

MZUMBE UNIVERSITY



FACULTY OF LAW

COURSE: L.LLB 1

SUBJECT: CONSTITUTIONAL LAW

CODE: LAW 127

NATURE OF WORK: GROUP PRESENTATION

DATE: 22ND AUGUST, 2008

PARTICIPANTS: 1) KAREN MRANGO

- 2) MAGONGO TAMASHA
- 3) THERESIA HIZZA
- 4) MPITANJIA, JOHN
- 5) MDACHI CHRISTINE
- 6) NDOMBA BERTHA
- 7) VEDASTUS MWARIA
- 8) NGOGO HAPPY
- 9) LALL, PARMINDER.
- 10) REBECCA MICHAEL

QUESTION 6; "It is essential in a democratic society which believes in the equality of all of its citizens

that every individual should subject to the law. Further, it is of paramount importance

that the execution of the law should be without fear or favour. Judiciary at every level

must be independent of the executive arm of the **State.**" Discuss.

OUTLINE

1.0: INTRODUCTION

1.1: Concept of democracy and democratic society

1.2: Rule of law

1.2.1: Features of rule of law

1.2.1.1: Ruling according to law

1.2.1.2: Parliamentary supremacy

1.2.1.3: Bill of rights

1.2.1.4: Separation of powers

1.2.1.5: Independence of Judiciary

2.0: MAIN BODY

2.1: Independence of judiciary in Tanzania

2.1.1: Dimension of independence of judiciary

2.1.1.1: Separation of judicial power and personnel from
the

Executive and Legislature

2.1.1.2: Security of tenure

2.1.1.3: Remuneration or Personal emoluments

2.1.1.4: Judicial immunity

2.2: How independence of judiciary is a foundation of democracy

2.3: Factors undermining the Independence of the Judiciary

3.0: RECOMMENDATION

4.0: CONCLUSION

4.0: BIBLIOGRAPHY

1.0: INTRODUCTION.

Any society living by following the doctrine of rule of law is said to be a democratic society whereby the citizens are required to adhere to the laws of the country as confined to themselves, that every individual should be subjected to the law. Our question invites us to discuss the independence of Judiciary in Tanzania.

1.1: Concept of democracy and democratic society.

According to Dahl, he said that democracy is taken to include all political systems falling in which the opportunity to participate in decisions is restricted to a few.ⁱ According to the Law Lexicon a democratic society is a society that advocates and practices principles of democracy.ⁱⁱ

1.2: Rule of law.

Rule of law as provided for under Article 13 of the Constitution of the United Republic of Tanzania herein referred as CURT, in one of the principles of democracy. The doctrine of rule of law originated many years ago during the middle age. But it became clearly formulated after emergence of capitalism. It became part and parcel of liberal democratic constitution. It means a leader or any person vested with powers should lead or exercise those powers according to that law. The modern concept of rule of law is that rulers or leaders should or lead according to law, but such laws must be reasonable. Making laws which are oppressive and ruling according them, one can not claim that there is rule of law as provided for under Article 13 (2) of the CURT. So the laws made must be fair and not arbitrary.

According to Dicey, rule of law means equity before the law or the equal subjection of all classes to the ordinary courts of law in this sense. The role that officials like citizens is under a duty to obey the source of Law.

1.2.1: Features of Rule of law

Rule of law comprises of the following features;

1.2.1.1: Ruling according to law; It means a leader or any person vested with powers should lead or exercise those powers according to that law. The law should be reasonable, fair and not oppressive.

1.2.1.2: Parliamentary supremacy; According to Dicey, parliamentary supremacy means the rights to make or unmake law and that no person is recognized by law as having rights to override or set aside the legislation of parliament. Also this is provided for under Article 64(1) of the CURT. The doctrine of supremacy of parliament originated from British Constitution. This doctrine became applicable in various countries including Tanzania. It is only Parliament which is empowered to make or amend law in Tanzania.

1.2.1.3: Bill of rights; this simply refers to the human or basic human rights, these are rights which human beings deserve simply because they are human beings, such rights are not created by the Constitution but the CURT has to guarantee them. Examples of those rights are Right to life, equality before the law, right to own property, right to liberty and self expression, *inter alia*. This provided for under Part three of the CURT.

1.2.1.4: Separation of Powers; the doctrine of separation of powers was propounded by Montesquieu in the 19th century when feudalism started collapsing, but this idea started as early as the time when Aristotle was alive. The doctrine advocates the division of government into three organs and each organ should have its powers and functions. These organs are Executive to administer and enforce law and policies, Legislature or the Parliament to make and unmake laws and the Judiciary to apply the laws

made by the parliament. These are provided for under Chapter Two, Three and Five of the CURT respectively.

The doctrine of separation of powers has played a prominent part in the theory and practice of the constitution making and practically influenced the framers of the Constitution. Separation of powers may mean that the same person should not form part of more than one of the three organs of the government and that one organ of the government should not control or interfere with the exercise of its function by another, for instance ministers should not have legislative powers. In the field of judiciary, independence and separation of power is strictly observed.

Judiciary is secured by law and by public opinion. In our question we are going to discuss about the independence of judiciary in Tanzania.

2.0: MAIN BODY

2.1: Independence of judiciary in Tanzania; The word Judiciary is referred to that branch of government vested with the judicial power – The Bench. It is that branch of the government which interprets, construes and applies the law.ⁱⁱⁱ

Judiciary in Tanzania constitutes of the court of Appeal of the United Republic of Tanzania which is provided for under Article 117 of the CURT. The High Court of the United Republic as provided for under Article 108 of the CURT, together with all other courts which are subordinate to the High Court.

Therefore there are two sets of judiciary in Tanzania, the first one comprises of Subordinate Courts, High Court of Tanzania and the Court of Appeal of Tanzania. The second comprises of Subordinate courts, the High Court of Zanzibar and the Court of Appeal of Tanzania.

Independence of Judiciary; Here in Tanzania, in the case of **Republic v. Idd Mtengule**,^{iv} Chipeta J had the following to say, on the meaning of the independent Judiciary;

“As I understand the Constitution position in our country, the judiciary is supposed to be an independent institution in the sense that those, who are entrusted by the Constitution to decide the right and liabilities or the guilt or innocence of people must be free from all kinds of pressures regardless or the corners from which those pressures come. The

judiciary must be free from political, executive or emotional pressures, it is going to work with the smoothness and integrity expected or it under the supreme law of the land – the Constitution. It must not be subjected nor succumb to intimidation of any kind.”

2.1.1: Dimension of Judicial independence; The judiciary in Tanzania is a creation of the Constitution whether it is independent or not may be examined from the various aspects or dimensions which measure such independence.^v

2.1.1.1: Separation of Judicial Powers and personnel from the Executive and the Legislature; the structure of the Constitution provides for three distinct branches of government, which are Executive, Legislature and the Judiciary and functions of each branch are spelt out. It can be said therefore that the Constitution does provide for separation of judiciary powers from the executive and the legislature. This dimension requires that there should be separate of judicial officers from Executive so as to enable justice to be done and seen to be done. Judicial officers should be free from interference of executive and legislature in exercise of the judicial function. A judge is just to be a judge, and he should be separated from the executive and legislature. The rationale is so as justice to be served.

2.1.1.2: Security of tenure; this is concerned on how the judges and magistrates can be removed from the office. The Constitution does provide for security of tenure for judges under Article 110 and 120 of the named Constitution are to the effect that; -

A judge of the High court shall vacate office upon attaining the age of sixty years and justice of Appeal shall vacate office upon attaining the age of sixty five years. A judge of the High court or justice of Appeal may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour.^{vi}

In either case removal from office is conditional upon as adverse recommendation by a Judicial Board. As for District and Resident

magistrates, they hold office until they reach the age of compulsory retirement which is 55 years. A magistrate may be removed from office by the Judicial Service Commission^{vii} established under Article 112 of the CURT. In practice, District and Resident Magistrates are removed from office on grounds similar to those upon which Civil Servants are removed from office by the Civil Service Commission established under the Civil Service Act.

Primary Court Magistrate may be removed from office by a body known as Judicial Service Commission, however, acts on the recommendation of a District or Regional Judicial Board with the consent of the Minister responsible for legal affairs.

2.1.1.3: Remuneration or Personnel emoluments; To avoid executive to influence judges to make decisions in their favour, there is a need to have a remuneration that can not be interfered, as without that protection executives could threaten judges. For example they could reduce their salaries and or impose high tax on them.

To make sure that the situation does not happen in Tanzania, remuneration for judges is covered in the CURT, Article 142(2). Salary and pensions of judges is payable out of the consolidated fund and does not depend on annual parliamentary budgets.

2.1.1.4: Judicial Immunity; the rationale behind Judicial immunity is the protection and maintenance of the concept of independence of judiciary. The immunity is not intended to protect corrupt or malicious judges and magistrates. The immunity is there to serve public interest. Is important for this immunity to enable judges and magistrates to administer justice without fear or favour. Without that protection judges and magistrates would be victims of executives, especially where they make decisions which executives dislike.

ⁱ Constitutionalism in the Common Wealth Today. P. 205

ⁱⁱ The Law Lexicon (2004),

ⁱⁱⁱ Black Law Dictionary, 4th Edn (R) 1963, P.987

^{iv} High court of Tanzania, at Dodoma, (P.C) Crm. Rev. No. 1 of 1979

^v Nditi N.N, The Independence of the Judiciary

^{vi} The Constitution of The United Republic of Tanzania

^{vii} *ibid*

In Tanzania both Judges and Magistrates enjoy judicial immunity. The High court and Court of Appeal Judges enjoy immunity under Section 66 of the Magistrate Court Act, Cap.11. R.E 2002. The Magistrates enjoy immunity under the same Act. This immunity is granted to judicial personnel when performing judicial functions only.

2.2: How independence of judiciary is a foundation of Democracy

Firstly, the most important justification for the independence of judiciary is that politics, authoritative control or influence or pressure from the government should be kept out of the courts. This is essential for democracy to prevail; the judiciary must act as an arbiter between the government and the citizens. Moreover, the legislature which makes the laws should not enforce them, nor should that institution which yields executive power to enforce the laws. A rule of natural justice states that *'no person should be judge of his own case.'*

Secondly, the judges and magistrates should not be exposed to corruption. The aim is to try and insulate Judges from being subjected to or tempted by corruption.

Third, an independent judiciary, is expected, will be courageous is likely to administer justice without fear or favour, more so if judges are intellectually honest in arriving at decisions.

Fourth, an independent judiciary is intended to keep the courts as decent and venerable institutions where the private citizen will appeal for assistance with confidence.

Fifth, creation of a judiciary is in fact a human endeavor to seek truth and to do justice for parties according to the law, as opposed to arbitrary or capricious settlement of disputes by force. Independence of judiciary is important in this context as a judge will not endeavor to discover the truth if he knows or anticipates some unpleasant consequences of his decision.

Further, it is of paramount importance that the Judiciary be independent because a partial corrupt administration of justice is likely to cause political and social discontent and might precipitate or provoke public disorder or unrest.

Also, an independent judiciary is the only consolation to the minority from being undermined by the majority.

2.3: Factors undermining the independence of judiciary in Tanzania.

According to Chris Maina Peter,^{viii} there are factors that undermine the independence of judiciary in Tanzania, which might seriously affect the independence of judiciary, these factors are as follows;

Corruption; this is not a new phenomenon in this society, currently it is a cry on everybody's lips because its magnitude has reached alarming proportions. Back in the 1960`s Mwl. Nyerere was to complain in the Colonial Legislative Council that;

"I think I would be less than honest if I said that all is well, because it is not. There is corruption if people can not have confidence in their government, if people can feel that justice can be bought, and then what hope are you leaving with the people? They have no other hope."

Protection of incompetent personnel; one of the weaknesses of the judiciary which undermines its dependence is the tendency to protect the incompetent, corrupt and unworthy elements in the department. This is usual where there is a powerful 'Godfather' in strategic position within the government.

Marginalization of the judicial personnel; A hungry and needy person can never be a serious source of justice. It is being said now and then and it is still worthy repeating, that it is essential to pay the judicial personnel well. The emoluments should march their status and the seriousness of the matter they handle in the process of exercising their functions. It is unfair to expose the judicial personnel to an inducement and other illegal attractions due to genuine hardships. Sometimes, it is these hardships which lead to the bending of justice. Therefore, it is not enough to have the salaries and their benefits from of the judicial personnel charged from the consolidated fund of the United Republic but they should be paid well.

Harassment of the judicial personnel; for instance in 1968 a magistrate in Tabora in the course of the exercise of his judicial functions released one Joseph Kassella Bantu on bail pending the hearing of his case. Kassella Bantu, who was then the Member of Parliament for the then Nzega East Constituency, who had been charged with others in connection with killings of cattle rustlers in his constituency. The magistrate who granted bail was

^{viii} Peter C.M, Human Rights in Tanzania, Selected Cases and Materials, p. 486

immediately detained on orders from above.^{ix} Also harassment of the judicial personnel is evidenced in the case of **R v. Idd Mtengule**^x, whereby the magistrate in the course of his work released an accused person who had been charged with selling buns in disobedience of an order by the Area Commissioner banning the sale and or consumption of edibles in a bid to prevent the spread of cholera in the district. Buns were not among the prohibited items in the order by the Area Commissioner. The area commissioner was furious and wrote a stern letter to the magistrate emotionally accusing him of biasness and deliberate attempts to thwart efforts of the authorities to stamp out cholera. He went further than that. He asked the magistrate to explain why he had acquitted the accused and threatened to take stern action against him. The magistrate did not calm down. He retorted immediately and informed the area commissioner that what he was doing was to interfere with the independence of the judiciary. He informed him further that not every accused person is supposed to be convicted as in Tanzania an accused person is presumed innocent until the contrary is proved.

Contempt of court by the government; Independence of judiciary envisages an effective judiciary. This judiciary whose decision will be implemented to the letter. This means that agencies of the governments work closely with the judiciary, that is the police and prisons departments must respect the court of law. in Tanzania it is common place for the government agencies and institution to disregard or simply ignore court orders which there are supposed to enforce. For example in the case of **Lesinai Ndeinai and another v. Regional Prisons Officer**,^{xi} whereby the two applicants in this case were arrested by police in August, 1979 pursuant to orders of the officer Commanding District. From the police custody they were transferred to prison and no formal charges were preferred against them. Being naturally desirous of resumption of their liberty, they filed an application for *Habeas Corpus* in the High Court. The High court granted their application and ordered their immediate release. However the unexpected happened, on stepping outside the court room as freemen, the two were

re - arrested and returned to prison. The order of the court that they be released as their detention was illegal was totally disobeyed by both the police and the prison officials.

^{ix} R v. Kassella Bantu and others (1969) H.C.D No. 170

^x High Court of Tanzania at Dodoma, Crm. Rev. No 1 of 1979 (unreported)

^{xi} High Court of Tanzania at Arusha, Misc. Crm. Cause. No 22 and 23 of 1979 (unreported)

Appointment of judges by the president; Article 118 of the CURT. The chief Justice is appointed by the President under Article 118(2), other judges of the court of Appeal are appointed by the President under Article 118(3), judges of the high court are appointed by the President under Article 108. The appointment of the judges by the executive will infringe the performance of the judges in the course of dispensing justice. The duty to appoint should be left to the judiciary itself.

3.0: RECOMMENDATIONS

It is our view that the system of appointment of judges should be left to the judiciary itself rather than the executive to appoint them because it infringes the performance of these judges. Also the executive should not in any way interfere the function of the judiciary, and the working conditions of the judicial personnel should be improve so as to avoid chances of corruption.

In spite of the disadvantages of interference of executive arm of the government to the judiciary, there are some advantages for instance when the President affirms *death penalty*. If this duty would be left to the judges, many people would loose *their right to life* . When the judges pass death penalties, the convicts wait for the President`s affirmation, the period of waiting for the President`s affirmation gives the prisoners some grace period before death and some of them do get life imprisonment instead of death penalty.

4.0: CONCLUSION

To conclude we can say that the independence of judiciary is desirable, no one will deny. An independent judiciary is the surest protection against abuse of power, thus we concur with the ideas of Mwl. J.K Nyerere that in a democratic society which believes in the equality of all of its citizens, every individual should be subject to the law. And for the execution of the law to be without fear or favour, our judiciary at every level must be independent of the executive arm of the state.

BIBLIOGRAPHY

Constitution

Tanzania Government of, **Constitution of United Republic of Tanzania**,
1977(as amended from time to time),
Government Printers, Dar es Salaam.

Books

Aiyer, P.R (2004); **The Law Lexicon, The Encyclopedia Law Dictionary**,
2nd E.D,

Wadhwa and Co, Nagpur.

De Smith, S.A (2000); **Constitutionalism in the Common Wealth today**,
Malaya Law Review, Malaya.

Maina, C.P (2000); **Human Rights in Tanzania, Selected cases and materials**,

Rudeger Koppe Valag, Koln.

Wade E.C.S and G.G. Philips, **An Outline of the Law and Practice of The**
The constitution including central and local
government

The citizens and the state and Administrative
law,

3rd E.D, lowe and Brydone Ltd, London

