Justice in a One-Party African State: The Tanzanian Experience

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Introduction

A number of African states,[1] for not very dissimilar reasons, have opted for a one-party system.[2] And they have sought to entrench it legally through the establishment of party supremacy. The implications of party supremacy for the social, political and legal processes of a state are inevitably far-reaching. It is as yet largely a grey area. One hopes that in years to come social scientists and lawyers would investigate the problem empirically and draw meaningful conclusions.

In this short paper, an attempt is made to analyse the implications of party supremacy for the administration of justice, taking the Tanzanian system as a paradigm for our analysis.[3] We would use the Tanzanian experience as an example to demonstrate the tension between the one-party system and the administration of justice. Such tension is not unique or germane to one-party systems; it obtains in democracies with competitive party systems as well. But the nature, the direction and the intensity of the tension is certainly not the same.

We would begin by examining the concept of party supremacy and its legal entrenchment in Tanzania. We would then have a look at some aspects of the judicial system and the judicial process. The interaction between the party supremacy and the judicial process would be studied with the help of some real and some hypothetical conflict situations.

1 Kenya has recently converted itself into a one-party democracy and there is some talk of Zimbabwe doing the same.

2 There is no standard definition of a ›one-party‹ state. In this paper, the expression is used to denote a system, which forbids the formation of a political party other than the named.

3 The African countries are broadly divided into Anglophonic and Francophonic countries. Then there are former Portuguese African countries and others which were Belgian. To divide African countries on the basis of their colonisers serves little purpose. The fact remains that a number of African countries, across their denominational lines, have opted for a one-party system. While the historical reasons and the details of such a system in different countries may vary, there are broad similarities with the Tanzanian situation. It is thus assumed that our discussion, though centred around Tanzania, may have a broader significance for other one-party African states as well.

Party Supremacy

The question of party supremacy is not a meta-legal question, as it is sometimes made out to be. In legal theory, party supremacy may only mean the supremacy of the **decisions** of the party, not the supremacy of individuals within the party. It follows from this that the relevant decision-making process has to be legitimate. If there is a significant gap between the legal theory thus perceived and reality, then the institution of party supremacy in such a legal system is, to us, open to doubt. This rider must be borne in mind when we describe party supremacy as a politico-legal concept.

The formal source of party supremacy in Tanzania is section 3 of the Constitution[4] which legally entrenches the doctrine of party supremacy.[5] It designates CHAMA CHA MAPINDUZI[6] (hereinafter described as CCM) as the sole political party and directs that all political activities in Tanzania[7] have to be conducted by it or under its auspices. It confers and establishes supremacy of the CCM over **all** organs of the state. It has been claimed[8] that the CCM retained the historical continuity to the maximum extent pos-

4 Between 1965 and 1977, Tanzania was governed under an Interim Constitution. The Constitution was regarded as interim because the constitutional and legal relationship between Tanganykia and Zanzibar needed time for sorting out the kinks. In 1977, the two political parties, TANU in Tanganyika and ARFO-SHIRAZI in Zanzibar, were replaced by a common political party, called CHAMA CHA MAPINDUZI (hereinafter referred to as the CCM) on 5th February 1977. This opened the way for the replacement of the Interim Constitution by a permanent Constitution, which came into force on 26th April 1977. See S. 95(2) of the Constitution.
All references to the Constitution hereinafter are to the national Constitution, as distinguished from the CCM Constitution. It may be pointed out that the national Constitution is in Kiswahili and no official translation in English language is so far available. The Faculty of Law of the University of Dar es Salaam did prepare an unofficial working translation, which has been used in this paper.

5 Section 3 of the national Constitution, 1977, reads:
»S. 3(1) CHAMA CHA MAPINDUZI (in short CCM) shall be the sole political party in Tanzania having supremacy in accordance with its Constitution«.
(Reference is to the 1977 CCM Constitution. See its art. 1(1), which provides that the »name of the party shall be the CHAMA CHA MAPINDUZI, in short CCM and (it) shall be the sole political party exercising supreme authority over all state organs«).
»S. 3(2) All political activities in Tanzania shall be conducted by or under the auspices of the party«. (See S. 94(1) of the 1977 national Constitution. It may be noted that this has been so since 1965, when the Interim Constitution was amended to make it clear).
»S. 3(3) All activities of the organs of State of the United Republic of (Tanzania) shall be conducted under the auspices of the Party;
»S. 3(4) All the provisions of the Constitution shall always be carried out in accordance with the authority of the Party as provided for in subsection (1), (2) and (3) of this Section.«

6 It is a Kiswahili expression meaning »The Revolutionary Party«.

7 Tanzania was formed as a result of merger on 5th February 1977 between what was once the Republic of Tanganyika and the People's Republic of Zanzibar. In the 1977 national Constitution, Tanzania mainland refers to the former Tanganyika and Tanzanian Islands to the former Zanzibar. It may be pointed out that the organisation of political and legal system in the Tanzanian Islands is still significantly different from the Tanzanian Mainland due to historical reasons. This paper deals with the situation in the Tanzania Mainland only.

8 Prior to the establishment of the CCM in 1977, here were TANU (Tanganyika African National Union) and the ASP, (AFRO SHIRAZI PARTY) on the mainland and islands respectively. On 21 January 1977, a joint meeting of the National Conference of TANU and ASP in Dar es Salaam resolved to dissolve TANU and

sible by drawing on the constitutions and practices of both TANU[9] and AFRO-SHIRAZI, its predecessors.[10] The institutionalisation of party supremacy was a part of this historical continuity and a necessary concomitant of a one-party system of government. It can be easily deduced from section 3(4) of the 1977 national Constitution that none of its provisions can be used to subvert the supremacy of the CCM. Supremacy of the CCM is also provided in the 1977 CCM Constitution,[11] which is obviously a political document. Whether the CCM Constitution controls the national Constitution in the event of a conflict is a moot question. It can be argued that the supremacy of the CCM is established by the CCM Constitution itself, the national Constitution doing no more than accepting an established fact. But this argument overlooks the fact that the CCM Constitution can establish party supremacy only as a **political fact;** it is the national Constitution that establishes it as a **legal fact,** and if the rule of law has to have any role and meaning in Tanzania, party supremacy has to be subsumed under the national, and not the party-Constitution. It has obvious implications for the administration of justice and is one important reason why party supremacy cannot be regarded as a meta-legal question.[12]

Admittedly, party supremacy needs a political environment – a one-party democracy, or what is often described as a one-party state. That can best be tackled by asking why and how Tanzania established what it describes as a »democratic, one-party state«?

Tanzania, or what is now Tanzania Mainland, won its independece from Britain on 9th December 1961. On 14th January 1963, President Nyerere announced the decision of the National Executive Committee (NEC) of TANU that Tanganyika should become a

ASP with effect from 5 February 1977 and establish from the same date »a new single political party (CCM) for the whole of Tanzania, which will have supreme constitutional power over all state organs«. (CCM Constitution preamble).

9 Tanganyika African National Union. Its predecessor was TAA, Tanganyika African Association, which was founded in 1929 and had its ups and downs. In May 1952, some thought was given to give TAA a political name. »Apparently, one suggested was TANU«. The suggestion was not immediately followed up. In April 1953, Nyerere was elected TAA's President. He drafted a new constitution, essentially based on the constitution of Britain's Labour Party and Ghana's Convention People's Party«. On 7 July 1954, the new constitution was approved by the TAA's territorial conference. (saba saba meeting). This conference also changed TAA's name to TANU. On this, see Iliffe, J, *A Modern History of Tanganyika.* Cambridge, 1979, at pp. 485–513.

10 Mwansasu, Bismarck U, »The Changing Role of the Tanganyika African National Union« in *TOWARDS SOCIALISM IN TANZANIA,* eds. Pratt, C and Mwansasu, B, Dar es Salaam 1979 at pp. 169–192, Hereinafter cited as MWANSASU AND PRATT: TOWARDS SOCIALISM IN TANZANIA.

11 See Art 1(1) of the CCM Constitution and n.4 above.

12 Cf. the statement of the second Vice-President (and reportedly one of the unsuccessful aspirants to the Tanzanian presidency), Rashid Kawawa in the National Assembly on 1st October 1968 that »in a one party democracy, the party is supreme all the way«. *Parliamentary Debates (Hansard)* of 1st October 1966, cols. 47–48. Also quoted in Msekwa, P., »Towards Party Supremacy: The Changing Pattern of Relationship between the National Assembly and the NEC of TANU Before and After 1965«, (unpublished) M.A. thesis, 1973–4 of the University of Dar es Salaam at page 38, (hereinafter referred to as Msekwa: TOWARDS PARTY SUPREMACY).

»democratic, one-party state.«[13] Both **Msekwa**[14] and **Pratt**[15] claim that Nyerere himself was the initiator and moving force behind the decision and NEC merely went along with it. The philosophy and personality of Nyerere as revealed in his writings do support their conclusion[16] that Nyerere perceived a democratic, one-party state as the best political alternative in the Tanganyikan context, given its poverty and underdevelopment. It seems that central to that perception was the political reality that more or less since 1959 Tanganyika had been under a **de facto** one-party system as shown by the electoral results, with almost all TANU candidates returned unopposed or victorious.[17] It was claimed that this, in effect, meant a **de facto** »disenfranchisement« of voters.[18] What had happened was that TANU, which began as a nationalist movement, had become a national party without any perceptible opposition.

There was nothing unusual in this. Several developing countries in Africa and Asia have shared this experience. Indeed, if one were to look for a single, most significant factor for a rash of one-party states in Africa, it would invariably be the emergence of the nationalist party that opposed the colonial ruler into a national party ruling the country after independence. And it seems that the more bitter and prolonged the struggle for independence from colonial rule, the greater such probability.

It does not, however, fully explain the movement to a further stage, when the national party transforms itself into the sole legal political party in the state. Another related question is whether true democracy is really compatible with such a one-party system? In retrospect, the transformation of the national party into the sole legal party has invariably been the result of a conscious and deliberate political choice of the charismatic leaders like Nyerere and not so much of the party. India, for example, consciously strove to establish a competitive party system even though, like Tanganyika, there was a nationalist movement which transformed itself into a national party, and which swept

13 It may be pointed out that decision-making within the NEC has never been scientifically studied. Its proceedings are invariably in camera. Before 1967, even the records of the proceedings were not maintained.

14 Pratt, C., *Critical Phase in Tanzania, 1945–68,* Cambridge, 1976 (Hereinafter referred to as PRATT: CRITICAL PHASE).

15 Msekwa, P., »TOWARDS PARTY SUPREMACY« at 61. Msekwa went on to become the Chief Executive Secretary of the CCM in 1980.

16 Nyerere, J., »One Party Government«, *SPEARHEAD* Vol. 1 No. 1 at page 7. The issue is date November, 1961: Nyerere, J., »Africa's bid for Democracy«, *AFRICAN AND COLONIAL WORLD* Vol. VIII, no. 3 (July 1960) at p. 70; Nyerere, J., »Africa's Place in the World«, in *SYMPOSIUM ON AFRICA* (Wellesley, Mass. 1960) at 153; Nyerere, J., »Will Democracy Work in Africa?«, *Africa Report,* Vol. 2 at p. 4–5 (February 1960); Nyerere, J., »Democracy in Africa«, in *TRIBUNE* (London) of June 1960, quoted and discussed in PRATT: *CRITICAL PHASE* at 63 et seq. See also MWANSASU, »Changing Role of TANU« in MWANSASU AND PRATT: TOWARDS SOCIALISM IN TANZANIA at 196 *et seq.*

17 Thus in 1958–59 elections to the Legislative Council, no candidate opposed by TANU was elected. In 1960 elections all excepting one TANU candidates were either TANU members or supported by it. See REPORT OF THE PRESIDENTIAL COMMISSION ON THE ESTABLISHMENT OF A DEMOCRATIC ONE PARTY STATE, Govt. Printers, Dar es Salaam, 1965 at pp. 13–14, (hereinafter referred to as the PRESIDENTIAL COMMISSION REPORT). In 1962–63 local government elections as many as 350 TANU candidates for 356 seats were returned unopposed.

18 See Msekwa, P., »The Doctrine of the One Party State in Relation to Human Rights and the Rule of Law«, *UTAFITI,* Vol. 3 No. 2, 1978, at 397–398.

the electoral polls. In effect, there indeed was a **de facto** »disenfranchisement« of voters, like Tanganyika, in a large number of constituencies. But subsequent events clearly proved that it was, at best, for a temporary period.

Arguably, TANU's electoral triumphs can be accounted for by two considerations. Firstly, political independence was secured through the instrumentality of TANU and the leadership of Nyerere. Voting TANU (and Nyerere) into power was the expression of gratitude on the part of voters. Fascination with the Congress Party in India, for a long time, was basically due to the image of some of its charismatic leaders and it was reflected in the electoral triumphs.

Secondly, there was the race argument. For quite sometime, membership of TANU was open only to Africans.[19] And, in a country where Asians and Europeans never endeared themselves to Africans, TANU was rightly seen as **the** party for Africans. Therefore, though the »disenfranchisement« argument was a convincing political expedient to secure NEC's approval in 1963 in Tanganyika, it could not be an enduring explanation of Tanzania's present one-party system. It is submitted that the only rational explanation for establishing a one-party system in Tanzania was Nyerere's perception that it safeguarded the nation from the disruptive potential of divisive politics based on the organised interest groups, which could be detrimental to the unity of the country and its developmental efforts.[20] These arguments were perceived as valid in 1963 and, to some extent, even in 1985 by the Tanzanian leadership.

It is trite that the source of strength of any political party is its close identification with the aspirations of the people whose support it seeks. Such close identification on a long-term basis needs infusion of a democratic character in the structure and working of the party, that is, a system which is responsive and responsible to the people themselves. No wonder, right from the beginning, Nyerere insisted on marrying a one-party system with democracy. He pointed out some of the features of liberal democracy as practised in the West which, he thought,[21] were compatible with one-party system. Notwithstanding the multi-party system in liberal democracies, a member of parliament must represent, once elected, the interest of all the constituents, not only of those who voted for him or who shared the same party label. Then, a war-time coalition government is said to be compatible with a constitutional democracy even though it submerges party affiliations. The ›war against poverty, ignorance and disease‹ that Tanganyika faced (and faces even now) needed no less a unified government.[22]

19 Ilife, John cit. supra n.9, observes on page 567 that the ›fear of division prevented (TANU) from admitting non-African members.‹ It is submitted that this ›fear‹ also prevented Tanzania (and probably other black African States) from having constitutional and other legal safeguards for the ethnic minorities. Such safeguards are routine in mature democracies. See Indian Constitution, for example.

20 Nyerere, J., »One Party Government«, *loc.cit.*, n.16 above. He argued that there was a historical advantage of »time and ignorance, which alleviated the growing pains« of liberal democratic traditions in the »older countries« and which were not available to Tanganyikans. In addition modern means of communication, he added, generate an upsurge to people's expectations by bringing the British and American workers »in almost daily contact with African workers«. Quoted in PRATT: *CRITICAL PHASE*, at 68.

21 Nyerere, J., »Democracy and the Party System«, Dar es Salaam, January 1963, at 27.

22 Quoted in PRATT: *CRITICAL PHASE*, at 68.

But the roots of democracy lie in the political and legal arrangements that allow expression of the popular will and its participation in national policy-making. In the western democracies, this is ensured by the freedom of speech and expression, an independent judiciary with powers to check executive excesses, free and fair elections within a competitive political system and a system of government, whether parliamentary or presidential, responsible to the people, through their elected representatives. These checks and balances have evolved over a fairly long period of time. In that context, a democratic political system, as generally understood, and a one-party system certainly look strange bed-fellows.

A one-party system, with an institutionalised partysupremacy over all state organs, would have to work out a form of democracy compatible with it and devise appropriate political, legal and institutional arrangements for its efficient functioning. A historical process of trial and error may still be useful to refine the arrangements. It is our submission that the task of devising appropriate political, legal and institutional arrangements was not carried out satisfactorily and that it has been reflected in the socio-economic and political problems Tanzania has been confronted with, and continues to be confronted with, in all these years. Unfortunately, scant or no attention has been paid to this and, in particular, to the legal implications of party supremacy and the legal arrangements that the supreme party should have with other state organs.

In Tanzania, the task was entrusted to a Presidential Commission[23] appointed on 28 January 1964. It was specifically asked to recommend »changes in the constitution of Tanganyika and the constitution of the (Party), and in the practice of the government that might be necessary to bring into effect a democratic, one-party state in Tanganyika.«[24] The Presidential Commission was required to work within the parameters of the stated »National Ethic« and specified associated policies.[25] The document titled ›National Ethic‹ stated eight principles, »which lie at the **basis** of the Tanganyika nation« and which required rapid implementation.[26]

The third and fourth principles read as follows:

»(3) Every individual citizen has the right to freedom of expression, of movement, of religious belief, of association within the context of law, subject in all cases only to the maintenance of equal freedom for all other citizens;

23 The Commission's membersphip was broad based and included members from TANU (4 plus a Chairman), one Asian, one European, one Elder, four civil servants and the expatriate Attorney-General. Pratt tells us that the members of the Commission were carefully selected by Nyerere himself and »to a very significant extent the report of the Commission . . . (was) a shrewd and highly original effort to build a political system, which would reflect Nyerere's conception of a form of democracy appropriate to Tanzania«. PRATT: *CRITICAL PHASE,* at 204.

24 *PRESIDENTIAL COMMISSION REPORT,* at p. 1.

25 They were set out in two documents, one titled, »The National Ethic« and the second, »Guide to the Commission on a One-arty State«. It is widely believed that both were prepared by Nyerere himself.

26 *PRESIDENTIAL COMMISSION REPORT,* p. 3.

(4) Every individual has the right to receive from society protection of his life, and of property held according to law, and to freedom from arbitrary arrest . . .«[27]

Certain associated policies[28] were laid down too, one of which read as follows:

»All Tanganyikans shall have the right to a fair trial by an independent judiciary, whose repsonsibility is the upholding of the laws constitutionally enacted.«

Another document titled, ›Guide to the Commission‹ directed the Commission to consider eleven specifically enumerated issuses.[29] The gist of these was how to ensure that a one-party system would operate within a democratic framework. For example, the Commission was to define the relationship between the National Assembly and the National Executive of the Party (NEC) and the division of powers between them, as well as, between the Executive and Legislature. In particular, it was pointed out[30] that there was a need to ›minimise the possibility of conflict between the President and the legislative body.‹

Our discussion of the Tanzanian ›National Ethic‹ and the associated policies are meant to underscore their potential importance **vis-a-vis** the exercise of party supremacy. Until very recently, it was insufficiently understood. A cursory examination of the national Constitution and the CCM Constitution would bear out our contention that the principles of National Ethic and the so-called associated policies were really given short shrift. Some of the postulates of the National Ethic do find expression in the aims and

27 *Ibid.*, p. 3. The others were: (1) The fundamental equality of all human beings and the right of every individual to dignity and respect, (2) Every Tanganyika citizen is an integral part of the nation and has the right to take an equal part in government at local, regional and national level, (3) and (4) Quoted in the text, (5) Every individual citizen has the right to receive a just return for his labour, whether by hand or by brain, (6) All the citizens of the country together possess all the natural resources of the country in trust for their descendants, and those resources may therefore not be surrendered in perpetuity to any individual, family, group or association, (7) It is the responsibility of the state, which is the people, to intervene actively in the economic life of the nation so as to ensure the well-being of all citizens of Tanganyika, and so as to prevent the exploitation of any person, or the accumulation of wealth, which is inconsistent with the existence of a classeless society, (8) The nation of Tanganyika is unalterably opposed to the exploitation of one man by another, or one group by another. It is the responsibility of the state, therefore, to take an active role in the fight against colonialism, whereever it may exist, and to work for African unity, and for world peace and international cooperation on the basis of human equality and freedom.

28 Apart from one quoted in the text, the others were (1) the object of government shall be to establish complete equality of opportunity for all Tanganyika citizens in all fields of endeavour, (2) There shall be no discrimination against any Tanganyika citizen on grounds of race, tribe, colour, sex, creed or religion. Temporarily this shall not preclude the government, or any other appropriate authorities, from taking steps to correct any imbalance which results from past discrimination on any of these grounds, (3) There shall be no propogation of group hatred, nor of any policy, which would have the effect of arousing feelings of disrespect for any race, tribe, sex or religion, (4) All Tanganyika citizens shall be equally subject to the laws of the country, and no one, whatever his political, social or economic position, should be able to claim or obtain exemption from their implementation, (5) Quoted in the text, (6) All Tanganyika citizens shall have the duty to work and to contribute from the proceeds of his labour to the well-being of society and all its members, as required by law, (7) The Tanganyika government shall have the duty to take all possible action to promote the economic and social well-being of the people and of the nation as a whole and to build a classless society, (8) The government and all public institutions shall have the duty to further the cause of African unity, and world peace on the basis of human equality and brotherhood, in all practical ways«.

29 *PRESIDENTIAL COMMISSION REPORT,* at 4–5.

30 *Ibid.*, at p. 5.

objectives of the party in the CCM Constitution. Others, perhaps, could be read into them by implication. But the 1977 national Constitution, apart from a bland assertion in the Preamble, paid no attention to them.

Civil liberties were conspicuous by their omission in the national Constitution. The Presidential Commission Report, which was submitted on 22nd March 1965,[31] did not foresee the problems that would follow by not recommending a concrete incorporation of some of the principles of the »National Ethic« in the national Constitution in the form of a Bill of Rights. It was only in 1984 that the Bill of Rights was added in Chapter I, Part III of the national Constitution (sections 12 to 32)[32] but it is not yet operational.[33]

From our point of view, a more serious omission in the Presidential Commission Report concerned the delineation of procedure for the exercise of the party supremacy. For it ought to have been obvious that not all the decisions of the party can be supreme. Some of them would be run-of-the-mill, routine decisions that would scarcely have the status of supreme decisions. Some others would be supreme and binding on all state organs under section 3 of the national Constitution. Party supremacy, thus, has to be expressed through party decisions and a distinction has to be drawn between decisions that are supreme from those that are not. It seems to us that this distinction is fundamental to the **legitimacy** of party supremacy itself.

The national Constitution, while endowing the party with supremacy, nowhere provides how the party will exercise its supremacy. The party Constitution is not much of a help either. It provides a seemingly efficient organisational structure consisting of (a) the cells, (b) the Branch Organs, (c) District Organs, (d) Regional Organs and (e) National Organs. Cells provide a grass-root presence of the party. They are formed in residential areas as well as at places of work and consist of party members resident or working there, as the case may be. Each cell elects its own leader. Next to the cells in hierarchy are party branches. They are formed only when there are 50 or more party members in villages, places of work or residential areas. Every district and every region has party organs. Then there are national organs at the top of the party hierarchy. There is a certain symmetry in the organisation of the party at the branch, district, regional and national levels. The basic organisational units are a ›conference‹, an ›executive committee‹ and a ›working committee‹.[34] A common feature of the composition of these organs is that their membership is indirectly elected.

In theory, the conference organs are a repository of party supremacy. The Branch Conference, which meets normally once a year is supposedly the supreme organ of the party at the branch level; the District and Regional Conferences, which meet normally once every thirty months, are supposedly the supreme organs of the party at the district

31 The Report was broadly accepted by the government but some of its recommendations are yet to be carried out.

32 See *Act 15 of 1984*, entitled *An Act to Make the 5th amendment to the National Constitution.*

33 See Act 16 of 1984, which denies them, in effect, operational validity for three years.

34 However, at the branch level, instead of a working committee, there is a »general meeting« and at the national level, there is instead a »central committee«.

and regional level. The National Conference, which meets normally once every five years, is described as »the supreme organ of the party‹ and the ›ultimate authority‹. Any ›conference‹ is a relatively large body drawing representatives from other party organs at the lower and higher hierarchial levels, resident members of the National Assembly and its Zanzibari equivalent, the Revolutionary Council, and some representatives from designated mass organisations. As indicated above, there are also ›executive committees‹[35] at every hierarchical level. Their composition follows broadly the same pattern as the ›conferences‹ except that they are much smaller in size and have few elected representatives from the respective ›conferences‹. They meet more frequently than the respective ›conferences‹. Thus, the branch executive committee meets once a month and others normally once in every six months. Then, there are ›working committees‹ at every hierarchical level, which are still smaller and meet at shorter intervals of about two months. At the national level, the working committee is called a ›central committee‹. Their organic composition follows broadly the same pattern as the ›conferences‹ and the ›executive committees‹. The idea seems to be to integrate the party at various levels into a unit. The close membership linkages between various organs at different levels of organisation ensure not only a regular feedback to the party organs at the national level but also provide a mechanism by which various organs may be made to follow closely the directions taken by the party at the national level.

Such interlocking linkages through the various organs of the party and at all levels are perhaps essential to the maintenance of party supremacy. It also facilitates tight internal control from the top. The system of indirect elections for membership at various intervals seems to reinforce it. Though the various provisions in the CCM Constitution emphasise that the supreme organs of the party at various levels are the ›conferences‹, experience has shown that it is the ›executive committees‹, which enjoy supremacy, for the simple reason that the ›conferences‹ are too unwieldy and meet only far between.[36] What happens is that the executive committee decisions are simply adopted by the respective ›conferences‹. Often, the ›conferences‹ have no choice because the executive committee decisions are already a **fait accompli.** And, of all the executive committees, it is the National Executive Committee (NEC), which wields ›ultimate authority‹ on behalf of the National Conference.

Supremacy, we said earlier, is a politico-legal concept. In political terms, supremacy may mean a right to set long-range goals for the nation as well as a right to make major policy decisions in a routine manner and a capacity to execute those decisions.[37] From that point of view, it is the NEC, not the National Conference, that is in reality the repository of party supremacy. NEC has ›power to initiate, discuss, make decisions and

35 Like the Youth Organisation, the Union of Tanzania Women, the Union of Tanzania Workers, the Union of Cooperative Societies and the Tanzania Parents Association.

36 Extraordinary meetings of the »conference« could be called but experience has shown that it is not the common practice.

37 That is how Msekwa defines party supremacy. See MSEKWA: *TOWARDS PARTY SUPREMACY*, loc. cit., n. 10.

issue guidelines on party policy‹ in various fields. It is clearly stated in the CCM Constitution that is the NEC, which ›shall‹ guide and supervise all development plans and ›shall‹ consider proposals for the National Development Plans. Since 1967, the development plans are first submitted to the NEC for their consideration and approval. In theory, the National Conference has power to ›confirm, amend, repudiate or revoke any decision made by any other organ of the party or by any party leader‹. In practice, as pointed out above, it merely endorses the NEC's decisions.

Perhaps the most significant power of the NEC is ›to consider and make final nominations of names of candidates applying for election to Parliament‹.[38] This affects nearly 70 % of the total membership of the National Assembly.[39] The remainder are either nominated members or are members by virtue of their office.[40] Directly elected representatives constitute less than half – about 45 % – of the total membership.[41] The electoral procedure is based on a system of pre-selection in which the party plays the crucial role.[42] The Presidential Commission thought that if worked in a spirit of tolerance and good faith, such pre-selection procedure would not be inconsistent with the ›democratic principles of complete freedom of the people to choose their own representatives . . .‹[43]

No one unless a member of CCM can contest an election.[44] And no one, excepting a peasant or a worker not associating himself with the practices of capitalism or feudalism, could be a member of the CCM.[45] But effectiveness of these provisions required establishment of an efficient filtering mechanism. This was never developed.

Pre-selection comprises three stages. In the first stage, candidates for election secure primary nomination from at least 25 party members registered as voters from the constituency where they seek election.[46] The second stage is only needed when more than two candidates succeed in securing primary nominations. The members of the District Conference then indicate their preferences through a secret ballot.[47]

38 See Art. 61(6) (b) of the CCM Constitution.

39 See S. 23(1) of the national Constitution.

40 Forty-six per cent (111) are directly elected, 30 % (72) are indirectly elected by the National Assembly or Zanzibar House of Representatives, 23 % (56) are direct appointees of the President. Thus, roughly 54 % are indirectly elected or nominated. See Shivji, Issa, »The State of the Constitution and the Constitution of the State in Tanzania«. E.A. Law Rev. Vol. 11–14 (1978–81), p. 1 at note 6 on p. 27–28.

41 This is certainly inconsistent with the general tenor of the Presidential Commission Report, which stated that: »We regard it as a basic principle that the supreme lawmaking body in the state should be directly elected by universal suffrage and we could not contemplate any major departure from this principle«. PRESIDENTIAL COMMISSION REPORT at page 17. The Report recommended that no more than 42 out of 149 as nominated members i.e. 28 %, thus leaving the remaining 72 % for direct elections.

42 S. 27 of the national Constitution.

43 *PRESIDENTIAL COMMISSION REPORT,* pp. 19–20. The Commission stated that »the positive role of the Party can not be sustained if it abdicates all rights to influence the choise of candidates for election to the Parliament.

44 Art. 26(2) of the CCM Constitution.

45 *Ibid.,* Art. 7 and S. 26(2) (g) to (j) of the national Constitution.

46 S. 27(2) (a) of the national Constitution.

These preferences are then submitted to the NEC and normally it abides by the ranking and nominates the first two candidates securing the maximum preferences for direct elections.[48] Apart from these, the NEC also scrutinizes and finally approves as many as 50 members, who are nominated to Parliament.[49] Thus, together with 111 constituency members, as many as 66 % members of the National Assembly are pre-selected by the NEC. And, so it would seem that through their natural allegiance to the party,[50] its doctrinal supremacy is assured.

Pratt claims[51] that notwithstanding pre-selection, Tanzania's one-party system is basically democratic because the CCM is not an ideologically closed party[52] in practice, whatever its Constitution may say and that through the system of primary nomination, every constituency chooses its own representative rather than having one imposed on it. But is not democracy more than that? A vigorous Parliament, a healthy respect for the rule of law and an independent judiciary are not merely symbols of democracy. In a one-party state, the organisation and the internal functioning of the party itself has to be on democratic lines. Tanzania scarcely meets these tests.

Administration of Justice

It is now generally agreed in liberal democracies that an independent judiciary is essential for a proper administration of justice. P. T. Georges, who was the expatriate Chief Justice of the High Court of Tanzania from 1965–71, once stated that,

> »the framework of the one-party state in Tanzania is not geared to authoritanism and dictatorship, and that the beliefs and principles of the ›party‹ are such as to favour the development of free and impartial courts of justice.«[53]

47 *Ibid.*, S. 27(4) (a) and (b).

48 *Ibid.*, S. 27(5) (b).

49 Fifteen nominees of mass organisations, 25 national members and 10 out of 32 members from Zanzibar, who are not members of the Revolutionary Council.

50 Every candidate is required to affirm his allegiance to the supremacy of the CCM.

51 *PRATT: CRITICAL PHASE*, at p. 205.

52 The Presidential Commission categorically rejected the notion that (CCM) should be a vanguard party of ideological elite. (p. 5) They recommended instead that it should be a mass party but free of »narrow ideological conformity«, which they thought was safeguarded by Art. 2 of the then party Constitution.

53 Georges, P. T., »Law and Administration in a one-party state«, chap. 1 of R. W. James and F. M. Kassam (eds.), Selected Speeches of Telford Georges.
Perhaps, some of the statements made by Nyerere led *Georges* to say so. Nyerere stated that he regarded as ›of paramount importance that the Tanzanian judiciary at every level is independent of the executive arm of the State.‹ (in »Education and Law« a chapter in Nyerere's »Freedom and Unity« at page 131) The true meaning of the independence of judiciary is, Nyerere said on another occasion, ›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 mind, his training in law and his independent judgement about the issues in dispute and the facts involved.‹ (Nyerere at the farewell dinner to Chief Justice Georges in Dar es Salaam on 31 March 1971, reported in Nyerere's »Freedom and Development« at page 261) ›Judges are, and must be nothing less than the buttress wall supporting the individual justice for which our people struggled when they fought for national independence‹.

We shall shortly see that subsequent events did not bear out the fond hopes of the Chief Justice.

The court system in Tanzania has a Court of Appeal at the apex, the High Court below it and the subordinate courts at the base.[54] The independence of the judiciary is recognised in the party Constitution as well as in the national Constitution.[55] Though the President plays a major role[56] in the appointment of judges, there has been no attempt, so far, by the Party ›to pack‹ the courts with their ›own men‹. Judges do enjoy a reasonable security of tenure.[57]

Section 3 of the national Constitution, however, does seem to cast a shadow. It entrenches party-supremacy and stipulates that »**all** activities of the organs of the State« shall be conducted under the auspices of the CCM. Warioba and Seaton[58] believe that notwithstanding the fact that the judiciary is an organ of the State, section 3 does not endanger judicial independence because the word ›activities‹ would not embrace the exercise of judicial functions by the courts. It is our submission that this understanding needs to be embodied in the national Constitution in view of some of the disturbing pointers that one finds in some of the recent court decisions.

Ally Juuyawatu v. **Loserian Mollel & Landanai Mining Cooperative Society**[59] is a case in point. The party at the regional level had passed, what it called Batbati Declaration. The Declaration directed that only mining cooperatives shall be eligible to obtain licences for prospecting and mining. This was a departure from the Mining Ordinance, which empowered the Commissioner for Mines to grant licences even to individuals. Juuyawatu

(Speech of Nyerere at the opening of the Judges‹ and Magistrates‹ Conference in Dar Es Salaam on 7th December 1965) And, ›real freedom requires that every citizen should feel confident that his case will be impartially judged even of it is a case against the Prime Minister.‹ (Nyerere's »Freedom and Unity« at page 131) But Nyerere did not foresee the difficulties in turning his vision into reality.

54 There is provision for the setting up of an *ad hoc* Constitutional Court for the sole purpose of hearing and determinining any constitutional dispute between Zanzibar and the United Republic. See S. 125 to 127 of the national Constitution.

55 See the Preamble of the national Constitution, Sections 62 and 68B of the national Constitution are also relevant. The latter provides for the security of tenure of the judges of the High Court and the Court of Appeal.

56 The Chief Justice of the Court of Appeal is appointed by the President. The other judges (up to 4 in number) are appointed by the President on the advice of the Chief Justice. The High Court is led by a Jaji Kiondozi and 15 puisne judges, who are appointed by the President on the advice of the Chief Justice. Magistrates and other judicial officers of the subordinate courts are appointed by a Judicial Service Commission, which has the Chief Justice as the Chairman, another member appointed by the President and the third member appointed by the President but on the advice of the Chief Justice.
The Chief Justice is the head of the judiciary and, as can be seen from above, wields considerable authority.

57 See Ss 62 and 68B of the national Constitution as regards the judges of the High Court and the Court of Appeal. The Magistrates' Courts Act, 1984, provide for the tenural security of the magistrates and other subordinate judicial officers.

58 These remarks were made during an informal discussion with the author. Mr. Warioba, who was then the Attorney General of Tanzania, is presently the Prime Minister of Tanzania. Seaton is presently the Chief Justice of the Seychelles Supreme Court. He has been a respected member of Tanzanian judiciary for many years.

59 *Civil Case No. 6 of 1978,* High Court of Tanzania at Arusha in *1973 Law Reports of Tanzania,* Case No. 6, p. 87.

held such a licence in respect of some 12 prospecting and mining sites. He also had buildings and other prospecting and mining equipment on the sites.

The Babati Declaration was certainly in line with the national policy of socialism, which discouraged individuals owning or controlling the means of production.[60] It was passed by the duly constituted regional executive committee, which, as we indicated earlier, constituted the supreme organ of the party at the regional level. But it had no legislative basis, whatsoever. The Mining Ordinance had not been amended to give effect to the Babati Declaration.

Yet the Regional Party Secretary sought to implement the Declaration forthwith. The Regional Party Secretary, we may mention again, is **ex officio** the Regional Commissioner as well. He wears two hats. The Regional Party Secretary is an appointee of the Chairman of the party. As a Regional Commissioner, he represents the President of the country in the region. Thus, he wields enormous prestige and powers. In this case, Juuyawatu was deprived of his prospecting and mining licences, buildings and equipment, and they came to vest in the Landanai Mining Cooperative Society, under the order of the Regional Commissioner, who acted in pursuance of the Babati Declaration and the resolution of the Regional Executive Committee. The High Court at Arusha had no choice but to stay the implementation of the order and restore to Juuyawatu his licences and property seized from him. It is well-known that this upset the Regional Commissioner very much and he complained both to the Minister of Justice and the party about the courts not respecting the supremacy of the party.[61]

Only about a year before Juuyawatu's decision, there had been a circular from the Chief Justice of the High Court urging his colleagues, primarily in subordinate courts, to further the policies laid down by the party and the government. It led to a rather sharp reaction from Justice Biron of the High Court, who fulminated:

> »The Chief Justice can not issue circulars ordering the members of the judiciary to abide by political or executive whims . . . Judges are supposed to act independently of political or executive pressures and, thus, to dispense justice without fear or favour . . .
>
> . . . The fact that the NEC made policies did not mean . . . that whatever came out of it was law. No, where an important policy matter had been issued without a corresponding parliamentary endorsement by way of legislation, the courts are not bound to enforce it.«

60 See note 25, para 5, where it is stated that it is a principle of national ethic lying at the »basis of the nation«.

61 See Mlawa, George F., »The Constitution of the United Republic of Tanzania: Proposed Changes« *E.A.Law Rev.* Vols. 11–14, (1978–81) at 151–153.

62 These observations were made in 1977. The author believes that the sentiments reflect even now the views of the majority of the judges of the High Court and the Court of Appeal, as well as the subordinate judiciary. The quotes are from Peter, C. M., »Independence of the Judiciary and Party Supremacy in Tanzania«, A LL.B. 3rd year compulsory research paper submitted in part-fulfillment of LL.B. requirements of the University of Dar es Salaam, in 1977. Being a student's work, it suffers from unsubstantiated generalisations and is overtly critical.
See also James, R. W., »Implementation of the Arusha Declaration: The Role of the Legal System«, *The Africa Review*, Vol. 3, No. 2 (1973) pp. 179–208.

In essence, it is a tussle between ›expediency‹ versus ›legality‹ arguments. It has been raised again and again and has taken various forms. In Zimbabwe, for example, the orders of the High Court against squatters trespassing on private property were ignored by the executive and not carried out. Later, an ordinance was passed to legalise the practice. In another instance, the refusal of the Zimbabwe High Court to admit confessions obtained in the police custody led to outbursts of outrage from senior party functionaries and even led to the resignation of the expatriate Chief Justice, who left the country.

The Tanzanian case of **Re: An Application by Paul Massawe**[63] is quite instructive in this connection. Massawe and his driver were travelling in his lorry from Moshi to Rombo in the Kilimanjaro region, when his lorry was stopped. The police suspected them to be smuggling certain goods to Kenya. The goods and the lorry were confiscated by the police and they were charged with the offence of illegally exporting goods to Kenya. This could not be proved and the court ordered that the confiscated goods and the vehicle be restored to the accused. All this had taken several months.

The party was undoubtedly concerned with the spate of smuggling essential goods to Kenya, aggravating an existing serious shortage in the country. It had asked all regions to take adequate steps to prevent this. The Regional Commissioner, therefore, was not happy with the decision of the court. He called a meeting of the Regional Defence and Security Committee (which has no statutory basis), of which he was the **ex officio** Chairman. The Committee, in clear contravention of the judicial order, resolved to sell the confiscated goods and the lorry. When the applicants came to know of it, they alerted the office of the Prime Minister in Dar es Salaam to stop the illegal sale of his property. There was evidence that the Prime Minister's office did ask the Regional Commissioner to comply with the order of the court. This, however, did not have any effect and Massawe's goods and the lorry were sold off as ordered by the Commissioner.

Massawe had to file an application for the writ of **mandamus** to recover his property from the police. Eventually, he had to be consoled with the award of compensation. The court, in a rather strong language, came down heavily on the Regional Commissioner:

> »One of the things that distinguish Tanzania from other one-party states is the independence of its judiciary; should one now commence, as did the Honourable Regional Commissioner, blocking and interferring with court orders which are not to his liking, we will, I am afraid, be sinking to the level of a Banana Republic where judges can be dismissed at whim and where judgements are written by rulers . . .
>
> ». . . this court would like to mention to the Honourable Regional Commissioner that it is not, in so far as I am aware, the policy of this country to substitute expediency for legality . . .
>
> The freedom of a just man is worth little if court orders can be so arrogantly flouted. The Regional Commissioner's act of ordering the (police) to interfere with the court's

63 (1979) *Law Reports of Tanzania*, case no. 18.

lawful order was clearly **ultra vires,** illegal and totally unconstitutional. Such acts dangerously border on the offence of contempt of court.«[64]

It not only bordered on, it really amounted, in law, to contempt of court. And, it had happened in Tanzania again and again. Not once the courts took it up. They were simply timid in view of the prestige and high position that a Regional-Commissioner-**cum**-Regional-Party-Secretary enjoys in the party.

The judicial timidity was more clearly reflected in **Ahmed Janmohamed Dhirani** v. **Republic of Tanzania.**[65] This case concerned the legality of an order of detention under the Preventive Detention Act of 1962. The Act authorises the President to order detention of a person for an indefinite period, if he is satisfied that such detention is necessary for the peace and good order or for the defence or security of the state.[66] It is well-known, however, that the Act has been used to detain ordinary criminals[67] and to suppress dissent.[68] The Act grants the power **only** to the President ›under his hand and the Public Seal‹ to order the detention of a person. Dhirani, however, was detained in pursuance of an order, which was signed by the Prime Minister and the second Vice-President. The legality of the detention order was, therefore, challenged. The defence was that the national Constitution authorised the President to delegate to any of his Ministers the power to sign detention orders.[69] But that delegation had to be ›in writing‹,

64 *Ibid.*, at 166–167.

65 *Ibid.*, Case no. 1.

66 S. 2 of the Preventive Detention Act provides:
»S. 2(1) Where (a) it is shown to the satisfaction of the President that any person is conducting himself so as to be dangerous to the peace and good order in any part of (Tanzania) or is acting in a manner prejudicial to the defence of (Tanzania) or the security of the state, or (b) the President is satisfied that an order under this section is necessary to prevent any person acting in a manner prejudicial to pease and good order in any part of (Tanzania) or to the defence of (Tanzania) or the security of the state, the President may by order under his hand and the Public Seal direct the detention of that person.
S. 2(2) Unless the President in satisfield that it is feasible or practicable to require that any particular item or information shall be given on oath, he shall require that any information on which he satisfies himself or acting in any such manner aforesaid or that it is necessary that any order be made as the case may be shall be given on oath«.
S. 4(1) of the Act stipulates that:
»S. 4(1) An order made under this Act shall constitute an authority to any police officer to arrest the person in respect of whom it is made and for any police officer or person to detain such person as a civil prisoner in custody or in prison, and such person shall while detained in pursuance of the order be in lawful custody«
Under s.3 of the Detainees' Regulations (G.N.203/1963) no detention shall, except with the previous authority in writing of the Minister responsible for Home Affairs, receive any visitor or write or receive any letter or any other written communication.
Under S. 5 of the Act, the President may rescind a preventive detention order or he could direct that the operation of the order be suspended hut subject to such conditions as may be specified therein. These conditions may, *inter alia,* require that the former detainee should notify his movements to specified authority(ies) in a given manner and that, in addition he should enter into a bond, with or without sureties, to observe the specified conditions. In the event of his failing to observe the specified conditions, the detention order revives and he is to be detained again.

67 See »A Nightmare Act« in *Africa Now* (Jan 1983) at 12; Shivji, Issa: *loc.cit.*. n.38 above, at 15.

68 See Ong'muhana, Kubuta, »Human Rights in Tanzania: A Constitutional Overview«, *Ibid.*, at 240.

69 Reference was to S.9(4) of the 1965 Interim Constitution, which is exactly similar to S.8(4) of the 1977 national Constitution. The section provides that the President may »by directions in writing authorise a

under the national seal, and there was no evidence before the court to that effect. Yet the court refused to hold the detention unlawful on the ground that a proper delegation must have been made by the President![70]

There have been many instances of legally defective detention orders in Tanzania. It is only in **Attorney General** v. **Lesinoi Ndeinai and others,**[71] the first preventive detention case to reach the Court of Appeal, that the first hesitant steps were taken to stem the rot. The facts of the case were straightforward and clear. Three persons were detained under a preventive detention order signed by the Vice-President in August 1979. The President had not delegated to the Vice-President his authority to issue detention orders in writing. But this was overcome by the Court of Appeal by taking recourse to section 8 (1) of the national Constitution,[72] which, in effect, automatically devolved on the Vice-President the functions of the office of the President, when the latter was away. The detention order did not carry the Public Seal as required by the Preventive Detention Act. This procedural defect, the Court of Appeal held, rendered the detention order invalid and unlawful.[73]

The history of development concerning the strengthening of civil liberties exemplifies the emphasis the courts in common law jurisdictions have placed on following strictly the statutory procedure laid down as a part of the requirement of the dues process of law.[74]

Minister to discharge, subject to such limitations and restrictions as he may direct, such of the functions of the office of the President as he may specify, (entitling such Minister) to so discharge such functions, notwithstanding the provisions of any other law«.

70 In this case, though the Regional Superintendent of Prisons had the detention order in his custody, he refused to accept the judicial summons to appear before the High Court with the detention order. Instead, he locked the document away and went on a *safari*. The High Court found this ›disrespectful to the court‹ but did not proceed in contempt of court.

71 1980 Law Report of Tanzania. See Quigley, John, »Cases of Preventive Detention: A Review« for an exhaustive analysis of the case. E.A. Law Re. Vol. 11–14 at 326.

72 The relevant para of S.8(1) of the 1977 national Constitution states that »when the President is absent from Tanzania, the functions of the office of the President shall be discharged by the first of the following Ministers, who is present and able to act«. Vice President is mentioned as the first of such Ministers.
The High Court had held that such devolution of Presidential powers was not automatic but required a written delegation of authority under S.8(3) of the national Constitution. But S.8(3) seems to require this if (a) the absence of President was for a short duration, which it was in the case, and (b) the President »considers it desirable to do so«, to which there was no evidence. In that case, if the two conditions were met, the President can upset the devolution arrangements specified in S.8(1) and delegate his powers to any of his Ministers. cf Quigley, J., »Cases of Preventive Detention: A Review«, loc.cit. supra n.71, who sees it differently.
This case should be distinguished from Dhirani's case, where the second Vice-President and the Prime Minister signed the detention order, which was possible only if there was a wirtten delegation.

73 Even the High Court had held the order unlawful though on a different ground that in the absence of a written delegation from the President, the Vice-President was not competent to order detention. As a footnote to the case, it may be mentioned that the three detainees had at best a symbolic victory. All were detained under the Deportation Ordninance, 1921 (cap. 38), Revised Laws of Tanzania, frustrating the judgement of the courts. It was obviously an abuse of the legal process and the demoralised detainees left it unchallenged. This, incidentally, has happened again and again.

74 Chief Justice Nyalali specifically stated that affixing the seal is a due process requirement and that in countries, where liberty or freedom of citizens is regarded as fundamental, public policy requires that citizens shall not be deprived of their liberty or freedom except by due process of law.

Ndeinai's case, therefore, could be seen as a key that may open other doors as well. Quigley, thus, rightly points out that detention orders may, in future, be held invalid for failure to comply with other requirements of the relevant statutes.[75] There are interesting obiter dicta in the **Ndeinai's** case, which could be exploited by the courts to strengthen the substance of the liberty of citizens in the preventive detention cases. For example, the detainee could demand to be shown the detention order prior to his arrest. He could demand that grounds for his detention be supplied to him in sufficient detail within fifteen days as required by section 6 of the Preventive Detention Act, and that the Advisory Committee established under section 7 of the Act to review his detention. The Committee's advice is not binding on the President. But an alert judiciary may query if the advice was rejected for arbitrary or whimsical reasons. The detention order itself is issued on the basis of the ›satisfaction‹ of the President and the court may even query the basis of such ›satisfaction‹. Surely, a detention order that proceeds from bad faith, for reasons that have nothing or very little to do with the detention requirements of the Preventive Detention Act may not stand in law.[76]

This scenario can become a reality only if there is a conscious attempt to create conditions that allow a fair and impartial administration of justice. The concluding part is devoted to this.

Conclusion

In this short paper, it has not been possible to analyse all the pertinent decisions. In any case, it seems that the major abuses probably are at the level of the subordinate courts, whose decisions are not published.[77] Nor one can smugly brush off these abuses as mere aberrations.

Also see generally David, René and Brierley, John E.C., »Major Legal Systems in the World To-day«, (Stevens, London, 1978) pp. 285–339 for a historical evolution of the use of procedures for the development of substantive rights of citizens in England and its significance for the common law jurisprudence.

75 Professor Quigley limits it to the Preventive Detention Act but that seems to be a too narrow reading of the judgement.

76 Mr. Shaidi, a lecturer in the Faculty of Law of the University of Dar es Salaam, has reported that more than 95 % of the detainees in the »Centres« under the Resettlement of Offenders Act of 1969, have been put there without due compliance with the procedural requirements of the Act. See Shaidi, L.P., »The Resettlement of Habitual Offenders in Tanzania«, (1978). Unpublished. University of Dar es Salaam.

77 See Peter, C. M., »Independence of the Judiciary and the Party Supremacy in Tanzania«, loc.cit. n.59 above. And also see Namiti, R.K., »Courts' Administration of Justice in East Africa«, a LL.B. 3rd year compulsory research paper of 1979.
Under the Magistrates' Courts Act, 1963, magistrates are appointed by the President on the advice of the Judicial Service Commission. But the Commission considers only those candidates for appointment as magistrates, who have been recommended by the Regional Judicial Board, which is chaired by the Regional Commissioner, a senior party functionary of importance.
A Primary Court magistrate must sit with two assessors, who are judges of both facts and law and have an equal vote with the magistrate. Party plays a major role in the selection of assessors. District and Resident Magistrates may sit with assessors and are bound to sit with them when directed by the Chief Justice.

In fact, there is some evidence that the Tanzanian leadership is aware of them and corrective steps are being taken. Most published decisions indicated the danger of vesting the Regional Party Secretary with the office of the Regional Commissioner. The two are being separated. A Regional Commissioner shall no longer be a Regional Party Secretary. Apparently, due to fortuitous circumstances, rather than by design, the Chairman of the party and the Head of the government shall no longer be the same person, at least in the foreseeable future. The decision to separate the party and the government functionaries[78] augurs well for the future, though it is not yet known how far this separation would proceed. It is our submission that the government functionaries are far less likely to interfere in the administration of justice.

To check the executive and the party excesses, a Bill of Rights has been added to the national Constitution in 1984. This was long overdue. After all, Tanzania is a signatory both to the U.N. Declaration of Human Rights, as well as the African Charter on Human and Peoples' Rights. The latter imposes a duty on member states to guarantee the independence of courts and establish appropriate national institutions to promote and protect the rights and freedoms guaranteed by the Charter.[79] Tanzania, therefore, may have also felt obligated[80] to give a concrete expression to these rights. It may be recalled that a number of these rights were stated as principles of »National Ethic« lying at the basis of the Tanzanian nation. And a reference was made to them in the Preamble to the national Constitution and in the CCM Constitution. That was not enough, of course, for the Tanzanian courts, following English precedents, held that the preamble does not form part of an enactment.[81] The Bill of Rights provisions, however, is not yet operational in Tanzania. Section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, provides that:

> »Notwithstanding the amendment of the Constitution and, in particular, the justiciability of the provisions relating to basic rights, freedoms and duties, no existing law or any provision in any existing law may, until after three years from the date of the commencement of the Act, be construed by any court in the United Republic (of

Assessors have no security of tenure and their appointment can be terminted by the party for »any cause whatsoever«. The Judical System Review Commission found that perfomance of many assessors was »inept and of miserably poor standard«. It reported that »most Primary Court magistrates are ill-equipped by training, experience or wisdom to discharge the high responsibilities of magistracy.« (Report of the Judicial System Review Commission, Government of Tanzania, 1980, pp. 108–110).

The combination of a poorly trained magistracy and the completely untrained assessors, having a more or less equal say in the outcome of the dispute, have made it tempting for the party functionaries to manipulate the magistracy to secure ›pary‹ or ›party-approved‹ ends. »Daily News«, a government-owned and controlled newspaper, regularly reports incidents that confirm this impression.

The recently enacted Magistrates' Courts Act, 1984, does not alter this picture.

78 See *Daily News,* Monday 31st January 1983.

79 See Arts. 25 and 26 of the Convention.

80 Several African states are moving in the direction. Lesotho, for example, enacted a Human Rights Act, which came into force on 18th July 1984.

81 See *Magor v St. Mellons Rural Development New Port Corpn.* (1952) A.C. 189 (H.L.) and *A.C. v. Lesinoi Ndeinai and Others.* Crim. App. Nos. 52 and 53 of 1979. The decision is also reported in 1980 Law Reports of Tanzania.

Tanzania) as being unconstitutional or otherwise inconsistent with any provisions of the Constitution.«

The process of harmonisation of the corpus of Tanzanian legislation with the Bill of Rights may take two forms:

(a) The inconsistent laws may be amended and brought in line with the Bill of Rights. This alternative assumes that the courts may be allowed to strike down the statutes or statutory provisions repugnant to the Bill of Rights as **ultra vires.** This would certainly enhance the stature of the judiciary and judicial process generally.

(b) The second alternative would to to lump the offending legislations together as a ›schedule‹ or an ›appendix‹ to the national Constitution and make it immune from judicial attack for being repugnant to the Bill of Rights.[82]

In either case, the executive and party excesses could be challenged if they run foul of the Bill of Rights provisions.

Along with an independent judiciary and a justiciable Bill of Rights, a truly representative Parliament is a **sine qua non** for the smooth functioning of a democratic, one-party state. It is only in such a socio-legal environment that respect for the Rule of Law can be fostered and courts are able to administer justice uninhibited. The Presidential Commission had recommended that as many as 72 % of the total National Assembly membership should be directly elected.[83] It seems that this is being implemented.[84] It is our submission that the role of Parliament has to be strengthened too. At present, though the preamble to the national Constitution provides for the government to be responsible to a ›freely elected Parliament representative of the People‹, it is not so in reality. In the picturesque language of Professor Srivastava,

> Starting in 1961 with the position of grandeur and omnipotence, (the Parliament) lost its majesty in 1962, when the government ceased to be accountable to it; it was deprived of its splendour in 1965, when membership of the Parliament became co-extensive with the membership of the Party and its life became dependent upon the pleasure of the President and finally, it was stripped of its identity in 1977, when from a sovereign, law-making body, it was reduced to the status of a mere committee of the Party, virtually rubber-stamping decisions taken elsewhere.«[85]

82 The Indian Constitution has such a »schedule« which was originally aimed at protecting the land reform laws from being declared unconstitutional, particularly on the ground that the compensation paid to erstwhile owners was not adequate. In due course, others laws were added to.

83 See note 41 above.

84 It has been proposed that 15 members nominated by »mass organisation«, 25 indirectly elected members from the regions by abolishing the concept that each Party District is a Constituency and 32 members of the Zanzibari Council would no longer be members of the National Assembly. The number of directly elected members would go up substantially from the present 111. In future, for the Tanzanian Mainland, there would be one directly elected member for approximately every 10 000 persons. That would be a good improvement on the present system, in which administrative districts, irrespective of their population, are designated constituencies. See *Daily News,* Monday, 31st January 1983.

85 Srivastava, B. P., »The Constitution of the United Republic of Tanzania, 1977 – Some Salient Features, Some Riddles«. Professorial Inaugural Lecture delivered on 6th March 1982 at the University of Dar es Salaam. Also published in *E.A. Law Rev.* 11–14 (1978–81) p. 73 at pp. 108–109).

This too needs rectification. We are not suggesting a return to parliamentary supremacy in the Westminster sense. Far from it. What we suggest is strengthening the role of parliament through a constitutional and a party mandate, which would make the government of the day responsible to the duly elected representatives of the people. This may require dimnishing some of the powers of the presidency and the party. Presently, Tanzania has an Executive President, ›an absolute ruler, who could exercise his (immense) powers without any real constitutional inhibitions‹, and who, unlike his American counterpart, is ›not constrained by any principles of checks and balances.‹[86] Such a position has been rationalised as being in line with the traditional African notion, where ›the honour and respect accorded to a Chief or a King or, under a republic, to a President, is indistinguishable from the power that he wields.‹[87] It is our submission that this experiment has not been proved to be successful and that the time has come to modify it by building checks and balances as regards the exercise of presidential powers. We are not suggesting that the Party should abandon its role of a policy formulator but that it should be clear by now that the resolutions and policies of the party can not be regarded as a source of law. They may have to be enacted into laws for their implementation. Of course, there could be instances when their implementation requires only an executive action under an established law. But in either case, it is our submission that the cabinet of ministers headed by the President have to consider them and make appropriate recommendations to the Parliament for their adoption. A meaningful debate in the Parliament has always been helpful. If the government has to be made responsible to Parliament, then it goes without saying that the President and the cabinet ministers have also to be made answerable to Parliament for their actions.

To conclude, we find it difficult to conceive of a democratic, one-party state without these three essential features: a Parliament composed largely of directly elected representatives of the people with sufficient powers to oversee the performance of the government and the passing of legislation, a Bill of Rights to check executive and party excesses and to safeguard the dignity and freedoms of individual as laid down in the African Charter, and an independent judiciary for an efficient administration of justice.

86 *Ibid.*, at p. 95 and 102. See also Srivastave, B.P., »Devolution of the Powers and Functions of the Chief Executive under the Constitution of the United Republic of Tanzania«, Faculty of Law, University of Dar es Salaam 1981. Unpublished.

87 Seaton, E. A. and Warioba, J. S., »The Constitution of Tanzania: An Overview«, *E.A. Law Rev.* Vol. 11–14 (1978–81) at 35 (40).

ABSTRACTS

Justice in a One-Party State: The Tanzanian Experience

By *Umesh Kumar*

Many African states, after gaining independence from colonial rule, evolved into varieties of one-party polities. This paper delineates some basic features of African one-party régimes, with particular reference to the historical parentage constituted by national liberation movements which had come to the fore during the period of struggle for independence. Concentrating on Tanzania, the author describes some of the orthodox attempts to reconcile conceptually the predominance of one party with simultaneously perceived requirements for pluralist participation and judicial review; the uneasy practical coexistence of a supreme party and a judiciary theoretically charged with impartial review of executive acts and the authoritative exposition of the law; and, lastly, areas of improvement in order to prevent party paramountcy from submerging the influence of such agencies as parliament and the courts of law.

Ideology and Strategy: German Africa Policy and Its Critics

By *Volker Weyel*

The author reviews the creation, in the late nineteenth century, of the short-lived German colonial empire in context with the 1884 Berlin conference on Africa.
Contemporary and modern political and historical evaluations of the German colonial effort are discussed with particular reference to critical and apologetic attitudes towards colonisation and the influence on either of the 19th-century ideology of imperialism as a »civilising mission«.
Modern sequels to past colonial ventures in present-day West German policy on development aid and international economic relations are critically assessed.