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INSTITUTE OF JUDICIAL ADMINISTRATION

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MANUAL ON CONSTITUTIONS AND LEGAL SYSTEMS

Prepared by Ms Anneth Amin Mnzava, LL.B (Hons) Dar.

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UNIT 1

Introduction to Constitutions and Legal Systems

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Introduction

Generally, the study of Law comprises of number of courses in Law including Constitutions and Legal Systems of variety Countries/Continents of the World. The key objective of the Constitutions and Legal Systems Course is to expose to the students the concept of a constitution as a basic law in any particular legal system around the World. To begin with the key elements and basic concepts of the course will be introduced.

Objectives

At the end of the lecture students are expected to be able to:

- Explain what it means by a legal system
- Identify the different global legal systems
- Outline the historical background and the developments of each legal system
- Identify the features of each legal system

What is Legal System?

Legal System presupposes the existence of laws, including the constitution, regulations, the instruments of their enforcement and the instruments for deciding whether or not in any given case the laws or regulations have been violated[1]. Briefly, one would argue that Legal System presupposes the existence of Law making body (the Legislature in any form be it Parliament, Congress or House of Representatives), the Executive and the Law Interpreter (the Judiciary)

Types of Legal Systems

The World does not posses a uniform type of legal system. Legal Systems differ from one country to the other, some countries follow religious form of a legal system like Islamic Law System to most of Arab Countries, African countries, before colonialism, based mainly on Customary Law System and these are still in application, with various amendments, todate in some countries like Tanzania. In most cases these laws do not stand as legal systems but rather as personal laws to settle mainly inheritance, succession and family disputes. There are many different legal systems of human civilization. But the most dominant legal traditions and systems in the modern world are Western. This is because over the last couple of centuries, West European countries invaded and dominated much of the world and continue to do so today through their economic and military superiority…Therefore there are variations, and between legal traditions.

[1] C. K. Mtaki, Constitutions and Legal Systems of East Africa: part one, @ p.3

None of them is monolithic[2]. However, the most popular and applicable legal systems in the world are two i.e. Civil Law System and Common Law System, but the scholars have added another type called Socialist Legal System, which came at the triumph of socialism in several countries like the former USSR. Other legal systems, though not popular, include Islamic Law, Customary Law, and Hindu Law etc.

Civil Law System

This legal system is a result of joint efforts of Scholars from Universities of Latin and Germany between 12th and 13th Cs in Western Europe. Some Scholars, such as David and Brierly prefer to refer to this system as Romano-Germanic[3]. Thus, Civil Law System originated from continental Europe, and is principally centered there today even though because of European's expansion through colonialism, many non-European countries have adopted it or borrowed certain elements. The Civil Law System was formed by the efforts of the European Universities which, from 12th C and on the basis of the compilations of Emperor Justinian (A.D. 483-565), evolved and developed a juridical science common to continental Europe. The compilations were known as the DIGEST. Prior to this time there existed various laws however they were not that much developed to acquire the status of a legal system, thus Justinian made extra ordinary efforts to give the existed laws the status of legal system, however, this was just a first phase.

The second phase came after the fall of Justinian Empire where by the DIGEST ceased to apply and primitive legal systems came to the

[2] I. G. Shivji et al. Constitutional and Legal System of Tanzania: A Civics Sourcebook, @ p.21
[3] C. K. Mtaki, supra, @ p 4

replacement. These primitive legal systems based on either tribal or clan foundations.

The second phase in the growth of civil law system began with the renaissance of Roman law studies in the universities of Latin and Germanic countries during 12th C. For about five Centuries the system was dominated by the writings of jurists under whose influence legal practice itself in continental Europe evolved. The second way finally paved way to the third phase that came to be known as the Modern Phase in which the legal system, apart, from the dominance of the jurists writings is now dominated by legislation- written law.

Features of Civil Law System

- Initially, the task to determine and formulate the law was vested with the jurists/Legal scholars.
- It evolved as an essentially, private law. (Tailored to regulate private relationships between individual citizens)
- Court proceedings are based on Inquisitorial procedure. I.e. The judge has a much more central role in the process of not only judging but in inquiring, and setting the terms of inquiry, into the dispute.

Common Law System

The Common Law System operates in England and Wales. This is a legal system that bases on the doctrine of precedent where by law develops

through the judges who seek principles and rules from previous decisions to decide the matters at hand. Therefore, the Common Law System does recognizes the laws made by the Judges while deciding cases through the principles and rules from previous decisions and this fact makes Common Law to be both the laws made by the law making body (Parliament) and the law interpreter. Thus, the question that **" Do Judges make laws?"** receive the positive answer **"YES"** under the Common Law System, while to some other legal systems like civil law system the interpreter in this context the Judiciary is not allowed to make law. So, the most important thing to note here is that under common law system court decisions, though not all of them, are laws after the long time practice. It is to be understood that court decisions become laws when judges announce their decisions and give the reasons to their decisions, when cases of similar facts arise then judges would **just decide** to be guided by previous decisions. **(formally this was taken to be persuasive in nature but after time, judges found themselves bound to decide cases of similar facts through the principle of analogy from previous decisions, this developed through the doctrine of binding precedent, stare decisis. This had one objective to make develop uniformity in cases of similar facts though judges do enjoy the right to decide cases by basing on their facts; each case has to be decided on its own merits),** This is called in law decision-making by analogy, and this is what is called **judicial precedent**. Therefore, court decisions become law only when developed through judicial precedent.

Origin and growth of common law

The common law has its origin in Anglo-Saxon customary rules by judges after the Norman Conquest in 1066. Before the coming of William the Conqueror in 1066 there already existed a primitive legal system consisted mainly of customary rules and written laws which were codes of law compiled by Anglo-Saxon Kings. Geographically the whole country was divided into shires and each shire had its own court known as communal court. The courts used to administer the customary rules and the written laws that were compiled by the Anglo-Saxon kings. The shire court met periodically in the county town and was presided over by an official known as the sherrif, who was a representative of the king.

In 1066, King William of Normandy conquered England establishing feudalism and a strong government and legal system. At first, William and his co-Norman kings ruled the country by using the existing local courts and other institutions. But beginning the year 1096 William began sending administrative officers and royal officials throughout the country to discharge administrative and judicial functions. This system enabled William to control the country better because the royal officials sent or hear cases offered better methods of trial compared to the communal courts. In the long run the communal courts died a natural death.

Therefore it can be concluded with certainty that common law was formulated from the indigenous customs by royal itinerant judges who were sent out as representatives of the king, to administer justice throughout the realm which was then divided into circuits. In the course of discharging their functions the judges ascertained and applied the customs applicable in

the locality. They discovered the customs with the help of a jury and then applied them. On completing their circuits the judges returned to the royal courts at Westminster. Here the judges would discuss the merits of various customs discovered, agreeing on certain customs and rejecting others. In this way local customs gained the force of general law since local customs formed the basis on which judges developed the common law. By about 1250 of those customs were sifted and unified into one system of law common to all people hence the term **"common law"**[4].

Features of the Common Law System

- Itinerant judges formed it.
- It bases on the doctrine of precedent.
- It is adversial in nature in which parties make their side of the case and the judge play an impartial role.
- It is mainly Public law since private matters were not much of concern to common law courts.

EQUITY

The English legal system is made up by common law and the well-known doctrine called the principle of Equity. This is a body of laws in contrast to the common law that developed in the 15th C. by the court of Chancery to remedy the inadequacies of the common law. Equity became a supplement to common law. It happened several times in England that people were not satisfied with the decisions announced by judges by basing on common law.

[4] C.K Mtaki, Supra, at pp. 8-10

People thought that in some instances common law was not doing them justice, people sought a mechanism of seeing the King by themselves and present their grievances for fair and just solutions. The King's wisdom became another legal means in handling peoples' disputes. Thus, since then Equity stands for natural justice and fairness. One should go to equity with clean hands.

Socialist Legal System

Socialist laws constitute the third category of world legal regimes. The system originated in the USSR. With the triumph of the Socialist Revolution USSR began to build new type of society. The society to be created is a communist one under the aegis of fraternity (brotherhood) where there will be no more state and no more law. In a communist society state will be made superfluous by a new feeling of social solidarity developed through the disappearance of the capitalist world's antagonisms. In this communist society even the instruments of coercion will disappear and that social relations will be ruled primarily by communist morality. It can simply be argued that the Socialist Legal System targeted on building communism where by state and law would not find their way to survive in the societies, however, with the fall of USSR, it is doubtful if the remaining countries like Romania for example will be able to stand their goal of transforming their societies into communism.

Features of Socialist Legal System

- Revolutionary in nature.
- Disappearance of State and law.

- Private law narrows down at the expense of public law.

Conclusion

With the above lecture it is highly expected that students are now well equipped with what it means by the term Legal system. It is also certain that students are at this juncture able to explain different types of legal regimes that operate or were once upon a time in operation in the World. Finally, students should be well aware on how these legal systems were introduced in Africa particularly in Tanzania.

UNIT 2

The Theory of State and Law

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xv. The Theory of State and Law
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xvii. Origin of Law
xviii. Nature of Law
xix. Functions of Law
xx. Law compared with other social norms
xxi. Division of law
xxii. Correlation between State and Law
xxiii. Law as Custodian of the Interests of the Ruling class (ideology of law)
xxiv. What is a State?
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Introduction

For a long time in the history of the World Scholars and philosophers have been trying to find out what it means by these two important phenomena, i.e. State and Law. Attempts have been made to ascertain on whether State and Law have always existed. There have different types of approaches and theories as far as the existence of law and state are concerned. In this lecture some of these approaches will be looked at and see if the question will receive a satisfactory answer. In addition the nature and correlation of the two will be a mater of discussion in this lecture as well.

Objectives

- It is aimed that at the end of the lecture students will be able to:
- Identify broad theories of state and law.
- Define law.
- Differentiate law from other social norms.

- Explain the nature of law.
- Explain how law is created.
- Analyze the relationship between state and law.
- Define and explain the origin of the state.

The Theory of State and Law

There have been several attempts by various scholars and philosophers on the origin of state and law, however, only two of them have received the world's attention and recognition. These broad theories are Idealist theory and Materialist theory.

Idealist Theory.

Scholars who believe that the source and origin of everything is God propound idealist theory. They believe that all material beings originate from a **transcendental being** that is God. They contend further that since God is the source of all material beings, he is, by the same token, the prime mover of such material beings. Therefore they argue that God is the sole determinant of all phenomena including law and state, which he gives once and for all. Thus according to this theory state and law are God given and for that matter they are eternal categories, which are over and above man and society generally. To them Kings and rulers are representatives of God in the world with the assignment to rule by divine right. It is therefore a must for man to obey God fully. Founders of this theory include John Locke and Thomas Hobbes, these and many others connect state and law with God.

Materialist Theory.

Unlike Idealist theory, materialist theory contends that to understand the origin of state and law it is important to study the historical and dialectical development of the two phenomena. They therefore argue that the two are social institutions, in which their origin is to be traced through modes of production at each particular stage of human development. To them, state and law came into being at a particular stage of human development. They argue that state was not in existence at the primitive communalism because at this time man lived a very low and primitive life due to low level of development. They are of the view that state and law originated at the time when man was highly developed economically, socially and technologically, where man was able to produce surplus. At that time when man had improved means of production. They conclude by saying that state and law emerged when there was tremendous improvement in the productive forces, production relations and social relations which in turn guaranteed division of labour, production of surplus, and class formation in society.

What is Law?

For years now Philosophers and other social thinkers have been making attempts to explain what it means by the term law. However, it seems the clear definition of law has been difficult to be obtained; there has not been uniformity in the definition of law. Probably that has been so due to the fact that law, like other social phenomena, is traced by different

approaches. Despite the fact that there have been various approaches on the meaning of law that does not bar us from taking a stand somewhere on the meaning and the nature of law. In this part various definitions of law as given by different philosophers will be discussed. The discussion will look at law as those rules, which we have to obey and, if we do not obey them, we can be taken to court and get punished for breaking the law.

Sir John Salmond defines law to mean **the body of principles** recognized and applied by the state in the administration of justice. He argues that law entails **rules** recognized and acted on by courts of justice. To Salmond law are the rules enforced by the state. Is it a satisfactory definition?

John Austin says law is a **rule** of conduct imposed and enforced by the sovereign. To him law is a command of a superior being over the inferior being that is enforced by sanctions/punishment. Austin establishes the state to be the superior being while individuals are the inferiors. Thus, law Is a command set by the state to the individuals.

Thomas Hobbes defines law to be an **obligatory rule** of conduct that is set by him or them that have coercive power. Here Hobbes is of the view that law is a command set by the state or rulers who own/posses the police and other coercive powers.

At another level, law can be defined as a system of rules of social behaviour. The rules can be general because they do not deal expressly with a single person but with a group of human beings. The rules are also

general because they describe a possible human behaviour (only social behaviour) in a general abstract way[5].

From all these definitions one will notice that all scholars agree that law is either a rule or a set of rules. However, the most important thing to note here is that form the definitions three elements are deduced, these are:

- Law is a body of obligatory rules of human behaviour or conduct. It is a collection of norms that one has no option other that obeying them.
- Laws are rules that are imposed and enforced by a coercive body, that is, a sovereign or the state. State refers to a central organ, which has the monopoly of violence or ultimately uses force or coercion so that law is obeyed. The ultimate use of force is an important element of law. This differentiate law from other social norms like moral, religious or social rules of conduct…
- Breach or violation of these rules results in a sanction being applied against the person who breaches the rule.

Origin of Law

The origin of law is closely connected with the division of society into classes in the course of a long historical period. Law was created to secure the rule of one class over the other classes. Since society split up into classes, the economically dominant class guaranteed its rule by using the state to create and to enforce a legal system, which

[5] C. K. Mtaki, supra at p. 23

corresponded to its fundamental interests. Law, therefore, express the will of the economically and politically dominant classes. It assumes the form of **state will** by virtue of the politically dominant class because, above all, it dominates, the state. Since the state is an institution of political power, law is always a political phenomenon.

Nature of Law

Law is differentiated form other social norms that regulate human behaviour by its unique nature of normativity. Normativity of law means that the members of society are bound to behave in accordance with the law. People are bound to live in accordance with the law and not in accordance with their interests and wishes. Law has always been binding. Generally, normative nature of law is seen in three scenarios:

- Law as permissive rules.
- Law as prohibitive rules and
- Law as directive rules

Therefore, law regulates human behaviour through any of the above ways.

Functions of Law

Law in any given jurisdiction has its own roles and functions. Through these functions the need and demand of any society to have the law are met. It is out of the need for well-governed society, the need to have a well-organized public power, the demand for peaceful society and the desire to have a system that governs and regulate individuals in societies. Therefore, all these needs attracted the emergence of

law in societies and thus, laws that are set or enacted must fulfill these demands. Therefore the following are the major functions of law:

- Law has a role to structure public power. With this function law expresses or establish public power (the state). Law also structure and controls the exercise of power. It is the law that puts in place the organs of the public power and set the limits on the same. Law plays the role of recognizing basic human rights and set the duties of the people in societies they live. Therefore, by meeting this important role, law structures the public powers for the benefit and good of both classes in the societies mainly, the ruling class and the ruled.
- Law facilitates and regulates private relations. With the advancement of technology and improvements in modes of productions there have been tremendous changes in socio-economic relations among individuals. Conducive environment that would make the new socio-economic relations operate was a must, and that environment was to be laid down by rules and laws that would attract for example fair contractual relations, or property ownership relations. In these we get law of contract and law of property etc.
- The other function of law and which is well known to many is to solve disputes or conflicts between and among members of society. In any living and growing society where members of that particular society interact in day-to-day activities, conflicts are inevitable. Therefore, it is for the law to resolve

these emerging conflicts and restore the status quo in society. Through this role peace is restored and make people focus on production activities and the living peaceful. This is done by the state through law to set institutions like courts of law and other bodies to resolve disputes.

Law compared with other social norms

Law is not the only social norm that regulates the social behaviour of the people in society; there are other social norms like, rules of morality, customs and organizational rules. The differences between law and other norms are:

- Law is created by the state, either by being enacted by a law making body or by being formulated by certain organs like courts and members of the executive when practicing delegated functions.
- Law attracts state interests, therefore can be or is enforced by means of exercising state power.

Divisions of Law

Commonly, law is classified into three categories that are:

- Criminal Law and Civil Law
- Public Law and Private Law
- Substantive Law and Procedural Law

Criminal Law and Civil Law

These are the well-known divisions of law to many people including laymen. **Criminal law** is that class of law that attracts the interests of the

state/public and therefore deals with relationship between the state and individuals. It deals with crimes and punishments. In criminal cases the suspect of a crime is called the **accused** and those who allege suspicion towards the accused are called **prosecutors.** When the case is determined the accused is either found **guilty** or **not guilty** and if guilty he is **convicted** and **sentenced** accordingly.

Civil law is the class of law that regulates the relationships of individuals to which the state has no interest at all and is not directly involved. The state only provides institutions and framework for the resolution of private disputes. In civil cases the person who sues is called the **plaintiff** and the person who is sued is called **defendant.** Normally punishment in a civil suit is **compensation** when the court finds that the lawsuit is justifiable.

Public Law and Private Law

Public law is that branch of law that deals with the relationship between the state and the individual. It also provides for how public power is to be exercised, by whom and by what limits. Public law comprises of laws such as constitutional law, administrative law and criminal law. **Private law** is the one that governs and regulate the relationship between the individuals. It deals exclusively with relationships between private individuals. Private law is made by various laws such as law of contract and family law.

Substantive law and procedural law

Substantive law is the branch of law that deals with the rights and relationships that give rise to either rights or obligations, while

procedural law is the law that provides for procedure for establishing who is right and who is wrong. E.g. the law that says it is wrong to breach a contract is substantive under the law of contract. It provides for the substance of the law that is what the law says or directs. The law that says you have to file some documents or papers to make your case is procedural one.

Law compared with other social norms.

Law is not the only set of social there are other norms such as customs, rules of morality. However, law as a social norm is differentiated from other social norms due to the fact that unlike other norms law is creature of the state. The state through its law making body enacts laws or law is formulated by state organs like courts of aw or the executive through delegated powers. Other social norms are only enforced only when recognized by the state. Upon recognition they attain the force of law and regarded as laws of the country.

What is a State?

There has much confusion on defining and understanding the term 'State'. In most cases state is explained as a country, nation or government, but is completely wrong. These are just related terms but their meanings remain different. Normally, **country** is used to describe a geographical space or territory bounded by internationally recognized boundaries. **Nation** refers to a community of people constituted historically and who share territory, language, culture and economy and they identify themselves as part of a

nation. E.g. the nation of Palestine exists but it does not have a country because its people were driven out of their territory. **Government** is interchangeably with the state but strictly speaking **government** refers to the executive arm of the state while state is an organ of class rule. **The state is more than an executive it also includes judicial organs, legislature, prisons, army and civil service.** It is possible for the government to change after a certain time but the state remains the same. This happens because in most jurisdictions government is formed by the strongest political party especially in multi-party countries. Summarily, One will say that **state means public power**. State power is constituted in a constitution of a country.

Emergence of state is traced at the time when society, due to improvement in the means of production, split into classes. Initially, economically powerful class formed the state but since the interests in society differed a special instrument was needed to superimpose the interests of the ruling class onto the whole society. Therefore, some changes were inevitable, state had to develop as a special public power with supreme authority and a system of institutions of coercion like the police, army and prisons.

To this juncture now one will be in a good position to answer the question as to whether state and law have always existed.

Sir, Frederick Angels once argued, "State has not existed from all eternity. There have been societies that did without it, that had no conception of the state and state power. At a certain stage of economic development which was necessarily bound up with the cleavage of society into classes, the state became a necessity owing to this cleavage".

Interrelationship between State and Law.

The interrelation between law and the state is historical one. History demonstrates that law as a special system of social norms emerged together with the state as a special system of public power. It is argued that with the emergence of the state, emergence of special social norms that can be enforced by the state was necessary to support the new states. These norms had to be different form other social norms that were in operation before states emerged. The new norms (law) were initially selected by the state (from rules that existed in pre-state) but later on states stated to enact laws in both cases protecting the enforcement of those rules by the exercise of the new state power. This correlation between state and law has been retained throughout history. Therefore, no state has ever been without its own system of law, vise versa (no system of law has ever been without a state power defining what is the law and protecting its enforcement by the special means, which are at the disposal of the state and of the state only.

Conclusion

The above discussion has responded to the very important question as to whether Law and State have always existed. It is now a matter, which is so certain that the two phenomena have never been existed always, but they came through changes that took place in the world following various changes of development in society. It has been also highlighted that law and state are two sides of the coin that are inseparable. They support one another. There has been no state without law and likewise. Some reached a point of arguing that law is the custodian of the interests of the state. Law is put in

place to support and safeguard the interests of the ruling class, and law is always political, in nature. Whether currently, that argument holds water is also a matter of discussion, basing on the fact that nowadays we have different types and branches of law some do support the rights of those who by one way or the other are discriminated or their rights are either violated or denied by different people or organs.

UNIT 3

i. Constitutions
ii. Introduction
iii. Objectives
iv. Definition of Constitution
v. Ideas about Constitution today
vi. Why a Constitution
vii. Classification of Constitutions
viii. Constitutional Structure
    - Synopsis
    - Major features
    - The executive
    - The Parliament
    - The Judiciary
ix. Conclusion.

Introduction

The word constitution is not a strange one in the world today. In the vast majority of the modern states or political societies there exists an identifiable document, or a group of documents, called constitution, embodying a selection of the most important rules about the government of the country. There has also been awareness among people on the need and importance of having constitution or amendments of the existing

constitutions in different countries. Procedures for constitutional amendments differ from one another however, all amendments are common on one thing, that is they require the amending measure to be passed by special majorities in the legislature, or to pass through a referendum procedure where by people have to opine through votes, or in some countries both procedures can be applied. The procedure to be used in amending the constitution is to be provided for in the constitution of a country, for example the constitution of the United Republic of Tanzania, 1977 empowers the Parliament under Article 98 to amend the constitution. In many countries people have been struggling to have democratic constitutions in their respective countries. The constitutions that reflect constitutional structure and the one that have the required constitutional principles. Stanley De Smith writes[6] Constitutions are primarily about political authority and power- the location, conferment, distribution, exercise and limitation of authority and power among the organs of a State. They are concerned with matters of procedure as well as substance. More often than not they also include explicit guarantees of the rights and freedoms of individuals. And sometimes they incorporate ideological pronouncements- principles by which the State ought to be guided or to which it ought to aspire, and statements of the citizens' duties. Therefore, in this part the discussion will dwell on what it means by the word "constitution", its classification, its structure and reasons as to why constitution.

[6] De Smith, S. et al, Constitutional and Administrative Law, 7th Edition, Penguin Group, England, 1994.

Objectives:

At the end of this lecture students should be able to:

- Define a constitution
- Know classification of constitutions
- Understand constitutional structure
- Know the motives of having constitution

What is a Constitution?

A constitution provides a framework of rules that creates the structure and functions of a human organization. Any organization might have a constitution, although an organization that depends on close personal bonds such as a family is unlikely to do so. We are concerned with the organization of a country comprising millions of people with few common purposes capable of giving shape to a constitution[7].

Wade and Phillips[8] define constitution to be "**a document**, having special legal sanctity, which sets out the framework and the principle functions of organs of government of a state and declares the principles governing the operations of those organs"

The above definition suggests that a constitution needs to:

- Be a legal document
- Set or establish the Pillars of the government
- Set the functions of those organs
- Set the powers and limits of those organs

[7] Alder, J. constitutional and Administrative Law, 5th Edition, Palgrave Macmillan Publishers, New York, 2005.

[8] Wade, ECS & Phillips, H. Constitutional Law, London, 1965.

However, this definition has received a lot of challenges from scholars who argue that it is not necessary for a constitution to be found in a document, it is possible for a country to have her constitution in various documents, United Kingdom is mostly sited as an example where by her constitution is made by the Magna Carta, 1215, the petition of right, 1628, The bill of Rights 1688, The Act of Settlement 1700, and the Acts of Union.

Wheare[9] defines constitution into two.

He firstly defines to mean **"the whole system of government of a country, the collection of rules, which establish and regulate or govern the government. These rules are partly legal in the sense that courts of law will recognize and apply them and partly non-legal or extra-legal taking the form of usages, understandings, customs or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly called"**

In the above definition Wheare talks much on what it means by the word constitution by basing on the essence other than the form (document or documents) of the constitution. That is the wider and broader meaning of he term.

In the narrow sense of the constitution Wheare says in almost every country in the world except Britain, constitution means **"the whole collections of rules, legal and non-legal but rather a selection of them, which have usually been embodied in one document or in a few closely related documents".**

Prof. Issa Shivji[10] defines constitution to be a piece of basic or fundamental law, which tells how the state and its various apparatus are

[9] Wheare K. C. Modern Constitutions, Oxford University Press, London, 1964.

organized, the interrelationships between them and the division of power inter-se between and among these apparatuses.

Perhaps, one would agree with Prof. Shivji et al[11]… by saying that Constitution is a law found in one or more documents which constitutes State Power and defines the relationship between major organs of the State and between the State and the Citizen.

Prof. A. V. Dicey (Dicey, 1915, p. 22) defines constitution to mean all rules directly or indirectly affect the distribution and exercise of the sovereign power in the state. Therefore, Dicey focuses on constitution being a composition of rules that bring about how state power is distributed and exercised. By this notion Dicey speaks on a constitution that puts in place state organs, whether all rules are to be found in a single document or in various documents that is not a, matter of concern and discussion to Dicey.

Anthony King writes[12] [a] constitution is the set of the most important rules that regulates the relations among the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country. With definition Anthony seems to deal much on idea that constitution is made up by rules that set organs of government and how they relate between themselves and their relationships with individuals. Anthony joins Dicey on the constitutional form, that constitution might be a document or documents.

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[10] Vol. 11-14 EALR (1978-1981)- Publication of the Faculty of Law.

[11] Prof. Shivji I. G. et al. Supra at p.37

[12] King, A. Does the United Kingdom Still Have a Constitution? 2001, London: Sweet & Maxwell, 2001.

Freidrich[13]writes, a constitution is the ordering and dividing of the exercise of political power by that group in an existent community who are able to secure the consent of the community and who are thereby make manifest the power of the community itself. Freidrich's definition suggests that a constitution is to establish state power that is a result of peoples' consent. He stresses on consent of the community. (This seems to be a political approach).

Tully (2002)[14]suggests that a constitution has a special status, he defines it as the cluster of 'supreme' or 'essential ' principles, rules and procedures to which other laws, institutions and governing authorities within the association are subject. Therefore, according to Tully, once a constitution exists all other laws, organs of the government and institutions must derive their legality from the constitution. In this perspective constitution is supreme.

NB:

It is also the time to discourage the argument by some people who define constitution to be a contract or agreement between the State and citizens or between the ruling class and the ruled one. Prof. Shivji[15]says, this is not correct either historically or legally. For, there is no evidence that rulers and the ruled sit together and negotiate a contract called constitution. If it is to be understood that a constitution is an agreement or contract it is to be shown as to when and where these two parties to a constitutional contract met and set terms of their contract, the thing that in normal

[13] Freidrich, Limited Government: A Comparison, 1974, p. 21.
[14] Tully, J. (2002) 'The Unfreedom of the Moderns', Modern Law Review, 65: 204.
[15] Prof. Shivji I. G. et al. Supra at p.37

circumstances cannot be obtained. Again, for those constitutions that are not Democratic how can citizens agree to a contract that violate or does not recognize their rights for example? The modern philosophy of constitution sees the constitution as a product of consensus among people themselves (**see in the preamble of our constitution that declares that it was made by the people).** In historical reality, various constitutions come about through different historical circumstances and reflect the results of social and political struggle in those societies. Therefore, the argument that a constitution is a contract is wrong both, legally and historically.

Why a Constitution?

It is obvious that one will ask himself, after going through various definitions, why constitution? There are number of reasons why there is a need to have a constitution in countries around the world:

- A constitution acts as a political manifesto of any government in power. By being the political manifesto the constitution states the kind of government that is in power and its political ideology. For example the constitution of the United Republic of Tanzania states in the preamble that…KWA HIYO, BASI, KATIBA HII IMETUNGWA NA BUNGE MAALUM LA JAMHURI YA MUUNGANO WA TANZANIA, kwa niaba ya Wananchi, kwa madhumuni ya kujenga jamii kama hiyo, na pia kwa ajili ya kuhakikisha kwamba Tanzania inaongozwa na Serikali yenye kufuata misingi ya demokrasia, ujamaa na kujitegemea na isiyokuwa na dini.
- A constitution is also used to put in place the guiding principles for the ruling class and the ruled one. It puts the guiding principles in

definitive words so that he rulers and the ruled may know those guidelines.

- A constitution establishes the organs of the government and gives powers and limits to these organs. In this the constitution has a last say and acts a supreme organ.

The above explanation as to why constitution is summed up by Prof. Shivji[16] who says, depending on how it was made that is whether it was imposed or arrived at by a consensus a constitution serves an important function of giving political power legitimacy, that is, acceptability and respectability. Another important function of the constitution is to structure state power by establishing and defining the powers and functions of different organs and institutions of the state. The third function of the constitution is to limit the exercise of power by stipulating certain basic rights of citizens.

Classification of constitutions

Constitutions are classified in different ways such as:

- Written or Un-written
- Flexible or Rigid
- Presidential or Parliamentary
- Unitary or Federal
- Monarchical or Republican
- Single Party and other Constitutions
- Diarchical and other Constitutions

Written or Unwritten Constitutions

A constitution is said to be **written** when it is found in a single document.

[16] Ibid

This type of a constitution is found in almost every country of the world, except in the United Kingdom. The idea of a written constitution is a legacy of the revolutionary period in eighteenth and nineteenth century Europe when, with mixed success, widespread uprisings challenged traditional aristocratic, colonial and religious regimes. Since the French Revolution (1789) almost every nation has adopted a written constitution, sometimes as a reaction against a hated previous regime and sometimes to mark a new event such as independence from colonial status[17]. The political significance of a constitution as a single document was stressed by the radical Tom Paine[18] who said, a constitution is a thing antecedent to a government, and a government is only the creature of a constitution… . *A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right.* It is to be noted that though many countries in the world adopted written constitution the form, purpose and the content of their constitutions differ, however De Smith[19] writes, although written constitutions differ widely in their purposes, form and content, they normally be found to have two characteristics in common. They will be the fundamental law of the land, and they will be a kind of higher law. They will be fundamental law in so as they designate the principal organs and invest them with authority; thus, they will constitute and define the Legislature, and state what is the scope of the law-making power and the procedure for exercising that power. In other words, they will be law behind the law- the legal source of legitimate

[17] Alder, J. Supra, p. 5
[18] Paine, T. Rights of Man, (ed. H. Collins), pp.93 and 207.
[19] De Smith, S. Supra p. 5

authority. It has been argued that written constitutions seek to avoid a concentration of power in the hands of any one organ of government by adopting the principle of separation of powers, vesting legislative power exclusively in the legislature, executive power in the executive and judicial power in the courts[20]. However, if that mission stands, that will be the discussion on unit five of this manual. **Unwritten constitution** means a constitution that is found in various writings- in statutes, law reports, parliamentary standing orders, works authority, and so on, although authoritative and reasonably comprehensive document called the 'Constitution' is lacking. This type of constitution is found in United Kingdom where the foundation of legal system is covered by the doctrine of the legislative supremacy of the parliament and therefore, much greater importance attaches to Acts of Parliament and also to judicial decisions.

Flexible or Rigid Constitutions

A constitution is **flexible** when it requires no special procedure for amendment. Any changes that are to be done in a flexible constitution need not to pass through a special procedure. It is taken to be easy to amend a flexible constitution. **Rigid constitution** is a type of constitution that requires special procedure to be followed before it is amended. A special procedure may take the form of referendum for example. (Referendum is a defined to mean a direct vote by all the people of a nation or area on some particular political question[21]). (On the procedure how to amend our

[20] Wade E. C. S. and Bradley, A. W. Constitutional and Administrative Law, Longman inc., New York, 1985.
[21] Longman: Active Study Dictionary of English.

constitution see Art. 98). However, De Smith observes, the rigidity or flexibility of written constitutions cannot be ascertained merely by comparing procedures for constitutional amendment. A constitution containing a cumbersome procedure for its own amendment may in fact be very flexible if there is no effective opposition to the party in power; and several modern states have authoritarian regimes[22]. Therefore, De Smith is of the view that flexibility is a matter of degree, which will not necessarily be predetermined by the formal procedure for constitutional amendment.

Presidential or Parliamentary Constitutions

This class mainly refers to system of a particular country, whether presidential or parliamentary. It bears much on the executive branch of government in relation to the legislature. **In Presidential** constitutions the President is both the head of the state and the head of the executive, but he is not a member of a legislative body directly. Tanzania is a good example of this system. **In Parliamentary** system the executive is the Prime Minister who is also the member and is responsible to the legislature, that is, he also sits in parliament when it makes laws. The President if any, the Queen, or the King remains as head of state, a title that is a mere ceremonial.

Federal or Unitary Constitutions

Federal constitution is found in Independent States that have come together in a form of Union for certain reasons and interests, but they

[22] De Smith, S. Supra p. 5

preserve their identity and some measure of independence. United States of America and Nigeria are good examples. In this constitution there is a distribution of power between the federal government and the government of respective States forming the Federation. A State has the power to make laws that will be applicable in its own territory. It is possible for each State to have its own constitution etc. **A Unitary constitution** is a type of constitution whereby the legislative authority is exercised by one Central power. This is called a highly developed form of federalism. In Unitary Constitution the Independent countries or states decide to come together and surrender their sovereignty and form a union. Uk is a good sample of unitary constitution (what about Tanzania with its unique type of union between Tanganyika and Zanzibar where independence of Zanzibar has not been completely surrendered.

Monarchical or Republican Constitutions

This class of constitution tells us nothing worth knowing about the form or substance of government; hence, it is no longer a difference of any general importance. It is possible that one can have an absolute monarch or very extensive personal discretionary powers (as in Nepal), or one can have very limited personal powers like in the United Kingdom. It is also possible for one to have a President who is the head of the State but is not the effective executive head of Government (Germany is a good example), or one who is both head of State and head of Government like in the United States of America.

Single Party and other Constitutions

Obviously a constitution under which only one party can legitimately operate tends to differ from one in which, at least ostensibly (presumably), freedom of political association is permitted. A constitution for a single-party State is apt to be of a political manifesto. In such a constitution, lip-service (insincerity) may still be paid to the basic freedoms of the individual. However, in some States with single-party constitutions (as in Uganda) there is more freedom of expression than in States with impeccably liberal constitutions (as in Zimbabwe). Tanzania, with the 1965 Interim Constitution, was once a single-party state where by the Party was supreme, over and above the Organs of the State. However, with the Eighth Constitutional Amendment Act, 1992, Act No. 4 of 1992 a landmark change in the history of constitutionalism was experienced in the country. The amendment introduced a big change in terms of political party style; it introduced Multi-party system.

Diarchical and other Constitutions

A diarchical constitution can be defined to be as one in which there is a division of governmental competence between two or more authorities in the State otherwise than on a regional basis. For instance, law-making powers may be divided between the Legislature and the Executive, the former having power to pass laws within a defined field and the latter having an autonomous and exclusive power, derived directly from the constitution, to issue decrees, ordinances or regulations within a defined field.[23] Such

[23] Nicholas (1970) Public Law at p. 251

divisions have close likeness with the doctrine of separation of powers that will be discussed in the next unit of this manual.

Constitutional Structure

Constitutional structure refers to the major features that are found in the constitution and in how many parts these features are covered. From the discussion on the meaning of the constitution the common characteristic that dominated the discussion was the common task that a constitution has that of establishing the organs of the government and provides them with powers and limits. Constitutional structure therefore, focuses on the coverage that is given to these organs and other features like the Bill of rights, Duties of citizens, Directive principles and Objectives of the constitution. In this Unit the discussion will base on structure of each organ and objectives and directive principles of a constitution. It will be realized that this part will base mainly on the presidential type of a constitution, as it is the one that applies in Tanzania.

The Executive

The executive arm of the state consists of the President, the Vice-President, the Prime Minister and the Cabinet. The Public service, prisons, police and the armed forces fall under the Executive Branch.[24]

A well democratic constitution that governs a rule of law State will always establish the three pillars of the state among them the Executive. In the executive arm of the State is where the President and Vice are established. The Prime Minister for the countries that have that structure also is found

[24] Prof. Shivji, I. G. et al, supra, p. 67

in the executive and the council of Ministers, the Cabinet. The coercive power like police and the prisons fall under the executive as well. However, it is to be noted that the Executive structure differs from one country to the other, for example in Kenya there is no Prime Minister, it is only the President, Vice-President and the Cabinet. The constitution in establishing the executive will give in details powers and limits of the said arm of the State. The part of Presidency and the Vice-Presidency provides on how a president of a country and his Vice are obtained, their qualities and it also establishes the President to be the Head of the Executive. Presidency tenure also is provided in this part. This part also covers for the Prime Minister and the Cabinet on how they are obtained. In the Constitution of the United Republic of Tanzania of 1977 (as amended from time to time), the Executive is found under Articles 33-61 respectively.

The LEGISLATURE

The Legislature is the Law making body. The powers and limits of it are stipulated in a country's constitution. The main function of this body is to make laws of a particular country. The Legislature enacts various pieces of legislations; that are called *Acts of Parliament*. The Body also, through its delegated powers, can empower other government organs such as the executive to make laws to regulate certain conducts in communities. The laws that are made by the Legislature itself, that is the Acts of Parliament are known as *Principal Legislations* and those made by other organs through

delegated powers are called *Subsidiary Legislations (subordinate legislation).* There are number of reasons that make delegated legislations inevitable in modern governments some of them include, pressure upon parliamentary time, technicality of the subject matter, the need for flexibility and state of emergency.[25]

The composition of Legislative body must be sated in the constitution as well. Depending on a country's system all required officials that make up the law making body and the procedure for their recruitment must be provided for in the constitution. In most cases the law making body is made up by the Members of Parliament who are either elected by people during parliamentary elections to represent them in parliament for period stipulated in the constitution, or by being nominated by the President in case the constitution empowers the President to do so. In some countries like Tanzania the Parliament is composed of by the President and the Members of Parliament (National Assembly). In Part three the constitution provides; Kutakuwa na Bunge la Jamhuri ya Muungano ambalo litakuwa na sehemu mbili, yaani Rais na Wabunge.[26] In Tanzania the Legislature by the name of Parliament is covered under Articles 62-101 respectively.

The Judiciary

The Judiciary is the law interpreter. Its main function is to interpret the law without fear or favour. The Judiciary is the custodian of justice therefore it is empowered by the constitution to dispense justice without either being interfered with any external force that will prejudice this goal,

[25] Wade, E.C.S and Bradley, A.W. Constitutional and Administrative Law, Longman inc, New York, 1985, pp. 611-612

[26] Article 62(1) of the Constitution of the United Republic of Tanzania, 1977.

or work o the basis of favours. The Judiciary, when looked at, should present *justice* and *fairness*. The Judicial system of a country is covered in the constitution. The constitution must states the court system of the country, the procedures that are used to get judicial officers like Judges and Magistrates, their tenure in office and their remuneration, also disciplinary measures against them. Surprisingly, in Tanzania the constitution covers the High Court and the Court of Appeal only. The courts subordinate to the High Court, that is, magistrate's courts are established by an Act of Parliament. Part five of Constitution of the United Republic of Tanzania covers the Judiciary.

Conclusion

UNIT 4

Constitutional History and Constitution making in Tanzania

ix. Introduction

x. The First Constitution: The Independence Constitution, 1961

xi. The Second Constitution: The Republican Constitution, 1962

xii. The Third Constitution: The Constitution of the United Republic of Tanganyika and Zanzibar, 1964

xiii. The Fourth Constitution: Interim Constitution of Tanzania, 1965 (one party constitution)

xiv. The Fifth Constitution: Constitution of the United Republic of Tanzania (The Union Constitution), 1977 and its amendments

xv. Zanzibar Constitutions

xvi. Conclusions

Introduction

In this unit the discussion will dwell on the constitutional developments and constitutional making in Tanzania since independence in the year 1961. Tanzania since independence to date has had five constitutions which are: The Independence Constitution, 1961, The Republican Constitution, 1962, The Constitution of the United Republic of Tanganyika and Zanzibar, 1964, The Interim Constitution of Tanzania, 1965 and The Constitution of the United Republic of Tanzania, 1977 (as amended from time to time). All these constitutions will be discussed in details in terms of their structure and their making. Constitutional making means both amending the existing constitution and making the new constitution if need be. Basing on the fact that Tanzania is the union of Tanganyika and Zanzibar, whereby Zanzibar has her own constitution this part will also visit in depth the constitutional developments and constitutional making in Zanzibar as well. It is to be noted that since her independence Zanzibar has had three constitutions.

The Independence Constitution, 1961.

The first constitution of Tanganyika was the Tanganyika Order in Council, 1961. This was referred to as the Independence Constitution, 1961. The Independence constitution of 1961 was a result of a consensus between Tanganyika under TANU that was led by Mwalimu J. K. Nyerere, and the British Colonial government. The intensive discussions between the two sides

made the British colonial government to grant Tanganyika her independence on 9th December, 1961 without bloodshed. The Colonial government through her Legislature passed the Tanganyika Order in Council that gave Tanganyika her independence and declared Tanganyika to be a sovereign State. Thus, the first constitution of Tanganyika was an Act of Parliament. The constitution made provisions that established the organs of the state that is the Executive, the Parliament and the Judiciary. It also recognized the fundamental freedoms (Bill of Rights), citizenship matters were also included in the Independence constitution. The form of government under the first constitution was very much based on the Westminster model with a sovereign parliament, multiparty democracy, a prime minister and the Governor General as head of state representing Her Majesty the Queen of England.[27]

The Executive

The executive was made up by the Governor General, Prime Minister, the Cabinet (Ministers) and the Parliamentary secretaries.

The Governor General

The Governor General was Her Majesty appointee and held the office at her pleasure. The office of Governor General was established via Article 11 of the constitution. The Governor General represented Her Majesty in Tanganyika and exercised all powers vested to him on her behalf. The Governor was also vested with powers to make appointments that constitute various offices and powers to terminate such appointments but in accordance with the provisions of the constitution. This power was vested to him via Article 54 of the constitution. The Governor also had powers to

[27] Prof. Shivji, I. G. et al, supra, pp. 47-48.

assent to Bills that were passed by the Parliament. No Bill became law unless it was assented to and signed by the Governor General on behalf of Her Majesty. The Governor had powers to appoint the Prime Minister from among the members of National Assembly. The Governor was enjoying prerogative of mercy vested to him via Article 55 of the independence constitution, however in exercising this power the Governor had to seek advice from the Minister designated in that behalf.

Prime Minister

The Prime Minister was the Governor General appointee from among the members of the National Assembly subject to the majority support of the members. Therefore the Prime Minister had to come from among the members of the Assembly and in case he ceased to be the member of the National Assembly then he is disqualified from holding the post of a Prime Minister. Article 42 of the constitution provides for the post of Prime Minister and circumstances where the office can fall vacant.

The Cabinet

The power to establish the cabinet apart from the Prime Minister was vested with the Parliament, however the Governor General on advice by the Prime Minister and subject to the provisions of any Act of Parliament could establish offices of Ministers, this power was conferred to him via Article 42(2) of the constitution. The Ministers were appointed from among members of the National Assembly and Ministers together with the Prime Minister formed the Cabinet of Ministers. The Cabinet was responsible to the Parliament with the major function to advice the Governor General.

Parliamentary Secretaries

Parliamentary Secretaries were appointed by the Governor General from among members of the National Assembly subject o the advice given to him by the Prime Minister. The Parliamentary Secretaries had the duty to assist Ministers in the performance of their duties.

Bill of Rights

The constitution recognized the basic human rights via the Bill of Rights that was found in the Preamble to the constitution. Thus, due to the fact preamble is not part of the constitution, the Bill of rights were never included in the constitution. The inclusion was resisted by TANU during the discussions that brought about the independence constitution. TANU was reluctant to have the Bill of rights entrenched to the constitution due to various reasons:

a) That during the constitutional talks leading to independence constitution TANU leadership ingeniously pointed out as a fact that the absence of a Bill of Rights in the unwritten constitution did not erode the rule of law in Britain. Therefore, it was useless exercise to try to force the same on the people of Tanganyika.

b) The popular support enjoyed by TANU during the constitutional conferences made it easier for TANU to have its way with little resistance. In the absence of a strong opposition political party, there was none to overcome TANU's position that the Bill should be omitted from the constitution.

c) In Tanzania the urge for inclusion of a Bill of Rights in the constitution did not have much backing as was the case in some

countries e.g. Kenya. In Kenya the white settler community with massive property acted as a catalyst for the demand of a Bill of Rights.

d) During the constitutional negotiations the TANU leadership windhooked the colonialists by presenting TANU as a nationalist movement that endeavoured to stick to legalistic formation and deliberately avoid unlawful agitation. Therefore the fear that TANU and its leaders would in future turn into an autocratic party was unthinkable.[28]

Therefore, the Bill of Rights was finally not included in the independence constitution, it only got recognized in the preamble and because the preamble was not part to constitution it became difficult to enforce the violation of the basic human rights. Meanwhile, it remained to be the idea of the newly independent Tanganyika under TANU government that the demand for inclusion of Bill of Rights by the British Colonial government did not target to safeguard the interests and rights of indigenous Tanganyikans but rather to protect themselves from actions that could probably be taken against them due mal-violation of human rights that they did during their rule. They feared the new government so they wanted to put in place, before they leave, conducive and safe environment that assured them that they were not going to be blamed and prosecuted against violations of human rights in colonial Tanganyika.

[28] Mtaki, C. K. Constitutions and Legal Systems of East Africa, Part Two, pp. 168-169.

The Republican Constitution, 1962.

The Republic Constitution of 1962 replaced the Independence Constitution of 1961 following the publication of the White Paper, Government Paper No. 1 of 1962. The aim of the White Paper was to collect views from the public on the TANU government to enact the Republic Constitution that will Presidential in nature and make the Executive that is manned by the President. This was considered to be a big change in the history of constitutional making in Tanganyika and therefore the opinion of the public was of highly importance. After the discussions the National Assembly passed An Act of Parliament, The Constituent Assembly Act, Act No. 66 of 1962 that converted the National Assembly into a Constituent Assembly. The Act mandated the Constituent Assembly with the power to enact a new constitution. A Constituent Assembly is a special body usually created through election for the purpose of adopting a constitution. Once it completes that task it is dissolved. In constitutional theory the Constituent Assembly is considered a higher body than the Parliament. This is because the Parliament itself has been created by the Constitution which in turn was made by the Constituent Assembly. The powers of the Parliament are thus limited. A Constituent Assembly is considered a peoples' instrument to make a constitution.[29] Therefore the Constituent Assembly adopted the new constitution whose full citation is The Constitution of Tanganyika, 1962 Constitutional Act No. 1 of 1962. The Constitution of Tanganyika established the Executive under the President, The Legislature and the Judiciary. As it was with the Independence Constitution, 1961 the Constitution of

[29] Prof. Shivji, I. G. et al, supra, p. 54.

Tanganyika did not include and recognize the basic human rights, instead the President proposed the creation of a National Ethic based on moral and political obligation with the idea of restraining the Executive from abuse and excessive use of its power. However it is obvious that since the National Ethic was not the Bill of right and because it based on the moral and political directives that the Executive had to abide to, did and could not in any way protect human rights in real sense.

The structure of the Constitution of Tanganyika, 1962.

The Executive

The powers of the Executive were vested with the President who was the head of the executive via Article 1 of the Constitution that declared Tanganyika to be the Sovereign Republic. The effect of the declaration was that executive powers that were once under the Crown were transferred to the Republic under the President of Tanganyika. The president via the Constitution assumed powers as the head of State and head of the government, commander-in-chief of the army and part of the parliament. By being part of the parliament the President had crucial power of signing Bills that were passed the National Assembly to be Laws. Bills only become laws once assented to and signed by the President of the Republic. The President by being part of the Parliament assumed powers to address the National Assembly. Shivji writes that, the form of government under the 1962 Constitution was thus a kind of a mix between a parliamentary and presidential system, though much more titled towards the presidential system. In many respects, the presidential system that was adopted was closer to the colonial arrangement where no law passed by the Legislative

Council could become law without the assent of the Governor and the Governor commanded all power o behalf of the colonial state. The difference of course was that whereas the colonial Legislative Council was composed largely of appointed members, the National Assembly was an elected body. The Republican Constitution set the precedent for the concentration of power in the presidency, which was later to become the hallmark of subsequent constitutions.[30] The Vice-president and the Cabinet also made the executive. The office of Vice- President was constitutionally established via Article 11 while the President via Sub-article 2 of the Article 11 established offices of Ministers, however both the Vice-President and the Ministers were to be the members of the National Assembly for them to be eligible to be appointed by the president on their respective offices. For the Vice- President there was an additional qualification and that was he was to be an elected member of the Parliament.

The Legislature

Two parts, the President and the National Assembly, made the Legislature, (the Parliament) whose main task was to make laws as it was in the Independence Constitution. The laws were made in two procedures, first the Bills were presented, discussed and upon the majority votes passed by the National Assembly. Second the passed Bills were presented to President for assenting and signing them. Once this procedure is complete the Bills became laws. The Parliament retained powers to amend various laws including the constitution. The Parliament is said to be in its Legislative capacity if its sits to make ordinary laws, and it is in constituent capacity if it amends the constitution. The Constitution provided on how the National Assembly was

[30] Ibid, pp 48-49.

obtained and how it was dissolved. The National Assembly was an elected body and could be dissolve in three scenarios:

a) Pursuant to section 34(4) of the Constitution, that is, if the President dissolves the Parliament before assenting to a Bill sent to him for the second time within six months of its being returned to the National Assembly,
b) Pursuant to section 44(2)- President could at any time dissolve the Parliament. He was not bound to give reasons.
c) Pursuant to section 44(4)- when its life of 5 years expired.[31]

The Judiciary

The Constitution of the United Republic of Tanganyika and Zanzibar, 1964.

This was the third Constitution, which was the result of the Union between Tanganyika and Zanzibar on 26th April 1964. The union was born after the signing of the Articles of Union to unite two countries by the President Julius Kambarage Nyerere on behalf of the people of Tanganyika and President Abeid Amani Karume on behalf of the people of Zanzibar. The Articles of Union signed by two Presidents for their respective States was a treaty to enter into union. The Parliament of Tanganyika by an Act of Parliament called the Union of Tanganyika and Zanzibar Act, 1964, ratified the Articles of Union. (No. 22 of 1964) There is uncertainty as to whether the Acts of Union were ratified by the Revolutionary Council of Zanzibar

[31] Mtaki, C. K. Constitutions and Legal Systems of East Africa, Part Two, p. 51

because the Act was not published in the Government Gazette of Zanzibar, it is just said that the Acts were ratified by the Revolutionary Council of Zanzibar under the Union of Tanganyika and Zanzibar, 1964 (see the book on Constitutional and Legal systems of Tanzania by Professor Shivji and others for more discussion on this aspect of uncertainty on part of Zanzibar). However in law whether the treaty is ratified or not it binds the subjects who signed it for that matter the people of Zanzibar are bound by the Acts of Union as it is the fact to the colleagues of Tanganyika.

Under the authority given to him by the Acts of Union (Articles of Union), the President of Tanzania issued a Decree entitled The Interim Constitution Decree, 1964(Government Notice No. 246 of 1/5/64) modifying the Constitution of the Republic of Tanganyika to make provision for the Union. The new, modified constitution was called the **Interim Constitution of the United Republic of Tanganyika and Zanzibar**.[32]

The Interim Constitution of Tanzania, 1965

The Interim Constitution of Tanzania of 1965 was the fourth constitution in the history of constitution making in Tanzania. It is highly referred to as *One Party Constitution* due to the fact that it established a one party state via Article 3 which stated ***"There shall be one political party in Tanzania" and "until the union of Tanganyika African National Union with the Afro-Shirazi Party the Party shall, in and for Tanganyika, be the Tanganyika African National Union and, in and for Zanzibar be the Afro-Shirazi Party."*** The Interim Constitution was enacted by the Parliament just like other Acts of Parliament, it lacked peoples' mandate. The Constituent

[32] Prof. Shivji, I. G. et al, supra, p. 52.

Assembly that is required to be set to repeal and replace the existing constitution with the new one was never established. It is the Constituent Assembly that represents the people of Tanzania in constitution making, but like other constitutions the same was not there. It is right to argue that people were not represented in the making of the 1965 Constitution, but rather the Constitution was imposed to them. The constitution was more of political interests other than peoples' will. This was evidenced by the speech of Mwalimu Nyerere when addressing the Commission he set that was mandated to collect peoples' view on the type of one party-state that Tanzania should have, he said, *"In order to avoid misunderstanding, I think I should emphasize that it is not the task of the Commission to consider whether Tanganyika should be a one-party State. The decision has already been taken. Their task is to say what kind of one-party State we should have in the context of our own national ethic and in accordance with the principles I have instructed the Commission to observe"*[33]. Professor Shivji states in ***Towards a New Constitution Order:***

"The making of the 1965, Constitution again, is another example of lack of constitutionalism and participation of the people. This time around the Constitution was not even adopted by the constituent assembly, not even one in its reincarnation of the pre-existing national assembly. Instead, the 1965 constitution was enacted as an ordinary Act of Parliament presumably in the constituent capacity of the Parliament. This is equivalent of saying that an amendment of the constitution repealed the constitution and established a new constitution in its place."

[33] The Report of the Presidential Commission on the Establishment of a Democratic One-Party State, Dar es Salaam: Government Printer, 1968, p.2

The Interim Constitution survived for 12 years until 1977 the time it was repealed and replaced by the 1977 Constitution which is considered to be the permanent constitution of Tanzania. During its life the Interim Constitution passed through three types of amendments. Shivji writes, one type was that which increased the number of union matters. Another type was to increase the powers of the President on the one hand, and establish the supremacy of the ruling party, on the other. The third type was to make the party and party organs supreme over the National Assembly while at the same time reduce the proportion of directly elected members in the National Assembly by bringing in nominated members.[34] With the 1965 Constitution, it was the time of "***Party Supremacy".*** Having established a one-party rule, the next point on the agenda of the party was to strive for the supremacy of this party. That is, to make the party the highest authority in the decision making in the country.[35] In one-party democracy the party became supreme, the then Vice-President Rashid Mfaume Kawawa, once said that" *TANU and ASP are the originators of this Sate. The two parties are policy makers while the duty of the government is to implement the policies. We have assisted the government with parliament, law and finance to facilitate such implementation… We are governed mentally by our colonial past in believing that the government is supreme. The German and British impact is still with us. We need to bring about our mental revolution to remedy this situation… In one-party democracy the party is supreme all the way."*[36] *"The Party is supreme all the way*" and it was vivid where by the

[34] Prof. Shivji, I. G. et al, supra, p. 53
[35] Helen Kijo-Bisimba and Chris Maina Peter, Justice and Rule of Law in Tanzania: Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries, p.6
[36] Parliamentary Debates (Hansard) 1st October, 1968

constitution of TANU was entrenched in the Constitution via Article 3(4) as a schedule to the constitution and the courts of law justified this *unexplainable* action by the TANU officials ***(See the cases of Thabit Ngaka V The Regional Fisheries Officer (1973) LRT No.24 and Hatimali Adamji V East African Posts and Telecommunications Corporation (1973) LRT No. 6).*** Yet there were no reasons as to why the constitution of the ASP was never made part of the Interim Constitution of 1965. With one-party democracy it was believed that the foundations of democracy would be firmer than in multi-party democracy. The President of TANU when addressing TANU Conference in 1963 expressed this idea, he said:

"Where there is one party, and that is identified with the nation as a whole, the foundations of democracy are firmer than can ever be where you have two or more parties, each representing only a section of the community".[37]

However, Mwalimu completely changed this ideology by engineering and insisted for the ruling party to accept the move for the need of multi-party democracy in Tanzania in 1990s'.

The Constitution of the United Republic of Tanzania, 1977

The Interim Constitution of 1965 declared under Article 3 that, **"There shall be one political party in Tanzania" and "until the union of Tanganyika African National Union with the Afro-Shirazi Party the Party shall be, in and for Tanganyika, be the Tanganyika African National Union and, in and for Zanzibar be the Afro-Shirazi Party."**

The provision of Article 3 above had a word of promise to the people of Tanganyika and Zanzibar that their leaders are determined towards uniting

[37] Nyerere, Julius, K., Freedom and Unity: A Selection from Writings and Speeches 1952-1965, Dar es Salaam: Oxford University Press, 1966, p. 196

their two political parties into one. This union was finally achieved on 5th February 1977. TANU and ASP united together and Chama Cha Mapinduzi was born. The union of two parties had a great impact on the history of constitution making in Tanzania. There arose a need to adopt a constitution that would reflect the one country TANZANIA and the need to have a permanent constitution for the United Republic of Tanzania. Acting under the powers vested to him via the Articles and Acts of Union the President through Government Notice published on 25th March 1977 appointed the Constitutional Commission that had a task to make a proposal for new constitution before the Constituent Assembly. Actually, the members of the National Executive Committee of the Party, who made the Constitution of Chama Cha Mapinduzi (CCM), composed the Constitutional Commission. Again under the powers vested to him by the Articles and Acts of Union the President through Government Notice of 16th March 1977 that was published on 25th March 1977 appointed the Constituent Assembly that had one task to enact a new constitution basing on the proposal presented to it by the Constitutional Commission. Finally, after the discussions in the Constituent Assembly a new constitution for United Republic of Tanzania was adopted. The new constitution was called The Constitution of the United Republic of Tanzania, 1977. The Interim constitution survived for twelve good years, and this long survival invites the questions as "*to how long interim is interim"?* For a long period of about 12 years Tanganyikans and Zanzibaris were governed by the interim constitution though in reality it suggests those twelve years were more than interim. Opining on the 1977 Constitution Professors Shivji, Fimbo and Dr. Mvungi say:

"Thus was born the permanent constitution of Tanzania. There was no public consultation or debate, the provisions of the Articles of Union were at best only technically complied with-its spirit and necessary intention were mutilated. The discussion in the Party was behind closed doors in the National Executive Committee. In any case the National Executive Committee of the party was not supposed to be the forum to consider the constitutional proposals".

The Constitution of the United Republic of Tanzania, 1977 came into effect on 26th April 1977, to date the Constitution has passed through fourteen amendments, all these amendments will be discussed accordingly in coming discussions in this unit, there will be also the discussion on the structure of the constitution as summarized hereunder.

The Constitution of the United Republic of Tanzania is divided into ten chapters that are preceded by the Preamble to the Constitution. These ten chapters provide for the structure of the Constitution. Part one of chapter one declares Tanzania to be one State that is Sovereign United Republic and declares its territory. It also provides for political parties, the people and he policy of Socialism and Self-reliance. Part two states the fundamental objectives and directive principles of State policy while part three recognizes basic rights and states the duties of citizens.

Chapter two which establishes the Executive of Tanzania is divided in three parts. Part one is on the President, part two establishes the office of the Vice- President while the office of the Prime Minister, the Cabinet and the government are covered under the last part, that is, part three.

Chapter three establishes the Legislature of the United Republic of Tanzania. The Legislature is covered in three parts as well which are; The

Parliament in part one, part two is on Members, Constituencies and election of Members. The procedure, powers and privileges of Parliament are enshrined in part three of this chapter.

Chapter four which is also in three parts covers the Revolutionary Government of Zanzibar, the Zanzibar Revolutionary Council and the House of Representatives of Zanzibar.

Chapter five dwells on the High Court of the United Republic of Tanzania, the Judicial Service Commission for Mainland Tanzania, the High Court of Zanzibar, the Court of Appeal of the United Republic and the special Constitutional Court of the United Republic. Chapter five is divided into six parts.

Chapter six establishes the Commission for Human Rights and Good Governance and the Public Leaders Ethics Secretariat, these are detailed in two parts.

Provisions regarding the finances of the United Republic are provided for and established under chapter seven.

Chapter eight is on the Local Government Authorities, while chapter nine provides for Armed Forces.

Chapter ten is the Miscellaneous Provisions chapter.

The Structure of the Union Constitution.

As it has been stated in the summary of the structure of the Constitution of the United Republic of Tanzania, that the Constitution is divided into ten chapters that provide for various provisions that deal with the structure and other main features like the fundamental Objectives, Directive Principles of the State policy and the Basic Rights and Duties. In this part the thorough

discussion of all chapters is made so as to help the reader understand the Constitution both in the structure and main features that it provides and deal with.

CHAPTER ONE

This chapter proclaims Tanzania to be one State that is a sovereign United Republic. Article 2(1) states the territory of the United Republic, which consists the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar that also includes the territorial waters. Declaration of Multi party State is made via Article 3(1) *"The United Republic is a democratic and socialist state which adheres to multi-party democracy".* The democratic principle of separation of powers is entrenched in the Constitution under Article 4. The Article vests executive powers in two organs that is, the Government of the United Republic and the Revolutionary Government of Tanzania Zanzibar, Judicial powers are vested with the Judiciary of the United Republic and the Judiciary of Tanzania Zanzibar while the Legislative and supervisory powers over public affairs are vested with the Parliament of the United Republic and the House of Representatives of Zanzibar. The right, to vote, for every citizen of the United republic who has attained eighteen years of age is recognized in this chapter through Article 5(1), but the enjoyment of this right is subject to the provisions of subarticle (2) that empowers the Parliament to enact a law that imposes conditions which restrict a citizen from exercising the right to vote by reason of being a citizen of another state, being mentally infirm, being convicted of certain specified criminal offences, omission or failure to prove or to produce evidence as to age, citizenship or registration as a voter.

Apart from these conditions every citizen of Tanzania who is eighteen years of age is eligible to vote in any public election held in Tanzania.

Fundamental Objectives and Directive Principles of State Policy

Part two that deals with the Fundamental Objectives and Directive Principles of State policy puts responsibility to the Government of the United Republic and the Government of Zanzibar, Local Authorities and any person who exercises power or authority on behalf of either Government to take cognizance of, observe and apply the provisions that are made therein (part two). Subarticle (2) of Article 7 declares that provisions on fundamental Objectives and Directive Principles of State policy are not enforceable by the courts of law. The Constitution denies courts of law to entertain any matter with regard to the provisions of part two. The courts are declared to lack jurisdiction and to be incompetent to determine the question whether or not any action or omission by any person or any court or any law or judgment complies with the provisions of part two of chapter one. Article 8(1) of the Constitution covers Fundamental Objectives and Directive Principles of State Policy. The Article shows the relationship between the Government and the people. Among the Directive Principles that are stated in Article 8(1) includes **Sovereignty of the people** by declaring that sovereignty resides in the people and it is from the people that the Government through the Constitution shall derive its power and authority. It is therefore a constitutional directive that the sovereignty resides with the people and through that the Government has to derive its power and authority from the people through the Constitution. The power and authority

of Government if derived outside the Constitution then they are not of the people hence unconstitutional with no blessings of the people at all. The same provision declares the **Supremacy of the Constitution** by directing that it is through the constitution on behalf of the people the government shall derive its power and authority from. The Government is, under Article 9, directed to ensure respect of human dignity and human rights, upholding the laws of the land and ensure that they are enforced accordingly (emphasis is mine). The State is also directed to ensure non-exploitation of one person by another. Another directive covered is equality between men and women in all opportunities available for them without regard to their colour, tribe, religion or station in life. Accountability of Government to the people is another directive principle stated in the constitution under Article 8. The State must also put in place policies that guarantee the rule of law and democratic participation of the people in decision-making. Observance to the principle of Separation of powers should be guaranteed as well. Discrimination and all forms of injustice intimidation, corruption, oppression or favouritism are to be eradicated in the country. The State and its organs should ensure that such practices that are mentioned in paragraph (h) of Article 9 do not find room in the country.

The Fundamental Objectives include the welfare of the people. It is stated in Article 8(1) (b) that the primary objective of the Government shall be the welfare of the people. The State should make sure that public affairs are conducted in such a way as to ensure that the national resources and heritage are harnessed, preserved and applied for the common good of all people (emphasis is mine). Resources and wealth of the country are to be utilized for the betterment of the people. It is the fundamental objective

that national economy is planned and promoted in a balanced and integrated manner and that the economic activities are not conducted in a manner capable of resulting in the concentration of wealth or the major means of production in the hands of a few individuals. With this objective the State is to ensure that the running of a country in terms of policies and economic activities are not handled by few individuals and results in making these few individuals rich leaving the majority of the people in extreme poverty situation. The objective is to avoid the nation that is in stratification by having classes of *haves* and *have not*. Policies and programmes of the State should address positively and in a tangible manner the use of national resources by placing the emphasis on the development of the people and in particular is geared towards the eradication of poverty, ignorance and disease. The three phenomena were declared and are still taken to be the biggest enemies of the country towards economic development. The State is to make appropriate provisions for the realization of a person's right to work, to self education and social welfare at times of old age, sickness or disability and in other cases of incapacity, also the to make provisions that ensure every person earn livelihood without prejudice to the rights specified in Article 11.

Basic Rights and Duties

In Tanzania since Independence fundamental freedoms were recognized in the Preamble to the constitutions that existed before the 1977 Constitution through the fifth amendments in 1984. For the whole of that period it was difficult to enforce the violation oh human rights since they were not law basing on the fact that preamble to the constitution is not part of the constitution. This was evidenced in the case of ***Hatimali Adamji V East***

African Posts and Telecommunications Corporation[38] where by the court held 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.* In this case the complainant who was of Asian origin was challenging the retirement notice issued to him during the process of Africanizing the Corporation to which he was working with. He challenged the retirement that was violating right to non-discrimination recognized by the Constitution. The right to non-discrimination was recognized in the preamble.

However, following the pressure from the people and various rights groups bill of rights was passed in the year 1984 and introduced in the Constitution of the United Republic for the first time.

Right to life

The Constitution recognizes the right to life through Article 14 by providing that *"Every person has the right to live and to the protection of his life by the society in accordance with law"* With the right to life it is to be understood that this is the most important right among the recognized rights, all other rights follow when life is guaranteed, with no life other rights cease. Right to life is the custodian of all other rights. Right to life if not guaranteed other rights are meaningless. Therefore, no one is entitled to take away the life of another, but rather the Article recognizes protection of one's life from the society in he/she leaves in accordance with law. Writing on right to life Prof. Chris Peter[39] states that, *the right to life is the most important of all human rights. There is no doubt that if there*

[38] (1973) LRT No. 6

[39] Helen Kijo-Bisimba and Chris Maina Peter, Supra, p. 37

were no right to life, there would be no point in having any other human right. This right can therefore legitimately be referred to as the mother of all other rights. Article 14 that recognizes right to life was interpreted in the case of **Republic V Mbushuu and another**[40] where by Justice Mwalusanya held that,*" the death penalty is a cruel, inhuman and degrading punishment; and that it offends the right to dignity in the course of executing the sentence; the death penalty infringes the right to life; the death penalty is not in public interest; thus it is unconstitutional and hence null and void; in the place of death the punishment of life imprisonment can serve the purpose"* . However on appeal the Court of Appeal hesitated to decide that the death penalty is unconstitutional. Court of Appeal held that death penalty is for public interest. With the decision of court of Appeal the death penalty is still enforced in Tanzania as punishment to those who are found guilty of murder. The highest judicial body in Tanzania missed in, its history, an opportunity to discourage the applicability of brutal penalty of death. By having death penalty death is justified, and right to life is taken away, perhaps we have the penalty due to the thoughts of the people that whoever kills and found guilty of murder must also die. This holds no water basing on the fact that among the aim of punishments is deterrence. Deterrence character of a punishment should deter potential offenders on one hand from committing crimes and the guilty person on the other from committing offences again. Basing on this argument death penalty does not deter the guilty person. Again the function of punishment to reform the

[40] High Court of Tanzania at Dodoma, Original Jurisdiction, Criminal Sessions Case No. 44 of 1991. Prof. Peter reproduces the case in; Human Rights in Tanzania: Selected Cases and Materials, pp. 42-46 and in; Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries, pp. 40-46

guilty person does not exist as long as the guilty person will be killed and therefore lack an opportunity to learn the bad of his action. By death penalty the guilty person is not reformed. The challenge today, as far as death penalty is concerned, lies with individuals, rights groups and to a large extent the Commission for Human Rights in Tanzania to look for and advise the government on an appropriate alternative punishment for people found guilty of murder. The most appropriate and best penalty for murderers could be life imprisonment. (*See Human Rights in Tanzania by Prof. Peter and Justice and Rule of Law in Tanzania by Prof. Peter and Helen Kijo-Bisimba for more discussion on death penalty*)

Right to equality

"All human beings are born free, and are all equal".[41] " Every person is entitled to recognition and respect for his dignity".[42]

The words of Article 12 guarantee equality of human beings basing on the fact that human rights are derived directly or indirectly from the very nature of man. By this fact it may be 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. Being a human being is the only condition necessary for enjoying natural basic rights, and this condition lays down the equalitarian principle. **Carlos Santiago Nino**[43] argues that, "if the only relevant condition for enjoying certain rights is being human, and if this property does not admit of degrees, there cannot be differences of degree in the extent to which the

[41] Article 12(1) of the Constitution of the United Republic of Tanzania, 1977.
[42] Article 12(2) of the Constitution of the United Republic of Tanzania, 1977.

[43] Carlos Santiago Nino, The Ethics of Human Rights, Clarindon Press, Oxford, 1991 p. 34

rights in question are held; this is, all human beings have them to the same degree"

Equality before the law

Equality before the law is recognized under Article 13 of the Constitution. Equality before the law calls for equal treatment and protection of all persons before the law without discrimination. Equality before the law demands for the protection of civic rights, duties and interests of every person by the courts of law or other state agencies established by or under the law. **Prof. Peter and Helen**[44] write, " Equality before the law means all classes of people in a civil society should be treated alike by the law itself and before all law enforcement bodies and agencies which are created by the law… Equality before the law has also been taken to be a rule requiring all functions of the State which are likely to affect the basic rights of the people to be subjected equally before the law".

The Constitution of the United Republic of Tanzania, 1977 through Article 13 that recognizes equality before the law, prohibits any form of discrimination.[45] The same Article defines discrimination to mean, **"to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications".** These words

[44] Helen Kijo-Bisimba and Chris Maina Peter, Supra, p. 379
[45] Article 13(4)

denote that there is discrimination whenever persons' rights or other requirements are satisfied and recognized on the basis of colour, tribe, political opinion, place of origin, religion or station in life, gender etc. that is to say it is racial discrimination if one is regarded weak or inferior simply because he/she is black. All the same it is discrimination if a person is regarded valueless on the basis of belonging to a particular, probably, a small tribe in the country, being a member of a certain, presumably, an opposition political party, being of weak financial position, by being physically challenged or even by being of a certain gender, e.g. by being a female person. In Tanzania gender discrimination has been for a long time the most notable form of discrimination. Prof. Peter[46] says, "this state of affairs is not new. It is old and has a long history and historical and social-economic basis". According to Eze, the inequalities and marginalisation of women in various societies, and particularly in Africa, is reinforced by two variables. These are the capitalist socio-economic organization; and the various customs which have been further reinforced by colonial and religious influences.[47] Taking note from the thought of Eze it is obvious that the Capitalist socio-economic system and the customs especially customary law for decades have left women victims of the unjustified gap between men and women. The colonial governments for example, prohibited, in many colonies the recruitment of women in productive sectors and in most instances the colonial masters required local leaders to make sure that women in colonies did not leave their households for their husbands in places where they were

[46] Peter, C.M. Human Rights in Tanzania: Selected Cases and Materials, p. 379
[47] Remarks by Eze Osita are reproduced by Prof. Peter in his book Human Rights in Tanzania at p. 379

being recruited to work. Women are marginalized by the said variables in the political, social and economic spheres. Patricia McFadden[48] writes, *"Where the state existed as a viable and fully developed entity prior to colonization, most women were excluded from political engagement because they were not considered citizens or even adults within such communities. While women of the ruling classes engaged in some limited political agency vis a vis the state and the arena of public life, the majority of African women were systematically excluded from both political and civic engagement. The colonial state continued and or formalized this particular exclusionary practice by consciously colluding with black men of all classes in the continued exclusion and marginalisation of African women from the arenas of public engagement, particularly in relation to issues of rights and mobility. The history of the continent is replete with evidence of this collusion, the most blatant and intractable being the legitimization of essentially patriarchal feudal privilege for men into formalized 'laws'-the so-called customary law so well loved by both anthropologists and militant black nationalist. In the purview of the colonial administrator, black women existed only as chattels of men- both white and black-and a direct relationship with the state, let alone one instruments of governance and entitlement such as constitutions, could not even be imagined…"* The two phenomena have all the same guaranteed no opportunity for women to own major means of production such as land, which is the potential source of income and living in many African Countries including Tanzania. Women have

[48] Patricia McFadden "Constitutional Dimensions of Rights: Ethnicity, Gender and Citizenship in Africa" Constitutionalism & Transition: African and Eastern European Perspectives, (eds) J. Oloka-Onyango and Chris Maina Peter, pp.72-73

always been looked down and in many communities through customary laws they are valueless only regarded as properties of men. However, the Judiciary in Tanzania deserves a credit for standing bold in upholding the womens' rights even before the inclusion of the bill of rights in the Constitution. **(See the cases of Ndewawiosia Ndeamtzo (1968) H.C.D no. 127,Peter Byabato Vs Pastory Rugaimukamu (unreported see it in Prof. Peter's book) Holaria Pastory etc)** These cases mark a revolution against gender discrimination and marginalisation in Tanzania. However, though the court decisions in these cases reveal the clear blue sky and the shining stars towards recognition of women rights, yet one should not look at the clear blue sky and think that all is well, all is not well, all is not well and there is a long way to go. There is a high demand to make the members of the communities aware that women rights are human rights, and that the fight and struggle for women rights is not the fight against men but rather the fight against the system, male dominated system that for centuries have been built by the capitalist socio-economic organization and our customs like how Eze puts it. The promising thing is, Tanzania with the bill of rights in the Constitution practices a *bottom-up approach* whereby women rights as one among the best values of society are reflected in the Constitution, this is to be used as the starting and point of reference in the struggle for respect and protection of women rights. The big challenge is to make the rights that are recognized in the Constitution a reality in women's lives. It is not enough to say that the Constitution recognizes women rights; rather the existence and recognition of these rights need to be tested in the real and everyday life of women themselves. The rights need to be brought to the real life of women from the Constitution. However, there are some areas

where the tangible changes are a little bit experienced by the people. These areas include access to key decision making bodies such as Parliament, Cabinet and Government. In the Parliament for example, following Article 66-(1) (b) that provides for among members of Parliament women members, whose number should not be less than 30 percent of the members mentioned in Article 66 (a) (c) (d) and (f) who have the qualities specified in Article 67, there are now …women members. Women members are to be elected by their political parties in accordance with the requirements of Article 78. The Judiciary especially the High Court and the Court of Appeal whereby judges are Presidential appointees the number of female judges has reached…in this year.

Right to personal freedom

Article 15 of the Constitution on the right to personal freedom provides that no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only under circumstances and in procedures prescribed by law or in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or in a conviction for a criminal offence. The Article provides for protection against arbitrary arrest, imprisonment, confinement, detention and deportation except where any of the said acts is done by basing on circumstances and procedures prescribed by law. Article 15 implies two things firstly; a person can be deprived of liberty only in accordance with the circumstances and procedures prescribed by law. For the procedure as required in Article 15 to hold water and satisfy the requirement of the Article needs to be fair, just and reasonable. The procedure should not be arbitrary, oppressive or fanciful (far-fetched/imaginary), if so then it will

be useless to have the protection guaranteed in Article 15. In order for the procedure to be just, fair and reasonable it has to conform to the rules of natural justice that base on fairness and justice; these include (i) the rule against bias, (ii) right to be heard and (iii) right to know reasons for the decision.

(i) The Rule Against Bias: no man is to be a judge in his own cause

The rule against bias, which is expressed in the maxim nemo judex in causa sua, requires a man not to be a judge in his own cause but rather to be an impartial judge when deciding the matter before him. The essence of a fair judicial decision is that it shall have been made by an impartial judge.[49]The circumstances that may lead to the rule against bias were stated in the case of *R v Rand* first, where the judge has any direct pecuniary interest, however small, in the subject matter of inquiry. However, there is an exception to this rule and the exception is a judge can not be disqualified from acting and deciding the case if the parties are made fully aware of his interest in the proceedings and clearly waive their right to object to his participation, or a special statutory dispensation empowers the judge to preside over the mater, or a judge has to sit as a matter of necessity where other judges (rarely) are affected by disqualifying interest Secondly, where, apart from direct pecuniary interest, there is likelihood that the judge would have a bias in favour of one of the parties. According to Prof. Peter[50] what is vital and central in this situation is that the judge should not

[49] Wade, E.C.S and Bradley, A.W. Constitutional and Administrative Law, Longman inc, New York, 1985, p. 642

[50] Peter, C.M. Human Rights in Tanzania: Selected Cases and Materials, p. 427

hear evidence of one side behind the back of the other. The risk of not obeying to the rule was well elaborated by Lord Denning, M.R (as he then was) in the case of Kanda v. Government of the Federation of Malaya[51] *"no one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing".*

(ii) The right to be heard: no man to be condemned unheard

The right to be heard as expressed in the maxim audi alteram partem (hear the other party) requires that no one shall be condemned unheard. It was stated in the case of Kanda v Malaya[52] that when a person has a right to a hearing he must know what evidence has been given and what statements made against him and he must be given a fair opportunity to correct or contradict them. From this case two elements are deduced. *First,* the person has the right to know the case against him. *Secondly,* the person is legally entitled to cross-examine his accusers so as to correct or contradict the statements made against him/her. These elements were stated in the case of Hypolito Cassiano De Souza v. Chairman and Members of the Tanga Town Council[53]that:

a) The person accused must know the nature of the accusation made against him.
b) A fair opportunity must be given to those who are parties to the controversy to contradict any statement they may desire to bring forward and

[51] [1962] A.C 322 (PC)
[52] Ibid pp. 337-338
[53] [1961] E.A. No. 377

c) The tribunal should see that a matter which has come into existence for the purposes of proceedings is made available to both sides and, once the proceedings have started, if the tribunal receives a communication for one party or from a third party, it should give the other party any opportunity of commenting on it.

Therefore, the right to be heard dwells on the fact that each party must have the chance to present his version of the facts and to make his submissions on the relevant rules of law. Article 13 (6) (a) of the Constitution recognizes this right where it provides *inter alia* that:

When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

(iii) The Right to Know Reasons for the Decision

Today natural justice demands more than rule against bias and right to be heard. Natural justice requires for the person whose rights are determined by any judicial organ or tribunal to be given reasons for the decision reached by that tribunal. This requirement stands as a duty to any decision-making organ that determines the right(s) of a person. The right to know reasons is expressed in the maxim *nullum arbtrium sine rationibus*. According to Flick as reproduced in the book by Prof. Peter[54] *"Reasons are a valuable check on both the exercise of formal and informal decision-making. They provide the means whereby a party is appraised of why a decision has been made and*

[54] Peter, C.M. Human Rights in Tanzania: Selected Cases and Materials, p. 429

they provide some guidance to those who have to advise the public as to the attitudes of the administration".

Right to privacy and personal security.

This right is provided for under Article 16 of the Constitution. The essence of right to privacy and personal security is to guarantee an individual respect and protection of his/her person, privacy of one's person and his/her family and matrimonial life. This right extends to the protection of one's residence and private communication. The spirit of Article 16 revolves around respect and protection of one's dignity, the dignity of his/her family and his/her matrimonial life. It is all about ensuring that the person of every person is not abused in any way. The family and matrimonial life of every person is not interfered with without good reasons accepted by the law serve as provided for under sub-article (2) of Article 16, where by the state authority is allowed to lay down legal procedures that provide for the manner and extent to which the right to privacy and personal security may be encroached upon without prejudice to the provisions of Article 16(1). Knowing the importance of the right to privacy Article 16(2) uses the word "shall" to show that whenever the need to interfere with the person of any person, family or matrimonial life it is mandatory to have in place well established legal procedures which reveal circumstances, manner and extent to which this right may be denied to a person.

Right to freedom of movement

Under Article 17(1) every citizen of Tanzania is guaranteed the right to freedom of movement within the borders of Tanzania and the right to live in any part of Tanzania, to leave and enter the country (Tanzania), and the

right not to be forced to leave or be expelled from Tanzania. Article 17(1) provides for four aspects:

i. Right to move freely from one place of the United Republic to another place of the same
ii. Right to every citizen of the United Republic to settle, reside and establish himself/herself in any part within the borders of the United Republic
iii. Right to leave and enter the country, and
iv. Right not to be expelled from Tanzania or taken out of the country by force.

Therefore, every citizen of the United Republic regardless of his/her race, colour or tribe is entitled to full enjoyment of the right to freedom of movement within the border of the State. However, this enjoyment is subject to lawful and reasonable restrictions as provided for under Article 17(2).

Freedom of expression

Article 18(1) guarantees to every person the right to freedom of opinion and expression also right to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers and also the right of freedom from interference with ones communications. Sub-article two recognizes the right of every citizen to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society. Under Article 18(1) every person has the right to information. Every person can gather and transmit information by using any media without being interfered. Article 18(2) recognizes the right of every

citizen to be informed and made aware at all times of all events that occur in and outside the country that are important to the lives of these citizens and the society. During modern times of globalization where the World has become very tiny freedom of expression becomes a very important right to be guaranteed. This is due to the fact that socio-economic development and progress of the people and nations depend on alert and sound information. Freedom of expression has been inevitable in a society that needs to progress and survive in today's globalize world. However, this right is to be enjoyed without prejudice to expression the laws of the land.

Right to freedom of religion

Under the Charter of the United Nations all member States have pledged to promote universal respect for the observance of human rights and fundamental freedoms for all without discrimination as to religion.[55]

Being the member of the United Nations Tanzania made, and follows this commitment as well. Since her Independence Tanganyika was declared to be a secular State that follows no religion, and that spirit has been the same even after union between Tanganyika and Zanzibar in 1964. The Preamble to the Constitution and Article 8 of the Constitution declare Tanzania as a State that believes in principles of Democracy, Socialism and Self-reliance. However, the people of Tanganyika (by then) and now Tanzania were left free to believe religion of their choice. This right to freedom of religion like other rights is a constitutional one. It is recognized through Article 19. Under sub-article (1) of Article 19 every person in the country has the right to the freedom of thought or conscience (sense of right and wrong, ethics), belief or faith, and choice in matters of religion, including the freedom to

[55] Charter of the United Nations, Article 55 and 56.

change his religion or faith. The right to freedom of religion includes freedom of thought or conscience. Every person is free to entertain and cherish his/her inner thoughts, moral consciousness or belief of his/her choice. In relation to freedom of religion the State shall not intervene in anyway the affairs and management of religious bodies, however this will depend on if the activities of the religious bodies do not prejudice relevant laws of the Country. It is stated in sub-article (2) that without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation of religion shall be free and a private affair of an individual and the affairs and management of religious bodies shall not be part of the activities of the state authority. Sub-article (3) describes the word "religion" to include religious denominations.

Right to freedom of association

Person's freedom of association is recognized in Article 20. This right is entitled to every person, subject to the laws of the land. Every person is left to freely and peaceably assemble, associate and cooperate with other persons, express views publicly, and more specially to form or join associations or organisations formed for the purposes of preserving or furthering his beliefs or interests or any other interests. This right is very important as it recognizes the importance of people coming together in different associations be it religious, political or any non-governmental organisation. Through this right people, by basing on their interests, can assemble, associate and cooperate. Under the umbrella of freedom of association people can form political parties, religious organisations or any association of their choice and interests. These organisations especially, political parties and non-governmental organisations and others have proved

to be good and necessary stakeholders of the government in bringing about democracy, and development to individuals and the State at large. Dr. Chandra writes that[56] freedom of association implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interests… Associations, as a matter of fact, has become an indispensable ally in the struggle to preserve democracy against totalitarianism.

Right to participate in public affairs.

…Every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people… Every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him/her, his/her well-being or the nation. [57] This right recognizes in fully participatory process in decision-making and matters that have impact on a citizen either directly or indirectly. Citizens are to be made aware and participate direct or indirect through representatives of their choice in matters pertaining to the governance of the country. This right invites and puts in place the spirit of democracy that involves people in decision-making process for various matters starting with individual or personal level to country level.

The right to work and the right to just remuneration

Every person has the right to work. Every citizen is entitled to equal opportunity and right on equal terms to hold any office or discharge any

[56] U. Chandra, Human Rights, Allahabad Law Agency Publications, p.173.
[57] Article 21 (1-2)

function under the state authority.[58] The right to work consolidates to the dignity of a person as it is well appreciated that work or any lawful trade brings respect and dignity to a person. It is work or any lawful trade that enables a person to earn his/her income that will help him/her to do various things for development of himself/herself, family members, people in need and sometimes for the country. Right to work includes right to every citizen to equal opportunity and equal terms to hold any office or discharge any function in the country. This means that right to work is guaranteed to every citizen regardless of his/her gender, beliefs or tribe. As long as one is suitable for the specified work regarding the qualifications needed then he/she is to be considered for the job and recruited or given the opportunity to discharge the said work. Mwalusanya. J, (as he then was) had this to say regarding right to work, in the case of *Augustine Masatu v. Mwanza Textiles Ltd*[59]

For this right to exist [right to work] in a real sense, it is necessary that economic, political and legal order of the society assure everybody who is capable of working of the possibility of participating in building his society through work in accordance with his capacity and education and the right to earn an income proportional to the quantum of his work. And so job-security is the hall-mark of the whole system.

From the words of Mwalusanya, J (as he then was) a value was added to the right to work that brings the real meaning of the right to work. This value is nothing else than the call for job-security, which is to be assured by

[58] Article 22 (1-2)

[59] The High Court of Tanzania at Mwanza, High Court Civil Case No. 3 of 1986 (unreported). The case is reproduced in the book of Human Rights in Tanzania: Selected Cases and Materials pp. 173-181

economic, political and legal system of the country. Noting on the right to work Prof. Peter[60] had this to say:

The Constitution of the United Republic of Tanzania provides for the right to work in Article 22. This is one of the rare provisions of the Constitution which is not accompanied by a claw-back clause. It is therefore an absolute right. It goes hand in hand with the right of every citizen to be afforded equal opportunity and with equal conditions to occupy any position in the service of the United Republic. However, to the workers and the working class in Tanzania, the right to work does not commence and end with this salutary gesture of declaring the right in the Constitution. For them, it must mean more than that-the right should of necessity empower them to control their own destiny and give them a proper edge in their confrontation with their employers. Therefore, to them it is one of the tools in their struggle for a better life. The right to work is a product of many years of concerted struggle against capital and exploitation of labour n general. It means, among other things, the right to demand for better and fair wages, the right to withhold labour by use of strikes and other means etc…

Every person, without discrimination of any kind, is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and nature of the work done. Every person who works is entitled to just remuneration.[61]

This section is to the effect that every person who works regardless of gender, tribe, race, colour, whether he/she is physically fit or physically challenged any condition whatsoever, is entitled to be remunerated by basing

[60]Peter, C.M. Human Rights in Tanzania: Selected Cases and Materials, p. 170

[61] Article 23 (1-2)

on the measure of the work done. Sub-article (2) brings into attention the right of just remuneration to every person who works.

The right to own property

The right to own property is guaranteed by the Constitution under Article 24. The provisions of Article 24 declare that every person is entitled to own property and has a right to the protector of his property held in accordance with law. However, right to property should be enjoyed subject to the provisions of the relevant laws of the land, that is to say the enjoyment of this right depends on the condition that one does not violates the relevant laws of the country. In other words the right to own property is not an absolute one. In guaranteeing the full and meaningful enjoyment of the right to own property sub-article (2) declares that it shall be unlawful for any person to be deprived of property for the purposes of on nationalisation or any other purposes without the authority of law which makes provision for fair and adequate compensation. Sub-article (2) is a mandatory provision that unlawfully any taking of any person's property on nationalisation policies or for any other purposes without the authority of the law that provides for fair and adequate compensation. In other words before a person is deprived of his/her property there must be the law that authorizes the taking of the property by providing fair and adequate compensation, here compensation which is fair and sufficient is very important.

The history of the right to own property is well provided for by Prof. Peter.[62]

[62] Peter, C.M. Human Rights in Tanzania: Selected Cases and Materials, pp. 250-253

Duties to the society

Behind every right there is a duty. Though the Constitution recognises the rights of the people, it also invokes duties that citizens and the people in general should observe, and these are duties to the society. The duties once observed make the enjoyment of the rights by everyone a reality, but once one disregards the duties he/she violates the rights of others or society in one way or another, for example right to work goes perpendicular with the duty to participate in work. Article 25 creates a duty to every person to participate voluntarily and honestly in lawful and productive work and observe work discipline and strive to attain the individual and group production targets desired or set by law.

Article 26 stands for the duty to every person to observe and abide by the Constitution and the laws of the United Republic.

Students are advised to read Articles 25-29 respectively as far as duties are concerned.

CHAPTER TWO

Chapter two concerns the Executive of the United Republic and it is divided in three parts. Part one concerns the President, part two is on vice-president and the last part, part three provides for Prime Minister, Cabinet and the Government. Briefly, the discussion on each part is made hereunder.

Part One

The President

The office of he President of the United Republic is provided for in Article 33(1) "There shall be a President of the United Republic".

The President of the United Republic shall also be the Head of the State, the Head of Government and the Commander-in-Chief of the Armed Forces.[63]The President is elected by the people in accordance with the requirement of the Constitution and the laws enacted by the Parliament pursuant to the provisions of the Constitution.

UNIT 5

Constitutional Principles

xi. Introduction
xii. Sovereignty of the People
xiii. Supremacy of the Constitution
xiv. Separation of Powers
xv. The Doctrine of Parliamentary Supremacy
xvi. Representative Parliament
xvii. Independence of the Judiciary
xviii. Rule of Law
xix. Respect for Human Rights and Gender Equity
xx. Conclusion

CONSTITUTIONAL PRINCIPLES

[63] Article 33 (2)

Introduction

Meaning of Constitutionalism

Constitutionalism refers to the Constitutional limits on the Organs of the government, which are the Executive, Parliament and the Judiciary. The limits are set up by the Constitution itself through constitutional rules and principles. The limits should always derive its justification from the constitution. That being the requirement the limits should be legal. The Constitution should make the government realize that its rule is subject to a certain bunch of limits. The Government should have an attitude of justifying its actions with reference to the constitution. That will only be possible when the Constitution itself is democratic. Democratic in the sense that it stipulates the constitutional rules and principles clearly. The Constitutional rules and principles that need to be found in any democratic Constitution include: Supremacy of the Constitution, Sovereignty of people, Separation of powers, Independence of the Judiciary, Rule of law and basic human rights. The amalgam of these constitutional rules and principles form Constitutionalism. The limits, through constitutional rules and principles, help the government not to rule tyrannically on whims, caprices and arbitrary discretion but rather to rule in accordance with the constitution. Constitutionalism insists on transparency and good governance and respect of individual liberty. Constitutionalism is the whole idea of making peoples' interests and rights recognized and respected. Constitutionalism makes government accountable to its people. The whole concept of Constitutionalism rests on the principles of *limited government* and *rule of law*.

To sum up the meaning of Constitutionalism it is wise to quote a prominent writer on public law, S. A de Smith who said:

> To me, Constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure to which it must be performed or by delimiting its permissible content. …Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty.[64]

Constitutional limits on Government

It is now well known that constitutionalism is all about limited government and rule of law. That is to say, Constitutionalism simply means Constitutional limits in government. The constitution should limit the Organs of the government so that they do not exercise their power tyrannically. The whole practice of constitutionalism is well seen when the constitution of a country limits the pillars of the government. The pillars are the executive, the Legislature and the Judiciary. Since the three pillars are creatures of the

[64] S. A. de Smith, "Constitutionalism in the Commonwealth Today", 4 Malaya Law Review, vol.4, no.2 (1962), at p. 205.

constitution, the latter should clothes them with their powers and in so doing delimits the scope within which they are to operate. In this sense, Constitutionalism has come by and large to presuppose a written constitution. A government operating under a written constitution must act in accordance with it, any exercise of power outside the constitution is invalid. In such a system, a constitution is supreme. Alexander Hamilton writes that, No legislative act contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above the master, that the representative of the people are superior than the people themselves; that men acting by virtue of powers may do, not only, what their powers do not authorize, but what they forbid[65]. Hamilton's observation is to apply to the rest of government's organs.

Elements of the limits on government

Professor de Smith prescribes the minimum elements necessary for constitutionalism as follows:

> "A contemporary liberal democrat, if asked to lay down a set of minimum standards, may be very willing to concede that constitutionalism is practiced in a country where the government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are to organize in opposition to the government in office and where

[65] Federalist, 78.

> there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary and he may not easily be persuaded to identify constitutionalism in a country where any of these conditions is lacking.[66]

The same view is prescribed by Professor McIlwain who maintains that all that is needed is the ancient legal restraint of a guarantee of civil liberties enforceable by an independent court and the modern concept of the full responsibility of government to the whole mass of the governed.[67]

By looking at the above findings of Professors de Smith and McIlwain one will realize that the core and substantive elements of Constitutionalism are Separation of Powers, Democracy, Constitutional guarantee of individual liberties and Independence of the Judiciary. However, the developments on advocacy for Constitutionalism have integrated notions of Supremacy of the Constitution, Sovereignty of the people, Representative Parliament and Rule of law. Presently, these elements altogether are the core requirements for Constitutionalism. It is now the task of this paper to present them one after the other.

Separation of powers

The doctrine of Separation of powers traces its origin way back to Aristotle's work.[68]John Locke (1632-1772) later postulated it in his book,

[66] The New Commonwealth and Its Constitutions, 1964, p. 106.
[67] Constitutionalism: Ancient and Modern, revised ed., 1947, pp. 141-6
[68] Politics, Book IV

The Second Treatise of Civil Government. However, the doctrine received its modern formulation in the middle of the 18th Century by the renown French jurist called Montesquieu, who said:

> When the Legislative Power is united with the Executive Power in the same person or body of magistrates, there is no liberty because it is to be feared that the same Monarch or the same Senate will make tyrannical laws in order to execute them tyrannically. There is again no liberty if the judicial Power is not separated from the Legislative Power and from the Executive Power… If it were joined to the Executive Power, the judge would have the strength of an oppressor…[69]

According to the formulation by Montesquieu the doctrine simply means there are to be three different powers of the State, which are the executive, the Legislature and the judiciary, their personnel are to be different and their functions should be different. Professor Peter prescribes that, under the doctrine the legislature is supposed to make laws, the judiciary to interpret and administer them and the executive to enforce them.[70]

Constitutionalism demands for its efficacy a differentiation of governmental functions and a separation of the powers that exercise them. However, it has to be noted that practice and exigencies of modern governments have made a complete adherence to the doctrine impossible. The focus now is on insisting checks of one power by another. Separation of Power is taken to be

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[69] See L'Esprit des Lois, Book XI

[70] Chris Maina Peter, Human Rights in Tanzania: Selected Cases and Materials, 1997 at p. 482

an important element for constitutionalism as it prevents tyrannical rule. It was Montesquieu's argument that separation of power between different organs of the State helps to deter abuse of power and the three organs mutually act as checks on each other thereby balancing it.[71] The practical part of separation of powers proves that it is inevitable to strictly follow the three well-known meanings of the doctrine. Matters are designed in such a way that each branch operates as a check on the other. United States is a good example on this. The President may veto legislation but has no power to dissolve Congress, he can also be impeached by the Congress. Though the President can appoint federal judges, his appointments need to be confirmed by the Senate.[72] The Congress not the Executive removes Federal judges.

Checks and Balances

The idea of checks and balances seeks to make the separation of powers more effective by balancing the powers of one agency against those of another through a system of positive mutual checks exercised by the governmental organs upon one another. Thus, the executive might be empowered to dissolve the legislature and the legislature to impeach the chief executive, to approve the appointment of certain top State officials. The checks differ from one State to another depending on the type of government and its constitution. Checks and balances presupposes that a specific function is assigned primarily to a given organ, subject to a power of

[71] Shivji I. G. et al., Constitutional and Legal System of Tanzania: A Civics Sourcebook, 2004 at p.43

[72] The Senate rejected President Lyndon Johnson's for Chief Justice Fortas.

limited interference by another organ to ensure that each organ keeps within the sphere delimited to it.

Sovereignty of the People

Sovereignty of the people presents the idea that State power resides with the people. In any democratic government, sovereignty resides in the people in the sense that, it is the people themselves who are actually the source of power or authority. Sovereignty of the people is seen in many written Constitutions through their preambles. The proclamation in the preambles evidences that the people are the makers of the Constitution and that the latter derives its legal authority and political legitimacy from the people. The words "We, the People…" in a Constitution are not the mere words but they present a very important message that the Constitution is made by the people by virtue of constituent assembly or is made on their behalf. There are so many examples that can be used to reveal this argument, for example the constitution of India of 1949, states, 'WE, THE PEOPLE OF INDIA, …, IN OUR CONSTITUENT ASSEMBLY …, Do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION. In Tanzania the Union Constitution of 1977 (as amended in 2005) proclaims in its preamble, (see down for English Official translation)

KWA KUWA SISI Wananchi wa Jamhuri ya Muungano wa Tanzania

Tumeamua rasmi na kaw dhati kujenga katika nchi yetu jamii

Inayozingatia misingi ya uhuru, haki, udugu na amani:

NA KWA KUWA misingi hiyo yaweza tu kutekelezwa katika jamii

Yenye demokrasia, ambayo Serikali yake husimamiwa na Bunge Lenye wajumbe waliochaguliwa na linalowakilisha wananchi,

na pia yenye Mahakama huru zinazotekeleza wajibu wa kutoa haki

bila woga wala upendeleo wowote, na hivyo kuhakikisha kwamba haki

zote za binadamu zinadumishwa na kulindwa, na wajibu wa kila mtu

unatekelezwa kwa uaminifu:

KWA HIYO BASI, KATIBA HII IMETYUNGWA NA BUNGE MAALUM LA JAMHURI YA MUUNGANO WA TANZANIA, kwa niaba ya Wananchi, kaw madhumuni ya kujenga jammi kama hiyo, na pia kwa ajili ya kuhakikisha kwamba Tanzania inaongozwa na Serikali yenye kufuata misingi ya demokrasia, ujamaa na isiyokuwa na dini.[73]

[73] WHERAS WE, the people of the United Republic of Tanzania, have firmly and solemnly resolved to build in our country a society founded on the principles of freedom, justice, fraternity and concord:
AND WHEREAS those principles can only be realized in a democratic society in which the Executive is accountable to a Legislative composed of elected members and representative of the people, and also a Judiciary which is independent and dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged:
NOW THEREFORE THIS CONSTITUTION IS ENACTED BY THE CONSTITUENT ASSEMBLY OF THE UNITED REPUBLIC OF TANZANIA, on behalf of the People, for the purpose of building such a society and ensuring that Tanzania is governed by a Government that adheres to the principles of democracy and socialism.

Professor Shivji seriously states that these proclamations are not mere embellishment. They evidence one important legal and political fact. This is that the constitution derives its legal authority and political legitimacy from the people. By giving themselves a constitution, the people are formally and legally constituting state power: providing for state organs and their respective powers, the procedures for exercising those powers and the limits on exercising them. All state power, that is legislative power, executive power and judicial power, is created by the constitution and must derive its authority from the constitution. [74] In this perception and understanding of sovereignty of the people, all powers and actions of government organs need to be exercised and justified with reference to the constitution. The Executive should always execute its functions with reference to the terms of the constitution. The Parliament when making laws must not go beyond what is required of it in the constitution. The same applies to the Judiciary, it has to look and shape itself within the ambit of the mother law of the land. Nothing extra-constitutional by any of the organs can find justification in such a proclamation.

Supremacy of the Constitution.

The principle of Constitutional supremacy is found in many countries that have written Constitutions. In countries, where written constitution is adopted it is the constitution, which is supreme. Supremacy means that

[74]Shivji I. G " Constitutional Limits on Parliamentary Powers" at p.3

Constitution is the source of all other laws of the country. The Constitution is providing for the ways and procedures of making laws of the country. The Constitution is to declare the body, which is vested with powers to make laws. The procedures for amending the laws including the Constitution itself are to be provided for in the Constitution. Basic rights and duties of the people are to be recognized by the Constitution. Therefore, Supremacy of the Constitution demands for the Constitution to be above all other laws of the country. The laws must be made and justified from the Constitution. No law should be applicable if it contravenes the Constitution. Supremacy demands the Constitution to prevail whenever there is a conflict between the constitution and any other law. Supremacy of the constitution also requires the courts to hold void any exercise of power which does not comply with the prescribed manner and form or which is not in accordance with the Constitution. Shivji says, this is then the basis for the principle that the Constitution is "basic law" from which all other laws and institutions derive their authority.[75](See Article…)

Representative Parliament

Constitutionalism calls for the makers of the laws to be the result of peoples' choice. Members of Parliament must always be the representatives of the people. For there to be a representative parliament free, fair and democratic elections in a country is a must. People are to be given opportunities to choose their leaders freely. A representative parliament is guaranteed in a place where democracy is fully practiced. If this condition is

[75] Shivji I. G et al Constitutional and Legal Systems of Tanzania: A Civics Sourcebook at p 42

fulfilled then the Parliament becomes representative one, the parliament that speaks for the people and represents the interests of the people. It is only when a country has representative parliament where the people will feel part of the government.

Independence of the Judiciary

Judiciary is an autonomous organ, which is vested with powers to dispense justice. It deals with the interpretation, construing and application of the law. It is a body that determines the guilty or innocence of an accused person, also it decides on rights and liabilities of the people. Generally, the administration of justice is in the custody of the Judiciary. Basing on the idea above Judiciary needs to be independent for it to fulfill its functions without fear or favour. Judiciary must be kept away from all forms of interference and control. Hon. Justice Buxtorn Chipeta defined Independence of the Judiciary in these words[76]

> As I understand the constitutional position in our country, the Judiciary is supposed to be an independent institution- independent in the sense that those who are entrusted by the Constitution to decide the rights and liabilities of guilt or innocence of people must be free from all kinds of pressures, regardless of the corners from which those pressures come. The Judiciary must be free from political, executive or emotional pressures if it is going to work with the smoothness and integrity

[76] In the case of Republic v Iddi Mtegule, High Court of Tanzania at Dodoma (PC), Criminal Revision No. 1 of 1979 (Unreported).

> expected of it under the supreme law of the land- the Constitution. It must not be subjected nor succumb to intimidation of any kind.

In the same lines, Prof. Peter writes, Independence of the Judiciary means every judge or magistrate, as the case may be, is free to decide matters brought before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements, or pressures direct or indirect from any quarter or for any reason… . We always tend to think independence of the Judiciary means just independence from the legislature and the executive; it means more than that. It also means independence from political influence whether exerted by the political organ of the State, or by political parties, or the general public, or brought in by judges themselves through their involvement in politics, which may take two forms, viz. deciding in favour of dominant sects (such as the ruling party) and, or of membership of judicial personnel to political parties.[77]

Independence of the Judiciary also demands for the government to guarantee the welfare of judicial officers especially judges and magistrates. There should be specific provisions on salaries and other remunerations, security of tenure, judicial immunity and…. All these dimensions are to be recognized in the Constitution of a country.

With that, perspective independence of the Judiciary today means more than interference of the Judiciary by the Executive. In modern times, the term Independence of the Judiciary incorporates freedom from all kind of

[77] Prof. Chris Maina Peter Human Rights in Tanzania: Selected Cases and Materials at p 482

pressures no matter where they come from, whether political or administrative. The doctrine embodies impartiality of adjudication, fairness of trial and integrity of the adjudicator. Independence of the Judiciary once guaranteed in a country helps to indicate the recognition and practice of justice for a great extent. Once the Judiciary is Independent Judges and Magistrates are placed in a better and safe position to administer justice without fear or favour, again the citizens gain confidence with their government in the sense that it is the rule of law that is in place and not the rule by interests of the few people in power.

Judicial Independence In a country that professes for the rule of law and principles of democracy, Independence of the Judiciary is necessary Independence of the Judiciary has been a determinant factor for democratization. The advocacy for an Independent Judiciary is not the struggle to put in place the doctrine of Judicial Supremacy but rather to have in place the political power that facilitate Judicial Independence. In this regard, the building of judicial independence in any country depends on initiatiatives and efforts of more than one body. All stakeholders in the struggle to build democratic States including the Courts of law have a very big role to play in promoting judicial independence. However, that requirement does not excuse the Governments from the big role to play in ensuring the Judiciary is independent.

Rule of Law.

The principle of rule of Law is a historical phenomenon. The principle stands against rule by personal whims and caprices of the monarchies. Under the

monarch regime, it is rule by man that prevails as opposed to rule of law. Traditionally, rule of law, as propounded by Dicey[78] means Supremacy of the law and equality before the law. However, Constitutional scholars raised many criticisms that if rule of law is to mean supremacy of the law there is a big possibility for tyrannical leaders to put in place tyrannical laws so that they enforce them tyrannically. Good examples that are given to criticize the formulation by Dicey are the Apartheid regime in South Africa and the rule by Idd Amin in Uganda. However, the challenge is drawn that when Dicey was propounding for rule of law as against rule by law he wanted to see all unjust systems of governments are discouraged at the expense of just laws. Therefore, it is worth to argue that by supremacy of law Dicey meant supremacy of just laws. Basing on that take Professor Shivji[79] writes rule of law means that the exercise of political power is in accordance with rules and laws and power is to be exercised within these rules and laws and not according to personal whims or desires of the ruler. Every individual or Institution which exercises authority or public power has to justify it by reference to law.

The meaning of rule of law has been changing from time to time following great changes and challenges facing the world's democracy and human rights issues. The advocacy for democracy and human rights has added more value to the meaning of rule of law. Today it is not enough to say about supremacy of the law, but it values a lot to talk about the body that makes those laws. The people who are the result of peoples' choice must constitute the body

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79 Shivji .I.G et al Constitutional and Legal Systems of Tanzania: A Civics Sourcebook at p. 45

that is vested with powers to make laws. The body should have a representative flavour; that is to say, all the people should be well represented. Once the representative body is put in place it becomes easier to make the lawmakers accountable at the moment they enact unjust laws. Therefore, rule of law demands for a representative body to make laws of the country. In line with a representative body, the emphasis today is also on just and fair laws. The other ingredient that adds value to the rule of law is Independence of the Judiciary. The Judiciary as the custodian of justice should enjoy the maximum freedom enough to make it administer justice without fear or favour. Knowing the importance of Independence of the Judiciary as an element of rule of law the International Conference of Jurists held in New Delhi in 1959 pronounced that Independence of the Judiciary is an indispensable requisite of a free society under the rule of law. The experience since 1959 shows that for a country to be a rule of law State one among the things that need to feature in that particular country is the Judiciary that is Independent. Separation of Powers plays an important part in the doctrine of rule of law. In any, State rule of law is not complete if the Powers of the State are not separated from one another. There must be three State Organs. The Officials in these Organs are to be different performing different functions. Democracy is an essential element in rule of law. Through democracy, people are made part of the government. The people are participated fully in the decision making. Democracy allows people to elect their representatives in the government. In a rule of law, State people enjoy the freedom of speech and expression, which is part and parcel of democracy. In practicing democracy through freedom of speech and expression people can do it either by way of conduct or orally. In a

country, where rule of law is predominant people can freely express what they want their government to do for them, and condemn the acts of government that jeopardize the entire practice of rule of law. Therefore, the new jurisprudence on rule of law incorporates, apart from well-known traditional definitions, issues of Democracy, respect for basic human rights, Independence of the judiciary, Representative Parliaments, recognition and respect of peoples' views and expression in the running of governments. Rule of law in modern times also calls for Transparency and accountability on the part of the government.

Basic Human Rights

It is common and well known that the term human rights is not a novel phenomenon in the ears of many people in the world today, though this understanding does not refute the fact that in some areas due to different reasons people do not know their rights as a result makes it impossible to demand them in times of violations. Human rights are those rights recognized to any person simply by being a human being and nothing else. Human rights are not privileges that one may wish to give to another as he/she wishes. Basic human rights are to be recognized to all people regardless of their sex, race or religious beliefs. They are the same to all persons, the most qualifying character is the fact that one is a human being. Therefore, rights are to be recognized to all persons. Since human rights are not privileges then they are innate that is; one comes into the world with them. Human rights start to be recognized since one is still a foetus.

Generally speaking human rights are first said to be recognized, second, inalienable and inherent and third human rights are said to be essentially equal. On the recognized aspect of human rights, Dr. Chandra writes "Human Rights are neither derived from the social order nor conferred upon the individual 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[80]. Human rights are said to be inalienable natural and inherent in the sense that a holder of these rights cannot divest himself of them. The reason is simple. These rights are inherent in the very nature of human being[81]. Jackues Maritain writes on this aspect that "human person possesses rights because of the very fact that it is a person, a whole, a master of itself and of its acts…by natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to a man because of the very fact that he is a man"[82]. Therefore, the thing that is done by various documents is to recognize these rights. The Instruments that list the rights only recognize human rights but they do not give human rights, if they could be giving human rights then, human rights could be a matter of privilege and obvious the name human rights could be replaced by another name that would reflect the indication of privilege against a right. There are number of reasons as to why the term human rights is so popular and famous in different countries of the world. However, the most common reason for the

[80] U. Chandra, Human Rights at p.14
[81] Ibid at p.15
[82] J. Maritain, The Rights of Man and Natural Law, p. 65(D. Anson trans, 1951)

peoples' awareness towards human rights is the maximum violations of these rights. Mal-violation of human rights throughout the world has made it possible for people to know their rights, hence demand them in case of disrespect of the same. There is a common say in African History that Colonialism planted seeds of its own destruction, meaning that through the negative treatments of colonialists people suffered a great and intolerable pinch, that awaken them to find means of getting rid with colonialism. The hard life experienced by the people during colonial period stimulated them, not to sit back and wait for others to help, to struggle for independence. Similarly, the same test is to be compared with the struggle for respect for and recognition of human rights throughout the world. In different epochs, people have been able to demand their rights after feeling tangibly the pinch of the denial. In most cases, human rights are known through negative experience. Therefore, the recognition of certain basic rights has always been, and experience shows will always be, the result of what people see to be contrary to their rights. This is not to be taken that it is impossible to have the rights recognized before the violation is experienced but the reality is out of peoples' experience first that things are not right somewhere it is when certain rights are noted and advocacy for their recognition takes the motion.

There are number of documents that recognize human rights. These Instruments are categorized into three groups. International Instruments make up the first group. The second group is that of Regional Instruments and the third is made up by National Instruments. This is to say human rights are recognized in three different levels, and that helps to implicate

that issue of human rights has to draw and receive not only the attention of International Community but also the national attention. The member countries of United Nations should in all their dealings recognize and respect human rights. This is due to the fact that Member States of UN are required and emphasized to sign, ratify and domesticate all the human rights treaties, because they are bound by the UN-Charter of which declares the reaffirmation faith in fundamental human rights[83]. Following the understanding that some states deny the responsibility by basing on the argument that they are not UN Members and that they have not signed certain treaties hence not bound by them, all countries in the world whether UN members or not are bound by all human rights treaties passed regardless of the fact that they have signed them or not. Before discussing how human rights is regarded to be an essential element in Constitutionalism it is wise to dwell a little bit in essence of various International and Regional human rights Instruments.

International Instruments

Internationally, **The Universal Declaration of Human Rights, 1948**[84] is the very significant legal Instrument on human rights. It was the first document to recognize various human rights such as right to life, liberty and security of person.[85]The declaration reaffirms in the preamble the faith in fundamental human rights, in the dignity and the worth of the human person and in equal rights of men and women. The first two articles of the

[83] Article…of the UN-Charter.
[84] United Nations General Assembly Resolution 217 (III) of 10th December, 1948.
[85] Article 3 of the Universal Declaration of Human Rights, 1948.

Declaration insist on application of these rights and freedoms to all people regardless of their race, colour, sex, language, political or other opinion, national or social origin, property, birth or other status. The, Declaration states that "Everyone has the right to life, liberty and security of person". Other rights recognized by the Declaration include rights against torture, inhuman or degrading treatment or punishment[86]. Equality before the law is recognized under article seven It is stated in article seven that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Article eight recognizes the right to an effective remedy by the competent national Tribunals for acts violating the fundamental human rights granted by the constitution or by the law. The right against arbitrary arrest, detention or exile is stipulated under article nine, the article states " No one shall be subjected to arbitrary arrest, detention or exile. Right to a fair trial[87] and the eminent right of presumption of innocence[88] until one is proved guilty by the court of law. are also recognized by the Declaration. Freedom of movement is covered under article thirteen.

Economic, Social and Cultural rights are covered in articles 22-27. These include the right to work, the right to rest and leisure, the right to standard living adequate for the health and well being, right to education is

[86] Article 5 of the Universal Declaration of Human Rights, 1948 "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."
[87] Article 10 of the Universal Declaration of Human Rights, 1948.
[88] Article 11 of the Universal Declaration of Human Rights, 1948.

recognized under article 26 while article 27 dwells on the right to participate in the cultural life of the community.

Generally, the Declaration that has 30 articles is a very important document since it recognizes and sums up the Civil, Political and Religious Liberties of men and women all around the world. Writing on the importance of the Declaration Tandon[89]says, "The Declaration sets a new international standard. For the first time in history, the representatives of most governments on earth have agreed that certain rights belong not to any one national or group but to every human being as a human being. The United Nations have proclaimed that people have rights not because they are Swedes or Arabs, Christians or Buddhists, Eskimos, Hottentoes or South Sea Islanders, but because they are human beings. What the Universal Declaration really says is that each person should be considered on his or her merits and all deserve a chance to live a full and happy life".

The other International documents to supplement the UDHR, 1948 were **The International Covenant on Civil and Political Rights, 1966** and **The International Covenant on Economic, Social and Cultural Rights, 1966.** The two Instruments represent the first two generations of human rights namely the Civil and political rights being human rights of first generation. The second generation consists of economic, social and cultural rights.

The International Covenant on Civil and Political Rights, 1966

[89] M P Tandon "Public International Law" at p 199.

The International Covenant on Civil and Political recognizes various human rights such as inherent right to life[90]. Right against torture or cruel, inhuman or degrading treatment or punishment is recognized under Article 7 of the Covenant. Article 9 declares that everyone has the right to liberty and security of person. Right for persons deprived of their liberty to be treated with humanity and respect[91]. Freedom from imprisonment merely on the ground of inability to fulfil a contractual obligation[92]. Freedom of movement and freedom to choose residence[93]. Right to be treated equal before the courts and tribunals[94]. The right to be presumed innocent until proved guilty for everyone charged with criminal offence is covered under Article 14(2). Right to recognition as a person before the law[95]. Right to privacy and family[96]. Right to freedom of thought, conscience and religion[97]. Right to hold opinion and the right to freedom of expression are covered under Article 19. Right of peaceful assembly[98]. Freedom of association is guaranteed under Article 22. Right to family is under Article 23 while Article 24 recognizes the right of every child to protection as are required by his status as a minor, on the part of his family, society and the State without any discrimination based on race, colour, sex, language, religion, national or social origin, property or birth. Equality before the law is

[90] The International Covenant on Civil and Political Rights, Article 6
[91] Ibid, Article 10
[92] Ibid, Article 11
[93] Ibid, Article 12
[94] Ibid, Article 14
[95] Ibid, Article 16
[96] Ibid, Article 17
[97] Ibid, Article 18
[98] Ibid, Article 21

recognized under Article 26. Minority rights are recognized by virtue of Article 27.

The International Covenant on Civil and Political Rights has two major Optional Protocols, i.e. to say the Covenant was amended twice since its coming to force. The first Protocol is called Optional Protocol to the International Covenant on Civil and Political Rights, 1966. This Protocol mainly, laid the complaint procedure to the Human Rights Committee based in Geneva, Switzerland.

The International Covenant on Economic Social and Cultural Rights, 1966

The Covenant under Article 2 requires each Member State to undertake steps individually and through International assistance and cooperation especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures.

The Covenant recognizes the right to self-determination, right to people to dispose their wealth and resources[99]. Right to men and women to enjoy all economic, social and cultural rights that the Covenant set[100]. Other rights recognized to be of economic, social and cultural rights include the right to work[101], right to the enjoyment of just and favourable conditions of

[99] The International Covenant on Economic, Social and Cultural Rights, Article 1
[100] Ibid, Article 3
[101] Ibid Article 6

work[102]whereby workers are to be provided with fair wages and equal remuneration regardless of their sex whether men or women, no group should be treated as superior and the other inferior. Decent living is a guaranteed right to workers and their families. Right to safe and healthy working conditions[103]. Right to form trade unions is covered under Article 8. Right of everyone to social security[104]. Other rights include right to an adequate standard of living, right to the enjoyment of the highest attainable standard of physical and mental health[105]. Right to education is also recognized by the Covenant under Article 13 while right to cultural life is recognized in through Article 15.

Article 16 puts responsibility to member States to submit, to the Secretary-General of the UN, reports on the measures which they have adopted and the progress made in achieving the observance of the economic, social and cultural rights.

In the changing world today, recognition of basic human rights has been a major challenge in any country that professes Constitutionalism. Constitutionalism calls for great respect, protection and promotion of human rights. Recognition of basic rights is regarded to be an important dimension of Constitutionalism. Basing on the same spirit of protection and promotion of human rights UN-Member states are emphasized to ratify and domesticate all agreements geared towards human rights promotion.

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[102] Ibid Article 7
[103] Ibid Article 7(b)
[104] Ibid Article 9
[105] Ibid Article 12