LECTURE NOTES
IN

ADMINISTRATIVE LAW

Prepared by

Idd R. Mandi
LL.B. (Hons); LL.M. (Dar)
Assistant Lecturer in Law, UDSM School of Law.

LECTURE 1

ADMINISTRATIVE LAW

1. Introductory Note……...……1

1.1 What is law?.....2

1.2 Divisions of Law…….……2

2. Administrative Law……..……...……2

2.1 Historical Note……...……2

2.2. Definition……...……...……..3

2.3 The Purpose of Administrative Law……...……4

2.4 The Essence of Administrative Law……...……4

2.5 Administrative Law and Constitutional Law……...……4

LECTURE 2

ADMINISTRATIVE ORGANS

A. THE EXECUTIVE ……...……6

1. The President ……...……6
2. The Vice President……..6
3. The Prime Minister…….7
4. The Cabinet …….……...……7
5. Regional and District Commissioners……...……..7

Regional Commissioners……..……7

District Commissioners…….……...……8

B. ADMINISTRATIVE TRIBUNALS……..……...……8

Definition ……..8

Reasons for Tribunals……...…….……..9

Some Examples …….……...……..10

1. The Environmental Appeals Tribunal……..10
2. The Tax Revenue Appeals Board…….……...……..11

4. Fair Competition Tribunal……..……...……13
5. Land Tribunals……...……..16
i. Village Land Council…….…...……..16
ii. Ward Tribunal……...…….17
iii. The District Land and Housing Tribunal…….……...…..18

C. REGULATORY AUTHORITIES……..……20
i. SUMATRA (Surface and Marine Transport Regulatory Authority)…..…20
ii. Water and Energy Utilities Regulatory Authority (EWURA)……...…..…23
iii. Other Regulatory authorities……...……..26
D. LOCAL GOVT AUTHORITIES……...……26

LECTURE 3

DELEGATED LEGISLATION

1. Introduction……27
2. Delegated Legislation (Nature of)…….....…….28
3. Delegated/Subsidiary/Subordinate Legislation Defined……..…..28
4. Parent or Enabling Act…….....…….29
5. Justifications of Delegated Legislation……...…..……29
6. Criticisms of the Delegated Legislation……..31
7. Procedural Issues in Delegated Legislation ……..33
8. Judicial Control of Delegated Legislation ……..33

LECTURE 4

JUDICIAL REVIEW/CONTROL OF ADMINISTRATIVE ACTION

1. Introduction……...…….……48
2. Definition …….…...……49
3. "Judicial Review" and "Appeal" Distinguished……...…...…….49
4. Source of the Supervisory Powers of the High Court……...……..50

5. GROUNDS/PRINCIPLES OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION……..…….56
A: THE DOCTRINE OF *ULTRA VIRES*……..…...….57
i. Exercise of power — lawful only by the person vested…….....….57
ii. Excess of Power……...…….58
iii. Delegation of Power……...……...…….60
Exceptions:……..……61
(i). Statutory Permission……...…….…….61
(ii). The Doctrine of *Alter Ego* Theory……...…..……61

iv. Abdication of Power and Acting under Dictation……...……63
v. Unreasonableness (irrationality)…….…….66
Vi. Failure to Observe Procedural Requirements……...….……..69
vii. Unauthorised Assumption of Power……...…….73
Viii. Fettering Own Discretion…….……75

B. RULES OF NATURAL JUSTICE…….……...……77
Introductory Observations……77
Definition……...……..……77
Development of the Rules of Natural Justice…….……...….78
Importance of *Ridge v. Baldwin*……...……..81
The Rules……...……..……83
I. Right to be Heard……...…...……83
The Doctrine of Legitimate Expectation……...…….85
The Doctrine of Legitimate Expectation in Tanzania……..……90
II The Rule Against Bias……...…….91
Forms of Bias……...……93
1. Pecuniary Bias……93
2. Personal Bias……...……93

3. Bias in Respect of the Subject Matter……..……..94

TESTS FOR BIAS ……...…...…….95
The Test of Bias under English Law……...……...…..95
1. Suspicion of Bias……...……..95
2. Reasonable Suspicion or Apprehension of Bias…….……95
3. The Real Likelihood of Bias……...…...…….96
4. The Real Danger of Bias……...…….……97
5. Real Possibility of Bias as judged by the Fair-Minded and Informed Observer……...……...……99

Articulation and Applicability of the Test of Bias in Tanzania…….100
Some Local Authorities on Bias……..……104

III. Right to Reasons of a Decision-maker…….……106
Advantages of giving reasons……...…….108
Counter argument……...…….……109
Exclusion of the Rules of Natural Justice……..109
1. The Doctrine of Waiver……...……109
2. Necessity……..……..110
3. Statutory Exclusion……...……..…….111
4. Contractual Exclusion……..111
5. Decision Requiring Expertise Judgment……...……112
6. Preliminary Decisions……..……112
7. National Security……...……..112

C: ERROR OF LAW ON THE FACE OF RECORD……..…...…112

NEW DEVELOPMENTS IN JUDICIAL REVIEW……...……114

A. Illegality, Irrationality and Procedural Impropriety ……..…...…114
B. The Principle of Proportionality……...……...……..115
Application of the Principle in Tanzania ……...…..…..116

REMEDIES

A. PREROGATIVE REMEDIES……..……120
Brief historical note ……...……..120
1. *Certiorari*……...……...……121
2. Prohibition ……127
3. *Mandamus* ……...……..……129
4. Habeas Corpus…….…… 132
Prerogative Orders and Discretion……...…..……135
New Developments: Change of Nomenclature……...……142

THE PROCEDURE……...……143
First stage: Leave…….....…….145
Second stage: Application for Orders……...…...…….148

B. ORDINARY REMEDIES……...……..……149
1. Injunctions ……...…….……150
2. Declaration……...……..153
3. Damages……...…….……156

LECTURE 5
EXCLUSION OF JUDICIAL REVIEW

INTRODUCTION……...…..157
EXCLUSIONARY CLAUSES……..158
COURTS AND EXCLUSIONARY CLAUSES……...……...…160
Dislike of Ouster Clauses…….....……160
In England……...……161

In Tanzania …….……...…….162
CONSTITUTION AND OUSTER CLAUSES……...……165
General Survey……...……..……165
Article 107A of the Constitution – A burial of exclusionary clauses?.....167

LECTURE 1

ADMINISTRATIVE LAW

---

1. Introductory Note

1.1 What is law?

Lawyers are learned in law but they have never been able to agree themselves on the meaning of the term "law." Much ink and paper have been spent on this particular topic. Thurman says, 'obviously law can never be defined."[1] Nevertheless, the same author advises that lawyers should not give up in their struggle to define law.[2]

A renowned American scholar, Karl Llewellyn, observes that the difficulty of defining law arises from the fact that law is comprised of so many things some of which are vastly different from each other that make it 'impossible to get them all under one verbal roof."[3]

Despite all such difficulties, not all jurists have been daunted to take up the task. They have instead endeavoured to define the term "law." Austin is known for his famous definition that law, simply and strictly so called, is a command issued by the sovereign.[4] Austin links law with power or command. This definition has been criticised.

---

[1] M.D.A. Freeman, (2001), *Lloyd's Introduction to Jurisprudence*, 7th edn, Sweet & Maxwell, London, p.39.
[2] *Ibid*.
[3] Karl Llewellyn, "A Realistic Jurisprudence – The Next Step", in *Essays on Jurisprudence from Columbia Law Review* (1963), Columbia University Press, London and New York, p.149.
[4] James Carter, (1907), *Law*: *Its Origin, Growth and Function*, G.P. Putnam's Sons, New York and London, p.7.

Other writers have closely linked law with control of human conduct. Carter, for instance, notes that law is "a body of rules for regulation of human conduct."[5] Again, in the words of Holland, law is defined as "that general body of rules to which it is supposed that human conduct ought to conform."[6]

- ❖ Thus law is a body of rules or norms that regulate human conduct.

1.2 Divisions of Law

Law is traditionally classified under two major groups —

(i) Public Law, and

(ii) Civil Law.

Public law regulates the relationship between the state and the citizen as well as the state organs *inter se*. Civil law regulates relationship between individuals and, of course, between the state and individual citizens.

- Public Law (criminal law, constitutional law and administrative law),
- Civil Law (law of contract, law of torts and the law of trusts).

- ❖ Administrative law is a branch of public law.

2. Administrative Law

2.1 Historical Note

- 1960s and 1970s, in UK, was a period of explosive growth of the Administrative Law,

[5] *Ibid*., p. 8.
[6] *Ibid*.

- The modern administrative was already taking shape, reflecting the feeling that it was the duty of government to provide remedies of social and economic evils of many kinds.
- Powerful bureaucracy, expansion of local government, extension of education services, town and country planning and great many other services and controls. Provision of other social services like food, clothing and shelter etc.
- Laws were enacted but matters to be governed by law were too many to be encompassed by law and hence discretion or discretionary power.
- If discretion power is to be tolerable, it has to be kept under control :
  - Political control through parliament
  - NA, public opinion, the press, administrative bodies (Ombudsman),
  - Legal control through courts.

2.2. Definition

"Administrative law is the law relating to the control of government power, or administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities." [H.W.R. Wade.,(1982), *Administrative Law*, 5th edtn, Clarendon Press, London, at p.4]

"The law governing the organization and the operation of the executive branch of Government (including independent agencies) and the relations of the executive with the legislature, the judiciary and the public."[Brian A. Garner, (ed.), (1999), *Black's Law Dictionary*, West Group, St. Paul Minnesota].

Powers of all public authorities are subordinated to the law— ministers, local governments, administrative tribunals, and other public authorities.

All such subordinated powers have two inherent characteristics:

i. They are all subject to legal limitations — there is no such thing as absolute or unfettered administrative power.
ii. It is always possible for any power to be abused.

2.3 The Purpose of Administrative Law

(Wade, ibid. p.5)

The primary purpose of the Administrative Law, therefore, is to keep the powers of the Government within their legal bounds, so as to protect the citizen against their abuse. "The powerful engines of the authority must be prevented from running amok."

The courts are constantly occupied with cases of this kind which are nothing more than the practical application of the rule of law, meaning that the Government must have the legal warrant for what it does and that if it acts unlawfully the citizen has an effective legal remedy.

The public must be able rely on the law to ensure that all these powers may be used in a way comfortable to its ideas of fair dealing and good administration.

2.4 The Essence of Administrative Law

The essence of the Administrative Law lies in judge made doctrines which apply right across the board and which therefore set legal standards of conduct for public authorities generally.

2.5 Administrative Law and Constitutional Law

The whole of Administrative Law, indeed, may be treated as a branch of the Constitutional Law, since it flows directly from constitutional principles of the

Rule of Law and Sovereignty of Parliament, and it does much to determine the balance of power between the state and the citizen.

References

Carter, J., (1907), *Law*: *Its Origin, Growth and Function*, G.P. Putnam's Sons, New York and London.

Freeman, M.D.A., (2001), *Lloyd's Introduction to Jurisprudence*, 7th edn, Sweet & Maxwell, London.

Garner, B. A., (ed.), (1999), *Black's Law Dictionary*, West Group, St. Paul Minnesota.

Llewellyn, K., "A Realistic Jurisprudence – The Next Step", in *Essays on Jurisprudence from Columbia Law Review* (1963), Columbia University Press, London and New York.

Wade, H.W.R., (1982), *Administrative Law*, 5th edtn, Clarendon Press, London.

LECTURE 2
ADMINISTRATIVE ORGANS

A. THE EXECUTIVE

1. The President

- The office of president is established Article 33(1) of the Constitution.
- He is the head of state, head of government, and commander in chief of armed forces[article 33(2)],
- Some of his powers as stipulated in the Construction are power to constitute and abolish any office in the service of the Govt of URT; promote, remove, dismiss and discipline Govt employees(art 36) ; declare war(art 44); prerogative of mercy [art 45); power to dissolve Parliament [arts 97(4), 90(2) (a) - (e)]; appointments of the Prime Minister(51(1)]; Ministers and deputy of ministers[art 55(1) & (2)]; the Attorney General[art 59(1)]; the DPP[art 59B(1)]; Regional Commissioners [art 61(2)]; the High Court judges and Justices of Appeal [arts 109(2) and 118(2) & (3); chairman and commissioners of CHRGG[art 129(3)]; Clerk of the NA [art 87(1)]; etc.
- The bulk of powers vested in the President are scattered over many pieces of legislation—power to detain, deport, etc

2. The Vice President

The Office of the Vice President is established under art 47(1) of the Constn.

Functions of the VP are:

- to assist the President in making up a follow-up on the day to day implementation of union matters,
- perform all such duties as assigned to him by the President,
- to perform all duties of the office of the President when the President is out of the country or out of office.[art 47 (1) (a)-(b)].

3. The Prime Minister

This office is constituted under art 51(1) of the Constn. He is appointed by the President and confirmed by the NA [arts 51(1) & (2)].

Functions:

- Authority of control the over, supervision, and execution of the day to day functions and affairs of the Govt of URT [art 52(1)],
- A leader of Govt business in the NA [art 52(2)].
- Other matters as directed by the President [art 52(3)].

4. The Cabinet

- Established by art 54(1) of the Constn.
- Composition: Vice President, Prime Minister, President of Zanzibar and Minister [art 54(1)].
- The Attorney General attends but has no right to vote [art 54(4)],
- President attends and presides over all meetings of the Cabinet [art 54(2)].
- It is the main executive think- tank & decision maker.

5. Regional and District Commissioners

Regional Commissioners

- Established under art 61(1) of the Constn,
- Appointed by the President after consultation with the Prime Minister [art61 (2)],

- Functions and powers:
  - discharge all Govt duties in a region [art 61(4)],
  - maintenance of law and order in region [s. 5 of the Regional Administration Act, Cap 97 RE 2002],
  - Power to order a police officer to arrest any person is likely to commit a breach of the peace or disturb the public tranquillity [s.7 the *Regional Administration Act*, Cap 97 RE 2002],

District Commissioners

- The office of the District commissioner is not established in the Constn.
- It is established by section 13(1) of the *Regional Administration Act*, [Cap 97 RE 2002].
- Powers conferred are similar in many respects to the Regional Commissioner.

B. ADMINISTRATIVE TRIBUNALS

Definition:

Referring to the rule, as to the immunity for words written or spoken by a witness in a court, laid down by the Exchequer Chamber in *Dawkins v. Rokeby* (L.R. 8 Q.B. 255, affirmed, L.R. 7 H.L. 744), Fry L.J. said, "I accept that, with this qualification that I do not like the word 'tribunal'. The word is ambiguous, because it has not, like 'court', any ascertainable meaning in English law" (*Royal Aquarium v. Parkinson* [1892] 1 Q.B. 431, cited Court).[Stroud's Judicial Dictionary of Words and Phrases]

Bryan A. Garner, (1999), *Black's Law Dictionary*, West Group, St Paul- Minnesota:

An administrative agency before which a matter may be heard or tried, as distinguished from a purely executive agency; an administrative agency exercising a judicial function.

P.P Craig (*Administrative Law*, 3rd edtn, Sweet & Maxwell, London, 1994, p.143) defines the term "tribunal" by listing chief characteristics of tribunals:

- The ability to make final legally enforceable decision (subject to review and appeal),
- Independent from any department of Government,
- Holding a public hearing judicial in nature although more informal than that of ordinary courts,
- The possession of expertise,
- Requirement to give reasons,
- Provision of appeal to the High Court on a point of law.

Note: → a precise name of an institution is not determinative in the context. Such institutions may carry the names of Boards, authorities, commissions, or committees.

→ not all tribunals bear the above mentioned attributes.

→ there are changes which have taken place in recent years (exclusion clauses, and finality clauses.

Reasons for Tribunals (Craig, p.142)

i. Preferred to courts because they have advantage of speed, cheapness, and informality. The process of courts of law, on the other hand, is elaborate, slow and costly — its object is to provide highest standard of justice,

ii. Expertise — most of those who man the tribunals are professionals and thus more efficient system of resolution of disputes is expected,

iii. they deal with questions of commercial policy rather than law, which are unsuitable for the ordinary courts,

iv. ordinary courts might not be sympathetic to the protection of substantive interests contained in some of the legislation which laid the foundation of the welfare state at the turn of the century,

v. Symbolic means of giving the appearance of legality in particular area in order to render more palatable unpopular changes in the substantive benefits to which individuals were entitled (**a more radical argument**).

SOME EXAMPLES

1. **The Environmental Appeals Tribunal**

Established by section 204 (1) of the *Environmental Management Act*, 2006 (No 20).

Composition [Section 204(1) – (a) chairman appointed by the President amongst persons qualified to appointed to the office of the judge. (b) Advocate of the High Court of Tanzania recommended by the Tanganyika Law Society. (c) One member with high academic qualifications and experience in environmental law. (d) Two other members who have demonstrated exemplary professional competence in the field of environmental management. Members in paras a, b, c, and d are appointed by the minister,]

Jurisdiction [section 206 (1) the Tribunal shall exercise an appellate jurisdiction under this Act in respect of matters referred before it pursuant to the provisions of subsection (2).

206 (2) any person who is aggrieved—

(a). the decision or omission by the minister,

(b). the composition of or failure to impose any condition, limitation or restriction issued under this Act or the Regulations made under this Act; and

(c). the decision of the Minister to approve or disapprove an environmental impact statement,

May within thirty days after the concurrence of the event against which he is dissatisfied, appeal to the tribunal in such manner as may be prescribed by the tribunal.

Appeal from the Tribunal

209(1) any party who is aggrieved with the decision or any order of the tribunal on a point of law, may appeal to the High Court within thirty days of such decision or order.

(2) Every appeal to the High Court shall be heard and determined by a panel of three judges.

2. The Tax Revenue Appeals Board

Established by section 4(1) of the *Tax Revenue Appeals Act* [Cap 408 RE 2002].

Composition: section 4(2) The Board shall consist of–

(a) a Chairman who shall be appointed by the Minister;

(b) two Vice-Chairmen who shall be appointed by the Minister one of whom shall be from Tanzania Zanzibar,

(c) four other members who shall be appointed by the Minister from each region who shall sit in the Board for the purposes of hearing and determining any appeal originating in the region from which they are appointed.

Qualification: section 4(3) A person may be appointed to be–

(a) Chairman if he is a principal legal officer or a person having adequate knowledge of taxation;

(b) member of the Board if he has knowledge of, and experience in, taxation, commercial or financial matters.

(4) Where any appointment relates to a person from Tanzania Zanzibar, the Minister shall consult the Minister responsible for finance in the Revolutionary Government of Zanzibar.

Secretary of the Board

Section 6 (1) The Minister shall appoint a suitable person, being a senior public officer, to be the Secretary of the Board.

(2) The Secretary of the Board shall perform all administrative functions as provided for under this Act and as may be assigned to him by the Chairman of the Board.

Jurisdiction: Section 7: The Board shall, subject to section 12 have sole original jurisdiction in all proceedings of a civil nature in respect of disputes arising from revenue laws administered by the Tanzania Revenue Authority.

Registrar:

Section 10(1) The Minister shall appoint a public officer, being a senior lawyer to be the Registrar of the Tribunal.

(2) The Registrar shall perform all administrative functions as provided for under this Act and as may be assigned to him by the Chairman of the Tribunal.

Jurisdiction :

Section 11 (1) The Tribunal shall have sole jurisdiction in all appeals arising from decision of the Board on disputes on which original jurisdiction is conferred on the Board.

(2) Notwithstanding subsection (1), the Tribunal shall exercise general powers of supervision over the Board in the exercise of its powers under this Act and may in that respect, call for and inspect the records of any proceedings before the Board and may revise any decision thereof.

Appeals from the Tribunal:

Section 25(1) Any person who is aggrieved by the decision of the Tribunal may preferred an appeal to the Court of Appeal.

(2) Appeal to the Court of Appeal shall lie on matters involving questions of law only and the provisions of the Appellate Jurisdiction Act * and the rules made thereunder shall apply mutatis mutandis to appeals from the decision of the Tribunal.

4. Fair Competition Tribunal

Establishment: section 83.-(I) There shall be established an independent tribunal which shall be known as the Fair Competition Tribunal to exercise the functions conferred upon it by this Act.

Composition: section 83(2) The Tribunal shall consist of –

(a) a Chairman who shall be a person holding the office of a Judge the High Court appointed by the President after consultation with the Chief Justice, and shall serve on part time basis; and

(b) six other members appointed to serve on part time basis by the President after consultation with the Attorney-General from candidates nominated by a Nomination Committee established

under sub-section (4) of this section.

Quorum: section 85*(6)* The Tribunal shall be duly constituted if at any time the Chairman and two other members are present.
Section 85 (7) Any decision shall be deemed to be a decision of the Tribunal if it is supported by a majority of the members.

Qualification: section 83(3) No person shall be appointed as a member of the Tribunal other than the Chairman, unless he qualifies for appointment by virtue of his knowledge of, or experience in industry, commerce, economics, law or public administration.

Jurisdiction: section *85.-(I)* The Tribunal shall have jurisdiction -
(a) to hear and determine appeals under Part XI of the Act;
(b) to issue warrants in accordance with section 71;
(c) to carry out the functions conferred on it under the EWURA Act, 2001, the SUMATRA Act, 2001, the Tanzania Communications Regulatory Authority Act, 2003, the Tanzania Civil Aviation Authority Act, 2003 and any other written law
(d) to exercise such other functions and powers as are conferred upon it by the Act;
(2) The Tribunal may decline to hear an appeal if it considers that the person does not have a pecuniary and material grievance arising from the decision of the Commission. In reaching its decision the Tribunal shall have regard to any regulations on the matters made by the Minister under section 98.

Rules of Natural Justice

Section 85 (3) The Tribunal shall in the exercise of its functions under this Act be guided by the rules of natural justice and shall publish its decisions and the reasons for its decisions in the Public Register.
(4) Notwithstanding the provisions of subsection (4) of section 90, the Tribunal shall maintain a Public Register into which all the proceedings and decisions made by it shall be entered.

Other Powers

Section 85(5) The Tribunal shall in the discharge of its functions have all the powers of the High Court in respect of -
(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;
(b) compelling the production of documents; and
(c) the issue of a Commission or request to examine witnesses abroad.
(8) A witness before the Tribunal shall have the immunities and privileges as if he were a witness before the High Court.

Finality and Enforcement of Tribunal's Decisions

84.-(I) A judgment or order of the Tribunal on any matter before it shall, subject to sub-section (2), be final.

(2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of the High Court.
(3) The decision of the High Court on any appeal under this section shall be final.

5. Land Tribunals

i. Village Land Council

Establishment: section 167(1) of the *Land Act*, Cap 113 RE 2002.

Composition: section 5 of the *Land Disputes Courts Act* [Cap 216 RE 2002].

(1) The Village Land Council shall consist of seven members of whom three shall be women, and each member shall be nominated by the Village Council and approved by the Village Assembly.

(2) Qualification for nomination and appointment of members to the Village Land Council shall be as stipulated under section 60 of the Village Land Act *.

Registrar: Section 6. The Registrar of Villages appointed under section 23 or the Local Government (District Authorities) Act * shall be responsible for the total administrative functions of all Village Land Councils and Ward Tribunals and shall–

(a) be the Chief Executive of all Village Land Councils and Ward Tribunals;

(b) be responsible for estimates and expenditure; and

(c) advise local authorities on any matter regarding the functions of Village Land Councils and Ward Tribunals in their respective areas of jurisdiction.

Functions: section 7. Subject to section 61 of the Village Land Act *, the functions of the Village Land Council shall include–

(a) receiving complaints from parties in respect of land;

(b) convening meetings for the hearing of disputes from parties; and

(c) mediating between and assist parties to arrive at a mutually acceptable settlement of the disputes on any matter concerning land within its area of jurisdiction.

Reference: section 9. Where the parties to the dispute before the Village Land Council are not satisfied with the decision of the Council, the dispute in question shall be referred to the Ward Tribunal in accordance with section 62 of the Village Land Act *.

ii. Ward Tribunal

Establishment: section 167(1) of the *Land Act*, [Cap 113 RE 2002].

Territorial Jurisdiction: section 10(1) Each Ward Tribunal established under the Ward Tribunals Act shall be a Court for the purpose of this Act, the Land Act * and the Village Land Act * and shall have jurisdiction and powers in relation to the area of a District Council in which it is established.

(2) The provisions of the Ward Tribunals Act, 1985 shall apply as appropriately modified by this Act, and in the event of conflict between this Act, and the Ward Tribunals Act * in relation to Ward Tribunals, the provisions of this Act shall apply.

Composition: section 11 Each Tribunal shall consist of not less than four nor more than eight members of whom three shall be women who shall be elected by a Ward Committee as provided for under section 4 of the Ward Tribunals Act *.

General jurisdiction: section 13(1) Subject to the provisions of subsection (1) of section 8 of the Ward Tribunals Act, the primary function of each Tribunal shall be to secure peace and harmony in the area for which it is established, by mediating between and assisting parties to arrive at a mutually acceptable solution on any matter concerning land within its jurisdiction.

(2) Without prejudice to the generality of subsection (1), the Tribunal shall have jurisdiction to enquire into and determine disputes arising under the Land Act * and the Village Land Act *.

(3) The Tribunal shall, in performing its function of mediation, have regard to–

(a) any customary principles of mediation;

(b) natural justice in so far as any customary principles of mediation do not apply;

(c) any principles and practices of mediation in which members have received any training.

(4) The Tribunal shall, in all matters, attempt to reach a settlement by mediation and may adjourn any proceedings relating to dispute in which it is exercising jurisdiction if it thinks that by so doing, a just and amicable settlement of the dispute may be reached.

No Advocates: section 18(1) No advocate as such may appear and act for any party in a Ward Tribunal.

Appeals: section 19. A person aggrieved by an order or decision of the Ward Tribunal may appeal to the District Land and Housing Tribunal.

iii. The District Land and Housing Tribunal

Establishment: section 167(1) of the *Land Act*, [Cap 113 RE 2002].

Territorial jurisdiction: section 22(2) The Court established under subsection (1) shall exercise jurisdiction within the district, region or zone in which it is established.

Composition: section 23(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the judgment.

(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman and the remaining member (if any) may continue and conclude the proceedings notwithstanding such absence.

Opinion of assessors: section 24. In reaching decisions the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except that the Chairman shall in the judgment give reasons for differing with such opinion.

General Jurisdiction: section 33 (1) The District Land and Housing Tribunal shall have and exercise original jurisdiction–

(a) in all proceedings under the Land Act, the Village Land Act, the Customary Leaseholds (Enfranchisement) Act, the Rent Restriction Act and the Regulation of Land Tenure (Established Villages) Act; and

(b) in all such other proceedings relating to land under any written law in respect of which jurisdiction is conferred on a District Land and Housing Tribunal by any such law.

(2) The jurisdiction conferred under subsection (1) shall be limited–

(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed fifty million shillings; and

(b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed forty million shillings.

(3) The District Land and Housing Tribunal shall have powers to execute its own orders and decrees:

Provided that the pecuniary jurisdiction of the Tribunal shall be unlimited in proceedings under the Customary Leaseholds (Enfranchisement) Act and the Regulation of Land Tenure (Established Villages) Act.

C. REGULATORY AUTHORITIES

They may be Boards, Committees, authorities, Commissions, agency, etc.

How distinguished with tribunals — nature of their function, not their names.

These bodies perform a variety of functions — licensing, regulation of prices, enforcement of standards, regulation of quality, inquiries, inspection, taking decisions, etc.

i. SUMATRA (Surface and Marine Transport Regulatory Authority)

The Law:

The *Surface and Marine Transport Regulatory Authority Act, 2001*(No 9).

Establishment: 4.- (1) There is hereby established a body to be known as the Surface and Marine Transport Regulatory Authority or by its acronym "SUMATRA";

(2) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of

(a) suing and being sued;

(b) acquiring, holding and disposing of real and personal property;

(c) exercising the powers and performing the functions conferred upon

it by or under this Act;

(d) entering into any contract or other transaction, and doing or suffering to do all such other acts and things which a body corporate may lawfully Perform, do or suffer to be done.

Duties:

Section 5. It shall be the duty of the Authority that in carrying out its functions it shall strive to enhance the welfare of Tanzania society by-

(a) promoting effective competition and economic efficiency;

(b) protecting the interests of consumers;

(c) protecting the financial viability of efficient suppliers;

(d) promoting the availability of regulated services to all consumers . including low income, rural and -disadvantaged consumers;

(e) enhancing public knowledge, awareness and understanding of the regulated sectors including as to-

(i) the rights and obligations of consumers and regulated suppliers;

(ii) the ways in which complaints and disputes may be initiated and resolved;

(iii) the duties, functions and activities of the Authority;

(f) taking into account the need to protect and preserve the environment.

Functions:

Section 6--(l) The functions of the Authority shall be-

(a) to perform, the functions conferred on the Authority by sector legislation;

(b) subject to sector legislation- ...

(i) to issue renew and cancel licences;

(ii) to establish standards for regulated goods and regulated services;

(iii) to establish standards for the terms and conditions of supply of the regulated goods and sources;

(iv) to regulate rates and charges;

(v) to make rules.

(c) to monitor the performance of the regulated sectors, including, in relation to-

(i) levels of investment;

- (11) availability, quality and standards of services;

(iii) the cost of services;

(iv) the efficiency of production and distribution of services, and

(v) other matters relevant to the Authority;

(d) to facilitate the resolution of complaints and disputes;

(e) to take over and continue carrying out the functions formerly of the Tanzania Central Freight Bureau set out in section 4, 4A and 4B of the Tanzania Central Freight Bureau Act, 1981;

(f) to disseminate information about matters relevant to the functions of the Authority;

(g) to consult with other regulatory authorities or bodies or institutions discharging functions similar to those of the Authority in Tanzania or elsewhere;

(h) to administer this Act;

(i) to perform such other functions as may be conferred On the Authority by this Act or any other law.

Definition of key terms

Section 3.

"regulated goods" means any goods produced, supplied or offered for

supply or for use in a regulated sector and includes any goods the Authority declares under section 38;

"regulated sector" means rail transport, ports and maritime transport, public passenger road transport and commercial road transport;

" regulated services" means any services supplied or offered for supply in a regulated sector and includes services which the Authority declares to be such services under section 38;

"regulated supplier" means any person engaging in activities in or in connection with a regulated sector and includes any person whom the Authority declares under section 38 to be such supplier;

"review panel" means the review panel established under section 25;

"sector Act" means any of the statutes referred to in sections 48 to 53 and any other statutes amending or replacing those statutes;

"sector legislation" means the legislation amended by sections 48 to 53;

"sector Minister" means the Minister for the time being responsible for a regulated sector;

"Special Review Committee" means the Committee appointed by the Authority pursuant to section 25;

"standards" includes standards relating the context of telecommunications and electronic broadcasting applied in the surface and marine transport sectors;

ii. Energy and Water Utilities Regulatory Authority (EWURA).

Law: *the Energy and Water Utilities Regulatory Authority Act, 2001* (No 11)

Establishment: Section 4. There is hereby established a body to be known as the Energy and Water Utilities Regulatory Authority by its acronym "EWURA".

Legal Status and Capacity: section 5.-(1) The Authority shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of -

(a) suing and being sued;
(b) acquiring, holding and disposing of movable and immovable property;
(c) exercising the powers and performing the functions conferred upon it by or under this Act;
(d) entering into any contract or other transaction, and doing or suffering to do all such other acts and things which a body corporate may lawfully perform, do or suffer to be done.

Duties and Functions: section 6. It shall be the duty of the Authority that in carrying out its functions it shall strive to enhance the welfare of Tanzania society by-

(a) promoting effective competition and economic efficiency;
(b) protecting the interests of consumers;
(c) protecting the financial viability of efficient suppliers;
(d) promoting the availability of regulated services to all consumers including low income, rural and disadvantaged consumers;
(e) enhancing public knowledge, awareness and understanding of the regulated sectors including-
(i) the rights and obligations of consumers and regulated suppliers;
(ii) the ways in which complaints and disputes may be initiated and resolved; and
(iii) the duties, functions and activities of the Authority.
(f) taking into account the need to protect and preserve the environment.

Section 7.(1) The functions of the Authority shall be-
(a) to perform the functions conferred on the Authority by the legislation;
(b) subject to sector legislation-

(i) to issue, renew and cancel licences;

(ii) to establish standards for goods and services;

(iii) to establish standards for the terms and conditions of supply of goods and services;

(iv) to regulate rates and charges;

(v) to make rules;

(c) to monitor the performance of the regulated sectors in relation to-

(i) levels of investment;

(ii) availability, quantity and standard of services;

(iii) the cost of services;

(iv) the efficiency of production and distribution of services; and

(v) other matters relevant to the Authority;

(d) in the case of petroleum and natural gas, to regulate transmission and natural gas distribution;

(e) to facilitate the resolution of complaints and disputes;

(f) to disseminate information about matters relevant to its functions;

(g) to consult with other regulatory Authorities;

(h) to perform such other functions as are conferred on the Authority;

(i) to administer this Act.

"Regulated sector"

Section 3:"regulated sector" means any one or more of the following -

(a) electricity;

(b) petroleum and natural gas pipeline transmission and natural gas distribution.

(c) distribution of water and sewerage;

iii. Other Regulatory authorities:

- Tanzania Civil Aviation Authority (TCCA) [s. 4(1) of the *Tanzania Civil Aviation Authority Act, 2003* (No 10)],
- Insurance Supervision Department [s. 5 of the *Insurance Act*, [Cap 394 RE 2002].
- Tanzania Tobacco Board [s. 3(1) of the *Tanzania Tobacco Industry Act, 2001* (No 24)],
- Sugar Board of Tanzania [s. 3(1) of the *Sugar Industry Act, 2001* (No 26)],
- Public Service Commission [s. 9(1) of the *Public Service Act*, 2002(No 8)],
- Non Governmental Organisations Co-ordination Board (s. 6(1) of the *Non Governmental Organisations Act, 2002* (No 24)],
- Pharmacy Council [s.3(1) of the *Pharmacy Act*, 2002 (No 7)],
- Tanzania Food and Drugs Authority (TFDA) [s. 4(1) of *the Tanzania Food, Drugs and Cosmetics Act, 2003* (No 1)],
- Anti-Dumping and Countervailing Measures Advisory Committee (ACMAC) [S.4 of the *Anti- Dumping and Countervailing Measures Act, 2004* (No 1)].

D. LOCAL GOVT AUTHORITIES

- Local Govts or authorities are established under art 145 (1) of the Constitution.
- The general purpose of the local govt is to transfer authority to the people [art 146(2)].
- Local Govt authorities have the authority and power to participate and involve the people in planning, implementations of development programmes within their respective areas [art 146(1)].

LECTURE 3

DELEGATED LEGISLATION

---

1. Introduction

The doctrine of separation of powers which is entrenched under Article 4 of the Constitution of the United Republic of Tanzania, 1977 assigns different roles to the three branches of the Government.

- The Legislature — vested with legislative powers
- The Govt (Executive) — vested with executive powers
- The Judiciary — vested with judicial powers

Thus, the power to make law is vested by the Constitution in the Parliament.

Article 64(1) and (2) of Constitution also provides,

> 64(1) Legislative power in relation to all union and matters concerning the Tanzania Mainland is hereby vested in Parliament.
>
> (2) Legislative power in Tanzania Zanzibar over all matters which are not union matters is hereby vested in the House of Representatives.

Delegation

Article 97(5) of the Constitution provides:

> The provisions contained in this Article or in Article 64 of this Constitution shall not prevent Parliament from enacting laws making provisions conferring on any person or department of Government the power to make regulations having the force of law on any regulations made by any person, or any person, or department of Government.

Comments:

- power to make law vested in Parliament,
- to meet practical realities, delegation is inevitable,
- Constitution itself has permitted delegation,
- power may be given to any person or Government department,
- Parliament might confer a force of law to regulations made by any person or Government department.

2. Delegated Legislation (Nature of)

Huth v. Clarke, 25 Q.B.D.391

"To "delegate" to another is not to denude yourself. In my opinion the word, in its general sense and as generally used, does not imply, or point to a giving up of authority, but rather the conferring of authority upon some one else."

Per wills. J.

3. Delegated/Subsidiary/Subordinate Legislation Defined

I. Osborn's Concise Law Dictionary

Delegated legislation: Legislation made by some person or body under authority given to that person or body by Act of Parliament.

II. *The Interpretation of Laws Act*, [Cap 1 R.E. 2002]

Section 4:

"Subsidiary legislation"— means any order, proclamation, rule, rule of court, regulation, notice, by-law or instrument made under any Act or other lawful authority.

Comments:

- Whatever the name used, as indicated in the above definition, all the same it means delegated legislation.
- The law made by Parliament is generally referred to as "Principal legislation" whereas the law made by other persons or authority is generally referred to as Subsidiary / delegated/ subordinate legislation. The first term (subsidiary) is more famous than others.

4. Parent or Enabling Act

Parliament may allow a person to make a delegated legislation (regulations, rules, order, by-law, notice, or instrument) through a certain Act of Parliament. Such Act is usually referred to as the "parent Act" or the enabling Act."

Ministers — Regulations through different Acts

Local Government Authorities

i. The *Local Government (District Authorities) Act*, [Cap 287 RE 2002], Sections 153, 155, 160, 161, 162, 163, 168, and 169 etc.

ii. The *Local Government (Urban Authorities) Act*, [Cap 288 RE 2002], Sections 88, 89, 90, 94 etc

iii. The *Interpretation of Laws Act*, [Cap 1 RE 2002]

Part VI of the Act is dedicated to subsidiary legislation and has general provisions that apply across all delegated legislation.

Concluding comments — Power to make subsidiary legislation may be given to ministers, local authorities, directors, commissions, boards, the chief justice, the speaker of the National Assembly, the President, etc

5. JUSTIFICATIONS OF DELEGATED LEGISLATION

(i) Pressure on Parliamentary time

- The bulk of legislation is so great that Parliament does not have the time to concern itself with all the details.
- Thus, the parent Act is often issued as a mere skeleton and the appropriate minister is empowered to fill in the details — to give flesh and blood to the skeleton so that it may live — in the form of regulations and orders made under the authority of the parent Act.

(ii) Technicality of the subject matter

Members of Parliament are in general not qualified to discuss, for maintenance, the pattern of miners (safety camps, or whether a particular disease, or substance, or poison, should come within the scope of some general statutory provisions).

Thus, in such circumstance, the legislative power is left to scientific or other experts for instance matters relating to atomic energy.

(iii) Unforeseen contingencies

There are emergent situations which may not be contemplated by Parliament. Delegated legislation enables a minister or other person or body to deal with these contingencies as they arise eg stabilising the fluctuating exchange rate etc.

(iv) Flexibility

By means of delegated legislation statutory provisions may be more easily and quickly adapted to meet changed circumstances or special cases, to take account of the experience gained to the application of some statutory scheme and to enable improvements to be made after consultation with interested parties.

(v) Opportunity for Experience

Delegated Legislation can be used to enable a scheme to be tried out for a limited time or in a limited area by way of experiment. The experience gained may lead to the scheme being abandoned or preferred or extended.

(vi) Emergency powers

Emergencies arise both in war-time and in peace-time which call for more speedy legislation than of which Parliament itself is capable. In war-time some immediate measures may be needed and hence a subsidiary legislation which is easily attainable/ made. In peace-time some circumstances might arise which call for immediate action eg to safeguard public health, to control an outbreak of foot and mouth disease, to regulate the economy of the country etc.

(vii) Decentralisation of powers

Instead of concentrating powers to the central government, powers of making by-laws is exercised by local authorities which are closer to the people. This is taken to one way of involving the people in the administration of their affairs.

(vii) Local variations

Local variations can be taken care of by delegated legislation. They thus can be suited to a particular social circumstance as contrasted from the general parliamentary legislation.

6. Criticisms of the Delegated Legislation

Political scientists, lawyers and others have criticized the delegated legislation on various grounds. Some of such criticisms are as follows.

(i). The doctrine of separation of powers

Delegated legislation is derogation or a result of abrogation of the doctrine of separation of powers. It is made by members of the executive whose function is to enforce but not to make law.

(ii). Lack of people's mandate

Some matters which are covered by delegated legislation are very important to the lives of the people. They should have been made by people's representatives and should not have been left to some authorities which have no people's mandate.

(iii). Inadequate control

There are two main ways to control subsidiary legislation, viz., first, laying before the Parliament (Parliamentary control). This is usually done by a special select Committee charged with the function to oversee delegated legislation. Parliamentary control is not effective because of inadequacy of time, complexity and volume of delegated legislation. Second, judicial control or control by courts is another way of controlling delegated legislation. This control is also not effective because the legislation may operate so many years before it is challenged in court; court proceedings are expensive; the majority of the people are ignorant of their rights, etc.

(iv). Inadequate Publicity

Although there is a requirement for publicity, in practice, delegated legislation is not usually known not only to ordinary people but also to lawyers.

(v). Wide and uncertain powers

Some delegated powers are so wide and uncertain that the citizen is virtually powerless in opposing their exercise.

7. PROCEDURAL ISSUES IN DELEGATED LEGISLATION

(i) antecedent publicity

(ii) statutory consultation

(iii) subsequent publicity

(iv) approval

(v) laying before Parliament or national assembly.

8. JUDICIAL CONTROL OF DELEGATED LEGISLATION

Control: (i) Parliament (briefly discussed)

(ii) Courts (of interest here)

Remark: Oluyede, (quoting Professor Wade) notes,

> "it is an axiom that any subsidiary legislation which is not authorized by statute, except in a few cases of prerogative power, will be considered as *ultra-vires,* void and of no effect while acts of Parliament may enjoy sovereign force, the "legality of every piece of delegated legislation is at the mercy of the courts, applying their settled principles for the interpretation for statutes". (See P.A Oluyede, (1973), *Administrative Law in East Africa*, P.66).

Garner also observes,

> "The doctrine that subordinate legislation is invalid if it is *ultra vires*, is based on the principle that a Minister or other subordinate agency has no power to legislate, other than such as may have expressly been conferred by the Legislature." (See J.F. Garner, (1970), *Administrative Law*, Butterworths, London, p.75).

Remarks: In our own jurisprudence, courts will not strike down a parliamentary statute unless it is inconsistent with the Constitution. In case a certain provision of the Act of Parliament is ambiguous, some words may be read into that particular statute.

See the following cases:

- *Joseph Sinde Waryoba v. Stephen Wassira* [1997] TLR 272,

- *The Registrar of Societies & 2 others v. Baraza la Wanawake Tanzania & 5 others*, Court of Appeal (at Dsm), Civil Appeal No 82 of 1999 (CA) (unreported).
- *Goodluck Kyando v. R.,* Court of Appeal (at Mbeya), Criminal Appeal No 118 of 2003 (CA) (unreported).

Definition: Judicial Review of delegated legislation means review by courts of any exercise of a power to make some form of delegated legislation (P. 67, Oluyede).

Principles/Grounds upon which a Delegated Legislation may be Reviewed or controlled by Courts.

1. Failure to abide by statutory procedure (procedural ultra-vires)

Delegated legislation must be made according to the procedure laid down by the statute. In case that procedure has not been followed, that Delegated Legislation is liable to be struck down by the court when it is challenged for failure to comply with the statutory procedure.

In *R.v. Wakiso Estate* (1955) 7 ULR 137, the accused was charged for contravening Rules made under section 80 (1) of the Employment Ordinance (Cap 83) of Uganda. The section had a proviso to the following effect:

> "Provided that rules made under paragraphs (1),(2),(3), and (15) shall be laid before the Legislative Council and shall not come into operation until they have been approved either with or without modification by a resolution passed by the Legislative Council."

The rules under which the accused was charged were not in fact "made" by the Governor before a draft was laid before the Legislative Council for its approval. The instrument through which the rules were created read,

> "Made at Entebbe this 21st day of May, 1946 and approved by a resolution passed on the 30th April, 1946."

The Learned Magistrate at the District Court (at Mengo) held that the rules could not be laid before the Legislative Council and approved by the council until they have been made by the Governor. The Attorney General appealed.

Held (on appeal):

> "The words of the proviso are clear and unambiguous. What is contemplated is that the rules shall first be "made" by the Governor and then be submitted to the Legislative Council for its approval or otherwise, and they shall not come into operation until they are approved either with or without modification. Until the Rules have been made by the Governor, in the sense that he has signified his approval of them by signing them, there is nothing which can be laid before the Legislative Council."

- It is thus important for the rules/DL as a matter of practice to follow the proper procedure laid down by the parent statute otherwise it may be of no effect.

2. Review on Ground of Approval and Consultation

The wording of the parent statute is very important if the enabling statute says that an approval must be sought from a certain person or authority item it has to be sought otherwise the subsidiary legislation will be declared void.

Similarly, if a parent Act requires consultation with a certain person or authority, such consultation must in fact be made before a delegated legislation is made.

The English case of *Agricultural, Horticultural and Forestry Industry Training Board v. Aleysbury Mushrooms* [1972] 1 All ER 280, is a good example. In 1965, the Minister of Labour had plans to set up a training board for the agricultural, horticultural and forestry industry under the provisions of the Industrial Training Act, 1964. Preliminary consultations were held with the National Farmers' Union (the NFU). By April 1966, a draft Order had been prepared and a copy of the schedule defining the industry to which it related was circulated to a larger number of addresses inviting comments. At the same time the press notice was published summarising the activities which it was proposed should be covered by the new board and advising any organisation which considered that it had an interest in the draft schedule and had not received to apply to the Minister. Among the addressees to whom the draft schedule was sent was the Mushroom Growers Association (the "Association") which was a specialist branch of the NFU, although largely autonomous. The membership of the NFU was approximately 15,000 of whom about 180 were full members of the association. The association was not represented on the NFU Council but a representative was invited to attend when matters relating to mushroom growing were discussed. No comments were received from the association in response to the invitation accompanying the draft schedule and no application was made for a copy of it. The Order constituting the board was made on 2nd August 1966 and came into operation on 15th August. It subsequently emerged that the association had never received a copy of the draft schedule and had no knowledge of the press notice or of the consultation which had taken place between the NFU and the Minister. The association contended that it was not bound by the Order on the ground that, before making it, the Minister was under duty to consult the association since it was an organisation 'appearing to him' to be within one of the categories of organisations which, under section 1(4) of the 1964 Act, he was bound to consult.

Held: (i). the expression 'any organisation' in section 1(4) of the Act meant that the Minister was under a duty 'every' organisation which appeared to him to be an organisation which fell within provisions of section 1(4) and not merely one such organisation; in view of the importance which attached to consultation in the scheme of the Act, and the fact that the Minister had not in terms stated that the association did not appear to him to fall within section 1(4) it followed that the association was a body which had to be consulted.

(ii). No consultation had taken place with the association for mere sending of a letter which was not received was but an attempt to consult; the essence of consultation was the communication of genuine invitation, extended with a receptive mind, to give advise.
(iii). accordingly, the 1966 Order had no application to persons engaged in the growing of mushrooms solely by reason of they being so engaged.

3. Substantive *Ultra-vires*

A subordinate legislation may be *ultra-vires* simply because the subordinate law-making authority has gone outside or beyond the powers conferred on it by the enabling statute. In *Carltona Ltd v. Commissioner of Works* [1943]2All ER 560, it was partly held that even where the enabling power is widely drawn the subordinate act must be "capable of being related to the prescribed purposes of the enabling Act."

In *Fielding v. Thomas* [1896] A.C. 600, it was held that where a subordinate legislature is *ultra-vires*, the court will, if possible, separate those provisions which are *intra-vires* from those which are *ultra-vires* and will uphold the validity of the former (appeal from Canada).

But, it was held in two Canadian cases (*Re Initiative and Referendum Act*, [1919] A.C 935 and *Great West Saddlery Co. v. R.* [1921]2 A.C. 91) where the good is inextricably mingled with the bad, there will be no course to the court other to hold the whole instrument void on the ground of *ultra-vires*.

-Read a local case — Kanji's case cited in Oluyede

4. Unreasonableness

Power (public power) must be exercised reasonably. This includes the power to make a delegated legislation, that is, whoever is given power to make the DL he has to exercise that power reasonably. If a by-law is unreasonable, the court may declare it invalid and void. There are no definite standards against which the test of unreasonableness may be measured. In the leading case of *Kruse v. Johnson* (1898)2 QB 91, Lord Russel, CJ, said:

> "Unreasonable in what sense? If, for instance, they (the byelaws) were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust; if the disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra-vires'*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A byelaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."[Emphasis added].

Applying this reasoning, the Court (Lord Russel, CJ) held that a byelaw that prohibited any person from playing music or singing in any place within 50 yards of a dwelling house after having being required to desist, was held not to be unreasonable and therefore valid.

In *Parker v. Bournemouth Corporation* (1902), 66 J.P. 440 a byelaw made under a statutory power to regulate the selling of articles on a beach, was held to be unreasonable and therefore invalid because it prohibited certain sales "except in pursuance of an agreement" with the byelaw-making authority.

In *Repton School v. Repton R.D.C* [1918]2 K.B. 133, a byelaw which applied to both new buildings and extensions to existing buildings and which required that any such buildings or extensions should be provided with an open space of a certain size at the rear of the building was held to be unreasonable for it might be quite impracticable and unnecessary to provide such an open space in the case of an extension.

5. Uncertainty/unclarity

By-laws must be clear, definite and free fro ambiguity otherwise the court will hold them to be to wide and *ultra vires*. Thus, a by-law can be attacked and may consequently be declared void on the ground that it is vague in its terms, or uncertain in operation or application.

In *Nash v. Finlay* (1901) 66 J.P. 183, a byelaw providing that "no person shall wilfully annoy passengers in the streets", was held void for uncertainty.

In *Bugg v. DPP* [1993]2 All ER 815, the court struck down a by-law restricting access to a military base on the ground that the area covered by the by-law was not delineated clearly enough.

In *R.v. Hermitte* (1938) 18 K.L.R. 55, the appellant was convicted and fined under a by-law made under section 69 of the *Local Government (Municipalities) Ordinance 1928,* which read, "No person shall create any disturbance so as to be

an annoyance to any residents or passengers." Note that this by-law does not specify in what circumstances and in what place (whether public or private residence) a disturbance would fall within the meaning of the by-law.

Held (on appeal): The by-law in question was uncertain, unreasonable and *ultra-vires* of the powers conferred on the Municipality and it therefore null and void.

6. Review on Ground of Publicity and Publication

This ground is more or less an amplification of the procedural *ultra-vires* principle. A subsidiary legislation must be made in compliance with the procedure stipulated in the parent Act or the enabling statute. Antecedent and subsequent publicity may be conditions for the validity of a Rule or Regulation. According to section 37(1) (a) of the *Interpretation of Laws Act*, [Cap 1 RE 2002], a subsidiary legislation must be published in a Gazette. The section reads:

37 (1) Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall, unless the contrary intention appears–

(a) be published in the Gazette;

(b) subject to subsection (2) and to section 39, come into operation on the day of publication, or where another day is specified or provided for in the subsidiary legislation, on that day.

This condition is mandatory. Thus, a subsidiary legislation which has been brought to operation in contravention of that condition is liable to be held null and void. In *Mwangi v. R*. (1950)24 (1) KLR 72, two accused persons were charged and convicted in the Special Magistrate's Court of Nairobi for overcharging in respect of service, to wit, haircutting, contrary to regulation 11(1) of the *Defence (Control of Prices) Regulations, 1945*. Some of the facts were as follows:

(a) In 1948, an Order, which had been published in the Gazette, allowed hairdressers to charge 1/= for a haircut.
(b) In 1949, Government Notice No 1 purported to have repealed past prices Orders.
(c) In 1949 again, Government Notice No 20 fixed prices at 50 cents. But none of 1949 Notices was published in Government Gazette.

Issue: whether the price controller lawfully amended, varied, rescinded or revoked an order which he had published in the Government Gazette by a subsequent order which he did not so publish. The accused persons were specifically charged with a breach of Order No 20 of 1949.

Held: "Our answer is no." The duty of the Price controller is 'to cause notice of the effect of such order to be given as soon as may be in such manner as he thinks necessary for bringing it to the notice of all persons who in his opinion ought to have the Order. He may or he may not select the Government Gazette as a medium for the performance of that duty. If he does select the Government Gazette, however, then in our opinion he cannot amend, vary, rescind or revoke any Order so published without again using the same medium, namely, publication in the Government Gazette."

7. The Rule against Sub-Delegation

The Rule against Su-delegation is usually expressed in a Latin maxim: "*delegatus non potest delegare*", which means a delegated power cannot be further delegated.

As a general rule, powers conferred by law on a certain person must be exercised by that very person. The exception to this general rule is the doctrine of the *Alter Ego Theory*. The doctrine applies to ministerial powers, which are multifarious in nature. A Minister is not expected to do everything on his own. He is assisted by other officials within the Ministry. Therefore, if a certain function is undertaken by an official in the Ministry other than the Minister

himself, the law presumes that it is the Minister who undertook that function. The minister is responsible to Parliament for all actions, whether done by himself or another official. This doctrine is confined to ministerial duties only.

Another known exception to the rule against sub-delegation is statutory permission. If the enabling statute allows sub-delegation, the rule will not apply. For instance, assume that a certain Board or Commission is given power to make subsidiary legislation by a certain statute. If the same statute allows such Board or Commission to sub-delegate that power to one of its members, then the exercise of that power by such a member is lawful.

Apart from the above indicated exceptions, the rule applies to all other cases to ensure that power is exercised by a person or body, to whom or which it is given. The rule *delegatus non potest delegare* holds that a delegated power cannot be further delegated. In other words if certain powers are delegated to a certain person or authority, the delegate (a person to whom the task is entrusted) is not allowed to further entrust the task to another person or authority. On the basis of this principle, an authority to which, or a person to whom, Parliament has entrusted the power to make law must itself or himself exercise that power.

In an English case of Allingham *and Another v. Minister of Agriculture and Fisheries* (1948) 1 All ER 780, by virtue of Reg 66 of the *Defence (General) Regulations 1939*, the Minister of Agriculture and Fisheries delegated to a county war agricultural Committee his powers under reg. 62 (1), to give "directions with respect to cultivation, management or use of land for agricultural purposes." The Committee decided that 8 acres of sugar beet should be grown by the occupiers of certain land, but left to its executive officer the selection of the field, which was required by the regulation to be specified in the notice to the occupier. The

officer consulted a local Sub-Committee, and served a notice on the occupiers specifying the field to be so cultivated.

Held (on the principle of *delegatus non potest delegare*) the Committee could not delegate the power to determine the land to be cultivated to its officer, and, therefore, the notice was ineffective and non-compliance was not an offence.

In *Remtulla Gulamani v.R*. (1936) 1 TLR (R) 203, the Governor was given power to make by-laws under Rule 11 of the *Cotton Rules, 1931*, for the destruction of cotton plants harbouring pests and diseases of cotton. This power was exercised by the Director of Agriculture and gazetted on 11 October, 1935, as General Notice No 993. The accused subsequently contravened it and fined shs. 300/= and then appealed.

Held: the terms of paragraph (11) of section 2 of the Ordinance do not extend to confer such power upon the Director of Agriculture but upon the Governor and the Governor alone, who is precluded from transferring this power by the principle of law expressed in the maxim *delegatus non potest delegare.* Conviction was thus quashed.

Read also *R.v. Jan Mohamed* (1937)17 (1) KLR 108; *Sohan singh v.R* (1951)6 ULR 27.

8. Inconsistency with or Repugnancy to the Parent Act, any Act of Parliament or Constitution

- Section 36 (1) of the *Interpretation of Laws*, [Cap 1 RE 2002] stipulates that subsidiary legislation should not contradict its parent Act or any other Act of Parliament. Thus, if it contradicts then it will be held void.

In *Koinange Mbiu v. R.* (1951) 24 (2) KLR 130, section 4 of the *Crop Production and Livestock Ordinance*, Kenya, allowed the Governor-in–Council to fix by name an area

or areas in the Colony to which rules for controlling crop production might apply. Rule 3 (1) of the *African Grown Coffee Rules* made under this statute provided that "no coffee shall be grown by an African except on a plantation approved by the Director (of Agriculture) and situated in one of the areas set out in schedule A to these rules."
Issue: whether this rule was a valid exercise of the power in section 4.

Held: Rules 3 was invalid because, in the first place, it was in conflict with another statute — the *Coffee Industry Ordinance.* Under the *Coffee Industry Ordinance*, any person including an African, could plant coffee anywhere in Kenya, except in the "native lands" area. Rule 3(1) was therefore in conflict with this statute because it limited the area in which an African could grow coffee to the plantation in the schedule A.

Secondly, section 4 of the *Crop Production and Livestock Ordinance* allowed the Governor-in-Council to regulate areas and rule 3(1) went beyond this by regulating the area of the whole Colony, not just one area and also by regulating a particular class of persons, namely, the Africans, rather than area.[**Comment**: extension of *ultra vires* doctrine].

- Articles 30(5) and 64(5) of the Constitution declare that any law which is inconsistent with the Constitution is void to the extent of inconsistency. Any law (Act of Parliament, customary law, or Islamic law or received law) that contravenes the Constitution is null and void.

In *Bernado s/o Ephraim V. Holaria Pastory and another*, [1990] LRC (Const.) 757, a woman, Holaria Pastory, had inherited some clan land from her father by a valid will. Finding that she was getting old and senile and had no one to take care of her, she decided to sell the clan land to one Gervazi Kaizilege, a stranger and a non

member of the clan. One Bernado s/o Ephraim, a member of the clan, filed a suit in the Primary Court of Kashasha, Muleba District, praying for a declaration that the sale of the clan land was void under the Haya customary law — for female have no power to sell clan land. This was according to the *Haya Customary Law (Declaration) (No 4) Order of 1963*. Paragraph 20 of that Order provided:

"Women can inherit and acquire usufruct right but may not sell."

The action succeeded in the primary but failed in the District court on appeal. On further appeal to the High Court (Mwalusanya, J.), it was —
Held: The relevant Haya customary law was discriminatory on the basis of gender, thus inconsistent with Article 13(4) of the Constitution. It was null and void.

(**Comment**: this by-law could have been objected on another ground – what is it?).

9. Inconsistency with or Repugnancy to the General Law

There are principles of general nature. Some of these principles are based on the Common law or principles of equity, etc. A by-law is thus not allowed to contradict such principles.

In *Kanji v. Tanga Township Authority* (1940) 1 T L R (R) 239, the accused owned a house which was situated at the corner of Akida and No 6 street in the Township of Tanga. On the 12th June 1939, some old papers were found in the street outside his house. Consequently, he was charged. He pleaded not guilty to a change under Rule 25 of the *Township Rules* which stipulated:

> "No person shall throw or deposit --- in or upon any street------ dust refuse, ---- or noxious matter. Any such accumulation being immediately in front of any house shall be *prima facie* evidence that the same has been thrown there or deposited by the occupier of the house."

Held:

> "Rules and by-laws made under statutory powers enforceable by penalties are construed like other provisions encroaching the ordinary rights of persons. They must, on the pain of invalidity, be not unreasonable, nor in excess of the statutory power authorising them, nor repugnant to that statute or to the general principle of law."[Emphasis added].

The general principle of law that rule 25 offended against in this case is that "an accused is presumed innocent until he is proved guilty." Rule 25 seem to invert this general principle of law to be "an accused is presumed guilty until he proves his innocence."

[**Comment**: this general principle of law is now entrenched in the Constitution].

In another case, *Haridas v. Kericho U.D.C.* [1957] EA 370, the by-law was made to implement town plan schemes. It allowed demolition without compensation.

Held: this by-law was *ultra vires* as it contravened the general law that requires compensation.

10. Use of delegated Legislation for improper Purpose

A delegated legislation must be used exactly for the purpose for which the Parliament intended otherwise it will be declared void by courts when challenged.

In *Attorney General (for Canada) v. Hallet & Carey Ltd* [1952] AC 427, it was held that if it can be shown that subordinate legislation is being used for improper purpose, which is other than that intended by the Parent Act, it will be declared void. [This is another amplification of the *ultra vires* principle].

References

Craig, P.P., (1994), *Administrative Law*, 3rd edtn, Sweet and Maxwell, Oxford.

Garner, J.F., (1970), *Administrative Law*, Butterworths, London.

Oluyede, P.A., (1973), *Administrative Law in East A*frica, Kenya Literature Bureau, Nairobi.

Peter, C., (1997), *Human Rights in Tanzania*: *Selected Cases and Materials*, Rüdiger Köppeverlag, Kölon.

Wade, H.W.R., (1998), *Administrative Law*, Clarendon Press, London.

LECTURE 4

JUDICIAL REVIEW/CONTROL OF ADMINISTRATIVE ACTION

---

1. Introduction

"Power tends to corrupt", is a famous saying. Power is susceptible to abuse. Those who have been entrusted with public power are likely to misuse that power or exceed its limits; they misuse that power; they may even erroneously refuse to exercise powers given to them by law, etc. In view of this, control of the exercise of public power is thus inevitable.

Administrative powers are controlled in a variety of ways:

(i) Parliament [National Assembly],

(ii) Public opinion [demonstrations, writing, etc],

(iii) the Press,

(iv) Administrative ombudsman [CHRGG, PCCB],

(v) Courts of law.

Items No (i) — (iv) may be termed as the political control of administrative action.

This topic, that is, "Judicial Review or Control of Administrative Action" is about the control of the exercise of administrative powers by courts of law. We are not concerned here with political or other forms of control of administrative action.

2. Definition

Osborn's Law Dictionary defines the term "judicial review" as follows:
"A uniform system for the exercise by the High Court of its supervisory jurisdiction over inferior tribunals and public bodies and persons."

P.A. Oluyede, (1973), *Administrative Law in East A*frica, Kenya Literature Bureau, Nairobi, p. 84, remarks: "Judicial control means judicial review and it is quite different from an appeal."

3. "Judicial Review" and "Appeal" Distinguished

- An appeal means a superior courts or tribunal is given power to consider the decision of a lower tribunal on merits . But judicial review is not based on merits as such but on the legality of the lower court or tribunal's power.

- Appeal is ordinary provided for by a statute whereas judicial review is the exercise of the inherent supervisory jurisdiction of the High Court. In *Attorney General v. Shah (No 4)* [1971] EA 50, it was held: "…..appellate jurisdiction springs from statute. There is no such thing as inherent appellate jurisdiction." Also, in *Amina Ramadhani v. Omari Mohamed*, HC (at Dsm), Civil Appeal No 49 of 2003 (unreported), Massati J held that "there is no such thing as implied appellate jurisdiction."

- In determining the appeal the appellate court may substitute its own finding but in judicial review this is usually not possible.

4. Source of the Supervisory Powers of the High Court

In the United States

The source of the courts' power of judicial review has been a subject of debate in various contemporary academic discourses. In America, this debate was provoked by a famous American case, *Marbury v. Madison*, (1803), U.S. (1 Cranch) 137. In this case, which has been described as a "judicial and political masterpiece"[7], Chief Justice John Marshal declared that the Supreme Court has a power of "judicial review", that is, the power of the judiciary to decide whether a government official or institution has acted within the limits of the Constitution and, if not, to declare its action null and void.[8] It is notable that this power is nowhere indicated in the American Constitution. The Supreme Court has undertaken extensive judicial review over the years. For instance, in fostering social justice, it declared segregation in educational facilities between whites and blacks as unconstitutional[9]; it struck down capital punishment laws[10] and it took yet another drastic step by limiting the power of state governments to restrict abortion.[11]

Such decisions have, as Swisher asserts, earned the Supreme Court both high praise and bitter condemnation.[12] Those who condemn it question the legitimacy of judicial review as it is not sanctioned by the American Constitution. The answer to that query has been the *Marbury*'s. It is said, although that power is not expressly provided for in the Constitution, courts have jurisdiction to declare

---

[7] John Whitman, (1987), *American Government*: *We are One*, Coronado Publishers, Sanford, p. 294.
[8] See Thomas E. Patterson, (2004), *We the People*: *A Concise Introduction to American Politics*, 5th edtn, McGraw Hill, New York, p. 56.
[9] *Brown v. Board of Education of Topeka, Kansas*, 347 US. 483 (1954).
[10] *Furman v. Georgia*, 408 U.S. 238, (1972).
[11] *Roe v. Wade*, 410 U.S. 113 (1993).
[12] Carl Brent Swisher, (1965), *The Supreme Court in Modern Role*, New York University Press, New York, p.1.

any executive and legislative actions that contradict the Constitution null and void. Schwarz justifies judicial review in America in these words: "the silence of [the Legislature] is not to be construed as indicating a legislative intent to preclude review."[13]

In the United Kingdom

Britain has no a written constitution. Garner says: "there is…in this country no positive constitutional justification for judicial review. The citizen cannot appeal to any fundamental law other than such remedies as may be granted or recognised by statute or common law."[14] Most English writers thus speak of 'the rule of law' as the basis of judicial review. Bradley and Ewing assert in this regard: "judicial review of executive action is an essential process in a constitutional democracy founded upon the rule of law."[15] Speaking of the rule of law in somewhat different terms Garner notes thus,

> All government power must be recognised by the law, especially where that power is exercised in some manner which affects adversely the property or the liberty of a subject, and that recognition is given only to power that emanates from a single source, the Queen in Parliament."[16]

The argument that flows directly from the rule of law is that courts have a duty under the doctrine of rule of law to ensure that all governmental power is exercised within its legal bounds. In other words, there has to be an institution that will tell governmental officials that they have acted out of legal limits, and that institution is the judiciary.

---

[13] Schwarz, *An Introduction to an American Administrative Law*, at p.163 cited in[13] J.F.Garner, (1970), *Administrative Law*, Butterworths, London, p.111.
[14] J.F.Garner, (1970), *Administrative Law*, Butterworths, London, p.110.
[15] A.W. Bradley, and K.D. Ewing, (2007), *Constitutional and Administrative Law*, 14th edtn, Pearson Education Ltd, London, p.725.
[16] J.F. Garner, op. cit. pp. 108-109.

Also it is said the power of judicial review or supervisory jurisdiction is inherent in the courts. This assertion is more historical and customary. In the past, English courts were regarded as King's courts; judges were also regarded as King's judges. Because the king had right and power to supervise his courts and his judges, the King's Bench was granted an authority to undertake that task on his behalf. The King's Bench could then supervise inferior courts and call any case from subordinate courts.[17] This is the essence of the idea of "Supervisory Jurisdiction." William Holdsworth sums up the situation thus, "It (the King's Bench) drew much of its authority from the fact that it was held in presence of the king; and, as we have seen, its distinctive pieces of jurisdiction – its jurisdiction in error and its jurisdiction over criminal cases – originated in its close connection with the person of the king."[18] These powers and practice ultimately consolidated into a custom that was later on incorporated in the High Court of Justice.

In Tanzania

Just as in England, it is often said that the power of the High Court to supervise inferior tribunals and administrative agencies is inherent in the court. This is so traditionally and this principle is based on the principle of the rule of law.

Section 2(3) of JALA, [Cap. 358 R.E. 2002] incorporates the common law as part of our law. Thus, because under the common law this power exercised by the High Court of Justice in England the High Court of Tanzania would have the same jurisdiction.

[17] Phillip S. James, (1962), *Introduction to English Law*, 5th edn, Butterworths, London, p. 25.
[18] William Holdsworth, (1956), *A History of English Law*, Vol. I, Methuen, London, p. 206.

Article108(2) of the Constitution : "… the High Court shall have jurisdiction to deal with any matter which according to legal tradition obtaining in Tanzania is ordinarily dealt with by a High Court…"

The Debate

There are two schools of thought as to the High Court's source of its jurisdiction in relation to judicial review. One school points the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance* (Cap. 360) [now *the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act*, Cap. 310 RE 2002] as the source of the Court's jurisdiction of judicial review. The second school of thought points to section 2(3) of the *Judicature and Application of Laws Act*, Cap 358 RE 2002] and Article 108(2) of the Constitution.

1st School of thought

The first school of thought that points the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Act*, Cap 310 RE 2002 is indicated in the case of *Vidyadhar Girdhalal Chavda v The Director of Immigration Services and others* [1995] TLR 125. In this case, Samatta, JK (as he then was) partly made the following remarks:

At p. 129:

> "It cannot be doubted that Mr Mallaba's preliminary point raises an issue of considerable importance on the enforcement by this court of the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968, the legislation which confers on this court the power to grant prerogative orders."

At p132, the learned judge makes another pertinent remark:

> "…. Constitutional proceedings and proceedings which are instituted under this Court's supervisory jurisdiction, that is to say, the jurisdiction to supervise statutory and domestic tribunals conferred on the court by s 17(2) of the Law Reform (Fatal

> Accidents and Miscellaneous Provisions) Ordinance (Cap 360) as amended by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968,…"

It is clear in the above excerpts the judge regards the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance* (Cap 360) [now the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 RE 2002] as the source of the court's jurisdiction.

2nd School of thought

Professor Issa Shivji represents the second school of thought. His views are to be found in his article [Issa G. Shivji, "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, Dublin, pp. 129- 145]. In this article professor Shivji argues at pp. 131-132 (the quotation has to be read together with its footnotes):

> "*The High Court derives its supervisory jurisdiction from section 2(2) [sic] of the Judicature and Application of Laws Ordinance (JALO, Cap. 453).*[19] As is well known, under that provision the High Court exercises its jurisdiction in conformity with the substance of the common law, doctrines of equity and "with the powers vested in and according to the procedure and practice observed by and before Courts of Justice…in England." The substantive law of the common law, the practice and the procedure governing the judicial review are therefore governed by the common law and the practice and procedures obtaining in England on the date of reception.

[19] It is sometimes erroneously assumed that the source of supervisory jurisdiction is the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968* (Cap 360, hereafter Law Reform etc). (See, for instance, *Gordhan v. Director of Immigration* and *Vidyadhar Girdhalal Chavda v Director of Immigration Services* in which Samatta, J (sic.) characterised the 1968 Act as "the legislation which confers on this court the power to grant prerogative orders.'). the Law Reform statute only changes the designation of the three prerogative remedies(i.e. certiorari, mandamus and prohibition) from 'writs' to 'order', a change which was brought about in England in 1938 (de Smith,1995, 651) but does not constitute the source of jurisdiction.

> *I would go further and argue that the source of judicial review is the Constitution itself.* Article 108(1) establishes the High Court as the superior court of record with unlimited original jurisdiction while sub-article 2 gives it general jurisdiction in any matter which, "in accordance with legal traditions and conventional practices" obtaining in Tanzania , is to be dealt with by the High Court. By 1977 it can be said that the supervisory jurisdiction of the High Court through judicial review had become part of the legal tradition and practices of Tanzania. This is supported further by article 13(6) (a), which provides for "right to appeal or any other legal remedy".[20] Any other legal remedy presumably includes "judicial review". *In effect, therefore, it is submitted that the basis for judicial review is to be found in the* Constitution of the United Republic of Tanzania, 1977 *itself."*[Italics added].

For the sake of discussion one needs to read Section 17 of the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Act*, [Cap 310 RE 2002] to see whether it confers jurisdiction on the High Court:

> 17. (1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.
> (2) In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the Court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter, as the case may be.
> (3) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5).
> (4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.
> (5) Any person aggrieved by an order made under this section may appeal therefrom to the Court of Appeal.

[20] The Full Bench of the High Court in the case of OTTU *v. Attorney* has held the 'right of appeal' is a basic constitutional right. See also the Court of Appeal's decision in *Attorney v. Lohay Akonaay*.

Question: In your view, which school states the correct position of the law regarding the source of judicial review? Give reason(s) for whichever position you take.

5. GROUNDS/PRINCIPLES OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Over the years, courts have developed various principles through which administrative action is reviewable.

The Dynamic state of the Law: It is to be noted that this area of the law is very dynamic. Many principles which held ground in 1960s and 1970s have changed and others have been modified. On this basis, in *R. v. IRC, ex p National Federation of Self Employed* [1982] AC 617, P. 640, Lord Diplock warned: "Any judicial statement on matters of public law if made if made before 1950 are likely to be misleading to what the law is today."[See A.W. Bradley, and K.D. Ewing, (2007), *Constitutional and Administrative Law*, 14th edtn, Pearson Education Ltd, London, p.725].

The Problem of Organisation: There is also a notable problem of classification of the grounds or principles of judicial review by various authors on this area of the Administrative Law. For instance, some authors have lumped many of these principles under the under the doctrine of *ultra vires*, rules of natural justice etc. Others have divided the doctrine under two subheadings, namely, substantive and procedural *ultra vires*. There is also a category of authors who have dealt with these principles singly without an attempt to group them under some major headings. In 1985, in the case of *Council of Service Unions v. Minister for the Civil Service* [1985] AC 374, Lord Diplock introduced another form of

classification when he summed up these grounds as "irrationality", "illegality" and "procedural impropriety." It is not clear whether all principles are subsumed into the Lord Diplock's trilogy ("irrationality", "illegality" and "procedural impropriety."). These different approaches may be confusing at times. A student is advised to learn these principles one by one first before considering the manner in which they have been categorised.

For the purpose of this lecture, these grounds or principles are broadly grouped into three:

A: The doctrine of *ultra vires,*

B: Rules of natural justice,

C: Error of law on the face of record.

A: THE DOCTRINE OF *ULTRA VIRES*

The doctrine of *ultra vires* requires that actions of whoever conferred with legal powers to be within the confines of the law. A person or body that is given powers must follow the law and not otherwise. The doctrine covers both substantive and procedural aspects related to the exercise of power.

i. Exercise of power — lawful only by the person vested.

It is usually emphasized that power will only be exercised by a person to whom that power is given by a statute. Thus, any person or body which seeks to exercise public power must be able to justify the exercise of that power through the law. In other words, the powers exercised must have been conferred on him or it by the law. In the *Municipal Board of Mombasa v. Kala* [1955]22EACA, 319, the Municipal Board of Mombasa was empowered by a statue to supervise all matters of town planning of its locality. It had power to demolish houses. The house (which belonged to Kala) was certified as dangerous and had to be demolished. The enabling statute required a notice to be served on the owner

before demolition. A notice was served by the engineer but Kala did not comply with it. On expiry of time, the house was demolished. Kala sued the municipal Board for trespass.

Held: The power to demolish buildings was conferred to the board but not to the engineer. There was no indication that the engineer was acting on behalf of the board.

- The engineer could not exercise the powers which were not legally vested in him. He had no such powers; he could thus not serve the notice to demolish the building.

ii. Excess of Power

It is not permissible for a person or authority that is vested with public power to exceed or overstep the boundaries of such powers. The excess of powers will be declared by the court as void. In an English case of *White and Collins v. Minister of Health* [1939]3 All ER 548, a local authority had authority to acquire land that did not form part of a private "park." An order was made and confirmed by the Minister but the validity was questioned in the High Court on the ground that the land which was the subject of the order was in fact part of a park. The Court quashed the order as *ultra vires*.

In *Sheikh Mohamed Nassor Abdulla v The Regional Police Commander, Dar es Salaam and two others* [1985] TLR 1, an application was made in the High Court for directions in the nature of habeas corpus. The applicant was deported to Zanzibar from Tanzania Mainland under an order by the President. The order which was made under the *Deportation Ordinance* Cap 38, was challenged in the High Court on the ground that the President exceeded his powers under the Ordinance.

Held (Mapigano, J): (i) Section 2 of the Deportation Ordinance empowers the President to deport a person from one part of the Territory to any other part of the Territory;

(ii) under section 3 of the Interpretation of Laws and General Clauses Act, 1972 the word Territory means Tanganyika;

(iii) the President has no power under the Deportation Ordinance to order deportation of a person from Tanzania Mainland to Zanzibar; therefore, the deportation order was illegal.

In another case, Jama *Yusuph v Minister for Home Affairs* [1990] TLR 80, a deportation order was made against the Applicant (Mohamedi Jama Yusuph), who was a Tanzanian of Somali origin. The Minister made a deportation order against him on 10th April, 1989. The Minister's deportation order was made under s.24 of the Immigration Act, 1972, and it was served on the applicant on 19th April, 1989, after he was arrested on 17th April, 1989. The applicant challenged that order in the High Court by seeking an order of certiorari to quash a deportation order.

Partly held (Kyando, J.): "I am satisfied beyond doubt myself that the applicant is a citizen of Tanzania. Is the Minister then justified in ordering his deportation from this country? I unhesitatingly hold that he was not: he acted beyond his power in making the deportation order against the applicant and acted plainly in breach of the provisions in the Immigration Act, 1972, which empower him to make deportation orders. These provisions do not empower him to deport Tanzanian citizens, like the applicant, from the country. His order of deportation against the applicant was therefore contrary to law, as shown above, and I have, as I hereby do, to quash it, by certiorari, as prayed in the application filed by the applicant in this court."

iii. Delegation of Power

Power, as said, must be exercised by a person /body to whom or which it is given. Unauthorised delegation is generally illegal. In *Allingham v. Minister of Agriculture and Fisheries* [1948]1 All ER 780, under wartime legislation local committees were empowered to direct farmers to grow specified crops on specified fields. A Committee decided that 8 acres of sugar beet to be grown by a farmer, but left it to their executive officer to decide on which field it should be grown. The farmer, who was prosecuted for disobedience, successfully pleaded that the delegation was void since the executive officer had no power to decide on the field where sugar should be grown.

In *Carder v. Commissioner of Mosques* (1963)66 NLR 16 [Ceylon- Srilanka], the Board, which had powers to appoint trustees of a mosque, consulted a member of Parliament who supplied a list of names including his own, all of whom the Board appointed.

Held:

- The Board had merely adopted a ready-made decision by an outsider and such appointments were void.
- There can be no legal objection to a public body obtaining advice and consulting suitable persons, but it is vital that it should genuinely keep the decision in its own hands.

In *Barnard v. National Dock Labour Board* (1953)2 QB 18, registered dock workers were suspended from their employment after a strike. The power to suspend dock workers under statutory dock labour scheme was vested in the Dock Labour Board. In this case, the suspensions were made by port manager, to whom the Board had purported to delegate its powers. The dockers obtained a declaration that their suspension was invalid since the Board had no power to delegate its functions and should have made the decision itself.

Read the case of *Agro Industries Ltd v. Attorney General* [1994] TLR 43, for a contrary view.

Exceptions:

(i). **Statutory Permission**

If a statute allows delegation of power then that power may be delegated.

(ii). **The Doctrine of *Alter Ego* Theory**

Ministerial functions are diverse. It is not possible for a minister to personally perform all functions entrusted to his ministry. He must therefore be assisted by officials in his ministry. But actions of such officials are taken to be the actions of the minister himself and he is responsible to Parliament for such actions. Thus, ministerial powers are usually delegable.

In *Carltona Ltd v. Commissioners of Works and others* [1943]2 All ER 560, Lord Greene, MR said at 562:

> "In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were the case. Constitutionally, the decision of an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he

> selected an official of such junior standing that he could not be expected competently perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

Read R. *v. Skinner* [1968]3 All ER 124; *Karia v. Dhanani* [1969] EA 352.

The doctrine is applicable to ministerial powers only but not other statutory bodies, not even to local governments. Delegation of ministerial powers is lawful unless prohibited but sub-delegation is unlawful unless permitted by a statute.

Judicial Powers

Usually judicial power is not delegable. In *Barnard v. National Dock Labour Board* (1953)2 QB 18, Lord Denning said:

> "While administrative function can often be delegated, a judicial function (power) rarely can be. No judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication."

Caution: there is no general principle that administrative powers are delegable. Generally, power must be exercised by the agency to which it is vested. Perhaps Lord Denning was referring to ministerial administrative powers which are generally delegable.

Mwesegile Samuli v. Makanika [1980] TLR 152

The appellant and respondent accused each other of witchcraft before a primary court. The primary court ordered the parties to submit themselves before a

witchdoctor and on the basis of the witchdoctor's evidence the outcome of the case would follow. On appeal:

Held (Samatta, J, as he then was).

A judicial function cannot be delegated unless expressly authorised by the law.

Note: "Delegation of powers" to be distinguished from "devolution of powers."

iv. Abdication of Power and Acting under Dictation

A person or body that is vested with public power is required to exercise that power freely and without any pressure to bear. Likewise, it is not allowable for such person or body to abdicate the powers given to him or it by the law. Oluyede remarks thus, "where an authority adopts a policy under the influence or direction of some other authority, it may be that the body exercising the power has abdicated or surrendered its power to other authority."[21]

In *H. Levender v. Minister of Housing* [1970]3 All ER 871, Levender had asked for a planning permission in a reservation area to extract some minerals. The power to give permission was vested in the local authority and right to appeal lay to the Minister of Housing. The Minister refused the application subject to consultation with the Minister of Agriculture and consent from the same.

Held: Decision to refuse the application by abdicating power to another person is wrong in law.

Stephen Kiame Sefu v The Registrar of Titles [1988] TLR 127

[21], P.A., Oluyede, (1973), *Administrative Law in East A*frica, Kenya Literature Bureau, Nairobi, p.91.

Appellant, a holder of a right of occupancy made a disposition by deed of the Right in favour of one Hamoud Abdallah Sumry. Thereafter the appellant sought for and obtained consent for the disposition. He then submitted the transfer to the Registrar of Titles for registration. The Senior Assistant Registrar of Titles refused to register, contending that the appellant had first to sort out transfer problems with the Prime Minister's Office. Problems to be sorted out were not disclosed except for the information that some kind of objection to the transfer had been lodged with the Prime Minister's Office. Aggrieved by the refusal to register the transfer, the appellant sought the intervention of the High Court.

Held (Mapigano, J):

- The Land Registration Ordinance Cap. 334 has given no function to the office of the Prime Minister and the respondent erred in law in refusing registration on account of matters that were irrelevant or extraneous;

- The Registrar of Titles erred in law and is directed to re-admit the appellant's application for registration and dispose of it in the manner provided by the relevant provisions of the Land.

James Bita v. Idd Kambi, 1979 LRT n. 9.

A magistrate was asked to surrender the case to the Party for decision and he obliged. The Party sent its decision to be endorsed by the magistrate. On appeal.

Held: the magistrate in abdicating his powers and acting under direction of someone else or body was very wrong.

Hamisi Masisi and 6 others v Republic [1985] TLR 24

The applicants had applied for bail in the Resident Magistrate's Court at Musoma. They were granted bail upon execution of cash bonds of various amounts and upon additional requirements to report at the Police Station at stated times. Two days later a Senior State Attorney, saying he was acting on the instructions of the Director of Public Prosecutions, moved the court to cancel the order for bail. The magistrate complied with the move mainly because it became known that immediately after the court had released the applicants on bail two days earlier, the Regional Commissioner for Mara Region had ordered their arrest and detention, apparently on the same grounds for which they were charged in court and admitted to bail. The magistrate therefore cancelled his previous orders for bail in order to avoid a conflict between the executive and the judiciary. Subsequently, the Resident Magistrate forwarded the record to the High Court for review.

Partly Held (Mfalila J):
Constituting a judicial office a magistrate is required to disregard any extraneous pressures that might be applied on him, and to act only in accordance with the law, standing firm in defence of the people brought to his court and in defence of the constitution and the law; in this case the Resident Magistrate was wrong in succumbing to executive pressure and cancelling his earlier orders for bail for fear that the Regional Commissioner would simply re-arrest the applicants and render impotent the court order.

- Power must not be surrendered (abdicated); it must be exercised freely without pressures or directions.

v. Unreasonableness (irrationality)

Public power must be exercised reasonably. Generally, judicial review does not provide a right to appeal on the merits of the decision. However, decision may be set aside for unreasonableness. The real difficulty in this regard is what sort of standard is to be used to determine "reasonableness" or "unreasonableness" of a decision? [See A.W. Bradley, and K.D. Ewing, (2007), *Constitutional and Administrative Law*, 14th edtn, Pearson Education Ltd, London, p.735].

In a celebrated case, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1947]2 All ER 680, Lord Greene MR attempted to lay down the standard. Facts in brief were that a statute (the *Sunday Entertainments Act*, 1932) gave a local authority power to permit cinemas to open on Sundays, 'subject to such conditions as the authority think fit to impose'. A local authority allowed cinemas to show films on Sundays, on the condition that no children under 15 should be admitted to the performances, with or without an adult. These prevented parents taking their children to the cinema on a Sunday. The company which had permission to show films objected to the condition as unreasonable. The Court refused to hold that condition as unreasonable. It held, "the courts can only interfere with an act of an executive authority if it shown that the authority have (sic) contravened the law. On the face it, a condition of this kind is perfectly legal."[22]

What is important in *Wednesbury*'s case are remarks made by Lord Greene, MR, in respect to "unreasonableness":

> "When an executive discretion is entrusted by Parliament to a local authority, what purports to be an exercise of that discretion can only be challenged in the courts in a very limited class of case. It

[22] [1947]2 All ER 680, p. 681.

must always be remembered that the court is not a court of appeal. The law recognises certain principles on which the discretion must be exercised, but within the four corners of those principles the discretion is an absolute one and cannot be questioned in any court of law.

What, then, are those principles, they are perfectly well understood. The exercise of such discretion must be a real exercise of the discretion. If, in the statute conferring the discretion there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. Expressions have been used in cases where the powers of local authorities come to be considered relating to the sort of thing that may give rise to interference by the court. Bad faith, dishonesty — those, of course, stand by themselves — unreasonableness, attention given to extraneous circumstances, disregard of public policy, and things like that have all being referred to as being matters which are relevant for consideration. In the present case we have heard a great deal about the meaning of the word "unreasonable". It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the power of the authority. Warrington LJ, I think it was, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith. In fact, all those things largely fall under one head."[Underlining added]

According to Craig[23], this case shows that there are two meanings of the term "unreasonableness". In the first meaning, the term is used in an "umbrella sense": unreasonable is used here simply as a synonym for a host of more specific grounds of attack, such as taking account of irrelevant considerations, acting for improper purposes and acting *mala fide*. The second meaning may be termed the "substantive sense" of unreasonableness: a decision may be attacked if it is so unreasonable that no reasonable public body could have made it. To prove this would require something quite extreme. Lord Greene MR gave example of a teacher being dismissed because of red hair.[24]

Read *In re Bukoba Gymkana Club* (1963) EA 471. [Also cited in Oluyede, p.93].

After the *Wednesbury*'s case, English courts have persisted in their articulation of the "unreasonableness" test. In *Education Secretary v. Tameside Council* [1977] AC 1014, at p. 1064, Lord Diplock said that "unreasonable" denotes "conduct which

---

[23] P. P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet and Maxwell, Oxford, p.404.

[24] Although the Wednesbury case is regarded as the *locus classicus* of the reasonableness principle, there were other cases decided before that case wich expounded the same principle. In *Westminster Corporation v. London and North Western Rail. Co.* [1905] AC 426, Lord MacNaghten said: "*It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the second.*" In *Kruse v. Johnson* (1898)2 QB 91, Lord Russel, CJ, said:"Unreasonable in what sense? If, for instance, they (the byelaws) were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust; if the disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra-vires'*. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A byelaw is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."[Emphasis added].

no sensible authority acting with due appreciation of its responsibilities would have decided to adopt."

In *Council of Service Unions v. Minister for the Civil Service* [1985] AC 374, at p 410, Lord Diplock called the test as one of "irrationality." He said "it applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

The definition of the term "unreasonableness" (or irrationality) offered by Lord Diplock in the last two cited cases echo the substantive sense of the term as expounded by Lord Greene MR in *Wednesbury* case. It leaves out its composite sense as indicated by Lord Greene MR.

The concept of "reasonableness" or "rationality" is increasingly used in administrative law. In this regard, An Australian judge, Kirby J, said: "judicial review is designed, fundamentally, to uphold the lawfulness, fairness and reasonableness (rationality) of the process under review."[25] It thus recognised as a universal requirement of good administrative decision-making.[26] The courts have on several occasions expressed this ground as "*Wednesbury* unreasonableness" although the new term of "irrationality" is also increasingly being used.

Vi. Failure to Observe Procedural Requirements

The law requires that the procedure that is laid down by a statute to be observed in the course of the exercise of power. Courts are emphatic on the observation of procedural requirements. In *University of Ceylon v. Fernando* [1960]1 All ER 631, it

[25] *Minister of Immigration and Ethnic Affairs v. Guo* (1997)191 CLR 598-9.
[26] Geoff Airo-Farulla, "Rationality and Judicial Review of Administrative Action", (Melbourne University Law Review (Sourced from http://www/austilii.edu.au/journals, MUL/2000/23 htm.

was held, "if a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure must be followed." In another case, *Local Government Board v. Arlidge* [1915] AC 120 at p.138, it was held: "If a statute prescribes the means it [the Local Government Board] must employ them."

There are various procedural aspects in so far the exercise of power is concerned. In this regard, three aspects are briefly discussed, to wit, proceedings by an improperly constituted body, failure to observe rules of procedure and defects in form. These aspects are briefly dealt with *seritiam*.

Improperly constituted body: if a statute creates a certain body, say a Board, Commission, tribunal, etc. and prescribes a quorum (or composition) of persons who may reach a certain decision, then decision must be made when that body is "properly constituted" and not otherwise. In other words, all members of the body must be present when decision is to be taken. Thus, if one or less number than is required is present it is usually said that "the body is not properly constituted." In such a case a resultant decision would be as good as null and void. In *Gullamhussein Sunderji Virji v. Punja Lila and another* [1959] EA 734, one member of the Rent Restriction Board made a decision instead of the full required composition. Section 6(2) of the *Rent Restriction Ordinance* provided that "Three members shall constitute a quorum at any meeting of a Board." Such exercise of power was held void and null.

Failure to observe rules of procedure: if the law lays down steps to be followed in exercising certain public power, those steps cannot be disregarded. In *Donald Kilala v. Mwanza District Council*, 1973 LRT n. 19, the Plaintiff (Donald Kilala) was employed by the Respondents as a Deputy Treasurer. He was dismissed from his employment for alleged misconduct. He was notified of the dismissal through a letter. Regulations 40 and 45 of the *Local Government Commission*

Regulations, 1963 (G.N. No 1 of 1963) laid down the procedure to be observed before dismissing a local government employee. According to the laid down procedure, a tribunal of inquiry had to be formed, and the accused officer had to be given a notice of the allegations so that he could defend himself. This procedure was not complied with at all. Instead, the Plaintiff was dismissed by being served with a letter.

Held: Non-compliance with the laid down procedure rendered the dismissal void.

In *Agricultural, Horticultural and Forestry Industry Training Board v. Kent; Same v Tawell & Sons (a firm)* [1970]1 All ER 304, under the *Industrial Training Act*, 1964, a minister was empowered to set up a training board for an industry and to impose a levy on employers in that industry. The Board made an assessment of levy to be paid by farmer. Section 4(3) of the Act provided that the levy order shall give any person assessed to the levy the right of appeal to an appeal tribunal constituted under this Act. Art 4(3) of the *Industrial Training Levy (Agricultural, Horticultural and Forestry) Order,* 1967 was couched in this language:
"*An assessment shall state the Board's address for the service of a notice of appeal or of an application for an extension of time for appealing*." In pursuance of this provision notices of levy assessment were served to many farmers but without indicating the right to appeal in case of dissatisfaction of such assessment.

Held: article 4(3) is mandatory; so that the failure to comply with it makes the notice bad.

- The exercise of power must thus tread the letter of the law, that is, to comply with what the law ordains. Failure to do so renders anything done invalid.

Defects in Form: Sometimes courts are prepared to review the exercise of power due to non observance with formalistic requirements. In re *Wilfred Ngonyani* [1982] TLR 272, the applicant was to be deported under the *Deportation Ordinance*. Both the Deportation Order and Deportation Warrant did not state the place where the subject of the Deportation Order and Warrant did not state the place the detainee was to be deported to.

Held: (i) the omission to specify the place to where the subject of the Order and Warrant is to be sent, cannot be said to be a mere technicality, but is material irregularity.

(ii) Where a liberty of a subject is concerned the wording of the Ordinance must be strictly construed.
(iii) The detainee is to be released from custody forthwith.

In *Lesinoi Ndeinai and others v. Attorney General* [1980] TLR 214, the applicants were arrested and detained under the *Preventive Detention Act*, 1962. The Detention Order was signed by the Vice President. This exercise of power was challenged on the ground that the Vice President had no power to detain persons as the Act conferred those powers exclusively on the President, and the President had not delegated those powers to the Vice President.

Held: in the circumstances of the case it was lawful for the Vice President to sign the Order as the President was outside the country and his powers would devolve to another person as prescribed in the Constitution (the doctrine of

devolution of powers). However, the Detention Order did not bear the public seal and thus defective in form and making the Order void and null.

- Courts of law tend to favour individuals against the state through procedural technicalities. Statutory provisions tend to be construe very strictly against the Government, local authorities in case they fail to adhere to certain procedural requirements.

vii. Unauthorised Assumption of Power

As pointed out, any person or public authority that exercises public power must justify such power through the law. In other words, powers sought to be exercised must have been conferred on that person or authority by law. It thus not permissible for a person or authority to "assume" or take powers which were not bestowed to him or it by the law.

In *R. v. Magangi Mbuki* (1969) HCD n. 251, Council employees in Arusha six head of cattle which had allegedly strayed within the Council's jurisdiction, and placed them in an enclosed boma. The accused arrived an hour later armed with swords and sticks and after cutting down the fence of the boma drove away their cattle. They were charged and convicted for stealing from persons having an interest in the thing stolen contrary to sections 263 and 268 of the Penal Code. The issue was whether the accused had thereby breached the Township Rules in rescuing the cattle and so had stolen them. The Resident Magistrate found there had been a breach. On appeal,

Held (Platt, J):
Seizure of cattle was grounded on rule 82 of the *Township Rules,* Cap 101, which provided:

> "Any member of the Police Force or other person acting under instruction of the administrative officer may seize any animal straying in any street or public place or upon any government land and may take such animal to be impounded by the Police….."

It was not clear whether the Council officials had right to seize the cattle. For, under Rule 82 only persons entitled to seize cattle are members of the Police Force or other persons acting under instructions of the administrative officer, who may take the cattle to be impounded by the Police. The right to seizure must be established before determining whether the accused were guilty. After such observations the Court held that the accused cannot be said to be guilty.

In *Gullamhussein Sunderji Virji v. Punja Lila and another* [1959] EA 734, the appellant had paid rent in excess to the statutory standard rent. He applied to the Rent Restriction Board for determination of the standard rent and for an order for refund of any rent in excess of the standard rent paid by him. Although the hearing of the application started before a properly constituted quorum of the Board pursuant to section 6(2) of the *Rent Restriction Ordinance*[27], the Chairman alone inspected the premises and gave his decision. The demised premises in question were used for living accommodation and for business (a shop). The law had set different chargeable rents depending on the use of premises. The Chairman took the view the view that under section 2(2) of the Ordinance, the test for determining whether premises were residential or business premises was dominant user, held that the premises were business and accordingly dismissed the application. On appeal, it was submitted that the Chairman alone had no jurisdiction to decide the application and that he erred in holding that the main user of the premises was that of a shop. On the other hand, it was submitted for the respondents that the Chairman was empowered

[27] Section 6(2) of the *Rent Restriction Ordinance* provided that "Three members shall constitute a quorum at any meeting of a Board."

to sit alone under the provisions of the *Rent Restriction (Authorisation) Order*, 1951.

Partly held: the Chairman of the Rent Restriction Board sitting alone had no power to order a refund of rent paid in excess and had no power to hear and determine the application at all.

The Chairman had wrongly assumed the powers of the Board. For any decision of any administrative, judicial or legislative body to be valid, it must have been made by a properly constituted quorum as set by law.

- For unauthorised assumption of power read also the case the *Municipal Board of Mombasa v. Kala* [1955]22 EACA, 319.

Viii. Fettering Own Discretion

A body or person endowed with public power should not to fetter his/its discretion to consider certain matters by adoption of a rigid policy or rule. The law is against adoption of a policy that prevents the holder of power from considering the merits of a particular case. [See P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet and Maxwell, Oxford, p.391].

Bradley and Ewing write:

> "The exercise of discretion must not be prejudged or fettered by a binding rule. The decision - maker may adopt a general policy and indicate that it will be applied in the absence of exceptional circumstances[28], but may not have a rule that certain applications will always be refused."[29]

[28] See e.g. *R. v. Home Secretary, ex P and Q* [2001] 2 FLR 383 (a policy of allowing mothers in prison to keep babies with them under the age of 18 months).
[29] *R. v. Port of London Authority, ex p Kynoch* [1919] 1 KB 176, 184 (dictum of Blankes LJ). See also D J Galligan [1976] PL 332. Also *R. v. Home Secretary, ex p Venables* [1998] AC 407(discretion fettered by rigid policy of ignoring child's development in prison) and *R. v. Home Secretary, ex p*

> These principles apply to the exercise of discretionary powers vested in government departments, but departments cannot function effectively unless they formulate policies as to how a particular discretion will be exercised. Such policies may not be treated as binding rules."[30]

In *R. v. London County Council, ex p. Corrie* [1918]1 KB 68, the court quashed a decision refusing the applicant permission to sell pamphlets at certain meetings. The decision had been taken in reliance of upon a Council bylaw that nothing was to be sold in parks. Darling J stated that each application must be heard on its merits; there could not be a general resolution to refuse permission to all.

In *Stringer v. Minister for Housing and Local Government* [1970]1 WLR 1281, pp. 1297-8, Cooke J reviewed the legality of a policy which restricted planning permission for developments which could interfere with Jodrel Bank telescope. He held that the general policy could stand provided that it did not inhibit the taking of account of all issues relevant to each individual case which came up for determination.

- There is no objection for a public authority to adopt a policy a rule on how its discretion should be exercised.
- The authority should not adopt a general rule or policy that directs it to refuse to hear any case or application brought before it. It should not shut its ears to matters brought to it and it should rather properly consider each case on its own merits.
- In case the authority has adopted such a rule or policy, the courts would declare it invalid when challenged.

Hindley [2001]1 AC 410 (Home Secretary prepared to reconsider decision on whole life tariff at any time).

[30] A.W. Bradley, and K.D. Ewing, (2007), *Constitutional and Administrative Law*, 14th edtn, Pearson Education Ltd, London, p.734.

B. RULES OF NATURAL JUSTICE

Introductory Observations

One important ground upon which courts review administrative action is the breach of the rules of natural justice. Courts are increasingly demanding observation of the rules of natural justice. Rules of natural justice are usually not provided for in statutory enactments but are presumed by courts. They were invented by common law courts. Thus, in *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180[31], it was held that demolition powers vested in the defendant Board were to be subject to notice and hearing requirements. The omission of positive words in the statute requiring a hearing was held to be no bar since the justice of the common law would supply the omission of the legislature. Of recent, however, these rules are recognised by many statutes and Constitutions [see article 13(6) (a) of the Constitution of URT].

Definition

The meaning of expression "natural justice" as used in legal jurisprudence has never been adequately clear. It has meant different things to different authors. Garner notes in this regard:

> "Natural justice" has meant many things to many writers, lawyers and systems of law, including an approximate synonym of divine law, and also a form of *ius gentium* or the common law of nations. The common lawyers, however, have used the expression "natural justice" with surprising precision of meaning , as referring to two important but narrow principles only, namely *audi alteram partem* ("hear both sides"), and *nemo judex in causa sua potest* ("no one can be judge in his own cause"). (See J.F. Garner, (1970), *Administrative Law*, Butterworths, London, p. 111).

[31] Cited in P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet & Maxwell, London, p.281.

In its modern sense the expression "rules of natural justice" is used to mean rules of fairness that are to be observed by a person who makes a decision that may affect the rights of another. Professor Peter writes, "Rules of natural justice are about fairness and justice in the society. They address how judicial, administrative or other organs are to function in the process of reaching a fair decision in determination of any issue before them. These rules of fair-play in the administration of justice are regarded as universal and rules of the wise. They are an integral part of the doctrine of rule of law." [Chris Maina Peter, (1997), *Human Rights in Tanzania: Selected Cases and Materials*, Rüdiger Köppeverlag, Kölon, p.426].

Development of the Rules of Natural Justice

The development and applicability of the rules of natural justice have had a chequered history. In the 19th Century, the applicability of natural justice especially the right to be heard was wide. It equally applied to areas that may be described as administrative. In the 20th Century, things changed. English Courts began to draw a dichotomy between administrative and judicial decisions. They took a narrow view of what constituted a judicial or quasi-judicial decision and to require this as a condition precedent for the application of a right to a hearing.[32] Lord Reid, in *Ridge v. Baldwin* [1963]2 All ER 66, attributed this situation to the war time legislation and policy adopted by courts to assist the executive members during the war. For instance, in *R. v. Electricity Commissioner* [1924]1 KB 179, the application of natural justice was greatly restricted. Lord Atkin's dictum in this case excluded the application of natural justice save for two special circumstances only: (i) when decision taken affected an individual's

[32] P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet & Maxwell, London, p.283.

rights, and (ii) when decision is to be taken by a body with a duty to act judicially.

In *Errington v. Minister of Health* [1935] 1 K.B. 249, it was partly held that "if a minister were acting administratively natural justice would not apply."
In a different case, *Nakkuda Ali v. Jayarante* [1951] AC 66, there was a cancellation of licence without the concerned party to be heard and the Privy Council ruled out that the action was administrative and was not subject to the rules of natural justice.

In another case, *R. v. Metropolitan Police Commissioner* [1953] 1 WLR 1150, the court held hat it could not demand the compliance with the rules of natural justice because it was only a disciplinary case.

This trend went on for a considerable time. In early 1960s, the attitude of courts changed. The turning point was the case of *Ridge v. Baldwin* [1963]2 All ER 66. In this case, the plaintiff (Baldwin), a former Chief Constable of Brighton, had been prosecuted but acquitted on certain charges of conspiracy. In the course of that trial the presiding judge had made certain observations animadverting the plaintiff's character as a senior police officer, and a number of damaging facts had been admitted by him in the course of trial, all of which had been fully reported in the national newspapers. Immediately after the trial the Local Watch Committee summarily dismissed the plaintiff from his post as a Chief Constable. He appealed to the Secretary to the Home Secretary under the Police Regulations but his appeal was dismissed. In proceedings for a declaration, he claimed that his dismissal was wrongful in that the Watch Committee had not given him an opportunity of appearing before them. Streatfeild, J., at first instance, held that the Committee were bound to observe the principle of natural justice, but that there was here no need for any further hearing, as the Committee had been

made fully aware of all the facts from the newspapers reports. This argument was not accepted by the higher courts, as there was no evidence before the court where the members of the Committee had read the newspapers reports. Whether these reports contained such arguments as the plaintiff might have been able to adduce in support of his conduct, or indeed whether they were substantially accurate. It was held in the Court of Appeal that in the circumstances of the case, there was no need to comply with the principles of natural justice because the Watch Committee was acting administratively or taking executive action. The plaintiff was not daunted, he appealed to the House of Lords. In that House, the decision of the Court of Appeal was reversed and a declaration was granted to the effect that **the dismissal of the plaintiff was a nullity, as the *audi alteram partem* principle had not been observed**. In the course of long and important judgment, Lord Reid partly said:

> "The principle *audi alteram partem* goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority. In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighted or measured therefore it does not exist."

In the case, Lord Hodson, remarked: "No one, I think, disputes the three features of natural justice stand out — (1) the right to be heard by unbiased tribunal, (2) the right to have notice of charges of misconduct, (3) the right to be heard in answer to those charges".

Importance of *Ridge v. Baldwin*

The *Ridge*'s case is very important in so far as the applicability of the rules of natural justice is concerned. It did away with the previous judicial style of making distinction between "administrative function" and "judicial or quasi-judicial function." It held that rules of natural justice applied to all decisions affecting personal rights irrespective of form of decision making process or the nature of the body making that decision. In the words of Bradley and Ewing, *Ridge v. Baldwin* "has laid the foundations of judicial review today."[33]

Thus, this case marshalled the change of judicial attitude in England and other common law jurisdictions. This change in judicial attitude may be gathered from few decided cases. In *Re H. K. (an Infant)* [1967]2 QB 617, the Court of Appeal in England held that whether the function to be exercised by administrative body may be regarded as judicial or administrative, nevertheless it must be exercised with fairness.

In *R. v. Gaming Board ex parte Benaim and another* [1970]2 All ER 528, Lord Denning, MR said:

> At one time it was said that the principles [of natural justice] only apply to judicial proceedings and not to administrative proceedings. That heresy was scotched in *Ridge v. Baldwin and others*.[34] At another time it was said that the principles do not apply to the grant or revocation of licences. That is too wrong." [Cited in [Chris Maina Peter, op. cit. pp. 428-429].

In *Pergomon Press* [1970] 3 All ER 536, it was stated thus:

---

[33]."[See A.W. Bradley, and K.D. Ewing, (2007), *Constitutional and Administrative Law*, 14th edtn, Pearson Education Ltd, London, p.748].

[34] [1963]2 All ER 66 and [1964] AC 40.

> "… it is … not necessary to label the proceedings judicial, administrative or investigatory. It is the characteristics of the proceedings that matter but not the compacts in which they fall."

- The position of law enunciated in the *Ridge v. Baldwin* is that there is no need to distinguish between judicial and administrative function. If rights of an individual are at stake the rules of natural justice would apply irrespective of whether the function being exercised is administrative or judicial. *Ridge v. Baldwin* has widened the scope of applicability of the principles of natural justice. The benefits of this case have spread to many other persons, including students[35], police officers[36], school teachers[37], market stallholders[38], residents of local authority homes at risk of closure[39], those affected by decision of self–regulatory bodies[40], and prisoners in respect of prison discipline and the parole system.[41]

- However, a word of caution needs to be sounded here: there is no principle which says that the rules of natural justice would apply in each and every case. There are cases where the courts have held that such principles would not apply in certain circumstances.

---

[35]Eg. *R. v. Aston University Senate, ex p Roffey* [1969]2 QB 538; *Glynn v. Keele University* [1971]2 All ER 89.
[36] *R. v. Kent Police Authority, ex p Godden* [1971]2 QB 662; *Chief Constable of North Wales v. Evans* [1982]3 All ER 141.
[37] *Hannam v. Bradford Corpn* [1970] 2 All ER 690; *Malloch v. Aberdeen Corpn* [1971]2 All ER 1278.
[38] *R. v. Barnsley Council ex p Hook* [1976] 3 All ER 452; *R. v. Wear Valley Council, ex p Binks* [1985]2 All ER 699.
[39] *R. v. Devon CC, ex p Baker* [1995] 1 All 73.
[40] *R. v. LAUTRO, ex p Ross* [1993] QB 17; and *A Lidbetter* [1992] PL 533.
[41] Eg. *R. v. Hull Prison Visitors, ex p St Germain* [1979] QB 425 and (the same) (No 2) [1979]3 All ER 545; *Leech v. Deputy Governor of Parkhurst Prison* [1988] AC 533; *R. v. Home Secretary, ex p Doody* [1994]1 AC 531.

The Rules

Under the English common law, there are two rules of natural justice — (i) *audi alteram partem* (hear both sides) (A person should not be condemned unheard), and (ii) *Nemo judex in causa sua* (no man a judge in his own cause). In Tanzania, the courts have gone further in developing the jurisprudence on the rules natural justice. Thus, a duty of an adjudicator or any decision maker to give reasons for his decision has been recognised a third rule of natural justice (*nullum arbittrium sine rationibus* — the right to reasons from a decision-maker). These rules are often times expressed in the form of "rights": "the right to be heard"; "the right to an impartial tribunal or unbiased tribunal" (rule or freedom against bias) and "right to reasons of a decision-maker." Each of these rules or principles is briefly considered below.

I. Right to be Heard

This principle is variously called *audi alteram partem* (i.e. hear the other party) or expressed in the maxim that "no man should be condemned unheard." Generally, according to this principle, a decision should not be taken against certain person without affording him a right to be heard. He must be called to answer accusations against him; he must be heard. The immediate question that comes to mind is what entails hearing? Hearing entails three main things, namely,

(i) sufficient notice of allegation or accusation must be given to a party,

(ii) fair opportunity must be given to a party to present his case and to contradict any statement prejudicial to his interest, and

(iii) right to legal representation.

It is to be noted that some writers have included more other items out of this list. Alex Carroll[42], for instance, mentions a host of things that entail hearing: the right to be informed in advance of the case to be met— i.e. the factual basis on which the decision-maker may act; the right to a reasonable time in which to prepare a response; the right to be heard verbally or in writing; the right to cross-examine persons who may have made prejudicial statements to the decision-maker; the right to be legally represented; and the right to the reasons of the decision.

In *Kanda v. Government of the Federation of Malaya* [1962] AC 322, it was held:

> "If the right to be heard is real right, which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been made affecting him, he must be given a fair opportunity to correct or contradict them."

In a local case, *Nyirabu Gitano and 3 others v. Board Chairman, Songea Boys Secondary School*[43], students of Songea Secondary School were complaining of maladministration, infliction of unreasonable punishments and supply of bad food. They staged a demonstration to the Regional Commissioner. The Regional Commissioner then spoke to students and members of staff. A probe team was formed to look into the matter. It interviewed six student leaders and three other students including one applicant but the rest were not interviewed or consulted in any way. The team also collected other information which indicated the applicants were ring-leaders. The team then recommended the expulsion of the applicants to the School Board, the recommendation which was endorsed. In reaching the decision to expel the applicants from school, the applicants were

[42] Alex Carroll, (2003), *Constitutional Law and Administrative Law*, 3rd edtn, Pearson, London, pp. 305-306.
[43]High Court (at Songea), Misc Civil Application No 3 of 1994 (unreported).

neither given an opportunity to contradict the evidence against them nor even told of reasons of their expulsion. They challenged their expulsion in the High Court on ground of the Board's failure to observe the principle of natural justice. Samatta, JK, as he then was, granted *certiorari* and *mandamus* to quash the decision of the Board to expel applicants from school, and directed the Board to consider the accusations made against the applicants *de novo* and in accordance with the principles of natural justice.

Read similar cases reproduced in Chris Maina Peter, (1997), *Human Rights in Tanzania: Selected Cases and Materials*, Rüdiger Köppeverlag, Kölon, p.437 *et sequente*:

- *Felix Bushaija and others v. IDM and another*, High Court (at Dar es Salaam), Civil Case No 9 of 1991 (unreported).
- *Simeon Manyaki v. Executive Committee and Council of the IFM and others*, High Court (at Dar es Salaam), Misc. Civil Cause No 42 of 1984. This case is also reported (see *In Re Simeon Manyaki v. The Executive Committee & Council of the Institute of Finance Management* [1984] TLR 304).

The Doctrine of Legitimate Expectation

The doctrine of legitimate expectation is a recent development in public law. This doctrine which was invented in 1960s is an extension of the right to be heard in circumstances which such a right would ordinarily not avail to an individual. It became famous only in recent times. According to Mr. Justice Michael de la Bastide**,** "it is a product of judicial inventiveness designed to fill a gap in the protection which the courts offer against arbitrary action by public officials and authorities with power to make decisions that affect others."[44]

[44] See a paper titled "Judicial Supervision of Executive Action in the Commonwealth Caribbean" Presented by the Rt. Hon. Mr. Justice Michael de la Bastide, T.C., President of the Caribbean Court of Justice on the Occasion of Inaugural Telford Georges Memorial Lecture Barbados 31st March, 2006, p.10.

This doctrine was enunciated by the most famous English judge in the 20th Century, Lord Denning, MR, in the case of *Schmidt v. Secretary of State for Home Affairs* [1969]2 Ch. 149. In this case, the plaintiffs were foreign students of Scientology in Britain. They had a limited leave to stay in the country and their attempt to renew their stay permit was refused. Lord Denning, MR partly held that whether a hearing was required before the request that their stay be extended was rejected depended on whether an individual had a right, interest or "legitimate expectation." Applied here, the plaintiffs had no right to stay one day beyond their allowed period, and therefore they had no right to a hearing.

Thus, in accordance to the doctrine, a hearing will be given if there is, *inter alia*, "legitimate expectation." What does legitimate expectation mean? Mr. Justice Michael de la Bastide explains the meaning of the doctrine in these words:

> "What the courts have established is the principle that if a public official or authority has either expressly or implicitly conveyed to a person or group of persons the impression that they will receive or continue to enjoy a certain benefit or concession, then in the absence of some overriding public interest to justify disappointing the expectation thereby created, the courts will not countenance the denial or withdrawal of that concession or benefit, even though there is no legal right to it."[45]

Case law has established that there are circumstances in which an individual will have to be given a hearing due to legitimate expectation. Such circumstances are as follows. **1. Revocation of a decision**: when an authority has made a decision affecting an individual that it later seeks to replace with a fresh decision, the person to be affected will have to be given hearing. (See *Re 56 Denton Road Twickenham* [1953] Ch. 51).

---

[45] See a paper titled "Judicial Supervision of Executive Action in the Commonwealth Caribbean" Presented by the Rt. Hon. Mr. Justice Michael de la Bastide, T.C., President of the Caribbean Court of Justice on the Occasion of Inaugural Telford Georges Memorial Lecture Barbados 31st March, 2006, p.10.

2. Breach of assurance: the authority may act contrary to the assurance that it had given to an individual. In such a case, the court may enforce the legitimate expectation created by that assurance. In *A-G of Hong Kong v. Ng Yuen Shiu* [1983] AC 627 at 638, it was said, "When a public authority has promised to follow a certain procedure, it is the interest of good administration that it should act fairly and implement its promise, so long as implementation does not interfere with its statutory duty." Thus, in *R. v. Home Secretary, ex parte Oloniluyi* [1989] Imm AR 135, a Nigerian woman (without indefinite leave to remain in the UK) wished to return home for Christmas and was given a firm assurance by the Home Office that she would be readmitted if she came back by 31st January. It was held that the immigration could not refuse to readmit her when she returned before that date.

3. Consistent practice of the authority: in *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 375, the invariable practice of Government had been to consult with the civil service unions before changing terms of employment for civil servants. It was held that the unions had a legitimate expectation to be consulted before the government withdrew staff the right to join a union.

In *Leacock v. The Attorney General of Barbados,* HCA No. 1712 of 2005, a police officer challenged by judicial review the decision of the Commissioner of Police not to recommend his application for study leave to pursue the course leading to the Legal Education Certificate at the Hugh Wooding Law School. One ground of his claim was that he had a legitimate expectation that he would be granted the study leave requested based on a long-standing practice whereby officers who had successfully completed the course for the LL.B. degree at the University of the West Indies, were granted study leave in order to enable them to obtain their professional qualification at the Law School. The applicant had obtained

his LL.B. degree and indeed, had been given leave to attend classes while studying for it. Chief Justice Sir David Simmons sitting at first instance, having made a careful and thorough review and analysis of the authorities, came to the following conclusion:

> "Thus, it can now be said with confidence that the doctrine of legitimate expectation which originated as a public law innovation to ensure procedural fairness, such as to give the right to be consulted or be heard, has now evolved and expanded to protect benefits, advantages or interests of a substantive nature which an applicant can reasonably expect to be permitted to enjoy."

He found on the evidence that the applicant legitimately expected that he would be granted the study leave for which he had applied. He found no overriding consideration to justify a departure from what had been the previous practice and held that to resile from that practice in this instance would be a breach of the applicant's legitimate expectation. The Chief Justice declared the recommendation of the Commissioner against the grant of study leave to the applicant to be unreasonable and null and void and made an order of certiorari quashing it.

4. Change of policy: in *Re Findlay* [1985] AC 318, the Home Secretary changed the policy on granting of parole to convicted prisoners, causing certain prisoners to be become eligible for parole much later than would have been the case under the former policy. Lord Scarman said: "But what was the legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary sees fit to adopt."

In *R. v. Ministry of Agriculture, ex parte Hamble Fisheries Ltd* [1995]2 All ER 714, under the policy regulating catching of certain species of fish, a Company

planned to obtain an "aggregated" licence for a larger trawler by transferring licences from other vessels. After the Company bought two small trawlers for this purpose, but before it applied for 'aggregated' licence, the Ministry ended aggregation policy, acting under pressure from Europe to preserve fish stock. The new policy included transitional provision for licence applications for licence applications that had been submitted to the ministry but not yet to be decided. The Company was refused licence under the new policy. Held: (i) a legitimate expectation could give rise to a substantive claim for the benefit sought, and could (if fairness required) require the ministry to make an exception to its policy; (ii) here, the ministry had made transitional provision for claims already submitted; (iii) no one had legitimate that the policy would not change, and fairness did not require a further exception to be made to new policy.

It has to be noted that the doctrine of legitimate expectation does not apply to fresh applications but confined to cases of pre-existing 'rights' seeking renewal, confirmation, etc. In case of fresh application the body is only required to act fairly. In *A.G. (New South Wales) v. Quinn* [1990] 170 CLR 1, the applicant was denied an appointment as a local court judge on the ground that while he was a judge of Petty Court Session he had quarrelled with the Chief Magistrate. He was thus not invited for interview as others. He challenged that failure of invitation under the doctrine of legitimate expectation. It was held, "legitimate expectation may arise either from an express promise given on behalf of a public authority or from existence of a regular practice which a claimant can reasonably expect to continue."

The Doctrine of Legitimate Expectation in Tanzania

The High Courts of Tanzania at least once applied the doctrine of legitimate expectation. This was in the case of *Mohamed Jawad Mrouch v Minister for Home Affairs* [1996] TLR 142. Facts of this case were that the Applicant arrived in Tanzania during the course of 1987 and was subsequently granted a `Residence Permit Class 'A' No.004307', issued on 14 September 1990. Renewed on 16 September 1993, the permit was to remain current until 12 September 1994. In the interim, however, it was cancelled by the Director of Immigration Services and duly confirmed by the Minister for Home Affairs, on 2 December 1993. In a letter to the Applicant, the Director advanced that `the power conferred upon me under s.15 (2) of the *Immigration Act* No.8 of 1972' constituted the reason for the cancellation of the Applicant's permit. The Applicant's counsel contended that the unstated reason for the cancellation of the permit was due to certain criminal charges pending against the Applicant, and that the effect of such cancellation was that the Applicant, as *persona non grata* in the Republic, could not clear his name by defending the charges. The Applicant accordingly sought the invalidation of the cancellation of the permit on account of the alleged bias of the Minister and also on the basis that the Applicant was `punished' unheard.

Held (Mackanja, J):

- "The applicant has a legitimate expectation of staying in the country until the expiry of his residence permit. That expectation could be extinguished justifiably if, and only if, he had first been given an opportunity to make representations to the authorities. It is after hearing him that the authorities could have justly decided, after considering those representations, that it was in the public interest to revoke the permit."

- "I hereby issue an order of *certiorari* quashing the order of the Director of the Department of Immigration Services which cancelled the applicant's

Residence Permit Class `A' and an order of *certiorari* quashing the decision of the Minister for Home Affairs which confirmed the aforementioned cancellation. Pursuant to the above order, I further issue an order of *certiorari* quashing the Minister's order deporting the applicant from this country."

- "Finally I issue an order of *mandamus* against the Director of Immigration Services ordering her to restore Residence Permit Class `A', No 0043607, to the applicant forthwith."

II The Rule Against Bias

The rule *Nemo judex in causa sua* (no man a judge in his own cause), freedom from bias or right to an impartial or unbiased tribunal is another important principle of justice.

The rule against bias is predicated or based on two salient principles:

(i) **No man should be a judge in his own cause**: this means that a person who decides a matter should not have an interest in that matter. It is based on the experience that human nature being what it is, it is highly unlikely (almost impossible) that a person will to decide against his own interests, instead, it is almost certain that a person would decide a matter in favour of his own interests.

(ii) **Public Confidence**: it is necessary for a proper administration of justice to instil people's confidence in the judicial or adjudication process. As it has been expressed in a Lord Hewart's maxim, which, as Professor Wade says, has been overworked but nonetheless remains strong[46]: "justice should not only be done but should manifestly and

[46] H.W.R. Wade and Forsyth, (2000), *Administrative Law*, 8th edtn, Oxford University Press, London, p.445.

undoubtedly be seen to be done."[47] Inspired by the same principle, Lord Denning aptly said: "justice must be rooted in confidence and confidence is destroyed when right minded persons go away thinking 'the judge was biased'."[48] Thus, as one may note, law is not only concerned with justice being done. But, it also concerned itself with the impression given to the other members of the public. Non compliance with this principle nullifies or vitiates the proceedings in question.

Bias — what is it?

In an English case, *Franklin v. Minister of Town and Country Planning*[49], Lord Thankerton attempted to define the term 'bias' in the following words:

> "I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires for those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator".[50]

However defined, bias is a state of mind which is difficult to detect. In this respect, Lord Goff said in *R. v. Gough*[51] that "bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias."[52] Bias is thus inferred from different circumstances that are viewed in the light of human experience.

---

[47] *R. v. Sussex Justices ex parte McCarthy* [1924]1 KB 256.
[48] *Metropolitan Properties (FGC) Ltd v. Lannon and others* [1969]1 QB 577 (at p. 599); See also Lord Denning, "The Just Judge", in Dr B. Malik (ed), (1999), *The Art of Lawyer: Art of Cross Examination, Advocacy, Courtmanship*, University Book Agency, Allahabad (pp. 110- 124) at p. 118.
[49] [1948] A.C. 87
[50]Cited in Daniel Greenberg and Alexandra Millbrook, (2000), *Stroud's Judicial Dictionary of Words and Phrases*, 6th edn, Sweet and Maxwell, London).
[51] [1993]2 All ER 724.
[52] *R. v. Gough* [1993]2 All ER 724, at p.727.

Forms of Bias

1. Pecuniary Bias

Pecuniary bias denotes existence of monetary interests in the subject matter or a party to a case. Courts have been very strict in so far as pecuniary interests are concerned. The English case of *Dimes v. Grand Junction Canal*[53] is an illuminating example in this regard. It was held in that case that a judge who held shares in a company, which was a party to the case, was disqualified irrespective whether he was actually biased or not. In *R. v. Rand*[54], it was partly held: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter."[55] Direct interest results into what is called "automatic disqualification." This is pointed out in *Camborne Justices, ex parte Pearce*[56]: "any direct pecuniary interest in the subject-matter of a proceeding, however small, operates as an *automatic disqualification*.

2. Personal Bias

Various circumstances may give rise to personal bias: personal relationships (friendship, relationship by blood or affinity, classmates, etc.), personal animosity, etc. For instance, in *Ernest s/o Ndesangio v. R.*[57], the appellant (a court clerk) was charged with several counts of forgery and stealing by a person employed in the public service. The trial magistrate was his own boss. The appellant objected the magistrate on the ground that he (the magistrate) had exhibited unnecessary hostility towards him (the accused) when checking his work. The magistrate overruled the objection and he indicated that "he loved the accused to the bottom of his heart." It was held (Samatta, J) that: "the risks involved in a person occupying a judicial office trying a person who is dear to

[53] (1853) 3 HL Cas 759.
[54] (1866) LR 1 230.
[55] (1866) LR 1 230, at p. 232.
[56] [1954]2 All ER 850; [1955]1 QB 41.
[57] [1980] TLR 332.

him are not difficult to imagine. One of them is strong possibility that the judicial officer may succumb to the temptation to favour the accused or to demonstrate impartiality on his part by convicting the accused although the evidence in the scale against him (the accused) does not warrant such a decision. In either case justice would suffer."

3. Bias in Respect of the Subject Matter

Sometimes an adjudicator might have a general interest in the subject matter which may disqualify him from sitting. In R. *v. Bow Street Magistrate, ex parte Pinochet Ugarte (No 2)*[58], one of the five judges in the House of Lords who heard an appeal concerning General *Pinotchet*'s extradition, Lord Hoffman, was chair and director of a charity associated with the Amnesty International, that had argued the appeal in support of the extradition and thus become party to the case. The judge's involvement with the charity was not known to the parties during the hearing. It was held that the judge was automatically disqualified to sit otherwise he would be deciding a case that may affect a promotion of a cause in which he or she is closely involved with one of the parties.

In another case, in *Hoektra v. HM Advocate*[59] a senior Scottish judge, who had newly retired but was still sitting as an appeal judge, published a colourful newspaper article in which he referred to the European Convention as offering' a field day for crackpots, a pain in the neck for judges and a goldmine for lawyers.' It was held that the article would create an apprehension that the judge would be biased in presiding over a criminal appeal in which Dutch appellants were relying on their Convention Rights.'

[58] [2000]1 AC 119.
[59] 2001 SLT 28.

TESTS FOR BIAS

The Test of Bias under English Law

Courts in England have not been much consistent in formulating the test of bias. Various tests have been formulated in a rather haphazard fashion. Craig asserts that the law on the test of bias on matters other than pecuniary interest is in the state of confusion and characterises that confusion as "muddied waters."[60] As one may note distinctions among these tests were more semantic than real. Originally, there were three tests: "suspicion of bias", "reasonable suspicion or reasonable apprehension of bias", and "real likelihood of bias."

1. Suspicion of Bias

One of the tests which have been formulated is "suspicion of bias." This test appears to be more judicial policy than a test. According to it, a judge, like Caesar's wife, must be free from suspicion, unreasonableness of that suspicion notwithstanding. It may be argued that this is not a test in the real sense of the term as the judge cannot ascertain the reasonableness or likelihood of bias but the mere indication of suspicion suffices for him to recuse from the proceedings.[61] It essentially focuses on the impression that it is likely to be formed by people. This test is more antiquated and with moralistic connotations than others discussed below.

2. Reasonable Suspicion or Apprehension of Bias

Another test that was developed by courts in England is the "reasonable suspicion or apprehension of bias."[62] Essentially, this test emphasises that justice must be seen to be done and that no person should adjudicate in any case if it

[60] P.P. Craig, (1994), *Administrative Law*, 3rd edition, Sweet and Maxwell, London, p.330.
[61] See *Eckersley v. Mersey Docks and Harbour Board* (1894) 2 QB 667.
[62] See *R. v. Sussex Justices ex parte McCarthy* [1924]1 K.B. 256; *Metropolitan Properties Co. (FGC) Ltd v. Lannon* [1969] 1 K.B. 577; *R. v. Gaisford* [1892]1 KB 381; *Cooper v. Wilson* [1937] 2 K.B. 309.

might reasonably be thought that he ought not to act because of some interest.[63] Differentiated from the first test, this one looks at circumstances which may give rise to 'reasonable' suspicion of bias. In other words, not every circumstance may lead to a recusal of a judicial officer from proceedings. Recusal is merited if the suspicion can meet the subjective standard of reasonability.[64] Lord Denning extended this test in the *Metropolitan* case in a way which was described by the House of Lords in *R. v. Gough*[65] as a case that has "left a legacy of some confusion behind it."[66] In that case[67], Lord Denning partly remarked, "even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was real likelihood of bias on his part, then he should not sit."[68] This test thus stresses on the impression to be created into the minds of reasonable people.

3. The Real Likelihood of Bias

"The real likelihood of bias" was another fashionable test which was formulated by English courts. Professor Wade and Forsyth say that it was applied to cases where allegation of bias was far-fetched.[69] It was said that the court was to assess the facts before it and then conclude whether there was a real likelihood of bias. Some of English decisions that expounded this test are *R. v. Rand*[70], *R. v. Sunderland Justices*[71], and *R. v. Camborne, ex parte Pearse*.[72] Elaborating on this test, Devlin LJ observed:

---

[63] HWR Wade and Forsyth, (2000), *Administrative Law*, 8th edtn, Oxford University Press, London, p.456.

[64] In *Re a Solicitor* [1945] K.B. 368, 371, the word 'reasonable' was defined thus, "The word 'reasonable' has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know."

[65] [1993]2 All ER 724.

[66] [1993]2 All ER 724, at p.733.

[67] *Metropolitan* case.

[68] *Metropolitan* case, [1968]3 All ER 304, at p.599.

[69] See HWR Wade and Forsyth, (2000), *Administrative Law*, 8th edtn, Oxford University Press, London, p.456.

[70] (1866) LR 1 QB 230.

[71] [1901] 2 KB 357.

> "'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood without impugning the affidavit of a justice that he was not in fact biased."[73]

This test somehow disregarded the impression that would be had on other people. Rather, it focuses on the judgment of the court on whether there was real likelihood of bias or not.

4. The Real Danger of Bias

Many English cases decided at the period antecedent to 1993 fall under the above three tests, and especially the last two ones. However, in 1993 the House of Lords came up with another fashionable test called "a real danger or real possibility of bias." This was in case of *R. v. Gough*.[74] In introducing this new test, Lord Goff of Chieveley partly stated:

> "I prefer to state the test in terms of real danger rather than real likelihood to ensure that the court is thinking in terms of possibility rather than probability of bias."[75][Underlining added].

According to this test, it was for the court in possession of all relevant facts to apply the test and not from the point of view of the reasonable man. This gist of this test, as said, it is not necessary for the court to think in terms of a view likely to be entertained by an observer (usually personified as the "reasonable man"), because this person is not usually possessed with evidence and knowledge relevant to the issue. In this respect, Lord Goff said:

> "I think it [is] unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable

---

[72] [1955] 1 QB 41.
[73] *R. v. Barnsley County Borough Licensing Justices, ex parte Barnley and District Licensed Victuallers Association* [1960]2 All ER 703, at pp. 186-187.
[74] [1993] AC 646. See also *R. v. Gough* [1993]2 All ER 724.
[75] See *R. v. Gough* [1993]2 All ER 724, at p. 736.

> man, because the court in cases such as these personifies the reasonable man; and in any event the court has to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time."[76]

This test is a departure from the original principle that justice should be rooted in confidence, that is, people should see that justice is done. It does not look at what people would think but at what knowledge or evidence as possessed by the court itself. It also departs from the two previous tests which were based on the likelihood, probability of suspicion of bias but it focuses on the "possibility of bias."

The test has been criticised by courts in other common law jurisdictions. The High Court of Australia in *Webb v. R.*[77] criticised the test for its tendencies to emphasise on view of facts as held by the Court and disregard of public opinion on the matter. The English Court of Appeal also expressed its misgivings with the test in the case of *In re Medicaments and Related Classes of Goods (No 2)*.[78] The latter Court noted that the real danger test had failed to command a universal approval and it was in conflict with the jurisprudence of the European Court of Human Rights (referred to as "Strasbourg court"). It also suggested reconsideration of the test and recommended the adoption of the test of "a fair-minded and informed observer" which has its origin from the Strasbourg court. It held: "The court must first ascertain all circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased."[79][Underlining supplied].

---

[76] *R. v. Gough* [1993]2 All ER 724, at p. 736.
[77] (1994) 181 CLR 41.
[78] [2001]1 WLR 700.
[79] [2001]1 WLR 700, pp 726-727 (para 85).

5. Real Possibility of Bias as judged by the Fair-Minded and Informed Observer

About one decade the House of Lords decided to disturb the test "real danger or real possibility of bias." It redefined the test and came up with a horse of an entirely different colour, so to speak. This was in the case of *Porter and another v. Magill*.[80] Mindful of criticisms that had been levelled against the test formulated in *Gough*'s case, as it would seem, the House found it improper to ignore the reasonable man any longer. In suggesting a reformulation of the real danger test, Lord Hope of Craighead, after citing a relevant paragraph of Court of Appeal's decision, said:

> I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the 'reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded observer and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[81][Underlining supplied].

In this case, the House re-picked observers who it had abandoned in *Gough*'s case. Still, the House did not re-take all "reasonable men" in the traditional sense of the concept. The reasonable man or observer who was recognised was strictly qualified for such a person must bear two attributes. First, he must be fair-minded, and second, he must be informed. There is no elaboration as to who is the "fair-minded person." It may be supposed that it could be a person whose mind is honest and not infested with malice or 'evil intention' in its moralistic

[80] [2002]1 All ER 465.
[81] [2002]1 All ER 465, p. 506.

undertones. As to the second attribute, that is, the attribute of being informed, the House gave explanation. According to it, it means a person who has knowledge of facts or evidence of the case in question and judging from those facts or evidence he would reach a conclusion that there was a possibility that a judicial officer was biased.

Articulation and Applicability of the Test of Bias in Tanzania

The tendency has been for the courts in Tanzania to follow more or less the same English position. Just as in English courts, Tanzanian courts have never been consistent in the application of the test of bias. This may be demonstrated by both reported and unreported court decisions on the subject. The High Court of Tanzania applied the test of "reasonable suspicion of bias" in several cases. The first in the queue is *Tumaini v. R.*[82], in which the English case of *Metropolitan Properties v. Lannon*[83] was followed. Subsequently, the same test was applied in *Ernest s/o Ndesangio v. R.*[84] and *R. v. Albert Awour and 3 others.*[85] In the latter case, Samatta, J (as he then was) noted thus:

> "It is universally conceded that it is not enough for a person occupying a judicial office to do justice, he must also be seen to be doing so. Reasonable people — I am not speaking of those who cannot be described as sober persons — should not be placed in a position in which they may suspect that the person occupying the judgment seat is likely to favour one side to the detriment of the other."

The Court of Appeal of Tanzania also applied the "suspicion of bias test", which says that a judge must recuse himself whenever suspected to be biased irrespective of whether the suspicion is reasonable or unreasonable. The case of

[82] [1972] E.A. 411.
[83] [1969] 1 Q.B.577.
[84] [1980] TLR 332.
[85] [1985] TLR 20.

Zabron Pangamaleza v. Joachim Kiwaraka and another[86] is indicative of the application of that test. The background to this case was that it originated in a Magistrate's Court. Amidst the proceedings, the plaintiff boldly stood up and told the Magistrate: "sikuamini" (I do not trust you). When the magistrate demanded the reasons, the plaintiff's answer was simply, "sikuamini hivi hivi" (I just don't trust you). The magistrate overruled the objection. He feared to abdicate his duty by accepting applications based on what he described as "flimsy excuses." The Court of Appeal held that such approach was wrong in that the point was not whether or not the magistrate was biased,

> "I have no doubt at all that it was, but that was not the point. The point was the state of mind of the plaintiff before him. So while I am certain that the magistrate would have ensured that justice was done had he tried the case, the plaintiff before him would not have seen that it was actually done. By insisting to hear the case against such strong opposition and proceeding to dismiss it, the magistrate not only confirmed the appellant's worst fears of his having a personal interest in the matter, but also amounted to an error material to the merits of the case involving injustice to the appellant."[87]

Having directed itself that the test is not about truthfulness or merits of the allegation but to the impression likely to be created, it went on to give guidance to be applied by lower courts:

> "The safest thing to do for a judicial officer, who finds his integrity being questioned by litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case unless it is quite clear from the surrounding circumstances that the accuser is employing the delaying tactics. Apart from ensuring that justice is seen to be done, he saves himself from unnecessary embarrassment."[88]

It should be noted that from this case the only qualification to the rule is when a litigant or accused person is trying to delay or stall justice. It is upon that sole

[86] [1987] TLR 140.
[87] *Zabron Pangamaleza v. Joachim Kiwaraka and another* [1987] TLR 140 at p. 145.
[88] Ibid, p.146.

reason that the judge can refuse to withdraw himself from the case, the rationality or irrationality notwithstanding.

16 years later on, in the case of *The Registered Trustees of Social Action Trust Fund and others v. Messrs Happy Sausages Ltd and two others*[89], the Court of Appeal came up with a different principle altogether. It tacitly abandoned the test that it had directed to be applied in *Pangameleza*'s case without any reference to that case. It partly held:

> "It is our considered view that it would be an abdication of judicial function and an encouragement of spurious applications for a judicial officer to adopt the approach that he/she should disqualify himself himself/herself whenever requested to do so on application of one of the parties on the grounds of possible appearance of bias. A judicial officer should not automatically stand aside whenever requested to do so."[90] [Underlining added].

While in *Pangamaleza*'s case the Court held that it was necessary for a judicial officer to withdraw even if the accusations of bias were irrational, in *Happy Sausages*' case it says that "a judicial officer should not automatically stand aside." One may get an impression that *Pangamaleza*'s case has been overruled. It may be contested that that case was not overruled for it was not referred to the full bench. As the Court itself held in *Abood Saleh Abood v. Maryam Saleh Abood*[91], "a full bench is necessary where an earlier precedent of the Court is sought to be overruled." Also, Counsel for both sides did not argue on the point. It is on the strength of the foregoing that one may think that *Pangaleza*'s case was not overruled; it remains a good law that exists side to side and in competition with the *Happy Sausages'* case.

[89] Court of Appeal (at Arusha), Civil Appeal No 70 (unreported).
[90] Ibid, p.16.
[91] Court of Appeal (at Dar es Salaam), Civil Application No 19 of 1992 (unreported).

In the same case, that is, the *Happy Sausages*' case, the Court unqualifiedly imported the English test of "possibility of bias as judged by the fair-minded and informed observer" into our law. After citing the Decision of the House of Lords in *Porter and another v. Magill*[92], the Court said: "On our part, we would with the greatest respect, adopt the current formulation of the test for apparent bias as stated by the House of Lords in *Magill*'s case."[93] It went on to justify the adoption of that test thus: "our country is a member of the Commonwealth with a common law tradition. A decision of the House of House of Lords under appropriate circumstances would be of persuasive value in moulding our decisions."[94] Thus, the Court held that the controlling test should be whether the circumstances in question would lead a fair-minded and informed person or observer to conclude that there was a real possibility that the judge or adjudicator was biased. As already stated, this test shuns taking into consideration the views of every Tom, Harry, and Dick, usually personified as "reasonable men." Rather, the test focuses on the possible view likely to be entertained by the fair-minded and informed observers.

It may be pertinent to observe, as already done before, that the House of Lords defined the informed observer as a person who is aware of the facts of the relevant case. The Court of Appeal of Tanzania, however, assigned a different definition to that term, that is, "a fair-minded and informed observer." According to it such an observer should be a person who is aware of four things.[95] First, he must be aware of court procedures. Second, he should be aware of the role and function of a trial judge in adjudicating cases. Third, he has to be aware of interlocutory proceedings during a trial and that an aggrieved party can always appeal to the higher echelons in the court hierarchy. Fourth, he

[92] [2002]1 All ER 465.
[93] Page 20 of the Court's judgment.
[94] Ibid.
[95] Ibid, p. 21.

must be aware that there is no *proforma* ruling or judgment as they differ in substance and linguistic style. It is clear from these attributes that such a person is none other than a trained lawyer.

Point of discussion: is this test appropriate to Tanzanian setting?

Some Local Authorities on Bias

- *Jimmy David Ngonya v National Insurance Corporation Ltd* [1994] TLR 28.

  The applicant was dismissed from employment as a branch manager of the respondent corporation. The Board of Directors dismissed him on the basis of an audit report whose contents were never shown to the applicant to enable him to contradict them. When the Board of Directors met to deliberate on the applicant's case, the General Manager, who had initiated the proceedings against the applicant and had commissioned the audit, was present but the applicant was absent. The applicant applied for *certiorari* and *mandamus* arguing that his dismissal was in contravention of the rules of natural justice.

  Held (Bahati, J):

  (i) Since the audit report was prejudicial to the interests of the applicant and it formed the basis of the decision of the Board, it ought to have been shown to the applicant for his comments and for an opportunity to contradict its contents; failure to do that contravened the right of the applicant to be heard;

  (ii) Since the General Manager, who was in the nature of a prosecutor, was present during the deliberations of the Board which dismissed the applicant, the proceedings of the Board were vitiated by bias.

- *R. v Seif Sharrif Hamad* [1992] TLR 277.

In an application by the accused for an order that the presiding magistrate withdraw from presiding over the case, the learned trial Resident Magistrate with extended

jurisdiction found that no meritous grounds were established for the order to withdraw to ensue.

Held [Mmila RM (Ext. J)]:

(i) Whether or not the presiding Magistrate should disqualify himself from hearing a case on the ground of bias requires an objective appraisal of the materials before the court, and to say that a party has a subjective (albeit firm) apprehension of bias is not of itself sufficient to warrant, or require, the disqualification of the magistrate.

(iii) the duty of the magistrate to disqualify himself for proper reasons is matched by an equal duty not to disqualify himself save for proper reasons, and parties not to be encouraged to believe that, by an application for the disqualification of a magistrate, they can have their case heard by a magistrate thought to be more likely to decide a case in their favour.

- *Republic v Albert Awour & 3 others* [1985] TLR 20.

  The applicants were facing various charges in the district court at Tarime. Somehow they became apprehensive that they were not going to have a fair and impartial trial before any magistrate at that court. So they applied for a change of venue under s.80 of the *Criminal Procedure Code*. It was argued in support of the application that the proper test was whether there existed in the minds of the accused persons a reasonable apprehension of bias.

  Held (Lugakingira, J):

  (i) In determining whether or not there is bias, the court should not be guided by the subjective view of the accused, rather the test should be

whether, in the circumstances of the case, right minded persons would think that there is a likelihood of bias;

(ii) In the circumstances of this case, there is nothing which would make the minds of reasonable persons doubt the competence of the Tarime District Court and all its Magistrates to determine the case without bias.

III. Right to Reasons of a Decision-maker

The English law is yet to recognise the general duty for decision-makers to give reasons although it is moving in the direction of recognising that duty. However, English jurisprudence associates the giving of reasons by a decision-maker as part of the right to be heard rather than an independent rule of natural justice.[96]

In Tanzania, the High Court has taken a further stride by recognising the duty of the decision-maker to give reasons as an independent rule of natural justice. This was in the case of *James Gwagilo v Attorney General* [1994] TLR 73. In this case, the plaintiff (a seasoned civil servant) was charged under the *Economic and Organised Crime Control Act 1984* and acquitted. Then disciplinary proceedings were instituted against him under the *Civil Service Regulations*; the proceedings ended in his favour. He was then removed from office by, as stated in the letter communicating the decision to remove him, the President directing that he be removed in the public interest. He filed a suit for a declaration that his removal from office was wrongful.

[96] See Alex Carroll, (2003), *Constitutional Law and Administrative Law*, 3rd edtn, Pearson, London, pp. 305-306; P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet & Maxwell, London, pp.310-312.

Partly Held (Mwalusanya, J):

(i) When removing a civil servant in the public interest, the President is bound to give reasons indicating the public interest to be served; under the Constitution the civil servant so removed has the right to appeal against, or to apply for judicial review of, that removal and if no reasons are given therefore, that constitutional right will be rendered ineffective and illusory;

(ii) Disclosure of reasons for removal of a civil servant in the public interest is also necessary so as to reduce the possibility of casualness, arbitrariness and abuse of power in the decision making process and to instil public confidence in it and maintain its integrity, and to satisfy a basic need for fair play.

At pp. 79-80, the judge said:

> "It can be said with confidence that since article 13(6)(a) of our Constitution provides for the right of appeal and right of judicial review from every decision affecting citizen's rights, then ipso facto it creates a third head of the principles of natural justice ranking equally with *audi alteram partem* (the rule against bias). This third head is the right to reasons from a decision-maker - that it is a denial of natural justice to refuse to give reasons to the party who lost. Thus the third pillar of the principles of natural justice is here to stay just as day follows night. In order that it be at no disadvantage in point of latinity, this third arm of the principles of natural justice, should be referred to as *nullum arbittrium sine rationibus*."

The importance of this decision is that it imposes an obligation to decision-makers and states why giving of reasons is important.

Advantages of giving reasons

There are advantages of giving reasons by a decision-maker. Craig[97] discusses the advantages of giving reasons for decisions made:

- Reasons can assist the courts in performing their supervisory function.

Reasons enable the courts to know whether the agency took relevant considerations into account; or whether it aced for improper purpose, or whether the decision was so illogical or outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it (Wednesbury unreasonableness).

- An obligation to provide reasons will help to ensure that a decision is well thought and considered by the agency.
- Provision of reasons can have real significance in ensuring that other objectives of administrative law are not frustrated.

If, for instance, it is decided to grant consultation rights in certain areas, then the duty to furnish reasons will make it more difficult for decision-makers to go through the motions of hearing interested parties without actually taking their views into account.

- The duty to give reasons can perform more general function, eg, to reduce arbitrariness.

Compare these advantages with those offered by Justice Mwalusanya in the *Gwagilo*'s case.

[97] P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet & Maxwell, London, p.310 *et sequente*.

Counter argument

There also have arguments against giving of reasons. The cogency of such arguments is however questionable. It is said that giving of reasons may stifle the exercise of discretion and overburden the administration.

Exclusion of the Rules of Natural Justice

Modern legal jurisprudence and public administration have witnessed the increased application of the rules of natural justice. The decision of the House of Lords in *Ridge v. Baldwin* was very instrumental in widening the scope of their application. Inventions of new principles by courts like the doctrine of legitimate expectation have also played their magic. More and more people (including those on the higher echelons of power) are demanding the application of the principles of natural justice. Interestingly as it would seem, the application of natural justice was hotly debated recently in the Tanzania National Assembly in relation to the parliamentary inquiry on the infamous Richmond scam. However, despite all these achievements there are some areas in which natural justice may be excluded on some grounds.

1. The Doctrine of Waiver

An individual may waive his right to natural justice. Simply stated, waiver or acquiescence means to relinquish, surrender or give up one's rights. For instance, a person may waive his right to be heard by failing to appear before a certain body when requested to do so. Likewise, a person may waive his right to unbiased tribunal by expressly or impliedly allowing the adjudicator who is biased to proceed with the adjudication. In *A.K. Sikabuza v. Director of Land and Survey* [1960] EA 808, the Board cancelled the licence of the plaintiff under section 12 of the *Surveying Ordinance*. The composition of the Board consisted of

rival surveyors. But it was found that the appellant did not challenge such composition and hence waived his right.

The waiver by an individual of the right to be heard by unbiased adjudicator has been a subject of a considerable debate among legal writers. Craig argues,

> "The premise behind the ability to waive is that it is only the individual who is concerned, and thus if that person "chooses" to ignore the fact that the adjudicator is an interested party then so much the worse for the applicant. However there may be a wide interest at issue, in that it may be contrary to the public interest for decisions to be made where there may be likelihood of favour to another influencing the determination."[98]

Another writer, Goudkamp[99], also shares the same sentiments.

2. Necessity

In some cases necessity can justify the application of the rules of natural justice. The normal rules against bias will be displaced in circumstances where the individual whose impartiality is called into question is the only person empowered to act.[100] In an English case, *Phillips v. Eyre* (1870) L.R.6 Q.B. 1, it was held that the Governor of a Colony could validly assent to Act had to receive this signature. A local example may be found in section 28(2) of the *Industrial Court Act*.[101] In accordance with that provision, a Chairman of the Industrial Court of Tanzania is a part of the Revisional Panel. It happens that sometimes the revisional panel may be considering the propriety of a decision made by the Industrial Court presided over by the Chairman and two assessors. Naturally, a Chairman would not sit to revise his own decision but because there is only one

[98] P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet & Maxwell, London, p.334.
[99] James Goudkamp, "The Rule against Bias and the Doctrine of Waiver", *Civil Justice Quarterly*, Vol 26 July 2007, pp. 310-327, at p.315.

[100] P.P. Craig, (1994), *Administrative Law*, 3rd edtn, Sweet & Maxwell, London, p.333.
[101] [Cap 60 RE 2002].

Chairman, that is, the one appointed under section 17 of the Act, so without him there is no revisional panel.[102]

In situations of emergency, proceedings may be heard by persons regardless of whether they are biased or not. Likewise, the right to be heard may be disregarded in such a situation.

3. Statutory Exclusion

There may statutory exclusion of the rules of natural justice for one or some other reason. There is no local example of a statute which excludes natural justice. Even if there were such a statute, still it might fail to stand the constitutionality test.[103] In England, there statutes which exclude natural justice but they have been construed by courts strictly. In *R. v. Lee, ex parte Shaw* (1882)9 Q.B.D. 394, for example, section 258 of the *Public Health Act*, *1872*, which enabled a justice of the peace to sit even though a member of a local authority was held not to protect him where he acted in a prosecutorial and adjudicatory capacity.

4. Contractual Exclusion

One can contract to exclude natural justice but such exclusion should not operate as prejudice to the individual's.

[102] Section 28 (2) of the *Industrial Court Act*, [Cap 60 RE 2002], provides thus, "The Court shall, when exercising jurisdiction under subsection (1) be properly constituted if it is presided over by the Chairman sitting with two Deputy Chairmen and two assessors, all different from those who sat on the Court when it first heard the dispute." The Chairman is defined under section 2 to mean "the Chairman of the Court appointed under section 17." In accordance with section 17 (1) The Court shall consist of– (a) the Chairman of the Court, who shall be appointed by the President, upon advice by the Minister and after consultation with the Chief Justice, from amongst the Judges of the High Court.

[103] Perhaps such a statute may be justified under articles 30 and 31 of the Constitution of the United Republic of Tanzania.

5. Decision Requiring Expertise Judgment

There may be decisions that require expertise judgments for which an individual affected may not be afforded the right to be heard. For instance, students cannot claim to be represented during the setting of the examination by their lecturer, or examination body.

6. Preliminary Decisions

Application of natural justice is ordinarily excluded at the time of making preliminary decisions pending further decisions eg rustication of students from University campus.

7. National Security

When dealing with sensitive issues of national security, war, etc rules of natural justice may be excluded.

C: ERROR OF LAW ON THE FACE OF RECORD

Courts may review an administrative decision of a judicial nature where there has been an error of law "on the face of record" or where such an error is clear and obvious. [See Garner, p.133].

By being clear and obvious it does not mean that the error must be flagrant one, or relate to a simple or clearly established principle of law, but that the error must be readily ascertainable by the supervising Court, and not one that can be ascertained only by a detailed examination of all the evidence that was before the deciding agency or which needs the assistance of technical experts to explain it. (Garner: 133).

This ground of judicial review is antiquated. It was applied in *Bunbury v. Fuller* (1853), 9 ex 111. But it was brought to the fore in *R. v. Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 All ER 122; [1952]1 KB 338. In this case, Denning LJ partly said:

> "… the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do so. It leaves it to the tribunal to hear the case again, and in a proper case, may command it do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction it has always had."

The of the inferior tribunal or court will be quashed if it can be shown to be wrong in law in law in accordance with this principle, even if the error is comparatively minor technicality.

Wade and Forsyth[104]: "Review of the record was therefore the original system of judicial control adopted when the Court of King's Bench took over the work of supervising inferior tribunals and administrative bodies, such as Justices of the Peace and Commissioners of Sewers, after the Star Chamber and the conciliar courts had been abolished."

This ground is now antiquated and almost obsolete. Wade and Forsyth say: "this ancient head of judicial review has now been made redundant by the wide interpretation of the *Anisminic* case by the House of Lords, under which the error of law has become a species of *ultra vires*…" Although the doctrine can now be consigned to the limbo of history, it ought not to pass altogether into oblivion,

[104] H.W.R. Wade and C.F. Forsyth, (200), *Administrative Law*, Oxford University Press, p. 275.

since until the *Anisminic* era arrived it was an important head of judicial review."[105]

NEW DEVELOPMENTS IN JUDICIAL REVIEW

A. Illegality, Irrationality and Procedural Impropriety

In 1985, in the case *Council of Service Unions v. Minister for the Civil Service* [1985] AC 374, Lord Diplock articulated three grounds of judicial review: illegality, irrationality and procedural impropriety. Illegality meant that the decision-maker must understand correctly the law that regulates the power and must give effect to it; irrationality connoted *Wednesbury* unreasonableness, but could be expanded to cover other grounds of challenge; and procedural impropriety covered a breach of natural justice or failure to comply with the procedural rules in the enabling legislation. He had said:

> My lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should *for that reason only* be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating my analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by a case basis may not in course of time add further groups. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."

[105] H.W.R. Wade and C.F. Forsyth, (200), *Administrative Law*, Oxford University Press, p. 275

In *R. v Secretary of State for Environment ex p. Nottinghamshire CC* [1985] AC 240 at 249, Lord Scarman described Lord Diplock's statement as "classical but certainly not exhaustive."(See Wade and Forsyth, 8th edtn, p 979).

Lord Hoffman (in a lecture) said: "the principles of judicial review…. Cannot be captured even by Lord Diplock in three or four bullet points with single word headings elucidated by a single sentence of explanation."[See Wade and Forsyth, 8th edtn, p 979].

Despite such criticisms, the nomenclature introduced by Lord Diplock is increasingly used in Administrative Law.

B. THE PRINCIPLE OF PROPORTIONALITY

Meaning

Wade and Forsyth: In the law of European countries, there is a principle of proportionality which ordains that administrative measures must not be more drastic than is necessary to obtain a desired result.[106]

The doctrine was developed by the European Court of Human Rights and it has now infiltrated the English law as well as other common law traditions.

Carol: "the use of discretionary powers by a public body should not result in actions or decisions which cause a greater degree of interference with the rights or interests of individuals than is required to deal with the state's objectives. In other words, a public body should only do that which, within a reasonable margin of appreciation, is proportionate to the end to be achieved."[107]

---

[106] H.W.R. Wade, and C.F. Forsyth, (200), *Administrative Law*, Oxford University Press, p. 368.
[107] A. Carroll, (2003), *Constitutional Law and Administrative Law*, 3rd edtn, Pearson,

Question: Did the decision or action taken represent a reasonable assessment of how the authority's objectives might be achieved without doing undue damage to the rights or interests affected?

Under English law the doctrine of proportionality has been related to the unreasonabless principle although others are saying that they are not related.

Application of the Principle in Tanzania

The doctrine has been applied by courts in Tanzania.

In *Peter Ng'omango v Gerson M.K. Mwangwa and the Attorney General* [1993] TLR 77, Mwalusanya, J said at 87-88:

"It is also my considered view that the Government Proceedings Act 1967 offends the doctrine of proportionality. This principle of proportionality requires that the means employed by the government to implement matters in public interest should be no more than is reasonably necessary to achieve the legitimate aims. In other words, the government must show that the restriction imposed on a basic human right is required by a compelling social need and that it is so framed as not to limit the right in question more than is necessary or proportionate to achieve a legitimate objective. The doctrine is discussed by the Court of Appeal of Cook Islands in the case of *Clark v Karika*[108] and by the Supreme Court of Canada in the case of *The Queen v Big M Drug Mart Ltd*.[109] And Mr Anthony Lester QC in his article mentioned above at pages 1064-1065 quotes a number of cases decided by the Supreme Courts of many Commonwealth countries which consider the principle of proportionality to be as well established to be part of the public law or administrative law. In the USA the principle of proportionality was recognised by the US Supreme Court in the case of *Precunier v Martinez*[110] at p 143. While the European Court of Human Rights has invoked that doctrine in outlawing laws going against basic human rights in the case of Sunday Times Case (13) and the case of Silver Case (9). In England the doctrine of proportionality is discussed in *Halsbury's Laws of England* 4th ed vol 51 at para 2296 and see also the case of *Johnson v Chief Constable of the RUC*[111] at 151. In Tanzania the doctrine of proportionality was expounded by the Tanzanian Court of Appeal in the *DPP v Daudi Pete Case*[112] wherein it is stated that the law being defended for being in public interest should not be too broadly drafted such

London, pp.297-298.
[108] [1985] LRC (Const.) 732.
[109] [1986] LRC (Const.) 332.
[110] [1974] 416 US 396.
[111] [1987] Q.B. 129.
[112] [1993] TLR 22.

that its provisions are capable of depriving personal liberty not only to persons who are considered to be dangerous, but even to persons who cannot be considered to be dangerous. They said the law should not be a rat-trap which catches both rats and humans without distinction.
Now the Government Proceedings Act 1967 offends the doctrine of proportionality because it is so broad such that it denies an effective and prompt remedy to all and sundry without distinction - even to those who have a clear and genuine grievance against the government."[underlining added].

Read

Mbushuu alias Dominic Mnyaroje and another v R. [1995] TLR 97.

James F Gwagilo v Attorney General [1994] TLR 73.

Kukutia Ole Pumbun and another v Attorney General and another [1993] TLR 159.

References

Airo-Farulla, G., "Rationality and Judicial Review of Administrative Action", (Melbourne University Law Review (Sourced from http://www/austilii.edu.au/journals, MUL/2000/23 htm, on 20th December 2007).

Bradley, A.W. & K.D. Ewing, (2007), *Constitutional and Administrative Law*, 14th edtn, Pearson Education Ltd, London.

Carroll, A., (2003), *Constitutional Law and Administrative Law*, 3rd edtn, Pearson, London.

Craig, P. P., (1994), *Administrative Law*, 3rd edtn, Sweet and Maxwell, Oxford.

Garner, J.F., (1970), *Administrative Law*, Butterworths, London.

Goudkamp, J., "The Rule against Bias and the Doctrine of Waiver", *Civil Justice*

Quarterly, Vol 26 July 2007, pp. 310-327.

Greenberg, D., & Alexandra Millbrook, (2000), *Stroud's Judicial Dictionary of Words and Phrases*, 6th edn, Sweet and Maxwell, London).

Holdsworth, W., (1956), *A History of English Law*, Vol. I, Methuen, London.

James, P. S., (1962), *Introduction to English Law*, 5th edn, Butterworths, London.

Lord Denning, "The Just Judge", in Dr B. Malik (ed), (1999), *The Art of Lawyer: Art of Cross Examination, Advocacy, Courtmanship*, University Book Agency, Allahabad (pp. 110- 124).

Oluyede, P.A., (1973), *Administrative Law in East A*frica, Kenya Literature Bureau, Nairobi.

Patterson, T. E., (2004), *We the People*: *A Concise Introduction to American Politics*, 5th edtn, McGraw Hill, New York.

Peter, C.M., (1997), *Human Rights in Tanzania: Selected Cases and Materials*, Rüdiger Köppeverlag, Kölon.

Rt. Hon. Mr. Justice Michael de la Bastide, T.C "Judicial Supervision of Executive Action in the Commonwealth Caribbean on the Occasion of Inaugural Telford Georges Memorial Lecture Barbados 31st March, 2006.

Shivji, I.G., "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism*

and the Judiciary: Tanzanian and Irish Perspectives, Clarus Press, Dublin, pp. 129-145.

Swisher, C.B., (1965), *The Supreme Court in Modern Role*, New York University Press, New York.

Whitman, J., (1987), *American Government*: *We are One*, Coronado Publishers, Sanford.

Wade, H.W.R. & Forsyth, (2000), *Administrative Law*, 8th edtn, Oxford University Press, London.

REMEDIES

An applicant who seeks redress under judicial review must indicate a sort of remedy that he wants the court to issue. There are a number of remedies which are applied in public law. These remedies may be roughly grouped into two — (i) prerogative remedies, and (ii) Ordinary remedies.

A. PREROGATIVE REMEDIES

Brief historical note

Certiorari, prohibition, *mandamus* and *habeas corpus* are famous prerogative remedies. They originate in England. They are known as "prerogative remedies" because they were originally used by the crown and royal courts for the purpose of preventing inferior tribunals and other bodies from meddling in matters that did no concern them. (Wade & Forsyth, 18th edtn, pp.32-33; Garner, pp.167-168).

The two authors remark (at 32-33):

> "Prerogative remedies were used to enforce order in the complex network of jurisdictions, both central and local, which was a feature of the legal system. *Certiorari* would issue from the Court of King's Bench to quash a decision, for example of justices of the peace, which was outside their jurisdiction or patently contrary to law. Prohibition would prevent them from proceeding in any matter outside their jurisdiction. *Mandamus* would command them to carry out their legal duties, if they were in default. *Habeas corpus* would release any person unlawfully detained. But it was private individuals who usually called the attention of the court to these wrongs and in time the prerogative remedies ceased to be a royal monopoly and became available to any subject. Nevertheless the crown remained the nominal plaintiff and the remedies retained of remedies devised for upholding public order rather than private right."

1. *Certiorari*

Certiorari is an order of the High Court to call up and examine the decision of the inferior tribunal or other agency as to its legality. If it fails to pass the test of legality, it will be quashed or nullified.

Garner (at 170): "An order of *Certiorari* is a judicial process whereby the order of the "court" below can be brought up before the supervising court, examined and quashed. The record cannot be amended, as the order of *Certiorari* is a process of review and not of appeal."

Record: "In order that *Certiorari* may lie, there must be a 'record.' It was formerly assumed that this meant the decision must have been in writing, but now it seems that this is not necessary, and the supervising court is prepared to grant *Certiorari* where it can find an error in an oral decision.[113] Wade and Forsyth say, "The underlying philosophy is that all inferior courts and authorities have only limited jurisdiction or powers must be kept within their legal bounds."[114][Garner, at 170].

In *R. v. Electricity Commissioners* [1924] 1 KB 171 at p. 204, Lord Atkin's described *Certiorari* in the following terms:

> "The matter comes before us [the Court of Appeal] upon rules of prohibition and *certiorari* which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari*

[113] *R. v. Chertsey Justices, ex parte Franks* [1961]1 All ER 825.
[114] H.W.R. Wade and C.F.Forsyth, (2000), *Administrative Law*, 18th edn, Oxford Press, p.591.

> requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction; and doubtless in their origin dealt almost excessively with the jurisdiction of what is described in common parlance as a court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of the subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The above statement by Lord Atkin and others quoted above provide a good piece of history in so far as development of *certiorari* is concerned. First, it is shown that the order was primarily meant to control the inferior tribunals from "exceeding the jurisdiction." Second, it was principally used to control the inferior courts of justice but not the today's administrative tribunals.

As time went on, new developments occurred. One, it was given for other purposes than the sole previous ground of excess of jurisdiction. It was extended to cover many other grounds of judicial review that we know today. Two, as said, in its earlier use, it was much directed to inferior courts of justice like magistrates and Justices of the Peace. Later, more administrative tribunals with limited jurisdiction were established by Parliament. *Certiorari* and prohibition were extended to cover such new administrative bodies to make sure they do not exceed their jurisdiction. The statement of Holt CJ in *R. v. Glamorganshire Inhabitants* (1700) 1 Ld. Raym. 580, reflects that development:

> "For this court will examine the proceedings of all jurisdictions erected by Act of Parliament. And if they, under pretence of such Act, proceed to incroach[115] jurisdiction to themselves greater than

[115] It appears the word "encroach" was spelled in that way at that time.

> the Act warrants, this court will send a *Certiorari* to them, to have their proceedings returned here."

The new wide scope in terms of authorities covered and grounds upon which *Certiorari* will issue in modern day can be evidenced by the Court of Appeal of Tanzania's judgment in *Sanai Murumbe and another v Muhere Chacha* [1990] TLR 54 at 56. It described *Certiorari* in the following terms:

> "An order of *Certiorari* is one issued by the High Court to quash the proceedings and the decision of a subordinate court or a tribunal or a public authority where, among others, there is no right of appeal. The High Court is entitled to investigate the proceedings of a lower court or tribunal or a public authority on any of the following grounds, apparent on the record. One, that the subordinate court or tribunal or public authority has taken into account matters which in ought not to have taken into account. Two, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account. Three, lack or excess of jurisdiction by the lower court. Four, that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it. Five, rules of natural justice have been violated. Six, illegality of procedure or decision. (*Associated Provincial Picture Houses, Ltd. v Wednesbury Corp.* [1947] 2 All E.R. 680 and *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All E.R.935)."

Note: In your view, does the Court exhaustively cover all grounds (heads) of judicial review in the above quotation?

Discretionary remedy

The Assistant Registrar of Buildings v Fredrick G. Kibwana [1987] TLR 84 (CA)

A decision was made by an Assistant Registrar of Buildings to terminate the tenancy of the respondent. A prayer for the order of *Certiorari* to issue was granted by the High Court. The decision terminating the tenancy of the respondent was quashed and he was reinstated as the lawful tenant of the premises. The Assistant Registrar of Buildings appealed against this decision.

Held: *Certiorari* being a discretionary remedy for the courts to issue, it can not be issued in a case where there is already a contractual relationship between landlord and tenant - relationship of commercial or business nature. Recourse to a court of law to adjudicate on breaches of contract would be a better procedure.

Tanzania Dairies Ltd v Chairman, Arusha Conciliation Board and Isaack Kirangi [1994] TLR 33 at 38, Mroso, J.:
"The orders of *Certiorari* and *mandamus*, among other prerogative orders, are discretionary and this court may refuse to grant them even where the right has been established."

In *R. v. Paddington Valuation Officer, ex parte peachey Property Corpn Ltd* [1965]2 All ER 836, Lord Denning, MR discussed many points that had to be established before *Certiorari* could be granted:

(i) Is a *Certiorari* a proper remedy in the circumstances, or is there some other remedy provided by the statute for the particular case?
(ii) Is the plaintiff (applicant) a "party aggrieved"?
(iii) Is *Certiorari* available; is the respondent under a duty to act "judicially"?
(iv) Are the consequences of granting *Certiorari* such that the Court ought not to exercise its discretion in favour of granting the remedy?
(v) Can some ground be established on the basis of which *Certiorari* can be granted? In other words, has there been some error of law? "I would like to say that, if a tribunal or body is guilty of an error which goes to the very root of the administration, in that it does exceed jurisdiction."

Scope

In *R. v. Criminal Injuries Compensation Board, ex parte Lain* [1967]2All ER 770, at 778, Lord Parker said,

"The ambit of *Certiorari* can be said to cover every case in which a body of persons, of a public as opposite to purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially."

Some decided cases

Sanai Murumbe and another v Muhere Chacha [1990] TLR 54 (CA)

While 145 head of cattle of the respondent and another person were being moved from Mugumu to Mugeta village in Bunda District they disappeared at Singisi village, Serengeti District. It was sought to order the Singisi villagers to compensate the respondent. Consequently an inquiry was instituted in the District Court of Mugumu under section 15 of the Stock Theft Ordinance, Cap.422. The inquiry was instituted before seizing the cattle. Being dissatisfied with the proof of the claim the District Court dismissed it. As that decision was not appealable the aggrieved party applied for and was granted an order of *certiorari* by the High Court. After quashing the proceedings the judge went further and ordered the villagers to compensate the respondent. On appeal the compensation order was attacked. It was submitted that the judge was wrong in treating the matter as if it was an appeal. It was further contended that the judge acted beyond the scope of his jurisdiction. The appeal court considered the matter raised and also the proper procedure to be followed under section 15 of the Stock Theft Ordinance.

Partly Held (Nyalali, CJ, Makame & Ramadhani JJA**)**

So the order of *certiorari* quashing the proceedings of the District Court is upheld. The order of High Court for compensation to the respondent is set aside and any stock attached in execution of the decision of the High Court is directed to be released and restored to the owners.

Note: the order of compensation by the High Court was set aside because it went beyond the normal confines of judicial review. In judicial review the court would normally quash the impugned decision but not to make other orders.

Tanzania Air Services Ltd v. Minister for Labour, Attorney General & the Commissioner for Labour [1996] TLR 217 (HC)

The applicant company, aggrieved by the decision of the Labour Conciliation Board re-instating an employee whose services had been terminated, referred the matter to the Minister for Labour under s 26 of the Security of Employment Act 1964, Cap 574. The Minister lawfully delegated his power to deal with the reference to the Commissioner for Labour who confirmed the decision of the Conciliation Board but gave no reasons at all for reaching that decision. Section 27(1) of the Act stated that the decision of the Minister was final and conclusive. The applicant sought an order of *certiorari* to quash that decision contending that the failure to give reasons rendered the decision a nullity.

Held (Samatta, JK — as he then was).

(i) Under common law there is no general requirement that public authorities should give reasons for their decisions but that position has been under criticism;

(ii) The interests of justice call for the existence, in common law, of a general rule requiring public authorities to give reasons for their decisions;

(iii) Under s 2(2) of the *Judicature and Application of Laws Ordinance*, Cap 453, the High Court has power to vary the common law to make it suit local conditions; the conditions of the people of Tanzania make it fundamental requirement of fair-play and justice that parties should know at the end of the day why a particular decision has been taken;

(iv) The provision that the Minister's decision is final and conclusive does not mean that the decision cannot be reviewed by the High Court; indeed no appeal will lie against such a decision but an aggrieved party may come to the High Court and ask for prerogative orders;

(v) Quashing the Labour Commissioner's decision and letting the matter lie there will be unsatisfactory as it will leave in force the decision of the Conciliation Board; an order of *mandamus*, therefore, can be issued by the High Court invoking its inherent powers notwithstanding that there is no prayer for the same;

(vi) To ensure that justice is done and also it is seen to be done the order of *mandamus* should be directed to the Minister himself, not the Commissioner for Labour.

2. Prohibition

It is an order of the High Court to prohibit the lower tribunal or administrative tribunal or administrative body from doing something in excess of its jurisdiction or going contrary to the law.

"Primarily it lay to prohibit an inferior tribunal from doing something in excess of its jurisdiction. In what it may be called the jurisdictional warfare of the 17th

Century it was an important weapon of the King's Bench when that Court struck down the pretensions of competing jurisdictions such as those of the Court of Admiralty and Ecclesiastical Courts." (Wade and Forsyth, 18th edn, p. 592).

Later, like *Certiorari*, it developed into the part of regular mechanism of judicial control both of inferior tribunals and administrative authorities generally.

Lord Atkin said in *R. v. Electricity Commissioners ex parte London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171 at 206:

> "I can see no difference between *Certiorari* and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on cert *Certiorari*, I think that prohibition will lie to restrain it from so exceeding its jurisdiction."

The above statement indicates that, as it was the case to *Certiorari*, prohibition was primarily concerned with restraining inferior tribunals from exceeding their jurisdiction. But as of now its use has been expanded. Wade and Forsyth indicate the expanded use of prohibition in modern times: to prevent a body to undertake a scheme which is outside its powers[116]; to prevent the execution of a decision vitiated by breach of natural justice[117]; to prevent local authority to demolish a house erroneously[118]; to prohibit a biased adjudicator from acting[119]; to prevent a rent tribunal from proceeding with a case outside its jurisdiction[120]; and to prevent a local authority from licensing indecent films.[121] These are, of course, a few examples.

---

[116] *R. v. Electricity Commissioners ex p.London Electricity Joint Committee Co (1920) Ltd* [1924] 1 KB 171.
[117] *R. v. North ex parte Oakey* [1927] 1 KB 491.
[118] *Estate and Trust Agencies (1927) Ltd v. Singapore Imprisonment* Trust [1937] AC 898.
[119] *R. v. Kent Police Authority, ex parte Godden* [1971]2 QB 662.
[120] *R. v. Tottenham and District Tribunal ex parte Northfield (Highgate) Ltd* [1957]1 QB 103.
[121] *R. v. Greater London Council ex parte Blackburn* [1976]1 WLR 550.

Prohibition and *Certiorari*

- These two remedies are similar in many respects. They are complementary remedies based on the same principles. All of them developed together and were originally used to ensure that inferior courts and tribunals do not exceed their jurisdictional limits.
- Prohibition issues to forbid some act or decision which would be *ultra vires* whereas *Certiorari* issues to quash a decision which is *ultra vires*.
- *Certiorari* looks to the past whereas prohibition looks to the future.
- Both *Certiorari* and prohibition are discretionary remedies.

3. *Mandamus*

It is an order given by the High Court commanding a person to whom it is directed to carry out a public duty imposed by law. (Garner, p.173). [See also de Smith[122]].

Wade and Forsyth, 18th edn, at 605: "The essence of *mandamus* is that it is a royal command, issued in the name of the Crown from the Court of the King's Bench (now the Queen's Bench Division of the High Court), ordering the performance

[122] Passage from Judicial Review of Administrative Action by S.A. de Smith (2nd Ed. p. 462 was cited with approval by Goudie J. of the High Court of Uganda in the case of *Shah v A.G. of Uganda* (No.3): [1970] E.A. 543, he said: "In *mandamus* cases it is recognised that when a statutory duty is cast upon a Crown servant in his official capacity and the duty is one owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where however a duty has been directly imposed by statute for the benefit of the subject upon a Crown servant as *persona designata* and the duty is to be wholly discharged by him in his own official capacity, as distinct from his capacity as an adviser to or instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of this duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of a Crown, but the situations in which *mandamus* will not lie for this reason alone are, it is thought, comparatively few."[Cited by Mwalusanya, J in *Byombaliwa*'s case].

of a public duty. It s a discretionary remedy, and the Court has full discretion to withhold it in unsuitable cases."

Disobedience to *mandamus* is a contempt of court punishable by imprisonment or fine. The power of the court to punish in case the order is disobeyed is the one which makes the *mandamus* as a command which must be complied with.

In *John Mwombeki Byombalirwa v The Regional Commissioner and Regional Police Commander, Bukoba* [1986] TLR 73, at 76, Mwalusanya, J said:

> "For all that we know *mandamus* is the procedure whereby a citizen with sufficient legal interest may apply to the High Court to compel a public officer to perform a public duty entrusted to him. It is said it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do something or not to do something; the duty itself being of an imperative nature. From the foregoing discussion it has been said there are few conditions to be proved in order for an order of *mandamus* to issue. These are:-
>
> 1. The applicant must have demanded performance and the respondents must have refused to perform.
> 2. The respondents as public officers must have a public duty to perform imposed on them by statute or any other law but it should not be a duty owed solely to the state but should be a duty owed as well to the individual citizen.
> 3. The public duty imposed should be of an imperative nature and not a discretionary one.
> 4. The applicant must have a *locus standi*: that is, he must have sufficient interest in the matter he is applying for.
> 5. There should be no other appropriate remedy available to the applicant."

Just like *certiorari* and prohibition, *mandamus* is unlikely to be ordered by the court if there is another alternative remedy. Wade and Forsyth say: "The prerogative order of *mandamus* is not to be granted where the law provides some

other adequate remedy." As to why the courts are reluctant to issue *mandamus*, Bowen, LJ said in *Re Nathan* (1884)12QBD 461:

> "A writ of *mandamus*, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. if, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done. The proceeding, however, by *mandamus*, is most cumbrous and most expensive; and from time immemorial accordingly the courts have never granted the writ of *mandamus* where there was another convenient, or feasible remedy within the reach of the subject."

It is said that *mandamus* (and of course other prerogative remedies) will not issue when there is a right to appeal. This, however, does not appear to be the settled position of the law.[123]

Some decided cases

In *John Mwombeki Byombalirwa v The Regional Commissioner and Regional Police Commander, Bukoba* [1986] TLR 73, the applicant was one of suspected economic saboteurs. He was arrested in March 1983 and a substantial part of his property valued at Shs.11, 675,680/= was seized (excluding beer and Konyagi). He was charged with hoarding property but the special tribunal acquitted him and ordered that the seized property be restored to the applicant. The government officials involved did not comply with the order hence the application for an order of *mandamus* to issue.

Held (Mwalusanya, J)

[123] Lugakingira, J (as he then was) said in *The Republic Ex-parte Peter Shirima v Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General* [1983] TLR 375 at 383 that: "… the existence of the right of appeal and even the existence of an appeal itself, is not necessarily a bar to the issue of prerogative orders. The matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case. Where an appeal has proved ineffective, and the requisite grounds exist, the aggrieved party may seek and the court would be entitled to grant, relief by way of prerogative orders."

" I would order that the respondents should immediately hand over to the applicant his goods that were seized as listed on annexure A to the summons of Chamber application or if they don't have the goods they should pay him the value of the same which is Shs.11,675,680/=; they should pay him his beer and kerosine or their value Shs.1,435,112/00 which is allegedly lying in the suspense account of N.B.C. Kagera; and they should also give him his 79 cartons of Konyagi or pay him Shs. 568,800/= the value of the seized Konyagi. Consequently the applicant is to be given by the two respondents all the mentioned goods and if they are not there, they should pay him the total value of Shs. 13,679,592/70. An order of *mandamus* to issue accordingly. The application is allowed with costs."

In *Re Fletcher's Application* [1970]2 All ER 527, the applicant asked the Parliamentary Commissioner (an Ombudsman in England) to investigate his claim and the Commissioner refused. He filed an application in court asking it to issue the *mandamus* to compel the Commissioner to investigate. It was held that the relevant law partly provided that "….the Commissioner may investigate" and hence such duty was discretionary and *mandamus* would not issue.

However, in *R. v. Metropolitan Police Commissioner, exparte Holloway* [1911] 2KB 1131, *mandamus* was issued despite the fact the law allowed some discretion on the part of the public official. In this case, the power to grant licences on cabs business was given to the Minister but validly delegated to the Police Commissioner. Licences were to be granted upon fulfilment of certain stipulated conditions. The applicant met all conditions but his application was nevertheless refused. It was held that although the law had employed the term "may" but on satisfaction of all conditions it became mandatory to issue licence to him and *mandamus* would lie.

4. Habeas Corpus

This is an order of the High Court directing the addressee to produce a certain person who is illegally detained and to justify the detention and on failure of which a forthwith release will be ordered.

Unlike other prerogative remedies, this remedy is not discretionary. It cannot therefore be denied on account that there may be some alternative remedy (*R. v. Pentonville Prison Governor ex parte Azam* [1974] AC 18 at 31). Again, it may be directed to a private individual who unlawfully detains another.

In *Sheikh Mohammad Nassor Abdulla v The Regional Police Commander, Dar es Salaam Region and two others* [1985] TLR 1, Mapigano at p. 3

"The remedy sought for, as shown above, is the issue of directions in the nature of *habeas corpus*. This remedy has its roots in England. At common law the prerogative writ of *habeas corpus* is directed to a person who detains another in custody and commands him to produce or have the body of that person before the court for a specified purpose. The most important specie of *habeas corpus* is that which is called *habeas corpus ad subjiciendum*. This commands the person to whom it is directed to produce the body of a person detained, with the day and cause of his caption and detention, to do, submit to and receive whatsoever the court shall direct. We are told that this writ was formerly much used for testing the legality of imprisonment for political reasons, especially during the reigns of the Stuarts. Besides the efficacy of the writ in liberating the subject from illegal confinement in a public prison, it also extends its influence to remove every unlawful restraint of personal freedom in private life, availing, for example, to release a person from a place where he has been unlawfully banished. It is part of the law of this country. But, it may be stressed, to invoke the remedy of habeas corpus it must be shown that the detention is improper or illegal: See *Zabrovsky v Palestine General Officer Commanding* (1947) AC 246. That, of course, is trite law. So much for the writ of *habeas corpus*."

Again, in contrast with other remedies, this remedy is statutorily provided and has its statutory procedure. It is provided for in the *Criminal Procedure Act*, [Cap 20 RE 2002]. Section 390 of that Act provides thus,

(1) The High Court may, whenever it thinks fit, direct–

(a) that any person within the limits of Mainland Tanzania be brought up before the court to be dealt with according to law;
(b) that any person illegally or improperly detained in public or private custody within such limits be set at liberty;
(c) that any prisoner detained in any prison situate within such limits be brought before the court to be there examined as a witness in any matter pending or to be inquired into in such court;
(d) that any prisoner detained as aforesaid be brought before a court-martial or any commissioner acting under the authority or any commission from the President for trial or be examined touching any matter pending before such court-martial or commissioner respectively;
(e) that any prisoner within such limits be removed from one custody to another for the purpose of trial; and
(f) that the body of a defendant within such limits be brought in on a *return of cepi corpus* to a writ of attachment.
(2) The High Court may from time to time make rules to regulate the procedure in cases under this section.

An elaborate procedure to apply for Habeas Corpus is in the *Criminal Procedure (Habeas Corpus) Rules* [G.N.No 150 of 1930]. [124]

---

[124] **THE CRIMINAL PROCEDURE (HABEAS CORPUS) RULES**
(Section 390)
G.N. No. 150 of 1930

1. **Short title**
These Rules may be cited as the Criminal Procedure (Habeas Corpus) Rules.

2. **Application to judge in Chambers:** An application for the issue of directions in the nature of habeas corpus shall be made in the first instance to a judge in chambers ex parte supported by affidavit in triplicate.

3. **Issue of summons:** If the application is not dismissed the judge shall order a summons to issue directed to the person in whose custody the person alleged to be improperly detained is said to be, requiring his appearance in person or by advocate together with the original of any warrant or order for the detention, at a place and time named therein to show cause why the person so detained should not be forthwith released.

4. **Where custody is public copy of summons to be served on the Attorney-General:** The summons shall be accompanied by a copy of all affidavits lodged in support of the application and where the person detained is in public custody a duplicate of the application, the summons, and of all affidavits lodged in support thereof shall be forwarded to the Attorney-General.

5. **Affidavits in reply:** Affidavits in reply shall be filed in duplicate of which one copy shall be served on the applicant.

6. **Date of return to summons:** The date fixed for the return of the summons shall be as soon as may be convenient after its issue to permit of the attendance of the parties served.

7. **Admission to bail pending hearing:** Pending the return to the summons the person detained may, if in public custody, be admitted to bail, and if in private custody be released on such terms and conditions as the court may deem fit.

8. **Procedure at hearing:** At the hearing on the summons the applicant shall begin, the party resisting the application shall then be heard and in such case the applicant shall be entitled to reply.

Habeas corpus has distinctive features which separate it from other prerogative remedies. First, it is not discretionary and once established that a person is unlawfully detained the court will have to issue the order. Second, it may be directed to a private person as distinguished from other prerogative orders which go only to public bodies, individuals vested with public power or private bodies performing duties of "public nature." Third, unlike other remedies, the procedure to apply habeas corpus is statutorily provided. Perhaps on the basis of these reasons many modern writers on administrative law no longer regard *habeas corpus* as a prerogative order.

Read:

In Re Application for the Writ of Habeas Corpus Subjiciendum and in Re of Detention of Wilfred Ngonyani at Keko Remand Prison, Dar es Salaam [1982] TLR 272.

Chumchua s/o Marwa v. Officer i/c of Musoma Prison and another, HC (at Mwanza), Miscellaneous Criminal Cause No 2 of 1998 (unreported), produced on p.635 of Prof Peter's Book.[125]

---

9. **Order of release to be directed to Superintendent of Prisons:** If the court orders the release of the person detained in any jail, the order of the court shall be drawn up and served on the Superintendent of Prisons or other person having the custody of the person so detained.

10. **Habeas corpus ad testificandum:** Where the evidence of a person who is in public custody is required at a trial or proceeding before a civil court or before a court martial or any commissioners acting under the authority of any commission from the President, any party to such trial or proceeding may make application *ex parte* to a judge in chambers supported by affidavit that the prisoner be brought before such court or commissioners for the purpose of giving evidence, and the judge may thereupon direct that the prisoner be produced accordingly and that the party requiring his production lodge a sufficient sum in court to meet the costs thereof.

11. **Production of civil prisoner for trial by court martial or commissioners:** In the case of a prisoner detained in public custody whose presence is required before a court martial or commissioners acting under the authority of any commission from the President for trial, a judge in chambers may on application made by the chief military authority or on behalf of such commissioners order the prisoner to be produced before such court martial or commissioners for trial but shall not do so without first hearing the prisoner or an advocate on his behalf.

12. **Production of prisoner in court:** A judge may in addition to any order that he may make under these Rules order the body of any person alleged to be improperly detained to be produced before him in court.

[125] Peter, C., (1997), *Human Rights in Tanzania*: *Selected Cases and Materials*, Rüdiger Köppeverlag, Kölon.

Prerogative Orders and Discretion

All prerogative remedies except the writ of *Habeas Corpus* are discretionary. A person may prove that a certain body has acted improperly but the court may withhold the order. In this regard, Mroso J (as he then was) said in *Tanzania Dairies Ltd v Chairman, Arusha Conciliation Board and Isaack Kirangi* [1994] TLR 33 at 38 that "The orders of *certiorari* and *mandamus*, among other prerogative orders, are discretionary and this court may refuse to grant them even where the right has been established."

The court must be satisfied that the case at hand is one for which the orders may be properly issued. Discretion in law is by itself not a good thing. It makes the law unknown to anyone but the judge himself.[126] As Elegido rightly points out, there are inherent dangers of giving discretion to judges:

> "If a society were naively to assume that all judges are just and wise men beyond the reach of temptation, and were to give to them full unchecked powers to decide as they see fit, this would undoubtedly constitute injustice to its citizens, who would be deprived at the stroke of a pen of security in the enjoyment of their freedom and rights."[127]

Thus, some principles have been developed to guide the court on how to exercise the discretion to issue or withhold the orders sought by applicants. The insistence is that such discretion must be exercised judicially guided by

---

[126] Wade and Forsyth have criticised this state of the law in the following words: "There are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful; the citizen is entitled to resist unlawful action as a matter of right, and to live under the rule of law, not the rule of discretion. 'To remit maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to sand. The true scope for discretion in the law of remedies, where it operates within narrow and recognised limits and is far less objectionable. If the courts were to undermine the principle of ultra vires by making it discretionary, no victim of an excess or abuse of power could be sure that the law would protect him." (See 6th edn p.354 but also quoted in the 18th edn of the same work).

[127] J.M. Elegido, (1994), *Jurisprudence*, Spectrum Law Publishing, Ibadan, pp.301-2.

principles which have been developed over the years. Some of such principles are briefly considered below.

(i) **Where there is another way of pursuing the case (availability of another convenient remedy)**

The courts have often times insisted that if there is a convenient remedy like appeal the prerogative orders will not be given. In *Sanai Murumbe and another v Muhere Chacha* [1990] TLR 54 at 56, the Court of Appeal of Tanzania partly held thus, "An order of *Certiorari* is one issued by the High Court to quash the proceedings and the decision of a subordinate court or a tribunal or a public authority where, among others, there is no right of appeal."

In *Morris Onyango v. Senior Investigation Officer* [1980] TLR 150, Samatta, J (as he then was) said that order of *mandamus* is not one of right, it will issue where there is no alternative remedy.

However, it seems there is no hard and fast rule. Sometimes these orders may be issued even if there are alternative remedies. In *Tropex Ltd and another v. Commissioner of Income Tax and others* [1996] TLR 390, Mapigano J held:

> "The decisions[128] cited by Dr Kapinga strongly support the proposition that where the whole basis of a decision or action of a public body or official is impugned, and where the alternative remedy provided by a statute is not convenient, beneficial and effectual as the prerogative remedies, the High Court can entertain an application to review the impugned decision or action and upon the merits of the particular case make or refuse to make the prerogative orders. The two decisions are highly persuasive authorities, and no one can deny that they are entitled to the highest respect, considering the ranks of the courts which pronounced them, i.e. the Court of Appeal of England and the

[128] *R v Paddington Valuation Officer ex p Peache Property Corp Ltd* [1965] 2 All ER 836; *Hammatlas Harilal Mehts v State of Nadhya Predesh and others* AIR 15 SC 403 I.

> Supreme Court of India. I respectfully adopt the views expressed therein as correct. "

Similarly, Lugakingira, J (as he then was) said in *The Republic Ex-parte Peter Shirima v Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General* [1983] TLR 375 at 383 that: "… the existence of the right of appeal and even the existence of an appeal itself, is not necessarily a bar to the issue of prerogative orders. The matter is one of judicial discretion to be exercised by the court in the light of the circumstances of each particular case. Where an appeal has proved ineffective, and the requisite grounds exist, the aggrieved party may seek and the court would be entitled to grant, relief by way of prerogative orders."

(ii) Where there is undue delay

In *R. v. Stafford Justices ex parte Stafford Corporation* [1940]2 KB 33, for instance, an application for prerogative orders was refused because long time had passed since the illegality was occasioned.

In most cases, the practice is that the court is not to entertain an application brought after six after the occurrence of the act complained of. This practice is borrowed from the *Crown Office Rules, 1906*.

But where the delay is reasonably explicable prerogative orders may still issue. In *Yuasa Battery (EA) Ltd v Conciliation Board of Dsm and others* [1996] TLR 367, Kaji J (as he then was) held,

> "Upon perusing the affidavit deponed by Mr Juma Ibrahim Nzwalia who is the Assistant General Manager of the applicant company, and upon perusing the written submission of the applicant's learned counsel Mr Kisusi have been quite satisfied that the applicant's delay was neither deliberate nor through negligence but that the applicant was first trying to exhaust all available remedies before resorting to the discretionary remedy of a

> prerogative order of *certiorari*. This was in line with the principle laid down in the cases of *R v Hillingdon London Borough, ex p Royco Homes Ltd* [1974] 2 All ER 643 and *R v. Paddington Valuation Officer ex p Peachey Property Corp Ltd* [1965] 2 All ER 836. In view of this I hold that the applicant's delay was with sufficient cause. For that reason I allow the applicant's first prayer."

(iii) If the conduct of the applicant is regarded by the court as unreasonable in the circumstances

In Re *ex parte* Fry [1954] WLR 730, a fireman refused to clean his superior officer's uniform as ordered, claiming the order was unlawful. He was punished by a "caution" by the relevant disciplinary tribunal. He then sought *certiorari* to quash the decision to caution him. *Certiorari* was refused, the court observing that his disobedience was an extraordinary foolish conduct as he could have simply obeyed and then complained through existing laid down procedures.

In *R. v Secretary of State for Education and Science, ex parte Birmigham District Council* [1984] Times, 18 July, the Council made proposals to close a School. In due course the proposals were approved by the Minister as the law provided. Subsequently, the Council changed its mind about closing the School and sought *certiorari* to quash the approval by the Minister. *Certiorari* was refused.

(iv) The applicant must have an interest (*locus standi*)

Garner says (at 174): "whether *mandamus* is granted to a particular plaintiff seem to be a matter of discretion for the court; if the plaintiff has no interest whatever, the court will in most circumstances exercise their discretion against him and refuse to grant a *mandamus*." In *Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi* [1996] TLR 203, it was partly held that *Locus standi* is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with.

(v) Where application seeks to protect a privilege but a right

In *R. v. Gaming Board for Great Britain ex parte Benaim and Khaida* [170]2 QB 417, it was held that playing a game of chance is not a right but only a privilege, and *certiorari* may not issue to enforce that privilege.

(vi) Where the applicant had waived his rights

In *R. v. Williams ex parte Phillips* [1924]1 KB 608, the court refused to order *certiorari* to the applicant who had appeared before the tribunal which he knew that it was improperly constituted because one of the members had an interest in case, but raised no objection at the time. He was treated to have waived his rights.

(vii) where the order would be inconvenient or of no practical effect

Sometimes these orders may be refused simply because the practical effect of granting it would be disastrous or otherwise undesirable. In *R. v. Stafford Justices ex parte Stafford Corporation* [1940]2 KB 33, *certiorari* was refused on the ground of delay but also on the ground that the effect of *certiorari* would have been to reinstate a footpath as a highway; but by the time *certiorari* was sought it had already been built on, making it extremely inconvenient to reinstate it as a highway.

In the case of *Conrad Berege v Registrar of Cooperatives and the General* [1998] TLR xxx the Applicant established in court that the removal of the managing committee of the Morogoro Region Cooperative Union (1984) Ltd, of which the Chairman, and its replacement by a care-taker committee were done *ultra vires* and in breach of natural justice. Nevertheless the court refused to award certiorari because, among other reasons, certiorari would have had the effect of reinstating the applicant in office but already, while the case was pending in court, had lost the necessary qualification and there was considerable hostility persisting between him and his committee. Refusing to grant certiorari, Lugakingira, J (as he then was) said:

"If certiorari is granted it would result in an awkward situation, a vacuum in the Union's management, for the applicant is no longer to resume his office.

Sssssss

education, National Housing Corporation, Workers Development Corporation, etc.)"[130] Political parties, trade unions, and sporting clubs have been held in modern times to be public bodies as they undertake public responsibilities. Thus, judicial review may percolate the doors of their offices to see what is happening therein. In *Alhaji A. J. Mungula v Baraza Kuu la Waislam wa Tanzania* [1997] TLR 50, Mapigano J remarked, "There was a time when *certiorari* did not lie against private bodies. It is no longer so. It is now accepted that such order can lie against such bodies provided the body in question discharges a public function. The determinant factor is what a body is doing and not how it was formed."

Religious organisations are basically private organisations but they perform public functions and thus may be subject to judicial review only when carrying out public functions. But, orders of public law will not lie to them when they are not carrying out public functions. In In *Alhaji A J Mungula v Baraza Kuu la Waislam wa Tanzania* [1997] TLR 50, the applicant was the Executive Secretary of Baraza Kuu La Waislam Wa Tanzania (BAKWATA) but was removed from office without having been afforded the opportunity of a hearing. He sought an order of *certiorari* to quash the decision.

Held (Mapigano, J): "I would take the view that judicial review would be confined to the decisions of BAKWATA which pertain to such legal functions, and that there would be nothing which would sufficiently bring its decision on matters respecting the domestic relationship between it and its officers within the reach of judicial review. In these circumstances I feel bound to conclude that this application is misconceived. It is accordingly refused."

---

[130] See Issa G. Shivji, "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, Dublin, pp. 139.

As said, judicial review essentially focuses on functions or relationships of "public nature" but not those of "private nature." Thus, courts have refused to issue prerogative orders to public authorities in relation to functions or relationships of private nature. Thus, in *The Assistant Registrar of Buildings v Fredrick G. Kibwana* [1987] TLR 84, the Court of Appeal held that "*Certiorari* being a discretionary remedy for the courts to issue, it can not be issued in a case where there is already a contractual relationship between landlord and tenant — relationship of commercial or business nature. Recourse to a court of law to adjudicate on breaches of contract would be a better procedure."

In another case, Abadiah Selehe v Dodoma Wine Company Limited [1990] TLR 113, the High Court (Masanche, J) held:

- "In this instant matter before me, the applicant was a worker, employed by DOWICO. There was, therefore, a contractual relationship between him and DOWICO — a contract of service. If, therefore, the applicant, feels that he has been unjustly dismissed, he may sue the employer for wrongful dismissal. In short, therefore, there is a remedy and a forum. Leave to apply for orders of *certiorari* and *mandamus* is refused."

- "*Certiorari* being a discretionary remedy for courts to issue cannot be issued in a case where there is already a contractual relationship between landlord and tenant, a relationship of a commercial or business nature. The recourse to the courts of law to adjudicate on the breaches of contract would be better procedure."

Note: the organisations in the above last two cases were public. The first was directly established by law and another was a parastatal corporation.

New Developments: Change of Nomenclature

Recently in England there have been some important changes. In July 2000, the Chief Justice, Lord Woolf, CJ, issued "a Practice Direction" which in effect changes the traditional terminology of prerogative orders. The Direction also slightly alters the traditional citation of judicial review cases in England. The Practice Direction introduces three important changes on the judicial review:

(i) that element of the Divisional Court of the High Court dealing with applications for judicial review to be referred to as the Administrative Court;

(ii) The orders of *certiorari*, *mandamus* and prohibition hitherto to be known as quashing, mandatory and prohibiting orders respectively;

(iii) Parties to an application for judicial review henceforth to be cited as: The Queen (R), on the application of (name of applicant), versus, the public body against which the proceedings are brought against, i.e. *R (Black) v. Blackshire District Council*.

[For more information on the said changes, see Alex Caroll, (2003), *Constitutional and Administrative Law*, 3rd edn, Pearson Education Ltd, London, p. 331].

Thus, *certiorari* will be known as "quashing order", *mandamus* (mandatory order) and prohibition (prohibiting order). There are no reasons given for this change. So, text writers are now thrown into an expensive venture of reviewing their books to reflect the change. The terms *certiorari*, *mandamus* and prohibition would perhaps henceforth be consigned into the dustbin of history. It remains to be seen whether Tanzania will follow suit. It is to be noted that previously, in England, prerogative orders were known as "prerogative writs" but they were instead renamed as "prerogative orders." Tanzania followed that trend in 1968 for the law was enacted to adopt what happened in England. Section 17 (4) of

the *Law Reform (Fatal Accidents and Miscellaneous Provisions), Act*[131], provides thus, "*In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order*." On the basis of this experience, it may be reasonably surmised that Tanzania is likely to be swayed by a wave of this new change. Such a move would, in our view, be useless and disruptive of the settled legal jurisprudence. The tendency to adopt foreign emerging practices hook, line and sinker without reflecting on their usefulness in our own setting is the most embarrassing and sickening.

THE PROCEDURE

Applications for prerogative orders (*certiorari*, prohibition and *mandamus*) are neither governed by the *Civil Procedure Code*[132] nor by the *Government Proceedings Act*.[133] The procedure for applying such orders is not codified.[134] The above two statutes apply to civil proceedings whereas prerogative orders fall under the realm of public law.[135] Section 19 of the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Act*[136] empowers the Chief Justice to make rules that

---

[131] Cap 310 RE 2002.
[132] Cap 33 RE 2002.
[133] Cap 5 RE 2002.
[134] However, Section 18 (1) of the *Law Reform (Fatal Accidents and Miscellaneous Provisions), Act* [Cap 310 RE 2002] provides some form of procedure which requires the Attorney General to summoned at the leave stage: "(1) Where leave for application for an order of mandamus, prohibition or certiorari is sought in any civil matter against the Government, the court shall order that the Attorney-General be summoned to appear as a party to those proceedings; save that if the Attorney-General does not appear before the court on the date specified in the summons, the court may direct that the application be heard *ex parte*."
[135] Manento, JK, said in *Adelina Chungulu and 99 others v. NECTA and another*, High Court (at Dsm) Misc. Civil Cause No 55 of 2005 (unreported) at p.6: "The crax [sic] of the matter here is whether the provisions of the Civil Procedure Code, 1966 applies [sic] in applications for prerogative orders, which orders are questioning the already decisions made by public authorities. My answer is no. There is a different procedure applied in applications for prerogative orders from those used in instituting civil proceedings under the *Civil Procedure Code*."
[136] Cap 310 RE 2002.

would govern the application of prerogative orders. Four decades have now passed since such powers were given in 1968 but the Chief Justice is yet to make such rules. Legal practitioners, judges and other persons have thus been compelled to rely on case law and developed practice.

Justice Mwalusanya describes the absence of codified rules as a "blessing in disguise" as it allows the courts to develop the procedure freely.[137] Whatever the advantages of such absence are, lack of codified procedure for important judicial review proceedings is undesirable to say the least. It is extremely difficult for ordinary citizens to make applications under judicial review unless they are

[137] This was in *John Mwombeki Byombalirwa v The Regional Commissioner and Regional Police Commander, Bukoba* [1986] TLR 73., when his Lordship said at pp 77-78: "In Tanzania no rules of procedure have been made by the Chief Justice as he is empowered so to do under s.18 (1) [now s.19 (1)] of the *Law Reform (Fatal Accidents and Misc. Provisions) Ordinance (Amendment) Act* No. 55 of 1968. We follow the common law as developed and expounded by the case-law in England and our Tanzania judges. That is a blessing in disguise for if we had fixed and immutable rules, that would have fettered the judges to develop the law to meet changing conditions. As it is now the law on prerogative orders is constantly being developed by our judges. They often take relief from decisions of other Commonwealth countries and in this respect the decisions in the 'Law Reports of the Commonwealth - the section on Constitutional and Administrative Law Reports (Professional Books Ltd.) published since 1985 is useful and commendable. An example of the changing nature of our laws in this field is as follows. For a long time past it was thought that there could be no judicial review by means of prerogative orders for administrative actions as distinct from judicial and quasi-judicial acts: see Reide J. in *Re an Application by Bukoba Gymkhana Club*: [1963] E. A. 478 (T); *De Souza v Tanga Town Council*: [1961] E.A. 377 (C.A.) and Mwesiumo J. in *Northern Tanzania Farmers' Coop. Society Ltd. v W.H. Shellukindo*: (Merits) [1978] L.R.T. n. 37. However now the distinction between judicial proceedings and administrative proceedings is gone. The distinction has been "scotched" as a 'heresy' if I may be allowed to use the fine words of Lord Denning in the case of *R. v Gaming Board ex-parte Benaim and Khaida*: [1970]2 All E.R.528 (C.A.) And in Tanzania the distinction was scotched by the decision of the Tanzania Court of Appeal in the case of *Patman Garments Industries Ltd. v Tanzania Manufacturers Ltd*: Civil Appeal No. 15 of 1981 (unreported) delivered on 8/3/1982 by Mwakasendo J.A. on behalf of the Court. It will be seen therefore that our judges have a heavy responsibility in this field to see that the law takes the correct direction that will benefit the individual citizen. That great American judge Benjamin Cardozo in his 'The Nature of the Judicial Process' has underscored the judge's responsibility when he said:- "That court best serves the law which recognises that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what should be according to the established and settled judgment of society."

assisted by advocates whose services are expensive and unaffordable to many. Moreover, the law on this aspect is uncertain, troublesome even to the judges.[138]

The procedure for application of prerogative orders is a two-pronged stage process. Before applying for the orders, the applicant has to seek leave first. In other words, "he must apply for leave to apply" or "he must apply for a leave (permission) to file an application." If the applicant successfully jumps over this hurdle, he would then go to a second stage — application for the orders.

First stage: Leave

The law demands that the applicant must obtain leave before he makes an application for prerogative orders. Lugakingira, J (as he then was) observed in *Peter Shirima v Kamati ya Ulinzi na Usalama, Wilaya ya Singida, the Area Commissioner and the Attorney General* [1983] TLR 375 at 381 that:

> "… it is evident that prior leave has been the accepted procedure before this court for as long as I am unable to ascertain. Thus, apart from the unreported cases already referred to, in *Re Fazal Kassam (Mills) Ltd*., [1960] E.A. 1002, which was an application for the writs of *certiorari* and *mandamus*, leave had been applied for and granted. And *Re Hirji Transport Service* [1961] E.A. 88 was a ruling on an application for leave and it was granted. It is therefore clear to me that the efficacy of this procedure has never before been questioned or doubted.
> I am thus of the respectful view that by reason of long user, coupled with approval, the practice of seeking leave has come to

[138] This state of uncertainty indicated by Lugakingira J (as he then was) in *Shirima's* when he said at p. 380: "The quotation by Maganga, J. from Halsbury's Laws in the Lakarau case takes source directly from 0.59, r. 3(1) of the Rules of the Supreme Court in England which were made under s. 120 of the Administration of Justice (Miscellaneous Provisions) act, 1938, and which replace the Crown Office Rules, 1906. As pointed out by Mroso, J. these 1938 rules have no application in this country having regard to the reception date which is 22nd July, 1920. I would therefore respectfully agree that the law applicable is to be found in the Crown Office Rules, 1906. Unlike the learned judge, however, I have not been privileged to see these rules, but I believe he was correct in saying that they do not require an application for prior leave. Nevertheless, I cannot for bear to express my anxiety that, to-date, one has to have recourse to obscure rules which were abandoned by their country of origin more than forty years ago. I think there is urgent need to pay attention to subsection (2) of s. 349 of the Criminal Procedure Code."

> be part of our procedural law. The application now before me is therefore very relevant."

Similarly, in *Hans Wolfgang Golcher v General Manager of Morogoro Canvas Mill Limited* [1987] TLR 78, Maina J held that in all applications for prerogative orders, such as *certiorari* and *mandamus* leave must be sought and obtained before the application for any prerogative order is heard.

There are many decisions that state this requirement, to wit, an applicant must first seek leave. The law is fairly settled on this aspect. It thus means that a direct application for orders without seeking leave is liable to be rejected. Now, the question which immediately comes to mind is this: what is the object of that leave? In this regard, Professor shivji writes, "… the whole purpose of the application for leave would be to weed out frivolous and vexatious applications and perhaps those, on the face of it, that do not exhibit good faith or *ex facie* an abuse of the legal process."[139] Thus, the intention of the requirement for leave is to enable the judge to see whether there is a substance in the application.

The next question is what exactly the applicant must do? Manento, JK, in *Adelina Chungulu and 99 others v. NECTA and another*[140], supplies an answer to this question: "In application for prerogative order a party files a chamber summons supported by an affidavit and a statement for the grant leave. It is only after leave has been granted, will the petitioner petition for the orders sought." It is clear from the foregoing that the applicant has to file three sorts of documents:

[139] Issa G. Shivji, "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, Dublin, pp. 133.
[140] High Court (at DSM), Misc. Civil Cause No 55 of 2005 (unreported).

(i) The Chamber Summons, (ii) Statement of grounds, and (iii) Affidavit. Professor Shivji cites other authorities which propound this requirement.[141]

Now, when the applicant files the chamber summons, statement of grounds as supported by an affidavit, what the court should do? In *Amani Mwenegoha v. The Registered Trustees of the Lutheran Church in Tanzania & 3 others*[142], Massati, J (as he then was) says at pp 1-2:

> "There is before me an application for leave to apply for the prerogative orders of *certiorari* and mandamus. Normally at this stage, the court looks at the material filed and may grant leave *ex parte* without going into the matter in depth, if it is satisfied that there is an arguable case for the grant of the relief sought by the applicant. But it is also permissible and it is the practice, that if the judge looking at the papers in support of an application concludes that it is uncertain whether or not there is an arguable case he should invite the putative respondent to attend and make representations as to the grant or refusal of the leave (see *R. v. Secretary of State for the Home Department, ex parte Augur Begum* (1989) Times, 3 April, CA, a case cited in Halsbury's Laws of England (4th ed, Vol 1(1) p.277." [Underlining added].

Thus, what the court does at the leave stage is to look at the documents to see whether the applicant has established a *prima facie* case, whether there are arguable issues, or whether there is a substance in the application. Justice Kaji, in *YUASA Battery (EA) Ltd v Conciliation Board of DSM and others* [1996] TLR 367, said: "As far as the second prayer is concerned, after perusing the written submission by the applicant's learned counsel I have been quite satisfied that the applicant has established a *prima facie* case for leave to apply for an order of certiorari." [Underlining added]. If, therefore, the court is satisfied that the application is not frivolous or vexatious or made in bad faith, but rather it raises

[141] *Andrew W. Nkuzi v. Tanzania Sisal Authority*, HC (at Dsm) Misc Civil Cause No 3 of 1994; *Moses J. Mwakibete v. Principal Secretary an Attorney General*, HC (at Arusha), Misc. Civil Application No 11 of 1992 (unreported).
[142] High court (at Dsm), Misc. Civil Cause No 8 of 2005 (unreported).

arguable issues or establishes a *prima facie* case, or it has substance, it would then grant leave to file an application. If the court finds otherwise it would refuse the application but the applicant would be entitled to appeal to the Court of Appeal.

One last point in so far as the leave stage is concerned, applications for leave are usually made *ex parte*. It means they are usually made and determined in the absence of the parties against whom such applications are sought. Justice Massati introduces an exception to this practice. His Lordship held in *Mwenegoha*'s case (*supra*) that "if the judge looking at the papers in support of an application concludes that it is uncertain whether or not there is an arguable case he should invite the putative respondent to attend and make representations as to the grant or refusal of the leave." This is, it seems, a peculiar case which warrants calling the respondent at the leave stage. Again, section 18 (1) of the *Law Reform (Fatal Accidents and Miscellaneous Provisions) Act*[143] requires the Attorney General to be summoned at the leave stage. This section was introduced in 1991. In the views of Professor Shivji, the section was an effort by government to stifle applications for prerogative orders which are usually sought against governmental authorities. The practice is for the Attorney General to object every application and complicate the proceedings at the leave stage.[144]

Second stage: Application for Orders

While the first application (at leave stage) is specifically meant to secure the leave, the second one is meant to obtain the order(s) sought. In case the leave has been granted, the applicant would make a fresh application by filing the usual three documents — chamber summons, statement of grounds and an affidavit in

[143] Cap 310 RE 2002.

[144] See Issa G. Shivji, "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, Dublin, pp. 133-134.

support thereof. The practice is to indicate in the new affidavit that the leave has been granted.[145]

Unlike the first application which is usually made *ex parte*, the second one is *inter partes*, that is, all parties (the applicant and respondent) must participate. The respondent would be served and required to appear and file the counter affidavit. According to Professor Shivji, in judicial review proceedings the practice is a more pronounced use of affidavits than oral evidence.[146] But, that is not to say that oral evidence is not admissible in judicial review cases. Having scrutinised the arguments and counter-arguments from both sides, the court would then give its judgment to issue the orders sought or decline in which case the aggrieved party would have the right to appeal.

B. ORDINARY REMEDIES

The traditional public law remedies are prerogative orders (*certiorari*, prohibition, *mandamus* and *habeas corpus*). Public law is rapidly developing and changing. Thus, the practice to use the private law remedies (injunctions, declaration and damages) has grown in the field of public law. The domain of the so-called ordinary remedies (injunction, declaration and damages) is civil law.

The difference between prerogative remedies and ordinary (private law) remedies is firstly based on history and secondly on the distinct applicable procedures. Wade and Forsyth (18th edtn at 551) say:

---

[145] See Issa G. Shivji, "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, Dublin, pp. 133-134.

[146] See Issa G. Shivji, "Developments in Judicial Review in Tanzania Mainland", in William Binchy and Catherine Finnegan, (2006), *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives*, Clarus Press, Dublin, pp. 133-134.

> "Within the "ordinary" and "prerogative" families the various remedies could be sought against public authorities either separately or together or in the alternative. But each has its own distinct procedure. Damages, injunctions and declarations were sought in an ordinary action, as in private law; but prerogative remedies had to be sought by the procedure of their own, which could not be combined with an ordinary action."

Ordinary remedies thus belong to the family of private law remedies. The procedure of applying for ordinary remedies is provided for under the *Civil Procedure Code*, [Cap 33 RE 2002]. Three ordinary remedies (i.e. injunctions, declarations and damages) are briefly considered below.

1. Injunctions

The Black's Law Dictionary (6th edn) provides three versions of a definition of an injunction:

- A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury.

- An injunction is a prohibitive, equitable remedy issued or granted by the court at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter from doing some act which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law.

- A judicial process operating in *personam*, and requiring the person to whom it is directed to do or refraining from doing a particular thing.

Historically, an injunction is an equitable remedy since it derives its origin from the Chancery Court. The second definition above indicates the connections of

injunction remedy with the equity which was administered by the Chancery Court in England.

Injunctions are either (1) mandatory or (2) prohibitory. Mandatory injunction commands a party to whom it is directed to perform a certain act whereas the prohibitory one directs a party to refrain from doing a certain act. Mandatory injunction does not play a wide role in the field of public law because it is replaced by *mandamus*.

Injunctions are readily available against ministers, officials and public authorities. They are granted to prohibit certain actions by public authorities or unlawful actions.

Generally, injunctions are used in the public law field as a measure for interim protection. They are primary use is to prevent a certain action pending the application or determination of an application for prerogative orders. Thus, in *Hans Wolfgang Golcher v General Manager of Morogoro Canvas Mill Limited* [1987] TLR 78, it was held that, "Since no leave to apply for the prerogative orders of *certiorari* and *mandamus* had been obtained the temporary injunction cannot stand." Again, where there is an imminent danger or irreparable injury, an injunction may be ordered to maintain the *status quo*.

Before issuing injunctive orders, courts do consider a variety of factors: assessment of the circumstances as to whether injunction may issue; the applicant should prove that he is likely to get judgment; the act, if continued, will make the judgment nugatory. However, in *Kahama Gold Mining Ltd v. Minister for Minerals*[147] Mapigano J said: "Where such remedy is sought it is not necessary that the court should be satisfied to find a case which will entitle the

[147] High Court (at Dar es Salaam), Misc Civil Cause No 127 of 1989 (unreported).

applicant to relief at all events, it is quite sufficient for it to find a case which shows there is a substantial or serious question to be investigated and that the *status quo* should be preserved until such question can finally be disposed of. The balance of convenience will be overriding consideration."

The vexing question was whether the court could issue an injunction against Government. In England, it was also said that an injunction could not issue against the Crown. In Tanzania, section 11 of the *Government Proceedings Act*, 1967 (now Cap 5 RE 2002) prevented the issuance of injunctions against Government.[148] That provision came into question in the case of *Vidyadhar Girdharal Chavda v The Director of Immigration Services and others* [1995] TLR 125 before Samatta JK (as he then was). There was an application for an injunction but a preliminary point of objection was taken on the ground that the court could not issue injunctions against Government. After holding that the section applies to civil proceedings, he cited the English case of *M v Home Office and another* [1993]3 All ER 537, and came to the following conclusion:

> "If I may repeat what I ventured to say in my earlier ruling, there is no room for doubt that this Court has the power to grant an interlocutory injunction before hearing an application for leave to apply for a prerogative order.

[148] 11. (1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require:

Provided that -

(a) Where in any proceedings against the Government any such relief is sought as might in proceedings between private persons be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

> For the reasons I have given, I am satisfied that the law, justice and common sense dictate that I uphold Mr Mkono's contention that s 11 of the Government Proceedings Act does not stand in the applicant's path in the instant application. Except to autocrats, it must be intolerable that, in a democratic society like ours, courts should be impotent to grant a temporary injunction in favour of an individual who complains of unwarranted or oppressive use of statutory powers by a government minister or official. It should be made perfectly clear, I think that this Court can halt the bulldozer of the State before it squashes the right of an individual, company or society. The preliminary point fails."

Before Chavda's case, Mapigano J had held in *Kahama Gold Mining Ltd* Case (*supra*) that the Court has had such power. Also in *Amani Mwenegoha v. The Registered Trustees of the Lutheran Church in Tanzania & 3 others*[149] , Massati, J said at p.13-14: "… I hold that in appropriate cases in this court has an inherent power to grant an ad interim temporary injunction before the grant of leave."

2. Declaration

Declaration or declaratory judgment is essentially civil law remedy but which is also used in the area of public law in recent times.

Definition

Black's Law Dictionary (16th edn) defines the expression "declaratory judgment" thus:

- A remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights.

- A binding adjudication of the rights and status of the litigants even though no consequential relief is awarded.

[149] High Court (at Dsm), Misc. Civil Cause No 8 of 2005 (unreported).

Declaratory judgments play a large part in private law and are particularly valuable remedy for settling disputes before they reach a point where a right is breached. [Wade & forsyth, 18th edtn, p.560].

The Essence of Declaration

The essence of declaratory judgments is that they state the legal rights of the parties as they stand without changing them in any way. Such a judgment merely states some existing legal situation. It requires no one to do anything and to disregard it would not be contempt of court. (*Webster v. Southwark LBC* [1983] QB 698]. [Wade & forsyth, 18th edtn, p.560].

Declaration in public law

In administrative law, declaration is an efficient remedy against *ultra vires* actions of government or other public authorities. A declaratory judgment or order may be granted against unlawful actions by the government. As said, declarations are not binding on any authority but a democratic government that adheres to the rule of law is unlikely to ignore a declaration which has been issued by a court of law. A declaratory judgment may thus be sought against any public body.

In an English case of *Dyson v. Attorney General* [1911]1 KB 410, Dyson was served with a notice by the Inland Revenue Commissioners which required him to, under the pain of penalty if he didn't comply, supply certain particulars which could be used for the purpose of valuing land for tax purposes. The same demand had been sent out to more than eight million people. Dyson refused to comply with the notice. He sought a declaration that the demand was unauthorised and *ultra vires* the Finance Act. The Court of Appeal agreed. It was

argued for the Crown that he had no right to object until when he was sued for a penalty on failure. Fletcher Moulton LJ said:

> So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty."

As Wade and Forsyth note, declarations are freely available against many authorities: A child's guardian may obtain a declaration that a council is wrongfully refusing to accept a child in its school[150]; a police officer may obtain a declaration that he was not validly dismissed[151] ; a dock worker may obtain a declaration that he has wrongfully removed from the register and that he retains the right to employment[152], etc.

A Discretionary Remedy

Wade & forsyth say that declaration is a discretionary remedy. There is an ample jurisdiction to prevent its abuse. The court always has inherent powers to refuse relief to speculators and busybodies, those who ask hypothetical questions or those who have no sufficient interest. [Wade & forsyth, 18th edtn, p.560].

Garner (p 178): a declaration will be refused if the question on which the court's ruling is requested is academic and has not yet actually arisen. There has to be a justifiable cause unless the court will exercise its discretion not to grant it. In *Re Bernato, Joel v. Sanges* [1949]1All ER 515, where the trustees asked the court to say

[150] *Gatehead Union Guardians v. Darham* CC [1918]1Ch 146
[151] *Cooper v. Wilson* [1937]2KB 309; *Ridge v. Baldwin* [1964] AC 40.
[152] Vine v. National Dock Labour Board [1957] AC 488.

whether, if they took a certain course, the trust funds would be liable to estate duty. Not surprising the declaration was refused.

3. Damages

Damages refer to pecuniary compensation or indemnity which may be recovered in the courts by any person who has suffered loss, detriment or injury whether to his person, property or rights through the unlawful act or omission or negligence of another. [Black's Law Dictionary].

Damages may be compensatory, punitive or exemplary or even nominal.

Under the public, an award of damages may be made by an applicant of judicial review but only in conjunction with one of other remedies. Although its importance is currently rising they are not much famous under this area of the law.

Wade and Forsyth (18th edn, p 552) say: "… recently the courts have been called upon to investigate new possibilities of liability, sometimes with positive and sometimes with negative results."

The two authors also remark at 552:
"It is now clear that what might be called administrative are a subject of importance, and often difficulty, in administrative law. ….the remedy of damages , which has always been an essential element in the protection of the citizen against public authorities, is already gaining greater prominence as a means of ensuring that powers are exercised responsibly, in good faith and with due care."

LECTURE 5

EXCLUSION OF JUDICIAL REVIEW

INTRODUCTION

Judicial review presents an arena for struggle. On one side of the fray, judicial review is an important weapon in the hands of an individual against the governmental power. Judicial review is one way through which an ordinary citizen challenges governmental actions through the courts of law. It through judicial review that an individual can prevent uncalled for governmental action that may affect him in one way or the other. In the same vein, the individual may push public officials or public authorities to perform what they have unjustifiably refused to perform.

On the other side of the fray, public officials and governmental authorities have never been pleased with the interference of the exercise of their powers by individuals through the courts. It is natural that those who wield the reins of power want to exercise those powers freely without interference by any

authority. This has always been the policy held by those who are vested with public power. The idea that public powers are limited and that they should be exercised within their recognised limits sometimes does not augur well with that policy.

On account of that displeasure, the executive through the legislature have, often times, been able to influence the enactment of legislation which tends to exclude judicial review. The common justification is that the "exclusion" is in the public interest or national security. The exclusion, as Carroll[153] observes, has been done in three remarkable ways:

(i) by inserting an exclusion or "ouster clauses" in the enabling Acts which seek, in the express terms, to exclude or 'ouster' the power of judicial review;

(ii) By phrasing the powers so conferred in such wide subjective terms as to minimise the grounds on which the exercise of the powers may be questioned;

(iii) By providing statutory remedy to deal with any alleged abuses of powers or duties in the enabling Acts.

EXCLUSIONARY CLAUSES

For the purpose of this lecture, only the first way is discussed. This is so because it is the most common method which is used to exclude judicial review. It is done through enactment of legal provisions which are known as "exclusionary clauses", "ouster clauses", "finality clauses", etc. Such phrases are usually formulated in a variety of ways to ensure the exercise of power under the particular legislation is not questioned by courts. Examples of such formulations are as follows:

---

[153] Alex Carroll, (2003), *Constitutional Law and Administrative Law*, 3rd edtn, Pearson, London, p. 319.

- "Shall not be questioned in any legal proceedings whatsoever",
- "Shall not be questioned in any court of law",
- "Shall be final",
- "Shall be final and conclusive",
- "As if enacted in this Act".

Categories of such formulations are not closed. Examples of such statutory provisions can be seen below. Some of the statutes and provisions have been repealed or amended but are reproduced here to serve as examples.

1. Section 15 of the *Regulation of Prices Act, 1973* provided thus:

> "No decision of the Price Commission, or Assistant Price Commissioner made or purporting to have been made pursuant to any provision of this part shall be subject to review by any Court on any ground whatsoever."

2. Section 27(1) of the *Permanent Labour Tribunal Act, 1967*:

> "Every award and decision of the Tribunal shall not be liable to be challenged, reviewed, questioned or called in question in any Court sure on the grounds of lack of jurisdiction."

3. Section 28 of the *Security of Employment Act, 1964* stated:

> "No suit or other civil proceeding shall be entertained in any civil Court with regard to the summary dismissal or proposed summary dismissal of an employee."

4. The *Preventive Detention Act, 1962*, before 1985 had the following provision (Section 3):

> "No order made under this Act shall be questioned in any Court".

5. Section 84(1) of the *Fair Competition Act, 2003*:

"*A* judgment or order of the Tribunal on any matter before it shall, subject to sub-section (2), be final."

6. Section 55 of the *Railways Act, 2002* (No 4):

> "Where a person is convicted of an offence under this Act and is operating a railway; SUMATRA may in its absolute discretion suspend or vary the terms of the operating licence of such person or impose such other condition as it may think fit, provided that any person aggrieved by the decision of the SUMATRA pursuant to this Act may appeal to the Fair Competition Tribunal with sixty days from the date of such decision and the decision of the Fair Competition Tribunal shall be final."

7. Section 34 of the *Local Government (Elections) Act*, [Cap 292 RE 2002]:

.

(1) Every appeal under section 27 or 33 shall state shortly the grounds of appeal, and shall be accompanied by the sum of five hundred shillings as a deposit.
(2) The Resident Magistrate shall hear every appeal in public giving notice of the time, date and place of the hearing of the appeal to the parties concerned; and it shall be in his discretion whether to hear or not to hear any evidence. His determination of the appeal shall be final and conclusive and shall not be called in question in any court.

COURTS AND EXCLUSIONARY CLAUSES

Dislike of Ouster Clauses

Just as the executive have never been pleased with interference of the exercise of powers through judicial review, courts have never been happy with provisions

which oust their jurisdiction. As Biron J held in *Mtenga v. University of Dar es Salaam*, [1971] HCD n. 247, the court is jealous of its jurisdiction and it will not lightly find its jurisdiction ousted. The policy which had been adopted by the courts over the years is that such provisions are construed strictly and if there is any ambiguity it would be resolved in such a way that the court has jurisdiction.

In England

In England, the courts were also very unhappy with exclusionary clauses. In the case of *Anisminic Ltd v. Foreign Compensation Commission and another* [1969]2AC 147 the new principle was set. The House of Lords rejected an ouster clause by construing it strictly. In this case, Lord Reid retorted:

> "Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draughtsman or Parliament had intended to introduce new kind of ouster clause as to prevent any inquiry even as to whether a document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others: if that were intended it would be easy to say so."

It is to be noted that under the doctrine of parliamentary supremacy English courts cannot hold any statutory provision invalid or even unconstitutional as in our jurisdiction. The courts were left with only an option of "strict interpretation." Thus, the Law Lords did not say that the provision was invalid

but that they never thought that the Parliament intended to protect a nullity. So cases of nullity were covered by that provision. The principle which came out of this case is that if a tribunal or any other public authority was protected by an exclusionary such protection would be accepted by courts if such a body does not exceed its jurisdiction or decide illegally.

In Tanzania

In earlier years the courts in Tanzania had to succumb to various ouster clauses.[154] Many statutes ousted the jurisdiction of normal courts, the most famous one being the Preventive Detention Act, 1962 which allowed the President to detain persons indefinitely but such persons could not challenge such detentions in any court. One of the earlier expressions of dissent is that which was aired by Biron J in Mtenga's Case (supra). His Lordship said:

> "It is trite to observe that a court is and has to be for the protection of the public, jealous of its jurisdiction and will not lightly find its jurisdiction ousted. The legislature may and often does I am afraid, far too often, oust the jurisdiction of the court in certain matters, but for the court to find that the legislature has ousted its jurisdiction, the legislature must so state in no uncertain and in the most unequivocal terms."

In the case of *Mwanza Restaurant and Catering Association v. Mwanza Municipal Director*[155] Mwalusanya J dealt with section 15 of the *Regulation of Prices Act, 1973* which provided thus:

[154] See an extensive review of such cases in *Mwanza Restaurant* case.
[155] High Court (at Mwanza), Misc. Civil Cause No 3 of 1987 (unreported).

> "No decision of the Price Commission, or Assistant Price Commissioner made or purporting to have been made pursuant to any provision of this part shall be subject to review by any Court on any ground whatsoever."

After reviewing many common law decisions on the exclusionary clauses, the judge held that he had jurisdiction to deal with the matter. Employing Marxist philosophical language, he observed:

> ".. the ouster clauses are used to cover up or hide the errors or blunders of the ruling class and its statutory bodies. The judiciary has therefore a duty to see to it that the ruled are not oppressed by the ruling class unnecessarily or purely to serve the immediate interests of those who cling to power. The judiciary has a role to enhance the rights of the people. It is through the courts that people can defend their rights."

In the case of *OTTU (on behalf of P P Magasha) v Attorney-General and another* [1997] TLR 30, section 27(1C) of the *Industrial Court of Tanzania Act 1968* as amended by Act 3 of 1990, which provided that decisions of the Industrial Court were final; they could thus not be challenged. The appellant had instituted a trade dispute in the industrial Court arising from the alleged wrongful termination of his services by his employer. The action was dismissed by the Industrial Court. The appellant was advised that no appeal lay against a decision of the Industrial Court in view of the provisions of s 27 (1C) of the Industrial Court of Tanzania Act 1968 as amended by Act 3 of 1990. The appellant contended that this provision infringed his rights under article 13(6) of the Constitution, which guaranteed the right of appeal against a decision of a court of law.

Held:

(i). That s 27(1C) deprived a person of his basic right of appeal or another legal remedy except on grounds of lack of jurisdiction and was therefore unconstitutional and invalid;

(ii). That s 27(1C) was not saved by the provisions of article 30(2) of the Constitution: there were no overriding public or societal interests reasonably linked to the Constitution imposed under s 27(1C);

(iii) .That circumstances such as the constitution of the court; the elaborateness of its procedure, the permissible legal representation and the elegance and lucidity of the court's judgments were completely irrelevant to the issue in the present case.

- The Court accordingly declared s 27(1C) unconstitutional.

In a different case, the High Court had held in *Tanzania Air Services Ltd v Minister for Labour* [1996] TLR 217 that even if appeal was disallowed by a statute a party could still go to the High Court by the way of judicial review.

The Court of Appeal of Tanzania also stated its strong misgivings towards exclusionary clauses. In fact it went farther to declare that such provisions are unconstitutional because they are enacted in breach of the doctrine of separation of powers. This was in the case of *The Attorney General v Lohay Akonaay and Joseph Lohay* [1995] TLR 80 in which the court partly remarked:

> "We agree that the Constitution allows the establishment of quasi-judicial bodies, such as the Land Tribunal. What we do not agree is

> that the Constitution allows the courts to be ousted of jurisdiction by conferring exclusive jurisdiction on such quasi-judicial bodies. It is the basic structure of a democratic constitution that state power is divided and distributed between three state pillars. These are the Executive, vested with executive power; the Legislature vested with legislative power, and the Judicature vested with judicial powers. This is clearly so stated under art 4 of the Constitution. This basic structure is essential to any democratic constitution and cannot be changed or abridged while retaining the democratic nature of the constitution. *It follows therefore that wherever the constitution establishes or permits the establishment of any other institution or body with executive or legislative or judicial power, such institution or body is meant to function not in lieu of or in derogation of these three central pillars of the state, but only in aid of and subordinate to those pillars. It follows therefore that since our Constitution is democratic, <u>any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional</u>.* What can properly be done wherever need arises to confer adjudicative jurisdiction on bodies other than the courts, is to provide for finality of adjudication, such as by appeal or review to a superior court, such as the High Court or Court of Appeal."

CONSTITUTION AND OUSTER CLAUSES

General Survey

The members of the executive have at times been ingenious to find new ways to keep the courts away from questioning matters which they do not want the courts to. One clever innovation is to entrench the exclusionary clauses in the Constitution. The reason is that it is not easy for the court to ignore or declare a constitutional provision invalid. Thus, the exclusionary clause which is hidden in the Constitution is relatively safer. The Constitution of the United Republic of Tanzania has at least three exclusionary clauses.

Article 41(7) provides, "Iwapo mgombea ametangazwa na Tume ya Uchaguzi kwamba amechaguliwa kuwa Rais kwa mujibu wa ibara hii, basi hakuna

mahakama yoyote itakayokuwa na mamlaka ya kuchunguza kuchaguliwa kwake."

A hasty translation of this provision is that once a candidate has been declared to have been elected to the office of presidency by the Electoral Commission no court would have an authority to inquire how he was elected. This provision, as one may argue, was intended to cover up everything —— good and dirty. It seems to suggest that even if the presidential election was rigged nothing could be done to challenge that election once the results are officially declared. The provision is yet to be interpreted by courts but it is unlikely that any Court will interpret it in that way. According to it, once the Electoral Commission declares the results then nothing can be done —— it is over. Perhaps a more practical approach would be for a party to quickly file an application for an injunctive order or prohibition to restrain the Commission from declaring the results until the suit to challenge the election is determined.

A somewhat similar provision is found under Article 74(12) of the Constitution:

> "Hakuna mahakama yoyote itakayokuwa na mamlaka ya kuchunguza jambo lolote lililotendwa na Tume ya Uchaguzi katika kutekeleza madaraka yake kwa mujibu wa masharti ya ibara hii."

This exclusionary clause came under spotlight in the case of *Attorney-General and two others v Aman Walid Kabourou* [1996] TLR 156. The Court of Appeal said that provision cannot be construed to protect illegal actions by the Electoral Commission and that "the High Court of this country has a supervisory jurisdiction to inquire into the legality of anything done or made by a public authority, and this jurisdiction includes the power to inquire into the legality of an official proclamation by the Electoral Commission (tamko rasmi). "

See also Article 100 of the Constitution which may be looked at as being progressive as it enhances freedom of speech in the National Assembly.

Article 107A of the Constitution – A burial of exclusionary clauses?

In 2000, through the 13th amendments to the Constitution, many amendments were introduced to the Constitution. One of them was the introduction of Article 107A which provides:

> "107A (1) Mamlaka yenye kauli ya mwisho ya utoaji haki katika Jamhuri ya Muungano itakuwa ni ya Mahakama."

A rough translation of this provision is that the judiciary has the final authority in all matters of administration of justice. (See Nguni's case[156]).

Now, on the basis of this provision it may be safely argued that all exclusionary clauses could be challenged as unconstitutional. The reason is that they tend to exclude the judiciary from adjudicating disputes and vest such responsibility in the executive whose duty is not to administer justice. The courts are yet to interpret this provision and it would be very interesting to see exclusionary clauses challenged on account of this provision.

As it would appear, it is easy for any lawyer to make a submission to the court that a certain statutory exclusionary clause to be unconstitutional. The difficulty now is whether one can argue that an exclusionary clause which is entrenched in the Constitution to be unconstitutional. The question is, is it possible for the court to declare a constitutional provision unconstitutional? Lugakingira J (as he

[156] *The Judge i/c High Court Arusha, and Attorney General vs. N.I.N. Munuo Ng'uni*, Civil Appeal No. 45 of 1998 (unreported).

then was) briefly (though impliedly) dealt with this problem in the case of *Rev Christopher Mtikila v. Attorney General* [1995] TLR 31. He did what he called "harmonisation." He said if one constitutional provision is contradictory to another provision in the same and one Constitution, the court may disregard one provision and enforce another which upholds the individual right. Of course, he never suggested that the court had any scintilla of power to declare a constitutional provision unconstitutional.

In a recent case, *Rev Christopher Mtikila v Attorney General*[157] constitutional provisions were challenged. The Court concluded thus, "… this Court may indeed declare some provisions of the Constitution, unconstitutional."[158] This is a new breakthrough and it is extremely interesting finding. The jurisprudence has it that a court can interpret the Constitution but cannot declare it unconstitutional because the court is itself a creature of constitution.[159] The branches to the tree cannot cut its stem. Nevertheless, the Court declared that it is possible.

---

[157] Misc. Civil Cause No. 10 of 2005 (unreported).

[158] In this particular case the Court did not come out clearly whether it had declared constitutional provisions or the amending Act unconstitutional. At page 34, the Court said: "In our considered view the right to join or not to join political parties is as fundamental as the right to religious belief which cannot be made a basis for contesting for an elective political post. And so we proceed to hold that the provisions of Articles 21(1), 39(1)(c) and 67(1)(b) are violative of Articles 20 and 21 of the Constitution. But the contraventions alone are not sufficient to declare the Articles, unconstitutional. This then takes us to the second issue which is whether the impugned Articles meet the proportionality test?" Having discussed the proportionality test, it concluded at 31: "…we wish to make it very plain that in our view Act 34 of 1994 which amended Article 21(1) so as to cross refer it to Articles 5, 39, and 67 which introduced into the Constitution, restrictions on participation of public affairs and the running of the government to party members only was an infringement on the fundamental right and that the restriction was unnecessary and unreasonable, and so did not meet the test of proportionality. We thus proceed to declare that the said amendments to Articles 21(1), 39(1)(c) and 67(10)(b) are unconstitutional." Which provisions are being declared unconstitutional here? Is it constitutional provisions or the amending Act?

[159] Read the case of *Uganda v. Commissioner of Prisons, ex-parte Matovu[*1966] E.A. 514.

Also objected in this case was an enactment (a statute) through which the amendments to the Constitution were made. The enactment was challenged as unconstitutional. The Court agreed that law (a statute) was unconstitutional and declared it null and void. This approach is, however, not entirely free from problems. According to the conventional science of legislation, an Act of Parliament which is entirely intended to amend another law ceases to exist as a separate law when it is passed and assented to by the President. Now, could the court declare a non-existent law unconstitutional? It would be very interesting to see a decision of the Court of Appeal on this specific aspect.

References

Carroll, A., (2003), *Constitutional Law and Administrative Law*, 3rd edtn, Pearson, London.

Peter, C., (1997), *Human Rights in Tanzania*: *Selected Cases and Materials*, Rüdiger Köppeverlag, Kölon.