Judiciary and Good Governance in Contemporary Tanzania

Problems and Prospects

Sufian Hemed Bukurura

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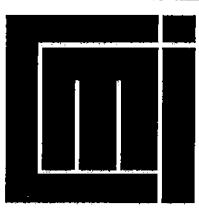
September 1995



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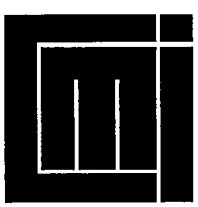

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Preface

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.

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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 literary 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 literary 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).[1]

[1] 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 match 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).[2] At the end of his tenure, President Nyerere praised him for

(1974).

[2] 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.[3]

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.

[3] 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.