Independence of the Judiciary in Tanzania: Many Rivers to Cross

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Our judiciary at every level must be independent of the executive arm of the State. Real freedom requires that any citizen feels confident that his case will be impartially judged, even if it is a case against the Prime Minister himself.

Julius K. Nyerere

The Role of the Judiciary in a Democratic Society

The judiciary occupies a special position in any democratic society. It is part and parcel of the state within the framework of the doctrine of separation of powers. Under this doctrine, the legislature is supposed to make the laws, the judiciary to interpret and administer them and the executive to enforce them. For the judiciary to be able to undertake its functions fairly and impartially, it is required to be independent of the other two organs of the State and independent from political and other societal pressures.

The judiciary embraces both the institution of courts and the persons who compose it, judges and the magistracy. As one of the principal organs of the State it is vested with the exercise of judicial power, i.e. that power which the State exerts in the administration of justice as opposed to the power it possesses to make laws and the power of executing them. It is the power to decide controversies between subjects of the State, or between the State itself and its subjects on matters of legal rights.

On the basis of the principle of separation of powers, the State surrenders judicial power to the judiciary, which will have compulsory jurisdiction to inquire into disputes and then give binding, authoritative and enforceable decisions.

Meaning of Independence of the Judiciary

Independence of the judiciary means every judge or magistrate, as the case may be, is free to decide matters brought before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements, or pressures direct or indirect from any quarter or for any reason. This is in accordance with the oath of office, which they take to do justice without fear or favour, affection or ill will.

There is a tendency of thinking that independence of the judiciary means just independence from the legislature and the executive. In reality it means more than that. It also means independence from political influence whether exerted by the political organ of the State, or by political parties, or the general public, or brought in by the judges themselves through their involvement in politics. This may take two forms namely, deciding in favour of dominant sections in the society such as the ruling party and, or of membership of judicial personnel to political parties.

Prerequisites of Independence of the Judiciary

Independence of the judiciary has a number of requisites. The first is that the State should guarantee it by entrenching clauses in the Constitution on the tenure, security, emoluments and independence of judges. The second is that the State should surrender through constitutional provisions the function of administering justice to the judiciary. It should also guarantee fundamental rights and freedoms of individuals in the Constitution. This is important especially in cases of conflict of interest between the State and an individual or group of citizens collectively. The third requisite is the relative non-partisanship on the part of the judiciary in adjudication of disputes where individual rights are in conflict with those of the State.

The judiciary does not work alone, but with others. Therefore, for it to be really independent, then it is essential that the freedom and independence of the Bar be also guaranteed. This is because the Bar complements the judiciary in the process of administration of justice in the country. A docile and intimidated Bar cannot contribute to the independence of the judiciary.

Judicial Innovation and Independence of the Judiciary

At the same time, it should be noted that independence of the judiciary does not mean licence to discharge the judicial function in whatever manner one pleases. There are accepted legal values, substantive and procedural rules of law, both implicit and explicit that should guide judges and Magistrates. These are constitutional principles, values of the society, the body of law of the society, accountability to the people and their national objectives; and ethics of the legal fraternity.

The independence of the judiciary also calls for innovation on the part of the judicial officers and particularly those in the higher judiciary. They should not always wait for each and everything to be delivered to them in the form of laws and by-laws. They require imagination in the process of dispensing justice. It is in this context that Professor Kivutha Kibwana warns that the judiciary should not cower and hide behind reasons such as lack of proper legislation to empower them. In his own words:

... it is mischievous for the judiciary to cry foul over legal strictures that hem its independence. The problem lies with the Bench for not making the best use of this wide plenitude of constitutional authority.

He goes on to warn that in this period of transition to democracy all over Africa, the judiciary has a vital role to play and to contribute to the process and it cannot acquit itself of its role.

International Community and Independence of the Judiciary

Realising the importance of the independence of the judiciary, the international community has come up with guiding principles, which can be taken as standard norms. These are:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary;

2. The judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason;

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law;

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law;

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals;

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected; and

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.[4]

It is essential that both the judiciary and the State in general take serious note of these standards provided by the international community as minimum conditions to ensure independence of the judiciary.

General Factors that Can Undermine Independence of the Judiciary

There are factors, some external and others internal to the judiciary itself that might seriously affect the independence of the judiciary. These have been discussed in various forums and should not be ignored.

The late Justice of Appeal Kahwa Lugakingira in his paper titled "Corruption and the Erosion of Judicial Independence in Tanzania: Some Tentative Observations" presented at the Judges and Magistrates Seminar on Corruption held in Dar es Salaam between 16th and 17th December, 1996 made reference to some of these factors which can undermine the independence of the judiciary and make the general public hold the judiciary in contempt. These are discussed below.

Corruption

Corruption is not an entirely new phenomenon in society in general and in Tanzania in particular. Currently, it is a cry on everybody's lips because its magnitude has reached alarming proportions. Back in May, 1960 Mwalimu Julius K. Nyerere was to complain in the colonial Legislative Council:

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

Mwalimu then recommended:

... Corruption must be treated with ruthlessness because I believe myself corruption and bribery is a greater enemy to the welfare of a people in peacetime than war. I believe myself corruption in a country should be treated in almost the same way as you treat treason.

Again, addressing the newly elected National Assembly of the United Republic of Tanzania on 12th October, 1965 Mwalimu re-echoed the same sentiments:

[Corruption] perverts justice, and if allowed to spread would destroy our nation. Therefore, in accordance with my duties under the Constitution, I shall insist that corruption in any form is exposed to the gaze of the people. Where appropriate, prosecution will follow. Members of this House, and of the Government, will be well advised not only to resist corruption, but also to conduct themselves in such a manner that it is obvious that they are not corrupted.

This war on corruption has continued unabated. The current President of the United Republic of Tanzania Benjamin Mkapa was nominated by the ruling party CCM as a presidential candidate in 1995 on the ground that he was "Mr. Clean" - untainted with corruption unlike some of the other contestants. On getting into office he immediately appointed a Commission of Inquiry into Corruption under the chairmanship of the former Prime Minister and First Vice-President Justice Joseph Sinde Warioba. Launching the Report of this Commission he assured the population that no corrupt element would be spared and that the fight against corruption was not going to be a one-time operation but a permanent campaign.

Unfortunately, notwithstanding the high gear with which the Mkapa government began it would seem that it has already run short of ideas on how to fight corruption. The various promises by the leadership to the people have gone unfulfilled and as the current regime is about to leave the political stage there is little hope for the common man. The regime is just too busy preparing a conducive business environment for foreign investors to remember what it promised those who voted it into office in the first place. This is clear from the views given by the people during the meetings, of the Presidential Commission on the Problems of Corruption in Tanzania.

In relation to the judiciary, the majority of those who appeared before the Warioba Commission were of the settled opinion that in Tanzania of today it is impossible to get justice without giving

some form of a bribe. In their opinion, in the courts of law there is law only but not justice. Complaints are directed at all branches of the judiciary but the main target is the Primary Courts. This is quite understandable as these courts are nearest to the people and hence their work affects the majority of the people in their daily lives and particularly when they operate without due regard to ethical considerations.

Of course it will be incorrect to lump together all judicial officers as corrupt. Definitely this would be unscientific. The problem is that it is not easy to distinguish a corrupt judge or magistrate from a clean one by a mere look at them. At the same time it would be incorrect to say that the corrupt elements in the judiciary are not known. It is these corrupt elements that manipulate court proceedings in various ways to achieve their desired ends. They distort evidence, prepare false court records and sometimes destroy court files. In worse situations, in an almost Mafioso extortion style, innocent people are incarcerated in order to force them or their relatives to give "something" so that they are released.

Protection of Incompetent Personnel

One of the weaknesses within the judiciary, which undermines its independence, is the tendency to protect incompetent, corrupt and unworthy elements. This is usually where there is a powerful "Godfather" in a strategic position within the judiciary or within the ruling Party or the government.

This is a serious headache to the community. Such elements may be charged and acquitted in dubious and doubtful circumstances and then reinstated in their offices notwithstanding the fact that their names have been tainted with suspicion and illegality. Thus, they continue with their vices. At the same time, it is frustrating and almost impossible for the immediate superiors of these incompetent persons to exercise authority over them. This is because they are afraid of the consequences. Often, reports by the superiors are leaked to those concerned thus leading to unnecessary confrontations. With time, these unworthy elements, with the assistance of their "Godfathers" find their way up the ladder to the higher judiciary. There they continue with their vices comfortably with all sorts of judicial guarantees!

Marginalisation of the Judicial Personnel

It has been said that a hungry man is an angry man. It can be safely added that a hungry and needy man can hardly be a serious source of justice. That is rather expecting too much from such a person. It has been said now and again and it is still worth repeating here, that it is essential to pay the judicial personnel well. The emoluments should match with their status and the seriousness of the matters they handle in the process of exercising their functions. It is unfair to expose the judicial personnel to inducements and other questionable attractions due to genuine hardships. Though not wishing to provide justification, sometimes, it is said that it is these hardships, which lead to the bending of rules and justice.

Therefore, it is not enough to have the salaries and other benefits of judicial personnel charged from the Consolidated Fund of the United Republic. They should be paid well. Statistics indicate clearly that the earnings of the members of the judiciary, just like the earnings of every other

wage earner in Tanzania, have not been matching with time and the rate of inflation. The Legal Task Force appointed by the Government in 1993 to undertake an in-depth study of the legal sector in the country in its report said that the conditions of service in Tanzania's legal sector can be justifiably characterised as depressing. On the remuneration of the members of the judiciary the task force noted:

The remuneration for the Judiciary is extremely poor and is not commensurate with the important role played by members of that key institution in a modern democracy.

The same could be said of the working conditions and necessary and essential facilities connected with their work and safety such as transport and stationery. This systematic marginalisation of the judiciary has serious consequences on the quality of justice in this country.

Specific Factors Undermining Independence of the Judiciary in Tanzania

In theory and in the structure of the State in Tanzania one would think and believe that the judiciary is independent of the other organs of the State and the politics involved. This is essentially because at independence there was a formal separation of judicial from administrative functions. As it can be recalled, during the colonial period District Commissioners acted as Magistrates as well.

The Magistrates' Courts Act, 1963 changed all this by establishing a three-tier system. At the top was the High Court and immediately below it the District Court (which included the Resident Magistrate's Court) and down below the Primary Court. The Act also did away with the colour of the litigants as the determining factor as to which court one could go to. This was replaced by the subject matter of the case. Under these circumstances one would expect an independent and vibrant judiciary free from all forms of pressures. This was not to be as other factors intervened. These are discussed herein under.

The Supreme and Towering Party – Over and Above Everyone

Observed historically, there have been political developments in Tanzania, which over time have affected not only the judiciary, but the other State institutions as well. Firstly, there was the declaration of a one-party State vide the Interim Constitution, 1965. Secondly, there was a departure from parliamentary supremacy to party supremacy. This novel idea started as a policy matter and was legally institutionalised in 1975. Article 3 of the Interim Constitution was amended to read:

All political activities in Tanzania shall be conducted by or under the auspices of the Party.

And further that:

The functions of all the organs of the State of the United Republic shall be performed under the auspices of the Party.

This amendment was carried forward in the Permanent Constitution of the United Republic of Tanzania of 1977, which declared the new ruling Party Chama Cha Mapinduzi (CCM) the sole political party in Tanzania.

Therefore, the legislature, the executive and the judiciary were expected to toe the Party line. And the head of the executive, who was also the leader of the Party, explained the new arrangement as follows:

For the truth is that it is not the Party, which is the instrument of the government. It is the government, which is the instrument through which the Party tries to implement the wishes of the people and serve their interests. And the Party has therefore to determine basic principles on which government shall act; it has to determine the policies its government will follow.

The effect of this new policy was to shift the duty of policy-making in the country from the Parliament to the National Executive Committee (NEC) of the Party. However, NEC decisions had to be "rubber-stamped" by the Parliament to have legal effect. Otherwise they could lead to legal problems as the late Biron, J. explains:

The fact that NEC made policy did not mean that it followed without saying that whatever came out of it was law. No! Where an important policy matter had been issued without a corresponding parliamentary endorsement by the way of legislation, the courts of law are not bound to enforce it.

Systematically, the Party stripped each and every institution of all powers with the Parliament being reduced to a mere Committee of the National Conference of the Party. This was the situation up to the adoption of multiparty political system in the country in July, 1992.

The judiciary was not spared in the course of this new political “revolution.” It is therefore not accidental that we find the head of the judiciary, the Chief Justice of the day urging his colleagues to try and identify themselves with the Party and its policies. He is reported to have argued:

Since Tanzania believed in Ujamaa, then the interests of many people in land should override those of few individuals. The Judiciary could not be used to oppose Ujamaa. As citizens and TANU members, the courts are bound to further Ujamaa.

This of course had its problems. Judges and magistrates had been sworn and committed themselves to resolve disputes in accordance with the law and not according to political expediency.

At the same time, the Party had a stronghold on the judiciary through the appointment process because from the very top to the bottom the Party, either directly or indirectly through its government, had a say as to who was to be appointed. The Chief Justice is appointed by the President (who is the Chairman of the ruling Party) and the other Judges are appointed by the same authority on the advice of the Chief Justice. At Primary Court level appointments are made by the Special Judicial Service Commission on recommendations from the District Judicial

Boards, which used to be chaired by the Regional Party Secretary - who was also the Regional Commissioner. Also, the Party had a say on the process of selection of assessors to be panelled both in Primary Courts and the High Court as well In this situation, there was no way the judiciary could ignore the all-powerful Party.

Harassment of Judicial Personnel

The power of the Party in the appointment process in the judiciary did not always assure the Party of the type of performance from the judiciary it would have liked to see. At times, there were "mischievous" judicial officers who did not toe the Party line. They were bold enough to defy the dictates of the Party - and that meant problems. The work of the judiciary had to be interfered with and, where necessary, harassment and intimidation had to be applied to pre-empt anticipated anti-establishment verdicts.

For example, in 1968 a magistrate in Tabora in the course of the exercise of his judicial functions released one Joseph Kassella Bantu on bail pending the hearing of his case. Kassella Bantu, who was then the Member of Parliament for the then Nzega East constituency, had been charged with others in connection with killings of cattle rustlers in his constituency. The magistrate who granted him bail was immediately detained on orders from “above.”

The target of harassment in the case of Ally Juuyawatu v. Loserian Mollel was a judge of the High Court Honourable Mr. Justice Edward Mwesiumo (as he then was). This was a dispute over a piece of land between an individual and a mining co-operative society. The plaintiff sought an order for the eviction of the defendants and damages. While some preliminary chamber applications were being considered by the court, the matter was brought to the attention of the Regional Commissioner (who was also the Regional Party Secretary) by the defendants who had chosen to fight the matter in and outside of the court. The Regional Commissioner called the State Attorney In-charge of the Northern Zone and asked him to use his good offices to ensure that the case file was withdrawn from the court and transferred for discussion and determination by the Regional Security Committee. The State Attorney informed the Regional Commissioner that he did not have the powers to withdraw case files.

Sometime later the file of this case was called to Dar es Salaam by the Chief Justice allegedly on instructions of His Excellency the President of the United Republic of Tanzania (also the Chairman of the Ruling Party) and no reasons were given. A court messenger was sent all the way from Dar es Salaam to go to Arusha and collect the file. He ransacked the chambers of the Judge like a common criminal's house. He eventually found the relevant file just on the Judge's table. It was returned a few days later undisturbed in an envelope addressed, not to the court, but to the Judge personally. Following this harassment, the judge withdrew from the case.

Members of the judiciary react differently when confronted with the unpleasant situation of interference with their work. Some stand firm and defend the right of the judiciary to decide according to the law. Others cannot stand the pressure - they give in and do what they are instructed to do. Two cases illustrate this point. First is the case of Republic v. Iddi Mtegule. In this case the tug-of-war was between a Primary Court Magistrate and the Area Commissioner (who was also the District Party Secretary) of Mpwapwa in Dodoma. The magistrate in the

course of his work released an accused person who had been charged with selling buns (maandazi) in disobedience of an order by the Area Commissioner banning the sale and or consumption of edibles in a bid to prevent the spread of cholera in the district. Buns were not among the prohibited items in the order by the Area Commissioner.

The Area Commissioner was furious and wrote a strong letter to the magistrate emotionally accusing him of bias and deliberate attempts to thwart efforts of the authorities to stamp out cholera. He went further than that. He asked the magistrate to explain why he had acquitted the accused and threatened to take stern action against him. The magistrate did not cower down. He retorted immediately and informed the Area Commissioner that what he was doing was to interfere with the independence of the judiciary. He informed him further that not every accused person is supposed to be convicted as in Tanzania an accused person is presumed innocent until the contrary is proved. This bold position of the magistrate in defence of the judicial independence was highly commended by the then Judge In-charge of the Central Zone Hon. Mr. Justice Chipeta (now retired) in the process of the review of the case.

But human beings are different. Not all magistrates are brave enough when confronted by similar circumstances. In the case of James Bita v. Iddi Kambi for example, the Area Commissioner (District Party Secretary) in Musoma wrote a letter to a magistrate informing him that the land dispute pending in his court was a political issue and therefore the Party was to be consulted. He further instructed the magistrate to shift the dispute from the court to the Village Council concerned. The magistrate complied. On receipt of the results of the Village Council deliberations, he wrote a routine judgement abiding by the decision of the Village Council.

Contempt of Court by the Government

The independence of the judiciary envisages an effective judiciary. That is a judiciary whose decisions will be implemented to the letter. This means that the main agencies of the government work closely with the judiciary i.e. the Police and Prisons Departments, must respect the courts of law. It is not only awkward, but also embarrassing when the court makes a decision and the government refuses to enforce it.

This is not a completely new phenomenon and occurs in circumstances of serious friction between the judiciary and the executive. It was the subject of controversy between President Andrew Jackson of the United States of America (1829-1837) and Chief Justice John Marshall of the US Supreme Court. This was in relation to the case of Worcester v. Georgia in 1832. In this case two missionaries had entered the Cherokee Territory and refused to get a government licence as required by the law of the State of Georgia. They were charged, convicted and sentenced to four years with hard labour. On appeal to the Supreme Court, John Marshall declared all Georgia law dealing with the Cherokee Indians unconstitutional and issued a mandate ordering the Georgia Superior Court to reverse its decision. On receiving news of this decision, President Jackson is said to have commented:

Well John Marshall has made his decision, now let him enforce it.

In Tanzania it is commonplace for the government agencies and institutions to disregard or simply ignore court orders, which they are supposed to enforce. A few cases can shed some light on this dangerous tendency.

First is the case of Sheikh Muhammad Nassor Abdulla v. The RPC Dar es Salaam and 2 Others. Here, a religious leader was arrested at his house in Dar es Salaam, detained and later deported to Zanzibar allegedly on the orders of the President. His deportation was challenged in court on the ground that the President of the United Republic of Tanzania has no legal powers under the Deportation Ordinance, 1921 under which he purported to act, to deport a person from one part of Tanganyika to Zanzibar. Therefore, by deporting this particular religious leader to Zanzibar, the President had exceeded his powers. The application was granted by Mapigano, J. (now retired) and the order of habeas corpus issued. However, the authorities ignored the court order and to date, more than twenty years later, the poor religious person is still restricted in Makunduchi, south of Unguja Island in Zanzibar.

The same happened in Lesinoi Ndeinai and Another v. Regional Prisons Officer and Another. The two applicants in this case were arrested by police in August, 1979. From the police custody they were transferred to prison and no formal charges were preferred against them. Being naturally desirous of resumption of their liberty, they filed an application for habeas corpus in the High Court. The High Court granted the application and ordered their immediate release. However, the unexpected happened. On stepping outside the courtroom as free men, the two were re-arrested and returned to prison. The order of the court that they be released as their detention was illegal was totally disobeyed by both the police and prison officials.

Exactly the same happened in Happy George Washington Maeda v. Regional Prisons Officer Arusha. In this case the late Mnzavas, J.K . ordered the release of the applicant from custody as both his arrest and detention were unlawful. However, on leaving the judge's chambers as a free man, the applicant was set-upon by police officers in civilian attire who were waiting for him outside. He was re-arrested and returned to custody and illegally detained.

Similarly, in Ally Lilakwa v. Regional Prisons Officer Arusha and Another court orders were ignored by the prisons and police authorities. The applicants had been arrested by police and detained in prison. While their application was still pending in court in Arusha, the police and prisons officers, against the orders of the court, decided to transfer the applicants to Dodoma, another town in another region about 300 kilometres away from the court in which their application was pending.

In Edward Mlaki and Another v. Regional Police Commander Kilimanjaro and Another the police in Moshi had seized two saloon cars, which the applicants used as taxicabs. They applied to the High Court for the order of mandamus so that the two vehicles could be released. Shockingly, the Regional Police Commander and the Secretary of the Regional Security Committee refused to accept court summons from a fully authorized process server of the court. This blatant refusal by both respondents was an indication of the degree of hostility between the judiciary and the other organs of the State and the Party - particularly at the height of the one-party rule in Tanzania. This defiance so worried the presiding judge who observed:

This defiance to the court process by the two highly placed government officials though prima facie directed at this court is in fact directed at the laws of this country and therefore at the Constitution and the government of this land. It would be definitely cheating oneself that by so doing it is the court which is being flouted but in reality it is tantamount to watering down the whole legal system of the country.

On the part of the Regional Police Commander, the judge wondered how such a person who day in day out needed the co-operation of the public in getting witnesses to court in the course of his duty of maintaining law and order could set such a bad example to others.

Side-stepping the Judiciary

Having realised that the judiciary is not always on its side, there have also been attempts by the executive to avoid crossing paths with the courts of law. And the executive has not been shy about this. It has publicly aired its distrust of the courts. During the crackdown on the so-called racketeers and economic saboteurs back in April, 1983 the then President of the United Republic of Tanzania, the late Mwalimu Julius K. Nyerere, had bad news for the judiciary:

We have a problem on what to do with these people. However, we have not yet decided on the course of action ... I ask magistrates to forgive us if we hesitate to take culprits to courts of law. At times racketeers have been taken to court where they have received light sentences or have been set free ... In the courts the racketeers could use their ill-gotten money to engage lawyers or use that money to twist the law to their favour. (emphasis added)

Following this warning, the government went ahead to establish the Anti-Economic Sabotage Tribunals, which completely ousted the jurisdiction of the ordinary courts of law as far as the so-called sabotage offences were concerned. These tribunals were established by the Economic Sabotage (Special Provisions) Act, 1983. As usual, notwithstanding the public outcry against these tribunals, their existence was justified by no other but Mwalimu Nyerere who explained:

Successive governments in this country have sometimes been forced to pass laws, which in practice can be very dangerous for justice... the recent Economic Sabotage Act, together with setting up of tribunals could be cited and there may be others. The reason for these laws is known. People can differ about whether or not they are necessary, but it is obvious that those who proposed them, or agree to them, thought that they were necessary and I am among those who saw their importance.

As indicated above, the Economic Sabotage (Special Provisions) Act, 1983 granted exclusive jurisdiction to these tribunals to handle all offences termed economic sabotage. The very essence of these tribunals and the law establishing them is well captured by the Legal Aid Committee of the Faculty of Law, University of Dar es Salaam in the following words:

The Economic Sabotage (Special Provisions) Act, 1983 was a draconian piece of legislation establishing tribunals outside of and parallel to the judicial system of courts. The tribunals had exclusive jurisdiction to try certain existing offences categorised as "economic sabotage offences." The tribunals were headed by judges and assisted by two laymen, all appointees of the

President. They had no security of tenure. Their decisions were made by the majority. The accused could not be represented by advocates nor did they have the right to bail. Their decisions were final; there was no provision for appeal. Rules of evidence under the Evidence Act, 1967 were set aside and even the rigours of Criminal Procedure Code on arrest and detention did not apply to the suspects of "economic sabotage offences.

The establishment of tribunals of this type has been interpreted as a lack of confidence in the judiciary by the executive. Judges and other members of the judiciary have not taken it lightly. Whenever the right occasion arises, they make it a point to condemn laws and processes which seek quick solutions at the expense of justice through among other ways, side-stepping the proper judiciary established under the Constitution and other laws.

Mounting criticism led to the repeal of the Economic Sabotage (Special Provisions) Act, 1983. The tribunals were done away with and the offences they had been handling were entrusted back to the High Court. This was basically done in a search for credibility and acceptance from the people.

Mwalimu Nyerere in a total turnabout a year later was quick to talk highly of the judiciary and judicial officers. In his own words:

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.

With such kind words, it was easy to buy peace among the main actors in the State in Tanzania.

It is worth noting that the Anti-Economic Sabotage Tribunals were just one form of the many administrative tribunals sometimes referred to as "Kangaroo Courts" for quick justice established by the executive arm of the State. They are usually handy and frequently used as a substitute to the normal courts of law. Tribunals of this nature are concentrated in areas, which are classified by the State as sensitive to the economy and likely to cause "political instability." The proceedings in most of them are held in camera so as to avoid "washing the dirty linen" in the open. The areas covered include land, labour, landlord and tenant, sabotage, and the like. It is though that these sensitive issues should, as of necessity, be handled administratively by people in whom the State has total confidence.

Another popular method with the executive of avoiding the courts of law has been the use of "Ouster Clauses" in legislation. Ouster clauses are statutory provisions excluding application for prerogative remedies in courts of law. These clauses thus make the administration immune from judicial review. It is no wonder that some people have referred to them as "judge proof." With an ouster clause in place, those who might think of challenging administrative action are effectively disarmed.

An ouster clause can be very helpful in such sensitive issues like presidential elections. In Tanzania the relevant provisions of the law are Article 41 (7) of the Constitution of the United Republic of Tanzania of 1977 and Article 34 (7) of the Constitution of Zanzibar of 1984. Both Articles provide that once the results of the presidential elections have been announced by the

authorities concerned i.e. the National Electoral Commission (NEC) of the United Republic of Tanzania and the Zanzibar Electoral Commission (ZEC) respectively, then the issue is closed and the same cannot be challenged in the courts of law. There is therefore the widespread belief - that, the Commissions have the last word. However, that is a mistaken belief and is not supported by the current interpretation of the law in relation to ouster clauses.

Various authorities in case law indicate that even where there is an ouster clause there is still a possibility of going to court and demand justice. In England, one famous authority is the decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission and Another. In this celebrated case Lord Reid said:

Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination, which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word 'determination' as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others: if that were intended it would be easy to say so.

This position was followed in 1984 in Council of Civil Service Unions and Others v. Minister for Civil Service where Lord Diplock formulated a new nomenclature for dealing with ouster clauses. He said:

Judicial review has I think developed to a state to-day when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality; the second irrationality and the third procedural impropriety. That is not to say that further development on a case-by-case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mention will suffice.

His lordship went on to explain that by illegality he meant that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided in the event of a dispute, by the judges. And by irrationality he meant what has hitherto been succinctly referred to as "Wednesbury unreasonableness" - from the case Associated Provincial Picture Houses Limited v. Wednesbury Corporation.

Tanzania is not short of authorities on this matter. Normally, courts of law put a strict construction on these exclusionary clauses or ouster clauses or preventive clauses as they are variously known. In Mtenga v. University of Dar es Salaam the late Justice Biron was confronted with Section 27 (1) of the Permanent Labour Tribunal Act, 1967 which reads:

Every award and decision of the Tribunal shall not be liable to be challenged, reviewed, questioned or called in question in any court save on the grounds of lack of jurisdiction.

He pointed out that:

It is trite to observe that a court is and has to be for the protection of the public, jealous of its jurisdiction and will not lightly find its jurisdiction ousted. The legislature may and often does I am afraid, far too often, oust the jurisdiction of the court in certain matters, but for the court to find that the legislature has ousted its jurisdiction, the legislature must so state in no uncertain and in the most unequivocal terms.

He then went on to hold that the jurisdiction of the court was not ousted as the Permanent Labour Tribunal had just given an "advice" under Section 10 of the Act but did not give any award or decision in accordance with the statute.

This line of argument was followed by Mwalusanya, J. in Mwanza Restaurant and Catering Association v. Mwanza Municipal Director. Here the court was dealing with the issue of the refusal by the Price Commissioner to review prices relying on Section 15 of the Regulation of Prices Act, 1973 which provides that:

No decision of the Price Commission, the Price Commissioner or an Assistant Price Commissioner made or purporting to have been made pursuant to any provision of this Part shall be subject to review by any court on any ground whatsoever.

Adopting the above approach by Biron, J., the Judge held that failure to review the prices is not a "decision" under the Regulation of Prices Act, 1973. A "decision" under the statute envisages a judgment one way or the other about the prices. A non-committal course of action does not amount to a decision. He added that:

However, even if we take the conduct of the respondent refusing to review the prices to be a "decision" still I would hold that the jurisdiction of this court has not been ousted.

There are many reasons, which would make it dangerous for the courts to fold their hands in despair the moment they are confronted with ouster clauses. A tribunal may not have handled the issue before it correctly and this may lead to miscarriage of justice as Mwalusanya , J. in the above case indicates:

There were many instances where although the tribunal had jurisdiction to enter on the inquiry, it may have failed to do something in the course of the inquiry, which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision, which it had no power to make. It may have failed in the course of the inquiry to comply with the

requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act. It may have refused to take into account something, which it was required to take into account.

In the instances given by the Justice Mwalusanya above it would be a clear miscarriage of justice to protect such a tribunal by an ouster clause.

The Court of Appeal of Tanzania has also been strongly against the ouster of the jurisdiction of the courts of law. In Attorney-General v. Lohay Akonaay and Another for example, the Court of Appeal had to deal with Section 5 (1) and (2) of the Regulation of Land Tenure (Established Villages) Act, 1992. This Section prohibits access to the courts or tribunals, terminates proceedings pending in courts or tribunals and prohibits enforcement of decisions of any court or tribunal concerning land disputes falling within the Act. The Court held:

We are satisfied, like the learned trial judge, that the entire section is unconstitutional and therefore null and void, as it encroaches upon the sphere of the Judicature contrary to Article 4 of the Constitution, and denies an aggrieved party remedy before an impartial tribunal contrary to Article 13 (6) (a) of the same constitution.

From the above, it is definitely clear that after all, ouster clauses are not all that "judge proof." It depends on the dynamism of the Bench in the protection of the fundamental rights and freedoms of the individual.

Unexpected Assault: The Parliament Challenges the Judiciary to a Duel

Traditionally, those jealously promoting and protecting the independence of the judiciary expect missiles mainly from the political front and particularly from the bureaucracy in the government of the day. It is uncommon to get attacks from elsewhere. In Tanzania in the recent past we have witnessed attacks against the judiciary coming from an unexpected angle – the legislature.

The source of this unexpected source of clash between the judiciary and the legislature was the decision of the Court of Appeal of Tanzania in the case of Julius Ishengoma Francis Ndyanabo v. The Attorney General. In order to appreciate the decision of the Court of Appeal in this matter a bit of background to the whole case in necessary.

The Appellant, who is a well known advocate of the High Court of Tanzania with a practice in Dar es Salaam decided to try his luck in politics by standing for elections in the Nkenge Constituency in Kagera Region during the 2000 General Elections. He lost but was not convinced that the contest had been free and fair. He decided to challenge the results in the courts of law. It was at this point that he was confronted by the requirements of Section 111 (2), (3) and (4) of the Elections Act, 1985 as amended by the Electoral Laws (Miscellaneous Amendments) Act, 2001. The Section provides:

The Registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court, as security for costs, a sum of five million shillings in respect of the proposed election petition. (emphasis added)

Therefore, as the law provides, he was required to deposit a sum of Tshs. 5,000,000/= before his case could be received and a date for it fixed. He was aggrieved and challenged the constitutionality of that requirement alleging inter alia, that the provision is discriminatory and unreasonable.

As his case was based on Article 13 of the Constitution, which is within the Bill of Rights, he was required to be heard by three judges as per requirements of the Basic Rights and Duties Enforcement Act, 1994. The majority of the Court – the late Kyando, J. and Ihema, J. found nothing wrong with the challenged provision of the law. Dissenting, Kimaro, J. found the contested provision to be a violation of the Constitution. The petitioner was not satisfied and appealed to the Court of Appeal.

The Court of Appeal agreed with the minority judgment in the High Court and declared the requirement of a deposit of Shs. 5,000,000/= by a petitioner before his case could be received and given a hearing date was unconstitutional.

This important decision by the highest judicial organ in the country was not well received by certain sections of the community and particularly the Parliament of the United Republic of Tanzania led by the Speaker Hon. Pius Msekwa . The Speaker wrote a number of articles in the newspapers and actually ensured that a special issue of Bunge News bulletin – the mouthpiece of the Parliament - was prepared on this matter. In a clear exhibition of maturity and responsibility, the judiciary ignored the campaign by the Speaker. It is the Bar – the Tanganyika Law Society (TLS) that engaged the Speaker in a spirited exchange.

By and large the decision of the judiciary to ignore the Speaker and not to engage him in a "fight" has been received very well in the legal fraternity. It is viewed by many as an indication of maturity and confidence. The decision itself is seen as an important contribution in the opening of the political space in the country and has contributed to people's confidence in their judiciary.

The Judiciary Tying its Own Noose

There are instances where it is the judiciary itself, which takes measures or assumes attitudes, which have the effects of undermining the very independence of the judiciary as an institution. Here, we examine situations in which it is the acts of the judiciary itself, which water down and undermine its independence.

Undermining Independence through Excessive Application of Technicalities and Indifference to Justice

Learning and mastering the technical aspects of the law is the ultimate dream of any lawyer. That is why one went to Law School and also that is the key to winning cases. However, technical aspects of the law in themselves are incapable of delivering justice. Therefore, there is a need of balancing the law – pure law a la Hans Kelsen – and justice, which the common man expects from lawyers and particularly from the courts of law.

It is therefore frustrating when courts excel in the interpretation and explanation of the law and underplay their role as custodians of justice. There is a feeling among lawyers in Tanzania that this is exactly what is happening in the Court of Appeal of Tanzania. The bone of contention is the issue of the value of technicalities versus the merits of the matter before the court. Should technical and procedural details block the way to the merit of the case or are the procedural aspects just facilitative avenues towards justice? That is an important question to consider.

To many a lawyer including courts of law, the role of procedure is reaching just decisions. It has been explained that procedural issues should not be used as a pretext to defeat justice. Lord Penzance of the House of Lords in Henry J.B. Kendall and Others v. Peter Hamilton explained.

Procedures are but the machinery of law after all - the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.

The same sentiments were echoed by Sir Newnham Worley, then President of the Court of Appeal for Eastern Africa in the case of The Iron & Steelwares Limited v. C.W. Martyr & Company, an appeal from the High Court of Uganda. His Lordship guided:

Procedural rules are intended to serve as the handmaidens of justice, not to defeat it, and we think that the High Court in its inherent jurisdiction to control its own procedure, has a discretion to waive the strict application of Order XVI rule 2, and has a duty to ensure that each party is given a fair opportunity to state its case and to answer the case made against it.

Therefore, the Bench cannot afford to stay aloof from the process and be oblivious of the need to see that justice is not only done but seen to be done by the members of the public. On this the late Biron, J. in John Magendo v. N.E. Govani had the following warning to give:

It is deplorable that any Bench-holder could treat court proceedings before him as a football match, with doubtless, the parties themselves being the ball kicked around by their Counsel, however inept they may be. It is the duty of a judge or magistrate conducting a case, to try the case and determine it on its merits doing justice to each party according to law.

Therefore, the central issue should be justice and not the procedure involved. Where a case involves lay people whose understanding of the law is very limited, there are even more compelling reasons to keep the technicalities at the barest minimum. This point was made by Kwikima, Ag. J. (as he then was) in the case of Simon Chatanda v. Abdul Kisoma. His Lordship advised:

Where the parties to a suit are laymen conducting their own cases, the trial court should scrutinise the pleadings before admitting them and in general furnish any necessary guidance.

One could add - “furnish any necessary assistance.”

In that way people would feel secure to go to court. But not where they will be bombarded with Latin and other jargons they have never heard of and at the end of the day pay for it.

A close examination of the work of the Court of Appeal indicates behaviour, which is just the opposite of the wisdom given above. In that Court there is a serious (almost religious) application of technicalities at the expense of justice. This led one lawyer to observe that:

The Court of Appeal is a court that preoccupies itself, and it evidently does so with gusto and relish, with its own administrative and procedural rules. As if that were not bad enough, the court is not predictable, reducing, in large measure, pursuit of an appeal into a game of chance, into a lottery.

He added:

The technical hurdles are legion. It is no wonder that some of us have determined that it is easier to pursue a seat in Parliament than to pursue a single appeal before the Court of Appeal of Tanzania.

One gets the feeling that more than often this court exhibits a considerable degree of insensitivity to justice and the plight of the people appearing before it. This is rather unfortunate - this being the last hope, being the highest judicial organ in the country.

At times, very fundamental issues are raised and then ignored completely or simply brushed aside. A few examples will assist in driving home the point. From the Mbeya Zone of the High Court of Tanzania came two conflicting decisions on the constitutional issue of discrimination on the basis of status. These were the decisions of Chua, J. (as he then was) in Phillemon Chatanda v. Republic and Mwaikasu, J. (as he then was) in Nkandi Nangale v. The Republic. At issue was the statutory requirement under the Economic and Organised Crime Control Act, 1984 as amended by Act 10 of 1989 that a person who is alleged to have caused loss of more than 10 million shillings to a specified authority was supposed to deposit half of the lost amount as part of bail conditions. The two brother judges had different views. Chua, J. (as he then was) thought and held that the provision was unconstitutional and granted bail in total disregard to the provision. Mwaikasu, J. on the other hand thought that the provision was alright and insisted that it should be respected before bail is granted. Given the two conflicting decisions at the High Court level, Mwaikasu, J. advised the parties to proceed on appeal so that this matter could be put to rest once and for all.

It was thus hoped that when the matter was brought before the highest court of the land, it would seize the opportunity to put the legal situation in order. That was not to be. When the matter was sent for appeal in Nkandi s/o Nangale v. R. the Court of Appeal found a legal escape route and simply said that the constitutional issue was not part of the pleadings in the original suit. It was raised suo moto by the Bench at the High Court level and hence could not be made a point of appeal. Very correct technically but does not help much in advancing the interpretation of the law and development of jurisprudence and precedent for the lower courts to follow.

Equally, in National Agricultural and Food Corporation v. Mulbadaw Village Council and Others the sensitive issue of land was at the centre of the stage. Local people in Arusha were fighting for their land rights against a State parastatal corporation – the National Agricultural and Food Corporation (NAFCO) acting as a front for Canadian capital in wheat development. At the High Court level they won but the Republic appealed to the Court of Appeal of Tanzania. In his very brief judgment of the Court the late Mustafa, J.A. declared that these local people could not be the owners of the disputed land as they could not hold land under customary law because inter alia, they had failed to prove that they were natives.

Again, in the case of Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre an appeal was struck out just because the decree was signed by a Resident Magistrate who was discharging the functions of an absent District Registrar. The Resident Magistrate was signing court papers as Acting District Registrar, a position to which he was not formally appointed. The question is whose mistake was this - the appellant or the judiciary? Yet again, in Total Tanzania Ltd. v. Yahya Ahmed non-service of the Record of Appeal within 7 days of lodging the appeal as required by the Court of Appeal Rules was ruled to be "fatal" by the court and thus leading to the throwing out a case in which millions of shillings were the subject of appeal.

The question is whether all these legal technicalities justified holding justice by preventing the Court from addressing the merits of the matters before to the Court. Has justice been done by this approach to issues by the Court? These are questions we cannot avoid to answer – lest they haunt all of us. By excelling in technicalities and ignoring justice, the Court of Appeal is undermining independence of the judiciary. People can no longer identify themselves with it as a source of redress for wrongs committed against them.

Lack of Consistency and Use of Double Standards

For the judiciary to be able to fully assert its independence it must be able to indicate to the public at large that it is confident, knows what it is doing and, most of all is consistent in its work. An indication of weaknesses can undermine not only its independence but also the respect from the public.

Over time we have witnessed inconsistencies when it comes to the work of the higher judiciary. In the case of the High Court the judges are not bound to follow the decision of fellow judges within that level. Stare decisis allows that. However, that is not expected in the Court of Appeal. That court being the highest judicial organ in the country is supposed to speak with one authoritative voice in order to provide guidance to those below. Unfortunately, that has not been the case for some time now.

There are complaints that the Court of Appeal has not been consistent in its approach to issues. In one case, the Court will provide guidance and when that guidance is adhered to the lower court attempting to respect the directive of the Court of Appeal will be rebuked. To illustrate this point are two cases. In the case of Attorney-General v. Marwa Magori the Court of Appeal provided guidance to the High Court on the exercise of its inherent powers to raise suo moto issues which have not been raised by the parties to litigation in order to reach a fair and just

decision. The late Francis Nyalali, former Chief Justice of the United Republic of Tanzania Francis Nyalali explained:

Although it is true that neither of the parties had raised the issue of the constitutionality of the Deportation Ordinance, we are satisfied that the learned trial judge was correct in raising it suo moto for two reasons: Firstly, all courts of law in this country are duty bound to take judicial notice of all constitutional and legal matters. Secondly, the courts in this country are not courts of the parties but are courts of law and have thus inherent jurisdiction to raise and to consider matters which are necessary to a fair and just decision of a case, provided the parties are given reasonable opportunity to respond to the matters thus raised.

Notwithstanding that clear guidance, a High Court Judge who attempted to follow it was labelled "ambulance chaser." This was in the case of Attorney-General v. W.K. Butambala where it was commented in part that:

... we think it is opportune to interject a few brief remarks. We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. ... If we may be permitted to borrow and extend the term "Ambulance Lawyers" in currency in certain jurisdictions, it is not desirable to reach a situation where we have "Ambulance Courts" which go round looking for situations where we can invalidate statutes. We say this deliberately and by design and we do not think that this is conservative in the negative sense ... But there must be occasion for that. That is a judicial power reserved for judicial situations. When we are moved we move into judicial action and fulfil our responsibilities. Not Otherwise. We are not knight-errants.

However, it would seem that the Court of Appeal itself has a licence to do exactly what it has prohibited others to do. It does not wait for those judicial situations nor does it wait to be moved. For instance, in The Director of Public Prosecutions v. Angelina Ojare the Court of Appeal went ahead to decide on an appeal against grant of bail in a murder case notwithstanding the fact that the State had already entered a nolle prosequi. It is debatable whether that was the "appropriate and really momentous occasion" to address the matter. We are not sure whether after the nolle prosequi had been entered by the State there was still a case standing on which to make a decision and thus "setting the record right."

The same course of action was adopted by the Court of Appeal in the case of S.M.Z v. Machano Khamis Ali & 18 Others. Here accused persons who were facing "treason" charges for attempting to overthrow the Revolutionary Government of Zanzibar had applied for bail in the High Court of Zanzibar which had been denied. They appealed to the Court of Appeal. Before the Court of Appeal could react to the appeal the Revolutionary Government of Zanzibar entered a nolle prosequi. That notwithstanding, the Court of Appeal went ahead to give its order to the court to carry out a revision – which actually was originally a criminal application .

Strangely, this discretion to go beyond the call of duty is applied on a case-by-case basis rather than to all cases equally. For instance, in the case of Seif Shariff Hamad v. Serkali ya Mapinduzi Zanzibar the Counsel invited the Court to address the conflicts existing between the Constitution

of the United Republic of Tanzania of 1977 and the Constitution of Zanzibar of 1984. While warning against sweeping these issues under the carpet and forgetting them and having noted that these issues could be explosive, the Court of Appeal did not make a finding on them. Instead, it said:

We suggest that the appropriate authorities on both sides of the Union take appropriate measures to harmonise these and other provisions of actual and potential conflicts between the two Constitutions.

One wonders if there can be a better carpet to hide things one would not like to discuss than that!

Again, there are times when cases of the same nature and same material facts are decided differently without being seriously distinguished. For example, in the case of Mpuya Juma Abbas v. Principal, Co-operative College, Moshi, the Court of Appeal could not entertain the appeal on the basis that the appellant had not obtained leave to appeal under Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979. Having found the appeal to be incompetent, the Court could not accommodate further orders. Yet, the same court in Robert John Mugo v. Adam Mollel found the appeal incompetent, struck it out, but still gave the appellant 21 days to obtain a proper decree and to:

re-institute the appeal within 14 days from the date of obtaining the decree from the High Court without further payment of court fees.

And there are many similar examples. Now, one wonders if the judiciary can be in a position to assert its independence if its highest organ is not providing clear and direct guidance downwards and conflicting decisions are prevalent.

Controlling Judicial Activists by the Judiciary Itself

The judiciary can seriously undermine its independence if there are attempts within its ranks to "keep law and order" by policing those members of the judiciary who are perceived to belong to the activist wing of the department. Normally, activism in judicial work affects the executive arm of the State and not the judiciary itself. Therefore, whoever attacks activism does so for and on behalf of the executive either knowingly or unknowingly.

Attacks on activism may take various forms. These include refusing to assign the perceived "Activists" cases on a regular basis or if assigned cases, then they are assigned insignificant and non-sensitive type of cases such as traffic cases or those involving street fights. It may also involve transferring them constantly from station to station and ensuring that they are in most cases in less sensitive places where they are unlikely to come across cases of substance. In this way, you make sure that activism within the bench is tamed and those involved are out of circulation.

To keen observers of the judiciary it sometimes surprises why, instead of providing a gentle guiding hand to the legal fraternity - the bar and the lower judiciary, the Court of Appeal has

been harsh at times. Advocates are forced to think twice before proceeding on appeal to this court. A senior member of the bar had this to say about the Court of Appeal:

Ask anyone who has had the misfortune of pursuing an appeal in our Court of Appeal. He would testify that it is a gruelling, agonising experience after which you would consider yourself lucky if you managed to escape only with a few bruises.

Sometimes their Lordships take offence at the way judgments are written in the High Court. For example, in Mbushuu alias Dominic Mnyaroje and Kalai Sangula v. Republic the Court of Appeal said:

Before we finish, we commend the learned trial judge for his excellent industry in his exploration of the human rights literature. However, we would also like to point out that the style he has used in writing the judgment, dividing it into parts and sections, with headings and sub-headings, is unusual. That style is more suited for a thesis than for a judgment.

This type of attacks frightens even the well-meaning members of the Bench or Bar who would like to get guidance from the highest court in the land. Trying to tame innovation and undermine personal initiative and industry on the bench by the higher judiciary to a very large extent works against independence of the judiciary.

Failing to Seize Historical Moments - Justification of the Death Penalty

The independence of the judiciary also entails being able to spot an opportunity in the life of society to make a difference by contributing to what is being debated. This may be at national level or at international level. Taking advantage of such opportunity earns the judiciary both credit and respect from the rest of the society.

In the case of Mbushuu alias Dominic Mnyaroje and Kalai Sangula v. Republic the Court of Appeal of Tanzania was provided with one such opportunity. The case involved an issue which has been controversial not only in Tanzania but around the world. This is the issue of capital punishment – otherwise referred to as the death penalty.

In this charged debate there are those who support this form of punishment and those who oppose it. A considerable section of the international community does not seem to like this form of punishment and measures have been taken to move towards its abolition. The European Union as a block has totally abolished it and no member State of the Union will extradite a person to a jurisdiction where such person is likely to face this type of punishment. In 1989 the United Nations adopted the 2nd Optional Protocol to the International Covenant on Civil and Political Rights of 1966 requesting member States to work towards abolition of the death penalty. Also, the Americas as a region adopted a similar Protocol as well in 1990 called Protocol to the American Convention on Human Rights to Abolish the Death Penalty inviting members to work towards abolition of this form of punishment.

At the same time, academic researches on various jurisdictions indicate very clearly that this form of punishment is not actually deterrent. In some cases the punishment or its possibility

makes the criminals even more callous. They may seek to completely wipe out their victims so as to preclude the possibility of their testifying against them.

In Tanzania, the death penalty is provided for in the Penal Code for two types of offences – murder and treason. The legality and constitutionality of the provisions of the Code on this punishment was a centre of discussion in the now famous Nyalali Report on political system in the country. The relevant provisions were listed in Volume Three of the Commission's Report which contained the 40-plus laws which the Commission viewed not to be compatible with the rule of law, democratic governance and the multiparty political system. The Commission recommended their examination for purposes of review, amendment or repeal. Unfortunately, in its report on these controversial laws, the Law Reform Commission did not find most of the Laws, including the one on capital punishment, offensive. In fact, according to the Commission many Tanzanians still supported this form of punishment!

The case of Mbushuu gave the judiciary an important opportunity to pronounce on this punishment. At the High Court level, the death penalty was declared to amount to torture, cruel, inhuman and degrading form of punishment and also unconstitutional. This position was not fully supported by the Court of Appeal which, while agreeing with the High Court that the death penalty contained some elements of torture, cruel, inhuman and degrading punishment still held that the right to life as contained in Article 14 of the Constitution of the United Republic of Tanzania of 1977 was not absolute. In the view of the Court the death penalty was not arbitrary and it was for the society, through the legislative process, to decide whether, in the absence of conclusive evidence regarding its effectiveness, the death penalty was "reasonably necessary" for the protection of the right to life. Thus in its view, the punishment was not unconstitutional. In our humble opinion, the Court of Appeal, by so pronouncing, lost a vital opportunity to make history in the protection and promotion of human rights and setting a trend for the rest of Africa. In a way, the court also undermined its respectability and reliability as a custodian of justice.

Waking Up: The Judiciary Reclaims Its Place in the State

In the recent times, there have been measures taken which indicate a clear movement towards consolidating the judiciary and its independence. Three of these are noticeable. One relates to the characterisation of the judiciary within the State in Tanzania. For many years, the judiciary has always been regarded as a "Department" of the Ministry of Justice and Constitutional Affairs.

This is no longer the case after the adoption of the 13th Amendment to the Constitution of the United Republic of Tanzania of 1977 in 2000. This may be dismissed as a small insignificant technical matter but it is not. For many, referring to the Judiciary as a "Department" or "Idara ya Mahakama" is clearly putting it very far below the other two arms of the State – the legislature and the executive. This is because, as a department, the judiciary will definitely be under the control of one of the ministries of the executive. This rather awkward situation has now been corrected. The judiciary becomes the judiciary and not a department of judiciary. The other two points are discussed at length below. These relate to constitutional guarantee of the independence of the judiciary and the improvement of the remuneration of the personnel in the higher judiciary. They are both central in guaranteeing the independence of the judiciary.

Constitutional Guarantee of the Independence of the Judiciary

Since Independence the judiciary in Tanzania has always been deemed to be independent. It was rather a matter of belief than law. This belief was cemented by various statements by the leadership about the rule of law and the need for the judiciary to be independent. Nowhere in the succeeding Constitutions or the law was the judiciary secured. It was easy for the executive to interfere with the judiciary either directly or indirectly. Thus sitting judges were transferred from the judiciary without officially removing them from their judicial office. Some were offered diplomatic posts abroad or appointed to head parastatal organisations. It was not easy to relate these postings with interference with the independence of the judiciary, which was actually the case.

In 2000 through the 13th Amendment to the Constitution of the United Republic of Tanzania, 1977, the independence of the judiciary was eventually entrenched in the Constitution. The new Article 107B specifically provides that:

In the performance of their work of dispensing justice, all courts of law shall be independent and shall only be required to follow the Constitution and the laws of the country.

That is a major step towards substantial independence of the judiciary. The removal of the few remaining hurdles depends mainly on the attitudes of the judicial officers themselves. They need understand this new freedom and fully utilise it to further justice.

Improved Remuneration of Judges

The independence of the judiciary entails the existence of an institution composed of persons of high moral integrity and persons whose sense of justice and fairness cannot be questioned. They should be like Caesar 's wife – beyond suspicion. In order to maintain that state of affairs, judicial personnel need to be paid well and their future secured. That is the only way they can concentrate on their jobs without fear of being compromised by those wishing to bend the law.

In Tanzania the members of the higher section of the judiciary – judges of the High Court and the Justices of Appeal enjoy security of tenure and in particular as regards dismissal or termination of employment. This is well secured in the Constitution. However, it should be quickly added that for a long time, this type of security did not exist as regards payment of terminal benefits. At first, the law was silent as to what their lordships and ladyships were entitled to on retirement. It was entirely left to the discretion of the relevant officer at the Treasury. It is these officers who determined what the judges and justices of appeal were entitled to. This created both anxiety and insecurity for the Judges and Justices of Appeal as they prepared for retirement. One is not sure what a holder of one of these offices could decide when confronted by a suit against the government a few months before retirement.

The situation changed in 1996. A new by law – the Pensions (Additional Retirement Benefits to Specified Public Officers) Order, 1996 was issued. This by-law gave the Judges and Justices of Appeal several rights on their retirement. This was a comfortable package. It was as if they had not retired at all in terms of their earnings. There is no doubt that this form of assurance of their

livelihood even after retirement contributed substantially to the building up of their confidence while in office. They could, without fear or favour dispense justice as per their oath of office. However, there was one snag as far as these entitlements were concerned. They were not pegged on a stable and reliable legal instrument. They were provided in a by - law and that was worrying. By its very nature a by - law can be removed by its maker at any time and even without notice. It could be superseded by another by-law or a principal legislation enacted subsequently. This fact was made clear by those who wished to see Tanzania establish an independent and fearless judiciary.

Now things have developed for the better. What was provided for by the way of a by - law has now been included in a principal legislation. The Public Service Retirement Benefits Act, 1999 provides a new package for judges of the High Court of Tanzania, Justices of Appeal and the Chief Justice of the United Republic of Tanzania. According to Section 20 (3) a Judge and a Justice of Appeal shall retire on a pension, which shall be equal to eighty per cent of the salary of the incumbent holder of the office in which he was serving and from which he retires.

In addition, the appropriate authority is required to grant such retiring Judge or Justice of Appeal with the following:

1. A diplomatic passport for him and his wife;

2. One motor vehicle given once, of a value not exceeding such amount as the President may from time to time determine;

3. A sum of money granted once as a lump sum which shall be sufficient to remunerate one driver for a period of four years;

4. A total sum of money sufficient to purchase fifty litres of fuel per week granted once as a lump sum which shall cover a period of four years;

5. A total sum of money being maintenance allowance for a motor vehicle to be granted once as a lump sum at a rate equal to forty per cent of the fuel allowance; and

6. Use of the VIP lounge [at airports].

Section 20 (5) indicates that the pension, gratuity, allowances and services granted to such officer shall be paid out of the Consolidated Fund and shall not be subject to income tax.

Things are even better for the Chief Justice in recognition of the weight of his responsibilities. Over and above what is granted to Judges and Justices of Appeal, the Chief Justice is granted the following:

1. A winding-up allowance of a sum equal to fifty per cent of the total sum of salaries he received while he held office as Chief Justice;

2. A gratuity of a sum equal to fifty percent of the total sum of the salaries he received while he held office as Chief Justice;

3. A health insurance policy that covers medical treatment within the United Republic;

4. Seventy litres of fuel per week; and

5. A Driver.

Again, all these payments are to be charged on the Consolidated Fund of the Government of the United Republic of Tanzania and they shall not be subject to income tax.

This is a very positive development which fortifies the independence of the judiciary which is constitutionally secured now under Article 107B of the Constitution of the United Republic of Tanzania which was enacted in 2000 through the 13th Amendment to the Constitution.

However, it should be remembered that the judiciary is not only the High Court and the Court of Appeal. There are other levels of the judiciary, which actually feed into these higher sections of the judiciary. There are Primary Courts, District Courts, Resident Magistrates' Courts and other important quasi-judicial institutions. The judicial officers in all these institutions provide vital services to the public. They handle more than three quarters of the whole work of the judiciary. At times, they are called upon to make some very sensitive decisions. They need to be protected too. Their tenure should be secured and their earnings while in office and thereafter should be enhanced to be commensurate with the weight of the matters they handle on a daily basis and with their standing in society. We are arguing this because any sense of insecurity could be a serious stumbling block towards ensuring that there is justice for all.

Conclusion: Many Rivers to Cross to Real Judicial Independence

The road to genuine independence of the judiciary is not a smooth one. It is littered with trials and uncertainty. While the judiciary would like to dispense justice without fear or favour, the Executive feels undermined and takes various measure to keep the judiciary in its place and hence the tug of war between these two institutions of the State. Things can be complicated if the third arm of the State – the legislature joins this tug of war in its urge to declare itself "supreme" allegedly for being the people's representative.

In such a situation, what is needed is a strong and unflinching team in control of the judiciary. It should be people who are prepared to administer the law even if the heavens fall. Justice should not be compromised at all. Therefore the road to the independence of the judiciary and hence to justice is not a smooth one – in the words of the Caribbean reggae sings Jimmy Cliff – there are many rivers to cross.