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QUESTION; Using decided cases, critically examine how Judges in Tanzania have translated the Bill of Rights into reality. What recommendations do you have to make it more meaningful to the daily life of the people of this country?

OUTLINE

INTRODUCTION

- Background of the Bill of Rights into Tanzania.

MEANING OF TERMS

- Bill of Rights

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- How Judges in Tanzania apply Human rights in deciding cases (justiciability)

- Limitations of Justiciabiity.

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INTRODUCTION

Background of the Bill of Rights in Tanzania.

Tracing way back in the colonial Tanganyika, one could not talk of human rights. For the colonial government to pretend to uphold fundamental rights and freedoms would defeat the very aim of colonization[i]. Thereafter, Tanganyika as well as Zanzibar had their constitutions entrenched with Fundamental rights and freedoms. For instance at the independence in 1963, Zanzibar had fundamental rights and freedoms enshrined into Constitution *vide* a Bill of Rights.

The **Bill of Rights** was incorporated into the Constitution of the United Republic of Tanzania of 1977 in 1984 following the Fifth Amendment of the Constitution[ii]. However the justiciability of the provision of the basic rights and freedoms in the court of law was suspended for a period of three years through the constitution (Consequential Transitional and Temporary Provisions Act, 1984).[iii]

In spite of its decision to suspend justiciability, the government still respected the rights and duties of individuals. But the individual had no remedy in law. The Bill of rights was officially made fully justiciable on 1st of March, 1988.[iv] With this the government allowed the Constitution provisions on the Basic Rights and Freedoms to burden of the Judiciary (Courts of Law). It was now up to the parties to raise the matter or the court itself in the exercise of its inherent jurisdiction could raise the matter *suo moto.*

DEFINITIONS OF TERMS

Adhering to the question at hand, focus will be directed to the meaning of the term Bill of Rights, in the main body we shall examine critically the way judges in Tanzania translate the bill in reality, then our recommendations will finalize.

According to the Concise Oxford Dictionary, **Bill of Rights** is a statement of rights, in particular the English Constitutional settlement of 1689 and the 1st ten amendments to the Constitution of the US, ratified, 1791.

In Tanzanian context, the **Bills of Rights** are the rights which are inherent to man as a human being. Thus these rights are not given to a man

individually but rather inherent (natural). It was stated in the case of **Rev. Christopher Mtikila v. Attorney General,**[v] that;

> "*fundamental rights are not gifts from the state but they are inherent in a person by virtue of birth, and they are prior to the state and the law, the enactment of those rights in the constitution is mere evidence of their recognition and intention that they should be enforceable in court of law and an intention of those rights should not be arbitrarily restricted by the state.*"

MAINBODY

Before going further, it is of supreme importance to point out that, there are a lot of rights as stipulated in Part two of the Constitution of the United Republic of Tanzania of 1977 as amended in 2005. Some of the rights *inter alia* included therein are; the right to life, freedom of movement, equality before the law, the right to work, the right to own property, right to be heard, independence of judiciary, separation of power and right to bail and presumption of innocence.

The issue on ***how Judges in Tanzania have translated the Bill of Rights into reality*** can be observed in various **decided cases**. Therefore hereunder are some discussed rights and the relevant cases as decided by Judges in Tanzania, and how they translated the bill of rights into reality in their decisions.

The right to life; this is provided for under Article 14 of the Constitution of the United Republic of Tanzania of 1977 as amended in 2005 that;

> "*Every person has the right to live and to the protection of his life by the society in association with the law.*"

Every one has the right to life, liberty and security of person.[vi] This is the most important of all human rights. All human rights provide for the protection of the right to life.

Death penalty among other things, infringe the right to life. This was stated in the case of **R v. Mbushuu and another,**[vii] it was held that death penalty offends the right to dignity, how it is executed and thus Contrary to Article 13(6)(d) of the Constitution. The penalty is inherently cruel, inhuman

and degrading punishment and the process of hanging is particularly gruesome, generally sordid, debasing and brutalizing as provided for under the Constitution. In the court of Appeal the questions were; whether the law providing for death penalty is a lawful law that is not arbitrary; and whether the death penalty is not more than reasonably necessary to achieve the legitimate object of protecting the society from killings of one another with *malice aforethought* .

The court **held** that the death penalty is not arbitrary, hence a lawful law and is reasonable. Therefore the death penalty and the laws prescribing, it is saved by the Constitution and thus Constitutional.

The right to equality before the law; this is provided for under Article 13(1) of the Constitution. All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law. The form of guarantee against discrimination goes hand in hand with the current spirit of the International Community which emphasizes the need of equality of all human beings as part of the International Community.[viii]In the case of **JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL**[ix], it was stated that a person's right of access of justice is one of the most important in a democratic society and, in Tanzania that right could only be limited by legislation that was not only clear but also which was not violative of the Constitution. The fundamental rights of access of justice was what linked together the three pillars of the Constitution; that is the rule of law, fundamental rights and independent, impartial and accessible judicature.

The right to work, as provided for under Article 22(1) of the Constitution of the United Republic of Tanzania. The right to work is important as it is related to the very survival of the individual and the society in general. It is close to the right to life itself as this requires legal protection. Lord Denning in **LEE v SHAWMAN'S GUILD** of Great Britain[x] remarked that,

> *"A man's right to work is just as important to him as, if not important than his right of property. These courts intervene everyday to protect rights of property they must also intervene to protect the right to work."*

Also it was stated in the case of **AUGUSTINE MASATU v. MWANZA TEXTILE LTD**[xi]**,** by Mwalusanya J, that;

> *"the right to work is a fundamental human right which is above and over ordinary legislation and so if the right to work had been taken*

away by ordinary legislation, then the same stood as a good chance of being declared void and unconstitutional by 1st March, 1988 when the Bill of Rights became justiciable."

The right to worship, as provided for under Article 19 (1) of the Constitution of the United Republic of Tanzania. Every person has the right to the freedom of thought or conscience, belief, or faith and choice in matters of religion, including the freedom to change his religion or faith.

It was stated in the case of **HAMISI RAJABU DIBAGULA v. R** that;

"The freedom enshrined in Article 19 includes the right to profess, practice and propagate religion. Since profession, practice or propagation of religious faith, belief or worship is also a form or manifestation of a person's expression, it must be correct to say, as we do, that freedom of religion is also impliedly guaranteed under Article 18(A) of the Constitution. That freedom, like other freedoms, is not an absolute right. The exercise of it, just as the exercise of other freedoms, is subject to the requirements of public peace, morality and good order, which are requisites of the common good of society."

The judges in this case also referred to the wise words of Voltaire, the 18th Century French Philosopher:

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[i] Peter C.M, Human Rights in Tanzania, Selected Cases and Materials, p *2*

[ii] Constitution (Fifth) (Amendment) act, 1984

[iii] Section 5 (2)

[iv] Lubuva D.Z, Reflections on Tanzanian Bill of Rights

[v] (1995) T.L.R 31

[vi] Art. 3 of The Universal Declaration of Human Rights 1948 (United Nations General Assembly Resolution 217

[vii] (1994) 2 LRC 335. *42*

[viii] Peter C.M, Human Rights in Tanzania, Selected Cases and Materials, p *42*

[ix] Court of Appeal of Tanzania at Dar ea Salaam, Civ. App. No. 64 of 2001

[x] (1952) 2 Q.B. 329

[xi] High Court of Tanzania at Mwanza, Civil Case no.3 of 1986 (Unreported)

"I disagree profoundly with every word that you say but I shall defend unto the death your right to say it".

With this, and other reasons stated therein, the judges decided to quash the conviction, allow the appeal and set aside the sentence imposed thereon.

The right to be heard; this provided for under Article 18 of the Constitution of the United Republic of Tanzania. The right to be heard otherwise is referred to as *audi alterem partem rule*. It is the second principle of the rules of natural justice. This rule requires that before the person is condemned or judged, he should be granted opportunity to present his side of the story. There are two requirements; **first**, the person should be adequately briefed of the case facing him. This is important for the purpose of arming the accused properly as he can only effectively controvert that which he is aware of. Also he can only conduct a meaningful re – examination of witnesses deposing against him if he has access to everything against him. **Secondly**, the person should then be given the opportunity to face his accusers. An example of the applicability of this right is the case of **NYIRABU GITANO NYIRABU and THREE OTHERS v. BOARD CHAIRMAN, SONGEA BOYS SECONDARY SCHOOL and THREE OTHERS**. Citing several authorities on the importance of the right to be heard as an Integral part of rules of natural justice. Samatta J.K granted both *certiorari and mandamus* quashing the decision of the Board of Songea Boys Secondary School to expel the four appellants from school. In addition he directed that the Board to consider the accusation made against the applicant *de novo* and in accordance with the principles of Natural Justice.

The independence of Judiciary and Separation of powers; the judges and the judiciary in general occupy a special position in any democratic society. They are part and parcel of the state within the doctrine of separation of powers.

On the basis of the separation of powers, the state surrenders judicial power to the judiciary which will have compulsory jurisdiction to enquire into disputes and there then give binding, authoritative and enforceable decisions, thus its independence is of utmost importance.[xii]

Also in realization of the importance of the independence of Judiciary, the International Community has come up with the principle that; *"The principle of the independence of judiciary entitles and requires the judiciary*

[xii] Peter, C.M, Human Rights in Tanzania, Cases and Materials, p. 482

to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected."

Moreover, the Basic Rights and Duties Enforcement Act,[xiii] provides for the procedures for enforcement of Constitutional basic rights, for duties and related matters.

Despite the Justiciability of the Bill of Rights, the Judges face some limitations. There are some incidences where the Judges fail to exercise full independence in deciding cases due to the interference by the Executive. This organ outwits the judiciary by inserting ouster clauses in areas of the Constitution and other laws where it does not want the court to exercise authority. These **limitations a**re as follows;

The Electoral Commission limits the court to enquire into anything done by the Electoral Commission in discharge of its function in accordance with the provisions of Article 74(12) of the Constitution of the United Republic of Tanzania. A good example is the By – Election incident in Pemba of 2003. The High Court of Zanzibar dismissed the appeal by CUF (Political Party) due to the technicality.

A decision of the Registrar of Political parties is final. No court can challenge how he performs his responsibilities. Again the Registrar and his assistants are protected against suit as provided for under Section 6.[xiv]

Further, the election of the President of the United Republic of Tanzania or of Zanzibar can not be contested in the courts.

The powers and actions of the Regional and District Commissioners of detaining people under their respective detention Acts (both of 1962 as amended by Act No. 119 of 1963 and Act No. 17 of 1985), can not be challenged in any court of law. However the Preventive Detention Act of 1962, which empowers the President to detain people without showing cause, or recourse to courts was amended in 1985, to among other things permit people concerned to challenge the justification for their detention I courts. This can also be observed in the case of **Ahmed Janmohamed Dhirani v. Republic**[xv] where the detention of the said Ahmed Janmohamed

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[xiii] SECTION 3 of The Basic Rights and Duties Act, [Cap 3 R.E 2002]

[xiv] The Political Parties Act of 1992

[xv](1979) LRT No. 1

Dhirani under the custody of the Officer-in-Charge, Butimba Prson, was declared lawful.

Another incidence is that, the President can suspend any Law during a state of emergence so as to act unchallenged by individuals and courts. This is provided for under the Emergence Powers Act.[xvi]

Nonetheless, the Executive (government) must receive a notice of ninety (90) days before an aggrieved individual takes it to court. In such cases the judiciary can do nothing to accelerate the awarding of justice. This is portrayed in the case of Peter Ng'omango v. Gerson M.K Mwangwa and Another.[xvii] In this case the High Court of Tanzania attacked the queer requirement of the consent in order to sue the government. This was followed by the Court of Appeal of Tanzania in **Pumbun and Another v. Attorney General and Another**[xviii]. The two courts insisted to bring equality between the parts on the United Republic. While citizens in Tanzania mainland could no sue the government without getting the permit, those n Tanzania Zanzibar could sue the same government after giving it one month's notice. The decisions by the courts of law have not the spirit of the government. All these cases notwithstanding, the government has restrained its isolative strategy through the back door on the matters of enforcement of the Basic Human Rights enshrined in the Constitution of the United Republic on Tanzania. This has been through the enactment of the Basic Rights and Duties Enforcement Act of 1994. This Act introduced very cumbersome procedures in human rights enforcement in the country. The procedures which were adopted *suo moto* by the High Court had been criticized as bogged down by technicalities. One would expect the new law to cure this abnormality by following examples from persuasive jurisdiction, but to our bewilderment the Act rails off the intended policy of Article 30 of the Constitution of the United Republic of Tanzania and the Bill of Rights in general.[xix]

[xvi] Emergence Powers Act, No 1 of 1980, Sections 7 and 18

[xvii] High Court on Tanzania at Dodoma, Civ. Case No. 22 of 1992 (unreported)

[xviii] [1993] 2 LRT 317

[xix] Peter C.M, Human Rights in Tanzania, Selected Cases and Materials, pp. 308 – 309.

RECOMMENDATIONS

In order for the Bill of Rights to be more meaningful to the daily life of the people of this country; we **recommend** the following;

Firstly, the government should ensure true Independence of Judiciary. This is by letting go of the interference of by the other arms on the government especially the Executive in judicial functions. For example the President is empowered under virtue of Articles 118(2)(3) and Article 108 of the Constitution of the United Republic of Tanzania, to appoint the Judges. The duty should be left to the judiciary itself. With that, judges can freely dispense justice.

For the example in the case of **Rev. Mtikila v. Attorney General** (supra) the provisions of the Election Act[xx] that a person can not contest for presidency as an independent candidate, is unconstitutional.

Also, the independence of judiciary does not mean license to discharge the judicial function in whatever manner it pleases. There are accepted legal values, substantive and procedural rules of law, both implicit and explicit which should guide judges and magistrates. These are Constitutional principles, values of the society, the body of law of the society. Accountability to the people and their national objectives; and ethics of legal fraternity.

[xx] Cap 1 of 1992

CONCLUSION

In a nutshell it can be concluded that; the Bill of rights embodies the fundamental rights and duties of the individuals in the country. These should be observed so as to assure the true freedom of individuals. This can only be done by allowing full justiciability of the Bill of Rights; hence judges in Tanzania should be free to determine matters in courts of law by applying the Bill of Rights adequately where need be. In so doing they translate the Bill of Rights into reality.