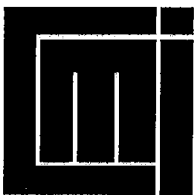


# **Judiciary and Good Governance in Contemporary Tanzania**

Problems and Prospects

Sufian Hemed Bukurura

R 1995: 3  
September 1995



**Report**  
Chr. Michelsen Institute  
Bergen Norway

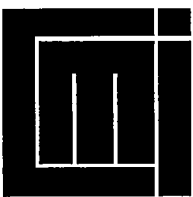
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*CMI Report Series*

Editorial coordinator: Svein Gjerdåker

Cover design by Dynamo Bergen  
Printed by Bergen Print Service AS

This series can be ordered from:

Chr. Michelsen Institute

Fantoftvegen 38

N-5036 Fantoft-Bergen, Norway

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E-mail: [cmi@amadeus.cmi.no](mailto:cmi@amadeus.cmi.no)

Price: NOK 90

ISSN 0805-505X

## **Indexing terms**

Legal institutions

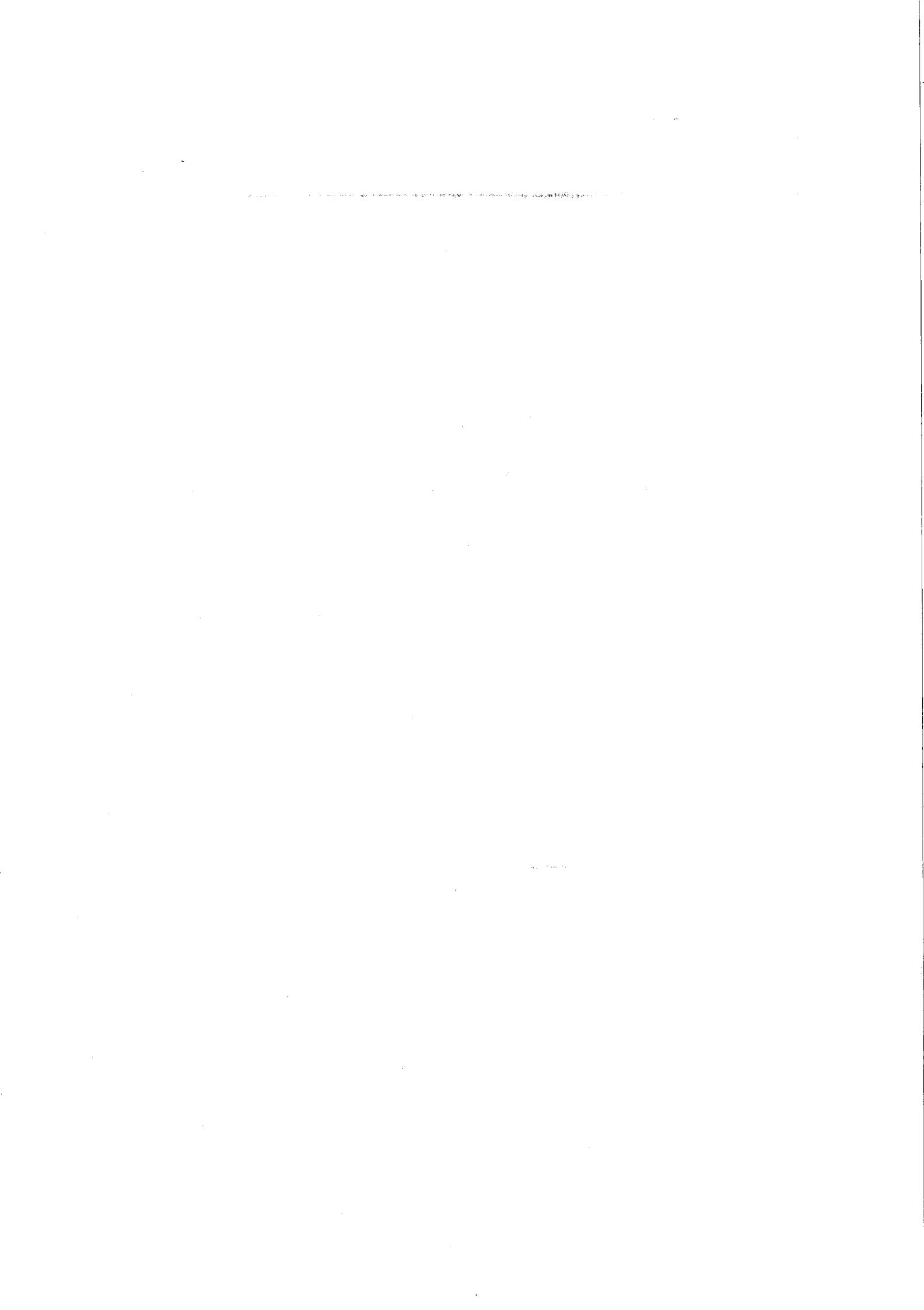
Judicial system

Good governance

Tanzania

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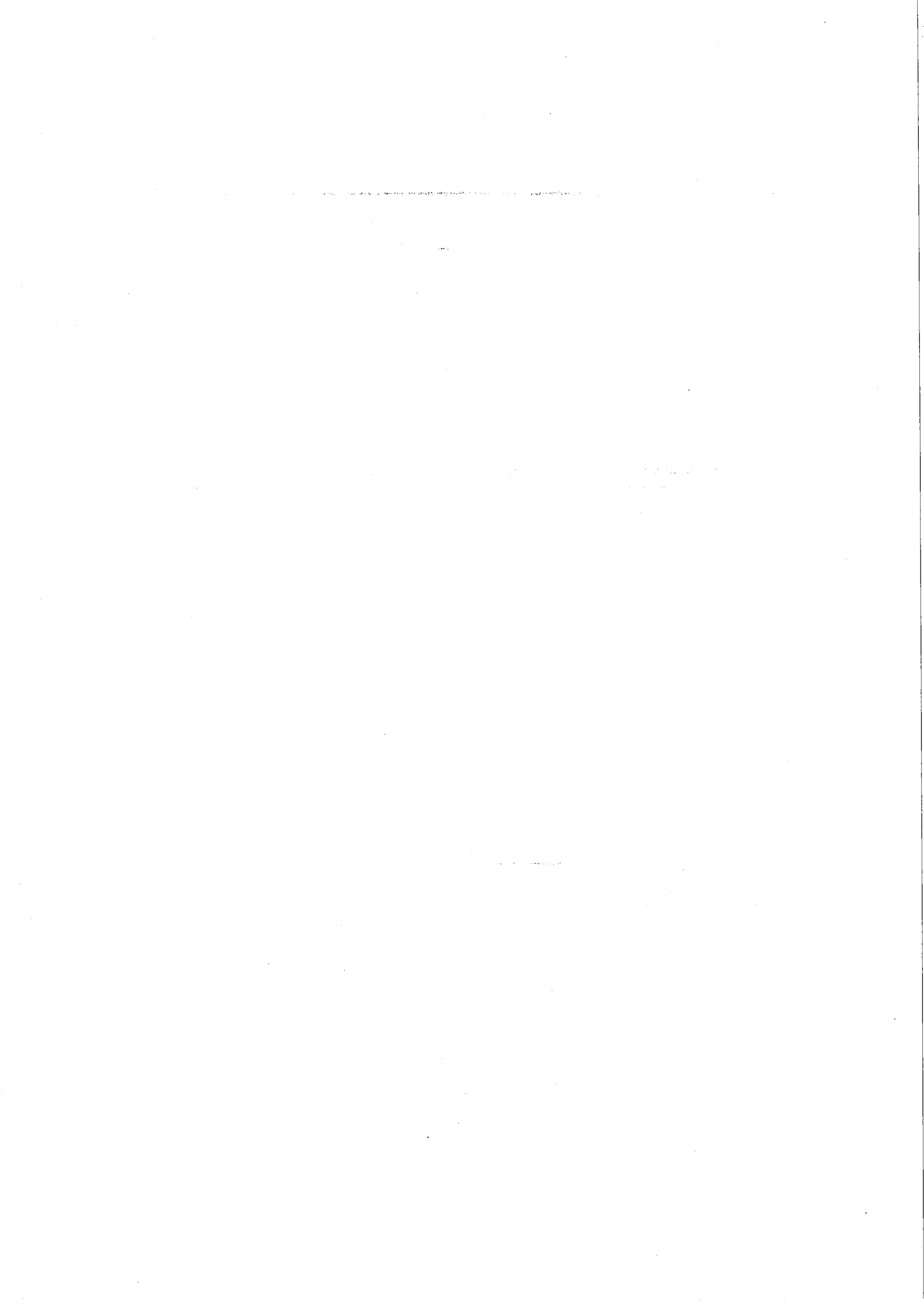
## **Preface**

The preparation of this study was facilitated by funding from Chr. Michelsen Institute which enabled me to spend two months in Bergen. The intellectual atmosphere at the Institute, particularly the interaction with research fellows, with diverse experiences, has been a very stimulating experience which enabled me to address some of the problems related to legal institutions in general, and the judiciary in particular.

In this task I have received intellectual and material support from different sources. Chr. Michelsen Institute researchers, librarians and administrative staff helped in many different ways. I would like to mention, specifically, Steinar Askvik, David Gairdner, Andy Kwawukume and Ussif Rashid Sumaila who read and commented on various sections of the manuscript.

The e-mail facility made it possible for Professor Bartazar Rwezaura, of Hong Kong University, to read and comment on certain chapters. Michael Wambali (University of Warwick), Jill Cottrell (Hong Kong University) and Dr. Gordon Woodman (University of Birmingham) helped to locate and obtain some important literature. Colleagues in the Law Subject Panel at the Institute of Development Management, Mzumbe, took over my teaching work load during the two months I spent at Chr. Michelsen Institute. Other people, numerous to be named, also helped in many different ways. I am indebted to all of them for their support in the work, but they are not in any way responsible for the blemishes and limitations in this study.

Bergen, July 1995





# 1. Introduction: The Judiciary and Good Governance

The observance of the rule of law and respect for individual human rights are said to be among the important components of good governance and market economy. The judiciary is known to be the custodian of most, if not all, the ideals that goes with the rule of law and human rights. Law and the judiciary, therefore, are expected to be among the essential pillars in the era of political pluralism as the two are central in the regulatory process for purposes of fair play (World Bank 1989). Many of these observations are made by the proponents of political pluralism and good governance. These sentiments are also echoed by the players in the game of power and power-seeking and, heard by the all of us (small time players and spectators in most of the time). Very little is said about the complexities of the law and the uncertainties surrounding justice administration.

Very rarely have the proponents involved in political pluralism, good governance and free market, taken sober and concerted effort to examine the practices, strength and constraints inherent in the law, the legal system and the institutions expected to be responsible for providing the necessary regulation during the era now in the making. One political commentator recently suggested that the judiciary was favouring the opposition in Tanzania (*The East African*, 17th April 1995). The cartoon that accompanied the story showed a person wearing a ruling party shirt playing volleyball against the another in opposition shirt with the judiciary on the opposition side. My own view is that these observations, which have been heard even before the publication of this newspaper article, are partly based on a faulty understanding of legal technicalities and may not reveal the complexities inherent in judicial decision making.

This study is an attempt to draw attention to the complexities involved in regulating contending economic and political interests and, in particular, an effort towards highlighting the challenges facing the judiciary as Tanzania, like other third world countries, move towards the market economy and multi-party political systems. My own view is that evidence available in Tanzania, and elsewhere, suggests that only in very limited situations have the judiciary stood for change. In most cases judiciaries are known to be very conservative and go to great length in support of the status quo. There is very little in Tanzania to suggest otherwise.

This skeptical and pessimist observation derives not from my disrespect for the rule of law and independence of the judiciary or the distrust of personalities entrusted with the regulation process. Far from it. It is based on abundant evidence available from place divergent geographically, economically and culturally. There is plenty of literature to show that the judiciary can be compliant and executive-minded, to the detriment and at the expense of individual rights. These concerns need to be addressed during the transition period.

What is very disturbing, to me at least, and the very reason prompting this study is that discussion on this important aspect of political pluralism, democratization and even the market economy, seem to be lacking in Tanzania. Law and legal institutions are taken for granted to an extent that an opportunity for reflecting on the strengths and weaknesses of the system, the institutions, and the persons who are the main actors in the institutions is wasted.

The elevation of law and legal machinery from marginality, suffered in the last two decades, to centrality during the democratization process and liberalization of the economy, without adequate discussion, not only obscures the history of the English legal system in general, and its application in Tanzania in particular, but also blind us from learning significant lessons of what has happened elsewhere. The euphoria, with which the centrality of law and legal institutions in general, and the independence of the judiciary in particular, has been received is understandable after many years in obscurity. However, the consequences, for lack of reflection and rigorous discussion of the significant issues at stake may be devastating. This study does not provide any answers to the questions it raise but marks signposts towards the search for answers. An opportunity to reflect on the questions may help us to come to terms with what we have already observed (cases decided by judges in our courts) and prepare our minds for more things to come. By so doing we may be able not only to understand court processes and decisions in their perspective, but we may also avoid making rushed conclusions.

Literature on the state of the judiciary in Tanzania shows that since independence the executive branch of government has amassed enormous powers and misused them. In that process it also downgraded the judiciary. The same body of material, however, recognises that within the judiciary there has been a tendency towards subservience to the executive. Whereas these tendencies are known to exist little, if anything, has been written on how they emerged and developed and how that affects the image of the judiciary to the general public. This study takes as its starting point the fact that the executive played a part in the marginalization of law and legal

institutions in general, and the judiciary in particular, have been very well argued and documented. What seems to be lacking in the literature is that these institutions, and the judiciary in particular, did not make sufficient efforts and initiatives to resist marginalization (see Olowofoyeku 1989 on the Nigerian judiciary). Instead, the judiciary chose to remain silent, which may even be interpreted as amounting to acquiescence.

In his sophisticated analysis of why executive powers were not challenged in courts, and if challenged stood little chance of success, Professor Shivji identified a combination of factors among which was "timidity and mediocrity on the part of judges accompanied by loyalty born out of pressures and expectations of favour from the executive" (Shivji 1985:7). Judicial silence and/or acquiescence to executive excesses and violation of legal powers partly contributed to the erosion of the legitimacy of the judiciary as custodian and fountain of justice in Tanzania and elsewhere. Writing about detention without trial and constitutional safeguards in Zimbabwe, for example, Hatchard noted that the existence of any enforceable individual rights in practice depends on the role the judiciary is prepared to play in upholding those rights. A weak judiciary can sound the death knell for individual freedoms (Hatchard 1985:57, see also Kuria 1991, Nwabueze 1977: Chapter 15 and Shimba 1987). There is plenty of literature, from countries of geographical and political diversity, which shows that weak and compliant judiciaries have not fared very well in the protection of individual rights. Examples are given in chapter 2.

The decline of the legitimacy of the judiciary, therefore, not being a phenomenon limited to Tanzania, could not have happened as an event but as a process. That process has to be understood in its historical context. The suitability of the adversarial system of justice, imposed on Tanganyika by British rulers, was a subject of intense and unresolved debate even among colonial rulers (see Morris & Read 1972 and Lyall 1988). The British system of justice was inherited as part of the independence package. To what extent the inherited system of justice administration served independence aspirations and beyond (for both the rulers and subjects) is now a matter of history. The relevance of that history is significant to the contemporary situation.

Law and legal institutions in general, and the judiciary in particular, which took over the traditions, forms, procedures and content of the British legal system, continue to be plagued by them as part of history (see Asante 1988 for a review of over 100 of the national legal system in Ghana). Those, like Nyerere and Chief Justice Georges, who expected the machinery of justice to adopt to social and economic changes introduced in the 1960s, ultimately despaired (and even became angry in the case of

Nyerere) when they found that these hopes could not be realised. The problems which were identified as being part of the limitations in the administration of justice were neither resolved nor taken seriously at the time (see Read 1966 and Kakooza 1969). It appears that we are back to that situation once again. Hopes are high that law and legal institutions in general, and the judiciary in particular, will provide the necessary regulation of contending economic and political interests, preserve and protect human rights and safeguard the rule of law (World Bank 1989). Whether this optimism is based on any evidence in history is a matter which needs to be carefully examined, considered and thoroughly discussed.

The extent to which the role of law in general, and that of courts in particular, have changed over the years has been very well documented (Shetreet 1988 & Theberge 1979). It is from such analysis that our discussion should proceed. There appears to be little disagreement among legal scholars that the function of courts have expanded beyond the primary duty of resolving ordinary disputes. There is a recognition of the fact that "courts may have to deal with problems involving political and social issues" (Shetreet 1988: 469). Court decisions on sensitive matters of political and social significance bring into light the manner in which the interpretation of the law is carried out.

Two dominant styles of opinion exist in the Anglo-American legal tradition: judicial restraint and judicial creativity. Under judicial restraint, it is argued that judges do not make law but they administer the law. It is said that they do that by interpreting the law literally by seeking to ascertain its purport through the sole medium of words. The argument goes on that by so doing judges are acting in accordance with the doctrine of separation of powers, which among other things, requires that each branch of government should perform only the functions entrusted to it. In the case of the judiciary, the function is to interpret the law and never to make it. By restricting themselves to the interpretation of law they not only maintain their independence but also their impartiality. Judges in this category are also called formalists, timorous souls, traditionalists etc.

Judicial creativity is discouraged by traditionalists because it amounts to judicial law making which is unacceptable because it is undemocratic and that if allowed would create rights where there was none. Mauro Cappelletti, who has researched extensively on the law making powers of judges, has observed that:

in all its expressions, formalism tended to accentuate the element of pure and mechanical logic in judicial decision making, while neglecting, or hiding, the voluntaristic, discretionary element of choice ... choice means

discretion even though not necessarily arbitrariness; it means evaluation and balancing; it means giving consideration to the choice's practical and moral results; and it means employment of not only the arguments of abstract logic, but those of economics and politics, ethics, sociology, and psychology (1981).

He concludes that even those who argue that the role of judges is only to interpret the law literally do in fact exercise an element of choice and discretion which is intrinsic in any act of interpretation. He quotes a statement once made by Lord Reid that there was a time in history when "it was thought almost indecent to suggest that judges made law rather than merely declaring it".

The opposite of judicial passivity is judicial creativity. Some theorists have suggested that judicial creativity was a revolt against judicial formalism. They emphasize that it was false and illusory to suggest that pure deductive logic could help the judge ascertain the law uncreatively and without personal responsibility. In this judicial approach it is argued that in the field of judicial interpretation there is a middle ground where choice and discretion may be exercised. Judges in this category are also known as judicial activists, bold spirits etc.

In its history revolt against judicial restraint has not been smooth. However, through it legal rights were extended to blacks and women in America which no one disputes today. In England judges read into the common law, without the intervention of Parliament (though endorsed later), the rights of the wife to hold title to property jointly with her husband when the title was doubtful. There are many examples of rights created through judicial activism.

What emerges from the history of English law and legality in general, and the imposition of the British legal system and its inheritance at independence in particular, taken together with the two styles of judicial opinion, is that there are forces within the judiciary in Tanzania and elsewhere contended with the maintenance of the status quo (inclined towards judicial restraint). There are others inclined towards change, the judicial activists. Factors influencing which style of judicial opinion a judge will take are varied. Parties to the cases which are taken before the High Court in Tanzania, and those which might ultimately go before the Court of Appeal, will find out who among the thirty justices (in the High Court and Court of Appeal) belong to which one of the two prominent styles of judicial opinion. The general public, if not by themselves, then through legal and political analysts will learn as well, who among the justices prefer judicial restraint instead of judicial activism. It is already clear, though, that among the justices in both the High Court and Court of Appeal, one has

already declared himself to be a judicial activist. The majority, if not all, of the rest have preferred to remain silent. That silence is a continuation of their past trends. Commenting about judicial conservatism in Tanzania, Peter (1992), who had together with another (Wambali & Peter 1987, see Shivji 1985: footnote 18) been charitable to the judiciary, noted that justices in the Court of Appeal were champions. This study shows, among other things, the ambiguities, complexities and contradictions revealed by the judge who has declared which one of the two styles of judicial opinion he favours.

The new role and place of the judiciary during the transition to market economics and political pluralism, has obvious implications to the general public. Since democratic governance entails, among other thing, participation in matters of national interests, the question do arise, as to what extent has the general public been involved in the preparation of the necessary ground for the legal tasks ahead? If these issues have been confined within professional circles (where the complexities are probably already well known any way), how will that affect public responses in the light of past experiences?

The way in which the general public perceives law and legal institutions in general, and the judiciary in particular is crucial for law to realize its intended aims. This perception has to be traced to the history of law in Tanzania and other third world countries in general (see Nyachae 1992:79 and Mingst 1988:140). As correctly noted by Professor Ghai (1981:155, 173), among others, in East Africa and elsewhere in the third world, public perception of law and legal institutions has been that of fear and distrust. How this fear and distrust of law and legal institutions came about need to be reflected upon. Whether the change from marginality to centrality will bring about public trust of law and legal institutions are important matters that need to be thoroughly discussed beyond professional confines.

What we have been witnessing, so far, is that only minor and cosmetic changes have been introduced. Such changes, welcome as they are, do not go far enough to empower the general public in the struggle for the preservation, protection and promotion of their human rights. Most, if not all, of the reforms have been introduced without broad consultation with the public. Lack of broad based discussion on these issues creates at best an impression of complacency and at worst secrecy on the part of the powers-that-be. Both, complacency and secrecy, are inconsistent with democratic governance. This study attempts to bring these issues out in the open for discussion.

In writing this study I have kept in mind the fact that the judiciary is only a part (an important one at that) of the legal system and that there

other important actors, themselves a part of the political, economic and social set up of the country. Such a recognition is significant not only in our understanding of the limits within which the judiciary in particular, and the legal system in general, operate, but also that political, economic and social organizations of the country are determined and shaped by what takes place around the world. In this case, the World Bank, the International Monetary Fund, and other bilateral donor perception of what constitutes good governance in general, and the role of law and legal institutions in particular, in market economies and political pluralism, have played an important role in what has taken place (and continue to happen) in the judiciary in Tanzania.

Thoughts put together in this study are, on the whole, tentative and more need to be done if the intricacies and ambivalences involved in regulation of competing political and economic interests are to be satisfactorily understood and ultimately disentangled. The study is organized as follows. Chapter 2 focuses on how the present legal system came into being in Tanzania and the processes which caused law and legal institutions to be downgraded. Chapter 3 demonstrates how the judiciary responded, albeit late, to marginalization and the steps that were taken to restore its credibility. There is also a discussion of how these reforms could be financed. Chapter 4 highlights two principal actors or reformers in the judiciary and how they help us to understand inherent limitations to the proposed reforms. Chapter 5, which is also the conclusion, brings together some loose ends in the discussion by showing, not only how consultations have been limited, within the legal system, but also that the general public has been excluded all together. In that chapter a discussion on the difficulties involved in the choice of one style of judicial opinion against the other are also outlined. The study ends with an observation regarding public hostility to law and legal institutions that exist in Tanzania and elsewhere. Public hostility need to be understood if the general public is to play any significant role in the administration of justice. Since good governance and democracy involves, among other things, transparency and accountability, relevant issues need to be thoroughly discussed beyond professional circles.

## **2. The Legacy of Liberal Legalism and the Marginalization of Law**

This study is about law and legalism in contemporary Tanzania. But, most if not all, of what is taking place in the legal field at the present have to a great extent been influenced by what happened in the past and cannot therefore be properly understood without it. A brief review of the past is, therefore, in order. The legal system and the attendant legal principles applicable in Tanzania is basically English in origin. With very minor exceptions (the restructuring of the judicial system in 1963 and the establishment of Ward Tribunals in 1985) the English legal system and English legal principles continue to apply, the Arusha Declaration and socialist aspirations of the 1970s notwithstanding. One can safely conclude that the judiciary imposed on Tanzania (then Tanganyika) in 1920, survived as an institution through the colonial era, to independence through the socialist construction and now into the multi-party system of government (Wambali & Peter 1987:133).

Although personalities have to a large extent changed, due to wear and tear and other reasons, the institution and most of the rules and practices applicable have remained largely the same. This partly reflects the resilience of the institution in question but, on the other hand, it is also evidence of how some institutions are very difficult to change. The judiciary being professional in character, the manner and patterns of its application of legal rules are matters acquired through long term professional training and assimilation and, therefore, internalized and not easy to shake off.

### **2.1 The Legacy of Liberal Legalism**

Since the present Tanzanian legal system derives from the colonial era it is important to state here that the colonial history has a bearing on the way in which law and legalism are viewed by both the populace and the executive. The legal principles imposed on Tanzania as on other British colonies, include the whole notion of constitutionalism and its corresponding elements such as: the rule of law, the separation of powers, the independence of the judiciary, parliamentary sovereignty, to mention only



some. It is from these principles that current demands and debates about human rights, representative democracy are derived. Since this study is not meant to examine these principles in any detail it is sufficient for this discussion only to note what prominent constitutional scholars have already made clear. It has been demonstrated that the history of the rule of law can be traced to the specific historical, economic and political struggles between the monarchy and the bourgeoisie (Luckham 1981, Baxi 1982, Shivji 1995 and Ghai 1990).

On the relationship between the rule of law and democracy, Professor Ghai has noted, that the two are not synonymous and that in historical terms the rule of law came before democracy and that in its origin the rule of law had little to do with democracy, political freedoms or social justice. Overtime, however, the rule of law has "broadened to encompass them, particularly by the extension of franchise and the recognition of certain social and collective rights" (1990:1,3. See also Sejersted 1988 and Aubert 1989).

Although the liberal democratic principles were known to the English colonial rulers, they were not made part of the colonial administrative practices in the colonies (Seidman 1969). It was only during the decolonization process that the departing colonial masters thought it was appropriate to incorporate them in independence constitutions, including that of Tanganyika (now Tanzania). As part of the decolonization process little or no arguments were raised against them and they, therefore, became part of the independence constitution (see Baxi 1982: Chapter 2). That part of the history is important to our endeavour to locate and understand the current events and processes, especially those related to democratization, political pluralism and free market economics, sweeping through the third world in general and Tanzania in particular.

After Tanzania's independence in 1961 the country's leaders continued to reaffirm their commitment to liberal democratic values in general and the rule of law and independence of the judiciary in particular. Commenting about Nyerere's view of law during that time Ghai observes that:

his views bear close resemblance to the bourgeois concept. He has constantly emphasized the equal and impartial administration of law, and has said that it is the duty of judges to enforce law even if it is unjust. Their job is to enforce the law fearlessly, and the responsibility for bad law is not theirs (1976:52).<sup>1</sup>

<sup>1</sup> Ghai (1976) analyzes in detail the attitudes of the executive towards law, legality and the ambiguity of the situation between independence and the mid 1970s. See also Martin

At the same time as the above positive comments were being made, however, the judiciary was also urged to appreciate and take part in the changes that were taking place in society. Speaking to judges and magistrates in 1965, President Nyerere remarked:

All aspects of our national life are changing very rapidly, and it is important that all responsible servants of the people should be clear about their duties and opportunities for service in the developing situation ... It is impossible for the judiciary to continue to operate in the colonial tradition when every thing else in the society is changing. What is necessary, instead, is for the basic purposes of our judicial system to be understood so that the implementation processes of those basic purposes can be adapted to the new society, and the fundamental principles thus preserved (Nyerere 1965:107).

Even when Tanzania proclaimed the Arusha Declaration in 1967, and declared its intention to build socialism, similar political attitudes of urging the judiciary to be part of these changes continued (see Nyerere 1971). It is not in any doubt that socialism is based on principles different from those of capitalism. Its construction, therefore, depends on conditions which are different from those of capitalism, which include not only a different legal system but also a different set of legal rules. Tanzania, unlike other countries of the world which declared their intention to build socialism, from popular struggles and revolutions, on its part stated its commitment to socialism through a political platform. The legal structures and personnel inherited from the British colonial masters at independence, were therefore, not transformed. They were, instead, expected to adjust themselves and respond to socialist needs and aspirations of the country. Besides the few nationalization laws, which placed private businesses under national control, only speeches by political and government leaders gave guidance on what the judiciary was expected to do in the march towards socialism.

The role of the judiciary in the construction of socialism was discussed in several judicial conferences in the 1960s and early 1970s. Chief Justice Georges (who was Chief Justice between 1965-1970), for one, was in the forefront of reminding his brethren on the need to identify not only with the masses, but also with government policies (see James & Kassam 1973 for his speeches).<sup>2</sup> At the end of his tenure, President Nyerere praised him for

(1974).

<sup>2</sup> It seems to be a shared view among commentators that expatriate judges, the category in which Chief Justice Georges belonged, tended to be more passive and compliant, see Nwabueze (1977), Ross (1992) and Days, III *et al.* (1992). I am told that most members

being a very good example of what was expected of the judiciary in Tanzania. The following words from the President's speech illustrates this point:

The Chief Justice has, in fact shown by all his actions that the independence of the judiciary does not mean the isolation of the judiciary from the life of the nation. He has shown a recognition of its true meaning; that in the consideration of cases, and in the giving of judgements, a judge or magistrate takes orders from no one, but uses his own brains, his training in law, and his independent judgement about the issues in dispute and the facts involved. And he does this regardless of other factors, because he knows that this is the service the people have demanded of him ... (Nyerere 1973:261).

Not all members of the judiciary agreed with Chief Justice Georges. Disagreements to his standpoint are known to have taken place during judges and magistrates' conferences and by individual magistrates and judges. Those who did not agree with Chief Justice Georges held very strongly to the view that the judiciary had to be independent of the executive and decide cases which went before them in accordance to the law, no more no less (Biron 1973 quoted in Wambali and Peter 1987 at p. 143). I am convinced that the role of the judiciary in the construction of socialism in Tanzania, though discussed within the judiciary, was never resolved. It appears now, with the benefit of hindsight, that the political expectations, expressed by Nyerere and others, and efforts made by Chief Justice Georges to convince his brethren, were not very successful. With only a few exceptions, most of the judicial work was carried on according to the English liberal legal traditions. Here is the point where problems could be said to have emerged.<sup>3</sup>

of the judiciary in Tanzania in the late 1960s and early 1970s understood Chief Justice Georges' comments and support for government policies to be prompted by his executive-mindedness.

<sup>3</sup> There is plenty of literature on the inadequacies of law and the legal systems of the newly independent states. For a review see Mingst (1988) and Nwabueze (1977: Chapter 15). Seidman, for one, notes that the rigid, complex and slow procedures of these system (including the judiciary), makes them merely rule applying and not problem solving institutions (1978:218). The relevance of Common Law to the contemporary African context was a theme of the Second Commonwealth Africa Judicial Conference held in Arusha in August 1988 (See Commonwealth Secretariat 1988 and 1986). Ghai (1976 & 1981) outlines, among other things, factors which might have contributed to the strong suspicion and distrust of legality and court processes in Tanzania.

It might have been difficult to discern, at that time, how the political leaders felt about that judicial attitude, but from the events that followed a little later some of which are discussed below, one can safely say that these leaders soon ran out of patience and probably got tired of urging the judiciary to be responsive to social needs.

As will be seen later, and with examples from elsewhere, such executive attitudes could arise irrespective of whether the regime was one party and/or socialist oriented. As Professor Ghai has noted the existence of other different legitimating ideologies at the time of independence affected the force of constitutionalism and the rule of law as power legitimation. These, together with authoritarian tendencies, influenced the way in which law and legal institutions were viewed by the rulers from the time of independence and beyond (1990).

## **2.2 Marginalization and Hatred of Law and Legal Institutions**

It is common knowledge that different forms of crises involving the state in Tanzania, as elsewhere in Africa in the 1970s, also affected the legal system. The Executive monopoly and domination which did not end with the economic sphere but extended to the political process, including the law making body (the legislature) also had an impact on the judiciary. There is no doubt that the judiciary was aware of the trends in the exercise of executive powers and observed the events like other members of the society.

Tanzania, unlike other countries of Africa and the third world in general, appear to have respected law and legal institutions for some time after independence, and these institutions do not seem to have been disregarded outright until the mid 1970s. Although political speeches made in the mid-1960s had a tone of caution to lawyers on what was expected of them, President Nyerere was still paying lip-service commitment to the rule of law. This view is partly reflected in the Report of the Presidential Commission on the establishment of a Democratic One-Party State (Tanzania, United Republic 1965) where it was expressly stated that the Commission believed that the independence of the judiciary was the foundation of the rule of law.

The events of the mid 1970s, however, gave indicators of what was in stock for the legal system in general and judiciary in particular. It was in 1973 that Nyerere first revealed his impatience with the law and the legal

institutions in general, and the judiciary in particular. Addressing judges and magistrates in Dar es Salaam on 16th May 1973 he called upon them:

to adhere to the principles of administering justice properly within the framework of the a nation's objectives. He also said that he would never hesitate to take action against them, independence of judiciary notwithstanding, whenever they misbehaved ...

... the country had now reached a very unpleasant stage where people are complaining about ... the poor services and irresponsibility of certain members of the judiciary ... (*Daily News*, 17th May 1973).

It may be recalled that the above speech was made at the height of massive corruption allegations within the police force and the judiciary.<sup>4</sup> Several senior police officers had already been retired allegedly in the public interest. One informed commentator writing about the workings of the judicial system (at the district level) observed that:

This part of the system deteriorated from about 1970 onwards. Petty corruption became so widespread in the police that the easiest way to defend a case was to bribe an officer to lose the case file. This led to repeated adjournments, waste of witnesses' time ... It became hardly worth while prosecuting for burglary or assault, unless the unfortunate offender was nearly destitute.

The authority of the legal system was further undermined by the unwillingness of the politicians to enshrine what they were doing in law (Coulson 1982:221).

From these events, and with the benefit of hindsight, it may be said that the caution in President Nyerere's speeches in the mid-1960s and early 1970s also embodied important signals of his concerns about law and legal institutions. When the opportunity presented itself, in the form of public complaints against the legal machinery in general and the judiciary in particular, that became the starting point for executive confrontation with the law and legal institutions.

<sup>4</sup> This led to the appointment of the Msekwa Commission in November 1974 with the following statement as part of the terms of reference: "to review certain aspects of the legal system and to recommend changes aimed at improving the administration of justice in the country...". The Commission presented its report in 1977 (Tanzania, United Republic 1977).

As will be shown in chapters 3 and 4 not very much is known to have been done, on the part of the judiciary,<sup>5</sup> in response to the President's caution and threat in comparison to the reforms which were introduced in the mid-1980s. This lack of visible action is very difficult to understand and/or explain. In my own view the silence, on the part of the judiciary, was itself a philosophical reaction. Both individually and collectively, under the doctrine of the independence of the judiciary, judicial officers decided to watch the events from their secluded chambers without raising a finger. There could have been a feeling that such statements from the executive branch were no more than executive interference. As one legal presumption goes: allegations of criminal nature need to be proved beyond reasonable doubt, by those who make them. The allegations above were no exception.

In his discussion, with examples, of the relationship between government and the courts in Tanzania in the 1980s, Mwaikusa (1991) identifies three important features. These are: court's attitude of subservience to the executive, executive disregard of court orders, executive mistrust and (sometimes outright hatred) of the judiciary (see also Wambali & Peter 1987:136-141). It was President Nyerere's speech, at the time of launching the anti-economic sabotage campaign, on 5th April 1983 that the hostile relationship between the executive and the judiciary were clearly exposed. Suspected economic saboteurs were not to be taken to ordinary courts but to an anti-economic sabotage tribunal created for that purpose.<sup>6</sup>

A year later he met judges and magistrates and said that it was not an occasion to speak about successes but about problems and failures affecting justice and its administration. He told them of the government's commitment to the rule of law and the equality of all people before the law, and noted that:

<sup>5</sup> Two important events relevant to this discussion need to be mentioned: first, a study was commissioned by the government in 1978 to find out the possibilities of decentralizing the judiciary. The report was accepted in October 1980 and a decentralized system became effective on 1st July 1981; second, a tribunal, convened in accordance with the provisions of the Constitution, held the first judicial enquiry into the discipline of four judges in 1982. The second such enquiry to be held in Tanzania was held in March 1991. See chapter 3 for details about the circumstances in which it was held.

<sup>6</sup> See the following report in the *Africa Contemporary Records: Annual Survey and Documents*, (1982/83) volume 14 at B281. "The reasons given for short-circuiting the standard legal procedure turn on the difficulty of securing evidence adequate to convict major offenders, and the tendency for courts to impose trivial sentences." Also Peter (1983) and Wambali & Peter (1987:140). Justice Kisanga was the only judge to speak about the anti-economic sabotage campaign in public. See Kisanga (1983).

we cannot say that our people are absolutely equal before the law. It is still an advantage to be educated, to be wealthy or have wealthy friends or relations, or to have friends or relations in high places. And the great public dissatisfaction with the administration of the law — often fully justified — has not led to the necessary corrective action (Nyerere 1984).<sup>7</sup>

He categorically stated that the judiciary was doing nothing or very little (either for failure or unwillingness) to remedy the situation. Sources in the Attorney Generals' Chambers, well informed of the events of the 1980s, talk of President Nyerere's intention to sack a High Court judge, for example, for giving a judgement in the case involving a public corporation which the President thought "unacceptable". The senior lawyer, to whom the President spoke, advised the President of the appeal option available to the government and the dangers involved in the sacking of the judge. The President is said to have reluctantly accepted the advice and the appeal to the Court of Appeal subsequently succeeded.<sup>8</sup> As Mwaikusa has correctly noted, the events of the mid 1980s vividly demonstrate how the executive mistrusted (and/or hated) the judiciary. In chapter 3, I will discuss how the judiciary came out of the closet and reacted to these challenges, unlike the manifest silence that greeted the Presidential speech in the early-1970s.

From the two speeches above and the executive actions of that time in general, we may deduce several kinds of criticisms which have been levelled against the judiciary in Tanzania.<sup>9</sup> Besides inefficiency and non-accountability (which took many different forms), there were criticisms on responsiveness to social needs, criticisms about maladministration (in the form of corruption, abuses of power and favouritism). There were also

<sup>7</sup> There appears to be an interesting coincidence here. Whereas the President gave his speech at Arusha on 15th March 1984, the Chief Justice addressed the National Executive Committee of the ruling party on the need to observe the rule of law on 30th May 1984, see the discussion in chapter 4, especially 4.1.2.

<sup>8</sup> The case of *National Agricultural and Food Corporation v. Mulbadaw Village Council*, Court of Appeal civ. app. 3 of 1985 decided on 21st June 1985 overturning the High Court decision of Judge D'Souza given on 3rd December 1984.

<sup>9</sup> My own survey of the Permanent Commission of Enquiry Reports revealed that the judiciary occupied 13 or 14 positions of government departments against whom complaints were filed in the early 1970s. That position changed from 1976/77 when the judiciary ranked among the top 4 of the departments complained about. Although these reports are not conclusive in any way, as they contain reports of both complaints found to be valid and those which are not, the change in the total number of complaints received against the judiciary partly indicate the feelings of injustices caused by the department to the complainants.

criticism about the colonial image of the judiciary. Chapter 4 will highlight what Justice Mwalusanya has called abuses of power by the judiciary (albeit by omission). It needs to be stressed that criticisms of this kind were and still are made against the judiciary in Tanzania and elsewhere. They have been made against judiciaries in countries with or without a one-party political system and countries pursuing or not pursuing socialism as a political ideology.

I can only mention here countries on which literature is readily available and the crises of the judicial system, like those observed in Tanzania, have been outlined and to some extent discussed. On the African continent, they include Ghana (Koilarbi 1989), Kenya (Kuria 1991, Muingai 1991, Days, III, 1992 and Ross 1992), Lesotho (Amoah 1987a), Botswana and Swaziland (Amoah 1987b), Nigeria (Ikhariale 1990, Olowofoyeku 1989), Zambia (Chanda 1995, Mbao 1992) and South Africa (Cameron 1990, Corder 1984, Dyzenhaus 1991 and Ellmann 1992). India is an example from Asia (Baxi 1982, Iyer 1987 and Bhagwati 1987). Zagaris (1988) indicates that almost all the Commonwealth Caribbean countries have faced crises, Castaneda (1991) discusses crises in Colombia while Anderson (1989) documents the same in Guatemala. Developed countries have not managed to avoid some of these problems either. There is evidence of crises in judicial systems from the United State of America (Franck 1949 and Frank 1972) and England (Thomas 1982 and Johnson 1992) as well.

Although the kinds of crises and the magnitude of the problem differ certain things appear to be common. In South Africa, the judiciary suffered from the legitimacy problem generally. Nigeria, Ghana, Kenya, Lesotho, Botswana, Swaziland and India almost have similar problems like those in Tanzania. The United States of America and England, like all the countries mentioned above, have problems related to lack of efficiency in general and delays in particular, especially regarding criminal trials. In England, public confidence in the criminal justice system seems to be on the decline as well. Out of all the countries mentioned, only the Indian Judiciary appears to have come to terms with the problem and have even gone to extent of inventing special procedures to deal with some specific pressing aspects (see Bhagwati 1987, Cottrell 1992 & 1993).

Chief Justice Francis Nyalali, however, seems to confine his interpretation of the events discussed above, and the marginalization of law and legal institutions in general, to the one party political monopoly. In his opinion, which is best expressed in the following long quotation, the one-party ideology displaced liberal legal ideology.



It was for that reason that the ruling party ideology and party constitution was taught in Tanzanian schools, and the party was organized at all levels and in all sectors of the society, from the national level down to the cell level constituting of ten households. It was for the same reason that civics and the country's constitution ceased to be taught in Tanzanian schools by the end of the 1960's. It is in that context that it was possible to move the vast majority of the rural population into about 800 new ujamaa villages without enacting or using any law to legalize such a far reaching programme. It was similarly possible to nationalize a wide range of commercial private enterprises by skeleton legislation, which dis-applied the time-tested Companies Ordinance, without providing for alternative legal norms to regulate the activities of the nationalized firms. The same explains why government was managed by a politicized civil service which increasingly became ignorant of administrative law and practice. It also explains why public offices ceased to keep proper records of statutes or Acts of Parliament, and why court libraries ceased to be supplied with new law books ... There are endless illustrations of this state of affairs right up to the time when the historic decision to change from one party to multi-party democratic state was made (Nyalali 1994b).

The Chief Justice's limited interpretation seems to me to miss several significant points, especially the positive way in which law was viewed in the early parts of the one-party era. Such a restriction has adversely affected the reform process initiated by the judiciary and might as well have consequences on the direction the judiciary wants to take during political pluralism and market economy now in the making in Tanzania. This will become clearer in the chapters ahead when a discussion of the reforms he has been attempting to put in place is made and how these have been understood both within and outside the judiciary.

It is in order at this point to state in very clear terms that complaints regarding the performance of the judicial branch were made and heard from many quarters (the executive, legislature, the ruling party and the general public) since the 1960s and 1970s. These grievances, valid or otherwise, together with authoritarian tendencies among some executives, were not necessarily led by or confined to (although they might have been strengthened and hardened by) the one-party political ideology prevalent at the time. The persistence of complaints and grievances ultimately led to a re-examination of attitudes among senior judicial officers. Such a re-consideration was necessary, if the judiciary was to command any respect at all. As will become apparent in the following discussion these responses, however, might have come too late and may not be adequate to have any apparent impact.

That background and context of the marginalization of law and legal institutions in Tanzania, and possibly in other third world countries where it has arisen, has to be taken into consideration. Such an understanding suffice as a basis for reflection about the changing fortunes of law and legal institutions (from marginalization to prominence), instead of the changes coming as a surprise or even being taken for granted and lightly.

### **3. Judiciary: Towards Rebuilding its Image**

The marginalization of law and legal institutions, discussed in the preceding chapter, had (and continue to have) immense implications to the legitimacy of the legal system as the whole and the judiciary in particular. Not only was the law of the land disregarded, the judiciary was sometimes outrightly hated by the executive, Mwaikusa correctly observes (1991:101). As a consequence legal institutions were also starved of financial and other resources. Commenting on this aspect the World Bank noted that there was a widespread institutional decay in most of the sub-saharan African countries, including the breakdown of the judicial system (1989:3, 22 and 30).

In this chapter an attempt is made to discuss how the judiciary in Tanzania responded to some criticisms levelled against it. The chapter begins with what is called “the climbing down from the ivory tower”, and describes how its leaders reacted to marginalization in order to capture lost grounds and restore its image and legitimacy. It then goes on to show how these attempts coincided, in many respects, with donor thinking at the time and how the World Bank and other donors responded positively towards assistance to the legal sector, including the judiciary. By way of conclusion and with the benefit of experiences from other crisis-ridden judiciaries with an English law origin, a pessimistic note is sounded that although both the responses initiated by the judiciary and the assistance given by the donors are welcome and commendable, they are not by themselves enough to change the bartered image of the judiciary and restore positive public confidence. Other important issues and questions have to be adequately addressed.

#### **3.1 Descending from the Ivory Tower**

Criticisms against the judiciary had been thrown from right, left and centre. Departmental leaders had no option but to climb down from the ivory tower, re-examine and respond to some of the criticisms which were not only persistent for years, but also valid in some respects. Although some measures were introduced in the mid 1980s, it was not until early 1990s,

that members of the judiciary came out in the open and asked themselves some searching questions regarding some of these criticisms (see Nyalali 1988, Bahati 1989, Chua 1989, Mfalila 1989, Mwalusanya 1989). Conferences were organized for judges in 1991 and 1992 at which papers and reports were presented with findings and recommendations, some of which were unheard of in the past (see Chipeta 1991, Kisanga 1991, Mrosso 1991a and 1991b and Nyalali 1991). Issues, such as the causes for the crisis of confidence in the rule of law, were raised and discussed. The existence of corruption, among individual judicial officers, were mentioned in public and measures aimed at combating them were outlined (Justice Lubuva in the *Daily News*, 7th May 1988 at Tabora and *Daily News* 20th March 1989 at Mwanza and Justice Mwaikasu in the *Daily News* 2nd August 1991). Members of the judiciary (at least the senior ones) showed their willingness to discuss openly transgressions among their own ranks and make recommendations. This was in sharp contrast with the past when only a few brave officials were willing to acknowledge that there were problems in the judiciary. Reference will be made to these reports at appropriate stages of this chapter. The initiatives and changes are numerous, and some are far reaching. For ease of presentation, I have categorized them under three broad headings: those introduced to enhance efficiency, measures meant to strengthen discipline and accountability among judicial officers, and those related to increasing public awareness of judicial activities and public relations.

### *3.1.1 Enhancement of Efficiency*

The judiciary, like all government departments, cannot disregard the calls for efficiency and effectiveness. Complaints regarding delay in the hearing and disposal of cases, delay in delivery of judgements, were made at different times in the history of the judiciary in Tanzania as elsewhere. Judiciary bosses could not afford to dismiss these complaints on the pretext of keeping the executive away from interfering with the independence of the judiciary. At different times the judiciary responded by introducing measures which were meant to do away with or at least reduce such delays.

In response to the problem of delays in disposal of cases, for example, both legal and administrative measures were taken. For the purpose of this discussion only administrative measures will be dealt with. These include the introduction of case flow management procedure (by Chief Justice circular number 2 of 1987), hearing of cases on shift basis (otherwise known as the relay system, by Chief Justice circular number 3 of 1987). Other efforts include: filing and admission of cases and applications in the

registries (also known as case stock taking, by Chief Justice circular number 1 of 1992), a requirement that magistrates should produce reports on cases conducted by advocates (also known as disposition of advocates, by Chief Justice circular number 2 of 1992), and the introduction of individual calendar (by Chief Justice circular number 3 of 1993). One senior judicial officer observed to me that in three years (i.e. between 1992 and 1994) the honourable Chief Justice issued many more circulars than he did for the previous 15 years (i.e. 1977 to 1991) put together. That comment could not be an over-exaggeration.

For want of time and space these measures can only be mentioned here in passing but it suffices to mention here that the introduction of the shift system, for example, followed the challenge made by President Ally Hassan Mwinyi during a speech to Judges and Magistrates in Arusha on 27th August 1986. The President challenged judicial officers to work out mechanisms for speeding up the hearing of criminal cases by comparing their services to those of the medical staff. It is on record that the President remarked that:

considering that court proceedings normally start late even this period is not fully utilized. A system could be revised to ensure that those rooms could be used for a much longer period by working in shifts. Hospital staff work in shifts to ensure that patients are attended to all the time. They have great concern for the people they serve. Judges and magistrates should demonstrate the same sensitivity for the people they are supposed to serve (Mwinyi 1986).<sup>1</sup>

The above remark is important when considered together with questions related to discipline among judicial officers to which I now turn.

### *3.1.2 Judicial Accountability and Discipline*

Demanding discipline and accountability among judicial officers is one of the matters which has for a long time been considered a taboo, on the pretext that raising it amounted to executive interference with the independence of the judiciary. Any attempt at raising the same, by members of the public and the press has in some other countries been encountered by charges of contempt of court (see Iyer 1987 and 1991). Chief Justice Georges' attempts in the late 1960s and early 1970s were brushed aside as

<sup>1</sup> This fact is acknowledged in the introduction to the Chief Justice circular number 1 of 1987.

being motivated by his executive-mindedness. The events of the mid 1970s and mid 1980s necessitated for a reconsideration of these attitudes.

I indicated above how in May 1973 the President at the time (Julius Nyerere) expressed his fears about discipline among law enforcement officers (including judges and magistrates) and how this was followed by the appointment of the Msekwa Commission. In 1984, following the anti-economic sabotage campaign in April 1983, these fears were echoed again in a more critical manner. In his opening address to the judges and magistrates conference the President spoke at length about the problems and failures affecting justice and its administration. He noted that:

The truth is that the protection of the principle of the Independence of the Judiciary is in your hands, and especially in the hands of senior judges ... You must enforce discipline throughout the judiciary ... There are jobs in our society which can be done by undisciplined people and people whose personal integrity can be called into question; being a judge or magistrate is not among them (Nyerere 1984).

At the meeting where the above opening speech and remarks were made a Code of Conduct for Judicial Officers was adopted. The code covers the conduct of all judges and magistrates and a violation of any rule constitutes a judicial misconduct and entails disciplinary action. Since its introduction several magistrates and a judge are known to have been disciplined. In March 1990, for example, a High Court judge was suspended (*Daily News*, 14th March 1990) and in less than a month's interval a senior resident magistrate was also suspended (*Daily News*, 4th April 1990). Both faced disciplinary charges a little later.<sup>2</sup>

In 1990 and 1991 several other measures were taken to tighten the grip and further enhance discipline among judicial officers. These include: the amendment of the *Advocates Ordinance*; Chapter 341 of the Laws (Act 12 of 1990), and the delegation of disciplinary powers of judicial officers to Regional and District Judicial Boards (Government Notice 510 and 511 of 1991). The amendment to the *Advocates Ordinance* was meant to give powers to judges to suspend advocates suspected of causing delays in the hearing of cases in which they are representatives of contending parties.

<sup>2</sup> It must be noted that disciplinary measures against the judge and magistrate took place during or at about the same time as the March 1990 cabinet resignation event. The Constitutional tribunal for the inquiry into the discipline of the judge was ultimately convened in March 1991. This was the second in the history of Tanzania since independence. For the circumstances and context in which the first tribunal was held, see chapter 1.

Advocates, through the Tanganyika Law Society in which all practising lawyers are members, protested this amendment. When the law was proposed they met the Attorney General and urged him to withdraw it, contending that the law was unconstitutional and that it would lead to anarchy in courts. The Attorney General told them that the basic aim of the law was to instil discipline and control in the profession (*Daily News*, 2nd April 1990). The law was ultimately passed but advocates continue to protest it even today.<sup>3</sup>

It must be said in regard to disciplinary powers that, before the 1991 amendment of the disciplinary rules and the delegation of powers to the Regional and District Judicial Boards, most powers were vested with and exercised by the Judicial Service Commission, appointed under the authority of the *Judicial Services Act*, Chapter 504 of the Laws.<sup>4</sup>

There are complaints regarding the Code of Conduct among junior magistrates, for example, who argue that its equal application to all judges and magistrates across the board does not take into consideration the fact that judges are relatively better remunerated and have relatively better working conditions, which places them very far away not only from executive pressure and scrutiny, but also from public eyes and day to day temptations. It is argued that in present circumstances and in its current enforcement procedure, magistrates are much more likely to be found in breach than judges. This is not because magistrates are more indisciplined than judges, but because the former are more exposed than the latter. A point is also made that most decisions regarding discipline within the judiciary are taken at higher levels (by Chief Justice and senior judges) without adequate consultations with the lower levels (magistrates) and that the latter is usually informed of the decisions by way of circulars.

Since 1991 the judiciary has also intensified the system applicable for the recruitment of magistrates at all levels. I am informed that the new procedure is intended to ensure that the people appointed to these sensitive

<sup>3</sup> I am reliably informed, by sources within the Tanganyika Law Society, that clashes have already occurred between some advocates and judges following the latter's exercise of disciplinary powers over the former. This partly confirms the fears expressed by Law Society members before the bill in question became law.

<sup>4</sup> Rules for the discipline of primary court magistrates and district and resident magistrates, can be found in Government Notice 57 of 1965 and 175 of 1965 respectively. This disciplinary procedure, however, was on many occasions in the past blamed, not only for being distant and far removed from the stations where most magistrates work, but it was also said to be slow to obtain any favourable results in cases where misconduct was alleged because of the lengthy appeal procedures embodied in it. For a general discussion on the accountability of judges, see Cappelletti (1983:46-52).

jobs, in the administration of justice, do not have a record of bad reputation.

In the bid to sharpen the focus on discipline among magistrates and judges, a recommendation was made by the Mrosso Commission (1993) that complaints officers needed to be appointed within the judiciary. The recommendation on the appointment of such officials means that the judiciary has started to take the question of discipline (or indiscipline) among its ranks very seriously, and complaints officers will deal full time with matters related to the discipline of all judicial officers.

### *3.1.3 Mending Fences with the Public*

Since the inheritance of the judiciary from the English colonial masters at independence, its operations have been conducted in an aura of mystique and guided by the principle of the independence of the judiciary. This approach, however, could not withstand the needs and demands of our time.

President Nyerere is on record calling upon judges and magistrates to identify with the masses only a few years after independence. In a speech to judges and resident magistrates held in Dar es Salaam on 7th December 1965, Nyerere said among other things that:

It is only by being an active part of our society that our judiciary can play its full part in shaping the development of our society. What better place to teach, both by example and by precept, the fundamental principles of the rule of law than at Party meetings and Party activities? Our national unity allows us this opportunity for sowing an understanding of the requirements of justice, and for learning about the people's meaning when they talk of justice (Nyerere 1968: 113).

On many occasions in the late 1960s and early 1970s, Chief Justice Georges urged judicial officers to identify with the masses (see James & Kassam 1973). Like issues of efficiency and discipline, this call was disregarded and misinterpreted for compromising the cherished doctrine of judicial neutrality.

When crises crept in and things started to go wrong, the judiciary not only remembered the wisdom of identifying with the people, but also took initiatives to make the people aware of their legal rights. With effect from July 1992 the Judiciary has been involved in mass education about legal rights and duties. This is done through radio programmes (broadcast twice a week), newspaper columns and weekly meetings with identified audiences.



A journal known as *Judicial Bulletin: a Journal of Judges and Magistrates Association of Tanzania* was launched in 1991 (as volume 1 for 1989). The honourable Chief Justice writing in its foreword, stated that:

A professional journal is essential for any dynamic professional body, like the Judges and Magistrates Association of Tanzania ... such a journal is a necessary medium for the interaction of professional minds within the professional body on the one hand, and the dissemination of ideas, knowledge and information to the public, on the other (Nyalali 1989).

The above statement has elements both of legal awareness and publicity. That issue of the journal had interesting articles covering a variety of pertinent issues, including those under discussion here. There were three articles on the administration of justice and one on the prevention of crime in Tanzania. An article titled "Administration of Justice in Tanzania: Delays in the Disposal of Case" written by Justice Mfalila deserves a special mention for the openness and self-criticism approach with which it was written.

After highlighting on how the problem of the disposal of cases was notorious, and how a long time advocate advised some of his clients to seek for assistance elsewhere, instead of going to courts (which the justice of appeal considered to be a bad commentary on the country's judicial system), the author gave one example of the cases he found pending at Arusha (one of the eight High Court registries) to illustrate the nature of the problem.

It was High Court criminal appeal No, 22 of 177 which went before the judge for admission on 11th June 1977. It was not until 30th August 1979 that it was admitted to hearing! The appeal is still pending (at the time he was writing in 1989). Yet the admission note which took two years to write was only a two line affair — "Admit to scrutinize evidence". I thought any clerk could have written that (1989:15).

These were serious observations made by a justice about another judge. The observations and the approach in which they were made, however, partly reflect the change of attitude within the judiciary on matters its members were willing to talk about and criticize. Such an attitude and criticisms could not have been heard of in the past. For reasons we need not go into here no other issue of the journal has since been published.

Judicial initiatives and efforts towards publicity and increased public relations activities in order to facilitate the portraying of the positive image of the judiciary to the public were given another boost in 1993. The Mrosso

Commission (1993) recommended, among other things, the establishment of a public relations unit within the judiciary and the appointment of public relations officers. The implementation of the above recommendation, like other proposals floated within the judiciary in recent years, will no doubt be subject to the availability of funds from the very government, which is already operating on a shoe-string budget, and engaged in retrenchment of employees as part of the World Bank and IMF led Civil Service Reform programme.

### **3.2 Funding of the Proposed Reforms**

Judiciary officials were (and still are) aware that most of the initiatives put in motion and recommended reforms needed immense funding. They were (and still are) also conscious of the fact that the government could not be expected to provide all the funds needed for these efforts. I am reliably informed, by sources within the Nordic donor community and elsewhere, that senior officials within the judiciary presented a number of requests for assistance in relation to some of these reforms in 1990.

As luck would have it, this was the very time when the World Bank, in collaboration with other donors, was already looking into the possibilities of providing financial assistance to areas critical to the efficiency of the public service, to the rule of law, and in particular, to the success of Tanzania's economic reform program. The two areas identified by the World Bank were: public sector financial management (especially accounting and auditing) and the legal and regulatory framework. So judiciary requests and applications for funding were not only timely but were also received with compassion. The World Bank assistance to the two identified areas became known as the Financial and Legal Manpower Upgrading Project — FILMUP (World Bank 1992). FILMUP must be understood in the context of two distinct but related developments and experiences worthy of mentioning.

FILMUP-like project, known as Administration of Justice Improvement, was introduced in the Commonwealth Caribbean in 1986.<sup>5</sup> The project was introduced following the Kissinger Report which recommended that the Reagan Administration should encourage, among other things, the building of strong judicial systems to enhance the capacity to redress grievances concerning personal security, property rights and free speech. The focus of

<sup>5</sup> According to Zagaris (1988:561-3) the Kissinger Report was produced in 1984. Funding for the project were authorized in 1985 for the project to become effective in 1986.

the project was to enable the rule of law to build a cornerstone of democracy and a positive force for just economic and social development (Zagaris 1988:561).

Closely related to the Caribbean experience above is the World Bank (1989) publication which focused sharply on the "restructuring of the African state in order to make it supportive of long term strategy for the liberation of the market forces and entrepreneurial potentials of African society" (Beckman 1992:83). It was in this report that the World Bank expressed the need to rehabilitate, among other things, the judicial systems in sub-saharan Africa so that they could become well-functioning again and be relied on to protect property and to enforce contracts (1989:9 & 192). It followed, therefore, from the above that law and legal institutions were, as of necessity, to become prominent not only for the regulation of free market, but also for safeguard of the rule of law, the independence of the judiciary and protection of human rights (1989:192).

The purposes and even the language of the Caribbean project and the World Bank Report discussed above are similar in many respects. And although the FILMUP project in Tanzania is related to the above two developments and experiences it also differs from them in some ways. One such difference need to be mentioned here, if only because that is explicitly stated in one of the World Bank reports. The Caribbean experience was initiated by America and funded by North American organizations (with the exception of the Commonwealth Fund for Technical Development and the British Development Division in the Caribbean which came in much later).

FILMUP, on the other hand, was initiated by the World Bank with the British and Nordic perspectives and dimensions added to it. The project was (and still is) funded by the World Bank, the British Overseas Development Agency (ODA), and Nordic donor organizations (DANIDA, SIDA and NORAD) and the Canadian CIDA (being the only North American organization). This cannot be sheer coincidence or accident. The influence of the Nordic donor organizations can be found in the following quotation which expresses these organizations' influence in Tanzania and their concerns for good governance and human rights related issues which are not World Bank concerns:

Government, Bank and donor interests in public financial accountability are similar and non-controversial: good accounting and auditing systems are essential for good economic management. With regard to the legal framework, however, the Bank approaches issues of legal reform from the stand-point of economic efficiency, but many bilateral donors, now keenly interested in the legal framework, approach it from the point of view of human rights and good governance. The two interests converge in

practice, not only because good “economic” laws governing, for example rights to property, serve as a logical starting point for good governance, but also because the same legal institutions (e.g. the Ministry of Justice) administer the legal framework for both economic and political rights (World Bank 1992: para 1.04).

The addition of both the British and Nordic dimensions in the Tanzanian FILMUP have a history (in the case of the British) and practical influence aspects (in the case of the Nordic donor organizations) attached to them which I need not go into here. That history and influence are important, however, to the proper understanding of the intended reforms.

At the time of writing an assistance, to the tune of USD 5.0 million as immediate direct assistance to alleviate some of the pressing needs of the legal sector as a whole, had already been given. For the judiciary, assistance was given to “finance training, library support, typewriters, and computers and other office equipment needed for a first-stage management information system” (World Bank 1992:19). Further funding was directed towards a study meant to determine a long term development strategy for the legal sector including the judiciary. At the time of writing the ten sub-projects had submitted their reports.<sup>6</sup> A general country report was still being prepared and results anxiously awaited.

All legal institutions in Tanzania are excited by and optimistic about not only the change from the marginalization of their institutions to prominence accorded them by the World Bank and the free market economy and political pluralism as a whole, but also with the FILMUP which was working towards the revitalization of legal institutions. Private legal practice in Tanzania has recently increased from less than 100 registered advocates in 1982 to slightly over 250 in 1994. This is still a small number when compared with Kenya, which had 852 practising lawyers in 1987 and 1200 in 1991 (Ross 1992:424 & Kariuki 1992:155), for example, but it was by any standard an unprecedented upward increase. This excitement and optimism were echoed by the honourable Chief Justice in a speech he gave

<sup>6</sup> Out of the ten sub-projects covered by the FILMUP study eight are of immense direct relevancy to the judiciary. These are:

i) The Administration of Justice; ii) Legal Education; iii) Law Libraries; iv) Quasi-Judicial and Alternative Dispute Resolution; v) Law Reform and Law Revision; vi) Legal Database and Registries; vii) Legal Literacy; viii) Legal Profession.

The other studies are:

i) Attorney General, Government Legal Offices and Tanzania Legal Corporation; ii) Ombudsman/Permanent Commission of Enquiry.

at the Law Society Dinner on 13th August 1994, where he said among other things that:

The administration of justice is a crucial component of the Rule of Law and, consequently, of Good Governance. It seems to me that until fairly recently, the administration of justice in developing countries was given the lowest priority by both international and national agencies of economic development. There is now an encouraging realization nationally and internationally that there can be no sustainable economic development without the enabling environment of the Rule of Law. As you are all aware, there is currently going on a wide ranging study of our legal sector ... It is unprecedented in scale and objectives on the African continent. We must give this exercise our total support. The study, code named FILMUP, seeks to identify the deficiencies currently afflicting the legal sector and to recommend appropriate remedies. With the active and enlightened commitment of its legal profession, Tanzania stands a good chance of becoming a model of how a one party state in Africa can transform itself into a multi-party state with solid roots in the Rule of Law.

As we await the outcome of the FILMUP exercise, we must however press ahead with the obvious reforms in the legal sector which do not require large additional resources to implement. We in the judiciary are committed to do so. (Nyalali 1994a).

What the FILMUP study findings will be we cannot tell at this stage. However, there is little doubt that lots of money will be required given the neglect and run down that has gone on for many years. One significant caution needs to be made here. Not all the money required for the rehabilitation of the legal sector will be provided by the World Bank and other bilateral donors. Some of it will have to be raised by and come from the government of Tanzania itself.<sup>7</sup> How much the government will be willing to give depends not only on what will be available in government coffers, but also on the government understanding and appreciation of the problem at hand and more so on its willingness to disburse funds for that expenditure item. That is where some of the existing optimism might have to start fading.

### **3.3 From Marginalization to Prominence: What Next?**

It must be said at this stage that initiatives of both the mid 1980s and those of the early 1990s were to a great extent influenced by political and

<sup>7</sup> This point is evident all along the World Bank (1992) publication.

executive events that took place at the time. It has already been shown above, how the judiciary responded and acted following the two Presidential speeches related to the anti-economic sabotage campaign in 1983 and 1984. I also mentioned that in 1986 the judiciary was called upon by the President to emulate hospital workers by working on shift basis and that they responded accordingly. Two further important events need to be discussed here: the Presidential speech to journalists in 1988 and the March 1990 cabinet resignation.

On 24th December 1988 President Ally Hassan Mwinyi spoke to journalists. The important part of the speech, relevant to this discussion, is reproduced below from the front page of the *Sunday News*, 25th December 1988.

President Mwinyi has said the iron broom is sweeping quietly to avoid intimidating the faithful and alerting the unscrupulous elements in government and public institutions ... The President, however, said the speed of the broom was being regulated by the rule of law. "Since we accept that the rule of law should prevail, we should allow the law to take its course", said the President, adding that the same law was at times protecting people who were publicly known to be wrong-doers. "The problem is not with lawyers, it is the law itself. That is why we have the Law Reform Commission to review the law so that it does not protect undesirable elements", President Mwinyi stressed.

The other event worthy taking note of happened in mid March 1990. It was first on the 12th March that President Mwinyi asked all ministers to resign their posts to allow him to appoint a new cabinet (see *Daily News*, 13th March 1990). Three days later a new cabinet was formed with seven ministers dropped, including the Minister for Justice, Minister for Health, Minister for Home Affairs and Minister for Tourism, Lands, and Natural Resources, among others.

When the President was asked why he asked the cabinet to resign, he said that it was prompted by the fact that corruption had become rampant in government and that there was a lack of accountability. In his own words he noted that "malpractice were widespread throughout the government, but they are worse in these ministries" (meaning of course those ministries for which the seven ministers were dropped. See *Daily News*, 16th March 1990). An understanding of the efforts and initiatives proposed and put into place by the judiciary must take these events and processes in mind.

It is my humble suggestion that the judiciary has, all along, been forced into reacting and responding to events. It was not, as we may be led to believe, that the department has been preparing itself, and the legal system

as a whole, for the demands of transition to political pluralism and free market. This diametrically opposed view has enormous implications, for the prominence accorded to the law and legal institutions, especially the judiciary. Important issues which need to be discussed and reflected upon are not only taken for granted, they are also being disguised. This is unsafe at this time when transparency and accountability are part of democratic requirements. Some examples of existing limitations and constraints will be shown in chapter 4. It suffices to emphasize here that other judicial systems, similar to that of Tanzania but also different from it, have been plagued by crises as well. The understanding of the fact that other judiciaries elsewhere are experiencing problems like those seen in Tanzania may help us to know the place and role of law and legal institutions in the transition to both political pluralism and free market economy. Such a background may be a trigger to a discussion of issues that have otherwise been taken for granted.

This is not an appropriate occasion to go into the details of these problems, but one general comment may be in order. There are certain notions and principles of the adversarial system of justice which make the judiciary isolated, paternalistic and out of step with social needs and demands. An uncritical adherence to some of these may be leading towards self destruction. Although an understanding of the existence of such limitations already exists, views on how they may be mitigated or even outrightly jettisoned differ (see Cappelletti 1981 & Shetreet 1988). These differences and other constraining factors are discussed in chapter 4.

## **4. Leading the Reforms: An Articulation of Constraints**

The judiciary is an institution, but it is at the same time composed of individual actors. These are the nuts and bolts without which the institution cannot do anything. These include judges (both in the High Court and Court of Appeal, magistrates (in the resident magistrates' courts, district courts, and primary courts). They also include all the supporting staff, the court clerks, process servers, administrators and accountants, and their assistants and secretaries of course. These are the actors all of whom together make the judiciary tick. As an institution these actors work together and portray the image of that institution. The actors, therefore, give the institution an image of oneness.

The fact that institutions are composed of individual actors makes it necessary to understand that there are roles and contributions which these individuals play as individuals, and which cannot necessarily be attributed to the institution in which they belong. These roles and contributions differentiate the individuals in question from their colleagues and counterparts in the institution. In studying institutions, both the oneness of the collection of individuals and the differences between them, have to be properly understood. Such an understanding may help in determining how and to what extent the actions and decisions of individuals are representative (or otherwise) of the institution in which they are members.

I have a feeling that since reforms have very often been led by individuals, a study of individuals may help to highlight some of these problems as well. Warren Burger and John Marshall (in USA), Lord Denning (in England) and Bhagwati and Krishna Iyer (in India) are among prominent examples of, not only how individual justices constitute component parts of judicial institutions, but also how individuals shaped and moulded institutions in which they were a part. I, therefore, decided to survey and document, as part of this study, some individual actors who, I and probably others feel, have played leading roles in the judiciary department, and who at the same time epitomize some of the inherent constraints reflected in the reform process. Choice of individual justices in Tanzania has not been an easy task but a starting point had to be made. For reasons which will become apparent in the course of the discussion, the reformers I have chosen to document are: the honourable Chief Justice



Francis Nyalali and honourable Justice James Mwalusanya. The two are in many respects different in their judicial outlook and approach, but the similarities between them are also glaring. Both have their admirers as well as critics.

#### **4.1 Chief Justice Francis Nyalali: A Legacy in Two Phases?**

Honourable Chief Justice Francis Nyalali was appointed in 1977<sup>1</sup> taking over from Augustine Said who served as Chief Justice between 1971 and 1977. Chief Justice Nyalali has been the longest serving Chief Justice in Tanzania since the introduction of the English legal system. During all these years of service in that honourable capacity, the judiciary has witnessed a variety of developments. Most of these have been attributed to him as the Chief Justice.

At the time of his appointment the judiciary was already experiencing a difficult time especially in its relationship with the executive as shown in chapter 2. My informants suggest that in those circumstances the appointee had to exercise a lot of caution, not only in the way he conducted himself but also in the manner in which he led and handled the department. Between 1977 and 1984 the Chief Justice very sparingly made comments or gave speeches. Of late, however, he has been making speeches.

There is a difference of opinion as to when the Chief Justice changed his outlook. There are people who suggest that he appeared to be a changed person when he addressed the National Executive Committee of the ruling party in May 1984 (*Daily News*, 31st May 1984). That is the time when he called upon the ruling party and government officials to observe the rule of law.

The other suggestion is that he displayed a change in attitude from 1992. This is traced to what he has been saying after he chaired a Presidential Commission for multi-party politics. Whichever is the exact timing of the change, however, it is an acknowledged fact that the present Chief Justice is not the same as the one in the earlier part of his tenure.

<sup>1</sup> The Chief Justice is both the President of the Court of Appeal (a judicial role) and the official head of the judiciary (an administrative post). It is common knowledge within the judiciary and political circles that the incumbent office holder had to argue very forcefully to have both roles combined when the Tanzania Court of Appeal was created in 1979 following the collapse of the East African Community and its institutions including the Court of Appeal for Eastern Africa.

#### 4.1.1 Phase 1: Cautious, Conservative and Probably Compliant

In the first half of his term of office the Chief Justice is said to have been very reserved, cautious and even conservative. Some of his critics have even suggested that he was executive-minded. In this respect the finger is pointed at what transpired and was recorded by the trial judge in the case of *Ally Juuyawatu v. Loserian Mollel 1979 LRT no. 6* where, according to the trial judge, “the honourable Chief Justice telephoned judge Mnzavas at Moshi and the latter had to rise from the High Court sitting for the matter to be communicated appeared to have been treated under certificate of urgency or emergency”. The trial judge considered that to be a violation of the independence of the judiciary doctrine from within the department itself.

The reasons for caution and conservatism, on the part of the Chief Justice, are varied. On the one hand, there is a suggestion that since he was appointed when legalism and law in general were already marginalized and less valued, and the judiciary in particular, was mistrusted or outrightly hated by the executive, there was very little he could have done as Chief Justice. In those circumstance, it is argued, he had to trade very carefully indeed. There is also a suggestion that at the time most professionals were looking for careers in politics and that the Chief Justice was no exception. He himself had political ambitions.<sup>2</sup> With such ambitions, it is suggested, he might have adopted a cautious, conservative and compliant standpoint as a strategy towards a position in the National Executive Committee and the Central Committee of the ruling Party.

There is a very scant material on which an independent and objective conclusion can be made about the Chief Justice during the first phase. This fact is in itself informative, especially if taken together with what has been going on since 1987. As shown in chapter 3 and in the next section, there appears to be a lot of material in the later part of his term in office compared to the first. These range from administrative circular to extra-judicial speeches.

<sup>2</sup> Several senior professionals secured seats in high political committees. They include, among others: Amon Nsekela (Chief Executive of the National Bank of Commerce) and Gibson Mwaikambo (Chief Executive of the National Insurance Corporation). As late as March 1995 honourable Nyalali's name was still being mentioned among Presidential contenders (see *Mfanyakazi*, 4th March 1995).

### 4.1.2 Phase 2: Reformer, Vocal and Critical

It was shown in chapter 3 how the judiciary has undergone a variety of changes since the mid 1980s. Most, if not all, of these changes were initiated by the Chief Justice in his capacity as chief executive of the judiciary. Observations have been made that the speech the Chief Justice gave to the National Executive Committee of the ruling party on 30th May 1984 marked the turning point in his career and his office. The contents of that speech have not been available for scrutiny but the following was the reaction of the ruling party as reported in the *Daily News* of 31st May 1984 (the official mouthpiece of the government):

The Political Propaganda and Mass Mobilization Department of the National Executive Committee issued a statement ... calling on the people, especially Party and Government leaders, to respect and follow the country's law.

That speech is mentioned by observers to demonstrate the fact that the Chief Justice had come out of the shadows of the executive to demonstrate that he was his own man. Commenting recently on the events of the 1980s, and shedding more light on the context in which that maiden speech was given, honourable Nyalali has on two occasions made the following observations which illustrate his present standing:

Under the one-party rule laws enacted by parliament and judgements passed by courts were often disregarded in favour of political expediency. By 1984 the situation had become so alarming that I got myself, as Chief Justice, invited to the Central Committee and subsequently to NEC to speak and warn against what I saw to be the impending dangers to the country arising from widespread disregard of the rule of law (*Daily News*, 8th June 1993).

Under the one-party state, law reflected that reality and judges were expected to interpret the law in harmony with political party ideology and party directives. Under that system, the crucial bonds which hold people together within the nation state were neither the law of the land nor the government of the country, but the party ideology and party organization (Nyalali 1994b).

As much as he was willing to demonstrate to the executive his independent personality and that of his office, by warning against the abuse of the rule of law and the independence of the judiciary, he also had to contend with and respond to the criticisms which were being laid at the doorstep of the

department of which he was (and still is) the boss. It is within this context that the initiatives and reforms discussed in chapter 3 have to be understood.

As luck would have it, the Chief Justice was later appointed Chairman of the Presidential Commission on One Party or Multi Party System in Tanzania. Following this Commission report, published in February 1992, the multi-party system of government was introduced in Tanzania. Since that time the Chief Justice has been among those in the forefront, not only advocating the virtues of democratization and the multi-party system, but also highlighting the vices of the one-party system. In one of his recent speeches, for example, he made the following observation:

It is realized in Tanzania that under a multi-party democracy, law and government must replace political party ideology and organizations as the fundamental bonds which hold people together in the nation state. There can be no doubt that, without establishing law and government as such new bonds, the process of change from one-party state could lead to the disintegration of society. There are numerous illustrations of this phenomenon including Somalia, Rwanda and former Yugoslavia (Nyalali 1994b).

Both the administrative circulars that the Chief Justice has issued since the late 1980s and the speeches he has made, since the introduction of the multi-party politics in Tanzania, demonstrate what my informants called "the two phases of Chief Justice Nyalali's term of office". Statements made and actions taken during these phases, however, implicitly suggest a number of limitations encountered in attempts towards reforming the judiciary. Before we examine them let us pause for a while to record other forms of changes which emerge from Justice Mwalusanya.

## **4.2 Justice Mwalusanya: A Critical Insider<sup>3</sup>**

The appointment of Justice Mwalusanya to the High Court of Tanzania in 1984 coincided with the year in which the Constitution of Tanzania was amended to incorporate the Bill of Rights provisions. The association between these two (the phenomenon of human rights protection in Tanzania

<sup>3</sup> Without being explicit about it, Justice Mwalusanya seems to be following the footsteps of the example shown by the Indian justices, especially Chief Justice Bhagwati and Justice Krishna Iyer, of being critical of the very system in which they are members. This practice is helpful to researchers who do not have access to inside information.

and the person of Justice Mwalusanya) are both interesting and remarkable. It is interesting because although Justice Mwalusanya was appointed together with others to the High Court, it is only him who has become a vocal custodian of human rights than his colleagues. Not only that his judgements have, on the whole, been influenced by the bill of rights provisions in the Constitution, his approach has also nourished and enriched the otherwise empty provisions of the bill of rights.

His appointment to the High Court bench took place during the era of economic centralization, one-party monopoly and socialist construction. That was the time when government policies, at least at the level of rhetoric, also proclaimed the concern for the masses of Tanzania. That era ended with the World Bank-IMF led liberalization of the economy and the ushering in of free market and introduction of political pluralism. Like his identification with human rights, he has as well identified himself with progressive forces and political change.

These two developments have formed the backdrop of his judgements and extra-judicial statements. In the ten years he has been on the High Court bench his contribution has been so enormous. He has not only struck down sections of the law that he found to be in violation of the Constitution, he has also indicated what he is likely to do in his judicial capacity if certain things and conditions are not fulfilled. In the political sphere he has shown what course of action the government needs to take in furtherance of good government during the process towards political pluralism. Justice Mwalusanya is one (and probably the only one) of the 30 plus justices in the High Court and Court of Appeal in Tanzania, who has expressly stated his standpoint on all these issues. The rest of his brethren have remained silent and non-committal, probably in furtherance of the principle of judicial neutrality.

Justice Mwalusanya's approach is also remarkable. In most of his writings (both in his judgements and extra-judicial statements) he has demonstrated a very high degree of industry through his research and proficiency. He makes reference to a variety of books (legal and non legal), magazines and newspaper reports, and all sorts of documents and memoranda that can be found to justify his decisions (in case of judgements) and/or support his points (in case of extra-judicial papers). One High Court judge, who has been to Justice Mwalusanya's office, commented to me that the office was full of human rights related documents and could not guess where he got them from. Justices of the Court of Appeal have, on more than one occasion, praised his research efforts and industry. On another occasion, however, they did not hesitate to comment negatively about his style. Their Lordships observed that "the

style he has used in writing the judgement, dividing it into parts and sections, with headings and sub-sections, <was> unusual. The style is more suited for a thesis than for a judgement” (See Ramadhani J.A. in the case of *Mbushuu @ Dominic Mnyaroje and another v. Republic*).

His combination of interests (human rights and political pluralism) have to be understood in the context of political and social developments of the world as a whole and in Tanzania in particular. What is unique, however, is the way he has managed to distinguish himself among the progressive forces out of all the justices in both the High Court and Court of Appeal.

Whereas he shows concern for the poor common people of Tanzania, whom he attempts to speak for both in his judgements and extra-judicial speeches, he at times contradicts himself and despises the very people, whose cause he has been attempting to defend. This point will be discussed further at a later stage of this chapter.

#### 4.2.1 *Judicial Contributions*

I mentioned earlier that Justice Mwalusanya was appointed to the High Court in 1984. Attempts at tracing his decisions since his appointment, in order to determine when he became a judicial activist, did not reveal much. This is partly not only because decisions of the High Court and Court of Appeal in Tanzania have not been reported since 1982, but also because the High Court Registries at both Mwanza and Dar es Salaam do not have adequate and proper records of court decisions. I was able, however, to find his judgement in the case of *R. v. Buruhani Athman and others*, where his judicial activism could be traced.

This was a case in which the accused persons, charged with robbery with violence, applied for bail pending trial. The trial court refused to release them on bail on the authority of section 148(5)(e) of the *Criminal Procedures Act* 1985 which made the offence they were charged with unbailable. The accused person further applied to the High Court for bail. Justice Mwalusanya analyzed the legal provision in very detail and observed that the law in question was bad law and urged the Law Reform Commission to take up the matter very urgently in order to remedy the legal anomalies associated with section 148(5)(e). He concluded by saying that:

Otherwise when the day of reckoning arrives, that is on 16th March 1988 when the court will be empowered to declare any law invalid if it is inconsistent with the Constitution, this provision under discussion stands no chance of survival.

The day of reckoning did come and the Law Reform Commission had not heeded to his lordship's advice and things were not yet right. Justice Mwalusanya was ready and willing to exercise his judicial discretion and exercise it he did. His judicial contribution has been very well documented and readily available (Shivji 1991; Peter 1992 and Mwalusanya 1994 & 1995a). It suffices here to mention only in outline. His judgements on the protection of human rights include: the right to be heard, the right to freedom of movement, the right to bail, the right to personal freedom, the protection of the rights of women against discrimination and the right to legal representation, among others. The totality of his contribution puts it beyond doubt that as an individual Justice Mwalusanya has made extensive contribution to the protection of human rights in Tanzania. I am reliably informed that even the South African Supreme Court recently considered and benefitted from his reasoning in their consideration of the constitutionality of death penalty.

#### *4.2.2 Extra-Judicial Pronouncements*

Unlike judicial decisions, which could not reveal when Justice Mwalusanya started being an activist, vocal and critical, his first extra-judicial statement was made in September 1992.

I had the benefit of identifying and locating nine of Justice Mwalusanya's extra-judicial documents. It appears to me that, besides the Chief Justice, Justice Mwalusanya has a bigger number of extra-judicial speeches than each of the remaining justices in both the High Court and Court of Appeal. In all of these speeches the protection of human rights and the necessary conditions for the success of political pluralism in Tanzania rank high on his lordship's agenda.

In his September 1992 speech, for example, he wrote and spoke about conditions for the functioning of a democratic Constitution. It was in that speech that he identified several pieces of legislation which in his opinion not only violated the Constitution, but were also an impediment towards democracy in Tanzania. He categorically stated that if and when these matters went to court they were likely be struck down. On two other occasions he has been invited to speak to journalists. At both occasions he spoke about the role of the media, the freedom of the press and political pluralism in Tanzania. In one of these speeches, he quoted at length examples from England (Lord Denning) and Zimbabwe (Justice Enock Dumbutshena) to show that there were judges who were compliant and executive-minded who "believed that they owe their existence to govern-

ment and refuse to do anything that might disappoint the government". He concluded by cautioning that:

these judges have to examine their conscience and cultivate a new outlook as to the proper role the judges are expected to play in society ... a judge must steer his way between the Scylla of subservience to government and the Charybdis of remoteness from constantly changing social and political pressures as well as economic needs (Mwalusanya 1995a:46).

In his recent paper titled "Checking the abuse of power in a democracy" Justice Mwalusanya has extended his attack on the abuse of power into the judicial realm. He observes that "the judiciary is not spared of the condemnation of abusing its powers at least by omission" (Mwalusanya 1995b). Between pages 23 and 33, that is about 20% of the 53 page paper, a discussion of the ways in which the judiciary has abused its power is presented under six sub-headings. These are: the failure to use purposive and generous construction of the Constitution, failure to deliver justice at the expense of the law, delay of cases, abdicating their adjudicative role on the ground that the matter is not justiciable, failure to use the power of judicial review (by means of prerogative orders) effectively, and failure to bring domestic law into harmony with innovations in international human rights norms.

The contents of one of his lordship's publications landed him into trouble. The Attorney General objected against Justice Mwalusanya presiding over the hearing of a petition filed by Christopher Mtikila in mid 1994. The State Attorney, who represented the Attorney General in that case, observed that Justice Mwalusanya's stand point on certain provisions of the Constitution disqualified him from adjudicating the petition in question. Justice Mwalusanya ultimately withdrew and the hearing of that petition had to be presided over by another judge.

In December 1994, another executive-initiated move, with the approval of the executive dominated legislature, a law was passed which requires, among other things, that a panel of three High Court judges sit together for the hearing and determination of petitions for the enforcement of constitutional rights. Both the Attorney General's objection (in Mtikila petition) and the stringent and restrictive legal provisions of the *Basic Rights and Duties Enforcement Act*, number 33 of 1994 have severe implications to the administration of justice in general and attendant intricacies during political pluralism. In the following section, an attempt is made to show how the above judicial processes have been interpreted in



Tanzania, and how that interpretation partly explains the constraints on the judiciary.

### **4.3 Skepticism and Contradictions**

So far the trends demonstrated by the two justices have only been presented as positive and commendable. It must be said, however, that there are also several skeptical voices both within and outside the judiciary which need to be brought out as well. In the following section, an attempt is made to discuss some of the comments made about the direction taken by the Chief Justice, and contradictions and inconsistencies apparent in Justice Mwalusanya's approach.

#### *4.3.1 Skepticism about the Attempted Reforms*

It was indicated in chapter 3 that the judiciary has of late been involved in a variety of reforms. These were classified as attempts towards increased efficiency, internal control and disciplinary measures, and legal literacy and public relations. Reactions to these measures and efforts both within and outside the judiciary have been mixed. These views may be divided into two categories. There are those who have observed that the Chief Justice has been doing too much too quickly. There also those who comment that he has done too little too late. Due to space limitation only some of these comments and observations can be treated here as illustrations of the general patterns.

Let me start by observing that the necessity and desirability of these reforms were acknowledged by all informants. This agreement seems to come from the fact that efficiency, effectiveness and discipline among judicial officers are considered necessary and important for the restoration of public confidence in the judicial system. Differences and a divided opinion, therefore, only arise on matters of details and methodology adopted towards achieving the desired end.<sup>4</sup>

The creation of the post of the Secretary to the Regional and District Disciplinary Boards and the subsequent appointment of personnel to these offices, for example, is pointed out as one of the areas where the Chief Justice appeared to be in a rush. Senior district magistrates, appointed to these seemingly prestigious offices, have complained about their appoint-

<sup>4</sup> For some of the written criticisms from within the judiciary, see Kalegeya (1993) and Mushi (1993).

ments. They, on the one hand, commented that the offices have very little to do and, on the other hand, that their appointments were made in secretive circumstances. These officers (officially known as secretaries to Regional and District Disciplinary Boards) argue that they are under-utilized, in the sense that they have only to sit in their offices waiting for allegations of indiscipline to arise in the districts or regions in which they have been posted. With regard to the secrecy surrounding their appointments, it has been observed that the appointments were made along certain predetermined lines which left the appointees suspicious of the intentions of their bosses at department headquarters.<sup>5</sup>

The creation of these posts is also said to be causing confrontation between practising magistrates and office occupants (board secretaries). Board Secretaries are said to be unnecessarily blamed by their practising magistrate colleagues whenever disciplinary charges are preferred. Accusing fingers are said to be pointed at these officials in their respective districts and/or regions. This, it has been said, is likely to continue being a cause of unnecessary enmity and suspicion which may ultimately affect working relationship between magistrates where nothing like it existed in the past. This situation is said to have arisen because magistrates (appointed as board secretaries) have been set against fellow magistrates in matters concerning discipline instead of leaving it to officials outside the judiciary, as the practice was in the past. Arguments along similar lines have also surfaced with regard to the implementation of the individual calendar and the admission of charges circulars discussed in chapter 3. In the latter circulars magistrates in charge of districts or regions are expected to report on the conduct of cases by the individual magistrates in the districts or regions.

Two further complaints need to be mentioned. It has been observed that at the time when the Chief Justice was introducing some of these far reaching changes, significant safeguards against judicial interference have been eroded especially at the level of the magistracy. In effect the Chief Justice has been blamed for relinquishing his disciplinary powers to the executive branch which in turn compromises judicial independence. The other observation made is that these changes, genuine and necessary as they are, have to correspond with the working conditions and remuneration of

<sup>5</sup> This view is partly reflected in the following comment made by the Registrar of the Court of Appeal (Kalegeya 1993). He said that secretaryship to Judicial Boards is "one of the most hated post in the Department by most of the potential magistrate candidates to hold it". It is said that only senior District Magistrates, who had arisen from the ranks and had not gone through the two year diploma training introduced for magistrates by the judiciary, were appointed to these posts. A suspicion arose in the minds of the appointees and their colleagues that the department was phasing them out.

judicial officers, especially magistrates and staff in junior ranks. I have heard comments to the effect that the Chief Justice appears to be willing to respond to executive demands for increased efficiency and tightening of discipline, but he has not been able to impress on the executive on the need to improve the appalling and terrible working conditions and remuneration for his colleagues and subordinates. I, for one, have read newspaper reports where magistrates lamented that they had to ask complaining parties to provide typing and duplicating paper, writing pads and folders for their cases to be registered and heard. These complaints were made by a senior district magistrate in response to allegations made by the district commissioner accusing magistrates for delay in the hearing of cases. The magistrate said that "some of the problems facing the courts adversely affected the dispensation of justice and even caused unnecessary delays" (*Daily News*, 10th April 1990). In another report the roof of the courthouse was known to be falling down "with the magistrate operating with the fallen piece of tin sheeting less than a foot above his head" (*Daily News*, 21st January 1991). Such reports, which are not journalistic exaggeration but a rule, illustrate what the working conditions are within the judiciary.<sup>6</sup>

Proponents of these two comments go to the extent of playing down the whole reform exercise and initiatives. They suggest that the reforms may in the long run not improve the image of the judiciary as a department, but that of the Chief Justice as a person. Such pessimism in turn makes the Chief Justice look more compliant and subservient to the executive.<sup>7</sup>

Some remarks have also been heard with regard to the introduction of legal literacy and public awareness and alternative dispute resolution. An observation made here is that the principal function of the judiciary is that of hearing of cases, and resolution of disputes and that the existing workload for both judges and magistrates is already very high and likely to increase with the current political and economic changes. It is argued that the decision to add these two new duties — training the public in legal awareness and involvement in the reconciliation of potential disputants, amounts to the overstretching of the already tired human resources. Such

<sup>6</sup> The question of the appalling working conditions and remuneration for judicial officers is discussed in details in one of the FILMUP sub-project reports (see Tanzania, United Republic 1994a) which was written by a distinguished English barrister, Louise Blom-Cooper. The Mrosso Commission (1993) states categorically that most of the recommendations made in their report are subject to the improvement of the working conditions and remuneration of judicial officers at all levels.

<sup>7</sup> This view seems to be supported by sources close to the Chief Justice. It is said that the boss is very keen to leave his mark on the judiciary as he comes close to retirement.

an extension of duties and functions of the judicial officers is interpreted as over ambitious on the part of the Chief Justice.

I indicated that the other category of view critical of the Chief Justice argue that he seems to be doing too little too late. Here, reference is made to what was attempted by Chief Justice Georges between 1965-1970. Their argument is that most of what the present Chief Justice has been advocating were first initiated in the mid 1960 and early 1970s by Chief Justice Georges. Very little is known about the reasons why those initiatives failed. The fact that those initiatives were not implemented partly suggest that they were either rejected or thought to be unacceptable at that time. The question asked now is whether the reasons which made those initiatives unacceptable have changed. If those reasons have changed, then, the delay in the implementation of those initiatives have probably made them more difficult to achieve the desired objectives now, as attitudes have crystallized and circumstanced changed.

Also relevant here, to the effect that the Chief Justice has done too little too late, are questions asked about the fate of the Msekwa Commission Report presented to the government in 1977. That report, it is noted, was about the review of the judicial service. Many observations and recommendations were made among which could have improved the judiciary. It is noted that the Chief Justice could have taken up the matter with the government to see to it that recommendations were implemented. Very little, or nothing at all, was done in that respect. The Chief Justice, however, appears to be very optimistic and hopeful with the FILMUP project as a potential for the rectification of existing judicial maladies. An observation is made that the inability to appreciate and accept Chief Georges's initiatives and the failure to follow up the implementation of Msekwa Report recommendations in time, were not only regrettable but also wasted opportunities, which may haunt the judiciary for a very long time.

#### *4.3.2 Contradictions in Mwalusanya's Approach*

Justice Mwalusanya's enormous contribution to the interpretation of the Constitution and laws of Tanzania has already been noted. He has shown what the High Court is capable of doing in the protection of individual human rights in Tanzania, and what steps the government need to take during the transition towards good governance. These efforts, commendable

as they are, have not been without inconsistencies and/or contradictions.<sup>8</sup> I will show how Justice Mwalusanya has confused socialist political rhetoric, prevalent in Tanzania since the mid 1960s, to the actual governmental practices in Tanzania. It will also be shown how his lordship has, on the one hand, attempted to interpret the law in the interests of the general impoverished public but, on the other hand, he seems to underrate and ridicule the very people that he seeks to speak and stand for.

Before the advent of multi-party politics in Tanzania, Justice Mwalusanya attempted to justify some of his decisions by making reference to socialist aspirations that Tanzania had declared since 1967. He also made reference to ruling party documents which stipulated that Tanzania was a democratic country. His lordship made these assumptions and observations part of his judgements in order to impress on the government in general and the parties to the case in particular, that certain government practices were inconsistent with its own declared direction. He did this at the time when Tanzania was a one-party state, and that ruling party was not only supreme in the constitutional sense, but also over and above all other organs. It could be said that although Justice Mwalusanya knew that the rhetoric was extremely the opposite in practice, he went ahead to substantiate his decisions on the basis of rhetoric than practice. In actual fact, one may say that he was trying to question why the practice was different from the declared goals. It appears to me that his lordship was attempting to come to terms with the irreconcilable gap between government statements and government deeds. The question which arises here is whether his lordship was right in making these assumptions?

My answer to the question posed above is that he was not. With the benefit of hindsight and after the introduction of multi-party politics, it has now become clearer, as noted by the Chief Justice in June 1993, that the one-party rule was not only undemocratic, but that it also marginalized the law and judiciary in favour of political convenience. Justice Mwalusanya was not able to notice this at the time, and if he did, he did not speak about it. Justice Mwalusanya has already taken up these issues in both his judgements and extra-judicial speeches. There seems to be a contradiction here.

Justice Mwalusanya has also been attempting to speak on behalf of the masses, the poor and downtrodden in Tanzania in both his judgements and extra-judicial speeches. In more than one of his judgements he has urged the judiciary to be relevant to the society (*Daudi Pete v. R.*, *Obadiah Salehe v. DOWICO.*, and *Hamisi Manywele v. R.*). He concludes that 'the

<sup>8</sup> For another line of argument on contradictions in Justice Mwalusanya's judgements, see Shivji (1991).

judiciary needs to come to the aid of poor citizen and if it cannot then we can as well do without it' (*Chumchua Marwa v. Attorney General*). In other judgements he has indicated that the judiciary and the bar and the judicial process were in the dock for neglecting the poor and that the two (judiciary and bar) had for very long "buried their heads in the sand like ostriches" (*Hamisi Manywele v.R.*, and *Thomas Mjengi v. R.*). These comments were made in his lordship's attempt to impress his colleagues in the judiciary and elsewhere of the desperate situation facing the common men and women who approach the legal machinery seeking for remedies in Tanzania. To some extent these comments suggest that Justice Mwalusanya not only understood the living conditions of common Tanzanians, but that he was also willing to use his legal discretion to provide legal remedies in recognition of these difficult conditions and circumstances. The practices in the High Courts and Supreme Courts of India have been very instructive on this (see Cottrell 1992 & 1993).

His lordship, however, has not been consistent in his understanding of and sympathy with the problems facing poor and common Tanzanians. I will give two examples to illustrate this. Between 1987 and 1990 Justice Mwalusanya decided cases involving *Sungusungu* members and groups.<sup>9</sup> *Sungusungu* arose among the Sukuma and Nyamwezi people following a wave of crime and criminality which was judicially noticed.<sup>10</sup> It was also apparent that the official institutions, responsible for the maintenance of law and order, had proved incapable of coping with the increasing crime wave. In all his decisions he found *Sungusungu* activities to be illegal and unconstitutional. His lordship did not hesitate to comment that resorting to self-help was unacceptable and that the people who engaged in *Sungusungu* activities were rolling the wheel of progress a hundred years backwards (see *Magreth Maduka v. Mponyo Makambi*, High Court Mwanza Registry, decided on 30th July 1987). His lordship did not show any appreciation of what these people did in defence of their lives and property in dangerous and helpless circumstances nor did he consider that these measures, taken

<sup>9</sup> For a discussion on the *Sungusungu* phenomenon, see Abrahams 1987 and Bukurura 1994 and literature cited therein.

<sup>10</sup> In the case of *Charles Charari Maitari v. Matiko Chacha Cheti and 4 others*, High Court civ. cas. no. 15 of 1987, in recognition of the state of criminality in Tanzania, Justice Mwalusanya commented as follows: "... we must not allow even our disgust at the poor performance of our police and courts and the increasing lawlessness, to overcome our commitment to the principles of the Rule of Law."

in desperation, amounted to a “common man’s sense of justice” that he advocated elsewhere.<sup>11</sup>

The second example is found in his lordship’s decision on the constitutionality of the death penalty (*R. v. Mbushuu and another*). In that case, as elsewhere in his lordship’s decisions, sentiments with regard to the plight of the common man are displayed. Justice Mwalusanya goes to the extent of demonstrating how the government had created the living conditions from which murders emerge. He observes that: “the grinding poverty and hunger lead to brutalization because the economy has been mismanaged by the government.” Having revealed his concern for the poor masses of Tanzania, Justice Mwalusanya, in total disregard of his common man’s sense of justice, goes forward to despise the very people that he has been attempting to speak for. He makes an observation that death penalty had the support of many people in Tanzania, but goes further to comment that the majority who support the death penalty did so blindly, and that “these are not enlightened and are not initiated or aware of the ugly aspects of the death penalty. Apparently it is so because the death penalty is carried out in secrecy.”

The contradiction in both examples is that whereas, on the one hand, his lordship has attempted to show his understanding of and sympathy with the plight of the poor masses he, at the same time, went out of his way to underrate their wisdom and judgement. One would have expected that the judge who identifies with the poor and downtrodden, would as a matter of course, comprehend and sympathize with their anger and frustration. Justice Mwalusanya’s insufficiency in this respect, neither differentiates him from the other lawyers and justices, “with a dense ideological fog”, as he labelled them in the case of Daudi Pete, nor does it help to enhance community confidence in the judiciary as a protector of society, the course he has been advocating.

#### **4.4 Implications for the Judiciary!**

Skepticism, contradictions and inconsistency discussed above reveal and partly explain the complexities and difficulties in the reform processes initiated by both the honourable Chief Justice Nyalali and Justice Mwalusanya. These difficulties are relevant to our endeavour towards the understanding of the judiciary as an institution, the individuals who are the nuts and bolts and who operate the institution (judges, magistrates and the

<sup>11</sup> For a critique of this and similar legal arguments, see Baxi (1982:328).

supporting staff) the judicial processes and the over all surroundings in which most of these events and processes take place. It is evident from the above discussion that individuals (Chief Justice Nyalali and Justice Mwalusanya) contributed their part. However influential, powerful and/or convincing these individuals may be, they are subject to professional, internalized conceptions and practices, gained over a long period of training and practice. They are equally and importantly subject to the system in which they are a part, and surroundings and circumstances within which they work.

The two phases through which Chief Justice Nyalali's term of office has passed shows how ones stay in office not only affect the way one thinks and works, but also the direction in which one can initiate, influence and manage change. Justice Mwalusanya, on the other hand, demonstrates how ones training, practices and in-built professional prejudices cannot be obliterated or even suppressed. These tendencies revealed themselves in the course of his judgements on *Sungusungu* issues and the constitutionality of the death penalty.

Both individuals discussed above attempted to do what they thought was right and within their individual abilities, powers and discretion. They also attempted to influence their colleagues' comprehension and reasoning. In both cases some forms of suspicion, doubts and even resistance have been detected. To my mind, however, all the attempts discussed above did not go far enough.<sup>12</sup> The failure to do this partly reflects internal inhibitions as well as system-based constraints.

One need to mention here how Chief Justice Bhagwati of the Indian Supreme Court managed to convince and bring on board his doubting colleagues to go along with him. Chief Justice Nyalali, on his part, has not attempted the Bhagwati approach nor is there any evidence to show that he is willing. Justice Mwalusanya, on the other hand, seems to be alone and probably speaking to himself. Individual efforts may be thwarted by

<sup>12</sup> Tanzanian judges in both the High Court and the Court of Appeal are quite aware of Indian legal developments in general and social action litigation in particular. See Kisanga (1985), Ramadhani (1989), and Justice Lugakingira in the case of *Christopher Mtikila v. Attorney General*, to mention only a few. Chief Justice Bhagwati was in fact invited to and did speak at the Second Commonwealth Africa Judicial Conference held at Arusha (8th-12 August, 1988). In his speech, he among other things, urged the judiciary to be relevant to society and to adopt an "activist-goal oriented approach". He said: "... let us not forget that protection of the Rule of Law and advancement of human rights are committed to our care by society and have to fulfil the expectations of deprived and vulnerable sections of society, through fearless discharge of our functions ... We must not live in the ivory tower ..." (Bhagwati 1988:100).



executive exercise or legislative measures. This observation is illustrated by the barrier erected by the Attorney General (by way of an objection in Mtikila's petition) and the stringent and restrictive legal provisions of the *Basic Rights and Duties Enforcement Act*, number 33 of 1994.

The experience from the above discussion also shows that the individual's ability to influence others is subject to team rules and spirit, within which that individual has to play (in this case the judicial system). The existing judicial system has its inherent constraints which the attempts made by the two discussed justices have not managed to surmount.

What are the effects of the discussion above to our understanding of these judicial processes in political pluralism and free market economy? One revelation is that there are inherent limitation both within and outside the judiciary. The challenges ahead are enormous, so are the limitation. Speaking in August 1994 the Chief Justice alluded to some. The following quotation is part of what he said:

For the first time in the history of our country, a court is empowered to adjudicate on the constitutionality of a law enacted by the Parliament and to declare null and void any law which is violative of the Constitution. Currently there are twenty three cases pending in the High Court country-wide. This confers an enormous power and responsibility upon the Tanzanian judiciary ... It is however a power and responsibility which demands the highest standards of integrity, judiciousness, learning and wisdom on the part of the judges. The exercise of this enormous power without due regard to these standards is similar to launching an unguided missile with a nuclear war-head. It may boomerang and destroy those who launched it, and in any event, it is bound to wreck havoc to all and sundry (Nyalali 1994a).

In the above quotation the challenges ahead are highlighted but a word of caution as to how those challenges have to be tackled is also made. Were the judges being called upon to exercise restraint as the means of avoiding the boomerang effect? Can the regressive steps in the political field taken in December 1994 be called such a boomerang? The Chief Justice's caution must be left to the individual interpretation (of the judges and analysts) in light of what we have shown in this chapter and the preceding ones. Whichever course of action is taken by individual judges hearing the cases will be guided by legal doctrines of what their lordships consider to be fair and just in the circumstance. The justice of the particular cases cannot be predicted even with the aid of modern technology and jurimetrics. With or without political pluralism the role of the legal system and the judiciary in the modern society is already complex and existing legal principles

developed over a long time will remain to be the guides to judicial decision making. The public will have to remain in the shadows of the judicial minds which act in accordance to what was once best in England. One English senior police officer once remarked that the English legal system is archaic and out of step.<sup>13</sup> That does not seem to be recognized by some members of judiciary in Tanzania.

<sup>13</sup> Albert Pacey (former Chief Constable of Gloucester and now Director General of the Criminal Intelligence Services) in the *Daily Telegraph*, 25th August 1993. See also comments by Charles Pollard, Chief Constable of Thames Police *Daily Telegraph*, 30th October 1993.

## **5. Conclusion: Legal Prominence in Hostility**

In the preceding chapters an attempt has been made to show how liberal legalism found its way into Tanzania during the colonial era, and that some of its principles were made part of successive Constitutions of Tanzania from independence and that most of these were on the whole retained all along to the present. It was also shown that the marginalization of law and outright hatred of legal institutions crept in the mid 1970s. For want of adequate information, but with the benefit of the attitudes of the time, we decided to engage in some guess work, from which a suggestion was made that this marginalization and hatred was probably a result of the inability of law and legal institutions to change and adapt to new demands after independence and beyond.

Chapter 3 outlined the measures taken by the judiciary towards rebuilding its image. These were examined under three broad headings as: the enhancement of efficiency, increased discipline and the training of the public about their legal rights and public relations exercise. These changes were boosted by the way in which the World Bank and other donors viewed the role of law and legal institutions during both the economic reforms and democratization processes that were being introduced in Tanzania at that time. An observation was made that, whereas some sources in the judiciary would like us to believe that these measures were deliberately initiated in recognition of the changing political landscape and for the purposes of preparing the way for a responsible judiciary in the changing political and economic circumstances of Tanzania, a careful and systematic analysis of the events and processes surrounding the initiatives suggest otherwise. A cautious note was sounded to the effect that crises in the law and legal systems was not unique to Tanzania and that examples existed elsewhere from which the reforms introduced by the judiciary in Tanzania might be compared with and lessons learnt.

Examples from two honourable justices who have been behind some of these reforms, were sketched in order to illustrate some of the constraints inherent in the reform process. The constraints were identified both at an individual level and within the judiciary department. These constraining forces may have enormous implications to the whole legal system.

When all the above have been said, it is also important to stress that liberal democratic principles are part and parcel of political pluralism, and the free market economy, sweeping through Tanzania and other third world countries. The importance of the rule of law, the protection of individual human rights and independence of the judiciary cannot be otherwise but prominent and high on the agenda. As the central role of law and legal institutions is recognised the need to examine its background and assess its operations during past political and economic phases has also to be done as of necessity, instead of being taken for granted. This has to be done, as already started, by the judiciary itself, its friends and critics as well. Such a discussion helps to identify the strong points as well as its weaknesses, both of which need to be known if the judiciary is to perform the important role and duty assigned by the Constitution. For this exercise to be successful, therefore, a discussion need to be broadened further than the initiatives outlined above.

That takes me to matters that seem to me to have been completely left out or inadequately considered in the reform exercise discussed above and the hostile circumstances within which the reforms are taking place. The two are intertwined and closely related and need to be understood as important and, therefore, placed on the agenda for discussion. The issues left out and the hostility that exist have implication both for the changes in question and the potential for their acceptability or otherwise. I will confine myself to the limited consultations with interested parties, the choice of approach to legal interpretation from among the exist two styles, from which Justice Mwalusanya has picked one as against the other, and a brief highlight of the hostile surroundings within which legal prominence has come about. These issues are raised as part of an attempt to understand the whole reform process in a broader perspective, instead of confining it within the professionals circles.

## **5.1 Limited Consultations**

It may be clear by now that most of the reforms discussed above were either introduced by or at the initiative of the judiciary. I have also mentioned that there are reforms which were instituted by way of circulars and/or by laws, and others by way of legislation. The reasons for this may not be hard to find. As highlighted earlier, it was because the judiciary was reacting to events or responding to challenges urged upon it from elsewhere. Before turning our attention to a discussion of the limited consultation with other bodies involved in legal duties, it is necessary to note that

even within the judiciary itself there appears to have been limited consultation.

My first impression was that consultation took place within the judiciary on the introduction of these reforms. On further inquiry, however, I learnt that there was a problem regarding the extent of these consultations. I was told that even within the judiciary discussion took place at higher levels only (i.e. among judges). It is said that most of the details were discussed at seminars organized for judges from which instruction, in the form of circulars, were issued to the subordinates to implement. Whereas these comments may be difficult to verify, they, in themselves, raise very significant points.

Related to the limited in-house consultation is the question of lack of or at least limited consultation with, other bodies and departments concerned with the administration of justice and the legal system in general. As noted earlier absence of consultations has not been without its difficulties. I mentioned in chapter 3, for example, that advocates have protested and continue to protest the law that subjects their performance and discipline before the judges. I have also heard advocates complaining about some circulars, especially circular number 2 of 1992 which stipulates that appearance before another court may not constitute sufficient ground for non-appearance before another court. The argument raised against this circular is that it almost demands that advocates should have only one case a day on their calendars in order to avoid the problem of collisions in court appearances and subsequent non appearance in other courts. Such a demand seems unreasonable to practising advocates who feel subjected to "only one case a day" timetable.

There are also complaints concerning work schedules of other departments which deal with the judiciary. For want of time and space I need not get into these here, it has been heard, from departments including the Police and Prisons, that some of the Chief Justices' circulars are making it difficult for them and causing complication in their work. The circular mentioned in this respect is the one on the shift system.

Information available to me from sources within other departments related to the administration of justice indicate that consultations have not been made in time, and in some cases it has not been adequate. I am told, for example, that in regard to the introduction of the shift system, a circular was issued by the Chief Justice and received by other departments with instructions to implement. The departments concerned issued follow-up circulars to their subordinates to implement the Chief Justice's circular. In the course of its implementation, however, some limitations were

encountered. As a result of these snags the said circular is now known to be implemented in some regions and districts and not others.

One general observation which have to be made here is that some of these circulars were only piecemeal solutions to some of these problems and that they needed extra considerations and consultations before they could be considered as adequate solutions for perceived problems. One observer noted that the judiciary was probably not the best department to be in the forefront in the initiation of some of these reforms. My informant thought that the Law Reform Commission was probably the most appropriate institution to initiate discussion and conduct research on the kind of changes needed. There was still a feeling, though, that the Law Reform Commission itself suffered from resource constraints as well (be it material, financial or human) which contributed to its inability to perform its statutory functions.

Whereas consultation has been limited and/or inadequate both within the judiciary and related legal institutions, consultation with the general public has been totally lacking. Although the judiciary has been trying to identify with the public, as shown by the legal awareness training and publicity-related efforts, it has not come to the attention of the judicial reformers that the general public need to be approached and consulted, as advisers to the judiciary, in the whole reform process. On the one hand, lack of public consultation does not bode well with the fence-mending exercise envisaged by the judiciary reformers. On the other hand, however, it may partly be a reflection of professional superiority and paternalism which detests consultation.<sup>1</sup>

What need to be stressed here is that, on the whole, reforms introduced for the judiciary can only be successful if they involve all important actors. Such reforms affect other departments in the legal system and the general public, as much as they are dependent upon them. Any failure or disregard of the views from these other important players has colossal effect on the implementation of the intended reforms.

## **5.2 Choosing a Style of Judicial Opinion**

In chapter 1 a suggestion was made that there are two prominent styles of judicial opinion. The approach taken by Justice Mwalusanya, for which he

<sup>1</sup> Arguments advanced and conclusions made by Schraeder (1994) regarding the limits of bureaucracy-led political reforms in Africa appear to apply to judiciary initiated reforms in Tanzania as well.

has urged and recommended his brethren to follow, is that of judicial activism. I am not in any doubt that judges in both the High Court and the Court of Appeal are aware of the existence of these two styles and approaches to constitutional interpretation. His lordship's calls and recommendations, which appear to have so far fallen on deaf ears of his colleagues, are not without their problems. There is an exercise of choice whether to follow it (like he does) or to ignore it and remain silent about it (as they did in the past and are doing now). These facts are important not only to Justice Mwalusanya, but to other judges and observers.

Justice Mwalusanya in all his judgements and extra-judicial speeches in which he urges his colleagues to follow his lead, does not adequately take into account the justifications for the other kind of judicial reasoning (judicial passivism). The problem here is that his failure to address this makes his calls both unreasonable and even empty. The question asked in this regard is what makes him feel that his approach is the best of the two? Although Justice Mwalusanya is admired and his efforts appreciated, even by his critics, it is argued that his persistence with only one style to the exclusion of the other is in itself self destructive.

This is said to be the case because by insisting on only one style his position as a judge becomes predictable even before the matter comes before him for hearing. Such a situation is said to be inconsistent with the office of the judge as an impartial and neutral arbiter of disputes. The argument goes that when and if the neutrality and impartiality of the judge is questioned the holder of such an office ceases to be a judge.<sup>2</sup> An example given here is the case of *Christopher Mtikila v. Attorney General*, in which the State Attorney raised an objection regarding the impartiality of Justice Mwalusanya<sup>3</sup> which led to his ultimate withdrawal from hearing the case.

It is argued that the two approaches are not mutually exclusive and that there are instances where the two approaches may be combined in the same judgement. If that is the case, it is argued, Justice Mwalusanya has no reason of making capital of judicial activism or despise judicial restraint. By stating categorically what his approach is, it is said, he is not doing

<sup>2</sup> Bell (1987:37) notes that a "frequently used argument to restrain what is considered excessive judicial activism is that it will bring the judiciary into disrepute and threaten the continuance of the present judicial arrangements". See also Cappelletti (1981).

<sup>3</sup> It is more that probable that, in view of what Chief Justice Nyalali has been saying lately, similar objections may be raised by the Attorney General against him as it happened against Justice Mwalusanya. We may not have to wait for long before it happens.

himself any good because he is alienating himself from his friends and creating uncalled for enemies in the process. He has been said to have put his neutrality and impartiality unnecessarily into question.<sup>4</sup>

What the above arguments come down to is that whichever style of judicial opinion a judge adopted it is his/her own choice, like any other choices exercised in judicial decision making, in the case being decided at that particular time and there is nothing that can be done about it. Analysts are entitled to make their own conclusions about the styles as much as judges stick to the business of hearing cases, resolving disputes and handing down judgements, impartially.

My reply to this is that the public's ability and need to demand accountability of the judges and magistrates can no longer be taken for granted. These matters are likely to intensify in the era of democracy and political pluralism. As and when they are made they will have to be answered, and there will be very little chance for masking behind the veil of judicial independence or any other legal camouflage. Which forms these calls and demands for judicial accountability will take need not to be discussed now. There is need, however, of thinking about what is likely to happen as democracy and accountability begin to take roots instead of closing our eyes and ears waiting as if these are merely far-fetched dreams which are unlikely to happen. What Justice Mwalusanya has done in most of his judgements and extra-judicial speeches, especially the one in which he identifies the abuses of power by the judiciary, is simply to draw our attention to the issue, from where a discussion might have to start. The fact that judicial accountability has been raised by a sitting judge, and a well informed insider, is in most respects indicative of how important it is for the public at large and cannot be left for the professionals alone.

### **5.3 Hostile Surroundings**

The fact that law and legal institutions were marginalized and even hated has been alluded to several times in the above discussion. I have also

<sup>4</sup> The effect of this argument is the same as that raised about the politics of United States Supreme Court where it has been argued that the Court was getting too much into politics beyond the extent allowed by the Constitution, expressed as the self-inflicted wounds, see Theberge (1979) especially chapter 1. A counter-argument to the one stated above, has been made in India and USA, that when both the law making body and executive have failed the people it is the judiciary which must speak out loudly and clearly "because it is held in higher public esteem than the other two branches". See Theberge (1979:24). Also Iyer (1987:92) and Baxi (1982:16-29).



argued that the reason for this seem to be varied. The consequences of the marginalization, like the reasons for it, are also various. The Chief Justice acknowledges that law and legal institutions were marginalized. Unlike myself, however, he attributes this to the one-party ideology. For that reason, even the reforms he has initiated have been restricted. The honourable Chief Justice hopes that the situation will change with the introduction of the multi-party and free market systems which place emphasis on the prominence of law. His approach, therefore, does not include any consideration of the hostile surroundings in which law in general and judiciary in particular have been elevated to. It is my opinion that the reform exercise discussed above has fallen short of facing squarely and coming to terms with the forms, causes and consequences of the marginalization of law and legal institutions that has gone on for more than two decades.

There are some important questions to be asked, and issues to be raised, in any fruitful consideration and attempts at coming to terms with both marginalization and hatred of the law and legal institutions. Such questions and issues cannot be taken for granted. These include: whether, in the light of the discussion above, the legal system in general and judiciary in particular is best placed for the tasks ahead? How are the lawyers in general, and magistrates and judges in particular, prepared to face the challenges created by the centrality of law after many years of marginalization and hatred? What should be done to change the attitudes of politicians and government functionaries who, for a very long time, disliked the application of law in their administrative functions? What should lawyers and legal institutions in general do to impress on political actors and civil servants about the central role of law during multi-party politics and free market economy? How can lawyers and legal institutions, in which they are a part, help to influence the development and consolidation of a democratic culture in Tanzania? What can lawyers in general, and judiciary in particular, do to reverse the negative attitude towards law and legal institutions, created among the members of the public, as a result of the marginalization and hatred processes? To what extent does legal awareness campaign, introduced by the judiciary, empower the public in the struggle to preserve, protect and promote human rights? These are some of the questions which need to be adequately captured in order to understand what constitutes a proper course of action under the circumstances.

When carefully considered these questions and issues lead to a revelation that the elevation of law and legal institutions, including the judiciary, to a central position in political pluralism and free market, is a very intricate

matter embodied with ambivalences. Not only that the law itself, and the institutions which manage it, will have to change, but also that the law givers (legislature), the law implementors (the executive at all levels) and the public (who are in most cases on the receiving end) will have to change as well. Whether the mentioned actors have changed and/or willing to change and by how much, are among the issues which have not yet been addressed.

An illustration of part of this hostility and its consequences can be found in the legislative measures related to the 11th Constitutional Amendment of the Constitution of Tanzania in December 1994. The Bill, which subsequently became law (Act number 34 of 1994), sought to amend, among other things, Article 21 of the Constitution in order to abrogate part of the decision of the High Court (passed on 24th October 1994) which declared that independent candidates be permitted to contest both the Parliamentary and Presidential elections.<sup>5</sup> The effect of the amendment of Article 21 (2) was to prohibit independent candidates from contesting parliamentary and presidential elections.

Commenting on these events, the honourable Chief Justice has gone to the extent of saying that the events are retrogressive steps taken in the political field which concern the Constitutional role of the judiciary. He noted that:

these retrogressive steps are indicative of a failure to appreciate and accept the real nature and scope of the constitutional changes that have taken place in this country during the last few years. There is a regrettable failure to realise that as Parliament has been empowered by these momentous changes to impeach the President, confirm the appointment of a new Prime Minister and remove him or her from office on a vote of no confidence for the good of the people of this country, so has the judiciary been empowered by these changes to enforce human rights and nullify unconstitutional laws for the good of the people of this country (Nyalali 1994c).

<sup>5</sup> Events of a similar nature happened in Tanzania 1963 when a law known as *Chiefs (Abolition of Office: Consequential Provisions) Act 1963*, chapter 535 of the Laws of Tanzania was passed to overrule the decision of the court in the case of *Chief Marealle v. Kilimanjaro District Council*, Arusha civil case 44 of 1961 (see Martin 1974:57). This was partly a reflection of executive mistrust of the judiciary discussed in chapter 2. Krishna Iyer (1987:91-92) comments that there is an uneasy relationship between the Indian Executive and Legislature, on the one hand, and the Judiciary on the other.

Both the retrogressive steps taken by the government and the Chief Justice's speech indicate the complex and ambiguous relationship between the executive, on the one hand, and the judiciary on the other.<sup>6</sup> There is no way one can tell what the relationship between these two will be during the multi-party era. Assuming that the government continues the trend demonstrated above, what is the judiciary in general and the Chief Justice in particular likely to do? Assuming yet again, that a confrontation between the two continue along the above pattern, what are the likely implications of that? Assuming for another moment that some members of the judiciary decide to avoid such confrontation as urged by the honourable Chief Justice in his August 1994 speech (Nyalali 1994a), what may be the likely consequences of that for the interpretation of the Constitution and others laws in general and the protection of human rights in particular? These questions are raised only to show how complex, ambiguous and ambivalent these developments are likely to be given the hostile surroundings in which law and legal institutions are becoming central and significant to both political pluralism and the free market economy.

None of these questions has been directly faced and addressed by the reform processes or at any other occasion. In actual fact, these questions seem to be taken for granted or being swept under the carpet due to euphoria on the part of lawyers in general and judiciary in particular. The reforms are, however, very much welcome only as a starting point but not an end in themselves. They seem to me to be very limited both in extent and scope. If these reforms end where they already are a lot will have been left undone. Implicit in this conclusion is that there is still much to be done both within and outside the judiciary.

## **5.4 Concluding Remarks**

The fact that law in general, and the judiciary in particular, were marginalized and even hated by the executive in Tanzania since the mid 1970s, is not in dispute, at least among legal and political scholars. An attempt has been made in the above discussion to put that marginalization and hatred in perspective. Doubts have also been expressed about the restrictive view taken by the honourable Chief Justice who confines marginalization to the one-party political ideology prevalent at the time. It

<sup>6</sup> One needs to recall here that only a few months earlier, in August 1994, the same Chief Justice cautioned his brethren of their exercise of powers of review of executive action and constitutional interpretation to avoid the boomerang effect. See the discussion in the conclusion to chapter 4.

has been argued that attempts towards the revival of the legitimacy of law in general and judiciary in particular has to take into account the background causes which gave rise to the marginalization of law in the first place, the consequences created by it and the present conditions prevailing in Tanzania. Reforms which do not take full and complete grasp of these important situations will at best be partial and piecemeal in character, and at worst a waste of both opportunity and resources, i.e., time, financial, material and human.

When the above have been said, however, one important thing also need to be taken into account. That is, the struggle for the promotion, preservation and protection of individual and community rights is probably greater now than it has ever been (see Baxi 1987). The question which arises, therefore, is in which ways and by what means are these individual and community rights going to be safeguarded? That question gives rise to more questions like: what rights are we talking about? Are we talking about the conventional human rights as defined by and promulgated in the international conventions or different kinds of rights? Are the conventional mechanisms for the protection of these rights the appropriate and best in the prevailing conditions? If they are, what need to be done in order to strengthen them? If not, what are they to be substituted with and by what mean? There are a lot more questions that need to be asked and solutions sought than taking conventional wisdom, definitions and institutions for granted. World Bank (1989) stipulation on the centrality of law and legal institutions in general and the independence of the judiciary in particular might not, by themselves, revive the public confidence lost in the process of marginalization and hatred nor can these stipulations secure the legitimacy required for effective performance of their functions. More need to be done including careful considerations and thorough discussion of all important issues in question. Unless these and other important questions are asked, answers might not be sought. As demonstrated above most of these questions have not been considered in the reform processes currently going on within the judiciary in Tanzania.

We do not know whether this conspicuous omission has been accidental or deliberate. If it has been accidental, then this is a modest beginning towards marking the signposts for constructive participation in the discussion. If it has been deliberate, a caution need to be raised that the current trends of public thinking and action in Tanzania is no longer in favour secrecy but transparency and accountability. Soon or later some of these questions will be asked, by the very members of the public whose legal awareness the judiciary has been attempting to enhance. At that point answers will have to be given. Public demand for accountability will not

only be confined to the executive and legislative branches of government but will extend to the judicial branch as well. The earlier these issues are addressed the better.

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The World Bank identified judiciary among institutions which ran down during centralized governance. The Bank also expressed the need for and willingness to take part in rebuilding these institutions so that they could effectively regulate competing political and economic interests during political pluralism and the free market systems, preserve the rule of law and protect human rights. This study traces the changing role of the judiciary in Tanzania (from being marginal for more than twenty years to becoming central during political pluralism and market economy) and characterizes what has been done by the judiciary as damage limitation. The study notes that in order for these reform initiatives to be effective, public indignation with law and legal institutions need to be recognised and addressed. Such comprehension calls for constructive public participation in legal reform.

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ISSN 0805-505X

CHR. MICHELSEN INSTITUTE