ST AUGUSTINE UNIVERSITY OF TANZANIA

COURSE:- ADVANCED CONSTITUTIONAL LAW

COURSE CODE:- SLW 602

SUBMITTED ON :- 20TH DECEMBER, 2010

SUBMITTED TO:-

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QUESTION:-

Discuss and Explain, with reference to appropriate case law, how the separation of powers doctrine actually works in Tanzania. (5 pages)

The Doctrine of Separation of Powers was first introduced in the 17th Century by the French Philosopher Montesquieu (1689-1755) who is accredited to have propounded this principle. He believed that the system in England was based on separation of powers, of which he was mistaken. But still his principle of separation of powers came to be applied fully in the United States. It was Montesquieu's argument that separation of power between different organs of the state help to deter abuse of power and the three organs mutually act as checks on each thereby balancing it. With due regard, the organs will base on the theory of Checks and Balances.

The three organs or branches of the state namely the Legislature, the Executive and Judiciary:-WHEREAS, The Legislature is the law government body of lawmakers which is an official body, usually chosen by election, with the power to make, change, and repeal laws; The Executive is the government section responsible for decisions**:** the section of a country's government that is responsible for implementing Legislative decisions; and The Judiciary is the government branch dispensing justice: the branch of a country's central administration that is concerned with dispensing justice, court system: a country's system of law courts, judges in general: a country's body of judges.

It is often assured that separation of powers is a mark of democracy. Whereby it is through the same ideology of democracy we get to know how the separation of powers doctrine actually works in Tanzania. Despite the fact that there can be democracy without separation of powers as it is in the case of Britain. The situation is different in Tanzania because we are proud to have a democratic legal system as it ought to be theorized though full of doubts when it comes to its

practice. But one should put in mind that separation of power does not mean disunity of power, hence state power may be separated but integral and unified.

The above being the case one ought to connect the relevance of the doctrine of separation of power and democracy with its mother law statute in Tanzania which is the Constitution of The United Republic of Tanzania due to the fact that it has adopted the said doctrine in its legal system.

Firstly, The Constitution of The United Republic of Tanzania has stipulated a doctrine of separation of powers under Article 4(1) but still it can not be stated that this doctrine is completely being practiced in Tanzania with due regard to Montesquieu's theory. Hence the separation of powers implies the consideration of three things such as;-

".. the state powers should be vested and exercised by three separate institutions or organs, the personnel in these organs must be different, and the functions of the three organs are different as well.."

BUT, this is not the situation in Tanzania. Hence the Head of the Executive is also part of the Legislature and the Cabinet is also derived from the National Assembly. That is to say the President of the United Republic of Tanzania is partly an executive, legislature also take part in the judiciary. For example he is the one responsible in the appointment of the Judicial Service Commission as provided for under Article 112. With due regard to this it is clear that in Tanzania the theory of checks and balances does not apply hence the three organs intermix within their functions.

Secondly, the fact that the courts or judiciary do not have much important discretions such as pronouncing and informing the legislature of the unconstitutionality of certain laws in the constitution while they have sorted the

nullity and make amendments at the appropriate time to avoid overlap of judicial responsibilities whenever necessary. BUT instead it's the duty of the Legislature (Parliament) to do the said as provided for under Article 98 thus influencing the legislature and the executive to repudiate the functions of the judiciary. A good example is the case that denied the judiciary to intervene in the organs functions is the case of Rev. Christopher Mtikila v. The Attorney General[1], it was held that, "courts could only interfere in executive or legislative action or inaction to protect the rights of the individual citizen. Beyond that the courts will not go. They could not formulate policies nor would they compel legislation. They could only make laws either through the doctrine of judicial precedent or in the exercise of the power to make rules of the courts". YET STILL the Legislature and Executive are in a different position unlike the judiciary, as seen in the case of Attorney General v. Rev. Christopher Mtikila[2] in this case Mtikila was questioning on the prohibition for independent candidates for presidential, parliamentary, and civic elections which was introduced by the Eighth Constitutional Amendment Act, 1992 under article 39 (c) that requires that one among the qualifications is that,"…one should be a member and sponsored by a political party.." stating that it is abridging the citizens the right to participate in national affairs as provided for under Article 21(1). It was poignantly summed up by Lugakingira, J. and concluded that, "..it shall be lawful for independent candidates, along with candidates sponsored by political parties to contest presidential, parliamentary and local council elections.." Thus, declaring some provisions of the constitution unconstitutional indirectly. Of which the High Court concluded that due to its jurisdiction given to it under Article 30(5) that the High court has the power to declare a certain law

[1] High Court of Tanzania, Civil Case No. 5 of 1993

[2] The Court of Appeal of Tanzania, Civil Appeal No.45 of 2009

unconstitutional if it is satisfied that any law enacted by the government or any other authority abrogates any of the basic rights, freedoms and duties set out in articles 12-29. BUT in a few days later the parliament changed that ruling through the Court of Appeal under the ground that it is the only body that can alter the provisions of the constitution through the provision of Article 98(2) under the ground that the said article that gives the rights to independent candidate has already been altered and reproduced under the Eleventh Constitutional Amendment. With due regard to the two cases it is clear that the constitution of Tanzania has some claw backs law provisions hence it gives the judiciary some functional rights and it takes them back and surprising enough it takes back those rights through the court itself, by doing so it rises a question as to why the courts are always in favor of the government? The answer to this is very clear that, in Tanzania the members in the three organs are partly members of each organ. As a result it makes me question the Tanzanian democracy as it is. Not only democracy but also this goes beyond the implications of the separation of power that, the *personnel in these organs must be different*. Through the above it is obvious that Article 107(1) and (2) of the constitution are being repudiated as well.

Thirdly, the question of multiparty system in Tanzania is also something to be questioned about in the rule making and democracy. Despite the fact that the Constitution has declared that the United Republic is a democratic and socialist state which adheres a multi-party democracy under Article 3(1), it is clear in Tanzania the ruling party has always covered at least two-thirds of the members of the parliament. Putting in mind that the laws of Tanzania are amended by the parliament but according to the Second Schedule which requires to be supported by at least two thirds of all members of parliament and among the matters that

they ought to deal with is the existence of the office of the President of The United Republic. It is clear that the parliament will make laws that protect the president not only as a president but laws that will protect the ruling party through him. This has been seen in the case of Mwalimu Paul John Mhozya v. Attorney General[3] the applicant sought an interlocutory injunction to restrain of the United Republic of Tanzania from discharging presidential functions pending a determination of the main case[4] in which the applicant sought orders of declaration that the Constitution had been violated, the president was guilty of having enabled the said violation and that the continued exercise of presidential powers by president Ali Hassan Mwinyi was unconstitutional and a potential danger to the well being of the country and its citizens. BUT it was held that, "..one branch of the government should not encroach on the functions of another branch.., no provision of the constitution or any other law authorizes to hold that president can be removed or suspended from office by any body other than that which the constitution specifically provides.., the High Court has no jurisdiction.." With regard to the helding of the court it is clear that the constitution protects the president far beyond reason due to the fact that not only that they amend matters of the Office of the President but they also amend The Authority of The Government of The United Republic. Thus the protection of the ruling party desires is far more protected by the constitution than the protection of the country and its citizens.

Not just with the use of that case that the ruling party is always on its protection but also in the matter of the limited distribution of qualitative weak press, police restrictions during the election seasons, unequal access to media as well as on the

[3]No. 1 (1996) TLR 130 High Court

[4] Civ. Case No. 206 of 1993, by allowing Zanzibar to join an organization known as Islamic Conference Organization

question of political participation in the NEC (National Election Committee) there is no free and fair election hence its members are chosen by the President of which the president who elects them may also be one among the Presidential Candidates. At the same time the elected leader has full power over the role of military thus making the Military muted hence it can not act on its accord but after the command of the President, thus infringing the checks and balance of the organs. A good example can be reflected on the 1995 incidence in Zanzibar where CCM omitted some election provisions, the opposition delegates CUF made violence on response to that. Some were imprisoned for a long term without charge until when the situation was settled in 2001 after an agreement between CCM and CUF.

Finally, I would like to quote what the Retired Judge of the court of Appeal Dc. Robert Kisanga[5] stated in his interview that, "..the constitution is like a living organism..it grows like a human being..we ought to know its needs as it grows.." and he further noted that, "..its not the matter of altering the amendments of the constitution hence our constitution already has enough patches and can not take anymore of those.." he also elaborated that the Constitution which was produced in 1977 has outlived its purpose..thus a need to have a new constitution which will fit the countries desires and needs is highly demanded." He further noted that, "…it is at his knowledge as to why CCM (ruling party) hesitates to allow a big change of the constitution due to the fear of the destiny of its ruling after the enactment of the new constitution.." and clarified those words as, "..fear of the unknown".

It is at my regard according to the above mentioned cases and according to the view of Kitanga, J. that the separation of power does not work in Tanzania as it ought to. Due to the fact that the Constitution is entrenched but it's not easy to obtain its security and that the question of democracy is not adhered because the

[5] Kulikoni Newspaper, dated 10-6th December, pg 1-2

freedom of expression of the people is not favored by the organs that should protect their rights as well as the implication of the doctrine of separation of powers not being adhered to as it has to be.