seaton, E. E. / Maliti, S. T.*, Tanzania Treaty Practice, Nairobi: Oxford University Press, 1973, p. 99.

<sup>44</sup> (1970) E.A. 453 and (1970) E.A. 457 respectively.

<sup>45</sup> *Supra* note 39 at p. 48.

<sup>46</sup> Criminal Appeal Case Nos. 44 and 45 of 1985 (unreported). The presentation of this case is borrowed from *Nyalali, F. L.*, "The Challenges of Development to Law in Developing Countries viewed from the Perspective of Human Rights", paper delivered to the 1st Commonwealth Africa Judicial Conference, in the Gambia, 6th. May, 1986, p. 19.

<sup>47</sup> Act. No. 13 of 1984.

of the Universal Declaration of Human Rights as stated under Article 9(1) (f) of Fundamental Objectives and Directive Principles of State Policy contained in Part Two of the Constitution of Tanzania. Justice Mwalusanya has energetically followed and creatively emulated the decision of the Court of Appeal affirming that the Universal Declaration of Human Rights is part of the Constitution of Tanzania by virtue of Article 9(1) (f). That Article 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."

Although the Fundamental Objectives and Directive Principles of State Policy are not enforceable in a court of law as per Article 7(2) of the Constitution, however, still under Article 7(1) of the Constitution, all organs of state, i.e. the judiciary, are required to take cognizance of it, observe and apply all its provisions. In this judgment, Justice Mwalusanya used Article 9 of the Constitution and therefore applied various international and regional human rights conventions in determining the compatibility of the Haya Customary Declaration of Human Rights which prohibits categorically discrimination by declaring that:

"All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

The Judge referred further to the Convention on Elimination of All Forms of Discrimination Against Women, the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights. Tanzania has ratified all the mentioned instruments. Article 1 of the Convention on Elimination of All Forms of Discrimination Against Women defines discrimination against women to be:

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social, cultural, civil or any field."

This convention supplements other international and regional human rights conventions prohibiting discrimination on grounds of sex. Article 26 of the International Covenant on Civil and Political Rights provides for equality of all men before the law and prohibits any kind of discrimination, among other grounds, on ground of sex. Article 18(3) of the African



Charter on Human and People's Rights prohibits discrimination on account of sex.<sup>48</sup> It further provides that:

"The state shall ensure that the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

Therefore in case of vagueness, ambiguity and lacunae or where the domestic law is contrary to the international standards, the above provision of the African Charter on Human and People's Rights obliges national courts to turn to international conventions. Fulfilling that obligation includes as provided by Article 5(a) of the Convention on Elimination of All Forms of Discrimination Against Women, that state parties are required to take all measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all practices which are based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles of men and women.

Although Justice Mwalusanya has not stated so expressly in his judgment, his references to international and regional conventions in this case were necessary in the interpretation of Article 13 of the Constitution. Article 13 provides for equality before the law. However, it is deficient in its sub-article 5 in which the expression "discrimination" is defined without explicit mention of discrimination on grounds of sex. The sub-article provides that:

"For the purpose of this section the expression "discriminatory" means affording different treatment to different persons attributable only mainly to their respective descriptions by race, place of origin, political opinions, colour, occupation or creed whereby persons of one such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such descriptions."

That what one can call an oversight is redressed by Justice Mwalusanya's reference to international and regional conventions on human rights. According to Justice Mwalusanya the standards set in the aforementioned conventions are "a standard below which any civi-

<sup>48</sup> *Benedek, Wolfgang*, "Report on the African Association of International Law", Training Workshop for Core Human Rights Advocates in Africa and Seminar on the Judiciary and Human Rights in Africa, Banjul, The Gambia, 10-12 and 13-17 November, 1989. At page 5 of the report Benedek reports that it was recommended in the workshop and the seminar that the duty of states to eliminate every discrimination against women as stipulated in the African Charter on Human and People's Rights should be interpreted in the light of pertinent United Nations Instruments and in particular the United Nations Convention on the Elimination of All Forms of Discrimination Against Women.

lized nation will be ashamed to fall".<sup>49</sup> In analysing the piece of Haya Customary Law of Inheritance Justice Mwalusanya adopted the constitutionality test as proposed by Prof. B. A. Rwezaura in cases dealing with customary law.<sup>50</sup> After the decision of the Courts of Appeal in the case of *Maagwi Kimito vs. Gibeno Werema* on the status of customary law, the courts can no longer ignore them simply by stating that they are obsolete or unjust. The Court of Appeal firmly declared that "The customary laws of this country (Tanzania) have the same status in our courts as any other law, subject only to the Constitution and to any statutory law that may provide to the contrary".<sup>51</sup> Justice Mwalusanya arrived at the conclusion that the said piece of customary law "flies in the face of the (Tanzanian) Bill of Rights as well as the international conventions to which we (Tanzania) are signatories".<sup>52</sup> Accordingly the Judge declared that piece of customary rights which confers on women only usufructuary rights on clan land with no power to sell to be void and of no effect. In the same vein he has extended the application of the redemption clause to clan land sold to strangers without the consent of clan members which before applied only to male members to apply also to female members of the clan.

#### 4. Conclusion

Justice Mwalusanya's application of international and regional conventions on human rights is laudible and commendable. It ushers in a healthy beginning of a new chapter of human rights jurisprudence in Tanzania. It is, however, still to be seen whether this positive trend will develop further and permeate the whole High Court Bench. More significant to further development of this trend depends on whether the Court of Appeal, which has been commended for this judicial activism during the past first decade of its existence<sup>53</sup>, will uphold Mwalusanya's decisions and by doing so making them binding law under the doctrine of precedent. The expectation that the Court of Appeal will accept Justice Mwalusanya's position is fortified by two decisions of that Court delivered recently. In the cases of *Rukuba Nteme vs. Bi Jalia Hassani* and *Gervaz Baruti and Haji Athumani Isaa vs. Rwen-*

<sup>49</sup> Supra note 3 at p. 4.

<sup>50</sup> *Rwezaura, B. A.*, State Law and Customary Law - Reflection on their Relationship in Contemporary Tanzania", Vortrag vor dem Europa-Institut der Universität des Saarlandes, Saarbrücken, 3. Juni 1987. In this publication Rwezaura comments on the Court of Appeal decision in the case of *Maagwi Kimito vs. Gibeno Werema*, Civil Appeal No. 20 of 1984 (unreported) in which the Court reversed the prevalent practice of most of the High Court judges ignoring certain customs on the ground that they are unjust or obsolete.

<sup>51</sup> *ibid.*

<sup>52</sup> Supra note 3 at p. 4.

<sup>53</sup> See "Review decisions, Appeal Court urged." in Daily News (Tanzania), August 18, 1989.

tama Mututa<sup>54</sup>, the Chief Justice, Hon. Nyalali, and Justice of Appeal, Hon. Kisanga, respectively agreed that discriminatory laws can be declared void for being unconstitutional by filing a petition in the High Court under Article 30(3) of the Constitution.

<sup>54</sup> Civil Appeal No. 19 of 1986 (unreported) and Civil Appeal No. 9 of 1988 (unreported) respectively.

## ABSTRACTS

### **Internal Norms of Conflict of Laws and Traditional Law versus Cultural Change: "The Case" S. M. Otieno**

*By Ralph Schuhmann*

In 1987 public discussion in Kenya was dominated by the legal dispute about the body of a dead man: The S.M. Otieno Case. The events once more demonstrated the importance of death and burial in traditional African society. They also highlighted the dynamics of African law and its social bases. African communities are increasingly becoming secularized and are moving towards an individualistic society in which the authority of family and clan is under decline. Even the role of the woman in society is beginning to move towards Western concepts. Finally, the well guarded dogma from colonial days Western = modern and traditional = primitive is increasingly being questioned. Such social dynamics challenge the established (Western) system of personal law: Does Western law always prevail over traditional law? Which meaning does repugnancy clause have today? How has traditional law to be determined? Is there any possibility of opting out of customary law? Personal law in Kenya has to find answers to these questions which are in line with social reality. Otherwise it will meet the fate of other African legal concepts and cease to have any relevance within the social context.

### **The Judiciary and Human Rights in Tanzania: Domestic Application of International Human Rights Norms**

*By Palamagamba John Kabudi*

Since the Tanzanian Bill of Rights became justiciable on 1st March, 1988, after the expiry of the suspension period, the courts in Tanzania have positively resorted to applying human rights standards enunciated in the International Bill of Rights and other international and regional conventions, in interpreting the Bill of Rights. The Judges in the High Court and the Court of Appeal have applied with ingenuity a provision in an unjusticiable part of the Constitution declaring Fundamental Objectives and Directive Principles of State Policy, to apply international human rights norms in interpreting the Bill of Rights. Article 9 (1) (f) of the Constitution of the United Republic of Tanzania, 1977 obliges the state authority and its

organs to comply fully with the Provisions of the Universal Declaration of Human Rights in all its policies and business towards securing the maintenance and upholding of the dignity of Man. This article comments on one of the High Court judgements which effectively applied established international standards prohibiting discrimination of women or discrimination made on the basis of sex.

## **Recent Developments in the Vietnamese Law of Foreign Investment**

*By Arno Wohlgemuth*

According to a statement by Ngoc Xuan, president of the State Commission for Cooperation and Foreign Investment, from June this year Vietnam has licensed almost 300 foreign investment projects with capital of over \$ 2 billion in the past three years under the Foreign-investment Code 1987. This Code has been amended in June 1990. More than 50 detailed regulations have been promulgated under the code covering key areas like banking, finance, technology transfer, labour, wages and travel to and from Vietnam.

The Decree of the Council of Ministers No. 139/HDBT of September 5, 1988, regulating the implementation of the Law on Foreign Investment in Vietnam contains provisions of joint ventures, enterprises with 100 % foreign capital and on business organisations. Other chapters deal with labour relations in enterprises with foreign invested capital, financial matters, foreign exchange control, accounts and audit, customs, immigration, residence and communications.

Further legislation concerning foreign direct investment in Vietnam, e.g. maritime law, aviation law and the oil and gas law, is envisaged. To boost protection of foreign investment in Vietnam the government is ready to sign agreements on investment protection and promotion and pacts on avoidance of double taxation (IHT of 26.6.1991, p. 17).