HUMAN RIGHTS:
MEANING, DEVELOPMENT AND PRACTICE IN TANZANIA

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INTORDUCTION

This paper attempts to explicate the meaning of the term *human rights*. It shall start with the definition of human rights, and then proceed to trace the origin and development of the concept of human rights. Thereafter, the paper will tackle the International Bill of Rights, which includes the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights. The contents of each instrument will be critically examined, and the importance and influence of the International Bill of Rights will be analysed. The application and limitation of human rights will also be analysed. Again, the paper will attempt to scan human rights in various categories, generations of rights, interdependence of rights, characteristics of rights, justification of human rights, criticism concerning human rights and human rights violations.

The paper will also attempt to engage into the human rights situation in Africa, and in that the African Charter on Human and Peoples' Rights will be the subject matter of discussion. Some of the issues that will come across are the uniqueness of the Charter, promotion and protection of human rights and state obligation under the African Charter. The paper will further attempt to show the human rights situation in Tanzania from colonial period to the present state of affairs, and finally, the paper will provide details of the newly established Commission for Human Rights and Good Governance in Tanzania.

The intention of this paper, therefore, is to show that it is difficult to have precise and compressive definition of the term *human rights*. Again, the paper intends to show that human rights is a product of a long process going down to the creation of human kinds, and it has gone through various complicated circumstances. Justification, criticism, and human rights violations are some of the key concepts that participants are expected to grasp. African System of Human Rights is tackled, and Tanzania is taken as an example of state practice. At the end of the presentation, participants are expected to understand the meaning of human rights, origin and development of human rights, International Bill of Rights, various classes of human rights, protection of human rights, limitation of human rights, enforceability of human rights, and state practice on the issues of human rights.

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1. Definition of Human Rights

The term human rights denotes all those rights which are inherent in our nature and without which we can not live as human beings.[1] In other words, human rights refers to the basic rights and freedoms to which all humans are entitled as being humans, and often held to include the rights to life and liberty, freedom of thought and expression, and equality before the law. One prominent scholar in Tanzania in stated that human rights are not dependent on being provided for in a particular legal document. These rights are inherent and therefore should be recognised, respected, and enforced.[2] Some of the case law in Tanzania have revealed that fundamental rights are not gifts from the state, but inhere in person by reason of his birth and are therefore prior to the state and law.[3]

It has been argued that in our times one method of judging the character of a government is to look at the extent to which it recognises and protects human rights. The raison d'etre for any government is its ability to secure the welfare of the governed. Its claim to the allegiance of the governed has to be in terms of what that allegiance is to serve. Allegiance has to be correlative with rights. Justice Lugakingira (as he then was) in the Mtikila's case stated that modern constitutions like our own have enacted fundamental rights in their provisions. This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law. Thereafter, Justice Lugakingira concluded that it can therefore be argued that the very decision to translate fundamental rights into a written code is by itself a restraint upon the powers of Parliament to act arbitrarily.[4]

The concept of *human right* is comparatively of recent origin.[5] It has formally and universally become recognised only after formation of the United Nations in 1945 which has as its central concern reaffirmed its faith in fundamental human rights, in the dignity and worth of human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in large freedom.[6] The United Nations Universal Declaration of Human Rights[7] justifies that position by stating that *all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*[8]

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1 United Nations, *Teaching Human Rights*, New York, 1989, p. 5

2 Shivji, I. G., *et al*, *Constitutional and Legal System of Tanzania: A Civics Sourcebook,* Mkuki and Nyota Dar Es Salaam, 2004, p. 77

3 Rev. Christopher Mtikila v. Attorney General [1995] T.L.R 31, p.49, Decision by The Hon. Mr. Justice K.S.K Lugakingira

4 Rev. Christpher Mtikila v. Attorney General [1995] p. 95

5 Chandra, U., *Human Rights*, Allahabad Law Publications,2000, p. 1

6 Charter of the United Nations, 3rd Preambular Paragraph, and 5th Preambular Paragraph of the UDHR

7 The United Nations Universal Declaration of Human Rights adopted by the General Assembly of the United Nations Resolution 217 A (III) of 10th December 1948 (herein to be referred as HDHR)

8 Article 1 of the UDHR

While there is wide-spread acceptance of the importance of human rights in the international structure, there is considerable confusion as to their precise nature and role in international law.[9] The question what is meant by a right is itself controversial and the subject of intense jurisprudential debate. Some rights for example, are intended as immediately enforceable binding commitments, others are merely as specifying possible future pattern of behaviour.[10] The problem of enforcement and sanctions with regard to human rights in international law is another issue can affect the characterisation of the phenomenon. Some scholars regard the incidence of non compliance with human rights norms as evidence of state practice that argues against the existence of structure of human rights principles in international law.[11] Although site must not be lost of violations of human rights laws, such an approach is not academically incorrect but also profoundly negative.

2. Origin and Development of Human Rights

The history of origin and development of human rights is very fascinating. Some scholars trace its origin in ancient Greeks. They illustrate it with the Greek play Antigone, where Sophocles describes that Antigone's brother was killed for rebelling against king, and his burial was prohibited by the King Creon. In defiance of the order Antigone buried her brother. When she was arrested for violating the order she pleaded that she had acted in accordance with the immutable unwritten laws of heaven which even the king could not override.[12]

In philosophy the development of the notion of natural rights of man was contributed by the Stoic Philosophers. They first developed natural law theory and by that virtue they explained the nature of human rights, which every human being possesses by virtue of being human being. The Stoic Philosophers formulated the theory of natural law after the break down of the Greek City States. The central notion of the Stoic Philosophy was that the principles of natural law were universal in their nature.[13] The Stoic formulation of natural law was best suited to the Roman temperament, for they, in principle, believed that man should improve himself both rationally and morally. Writing on natural law, Cicero (106-43) B.C laid emphasis upon the universal nature of it and that natural law is of universal application, unchanging and everlasting.[14]

In the Middle Ages, the scholastic philosophers like Abelard (1079-1142) and Thomas Aquinas (1224-1274), the most original thinkers of their times laid stress upon the concept of natural law as the

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9 Shaw, M., *International Law*, Cambridge, 1998, p.196

10 See both article 2 of the International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966

11 Watson, J., Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, University of Illinois Law Forum, 1979, p. 609

12 Sophocles: Antigone, *The Unwritten, Unchanging laws of the gods*, quoted in Chandra, Human Rights(2000) p. 2

13 Meaning that their application was not limited to any class of persons of certain sate, rather it applied to everybody everywhere in the world

14 De Republic, III, xxii, 33, quoted in Chandra (2000) p. 2

higher principles of law to be derived from reason. But these philosophers did not go further to quest of making human personality as the main concern of law and social life.

Natural law theory was later linked with the social contract theory because the basis of the new social contract theory was almost the same as of the natural law theory. The social contract theory became popular in during the 16th and 17th century through the writings of political philosophers as Thomas Hobbes (1558-1679), John Locke (1632-1704) and Jean Jacques Rousseau (1719-1778), who were arguing that state is was an artifact, an artificial creation of individuals or the result of the social contract. The upholders of the social contract theory considered human rights as the natural rights for the reason that human rights are based upon the contract concluded by the people with the state. The explained that when men entered into contract to form political society they renounced some of their natural rights which had previously been enjoyed by them in their free state of nature but certain basic rights, such as, the right to life, freedom and equality were preserved by them.[15] The teachings of the social contract writers had not only strengthened and revitalized the concept of natural rights but provided it with dynamic contents, such as it exercised great influence upon the American and French Revolution.[16]

Another attempt to conceptulise the ideas of human rights were made after the First World War in 1918 through Versailles Treaty to promote and universalise human rights but it met no success. This was from the fact that the judicial conscience of the civilized world was very much in the favour of safeguarding the rights of individuals against its violation by states, it was consistently realised that rights of individuals must be universalised so that it may be guarded against its violation by one's own state. With all reluctance of the civilized states, it was the San Francisco Conference held from 25th April to 26th June 1945, finally created the United Nations Charter, which incorporated numerous provisions relating to promotion and respect of human rights and fundamental freedoms for all without distinction as to the race, sex, language, or religion.[17] The General Assembly was has been assigned with the duty of initiating studies and making recommendations for the purposes of assisting in the realisation of human rights and fundamental freedoms.[18] The Economic and Social Council is authorised to make recommendations to the General Assembly, member states, and specialised

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15 These rights so preserved constituted their natural and inalienable rights which must be respected by the state.

16 The American Revolution originated in the colonial revolt of 1763. There were many factors which contributed towards the rise of this revolt, for instance, the growing importance of the notion of natural rights. Teaching of the writers of social contract doctrine, the British Bill of Rights of 1689 and the coercive actions of George III (1760-1820) and his predecessors, and on the other hand the French Revolution was based upon principles which were set in motion by the English and American Revolution. It differed mainly in that it was basically the result of economic and social inequalities and injustice of the French ancient regime

17 Article 1 (3) of the United Nations Charter

18 Article 13 (1) (b) of the Charter

agencies for the purpose of promoting respect for and observance of human rights and fundamental freedoms for all.[19]

3. The International Bill of Rights

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

At the 1945 San Francisco Conference, held to draft the Charter of the United Nations, a proposal to embody *a Declaration on the Essential Rights of Man* was put forward but was not examined because it required more detailed consideration than was possible at the time. The Charter clearly speaks of *promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*[20]. The idea of promulgating an *international bill of rights* was also considered by many as basically implicit in the Charter.

The Preparatory Commission of the United Nations, which met immediately after the closing session of the San Francisco Conference, recommended that the Economic and Social Council should, at its first session, establish a commission for the promotion of human rights as envisaged in Article 68 of the Charter. Accordingly, the Council established the Commission on Human Rights early in 1946.

At its first session, in 1946, the General Assembly considered a draft Declaration on Fundamental Human Rights and Freedoms and transmitted it to the Economic and Social Council for reference to the Commission on Human Rights for consideration in its preparation of an international bill of rights[21]. The Commission, at its first session early in 1947, authorized its officers to formulate what it termed *a preliminary draft International Bill of Human Rights*. Later the work was taken over by a formal drafting committee, consisting of members of the Commission from eight States, selected with due regard for geographical distribution.

3.1 Towards the Universal Declaration of Human Rights

In the beginning, different views were expressed about the form the bill of rights should take. The Drafting Committee decided to prepare two documents: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a convention, which would define specific rights and their limitations. Accordingly, the Committee transmitted to the Commission on Human Rights draft articles of an international declaration and an international

[19] Article 62 (2) of the Charter
[20] Article 1 (3) of the Charter
[21] Resolution 43(I)

convention on human rights. At its second session, in December 1947, the Commission decided to apply the term *International Bill of Human Rights* to the series of documents in preparation and established three working groups: one on the declaration, one on the convention[22] and one on implementation. The Commission revised the draft declaration at its third session, in May/June 1948, taking into consideration comments received from Governments. It did not have time, however, to consider the covenant or the question of implementation. The declaration was therefore submitted through the Economic and Social Council to the General Assembly, meeting in Paris. By its resolution 217 A (III) of 10 December 1948, the General Assembly adopted the Universal Declaration of Human Rights as the first of these projected instruments.

3.1.1 The Contents of the Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly *as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among, the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*[23]

Forty-eight States voted in favour of the Declaration, none against, with eight abstentions. In a statement following the voting, the President of the General Assembly pointed out that adoption of the Declaration was a remarkable achievement, a step forward in the great evolutionary process. It was the first occasion on which the organized community of nations had made a Declaration of human rights and fundamental freedoms. The instrument was backed by the authority of the body of opinion of the United Nations as a whole, and millions of people -men, women and children all over the world- would turn to it for help, guidance and inspiration.

The Declaration consists of a preamble and 30 articles, setting forth the human rights and fundamental freedoms to which all men and women, everywhere in the world, are entitled, without any discrimination.

Article 1, which lays down the philosophy on which the Declaration is based, reads that *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

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22 Which it renamed *Covenant*

23 Universal Declaration of Human Rights, 8th Preambular Paragraph

The article thus defines the basic assumptions of the Declaration: that the right to liberty and equality is man's birthright and cannot be alienated: and that, because man is a rational and moral being, he is different from other creatures on earth and therefore entitled to certain rights and freedoms which other creatures do not enjoy[24].

Article 2, which sets out the basic principle of equality and non discrimination as regards the enjoyment of human rights and fundamental freedoms, forbids "distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[25]

Article 3, the first cornerstone of the Declaration, proclaims the right to life, liberty and security of person -a right essential to the enjoyment of all other rights. This article introduces articles 4 to 21, in which other civil and political rights are set out, including: freedom from slavery and servitude; freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; the right to a fair trial and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and residence; the right of asylum; the right to a nationality; the right to marry and to found a family; the right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; the right to peaceful assembly and association; and the right to take part in the government of one's country and to equal access to public service in one's country.[26]

Article 22, the second cornerstone of the Declaration, introduces articles 23 to 27, in which economic, social and cultural rights -the rights to which everyone is entitled *as a member of society* -are set out. The article characterizes these rights as indispensable for human dignity and the free development of personality, and indicates that they are to be realized *through national effort and international cooperation*. At the same time, it points out the limitations of realization, the extent of which depends on the resources of each State.[27]

The economic, social and cultural rights recognized in articles 22 to 27 include the right to social security; the right to work; the right to equal pay for equal work; the right to rest and leisure; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life of the community.

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[24] Article 1 of the Declaration
[25] Article 2 of the Declaration
[26] See: Article 3 to 21 of the Declaration
[27] See: Article 22, 23 to 27 of the Declaration

The concluding articles, articles 28 to 30, recognize that everyone is entitled to a social and international order in which the human rights and fundamental freedoms set forth in the Declaration may be fully realized, and stress the duties and responsibilities which each individual owes to his community. Article 29 states that *in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*. It adds that in no case may human rights and fundamental freedoms be exercised contrary to the purposes and principles of the United Nations. Article 30 emphasizes that no State, group or person may claim any right, under the Declaration, *to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth* in the Declaration.[28]

3.1.2 Importance and Influence of the Universal Declaration of Human Rights

Conceived as *a common standard of achievement for all peoples and all nations*, the Universal Declaration of Human Rights has become just that: a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards.

Since 1948 it has been and rightly continues to be the most important and far-reaching of all United Nations declarations, and a fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms. It has set the direction for all subsequent work in the field of human rights and has provided the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms which it proclaims.

In the Proclamation of Teheran, adopted by the International Conference on Human Rights held in Iran in 1968, the Conference agreed that the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community. The Conference affirmed its faith in the principles set forth in the Declaration, and urged all peoples and Governments to dedicate themselves to principles and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare.

In recent years, there has been a growing tendency for United Nations organs, in preparing international instruments in the filed of human rights, to refer not only to the Universal Declaration, but also to other parts of the International Bill of Human Rights.

[28] Read Article 28, 29 and 30 of the Declaration

3.2 Towards the International Covenants on Human Rights

On the same day that it adopted the Universal Declaration, the General Assembly requested the Commission on Human Rights to prepare, as a matter of priority, a draft covenant on human rights and draft measures of implementation. The Commission examined the text of the draft covenant in 1949 and the following year it revised the first 18 articles, on the basis of comments received from Governments. In 1950, the General Assembly declared that *the enjoyments of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent.*[29] The Assembly thus decided to include in the covenant on human rights economic, social and cultural rights and an explicit recognition of the equality of men and women in related rights, as set forth in the Charter. In 1951, the Commission drafted 14 articles on economic, social and cultural rights on the basis of proposals made by Governments and suggestions by specialized agencies. It also formulated 10 articles on measures for implementation of those rights under which States parties to the covenant would submit periodic reports. After a long debate at its sixth session, in 1951/1952, the General Assembly requested the Commission to draft two Covenants on Human Rights, one to contain civil and political rights and the other to contain economic, social and cultural rights.[30] The Assembly specified that the two covenants should contain as many similar provisions as possible. It also decided to include an article providing that *all peoples shall have the right of self-determination.*[31]

The Commission completed preparation of the two drafts at its ninth and tenth sessions, in 1953 and 1954. The General Assembly reviewed those texts at its ninth session, in 1954, and decided to give the drafts the widest possible publicity in order that Governments might study them thoroughly and that public opinion might express itself freely. It recommended that its Third Committee start an article-by-article discussion of the texts at its tenth session, in 1955. Although the article-by-article discussion began as scheduled, it was not until 1966 that the preparation of the two covenants was completed.

The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were adopted by the General Assembly by its resolution 2200 A (XXI) of 16 December 1966. The first Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the same resolution, provided international machinery for dealing with communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

3.2.1 International Covenants on Human Rights

[29] Resolution 421 (V), sect. E
[30] Resolution 543 (VI), para. 1
[31] Resolution 545 (VI)

The preambles and articles 1, 3 and 5 of the two International Covenants are almost identical. The preambles recall the obligation of States under the Charter of the United Nations to promote human rights; remind the individual of his responsibility to strive for the promotion and observance of those rights; and recognize that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Article 1 of each Covenant states that the right to self-determination is universal and calls upon States to promote the realization of that right and to respect it. The article provides that *all peoples have the right of self-determination* and adds that *by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*. Article 3, in both cases, reaffirms the equal right of men and women to the enjoyment of all human rights, and enjoins States to make that principle a reality. Article 5, in both cases, provides safeguards against the destruction or undue limitation of any human right or fundamental freedom, and against misinterpretation of any provision of the Covenants as a means of justifying infringement of a right or freedom or its restriction to a greater extent than provided for in the Covenants. It also prevents States from limiting rights already enjoyed within their territories on the ground that such rights are not recognized, or recognized to a lesser extent, in the Covenants.[32]

Articles 6 to 15 of the International Covenant on Economic, Social and Cultural Rights recognize the rights to work; to the enjoyment of just and favourable conditions of work; to form and join trade unions; to social security, including social insurance; to the widest possible protection and assistance for the family, especially mothers, children and young persons; to an adequate standard of living to the enjoyment of the highest attainable standard of physical and mental health; to education; and to take part in cultural life.[33]

In its articles 6 to 27, the International Covenant on Civil and Political Rights protects the right to life and lays down that no one is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment ; that no one is to be held in slavery; that slavery and the slave-trade are to be prohibited; and that no one is to be held in servitude or required to perform forced or compulsory labour; that no one is to be subjected to arbitrary arrest or detention; that all persons deprived of their liberty are to be treated with humanity; and that no one is to be imprisoned merely on the ground of inability to fulfil a contractual obligation.[34]

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[32] See: Article 1, 3 and 5 of both International Covenants
[33] Article 6 to 15 of the ICESCR
[34] Article 6 to 11 of the ICESCR

The Covenant provides for freedom of movement and freedom to choose a residence[35] and for limitations to be placed on the expulsion of aliens lawfully in the territory of a State party[36]. It makes provision for the equality of all persons before the courts and tribunals and for guarantees in criminal and civil proceedings.[37] It prohibits retroactive criminal legislation; lays down the right of everyone to recognition everywhere as a person before the law; and calls for the prohibition of arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and of unlawful attacks on his honour and reputation.[38]

The Covenant provides for protection of the rights to freedom of thought, conscience and religion and to freedom of opinion and expression. It calls for the prohibition by law of any propaganda for war and of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It recognizes the right of peaceful assembly and the right to freedom of association. It also recognizes the right of men and women of marriageable age to marry and to found a family, and the principle of equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. It lays down measures to protect the rights of children, and recognizes the right of every citizen to take part in the conduct of public affairs, to vote and to be elected, and to have access, on general terms of equality, to public service in his country. It provides that all persons are equal before the law and are entitled to equal protection of the law. It also calls for protection of the rights of ethnic, religious and linguistic minorities in the territories of States parties.[39]

Finally, article 28 provides for the establishment of a Human Rights Committee responsible for supervising implementation of the rights set out in the Covenant.[40]

3.2.2 Conditions/ Limitations of the Application of the International Bill of Rights

The Universal Declaration of Human Rights affirms that the exercise of a person's rights and freedoms may be subject to certain limitations, which must be determined by law, solely for the purpose of securing due recognition of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Rights may not be exercised contrary to the purposes and principles of the United Nations, or if they are aimed at destroying any of the rights set forth in the Declaration.[41]

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35 Article 12 of the ICESCR
36 Article 13 of the ICESCR
37 Article 14 of the ICESCR
38 See: Article 15 to 17
39 See: Article 18 to 27
40 Article 28
41 Article 29 and 30 of the Declaration

The International Covenant on Economic, Social and Cultural Rights states that the rights provided for therein may be limited by law, but only in so far as it is compatible with the nature of the rights and solely to promote the general welfare in a democratic society.[42]

Unlike the Universal Declaration and the Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights contains no general provision applicable to all the rights provided for in the Covenant authorizing restrictions on their exercise. However, several articles in the Covenant provide that the rights being dealt with shall not be subject to any restrictions except those which are prescribed by law and are necessary to protect national security, public order, or the rights and freedoms of others.

Certain rights, therefore, may never be suspended or limited, even in emergency situations. These are the rights to life, to freedom from torture, to freedom from enslavement or servitude, to protection from imprisonment for debt, to freedom from retroactive penal laws, to recognition as a person before the law, and to freedom of thought, conscience and religion.

The Covenant on Civil and Political Rights allows a State to limit or suspend the enjoyment of certain rights in cases of officially proclaimed public emergencies which threaten the life of the nation. Such limitations or suspensions are permitted only *to the extent strictly required by the exigencies of the situation* and may never involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[43] The limitations or suspensions must also be reported to the United Nations.

3.2.3 Optional Protocol to the International Covenant on Civil and Political Rights

First Optional Protocol: The first Optional Protocol to the International Covenant on Civil and Political Rights enables the Human Rights Committee, set up under that Covenant, to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. Under article 1 of the Optional Protocol, a state party to the Covenant that becomes a party to the Protocol recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State of any of the rights set forth in the Covenant.[44] Individuals who make such a claim, and who have exhausted all available domestic remedies, are entitled to submit a written communication to the Committee.[45]

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42 Article 4of the ICESCR
43 Article 4 of the ICCPR
44 Article 1 of the First Optional Protocol to ICCPR
45 Article 2 of the First Optional Protocol to ICCPR

Such communications as are determined to be admissible by the Committee[46] are brought to the attention of the State party alleged to be violating a provision of the Covenant. Within six months, that State must submit to the Committee written explanations or statements clarifying the matter and indicating the remedy, if any, that it may have applied.[47]

The Human Rights Committee considers the admissible communications, at closed meetings, in the light of all written information made available to it by the individual and the State party concerned. It then forwards its views to the State party and to the individual.[48]

A summary of the Committee's activities under the Optional Protocol is included in the report which it submits annually to the General Assembly through the Economic and Social Council.[49]

Second Optional Protocol: The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, was adopted by the General Assembly in December 1989.[50] Under its article 1, no one within the jurisdiction of a State party to the Protocol may be executed. Under article 3 of the Protocol, States parties must include in the reports which they submit to the Human Rights Committee information on measures taken to give effect to the Protocol.

Article 5 of the Second Optional Protocol provides that, with respect to any State party to the first Optional Protocol, the competence of the Human Rights Committee to receive and consider communications from individuals subject to that State's jurisdiction shall extend to the provisions of the Second Optional Protocol, unless the State party concerned has made a statement to the contrary at the moment of ratification or accession. Under article 6, the provisions of the Second Optional Protocol apply as additional provisions to the Covenant.

3.2.4 Entry into force of the Covenants and the Optional Protocols

The International Covenant on Economic, Social and Cultural Rights entered into force on 3 January 1976, three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification or accession, as provided in article 27, and the United Republic of Tanzania became part to the Covenant 11th June 1976

The International Covenant on Civil and Political Rights entered into force on 23 March 1976, three months after the date of deposit with the Secretary-General of the thirty-fifth instrument of ratification

46 In addition to article 2, 3 and 5 (2) of the First Optional Protocol, lay down conditions for admissibility
47 Article 4 of the First Optional Protocol to ICCPR
48 Article 5 of the First Optional Protocol to ICCPR
49 Article 6 of the First Optional Protocol to ICCPR
50 See: General assembly Resolution44/128 of 15 December 1989

or accession, as provided in article 49, the United Republic of Tanzania became part to the Covenant in 11th June 1976.

As at the same date, 44 States parties to the International Covenant on Civil and Political Rights had made the declaration under its article 41, recognizing the competence of the Human Rights Committee *to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations* under the Covenant. The provisions of article 41 entered into force on 28 March 1979 in accordance with paragraph 2 of that article.[51]

The first Optional Protocol to the International Covenant on Civil and Political Rights entered into force simultaneously with the Covenant, having received the minimum 10 ratifications or accessions required. As at 30 September 1995, 85 States parties to the Covenant had also become parties to the first Optional Protocol, and the United Republic of Tanzania is not part to it.

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, entered into force on 11 July 1991, having received the minimum 10 ratifications or accessions required. As at 30 September 1995, the Protocol had been ratified or acceded to by 28 States and the United Republic of Tanzania is not part to it.

3.3 Worldwide Influence of the International Bill of Human Rights

From 1948, when the Universal Declaration of Human Rights was adopted and proclaimed, until 1976, when the International Covenants on Human Rights entered into force, the Declaration was the only completed portion of the International Bill of Human Rights. The Declaration, and at a later stage the Covenants, exercised a profound influence on the thoughts and actions of individuals and their Governments in all parts of the world.

The International Conference on Human Rights, which met at Teheran from 22 April to 13 May 1968,[52] to review the progress made in the 20 years since the adoption of the Universal Declaration and to formulate a programme for the future, solemnly declared in the Proclamation of Teheran:

1. It is imperative that the members of the international community fulfil their solemn obligations to promote and encourage respect for human rights and fundamental freedoms for all without distinctions of any kind such as race, colour, sex, language, religion, political or other opinions;

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51 See: Article 41 of the ICCPR

52 Declaration of Tehran, 23 U.N. GAOR Supp., No. 4, UN Doc. A/Conf. 32/42, 1968.

2. The Universal Declaration of Human Rights states a common understanding, of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community;

3. The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Convention on the Elimination of All Forms of Racial Discrimination as well as other conventions and declarations in the field of human rights adopted under the auspices of the United Nations, the specialized agencies and the regional intergovernmental organizations, have created new standards and obligations to which States should conform;

Thus, for more than 27 years, the Universal Declaration on Human Rights stood alone as an international *standard of achievement for all peoples and all nations*. It became known and was accepted as authoritative both in States which became parties to one or both of the Covenants and in those which did not ratify or accede to either. Its provisions were cited as the basis and justification for many important decisions taken by United Nations bodies; they inspired the preparation of a number of international human rights instruments, both within and outside the United Nations system; they exercised a significant influence on a number of multilateral and bilateral treaties; and they had a strong impact as the basis for the preparation of many new national constitutions and national laws.

The Universal Declaration came to be recognized as a historic document articulating *a common definition of human dignity and values*. The Declaration is a yardstick by which to measure the degree of respect for, and compliance with, international human rights standards everywhere on earth.

The coming into force of the Covenants, by which States parties accepted a legal as well as a moral obligation to promote and protect human rights and fundamental freedoms, did not in any way diminish the widespread influence of the Universal Declaration. On the contrary, the very existence of the Covenants, and the fact that they contain the measures of implementation required to ensure the realization of the rights and freedoms set out in the Declaration, gives greater strength to the Declaration.

Moreover, the Universal Declaration is truly universal in scope, as it preserves its validity for every member of the human family, everywhere, regardless of whether or not Governments have formally accepted its principles or ratified the Covenants. On the other hand, the Covenants, by their nature as multilateral conventions, are legally binding only on those States which have accepted them by ratification or accession.

In many important resolutions and decisions adopted by United Nations bodies, including the General Assembly and the Security Council, the Universal Declaration of Human Rights and one or both Covenants have been cited as the basis for action.

Nearly all the international human rights instruments adopted by United Nations bodies since 1948 elaborate principles set out in the Universal Declaration of Human Rights. The International Covenant on Economic, Social and Cultural Rights states in its preamble that it developed out of recognition of the fact that *in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.* A similar statement is made in the preamble to the International Covenant on Civil and Political Rights.

The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly[53] spells out the meaning of article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition was further reinforced by the adoption in 1984 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[54] Similarly, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the General Assembly[55] clearly defines the nature and scope of the principles of non discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief contained in the Universal Declaration and the International Covenants.

A similar situation prevails as regards international human rights instruments adopted outside the United Nations system. For example, the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe at Rome in 1950, concludes with the following words: *Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.*

Article 2 of the African Charter on Human and People's Rights[56], provides that one of the purposes of the Organization is *to promote international cooperation, having due regard to the Charter of the*

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53 General assembly Resolution 3452 (XXX)of 1975
54 General Assembly Resolution 39/46 of 1984
55 General assembly Resolution 36/55 of 1981
56 The Charter was adopted by the heads of African governments in Addis Ababa, Ethiopia in 1963

United Nations and the Universal Declaration of Human Rights. The American Convention on Human Rights[57], states in its preamble that the principles to which it gives effect are those set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.

Again, Judges of the International Court of Justice have occasionally invoked principles contained in the International Bill of Human Rights as a basis for their decisions. National and local tribunals have frequently cited principles set out in the International Bill of Human Rights in their decisions. Moreover, in recent years, national constitutional and legislative texts have increasingly provided measures of legal protection for those principles; indeed, many recent national and local laws are clearly modelled on provisions set forth in the Universal Declaration of Human Rights and the International Covenants, which remain a beacon for all present and future efforts in the field of human rights, both nationally and internationally.

Finally, the World Conference on Human Rights, held at Vienna in June 1993, adopted by acclamation the Vienna Declaration and Programme of Action, in which it welcomed the progress, made in the codification of human rights instruments and urged the universal ratification of human rights treaties. In addition, all States were encouraged to avoid, as far as possible, the resort to reservations.[58]

4. Looking Human Rights in Various Categories

4.1 Types or Division of Human Rights

Some scholars conceptually divide rights into negative and positive rights. By this distinction, *negative* human rights, which follow mainly from the Anglo-American legal tradition of natural rights, are rights that a government and/or private entities may never take action to remove. For example, right to life and security of person; freedom from slavery; equality before the law and due process under the rule of law; freedom of movement; freedoms of speech, religion, assembly; the right to bear arms. These have been codified in documents including the English Bill of Rights, the Canadian charter of Rights and freedoms, the Constitution of the United Republic of Tanzania of 1977.

This distinction holds that *Positive* human rights mainly follow from the Rousseauian Continental Europe legal tradition and denote human rights and entitlements that the state is obliged to protect and provide. Examples of such rights include: the rights to education, to health care, to a livelihood. Such *positive rights* have been codified in the Universal Declaration of Human Rights (Articles 22-28) and in many 20th-century constitutions, including the Constitution of the United Republic of Tanzania of 1977.

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[57] The charter was signed at San José, Costa Rica in 1969

[58] Part 1, Para. 26 of the Vienna Declaration and Programme of Action

4.2 Generations of Human Rights

There are three categories of human rights are as classified by various human rights scholars[59] namely, the human rights of first generation, the human rights of second generation and the human rights of the third generation. The first-generation is civil and political rights[60], the second-generation is economic, social and cultural rights[61] and the third-generation is solidarity rights.[62]

4.2.1 The First Generation of Human Rights: The International Covenant on Civil and Political Rights

Various rights contained in the Covenant on Civil and Political Rights are not new rights. These are rights that had developed in course of a very long period of time since the time of Greek City State and concretised in the form of the *Magna Carta* of 12th century in England; the American Declaration of Independence 1791; and the French Declaration of Rights of Man and of the Citizen of 1789. Thus, these rights reflect long established human values and as such are incorporated in the national constitutions[63] of various states, in the International Covenant on Civil and Political Rights, in the European Convention on Human Rights, Inter-American and various African Instruments.[64] Since these rights are incorporated in different important international and national documents, they represent an over whelming consensus of international community giving rise to the rules of international customary law of general application. This consensus on virtually all provisions of the Covenant on Civil and Political Rights is so wide spread that they can be considered as part of the law of mankind, a *jus cogens* for all.

4.2.2 The Human Rights of Second Generation: The International Covenant on Economic, Social and Cultural Rights

The main source for the origin of Civil and Political Right is highly considered to be from the American and French Revolution, but for the Economic and Social Rights are mostly considered to originate in Russian Revolution of 1917 and in the Paris Peace Conference of 1919. The particular significance of the Paris Peace Conference was establishment of the International Labour Organisation which laid emphasis upon the concept of social justice by proclaiming that peace can be established only if it is based upon social justice, and that failure of any nation to adopt humane conditions of labour is an obstacle in the way of other countries.[65] However, the real credit goes to the efforts of American president Roosevelt who for the first time has expressed his hope for an instrument dealing with the

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59 See: Sohan, L., *The New International Law: Protection of Rights of Individuals Rather than States*, 32 Am.U.L Rev. 1, 1982, and Vesak, K., *Tenth Study Session of the International Institute of Human Rights*, July 1979, p. 5

60 For instance right to life and political participation

61 For instance right to subsistence

62 For instance right to peace, right to clean environment and so forth

63 See: Article 12 to 29 of the United Republic of Tanzania Constitution of 1977 (as amended from time to time)

64 See, for instance the African Charter on Human and People's Right, 1963

65 See: International Labour Office, Conventions and Recommendations Adopted by the International Labour Conference, 1919-1966, 1966

economic and social rights.[66] In his message to Congress in 1944 made the concept of *freedom from want* clear when contemplated that true individual freedom can not be exist without economic security and independence, and that people who are hungry and out of ob are the stuff of which dictatorship are made, thus economic truths have become accepted as self-evident.[67] In his opinion the individual freedom can not exist without economic security and independence, and from these pronouncements had exercised their full impact upon the United Nations when it began to address itself to the human rights issues.

4.2.3 The Human Rights of Third Generation: Collective Rights

Some scholars argue that, individuals are also member of such units, groups or communities as a family, religious, community, social club, professional association, racial group, people, nation or state.[68] It is not surprising, therefore, that international law not only recognises inalienable rights of individuals, but also recognises certain rights exercised jointly by individuals who are grouped into larger communities, including people and nations. Some scholars have pointed out that the third generation of human rights infuse the human dimension into areas where it has all too often been missing having been left to state or states, and that these rights can be realised only through the concerted efforts of all the actors on the social scene: individual, the state, public and private bodies, and international community.[69] It has been argued that the first two generations of human rights represent the first two of the three guiding principles of the French Revolution that is liberty and equality. The third generation of human rights refers the fraternity of brotherhood. This category of right are based on the sense of solidarity, which is essential for the realisation of major concern of the international community such as peace, development and environment.[70] The effective exercise of collective rights is a precondition to the exercise of other rights, political, and economic or both.[71] The most cherished rights belonging to the third category of rights are the right to self-determination, the right to development and right to peace.

Out of these generations, the third generation is the most debated and lacks both legal and political recognition. Some theorists discredit these divisions by claiming that rights are interconnected. Arguably, for example, basic education is necessary for the right to political participation.

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66 In his message to the Congress of 6 January 1941, President Roosevelt referred to the four essentials freedoms namely, freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want and freedom from fear which he looked forward as the foundation future world- Read AJIL (1941) Vol. 35, p. 662

67 See, Eleventh Annual Message to Congress, 11th January 1944, The State of the Union Message of Presidents, (1790-1966), (1966), p. 2881

68 Chandra, U., *Human Rights* , 2001, and Sohan, L., *The New International Law: Protection of Rights of Individuals Rather than States*

69 Lectures by Karel Vesak, *Tenth Study Session of the International Institute of Human Rights*, July 1979, p. 5

70 See: The Study of the New International Economic Order and the Promotion of Human Rights, UN doc. E/CN4/sb.2/477p. 15, and Karel Vesak *Tenth Study Session of the International Institute of Human Rights*, July 1979

71 Buergenthal, T., and Shelton, D., Protecting Human Rights in the Americas: Cases and Materials, 1995, p.11

4.2.4 Interdependence of the Three Categories of Human Rights

At one stage, it was argued that new economic, social and cultural rights, should have precedence over the old civil and political rights for the reasons that, new rights are more important than the old one and new rights, economic, social and cultural rights represents the basic needs of the human being therefore, they must be satisfied first. In the same trend, it was argued that human rights of the third generation are even more important. If these rights are not implemented immediately, the world will soon become uninhabitable.[72]

However, in the present day world, all human rights are considered emphasised to be interdependent. Various international institutions have emphasised upon the interdependence, complementarity and indivisibility of human rights.[73] The Tehran International Conference on human Rights, for instance, declared in its Declaration that human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without enjoyment of economic, social and cultural rights, is impossible. The achievements of lasting progress in the implementation of human rights are dependent on sound and effective national and international policies of economic development.[74] Similarly, the General Assembly in it Resolution of 1977, clearly stated that all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion, and protection of both civil and political, and economic, social and cultural rights. The Resolution added that human rights questions should be examined globally, taking into account both overall context of the various societies in which they present themselves, as well as the need for the promotion of the full dignity of the human person and the development and well being of the society.[75]

When it comes to the implementation and importance of the third generation of human rights, scholars argues that the new rights may not be achieved immediately like economic, social and cultural rights. Solidarity right set new goals for the international community, and therefore should be accomplished progressively step by step by making strenuous efforts. They are vast and overwhelming, but so are our problems. The damage to humanity that might be inflicted by a nuclear war or an environmental catastrophe is almost beyond comprehension. The world, therefore, need to grasp any tool that is available to stem an engulfing tide that is of horrifying proportions.[76]

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72 Chandra, u., 2001, p.23

73 UNESCO, *Symposium on New Human Rights: The Rights of Solidarity*, Mexico City, 1980, UNESCO Doc. 55.81/CONF 806/4, 1981, Annex III, at ii

74 Declaration of Tehran, 23, U.N. GAOR Spp., No.4, at 1, U.N. Doc. A/Conf. 32/42, 1968, para. 13

75 General Assembly Resolution 32/130 U.N., GAOR Supp., No. 45, pp150-151, U.N. Doc. A/32/45, 1977

76 Buergenthal, B., and Shelton, D., 1995, p.17

4.3 Characteristic of Human Rights

4.3.1 Human Rights are Recognised: Human rights are neither derived from the social order nor conferred upon by the society. They reside inherently in the individual human beings independent of and even prior to his participation in the society. As such, they are the result of recognition by the state, but they are logically independent of the legal system for their existence. Scholars have assigned the origin of human rights to natural law and not positive law, and that natural law is normative system which is characterised by the fact that the criterion for the validity of its norms is based not on their enactment or recognition by certain individuals, but on their intrinsic justification.[77] Thus, a positive legal system which does not recognise human rights is not law.

4.3.2 Human rights are Inalienable, Natural and Inherent: Some human rights are said to be *inalienable rights.* The term inalienable rights or unalienable rights refers to a set of human rights that are fundamental, are not awarded by human power, and cannot be surrendered. Human rights are inalienable in the sense that a holder of these rights can not divest himself of them.[78] Human person possesses rights because of the very fact that it is a person, a whole master of itself and of its acts. These are things which are owed to a man because of the very fact that he is a man.[79]

The inalienable or natural rights are not identified with the norms of positive law. They are independent of the positive law, as such, human rights are used as a reference to evaluate the rules of positive law, law enforcement machinery, legal institutions and performance of the state. When a legal system does not recognise human rights of its citizen it is criticised as being oppressive and persistent demand is made for upholding the value of human rights.[80] African and Asian states are normally criticised for not implementing international human rights standards.

4.3.3 Human Rights are Essentially Equal: It is established that human rights are derived directly or indirectly from the very nature of man. It is, therefore, argued that by virtue of being human, one inheres all those attributes which are inherent in human personality, and natural rights being one among those attributes are inherited naturally. Therefore, the only condition necessary for enjoying natural rights is to be a human being. This is a reasonable preposition because it lays down an object equalitarian principle according to which a human being, by virtue of being human, can possess or enjoys all human rights without any distinction to his colour, stature, wealth or to his nationality.[81] It has been argued that if the only relevant condition of enjoying certain rights is being human, and if this property does not admit of degrees, there can not be differences of degree in the extent to which

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77 Nino, C, S., *The Ethics of Human Rights*, Oxford, 1991, p. 10
78 Chandra, U., 2001, p. 15
79 Mariain, J., *The Rights of Man and Natural Law*, Anson, 1951, p. 65
80 Nino, C. S., 1991, p.10
81 Chandra, U., 2001, p. 15

the rights in question are held. This, in fact, to say all human beings have them to the same degree and are equal. One writer argued that human rights are the rights that human being has by virtue of whatever characteristics he has that are both specifically and universally human.[82]

4. 1 Justification of Human Rights

Several theoretical approaches have been advanced to explain how human rights become part of social expectations. The *biological theory* considers the comparative reproductive advantage of human social behaviour based on empathy and altruism in the context of natural selection. Other theories hold that human rights codify moral behaviour, which is a human, social product developed by a process of biological and social evolution[83] or as a sociological pattern of rule setting.[84] This approach includes the notion that individuals in a society accept rules from legitimate authority in exchange for security and economic advantage.

On the other hand, natural law theories base human rights on the *natural* moral order that derives from religious precepts such as common understandings of justice and the belief that moral behaviour is a set of objectively valid prescriptions.[85] Some have used religious texts such as the Bible and Quran to support human rights arguments. However, there are also more secular forms of natural law theory that understand human rights as derivative of the notion of universal human dignity.[86]

Yet others have attempted to construct an interest theory defence of human rights. For example the philosopher John Finnis argues that human rights are justifiable on the grounds of their instrumental value in creating the necessary conditions for human well-being. Some interest-theorists also justify the duty to respect the rights of other individuals on grounds of self-interest.[87] Reciprocal recognition and respect of rights ensures that one's own will be protected.

Ultimately, the term *human rights* is often itself an appeal to a transcendent principle, not based on existing legal concepts. The term *humanism* refers to the developing doctrine of such universally applicable values. The term *human rights* has replaced the term *natural rights* in popularity, because the rights are less and less frequently seen as requiring natural law for their existence.[88]

4.2. Criticism of Human Rights

One of the arguments made against the concept of human rights is that it suffers from cultural imperialism. In particular, the concept of human rights is fundamentally rooted in a politically liberal

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82 Mayo, B., *What are Human Rights: Political Theory and the Rights of Man*, Macmillan, 1967,p. 68
83 Normally associated with Hume
84 As in sociological theory of law and work of Weber
85 See Part 2 of this work for natural law theories
86 Kohen, A., In Defence of Human Rights: A Non-Religious Grounding in a Pluralistic world, Routledge, 2007
87 Rather than altruism or benevolence
88 Weston, B., Human Rights in Encyclopedia Britannica Online,2007, p.2

outlook which, although generally accepted in Western Europe, Japan, India and North America, is not necessarily taken as standard elsewhere. An appeal is often made to the fact that influential human rights thinkers, such as John Locke and John Stuart Mill, have all been Western and indeed that some were involved in the running of Empires themselves. The cultural imperialism argument achieves even greater potency when it is made on the basis of Religion. Some histories of human rights emphasise the Christian influence on the agenda and then question whether this is in keeping with the tenets of other world religion. For example, in 1981, the Iranian representative to the United Nations, Said Rajaie-Khorassani, articulated the position of his country regarding the Universal Declaration of Human Rights by saying that the UDHR was *a secular understanding of the Judeo-Christian tradition,* which could not be implemented by Muslims without trespassing the Islamic Law (40).

Another set of debating points revolves around the question of who has the duty to uphold human rights. Human rights have historically arisen from the need to protect citizens from abuse by the state and this might suggest that all mankind has a duty to intervene and protect people wherever they are. Divisive national loyalties, which emphasise differences between people rather than their similarities, can thus be seen as a destructive influence on the human rights movement because they deny people's innately similar human qualities (41). But others argue that state sovereignty is paramount, not least because it is often the state that has signed up to human rights treaties in the first place. Commentators' positions in the argument for and against intervention and the use of force by states are influenced by whether they believe human rights are largely a legal or moral duty and whether they are of more cosmopolitan or nationalist persuasion.

An additional deconstructionist critique has been levied at the discourse of human rights by many scholars of critical legal studies. They argue that the logic of liberal human rights discourse is often circular and internally inconsistent, allowing for it to be easily manipulable. Moreover, they argue that human rights discourse often limits actors capacity to conceptualize radical, non-juridical, change. As Harvard Law Professor Duncan Kennedy has pointed out*: Legal thought can generate equally plausible rights justifications for almost any result... Rights are by their nature formal, meaning that they secure to individuals legal protection for arbitrariness--to speak of rights is precisely to not speak of justice between social classes, races, or sexes.* This framework in, in itself, part of the problem rather than the solution. It makes it difficult to even conceptualize radical proposals (42).

4.2 Human Rights Violations

Human rights violations are abuses of people in ways that abuse any fundamental human rights. It is a term used when a government violates national or international law related to the protection of

human rights. According to the Universal Declaration of Human Rights fundamental human rights are violated when, among other things:

- A certain race, creed, or group is denied recognition as a *person* (Articles 2 & 6)
- Men and women are not treated as equal (Article 2)
- Different racial or religious groups are not treated as equal (Article 2)
- Life, liberty or security of person is threatened (Article 3)
- A person is sold as or used as a slave (Article 4)
- Cruel, inhuman or degrading punishment is used on a person, such as torture or execution (Article 5)
- Victims of abuse are denied an effective judicial remedy (Article 8)
- Punishments are dealt arbitrarily or unilaterally, without a proper and fair (Article 11)
- Arbitrary interference into personal or private lives by agents of the state (Article 12)
- Citizens are forbidden to leave or return to their country (Article 13)
- Freedom of speech or religion is denied (Articles 18 & 19)
- The right to join a trade union is denied (Article 23)
- Education is denied (Article 26)

Human rights violations and abuses include those alleged by non-governmental organizations, such as Amnesty International, Human Rights Watch, Tanzania Legal and Human Rights Centre, Tanzania Media Women Association, and Tanzania Women Lawyers Association that collect evidence and documentation. Only a very few countries do not commit significant human rights violations, according to Amnesty International. In their 2004 human rights report the Netherlands, Norway, Denmark, Iceland and Costa Rica are the only, mappable, countries that did not violate at least some human rights significantly.[89]

Some people believe human rights abuses are more common in dictatorship or theocracies than in democracies because freedom of speech and freedom of the press tend to uncover state orchestrated abuse and expose it. Nonetheless human rights abuses do also occur in democracies.

Modern arguments suggest anyone accepting any judicial, political or government control over the interests of people requires moral obligations of the highest responsibility and trust. Its conduct should therefore be judged by the most exacting fiduciary standards. The fiduciary relationship arises from the government's ability to control people with the exercise of that power. In effect, if a government staff have the power to abolish any rights they are burdened with the fiduciary duty to

[89] Read *Amnesty International Reports 2004- 2006*, Amnesty International

protect such an interest because the government would benefit from the exercise of its own discretion to extinguish rights which it alone had the power to dispose of.

5. Human Rights in Africa

5.1 The African Charter on Human and Peoples' Rights

The African human rights system is of comparatively recent origin. The decision for drawing up a draft of an African Charter on Human and Peoples' Rights providing *inter alia* for bodies responsible for promotion and protection was taken at the Summit of Heads of States and government of the Organisation of African Unity (OAU), currently known as African Unity (AU), held in Monrovia in 1979.The Secretary-General of OAU was authorised to convene a meeting of high-level African Experts for the purpose of drawing up of draft of African Charter on Human and Peoples' Rights and to consider giving effect full effect to both the Charter of the United Nations and the Universal declaration of Human Rights. The draft was prepared by the end of 1979 and submitted for considerations at two sessions of Conference of OAU Ministers of Justice held at Banjul, Gambia in 1980 and in 1981 and finally adopted at the Nairobi Summit in 1981.[90] The Charter came into force on 21st October 1986. The provisions of the Charter are enforceable within the framework of the African Unity which is a regional inter government organisation established in 1963. The Charter has been ratified by more than forty Africa states thus becoming the most widely accepted regional convention.

5.2 Uniqueness of the African Charter on Human and Peoples' Rights

The uniqueness of the charter lays in the originality of its normative content. Indeed, this charter has unusual features, in the sense that it covers economic, social and cultural rights as well as civil and political rights, which actually distinguishes it from both the European and the American Conventions which follow a more traditional methodology. The Charter lays special emphasis on the right to development and that civil and political rights can not be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a quarantee for the enjoyment of civil and political rights.[91]

Furthermore, the African Charter covers third generation rights, such as the right to peace, solidarity, health environment and development having regard to Africa's place in the concept of nations. It also gives due importance to the assumption that a person has duties as well as rights in the community. This means that with the African concept of rights and duties are inseparable. Rights and duties apply

[90] OAU Doc. CAB/LEG/67/3 rev. 5, I.L.M. 58 (1982), Adopted on 27 June 1981

[91] See: Article 15, 18, 20, 22, and 29 of the Charter

to peoples and well as individuals. The Charter also places special emphasis on the rights and duties of the community such as the family, society, the nation and states.[92]

5.3 Basic Tenets of the African Charter on Human and Peoples' Rights

The charter grants the same protection to civil and political rights as is found in other regional and international instruments, except with respect to freedom from slavery, the freedom from forced or compulsory labor, the prohibition of the death penalty, the right to marriage and equality during marriage and the right to privacy which have less protection. Furthermore, the charter amalgamates duties and rights.[93] Moreover, it stipulates rights of both individuals and peoples. The African Charter is divided into three main parts. The two chapters of part I deal with rights and duties: chapter I sets out the human and peoples' rights to be protected under the charter, while chapter II sets out the individual's duties toward his family and society, the State and other legally recognized communities including the international community.

Part II of the charter, composed of four chapters, elaborates on the measures to safeguard the rights articulated in part I. Chapter I calls for the creation of the African Commission on Human and Peoples' Rights and sets down the structure of the Commission in detail. Chapter II deals with the functions of the commission. The final chapter of part II indicates the applicable principles by which the commission should secure the protection of human rights in Africa. Finally, part III establishes general provisions concerning the commencement of the African Commission on Human and Peoples' Rights.

5.4 Rights Covered under the African Charter on Human and Peoples' Rights

The Charter contains provisions dealing with rights and duties, on one hand and the organs for protections and promotion of those rights and duties on the other. The various rights and duties which are incorporated in the Charter are: right to non-discrimination;[94] right to equality, that is equality before the law;[95] rights of state;[96] right to life;[97] right to association and assembly;[98] right to development;[99] civil and political rights;[100] economic, social and cultural rights;[101] right to peace;[102] right to a healthy environment;[103] rights of the child;[104] rights of women[105] right to health care;[106]

92 Part I, Chapter II of the Charter
93 Part I of the Charter
94 Article 2, 19 and 28 of the Charter
95 Article 3, 5,, 19 and 26 of the Charter
96 Article 27 of the Charter
97 Article 4 and 20 of the Charter
98 Article 10, 11 and 13 of the Charter
99 Article 20 and 22 of the Charter
100 Article 8, 13 and 20 of the Charter
101 Article 15, 18, 20 and 29 of the Charter
102 Article 17 and 23 of the Charter
103 Article 24 of the Charter
104 Article 14 of the Charter
105 Article 18 of the Charter

right to property;[107] right to mental and physical health;[108] right to education;[109] right to national and international peace and security;[110] right to cultural activity;[111] right to liberty;[112] right to a fair trial;[113] right to self-determination;[114] right to movement and asylum;[115] state obligations;[116] duty of the individual.[117]

5.6 Promotion and Protection of Human and peoples' Rights in African

There are three bodies established for ensuring the promotion and protection of human and peoples' rights in Africa, namely the Assembly of Heads of State and Government of the African Unity, African Commission on Human and Peoples' Rights, and the African Court. The assembly of the Heads of State and Government is the organ set forth in the African Charter. It alone has power of decision to the exclusion of the African Commission. It is a matter of regret that it does not possess judicial powers, but some scholars argue that to have it, at first place, is the success.[118] It is above all a point of departure because of the way in which those responsible for the implementation will carry out their functions. Their know-how will enable ideas concerning human rights policy in Africa to be more clearly.

The African Commission on Human and Peoples' Rights on the other hand has been established to within the framework of the African Unity to promote human rights and peoples' rights and ensure their protection in Africa.[119] The functions of the Commission is to promote Human and Peoples' Rights and in particular: (i) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Government; (ii) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations; (iii) Co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.[120] It has been argued that the Commission

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106 Article 16 of the Charter
107 Article 14 and 21 of the Charter
108 Article 16 of the Charter
109 Article 17 of the Charter
110 Article 23 of the Charter
111 Article 17 of the Charter
112 Article 5, 6 and 9 of the Charter
113 Article 3 and 7 of the Charter
114 Article 1, 2 and 3 of the Charter
115 Article 12 of the Charter
116 Article 1, 18, 21, 22, 23, 25 and 26
117 Article 27, 28 and 29 of the Charter
118 It has been argued by the first chairman of the Commission, Isaac Nguema, that the African Charter on Human and Peoples' Rights as it now appears certainly represents a point of achievement.
119 Article 30 of the Charter
120 Article 45 (1) (a) – (c) of the Charter

has performed little in its protective mandate. The performance has been uneven particularly in the investigation work, and this partly due to the insufficiency of funds available to the Commission to enable it to carry out its activities. There has also been lack of cooperation from state parties. Worse still, decisions of the Commission were not taken seriously by the states pronounced to violate rights of the individual within their jurisdictions. It is these shortcomings which finally made the presence of a court inevitable.[121]

According to the Protocol for the African Court on Human and Peoples' Rights the court complements and reinforces the functions of the African Commission.[122] This is to say the Commission may refer a matter to the court in case it is not making progress with regard to a matter reffered to it. Scholars have suggested that the Court is more or less an appellate stage from the commission.[123] In any case, the role of the Court has been expressly stated as a means to avoid any overlap between the two institutions.[124]

The jurisdiction of the Courts extends to cases that are reffered to it by the African Commission, a state which has lodged a complaint with the Commission, by a state against which the complaint has been lodged, by a state whose citizen is a victim of human rights violations and by African intergovernmental organisations.[125] The Court may only examine Non Governmental Organisation or individual communications if the state parties involved have recognized the court's competence to exercise that jurisdiction by making special declaration.[126] Enforcement and monitoring of the execution of the decisions of the court is very clear in the Protocol. States are required to undertake to comply with the judgment in any case to which they are parties within time stipulated by the Court and to guarantee its execution.[127] Again, it has been argued that article 27 of the Protocol can be interpreted more broadly to allow the victim of human or peoples' rights violation to enforce the compensation part of the judgment of the Court in the national courts.[128]

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121 Peter, C, M., *The African Court on Human and Peoples Rights: An Argument for Its Establishment*, A Paper Presented at the Conference on the Future of the African Regional Human Rights System Organised by the Centre for Human Rights of the University of Pretoria, South Africa in Collaboration with the African Commission on Human and Peoples' Rights, Banjul, the Gambia, held at the University of Pretoria between 26th and 28th March 2001, p.7

122 7th Preambular paragraph and article 2 of the Protocol to the African Charter on Human and Peoples' Rights.

123 Carling, M., and chidi, A. O., *Building Bridges for Rights: Inter-African Initiatives in the Field of Human Rights*, London, Interights, 2001, p. 49

124 Peter, C. M., 2001, p. 7

125 Article 5 (1) of the Protocol

126 Article 5 (3) of the Protocol

127 This exercise is monitored closely by the Council of Ministers on behalf of the Assembly.

128 Shelton, D., *Remedies in International Human Rights Law*, Oxford, 1999, p 295

5.5 State Obligation under the African Charter on Human and Peoples' Rights

States parties to the African Charter on Human and Peoples' Rights are under obligation to recognize the rights, duties, and freedoms contained in the Charter and to adopt legislative or other measures to give effect to them.[129] The state is also required to protect physical and health of the family in the society, and to assist the family which is the custodian of morals and traditional values recognized by the community. Again the state is required to ensure ensure 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. The aged and the disabled are also have the right to special measures of protection in keeping with their physical or moral needs.[130] States parties are required individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity, and undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.[131]

With regard to the right to development the Charter requires states parties to have the duty either individually or collectively, to ensure the exercise of the right to development.[132] And with regard to international peace and security, states parties are required to govern relations between states and ensure that any individual enjoying the right of asylum under 12 of Charter are not engaged in subversive activities against his country of origin or any other State party to the Charter and their territories are not be used as bases for subversive or terrorist activities against the people of any other State party to the Charter.[133] Another obligation is found under article 25 of the Charter which requires states parties to the Charter to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.[134]

With regard to the organ which interprets the law, the Charter insist that states parties to the Charter guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.[135]

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129 Article 1 of the Charter
130 Article 18 (1- 4) of the Charter
131 Article 21 of the Charter
132 Article 22 of the Charter
133 Article 23 of the Charter
134 Article 25 of the Charter
135 Article 26 of the Charter

Each state party to the Charter, in accordance to the mentioned obligations required to submit in every two years, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter[136]

6. Human Rights in Tanzania

6.1 During Colonialism

During colonial period one could not talk of the human rights. For colonial government to pretend to uphold fundamental rights and freedom would defeat the very aim of colonialism.[137] Racism and discrimination were accepted as both ways of life and a matter of state policy.[138]

Human rights situation in Africa during this time was backward even by the standard of the African social science.[139] During this time black skins were said to have no souls.[140] They could be bartered for beads; gunned down like wild animals; packed like sardines; shipped like cattle and harnessed to a plough like horses without any compunction.[141] That was the ideology of domination.[142]

The big nations, like United States (US), were also reluctant to pursue democracy and human rights in Africa.[143] They were even supporting Apartheid Regime in South Africa and Vietnam War.[144] It was not until 1960s when US limited its dealings with countries which violated human rights.[145] One would ask why the issue of the Bill of Rights came to the fore in 1960s by the very powers that have been suppressing it for years.[146] It has been argued that it was not because colonialists cared a lot about individual rights and freedoms of the indigenous people, they were concerned about the property of their nationals still in the colonies after independence.[147]

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136 Article 62 of the Charter

137 Peter, C. M., (1997) *Human Right in Tanzania*: Selected Cases and Materials Rudiger Koper Verlag Köln, Pg 2.

138 Peter (1997) pg. 2.

139 Shivji, I., (1989) *The Concept of Human Rights in Africa* Dakar CODESTRIA Book Series Pg vii.

140 Shivji (1989) pg. 1.

141 Williams, E., *Capitalism and Slavery* London Andre Deutch 1964. See also Walter Rodney West Africa and the Trans Atlantic Slave Trade Nairobi East African Publishing House. Quoted in Shivji (1989) pg. 1.

142 This ideology accompanied with it the domination and bleeding. See: Shivji (1989) pg. 1. It is also said that in 1900 more than half of the World's people lived under colonial rule, and no Country gave its entire citizen the right to vote. See Human Rights and Human Development: Freedom and Solidarity [http://www.pcpafy.org>accessed on 13 October 2003].

143 Shraeder, P., (1994) *United States Foreign Policy Toward Africa*: Incrementalism, Crisis and Change, Cambridge University Press pg. 67.

144 Burry, C., (1976) *The Kissinger Study of Southern Africa*: National Security Study Memorandum 39 Westport Lawrence Hill and Co. Ltd.

145 For instance in 1981 US administration earmarked Zaire and South Africa for sanctions and denial of military aid. It has been argued that this time US saw racism and dictatorship as threat to its interest in Africa. The sanctions were pursued in order to influence human rights policies, and give US doors for its interests. See: Vance C *Human Rights and Foreign Policy* Georgia Journal of International and Comparative Law Quarterly 7 (May 1985) Pgs.54-81.

146 It is this time when there was Constitutional Talks at the Lancaster House in Britain where the British made sure that a Bill of Rights was entrenched in the constitution of its former colonies. See: Legal Aid Committee (1985) *Essays on Law and Society* Faculty of Law University of Dar es Salaam, pg. 12.

147 Legal Aid Committee (1985) pg. 13.

6.2 After independence

After independence, hopes for human rights were high. But soon thereafter the nationalist governments violated their own laws, misused their own powers, bullied and oppressed the masses and encroached upon people rights.[148] One of the law Professors in Tanzania has this to say:

> *In the struggle for independence things were not better. There was an open struggle between the people and the new rulers. While the people attempted to consolidate their independence from colonial ruler, this was frustrated quite early by the very leaders.*[149]

During independence the situation was bad. The in-coming government, right at the independence, rejected the guarantee of fundamental rights and freedom in the form of a Bill of Rights.[150] The nationalists put the arguments for rejection that a Bill of Rights would hamper the new government in its endeavour to development of the country, it would be used by Judiciary to frustrate the government by declaring most of its actions unconstitutional, and also it would invite conflict.[151]

The question of individual rights was raised again in the report of the Presidential Commission on the Establishment of a Democratic One-Party State in 1965.[152] The suggestion was ignored and the Interim Constitution of 1965 did not include Bill of Rights.[153] The 1965 Constitution only contained several very general rights provided in the preamble to the Constitution.[154] Since individuals had no any other alternative to enforce their rights, they had to try to use this alternative to enforce their rights and freedoms.

6.2. 1 Alternatives to the Bill of Rights

6.2.1.1 Preamble to the Constitution

The Interim Constitution of 1965 contained a preamble which had a constitutional guarantees usually found in normal Bill of Rights. But under the common law legal tradition, which is followed by Tanzania and other British colonies. The Preamble is not part of the constitution.[155] Therefore one cannot base his or her case for violation of rights or freedom on this part of the constitution.[156]

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148 Warfa, S. O., (1992) Challenges facing Africa as it embraces Pluralism: *Special Human Rights Report* Published in Daily Nations of 16 March 1992.

149 Peter (1997) pg. 3.

150 Peter (1997) pg. 3.

151 Peter (1997) pg. 3.

152 Legal Aid Committee (1985) pg. 13.

153 Legal Aid Committee (1985) pg. 14.

154 Legal Aid Committee (1985) pg. 14.

155 *Powel v. Kempton Park Racecourse Co*. (1899) A.C 143. You can also see Peter (1997) 9.

156 In India, though it follows common law legal tradition, one can enforce his rights basing on the preamble. In *Kesavanada v. State of Karala* AIR 1973 SC 1461 it was said that the Constitution, including the preamble, must be read as a whole and in case of doubt it has to be interpreted consistence with its basic structure to promote the great objectives stated in the preamble.

Eight years after the inclusion of the preamble to the 1965 Constitution, Hatimali Adamji[157] tried his case basing on the preamble. Being compulsorily retired from the East African Posts and Telecommunication Corporation to facilitate Africanisation, Adamji argued that his retirement violated the policy of non-racialism, and amounted to discrimination against him, as a Tanzanian of Asian origin, as provided in the preamble to the Constitution. The issue before the court was whether a person could enforce the rights contained in the preamble. The answer from late Justice Biron was that *the preamble to a constitution does not in law constitute part of the constitution and so does not form part of the law of the land*.

Seven years after the Adamji's legal battle, Lesinoi Ndeinai tried his lucky when he filed a case of fundamental rights and relied on preamble as an authority. After a very big battle in the court, Justice Kisanga had this to say:

A preamble is a declaration of our belief in these rights. The rights themselves do not become enacted thereby such that they could be enforced under the Constitution.

Justice Kisanga then concluded:

One cannot bring a complaint under the Constitution in respect of violation of any of these rights.[158]

It is therefore settled that under the common law legal tradition a person cannot base his arguments on the preamble.[159] Having difficulties in enforcing their rights, citizens in Tanzania looked for other alternatives. Schedule to the Constitution was the second alternative.

6.2.1.2 Schedules to the Constitution

According to law the schedule is part of the Constitution and therefore can be used to deal with issues relating to assertion and enforcement of fundamental rights and freedom.[160] It happened that in the same Constitution, which Lesinoi Ndeinai failed to enforce his right in basing on preamble, Tanganyika African National Union (TANU) Constitution was attached in the schedule. The TANU Constitution contained the belief on fundamental rights and freedom. Thabit Ngaka based his case on this part of the Constitution. Acting Justice Mfalila held that in Tanzania *under Article 3 (f) of the TANU Constitution workers including government employees, have a right to their wages and not a mere privilege*.[161] This holding is recognition that the schedule to the Constitution is part of the Constitution and therefore can be enforced.

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157 *Hatimali Adamji v. E.A.P.T Corporation* (1973) LRT 6.

158 See: Separate judgment of Justice Kisanga in *Attorney General V Lesinoi Ndeinai* [1980] TLR 214.

159 It has been argued that the decision was not good for future human rights in Tanzania. The argument put was that human rights do exist without any provision of a law. In England, for instance, there is no Written Constitution still people can enforce their rights in court of law.

160 Peter (1997) pg. 10.

161 See: *Thabit Ngaka V Regional Fisheries Officer* [1973] LRT 24.

The executive viewed this as a blow to their wishes. In 1977 they introduced a new Constitution.[162] This Constitution did not contain a Bill of Rights. The TANU Constitution was also no longer appended as a schedule. This sealed the fate of any form of enforcement of fundamental rights and freedom.

6.2.2 Introduction of the Bill of Rights

It was not until the Fifth Constitutional amendment in 1984 when the Bill of Rights was entrenched in the Constitution.[163]It has been opined that the Bill of Rights was not included in the Constitution not out of the state's genuine commitment to protect fundamental rights but rather out of pressure from people and other external forces.[164] Some of these internal pressures were from the people themselves to give their views in the Radio and Newspapers, pressure from Zanzibar, which had already have Bill of Rights. External forces included the pressure from the continent in Africa, particularly after the introduction of the *African Charter on Human and Peoples' Rights* by the Organisation of African Unit (OAU) in 1981.[165]

After the inclusion of the Bill of Rights into the Constitution, many people enforced their rights through courts of law. The courts were not so reluctant to recognise their rights. For instance, four years after the Bill of Rights, *Ntiyahela Boneka* filed a case concerning his rights to property, which were violated by Kijiji cha Ujamaa Mutala.[166] In this case the court held that the law in this country does not sanction seizure of an individual's property in absence of any enabling written law and without adequate compensation. This position was also considered in the case of *Bunzari Mpiguzi* where the court held that section 24 of the Fourth Constitutional Amendment Act 1984 unequivocally provides that no body should be deprived his property contrary to law and without compensation commensurate to the value of such property if such deprivation is necessary.[167]

Perhaps, in the legal history of Tanzania, the 1984 Constitutional amendment is the most significant. It has laid a foundation for the enforcement of individual rights and freedom. But it is said that there are still serious problems with respect for human rights in Tanzania.[168] The government has made some efforts to protect human rights at its best by amending the Constitution to accommodate new changes. For example in 1992, the government amended the Constitution to introduce a multi party

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162 The United Republic of Tanzania Constitution, 1977. Herein to be referred as the Constitution.

163 See: The 5th Amendment to the United Republic of Tanzania Constitution of 1997-Constitution (Fifth) (Amendment) Act, 1984 (Act No.15 of 1984).

164 Mbunda, L. X., The Bill of Rights in Tanzania*: Strategies for Protection and Promotion of Fundamental Rights and Freedoms in a Multi-Party Tanzania* In Mtaki C and Okema J (eds.) (1994) Constitutional Reforms and Democratic Governance in Tanzania Dar Es Salaam DUP.

165 Peter (1997) pg. 11.

166 *Ntiyahela Boneka v. Kijiji Cha Ujamaa Mutala* [1988] TLR 156.

167 *Bunzari Mpiguzi v. Lumwecha Mashili* [1983] TLR 354.

168 See: Tanzania Country Report on Human Rights Practices for 1998 [http://www.state.gov accessed on 10 September 2004].

system.[169] It also amended the Constitution in 2000 to give the judicature final authority on the dispensation of justice and adjudication of rights and obligations.[170]

In all these efforts, it is still said that the government in Tanzania indicates no intention of promoting or protecting fundamental rights and freedom of the people throughout post independence era.[171] The government in office have always been in a need of constant push in order to do any pro-human rights action. Otherwise nothing positive moves from the side of the state.[172] Although there are provision on the protection and promotion of fundamental rights, there are still hindrances to realisation of rights and freedom enumerated in the Constitution, such as the claw-back clauses.[173]

Due to these difficulties involved in protecting and promoting human rights, various Non Government Organisations and other international organisations thought of lobbying the government and other stakeholder to establish a human right Commission to deal with the abuse of human rights.[174] The recent establishment of the Commission for Human Rights and Good Government is viewed to be a solution of the ever-existing human rights abuse in the country.

7. Establishment of the Commission for Human Rights and Good Governance

The Parliament in Tanzania established the Commission for Human Right and Good Governance in 2000.[175] As the Constitution cannot provide details of the Commission, the Parliament had to enact a statute to give details. In May 2001 the Parliament enacted an act to establish the said Commission.[176]

7.1 Functions of the Commission

The Commission is provided with many functions in the Act.[177] Among the important ones are to promote within the country the protection and preservation of human rights and of the duties to the society in accordance with the Constitution and the laws of the land.[178] The Commission is empowered

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169 See: The 8th Amendment to the United Republic of Tanzania Constitution of 1997- Constitution (Eighth) (Amendment) Act, 1992 (Act No. 4 of 1992).

170 See: Article 107 of the United Republic of Tanzania Constitution of 1997 – Constitution (Thirteenth) (Amendment) Act, 2000.

171 Peter (1997) pg. 762.

172 Peter (1997) pg 762.

173 Peter (1997) pg. 763.

174 Peter, C. M., *The Bill o Enact the Commission for Human Rights and Good Governance Act, 2001: Introduction and Comments.* A Presentation at the Seminar on Commission for Human Rights and Good Governance Organised by the Ministry of Justice and Constitutional Affairs held at Sheraton Hotel in Dar Es Salaam on 23 March 2001, pg. 5.

175 See: The 13th Amendment to the United Republic of Tanzania Constitution of 1997 - The new article 129 to 130 which make Part I of Chapter 6 of the Constitution (herein to be referred as the Commission).

176 See: Commission for Human Rights and Good Governance Act, 2001 (Act No. 7 of 2001) (herein to be referred as the Act).

177 Section 6 (i) (a) – (o).

178 Section 6 (1) (a).

to receive allegations and complaints in violation of human rights generally[179] and to conduct enquiries into matters involving the violation of human rights and the contravention of the principles of administrative justice.[180]

The Commission is also empowered to conduct research into human rights, administrative justice and good governance issues and to educate the public about such issues.[181] When it is necessary, the Commission can institute proceeding in court designed to terminate activities involving the violation of human rights or redress rights violated or in contravention of the principles of administrative justice.[182]

The Commission can also provide advice to the government and to other public organs and private sector institutions on specific issues relating to human rights and administrative justice.[183] In doing so, the Commission can take measures for promotion and development of mediation and reconciliation among the various persons and institutions who come or who are brought before the Commission.[184]

The Act also empowers the Commission to cooperate with agencies of the United Nations (UN), the Organisation of Africa Unit (OAU),[185] the Commonwealth and other bilateral, multilateral, or regional and national institutions of other countries which are competent in the areas of protection and promotion of human rights and administrative justice.[186] To easy this cooperation, the Commission is empowered to promote ratification of or accession to treaties or conventions on human rights, harmonisation of national legislation and monitor and assess compliance within the country[187] by the government and other persons, with human rights standards provided for in the treaties or conventions or under customary international law to which the country has obligation.[188]

The good thing about the Commission's powers is that it does not intervene when human rights have already been violated. The Commission is empowered, in relation to the members of the public, to promote, protect and where necessary to provide assistance to persons whose human rights have or are in imminent danger of being violated.[189] But this should be done without prejudice to the above-mentioned functions.[190]

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179 Section 6 (1) (b).
180 Section 6 (1) (c).
181 Section 6 (1) (d).
182 Section 6 (1) (c).
183 Section 6 (1) (j).
184 Section 6 (1) (n).
185 Now is known as the African Unity (AU).
186 Section 6 (1) (m).
187 Note: The country in context of this paper is the United Republic of Tanzania.
188 Section 6 (1) (l).
189 Section 6 (2).
190 Section 6 (2).

7.2 Jurisdiction of the Commission

The Commission's jurisdiction is potentially wide. It extends to all complaints and allegations submitted to it from Tanzania Zanzibar.[191] The Commission has the power to investigate any human rights abuses or mal-administration.[192] It may act in its own initiative[193] or on receipt of a complaint or allegation[194] by an aggrieved person acting in such person's own interest.[195] It can also receive complaints or allegations from associations acting in the interests of its members.[196] The Commission can also hear a person acting in the interest of a group or class of persons.[197]

After conducting an investigation the Commission has the power to promote negotiation and compromise between the parties concerned;[198] or causing the complaint and the findings of the Commission to be reported to the appropriate authority;[199] or recommending to the relevant person or authority such measures or requiring that authority to take such measures, as will provide effective settlement, remedy or redress.[200] The Commission also has authority, under the Constitution and the Act, to take an action before any court and may seek any remedy which may be available from that court.[201]

7.3 Limitations and Restrictions on the Commission

The Commission is bound by the provisions of article 46 of the Constitution and article 36 of the Constitution of Zanzibar.[202] The Commission has no authority to investigate or institute any proceedings against the President either of Tanzania Mainland or Zanzibar.[203]

The Commission is also barred from investigating a matter which is pending before a court or other judicial tribunal;[204] a matter involving the relations or dealings between the Government of Tanzania and the Government of any foreign state;[205] a matter that is related to the prerogative of mercy;[206] and a matter which the President directs otherwise in accordance with the provisions of the Constitution.[207]

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191 Section 3.
192 Section 15 (1).
193 Section 15 (1) (a).
194 Section 15 (1) (b).
195 Section 15 (1) (b) (i).
196 Section 15 (1) (b) (ii).
197 Section 15 (1) (b) (iii).
198 Section 15 (2) (a).
199 Findings can also be reported to any person having control over the person in respect of whose act or conduct an investigation has been carried out by the Commission. See: Section 15 (2) (b) of the Act.
200 Section 15 (2) (c).
201 Section 15(3).
202 Section 16 (1).
203 Section 16 (1).
204 Section 16 (2) (a).
205 Section 16 (2) (b).
206 Section 16 (2) (b).
207 Section 16 (2) (c).

One of the jeopardy things within the Act is that the President can stop the investigation at any moment in time.[208] President can direct in writing and furnish the Commission with reasons for such direction and the Commission will inform the complainant of the decision and the reasons for it. Although the Act provides that President will act in accordance with the provisions of the Act and the Constitution, it will still give threat to the Commission.[209] It is good that in the same section there is a provision that gives individuals to seek assistance or redress from the High Court under provisions of article 30 (3) of the Constitution.[210]

7.4 Judgment of the Commission

The decision of the Commission will depend on the majority of the members present at a meeting. In the event of any equality of votes on any matter, the member presiding will have the casting vote in addition to his deliberative vote.[211] The decisions of the Commission shall have the status of a recommendation to the appropriate authority or person having control over the person in respect of whose act or conduct an investigation has been carried out.[212]

7.5 Execution of the Decision and Remedies

The Commission after making investigations and finds that the subject matter of the investigation amounts to breach of any of the fundamental rights and freedom provided in the Constitution or any international instrument to which the United republic is party, the Commission will report its decision, recommendation and the reasons for it to the appropriate authority concerned.[213] The appropriate authority is given time not exceeding three months, from the date of the recommendation, to make a report to the Commission detailing of actions taken by the authority to redress the impugned fundamental rights or acts of maladministration.[214]

If it happens that within the prescribed time the authority did not take any action seems to be adequate and appropriate, the Commission may bring action before any court or recommend to any competent authority to bring an action and seek remedy.[215] The Commission is not precluded from

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208 Section 16 (3).

209 It is provided that the direction shall be made in accordance with the provisions of article 130 of the Constitution, and only when there is real and substantial risk that an investigation would prejudice matters of national defence or security. See: Section 16 (4).

210 Section 16 (5).

211 Section 20 (3).

212 Section 17 (1).

213 Section 28 (1) (a). Other reasons for considerations of the decision are provided under section 28(1) (b)–(f) of the Act.

214 Section 28 (2).

215 Section 28 (3).

resolving complaint or rectifying any act or omission emanating from a violation of any fundamental right or acts of maladministration in any manner including mediation, conciliation or negotiation.[216]

7.6 Right to Representation

The right to legal representation is a fundamental right and it relates to the right to be heard and the right to personal freedom and liberty.[217] Legal representation is provided in the Act. The position is to the effect that a complainant, an interested party and any other person whose conduct is likely to be subject of adverse comment by the Commission may be represented by an advocate or by any other person suitable to represent him.[218] It is argued that this is a positive development as it allows even a layperson to represent parties in the Commission.[219] This shows that justice is done and is seen to be done.

7.7 Final Verdict, Remedies and Enforcement of the Decision

The Act provides that if the Commission, after investigation, finds that there has been a violation of human rights it shall report its decision or recommendation and reasons for it to the appropriate authority.[220] The appropriate authority is required, in time not exceeding three months, to make a report to the Commission with details of any action taken by such authority to redress the impugned fundamental rights or acts of maladministration.[221] If there is no adequate and appropriate action taken by the appropriate authority, the Commission may bring an action before the any court or recommend to any competent authority to bring action and seek such remedy as may be appropriate for enforcement of the recommendation of the Commission.[222]

Therefore, there would be no contempt of the Commission in cases of failure by the appropriate authority to take adequate and appropriate actions. This is much contributed by section 17 of the Act where the status of the decision of the Commission is just recommendation.[223] The Commission is supposed to issue binding and enforceable orders to the parties appearing before it and if ignored should amount to contempt of the Commission.[224]

8. Conclusion

The paper has attempted to show human rights developments and situations in the world generally, Africa and Tanzania in particular. It has been shown generally that human rights is a product of a long

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216 Section 28 (4).
217 Peter (2001) pg. 9. See also : Article 7 of the African Charter.
218 Section 23 (1).
219 Peter (2001) pg. 9.
220 Section 28 (1) (a) – (f).
221 Section 28 (2).
222 Section 28 (3).
223 Section 17 (1).
224 Peter (2001) pgs. 13 and 18.

and it has gone a long way down to the creation of human beings. In Tanzania the paper attempted to show how it is difficult to protect and promote human rights from colonial era to present. It has also been shown that our past human rights history is so sad. There was no culture of protecting and promoting human rights. The establishment of the Commission gives some hopes. The function of the Commission is to *promote* the protection and preservation of human rights and duties. The paper suggests that our future human rights protection and promotion is still an issue. To the Commission, at least, the impact cannot be *fully* assessed at the moment. The commission has been in existence only for six years. Again, there are only few inquiries attended to the present day, and the state have not offered full obligation as required by the Act.