

UNIVERSITY OF DAR ES SALAAM
LIBRARY

PROCEDURES OF DISPUTE SETTLEMENT;
PRE-COLONIAL TO POST INDEPENDENCE TANZANIA

by

Luitfried Xavier Mbunda

A Dissertation submitted in Partial Fulfilment
of the Requirements for the Degree of Master of
Laws (LL.M.) of the University of Dar es Salaam.

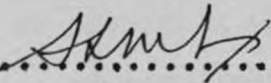
1985

All rights reserved. No part of this dissertation may be reproduced in any retrieval system, or transmitted in any form by any means: electronic, mechanical, photocopying, recording or otherwise without prior written permission of the author or the University of Dar es Salaam in that behalf.

To Angela Clara and her grandmother
the late Clara Mbele Kandumu

(1)

I, LUITFRIED XAVIER MBUNDA, DO HEREBY
DECLARE THAT THIS DISSERTATION IS MY OWN WORK
AND HAS NOT BEEN SUBMITTED OR CURRENTLY BEING
SUBMITTED FOR A DEGREE IN ANY OTHER UNIVERSITY.

Signed 

LUITFRIED XAVIER MBUNDA

ACKNOWLEDGEMENTS

The completion of this dissertation is a result of concerted efforts of a lot of people. I therefore wish to express my deepest gratitude to comrades, friends and colleagues (the list may be endless) without whom this dissertation would not have been what it is. Their encouragement was a great motive force to me.

Without relegating to a subordinate position the contributions by others, I owe a special *debt* to Dr. M.R.M. Lamwai, under whose supervision this dissertation was written for sharing so generously with me his knowledge and experience in this field and for his patience, encouragement, unflinching and constructive criticisms, directions and advice which he relentlessly offered throughout all the stages of preparing this work. If not for his devotion and commitment the completion of this work in time would have been impossible.

My gratitude should also go to the late Professor L. Kabir (may Allah rest his soul in eternal peace) who helped me in the initial stages of this work in selecting the topic, formulating the Research Proposal and suggesting the relevant

bibliography. Unfortunately he did not live to see the fruition of his work.

I am also grateful to Professor G.M. Fimbo of the Faculty of Law, University of Dar es Salaam for the stimulus I derived from continuing discussions with him on the court system of Tanzania. I am a great beneficiary of his long experience of teaching Constitutions and Legal Systems of East Africa. Discussions with him contributed a lot to those parts of the dissertation dealing with the development of the court system in Tanzania.

I am also grateful to my colleagues in the programme, Michael K.B. Wambali and Wilbert B.L. Kapinga, whose friendship and company made the course both rewarding and enjoyable. Also, the successful completion of a similar programme by my colleagues, Asha Rose Mtengeti and Chris Maina Peter added more impetus to my urge to complete this work.

I should also like to thank the staff of the Library, University of Dar es Salaam, particularly Ibrahim S. Ngozi of the Law Collection Section, the Director and staff of the National Archives, Dar es Salaam, the Registrar of the High Court,

Dar es Salaam, and the Tanganyika Law Society, Dar es Salaam, for their courteous assistance without which my research would have been difficult.

I am also most thankful to my father Xavier Clemence, brothers and sisters who have all the time filled me with hope and aspiration not only through this course but indeed throughout my formal education.

My employer, the University of Dar es Salaam must also be thanked for sponsoring the programme, as well as the Dean of the Faculty of Law, University of Dar es Salaam, Professor J.L. Kanywanyi for the encouragement he gave me throughout my postgraduate course, and for ensuring that I got all the necessary assistance.

Mention must also be made of my personal friends, Abutwalip A. Mvungi, Christian H. Gama, Grace Joyce and Sekunda Masolla who also assisted me in one way or the other to accomplish my cherished goal. I owe thanks to all of them.

Last but not least, my gratitude should go to Sayande Makere and Gilbert Ngonyani of the University of Dar es Salaam. The former typed this dissertation with the necessary efficiency

(v)

and speed and the latter did most of the proof-reading.

I wish to associate all those persons named above with the positive aspects of this dissertation and at the same time relieve all of them of any responsibility for shortcomings, both in form and content to which I remain solely responsible.

L.X. Mbunda

June, 1985

ABBREVIATIONS

Cap	Chapter
CCM	Chama cha Mapinduzi
c.f.	confer
D.S.M.	Dar es Salaam
E.A.C.A.	Eastern Africa Court of Appeal
E.A.L.J.	Eastern Africa Law Journal
E.A.L.R.	Eastern Africa Law Review
E.A.L.B.	Eastern Africa Literature Bureau
E.A.P.H.	Eastern Africa Publishing House
Ed., Edn.	Editor, Edition
etc	et cetera (and the rest or and all the others)
G.F.	Government Paper
G.N.	Government Notice
H.C.D.	High Court Digest
Ibid	Ibiden (the same place)
K.B.	King's Bench
mimeo	mimeograph
O	Order
op.cit.	opere citato (in the work cited)
pg.,pp.	page, pages
Q.B.	Queen's Bench Division
r.,rr.	rule, rules
s.,ss.	section, sections
T.L.R.(R)	Tanganyika Law Reports (Revised)

TABLE OF CASES

<u>English Cases:</u>	<u>Page(s)</u>
1. Anisminic Ltd v. The Foreign Compensation Commission and Another <u>/1967</u> 2 All ER 986	150, 153, 154
2. R v. Bolton (1941) 1 Q.B. 66	150
<u>Tanzanian Cases:</u>	
1. Abdallah Habib v. Harban <u>/1960</u> E.A. 325	149
2. Abifalah v. Rudnap Zambia Ltd. <u>/1971</u> HCD n. 166	157
3. Bartholomew Richard De Souza v. L. De Costa and J.J. Pereira <u>/1934</u> 16 KLR 47	152
4. Benjamin Chinjate Kassambala v. R. (1940) TLR (R) 249	96, 100
5. Bicoli v. Mahemba <u>/1971</u> HCD n. 420	168
6. Edward Kalemela v. Muyebe Rwenjege <u>/1968</u> HCD n. 80	168, 170
7. Endoshi v. Lemu <u>/1971</u> HCD n. 445	168
8. Ephraim Obongo v. Naftali Okoyo <u>/1968</u> HCD n. 288	168, 173
Francis Mwijage v. Boniface Kabelemeza <u>/1968</u> HCD n. 341	157, 164, 174
Gaudensia Samwel v. Marcel Marcel <u>/1967</u> HCD n. 331	167
Gwao bin Kilimo v. Kisunda bin Mfuti <u>/1938</u> I TLR (R) 403	118, 120, 121
Issan s/o Sefu v. Musa s/o Mohamed <u>1968</u> HCD	168

	<u>Page(s)</u>
13. Kitenge bin Ikwisi v. Alli bin Said (1937) I TTR (R) 407	93
14. Kitundu Sisal Estate & Others v. Shingo Hshuti and others /1970/ HCD n. 242	158
15. Kulthum Ally Kara v. Yasin Osman /1968/ HCD n. 340	157,165,174
16. Mapande v. The Manager, East African Airways /1970/ HCD n. 24	159
17. Marianbai Rajabali v. John P. Curtis /1968/ HCD n. 120	151, 152
18. Mohammed & Others v. The Manager Kunduchi Sisal Estate /1971/ HCD n. 430	159
19. Mtenga v. The University of Dar es Salaam /1971/ HCD n. 247	161
20. Smith v. East Elloe Rural District Council and others /1956/ I All ER 855	160
21. Walumu Jilala v. John Mongo /1968/ HCD n. 81	167
22. Zephrin Mgabona v. Hones Kalununa /1970/ HCD n. 12	169

TABLE OF STATUTESGerman East Africa, Tanganyika and Tanzania:

	<u>Page(s)</u>
<u>PRINCIPAL LEGISLATION:</u>	
1. Admiralty Ordinance Cap 531	157
2. Adoption Ordinance Cap 335	157
3. Advocates Ordinance Cap 341	157
4. Affiliation Ordinance Cap 278	176
5. Application of Laws Ordinance No. 7 of 1920	71, 113
6. Bankruptcy Ordinance Cap 24	157
7. Civil Procedure Code Act No. 49 of 1966	149, 163, 188 201, 190.
8. Civil Procedure Code (Transfer of Suits) Ordinance No. 8 of 1935	74
9. Civil Service Act No. 11 of 1962	159
10. Code of Civil Procedure Act No. 8 of 1859	112, 114, 183. 188
11. Companies Ordinance Cap 212	157
12. Constitution of C.C.M. 1982	141
13. Constitution of the United Republic of Tanzania, 1977	141
14. Courts (Amendment) Ordinance No. 7 of 1935	74
15. Courts Ordinance 1920 No. 6 of 1920	69, 70, 71, 73, 80, 81, 94, 97, 98. 99, 100, 101, 124

	<u>Page(s)</u>
16. Courts Ordinance 1930 No. 13 of 1930	69, 70, 71, 73, 80, 81, 94, 97, 98, 99, 100, 101, 124
17. Criminal Procedure Act 1985	148
18. Criminal Procedure Code Cap 20 of the Laws	148
19. Employment Ordinance Cap 366	176
20. Foreign Jurisdiction Act, 1890 (53 & 54) Vit. C 37	68
21. Judicature and Application of Laws Ordinance Cap 453 of 1961	182, 183
22. Land Ordinance Cap 113	175, 176
23. Law of Marriage Act No. 5 of 1971	157, 174
24. Law Reform Commission Act No. 11 of 1980	201
25. Local Courts (Amendment) Ordinance No. 38 of 1962	74
26. Local Courts (Minister for Justice and Regional Local Courts Officer) Act No. 16 of 1962	140
27. Local Courts Ordinance No. 14 of 1951 Cap 299	103, 104, 105, 146
28. Magistrates' Courts Act No. 15 of 1963 Cap 537	143, 145, 148 151, 154, 156, 162
29. Magistrates' Courts Act No. 2 of 1985	145, 146, 154, 155, 156, 177, 178, 179, 187
30. Native Courts Ordinance No. 5 of 1929	86, 88, 89, 90, 91, 92, 93, 94, 99, 100, 101 126
31. Non-Christian Asiatics (Marriage, Divorce and Succession) Cap 112	152

	<u>Page(s)</u>
16. Courts Ordinance 1930 No. 13 of 1930	69,70,71, 73,80,81, 94,97,98, 99, 100, 101, 124
17. Criminal Procedure Act 1985	148
18. Criminal Procedure Code Cap 20 of the Laws	148
19. Employment Ordinance Cap 366	176
20. Foreign Jurisdiction Act, 1890 (53 & 54) Vit. C 37	68
21. Judicature and Application of Laws Ordinance Cap 453 of 1961	182, 183
22. Land Ordinance Cap 113	175, 176
23. Law of Marriage Act No. 5 of 1971	157, 174
24. Law Reform Commission Act No. 11 of 1980	201
25. Local Courts (Amendment) Ordinance No. 38 of 1962	74
26. Local Courts (Minister for Justice and Regional Local Courts Officer) Act No. 16 of 1962	140
27. Local Courts Ordinance No. 14 of 1951 Cap 299	103, 104, 105, 146
28. Magistrates' Courts Act No. 15 of 1963 Cap 537	143,145,148 151,154,155 162
29. Magistrates' Courts Act No. 2 of 1985	145,146,154. 155,156,177, 178,179,187
30. Native Courts Ordinance No. 5 of 1929	86,88,89,90 91,92,93,94, 99,100,101 126
31. Non-Christian Asiatics (Marriage, Divorce and Succession) Cap 112	152

(xi)

	<u>Page(s)</u>
32. Penal Code Cap 16 of the Laws. (Revised)	148
33. Permanent Labour Tribunal Act 1967	159
34. Preventive Detention Act No. 60 of 1962	159
35. Private Hospitals (Regulation) Act No. 6 of 1977	159
36. Rent Restriction Act, Cap 479 of 1962	174
37. Republic of Tanganyika (Conse- quential, Transitional and Temporary Provisions) Act No. 2 of 1961	138
38. Security of Employment Act, Cap 574	158
39. Subordinate Courts Ordinance No. 15 of 1941 Cap 3	76, 77, 78, 141, 142, 143, 144, 145, 146
40. Tanganyika (Constitution) Order in Council Statutory Instrument No. 2274, 1961	138
41. Tanganyika Order in Council 1920 Cap 3	68, 71, 97, 98, 108, 113, 114, 117, 120
42. Tanzania News Agency Act No. 14 of 1976	159
43. Tanzania Zambia Railway Act No. 23 of 1975	159
44. Taxation of Bills Ordinance Cap 431	157
45. Workmen's Compensation Ordinance Cap 263	157, 191
46. Written Laws (Miscellaneous Amendment) Act No. 50 of 1968	169, 170

SUBSIDIARY LEGISLATION:

	<u>Page(s)</u>
1. Local Customary Law (Declaration) Order No. 4 of 1963, G.N. 279 & 436 of 1963	20, 45
2. Magistrates' Courts (Civil Procedure in Primary Courts) Rules, G.N. 310 & 312 of 1964	170, 184
3. Magistrates' Courts (Courts of Resident Magistrate Consolidation) Order G.N. 137 of 1977	218
4. Native Courts Proclamation 1925, G.N. 7 of 1925	81,82,83, 84,94,95, 96,97,98
5. Subordinate Courts (Resident Magistrates) Order, G.N. 235 of 1941	78

CHARTS

	<u>Page(s)</u>
Chart No. I The Court Structure under the Courts Ordinance 1920	72
Chart No. II The Court Structure under the Courts Ordinance 1930	75
Chart No. III The Court Structure under the Subordinate Courts Ordinance 1941	79
Chart No. IV The Court Structure under the Native Courts Proclam- ation 1925	85
Chart No. V The Court Structure under the Native Courts Ordinance 1929	102
Chart No. VI The Court Structure under the Local Courts Ordinance 1951	107
Chart No. VII The Court Structure under the Local Courts (Amendment) Ordinance 1961	142
Chart No. VIII The Court Structure under the Magistrate's Courts Act, 1963	147

ABSTRACT

This work traces the historical development and the role of the different procedures of dispute settlement in Tanzania. Different procedures of dispute settlement from pre-colonial and during German and British colonialism and post independence Tanganyika are examined.

We argue in this dissertation that the present law of Civil Procedure in Tanzania is alien and was imposed in this country by a foreign power. Before this imposition the natives of this country had different procedures of dispute settlement depending on whether their society was a centralised or a non-centralised one. This in turn was determined by the level of the development of the productive forces which invariably were crude. Consequently the procedures were characterised by mediation conciliation, arbitration, compromise, oath and ordeal. These procedures were characteristic of primitive conditions of life whereby man had not yet fully attained a mastery over nature and thus was interdependent with others in the society.

The coming of the German colonialists marked

the beginning of the disintegration of the traditional procedures of dispute settlement and their replacement by the adversarial system of dispute settlement. This was facilitated by the introduction of the capitalist mode of production into the tribal structures which not only corroded the traditional legal system but also established ground for the functioning of the imposed legal system.

British colonialism entrenched a colonial state in Tanganyika with several legislations from the colonial office in London. It is also greatly accountable to the erosion of the established indigenous procedures of dispute settlement. It is *from* this period that the present Code of Civil Procedure can be traced after it had been imported wholesale from India in 1920.

Ironically, the procedure of dispute settlement did not change after independence. In fact, the imported Indian Code of Civil Procedure continued to be applied after independence, until 1966 when the National Assembly enacted what was described "Our own Code of Civil Procedure" which was no more than a reproduction of the provisions of the Indian Code in pari materia with a change in the name only.

In conclusion we argue that, it is now settled that historically the mode of production and exchange *existing* in Tanganyika at present was imposed, and is still maintained by imperialist forces. The rules and orders for regulating the property relations were correspondingly imposed, and in fact are still imposed on the independent state of Tanganyika. Therefore in as much as the socio-economic relations remain basically unchanged it necessarily follows that the validity of the present Civil Procedure remain largely uncontradicted.

TABLE OF CONTENTS

	<u>Page</u>
DECLARATION	(i)
ACKNOWLEDGEMENTS	(ii)
ABBREVIATIONS	(vi)
TABLE OF CASES	(vii)
TABLE OF STATUTES	(ix)
CHARTS	(xiii)
ABSTRACT	(xiv)
TABLE OF CONTENTS	(xvii)
<u>INTRODUCTION:</u>	I
Notes	12
<u>CHAPTER ONE:</u> PRE-COLONIAL DISPUTE SETTLE- MENT PROCEDURES	114
1.1 Preliminary Remarks	14
1.2 History and Role of Civil Procedure..	16
1.3 Pre-colonial Dispute Settlement Procedures	19
1.4 Dispute Settlement in Non-Centralised Societies	21
1.5 Dispute Settlement in Centralised Societies	29
1.6 Characteristics of Pre-colonial Dispute Settlement Procedures	38
1.6.1 Collective Responsibility	38

	<u>Page</u>
1.6.2 Legal Representation !.....	40
1.6.3 Simplicity and Informality'...	42
1.6.4 The Role of the Tribunal :....	42
Notes	45
 <u>CHAPTER TWO: DISPUTE SETTLEMENT DURING</u>	
GERMAN COLONIALISM 1880s -	
1919	49
2.1 German Occupation of Tanganyika	49
2.2 The Basis of German Jurisdiction	51
Notes	64
 <u>CHAPTER THREE: DISPUTE SETTLEMENT DURING</u>	
BRITISH COLONIALISM, 1919 -	
1961	67.
3.1 Introductory Remarks	67
3.2 The Development of the Court System..	69
3.2.1 The Court Structure Under the	
Courts Ordinance 1920	69
3.2.2 The Court Structure Under the	
Courts Ordinance 1930	73
3.2.3 The Court Structure Under the	
Subordinate Courts Ordinance	
1941	76
3.3 The Native Court System	80
3.3.1 The Native Courts Proclamation,	
1925	81

	<u>Page</u>
3.3.2 The Native Courts Ordinance	
1929	86
3.3.3 The Local Courts Ordinance	
1951	103
3.4 Procedures of Dispute Settlement in	
British Colonial Tanganyika	108
3.4.1 Procedures of Dispute Settle-	
ment in the English Courts ...	108
3.4.2 Native Procedures of Dispute	
Settlement in the Subordinate	
Courts	116
Notes	131
<u>CHAPTER FOUR: INDEPENDENCE AND AFTER</u>	138
4.1 Introductory Remarks	138
4.2 Integration and the Court System	138
4.3 Jurisdiction of the Courts	148
4.3.1 Jurisdiction Defined	149
4.3.2 Territorial and Pecuniary	
Limitations	154
4.3.3 Concurrent and Exclusive	
Jurisdiction	156
4.3.4 Express and Implied Bar of	
Jurisdiction	158
4.4 Jurisdiction of the Courts under the	
Magistrates' Courts Act 1963	162

	<u>Page</u>
4.4.1 Jurisdiction of Primary Courts	162
4.4.2 Jurisdiction of District Courts	174
4.5 Jurisdiction of the Courts under the Magistrates' Courts Act 1984	176
4.5.1 Jurisdiction of Primary Courts	176
4.5.2 Jurisdiction of District Courts	199
4.6 Procedures of Dispute Settlement after Independence	182
4.7 The Civil Procedure Code Act 1966 ...	188
4.7.1 The Choice of Forum	191
4.7.2 The Appearance of the Defendant.....	193
4.7.3 Stating the Claim	194
4.7.4 Hearing	195
4.7.5 Enforcement of Judgments	196
Notes	202
<u>CHAPTER FIVE:</u> CONCLUSION	212

APPENDICES:

I.	Number of Courts of Different Grades and their Personnel as at January, 1985	221
II.	Advocates in Tanzania according to their Stations as at January, 1985 ..	223
	<u>BIBLIOGRAPHY:</u>	225

INTRODUCTION

The Law of Civil Procedure in its orthodox sense, is the law which regulates individual relationships of citizens in their capacities as citizens.¹ Basically it is concerned with the settlement of disputes between individuals qua private persons. At the same time a dispute is defined as a "conflict or controversy; a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other."² In law conflicts develop into disputes when contradictory claims are affirmed in public, that is, the claims and their incompatibility are communicated to a third person. This is the essence of the emphasis in Roman law on the litis contestatio as the moment marking the beginning of a dispute.³

The question which follows is whether regularised procedure used to deal with alleged breaches of norms and the consequent injuries and measures to redress them had existed in society so long as society existed.

Lamwai argues that, disputes properly speaking arise only when the question of individual rights arise. He writes that the concept of

rights is a creature of private property and therefore prevalent only in class societies.⁴

Taken to its logical conclusion, it is asserted that if dispute settlement is a creature of private property, then the law of civil procedure should be defined as the law which regulates individual relations between the different owners of property in a society which is organised on the basis of private property. Understood in this sense, dispute settlement becomes an aspect of administration of justice which is considered necessary in every class society. The inevitable conclusion therefore is that, if civil law is to be looked at from the point of view of the regulation of relations between individual citizens in their individual capacities as citizens then civil procedure does not develop until the state develops. Marx and Lenin have correctly pointed out that the state in essence is the product of the institution of private property in the following passage:

The state, then, has not existed from all eternity. There have been societies that did without it, that had no idea of the state and state power. At a certain

necessarily bound up with the split of society into classes, the state became a necessity owing to this split.⁵

The development of classes on the other hand, occurs when the development of productive forces has resulted into the division of labour into mental and manual labour replacing the former natural division of labour between sexes.⁶ When this stage is reached there emerges an appropriation of the surplus produced by the manual labourers by the class of mental labourers. This point has been succinctly elucidated by Lenin thus:

In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness.....⁷

With such division of labour, there is also a shift from communal ownership of property into individual ownership. This gives rise to the

institution of private property, which in turn marks the development of the concept of rights. Procedural laws therefore develop to enforce these rights. The nature and extent of these rights are predetermined by substantive laws.

There is ample authority to the effect that procedure is a forerunner of substantive law. In fact at one point of history, there was no distinction between substantive law and procedural rules.⁸ The major argument here is that at a later development of capitalism, procedure is only established after substantive law has been established.

The modes of dispute settlement acquire diverse forms depending on different conditions. These are the differing notions of justice arising out of the process of production, the level of development a particular society has attained and the material conditions of that particular society. At a later stage in the development of the society special institutions with the function of settling disputes according to a defined procedure are established. These are the political authorities, the police, judges, lawyers and courts of law. For purposes of convenience we shall call these

the judicial component in the process of dispute settlement.

However, it should not be understood that rules of social behaviour existed only after a particular stage of development. Social norms in the general sense have always existed in human society throughout history. Without social rules there could be no orderly social interaction and no permanent reproduction of socio-economic relations. There would also be no social order of whatever kind. Instead, there would be anarchy where every *body* would do what he likes. However, these other rules of social behaviour in a society must be distinguished from law. This drives us to the question as to what is that which exactly distinguishes these kinds of social norms from law. The distinction and the decisive factor in this respect is the relationship between state and law which is twofold. The first is that law is created by the state. That is, it is either enacted or otherwise formulated by competent state organs. These include - legislative bodies, courts, and already existing rules of social behaviour, especially customs as recognised by the state, and declared to be law.

Secondly law is applied either directly and positively in exercising state power, especially in the field of administration or it is applied to settle disputes on matters regulated by law especially in response to any violation of law, in the last resort, by exercising coercive force. This fact has been acknowledged by Nyerere in the following words;

It is true that no law is possible without authority There must therefore always be an enforcement authority; Law which cannot be enforced is liable to deteriorate into an expression of pious hopes.⁹

We have endeavoured^a to expound the vital and historical link between state and law for the purpose of answering the questions whether African societies before colonialism had what could be called law and whether the traditional tribunals could be called courts.

There has been a debate among many writers of African customary law on whether or not there was any system of customary law in Africa before the establishment of colonial rule. Writers of this subject are divided. Some argue that the so called African customary law was no law at all

and hence the traditional tribunals or tribal councils involved with the administration of justice in their respective areas could not be regarded as courts of law. Others on the other hand, acknowledge the existence of African customary law and are even inclined to grant the name of law to customary rules of social behaviour. They, however, totally deny the distinction in traditional customary law between crimes and other civil wrongs. Their argument is that in these societies all wrongs which are treated in English law as crimes were treated in some African societies as matters for private redress. The usual evidence cited in support of this contention is that offences like murder and theft which are clearly criminal offences according to modern law were generally treated by many African customary societies as matters for private redress by the wronged party or group. They argue further that to emphasize this position, penalties for all wrongs were exacted by the affected individual or his clan.

Without advancing this debate any further, it is enough to say that the historical link between state and law clearly shows that prior to

colonialism, there was no law or courts of law properly so called in traditional African societies. The customary tribunals or tribal councils were not courts of law nor did they administer law properly so called. The fact is, most African traditional societies had not developed into states with centralised governments and state organs before the establishment of colonial rule. There were thus no established and specialised judicial system in what came to be known as Tanganyika. However, it should not be understood that all precolonial African societies had never evolved politically beyond the stage of primitive communal society. There is ample evidence to show that this was not the case. There were many societies with centralised political authorities and administrative machinery, military and judicial organs which enforced law and order as they understood it. In fact some of the centralised societies went to the extent of making some vague distinction between crimes and civil wrongs. Writing about the Tswana, which was one of the centralised societies Schapera reports;

In practice, if not in theory Tswana law is divided by the people themselves into two main classes. These

may quite conveniently be termed "civil law" and "criminal law" respectively although their categories are by no means identical with those of European Systems of law.¹⁰

As for East Africa, Haydon¹¹ cites the example of a hierarchic acephalous society of the Ganda where certain crimes such as treason against the Kabaka, witchcraft, incest, sexual perversions, adultery with the royal wives or chief's wives, theft and cowardice in war were classed as crimes against the state and were punished with death or at least mutilation. Other offences were dealt with as torts and were settled by the payment of compensation to the injured party. Similar societies in Tanganyika included the Nyamwezi, the Chagga, the Sukuma, the Pare, the Haya, and the Ngoni to mention but some.¹² However, even in these centralised societies crimes and civil wrongs were but vaguely defined and not always definite. Whereas some acts or omissions were regarded as a crime in one society the same acts or omissions could be regarded as civil wrongs in another society. Likewise some acts or omissions gave rise to both criminal liability and civil

liability, a phenomenon which is also found in modern law. For instance in English law, defamation, conspiracy, the various forms of trespass to the person - assault, battery and false imprisonment give rise to both criminal liability and civil liability. For each of these an injured party may bring a civil action or the state may institute a criminal prosecution.

Human society in whatever form of organization has broad notions of what may be safely left to private arbitration or self help and what ought to be made the concern of all as likely to imperil orderly social existence. Such notions will vary as much or as little, with the mores and ethos of particular communities as with their historical and geographical conditions. Thus the class of acts and/or omissions which one society regards as a crime may be different in marked respects from that recognised by another society. There have been noteworthy points of difference in the manner of classification of acts and/or omissions into civil wrongs and crimes in modern law. The following few examples will serve to illustrate this point. Some jurisdictions punish homosexuality as a crime whereas others such as

France and Switzerland, homosexuality between two consenting adults is not even a civil wrong, let alone a crime. Also, in French law incest is not defined as a crime per se, whereas under English law it is. Again, adultery is a crime under French law, whereas it is a basis of a claim for damages under English law which abolished it as an offence in 1857.

To conclude, we may say that most of the traditional African societies did not distinguish between crimes and civil wrongs precisely because they were stateless. Even in those societies which had evolved politically beyond the stage of primitive communalism, societies with centralised political authorities and administrative machinery with military and judicial organs, it is very difficult to put forward a general definition of what were regarded as crimes and what were regarded as civil wrongs. Different societies had different bases for distinguishing between crimes and civil wrongs.

With this background, the discussion on procedures of dispute settlement can now proceed. In the following chapter we propose to discuss procedures of dispute settlement in pre-colonial Tanganyika.

NOTES

1. Pherooz Nowrojee, Introductory Lecture in Civil Procedure, Faculty of Law, University of Dar es Salaam. Quoted in Lamwai, M.R.M. Tanzania's Law of Civil Procedure in A Historical Socio-Economic Context. LL.M. Dissertation, University of Dar es Salaam, 1978 pg. 1 (mimeo).
2. Black's Law Dictionary, 4th Ed. pg. 558
3. Dispute and the Law (eds) Maureen Cain and Kalman Kulcsan / Akademiai Kiado, Budapest 1983 pg. 225.
4. Lamwai, M.R.M. Tanzania's Law of Civil Procedure in A Historical Socio-Economic Context. LL.M. Dissertation, University of Dar es Salaam, 1978 pg. 6 (mimeo).
5. V.I. Lenin, State and Revolution; in Lenin, Selected Works. Vol. 2 Progress Publishers, pg. 240.
6. Ibid pg. 246.
7. K. Marx, A Contribution to the Critique of Political Economy, Progress Publishers, Moscow, 1970 pg. 20.
8. See Lamwai, M.R.M. Tanzania's Law of Civil Procedure in A Historical Socio-Economic Context, op.cit. pp. 11 - 27.

Marx Weber: On Law in Economy and Society (1954) Havard University Press)
and
Maine, Early Law and Custom 1890, John Murray 1907 Ed.
9. J.K. Nyerere, Freedom and Unity/Uhuru na Umoja, Dar es Salaam, Oxford University Press, 1966 pg. 269.
10. T. Schapera, A Handbook of Tswana Law and Custom, 2nd Ed. Oxford University Press, 1959.

11. See generally, Haydon, E.S. Law and Justice in Buganda, London, Butterworth, 1960.
12. See generally Cory Hans, Sheria na Kawaida za Wanyamwezi, Dar es Salaam, G.P. 1955
Kilimanjaro District Book, Cory Hans.
Sukuma Law and Custom Oxford University Press, 1953 Cory Hans and Hartnou H.M.
Customary Law of the Haya Tribe, London Frank Cass 1971. Songea District Book.

CHAPTER ONE

PRE-COLONIAL DISPUTE SETTLEMENT PROCEDURES

1.1 PRELIMINARY REMARKS

7 UDE DISP

Dispute settlement procedures and institutions which existed before European influence in what was then called Tanganyika is discussed in this chapter. This is done in the light of the assumption that in any society there must exist procedures which can be used to deal with alleged breaches of norms and the consequent injuries. There must be ways by which it can be established whether in fact a breach has occurred and the extent of the injuries and the measures to redress it. There must also be the means of enforcing the decisions relating to the disputes and to prevent their recurrence.

Dispute settlement procedures acquire diverse forms depending on three things. First, the different levels of development in political and economic fields. Second, the differing notions of justice realised through social relations arising out of these socio-economic relations. Third, the process of production of diverse kinds.

Thus the character of dispute settlement in each society is from time to time closely related to the complex of political authorities, police, courts, judges and codes of law.¹ In other words, it will depend on the judicial component of organised governments. These are found in societies which have developed institutions special for the administration of justice with special procedures to be followed in settling disputes. In most of what came to be known as Tanganyika, there was no such government and hence no established and specialised judicial system. Accordingly, the administration of justice was limited to tribal customary practices. Thus, the traditional mode of dispute settlement can only be discovered by an examination of the more general social roles, relationships and group activities in the process of production. It is only through the process of production that man inevitably enter into definite social relations with others. These socio-economic relations in turn dictates the manner in which conflict resolution is conducted.

Before the different modes of dispute settlement in pre-colonial Tanganyika are

examined a brief discussion on what the law of civil procedure is all about is proposed so as to appreciate its role and history in different historical epochs.

1.2 History and Role of Civil Procedure

Civil Procedure is aimed at answering the question "who is liable and what is the extent of his liability."² The history and role of civil procedure therefore is essentially the history of property relations. However, property did not originate in society as individual (private) property but rather as communal property. It is exactly because of this communal ownership of property that the question of who is liable and to what extent is he liable as is presently posed in civil litigation did not arise. In primitive communities, therefore, there was only rights and liabilities of families, clans, or tribes vis-a-vis their respective counterparts, and an individual, apart from his rights to a few personal appurtenances, exerted all his rights as an individual through his mediate or immediate community.

The emergence of private property is what brings about the existence of a right. The

existence of a right presupposes its being asserted, and such assertion, if it is to have any meaning, must be effective. The mode of asserting a right or status is what may be called the gist of civil procedure in settlement of disputes.

A long historical development spans the periods of communal ownership of property and individual ownership of property. Even after the coming into being of private property, societies went through a number of epochs, and with each epoch, the mode of asserting the individual right to property changed accordingly. Despite these changes, however, one characteristic has remained intact. The individual nature of the enforcement of individual rights and status has subsisted throughout the history of class societies, reaching its highest expression during capitalism. By taking an individual simply as an embodiment of labour or as an owner of property, capitalism has completely atomized the individual into a bundle of property rights which are capable of being extinguished, wholly or in part, by some liabilities through the machinery of civil procedure. The development of civil procedure or the development of different modes of dispute settlement may thus

be considered as the evolution of individual rights, the former getting clearer and more defined with the individualistic relations of production.

The evolution of private property and the rise and fall of different ruling classes which were the main controllers and possessors of private property called for a continuous flux, a continuous movement in the laws and norms that governed the property rights and liabilities of the members of the propertied classes. This development gave civil procedure its changing role according to the various historical epochs. This change however, was not taking place in void. There were concrete socio-economical and historical settings which likewise were in constant motion through the agency of contradictions in property ownership and class struggles.

Tanzania's civil procedure has three threads of normative and legal history connected with its historical development. There was first the traditional methods of dispute settlement which were in use before colonialism. Later on, and for a brief spell of about thirty five years, the German colonialists imposed their law on the

people of the then German East Africa. The law of the subsequent British colonialists forms the third thread which had its immediate origin in British India. This poses the question of whether Tanzania has a separate history of its law of civil procedure. The answer is no. With the advent of capitalism "in place of the old local and national seclusion and self sufficiency, we have intercourse in every direction, a universal interdependence of nations"³ Since it was capitalism in its colonial form which brought the notion of individual rights to property par excellence in Tanzania, then the present law of civil procedure has a heritage different from the one that goes back into the tribal times. With this background, it is now proposed to discuss the first of the three threads of normative and legal history of Tanzania's Law of Civil Procedure. The period under consideration is the period before 1891 when the German Decree⁴ which affected the administration of justice in German East Africa was promulgated.

1.3 Pre-colonial Dispute Settlement Procedures

Prior to the establishment of colonial rule in Tanganyika, there was no central machinery for

the administration of justice and neither was the practice of settling disputes uniform. The mode of dispensing justice varied comparatively from one tribe to another. African peoples lived according to their indigenous customs, traditions and usages.⁵ Society was heterogenous in nature. Thus the institutions and procedures of dispute settlement varied. There were as many dispute settling institutions and procedures as there were tribes.⁶ Most tribes in Tanganyika prior to the establishment of colonial rule were living under primitive communalism. The family unit, the clan and the tribal organisation were very important social units.

Traditional African societies in this country portrayed two distinct systems of political organisation. There were chiefly or kingly systems which have generally been called societies with centralised authority.⁷ In these societies power was concentrated on one person and a kind of an institutionalised ruling class.⁸ Secondly there was the chiefless system where authority lay in the hands of the whole social unit rather than on a few individuals.⁹

With this background a discussion on the procedures of dispute settlement can now be embarked upon, starting with non-centralised societies.

1.4 Dispute Settlement in Non-Centralised Societies.

Non-centralised societies were characterised by a virtual absence of coercive enforcement mechanisms which resulted from the absence of a centralised authority. Such societies were found among the Waluguru, Wabondei, Wazaramo, Warufiji and Wazigua. The absence of a centralised authority necessitated arbitration to be the major dispute settlement institution especially in disputes between two clans. While disputes between clansmen were normally settled by the assembly without any representation, dispute involving members of different clans were settled by a representative for purposes of defending the communally owned property in case the clan was made to pay if their member was found liable.

... The parties to a suit although present, did not appear in person but are represented by what would be considered in our courts as advocates... The parties, it would seem, were quite prepared to arrive

at an amicable settlement and to this end in order to remove the possibility of a hasty word or blow struck in the heat of argument between the parties directly concerned and thus bring the opposing forces prematurely into conflict would employ a spokesman on their behalf...¹⁰

Representation procedures were found among many tribes with this type of social organisation. Examples can be found among the Wamutumbi, Wabondei Wazigua, the Makonde and the Makua.¹¹ The right to appear and prosecute one's own rights which is most pronounced in the adversarial system was not found in these societies. Such societies owned most of its property communally and therefore had a collective interest in all disputes hence the need for a communal spokesman. It is recorded thus in respect of the Makua tribe:

... Each party had its Namwasiri or a court advocate selected on account of his glibness of tongue and his ability... The Namwasiri conducted the proceedings and argued the case on behalf of their respective clients. If agreement was reached the parties returned to their homes and then, the plaintiff in the company of his

Mwenye visited the village of the defendant and judgement was pronounced by the defendant's Mwenye in his own village ...¹²

This procedure was absolutely necessary because of the communal nature of these societies. Every member of the clan was bound to each other for support and assistance. Therefore at each level be it the clan, tribe or confederacy, there was always first an attempt at conciliation and mediation. Most of the ultimate settlement was one to which both parties agreed, and therefore the question of enforcement did not arise. The whole dispute settlement procedure was highly informal.

The idea and main purpose of settling disputes at this time was to effect reconciliation between the parties and not to punish the offender as is the case in modern formal ways of settling disputes:

... reconciliation of the offender to the community is placed first. It was undoubtedly of the greatest importance...¹³

Reconciliation served the purpose of maintaining the equilibrium between the offender and the offended's family or clan.

Writing about the dispute settlement process among the Basotse, Gluckman¹⁴ had this to say:

The Lozi disapprove of any irremediable breaking of relationship. For them it is a supreme value that villages should remain united, kinsfold and families and kinship groups should not separate...

Throughout a concert hearing of this kind the judges try to prevent the breaking of relationship and to make it possible for the parties to live together amicably in the future.

Therefore the court tends to be reconciling, it strives to effect a compromise accepted to and by all parties.

The equilibrium which was sought to be maintained by reconciliation was through compensation and restitution of property.

Allot writing about the Banyoro procedure of settling disputes states:

There is no aim to punish a wrong doer, though a penalty can be imposed, rather it is the object of proceedings to dispose of quarrels between members of the community and to re-integrate a wrong doer in the community.¹⁵

In these family and clan based economy societies, authority was dispersed rather than concentrated. In the absence of traditional kings or chiefs, judicial and administrative organs were far less formal and institutionalised. There was complete reliance upon total cooperation of all the members of the community so as to be able to function efficiently. Total cooperation was necessary because every able bodied member of the community had to produce at least enough for himself and some surplus for the very young, the very old and the disabled. In order to have total cooperation, it was necessary to have complete unanimity of opinion among the members. This was safeguarded by a set of norms which had deep influence in the settlement of disputes in the community.

The first and foremost of these norms was the subordination of the rights and interests of the individual to the rights and interests of the community. The individual was more dependent on the community and the well being of the community contributed directly and immediately to his own well being. Because of this, a person was assured of the total support of the community if he was

very old or was ill or disabled. He was also assured of the community's total support of his family in case he died. For this, and considering that he could not survive on his own, the individual substantially surrendered his rights and interests and placed them in the hands of his small, well known and intimately familiar community.

Unanimity was also consolidated by the fact that the opinion of every member of the community was respected and was given due consideration by the whole group. This was reflected in dispute settlement where there was popular participation of all the members of the community with everyone feeling free to side with either of the disputants. These procedures not only allowed free and democratic participation by the members of the community, but also assured that each party in a dispute was amply defended before a decision was made.

The most remarkable feature in dispute settlement in communities with clan based economies was the absence of fixed procedures. Every dispute was settled as it arose and with resources at hand. Disputes had to be settled

without the least delay to avoid the destabilization of the community. There was also the absence of clearcut findings of guilt or innocence after the parties were heard. This was to avoid having a victor and the vanquished in any given dispute inasmuch as this would only perpetuate the dispute. Instead, either of the disputants was partly "bad" and partly "good" "liable and not liable." The only significant thing is that the guilt or innocence varied in degrees between the parties. For example the complainant, the winner, would be told: "If you are so good why didn't you forgive your fellow, but instead, asked for this case to be heard?"

After the dispute was settled, reconciliation of the parties was very necessary. Beer would usually be drunk and the dispute lightly and humorously discussed. The opinion of the elderly people was highly venerated for they were regarded as the custodians of the community's knowledge. As a result, although everyone participated in settling the dispute, it was the elders who pronounced the final opinion of the community. After the disputants were reconciled, the matter was forgotten and the experience noted by every member of the community.

The communal nature of the procedure can be more clearly illustrated in the following passage:

The unit of responsibility in the tribe is not the individual but the whole of the individual's family, and the family accepted and assumed responsibility for the acts of any member of it They assisted one another in any way when necessary, even to the payment of debts.... mutual assistance in all matters was considered common courtesy and the family whenever it acknowledged liability in respect of one of its members invariably paid any compensation awarded by a court or else supported the individual member in resisting any attempt by the other party to take it by force.¹⁶

In cases of inter clan disputes the arbitration procedures were modified into semi-arbitration adversarial and witnesses were called to support their clan's case.

... matters affecting members of different family groups were dealt with by a council presided over by the clan head and attended by the other patriarchs of the clan supported by their followers.

Decisions were given by the head of the clan but it remained for the party who obtained the decision in his favour to levy distress and obtain payment of the compensation awarded. As these courts were in the real sense arbitration courts only, there existed no machinery for enforcing their decisions and occasionally any effort to levy distress was resisted by the family against which the decision had been given and to the stronger party went the spoils ...¹⁷

We hasten to caution here that the above exposition does not pretend to be an exhaustive or even an adequate account of the traditional non-centralised society's dispute settlement procedures. This is rather a survey of what seems to be their most significant features. We now propose to give the same treatment to centralised societies.

1.5 Dispute Settlement in Centralised Societies

We have already stated that precolonial Tanganyika was not wholly free from class contradictions. These contradictions, however, were minute compared to those which were to be imposed by colonialism on the primitive tribal

peoples. This was specifically so on the eve of the coming of the Germans when some tribes came into contact with the Arabs hence modifying the social relations. This way aggravated by the introduction of a monetary economy which made people able to own personal wealth. These societies had institutionalised military and administrative machinery with law enforcement organs headed by appointed officials. Power in these societies was concentrated on one person, the Chief, Jumbe or Bambo Mkulungu with his kind of an institutionalised ruling class. Examples of these societies are the Nyamwezi, the Chagga, the Haya, the Ngoni, and the Matengo. In these societies existed a semi-centralised system of dispute settlement institutions centred on the Chief. The Chief exercised a dual function of both the judge and the Chief Executive. However, there was no systematic and common procedures of dispute settlement applicable in all these societies. Much depended on the political organisation of the society. Social and economic interdependence predominated in centralised societies as in non-centralised societies because of the lack of antagonistic classes. Accordingly the

procedures of dispute settlement were geared towards allowing a substantial number of the members of the society to participate. Conciliatory procedures were still used in intra-tribal disputes and self help remained the major method of settling disputes between different tribes.

The most common procedure found in chiefly societies began with the complainant instituting his complaint in the Chief's Council. Thereafter, the Chief's assistants summoned the respondent. Then the complainant began by stating his case and when he had finished he was called upon to substantiate important allegations with definite proofs. This he did by calling witnesses. Then the respondent took his turn, stated his defence and called his own witnesses. Examination in chief and cross-examination of the witnesses followed. Either of the arbitrators interjected ^{the} in form of queries which were designed to clarify [^] issues and to keep the parties and the witnesses to the salient points in the case. Any member of the assembly who had anything to say that was valuable was permitted to speak. Then the arbitrators later withdrew and finally returned

to announce their verdict. The unsuccessful party had to indicate his readiness to accept the verdict by repaying thanksgiving to his opponent. Other compensation or restitution had also to be paid there and then. Either party, however, could refuse to accept the decision, if he considered it to be unfair. In such a case, the dispute had to be tried all over again by another and more influential person or group of persons. Finally both parties were made to swear reciprocal oaths that they had forgiven and forgotten and this marked the formal reconciliation of the parties.¹⁸

It may be important to point out here that although the decision was based on evidence yet prior knowledge of some or all of the arbitrators was not a disadvantage as normally is in English trial procedure but rather an advantage. We would therefore concur with those who argue that the English form of justice is based on "judicial ignorance" while the African customary form of justice is based on "judicial knowledge."¹⁹

The elders did not come together to ascertain the facts, they knew them already or invoked the aid of the supernatural to find the truth.

Thus foreknowledge of the circumstances was not a bar to taking part in the proceedings as an adjudicator - rather the reverse ..²⁰ [Emphasis provided.]

There has been a popular opinion that the aim of African customary law was the maintenance of the social equilibrium. This resulted in the maintenance of solidarity between all those subject to it by repairing as far as possible all breaches that tended to disturb society. It has also been said that African customary law has always *striven* consciously to reconcile parties to a dispute, contrary to the procedure under English law which has often tended to limit itself to bare resolution of the conflict by stopping at the mere apportionment of blame between the disputants.²¹ This opinion is succinctly summarised in the following passage:

It was therefore a judgement by agreement intended to restore and preserve the social balance, and differed materially in principle from a judgement in European courts, which is a judgement by decree intended to enforce the legal rights of one party to the complete and permanent exclusion of the other, whatever the effect on the social

equilibrium may be ... The object of the elders [in African judicial process] was not punishment but settlement of the dispute, not a declaration of strict legal rights, but reconciliation.²²

The above exposition implies that African dispute settlement procedures were geared towards adjusting disturbances of the social equilibrium, to restore peace and goodwill of the two disputing groups in a give - and - take reciprocity. The principle of win-a-little and lose-a-little was followed. This approach was different from that under the adversarial system which tends to widen the gulf between the two groups by granting all the rights to one of them to the exclusion of the other. The latter system is generally concerned with facts and legal principles without taking cognisance of social implications. The principle "winner gets - all is applied hence, the saying "people leave customary arbitral proceedings as friends but they leave official courts as enemies."²³

It is, however, submitted that although the above assertion was true to most of the centralised and non-centralised societies, a beginning of

adversarial procedures in societies with centralised authority could be found. There were some tribunals which gave "winner-gets-all" decisions.²⁵ The Haya and the Sukuma are examples of centralised societies with a modified adversarial procedure which resulted into decisions on the basis of "winner-gets-all".

Although in the centralised societies there was a mixed adversarial and arbitration procedure, the former procedure was not perfected until a later period. Arbitration dominated the procedure. It was geared at reaching a compromise as the following passage shows:

... the procedure was informal and it may be added that greatest pains were taken to obtain the consent of the parties to the judgement ...²⁵

As for tribes like the Chagga, the Haya, the Nyamwezi etc. class distinction and private property ownership was already showing itself and was co-existing with many and stronger norms and practices supporting communal ownership of property. That notwithstanding, these tribes also had conciliation and amity as the linchpin of dispute settlement. The Chief was not a judge.

He was not an impartial umpire between two irreconcilable foes, but a "mediator between the victor and the loser after the trial". He did not represent a bureaucracy but invariably acted as a spokesman for his councillors who in turn sought to uphold and reinforce the established norms of relatively homogeneous community.²⁶

It is interesting to note that vestiges of coercion were already manifesting themselves in some of the societies with centralised authority. There were guarantors for the execution of the decision after a right had been ascertained by the judicial assembly and the chief. There were also persons who ignored such a decision and in case it was a rich person the chief was powerless and had to soften him by threats of pronouncing a curse over him. The rich person could still be recalcitrant, and here we see non-privacy of property ownership for then the complainant or his relatives and descendants would wait until the stubborn and powerful respondent died and they would say that brute has died let us now collect the total debt from his son. Fear of such liability going down to one's helpless descendants was often an important factor towards the prompt payment of a judgment debt.

There was also a sense of shame among many tribes which acted as an important factor in bringing disputes to an end. Since individual conflict was a shameful thing, many tribes were very ready to come to an amicable conclusion of a dispute. Similarly, curses, oath and ordeal which were considered as the most extreme remedy were not conducted at individual level but at a level where all members of the community participated physically or emotionally. The swinging of the cursing pot was believed to be able to kill the whole clan of the wrong doer to whom it was directed.²⁷

All this said, it should be borne in mind, that the jurisdiction of the chief's tribunal was exercised as a last resort. The interest of the parties was to have a dispute settled as quickly and simply as possible. People avoided taking their property cases to the chief's tribunal because this would potentially complicate the amicable settlement which was so desired. "Our case is like a tiny he goat, do you want to make an elephant out of it." The respondent would plead with the would be claimant trying to convince him that their dispute should be settled

by an arbitrator who was usually a neighbour or a mutual friend.

1.6.0 Characteristics of Pre-Colonial Dispute Settlement Procedures.

1.6.1 Collective Responsibility

An interesting element found within traditional communities in Tanganyika was the doctrine of collective responsibility. Crimes and civil wrongs alike were a corporate deed. Even during litigation the whole issue was taken as a family, clan or village issue rather than at the individual level. This arose out of the idea that the individual was merged in his group and therefore the latter was collectively responsible for his offences and civil wrongs against outsiders.²⁸ The group paid all compensation for an individual's private wrongs and answered for all his public offences. The following passage serves to illustrate this better:

... Perhaps the most important feature of tribal life, which was reflected in its system of customary law, was that it was collective, that the individual counted very little, and he was important primarily as a member of a family or clan, bound by a web of

reciprocal duties and obligations to the other members of the family or clan ... the life of the clan proceeded harmoniously so long as members discharged their duties and obligations faithfully. If one member defaulted the equilibrium was upset ... the clan member primarily affected by the action would endeavour to obtain redress, first by self help, but if he failed by appeal to the rest of the clan. The dispute went to the clan elders, those best suited to deal with it and to appreciate how the equilibrium had been upset and what was required to restore it. There was no question of the complainant claiming his individual rights;²⁹

In all these cases of collective responsibility however, the legal liability was without question that of the offending individual alone, but the discharge of that liability was very often the concern of all. This civil aspect of collective responsibility may be equated to some concepts of modern English civil law. For instance, a master or employer is vicariously liable for all the wrongs committed by his servant or employee in the course of the latter's employment. Likewise, a father or legal guardian of a child can be sued for the latter's torts and contracts for necessaries.

reciprocal duties and obligations to the other members of the family or clan ... the life of the clan proceeded harmoniously so long as members discharged their duties and obligations faithfully. If one member defaulted the equilibrium was upset ... the clan member primarily affected by the action would endeavour to obtain redress, first by self help, but if he failed by appeal to the rest of the clan. The dispute went to the clan elders, those best suited to deal with it and to appreciate how the equilibrium had been upset and what was required to restore it. There was no question of the complainant claiming his individual rights;²⁹

In all these cases of collective responsibility however, the legal liability was without question that of the offending individual alone, but the discharge of that liability was very often the concern of all. This civil aspect of collective responsibility may be equated to some concepts of modern English civil law. For instance, a master or employer is vicariously liable for all the wrongs committed by his servant or employee in the course of the latter's employment. Likewise, a father or legal guardian of a child can be sued for the latter's torts and contracts for necessaries.

Collective responsibility in pre-colonial traditional societies was possible because these societies predominantly featured simple technology. They were living at a subsistence level and virtually there was no division of labour into classes and hence the virtual absence of critically opposed economical and political interests. Due to the relatively low level of development of the productive forces, no community could be independent of another. So as to survive there had to be a general interdependence between the members of a given community, and one community and another. No community or individual could produce absolutely everything it or he required for his life, hence this interdependence.

1.6.2 Legal Representation

Another constantly recurring phenomenon in precolonial traditional judicial trial is representation. In both centralised and non-centralised societies both parties to the dispute had to be represented by a "wise man" in the community who acquired different titles in different societies.³⁰

The origin of this widespread practice may possibly be traced to the indigenous principle

that the head of the family alone is responsible for the wrongs of members of his household vis-a-vis third parties. A wronged person consulted his elder brother in minor cases and his father in major ones, and in all cases, it was the head who took the matter up with the village elders. In chiefly societies, the chief represented his community in all dealings with other communities. Among the Chagga of North Eastern Tanganyika for instance, besides the recognised spiritual leader of the clan there was someone called "The great one in Legal Matters" whose duty was to represent the clan, not as a paid advocate of an independent litigant, but as a legal guardian.³¹ This may be regarded as a small step to the direct representation by paid counsel which we find today in the modern adversarial system of dispute settlement.³²

These champions were found in fact in almost all precolonial traditional societies, from the most highly centralised down to the most segmentary. This may explain why in every Native Court Ordinance enacted by the British colonialists in Tanganyika, one invariably finds provision for voluntary legal representation of a litigant before a Native Court by the husband, wife or

other relative though never by a qualified advocate.³³

1.6.3 Simplicity and Informality

Simplicity and informality were yet other key attributes of the traditional modes of dispute settlement. Proceedings were simple and lacked any formality. Everybody was free to take part in the settlement including the disputants. Allot summarises the above exposition thus:

Justice was simple and popular. The people could understand the machinery ... and in many places participated directly in judicial proceedings. Justice was ... local and speedy ... Justice was simple and flexible. There was no elaborate codes of civil procedure and evidence.³⁴

1.6.4 The Role of the Tribunal

The Tribunal played a very active role in dispute settlement. In effect, the court itself acted as counsel for the disputants by listening to everything and sorting it out to determine the relevant issues. The tribunal also played the role of counsel in examining and cross-examining both the parties and any witness called to give evidence. It was the tribunal with its fuller

understanding of the law and its comprehensive view of the context and background of the dispute that knew which questions to put and how to put them.³⁵ This underscores the point that pre-colonial dispute settlement procedures operated on the basis of "judicial knowledge" unlike the adversarial system of dispute settlement which operates on the basis of "judicial ignorance" whereby the court plays the passive role of an umpire. The active role of the tribunal was considered to be necessary to ensure that the dispute was fairly and completely investigated and resolved. This explains the adoption by the customary tribunals of a highly activist and assisting role throughout the dispute - resolution process.

This was the situation which prevailed in Tanganyika prior to colonialism. However, the indigenous people of this country were since the beginning of the present century subjected to the general authority of an organised government established by colonial powers. One of the results of this was the establishment of a local government, appointed chiefs and regular courts headed by salaried magistrates.³⁶ A new kind of

procedure was thus introduced involving new powers of coercion, and the concept of neutral hearing and adjudication. This was the colonial adversarial mode of dispute settlement which disrupted the indigenous procedures and ultimately buried them altogether. This process began with German colonialism and was completed by the British administration.

In the following chapter we propose to discuss how this process was carried out during German Colonial period.

NOTES

1. Manumba, R.S. and Senguji, A.H. The relationship between the Ten-cell System, the Traditional Mode of Dispute settlement and The Modern Courts of Law - Third Year LL.B Compulsory Research Paper, University of Dar es Salaam, 1983 pg. 2 (mimeo)
2. Lamwai, M.R.M. Tanzania's Law of Civil Procedure in A Historical Socio-Economic context LL.M Dissertation, University of Dar es Salaam, 1978 pg. 1 (mimeo)
3. Karl Marx and Frederick Engels. "Manifesto of the Community Party" in Selected Works in One Volume, Progress Publishers, Moscow, 1968 pg. 39
4. See Extracts From German Ordinances and Decrees of German East Africa The Standard Printing and Publishing Works, 1916 pg. 63
5. These were subsequently taken to be the customary laws of those tribes. See Morris, H.F. and Read, J.S. Indirect Rule and The Search For Justice. Essays in East African Legal History, London, Oxford University Press, 1972

Allot, A.N. Essays in African Law London Butterworth & Co (Republishers) Ltd, 1960

African Conference on Local Courts and Customary Law. Record of Proceedings Dar es Salaam, 1964

Local Customary Law (Declaration) (No. 4) Order 1963, G.N. 436 of 1963, G.P. Dar es Salaam

T.O. Elias The Nature of African Customary Law, Manchester University Press, 1956

6. M.R.M. Lamwai: The Development of the Administration of Civil Justice in Kenya and Tanzania. A critical Analysis. Ph.D Thesis, School of Oriental and African studies, London University, 1983 pg. 28
7. e.g. Bukoba and Kilimanjaro
8. Frederick-Engels. The Origin of the Family, Private Property and the State. In Karl Marx and Frederick Engels. Selected Works in Three Volumes, Volume Three, Progress Publishers, Moscow pg. 204
9. See examples given by M.R.M. Lamwai Ph. D Thesis op.cit. pp 31/36
10. Rufiji District Book, The National Archives, DSM pg. 22
11. Among the Zigua tribe this representative was known as the Mnyosi, The Matengo called him a Hwakili, The Matumbi a Mseme, while the Makonde called him the Mkitara
12. Lindi District Book, The National Archives, DSM pp 198 - 203
13. Katende, J.N. Why were punishments in pre-European Africa Mainly Compensative Rather than Primitive (1967) Journal of The Denning Law Society, pg. 122
14. Marx Gluckman, The Judicial Process among the Barotse of Northern Rhodesia 1955, Manchester University Press pp. 20 - 21
15. Allot, A.N. "Essays in African Law" op.cit, pg. 122
16. Lindi District Book, op.cit. pp. 202 - 203
17. Lindi District Book, op.cit. pp. 198 - 203
18. This oath should be distinguished from the proof taking oath or judgement of God like the Mma or Kimangano among the Chagga.

19. See Allot, A.N. Essays in African Law.
op.cit.

Allot, A.N. Adaptation and Development in
African Law, 1965 H. Kuper & L. Kuper (eds)

Marx Gluckman: Ideas and Procedures in
African Customary Law. London, Oxford
University Press, 1966

Andrew H. Pike, interviewed by Lamwai,
London, 1983: see M.R.M. Lamwai, Ph.D
Thesis op.cit. pg. 36
20. Local Government Memorandum No. 2 - Native
Courts, 2nd Edn. DSM. G.P. para 6 at pg. 2
21. Elias, T.O. Nature of African Customary Law,
Manchester University Press, 1956 pg. 268
22. Ibid pp. 268 - 269
23. P.H. Guliver: Social Control In An African
Society. A Study of the Arusha. London
Routledge & Kegan Paul, 1963 pp. 173 - 174
24. P.H. Guliver: Social Control in An African
Society. A Study of the Arusha op.cit
pp. 173 - 274
25. Local Government Memorandum No. 2 - Native
Courts, 2nd Ed. op.cit.
26. Allot, A.N. Essays in African Law op.cit.
pg. 88
27. This was common among the Chagga, the Pare,
the Sukuma, the Matengo and the Ngoni
28. Local Government Memorandum No. 2 - Native
Courts, 2nd Ed. DSM. G.P. Para 6 pg. 2
29. Allot, A.N. Essays in African Law op.cit.
pg. 91

30. Ibid pg. 240
See also footnotes 10, 11, 12 and pp. 23 - 25
M.R.M. Lamwai: Ph.D Thesis op.cit. pp. 30 -33
31. M.R.M. Lamwai Ph.D Thesis, op.cit. pg. 30
32. Allot, A.N. Essays in African Law op.cit.
pg. 240
33. See also S. 29(1) & (2) of the Magistrates'
Courts Act, 1963 Cap 537; and S. 33(1) & (2)
of the Magistrates' Courts Act, 1984 Act. No.
2 of 1984
34. Allot, A.N. Adaptation and Development in
African Law, 1965 H. Kuper & L. Kuper (eds)
216 at pg. 232
35. R.A. Bush. Access to Justice Vol. III
Emerging Issues and Perspectives.
M. Cappelletti and B. Garth (eds) pp. 269 -
272
36. Gulliver, P.H. Social Control in An African
Society. op.cit. pg. 3.

CHAPTER TWO

DISPUTE SETTLEMENT DURING GERMAN COLONIALISM

1880s - 1919

2.1 German Occupation in Tanganyika.

Before 1884, German interest in Tanganyika was limited. The idea of conquest came from an individual, one Dr. Carl Peters who visited East Africa late in 1884 and obtained "treaties" with a number of local chiefs along the Tanganyika coast granting him large tracts of land granted for settlement by German settlers. When he returned to Germany in 1885, his government declared a protectorate over the interior of Saadani.¹ Thereafter, Peters formed the German East Africa Company to rule this protectorate. The German government helped him but did not want the responsibility itself.

When it came to acquisition of colonies, the actual physical occupation of the territories was mostly left into the hands of mere German Companies. In East Africa, actual occupation was left to the German East Africa Company which had been set up by a private society for German colonisation. The Company by way of an Imperial charter, was given tremendous powers such as to exercise sovereign rights and dispense

justice without restrictions on interference with the indigenous people's institutions, rights and customs.²

During the German East Africa Company's reign there was neither an introduction of the metropolitan legal system and law into German East Africa nor did the company uphold or respect the indigenous institutions and their legal systems.

The Company had no effective control over a significant part of the interior due to inaccessibility for lack of communication, lack of manpower and capital. The overwhelming majority of the tribes still maintained their independence and so continued to operate their customary legal systems and their traditional modes of dispute settlement without any hindrance.

With the resistance of the coastal peoples which drove the company out of all the coastal towns except Bagamoyo and Dar es Salaam in 1888, the German Government had to intervene by taking over the administration of German East Africa. The Imperial Government formally took over direct control and declared the area that is now Mainland Tanzania, Ruanda and Burundi a protectorate on

January 1st, 1891. By 1898, the main pattern of German administration was established. The protectorate was divided into districts whose number changed frequently, but by 1914 there were 22.³ Communication was so bad that almost everything was left to the District Officer (Bezirkshauptmann) who commanded a police force or a company of 100 - 200 troops, collected taxes, appointed and dismissed African chiefs and agents, and administered justice. The Germans preferred to employ existing chiefs as their agents, and where there were none, they appointed akidas to collect tax and administer justice. Whereas political control had been attained by 1914 and for the first time ever, all the diversified tribal states had been brought under one governmental control, systematic judicial control had not been achieved.

2.2 The Basis of German Jurisdiction

The treaties signed between the agents of the German East Africa Company and the inland tribes and supplemented by the German Ordinance of 1891⁴ formed the basis of German jurisdiction in German East Africa. Under this Ordinance jurisdiction over non-natives (white persons and persons

having the status of white persons e.g. Japanese, Syrians, etc) was exercised by District Judges and District Courts (Bezirksrichter and Bezirksgerichte) in Dar es Salaam, Tanga, Mwanza, Moshi and Tabora. Appeals (Burefungen) against the decisions of the District Judge and Court lay to the Superior Judge and Superior Court (Oberrichter and Obergericht) in Dar es Salaam.⁵ In the High Courts, the judges were assisted by European Assessors. Since these courts were hearing cases between Europeans the laws applicable were those which they were already used to. Also the fact that these courts were manned by professional lawyers trained in German Law and Procedure, it went without saying that German Law was applied. Thus the German Civil Procedure Code, together with the laws introducing it were applied to the High Courts in German East Africa in the same way as they were applied in the German County Courts. This formed the first system of dispute settlement during German colonialism.⁶

The principal powers and duties of the courts were as follows: The District Judge dealt with certain civil, criminal and bankruptcy matters,

non-contentious matters, (Freiwillige Gerichtsbarkeit) and Land Registration matters (Grundbush). He was empowered to perform marriages and to frame and issue authentic documents (Beurkundung) relating to marriages, births and deaths within his area of jurisdiction. He also dealt with certain matters relating to administrative summary procedure (Verwaltungszwangs-Verfahren).⁷

Jurisdiction of Second Instance was exercised by the Superior Judge (Oberzichter) and Superior Court (Obergericht). The Superior Judge was appointed by the Imperial Chancellor and exercised supervision over the District Judges. The Superior Judge had in addition, jurisdiction of Second Instance in respect of appeals by Coloured persons against the decisions of the Local Authorities in matters above 1,000 rupees.⁸

The Superior Court consisted of the Superior Judge and four assessors. It dealt with appeals (Berufung and Beschwerde) from decisions of the District Judge and District Court in civil contentious matters, bankruptcy matters and criminal matters, (Strafsachen)⁹ and with decisions of the District Judge in non-contentious matters. In these appeals, the assessors

performed a role similar to that they performed in the court of first instance.

A different approach was taken in respect of native jurisdiction. The requirements of native policy appeared to make it desirable that there should be the closest possible connection between the executive and the judiciary. The German administration considered the overwhelming majority of natives insufficiently "advanced" to be subjected to a system of law applicable to whites. Accordingly, jurisdiction over Natives of the Protectorate (Schutzgebiet) and over persons belonging to foreign coloured tribes and races (Arabs, Indians etc) was exercised by the local administrative authorities and Appeals (Beschwerden) lay to the Governor by whose order they were dealt with by the Superior Judge.¹⁰

Under the German Ordinance of 1891, the District Commander (Bezirkshauptmann) assisted by native judges had unlimited judicial authority over non-Europeans resident in the areas they controlled. This Ordinance also empowered the District Commanders to delegate their judicial authority to officers subordinate to them on the condition that the authority to delegate would

be exercised by the Commanders "at their own responsibility" and had to be reported to the Governor.¹¹ This was the basis upon which the Akidas and Jumbes or headmen were given magisterial jurisdiction both within the coastal strip and further inland where the Germans had established effective rule. While the Akidas enjoyed restricted jurisdiction over natives, the magisterial powers of the Jumbe over the natives of their areas depended on how influential they were.¹²

There was no general Native Law, but under the Imperial Ordinance of 3rd June, 1908, the Imperial Chancellor, and with the latter's sanction the Governor was empowered to issue Ordinances and Regulations concerning jurisdiction over natives. This Imperial Ordinance also confirmed such Ordinances on the subject as had already been issued by the authorities in question.¹³

There were few areas where German Rule was not sufficiently consolidated. In such areas which included Bukoba, the traditional authorities continued to settle disputes according to traditional procedures.

It is worth noting that courts which were under the Military commanders exercised jurisdiction over non-Europeans only. It automatically followed that most of the cases they heard were between natives only. No specific procedure was prescribed for them in the performance of this function. The Ordinance of 1891 which was supposed to provide for the same contained only general provisions. For instance, this Ordinance provided that litigants would be allowed to file their claims before the military commander at least once in a week. After the claim was filed, the commander was empowered to hear the parties immediately and where this was impossible then he could set a date for hearing.¹⁴ The Ordinance provided further that cases should be decided "in accordance with the principles of law acknowledged by civilised nations, common sense and the customs and traditions of the country."¹⁵ It went on to provide that the commanders could obtain the opinion of a Judge of the High Court in his District or that of the government if he was in difficulties.¹⁶ Thus, there was no specific law which was to apply in these cases, and it appears that the commanders, were allowed to

regulate their own procedures. This explains why there was a significant number of procedural differences in the different areas of the country despite the courts having the same jurisdiction.¹⁷

The Decree of 1905 which was intended to supplement the law of procedure in these courts in so far as the application of native law and custom was concerned did not remedy the situation either. This decree provided that the law applicable had to be determined "by general legal considerations whereby the law applicable to non-natives must be resorted to."¹⁸ Courts were also required to pay regard to the "practice of natives so far as this is not from the point of view of civilised nation ... contrary to the healthy common sense and good morals."¹⁹

It is submitted that the German administration's attempt to classify procedures into those which applied to other non-Europeans did not bring the intended results. As a matter of fact this facilitated the integration of the indigeneous native laws and procedures into German Laws and Procedures. This was caused by several factors. First, was the provision that the procedure which applied to natives had to be analogous to the

German procedure.²⁰ The German authority's interpretation of this provision was that it applied not only to the coastal mixed societies but to all non-European societies. Second, native procedures were a question of fact to be established by evidence allegedly on account of the varied nature of the customs which existed in the different tribes. The non-existence of written records buttressed this assertion. Third, there was a proviso in the Decree of 1905 to the effect that native procedures should be followed only when they were in conformity with the practice and procedure of civilised nations. Consequently, the whole of the native procedures were easily swept aside and a blend of the German adversarial procedures was introduced in all those areas which were under their effective control. Natives were accordingly brought to the adversarial system of dispute settlement. This was aggravated by the fact that court holders of courts subordinate to the commanders were not members of the communities and therefore they were totally ignorant of the local procedures. They enforced their own conception of "healthy common sense and good morals."²¹

It can now be stated that the German physical occupation of East Africa in general and Tanganyika in particular necessarily marked the beginning of the destruction of the numerous indigenous tribal judicial systems. Obviously the new colonial power could under no circumstances tolerate the supremacy of the tribal laws. To do so would have been tantamount to subjugating herself to the economic and political authority of the tribes. Law and Courts are always instruments of political authority and for controlling economic interests in a given society. Furthermore, the inculcation of the colonial mode of capitalist production and trade into the tribal structures would necessarily corrode the traditional legal systems since the legal system of any given society is a mere superstructure reflecting that society's economic base. Once the traditional socio-economic base had begun to succumb to the varied forces of colonialism the traditional legal structures were bound to change.²²

A perusal of the Ordinances and Circulars promulgated in respect of civil law during German colonial rule indicate that the German authorities divided the people into "coloureds" and "Natives"²³

The definition of these two terms was contained in S. 4 of the Protectorate Law of 10th September, 1900 and S. 2 of the Imperial Decree of 9th December, 1900.

There is an understandable dearth of civil procedure legislation in German East Africa. The main body of German law enacted for this country remained in the field of criminal law, labour law provisions, taxation and administrative laws.²⁴

The ousting of the Germans after the Allied victory in the First World War came too soon to have a comprehensive body of civil laws which later came to be necessary for the control of commodity and property relations whose first seeds German colonialism had sown

As a summary one may therefore say that the administration of civil justice during the German period was very much fused with the administration of criminal justice and the administrative machinery. This was necessary because firstly the German colonial state had to consolidate itself and property relations had to have the control and direct sanction of the state. Secondly, lack of judicial staff put the administration of law

in the hands of a few executive officers to whom the technicalities of the law and its intricacies were too much for them to call for any comprehensive civil procedure laws. To crown it all the German administration paid little attention to judicial administration. This was so because the Germans were more occupied with pacifying the resistant communities and therefore didn't have an opportunity of consolidating their administration.

By 1916 the British had fully occupied German East Africa North of the Central Railway line where they established their own provisional administration under Sir Horace Byatt who after the establishment of the British Mandate of East Africa became the first British Governor of German East Africa. The war therefore brought about a disruption of the German system of administering both criminal and civil justice which had already begun taking roots. The British on their part, appear to have systematically assumed authority over the whole of German East Africa from the outset by appointing an administrator who established civil administration in these areas they "conquered" from the Germans.

The administrator remained the authority with de facto jurisdiction to administer "law and order" in the occupied areas.

Thus, the outbreak of the First World War, and the consequent driving out of the Germans from German East Africa in November, sealed the end of German rule leaving behind an already established three parallel system of procedures of dispute settlement. The first was that followed by the traditional tribunals in those areas where the Germans had not taken effective control. The second which was applied to natives was found in those areas where the Germans had taken effective control, that is, areas which were under military commanders. These were provided for under the Ordinance of 1891 and the Decree of 1905. The third system of procedure was that which applied in the High Courts which were hearing cases between Europeans.²⁵

This was the position which the British found on assuming administration of German East Africa. The questions which follow are; first, whether the three parallel procedures of dispute settlement were preserved by the British administration or whether there were any changes

to them. Second, whether the British administration introduced any new procedures of dispute settlement in Tanganyika. These questions are answered in the following chapter which discusses procedures of dispute settlement during British rule in Tanganyika.

NOTES

1. Tanzania under German and British Rule in Socialism in Tanzania Vol. 1 Lionel Cliffe & John Saul (eds) EAPH, 1973 pg. 8
2. The History of East Africa, Vol. II Oxford University Press, 1965 pg. 126
3. Tanzania under German and British Rule, op. cit. pg. 15
4. Extracts from German Ordinances, Decrees etc. General Headquarters of the East African Force: Nairobi, Standard Printing and Publishing 1916
5. Tanganyika Law Reports (R) Vol. 1 1921 - 1952, pg. v
6. M.R.M. Lamwai, The Development of The Administration of Civil Justice in Kenya and Tanzania. A Critical Analysis.
Ph.D Thesis, School of Oriental And African Studies, London University, 1983 pg. 161 (mimeo)
7. Tanganyika Law Reports (R) Vol. I 1921 - 1952 op. cit. pg. 5
8. Ibid
9. Tanganyika Law Reports (R) Vol. I 1921 - 1952 op. cit. pg. vi
10. Ibid
11. The principal laws on which all jurisdiction was based were as follows:
 - (i) The Protectorate Law of 10th September, 1900
 - (ii) The Law of Consular Jurisdiction of 7th April, 1900

- (iii) The Imperial Ordinance of 9th November, 1900
 - (iv) Order of the Imperial Chancellor of 25th December, 1900 as ammended on 8th May, 1908
The Tanganyika Law Reports (R) Vol. I
op. cit. pg. v
12. A.C. Hollis, Report on Tanganyika Cmd. 1428, Part III
13. These Ordinances were:
- (i) The Ordinance of the Governor of 14th May, 1891 relating to the jurisdiction of the District Administration over Natives.
 - (ii) The Ordinance dated 23rd September, 1893 relating to Acts-in-the Law (Rechtsgeschafte) by Natives..
 - (iii) The Ordinance dated 4th November, 1893, 1st September, 1896 relating to the Estates of Deceased Natives.
 - (iv) The Ordinance of the Imperial Chancellor of 22nd April, 1896 relating to the exercise of punishment and discipline of Natives etc.
14. Extracts from German Ordinances ... op. cit.
15. Ibid
16. Ibid
17. M.R.M. Lamwai, Ph.D. Thesis op. cit. pg. 161
18. Extracts from German Ordinances op. cit.
19. Ibid
20. Ibid

21. For more on these arguments see M.R.M. Lamwai, Ph.D. Thesis op. cit. pg. 160
22. Mwipopo, E.L.K. Criminal Prosecutions in Tanzania, LL.M. Dissertation, University of Dar es Salaam, 1980 pg. 36 (mimeo)
23. Extracts from German Ordinances and Decrees of German East Africa op. cit.
- 24.. See for instance
The Ordinance Regarding Disposal of Legal Business of Coloured People effective from 1st of November, 1893

A circular in respect of the Ordinance providing for the taxation of the Estates of Deceased Coloured Persons.

A Circular regarding costs in Native Civil Suits, and another one banning usuary

All these are found in Extracts from German Ordinances and Decrees pp. 66 - 74 op. cit.
25. For more on this, see M.R.M. Lamwai, Ph.D. Thesis op. cit. pg. 161.

CHAPTER THREE

DISPUTE SETTLEMENT DURING BRITISH COLONIALISM 1919 - 1961

3.1 Introductory Remarks

Article 22 of the covenant of the League of Nations gave Britain a Mandate to administer German East Africa after Germany had lost the First World War. The Tanganyika Order in Council of 1920 renamed German East Africa Tanganyika Territory. Tanganyika continued to be ruled as a British Mandate up to 1945, when Britain, under Article 77 of the United Nations Charter¹ opted to rule it as a Trust Territory. On the 9th December, 1961 Tanganyika Territory became independent.

The coming of the British however, did not alter the hitherto capitalist relations and the contradictions attendant thereto as imposed by the Germans. There was continuity in capitalist exploitation of Tanganyika despite its differing approach and dimensions. The German and British colonial legal structures to support these imposed relations were similar. Also, the impact of the continuity in colonial

exploitation by the Germans and British upon their victims was more or less the same - the destruction of the old indigenous communities and their customary laws and the superimposition of an alien legal system and laws. This is supported by J.P. Moffet in his statement thus:

It will be seen that the Germans attitude towards administration of justice amongst the inhabitants of Tanganyika did not differ very much from the British except perhaps in so far as native courts came to be recognized as such after the assumption of the mandate.²

A systematic development of the court system under British rule which witnessed a dual court system with two separate structures of court hierarchies is to be traced from the Tanganyika Order in Council, 1920.³ This Order in Council was promulgated under the Foreign Jurisdiction Act, 1890 which gave the British Crown powers to legislate for the colonies and Protected Territories. Article 17(1) of this Order established the High Court as a court of record styled "His Majesty's High Court of Tanganyika" having full jurisdiction, civil and criminal,

over all persons and over all matters in the Territory. Article 22(1) of the Order provided for the constitution of courts subordinate to the High Court and courts of special jurisdiction. It was on the basis of this Article that a systematic development of the court system and especially courts subordinate to the High Court proceeded. This will be a subject of more detailed discussion below.

3.2.0 The Development of the Court System

3.2.1 The Court Structure under the Courts Ordinance, 1920

The Courts Ordinance 1920⁴ established four different courts subordinate to the High Court. The first were known as courts of a Magistrate or District Political Officer or an Administrative Officer-in-Charge of a District and were called subordinate courts of the First Class. The ordinary jurisdiction of these courts in suits and proceedings of a civil nature in cases where the subject matter in dispute was capable of being *estimated* at a money value was limited to Fls. 1,500/=.

The second were courts of an Assistant District Officer called subordinate courts of the Second Class. Their jurisdiction was limited to suits and proceedings in which the subject matter in dispute did not exceed *the* value of Fls. 500/=.

Courts of a Cadet or Political Officers of the second grade formed subordinate courts of the Third Class.⁵ Their civil jurisdiction was limited to suits and proceedings in which the subject matter in dispute did not exceed in amount or ^{the} value of Fls. 250/=.⁶ It can therefore be noted that whereas the pecuniary jurisdiction of these courts was limited according to their grades, the limitation of their territorial jurisdiction corresponded to the administrative jurisdiction of the holder of the court.⁷

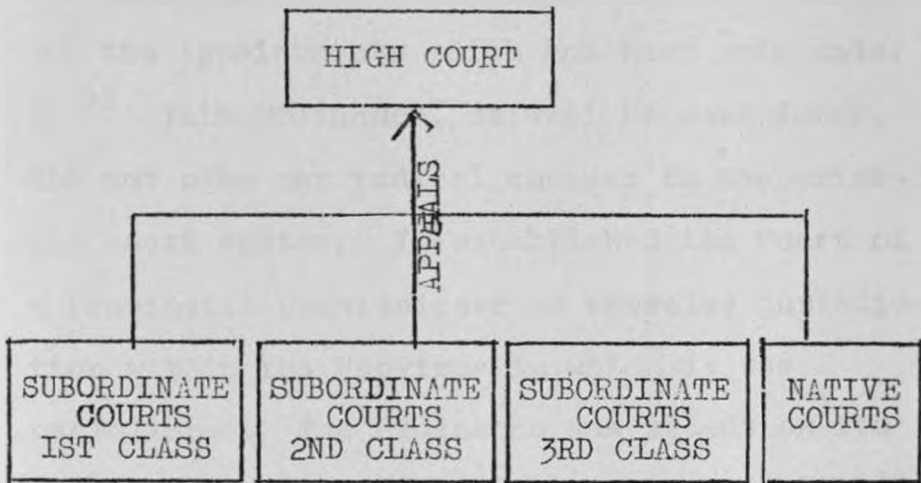
Appeals from these courts lay directly to the High Court and thence to the Court of Appeal for East Africa and ultimately to the Privy Council. These were basically English courts and the substantive law applicable was largely English law just as the preceding

German High Courts and courts subordinate to them had been applying German Law. The Indian Civil Procedure Code was applied in the High Court by virtue of the Tanganyika Order in Council, 1920, and the Application of Laws Ordinance 1920, and in the subordinate courts by virtue of the Courts Ordinance 1920.⁸

One important fact which is glaringly obvious from the courts Ordinance of 1920 is that it clearly contemplated the performance of judicial duties by officers who were purely political. Although their titles were changed in the course of time to Provincial Commissioner and District Officer, the fundamental task of political administration which they performed remained the same. There is no doubt that the fusion of the judicial and executive functions was intentional and that is why it survived until independence when complete separation of the judiciary and the executive was achieved at the lower levels of the judiciary.⁹

The chart below presents a schematic diagram of the Court Structure under the Courts Ordinance 1920.

Chart No. I: The Court Structure Under The
Courts Ordinance 1920



Notes (i) Although each of these courts had different territorial and pecuniary jurisdiction, none of them had appellate jurisdiction over the other. Appeals from either of these courts lay to the High Court and then, except for Native Courts, to the Eastern Africa Court of Appeal and finally to the Privy Council. This is not shown here because it did not affect procedure at the first instance.

(ii) Appeals from Native Courts of the first class had to go to the Native Court of the second class and then to the subordinate court (1st or 2nd class) before it went to the High Court. This was provided for by the Native Courts Proclamation, 1925.

3.2.2 The Court Structure under the Courts Ordinance, 1930

Though the Courts Ordinance 1930¹⁰ repealed the Courts Ordinance 1920, it saved all the appointments which had been made under it.¹¹ This Ordinance, as will be seen later, did not make any radical changes to the existing court system. It established the Court of a Provincial Commissioner to exercise jurisdiction within the Province in which it was established. The Ordinance was silent on its pecuniary jurisdiction.¹² It also established the Court of the Resident Magistrate and the Court of the District Officer or an Administrative Officer in charge of a district as Subordinate Courts of the First Class.¹³ The Court of an Assistant District Officer formed the Subordinate Court of the Second Class¹⁴ and the Court of an Administrative Officer of Cadet rank formed the Subordinate court of the Third Class.¹⁵

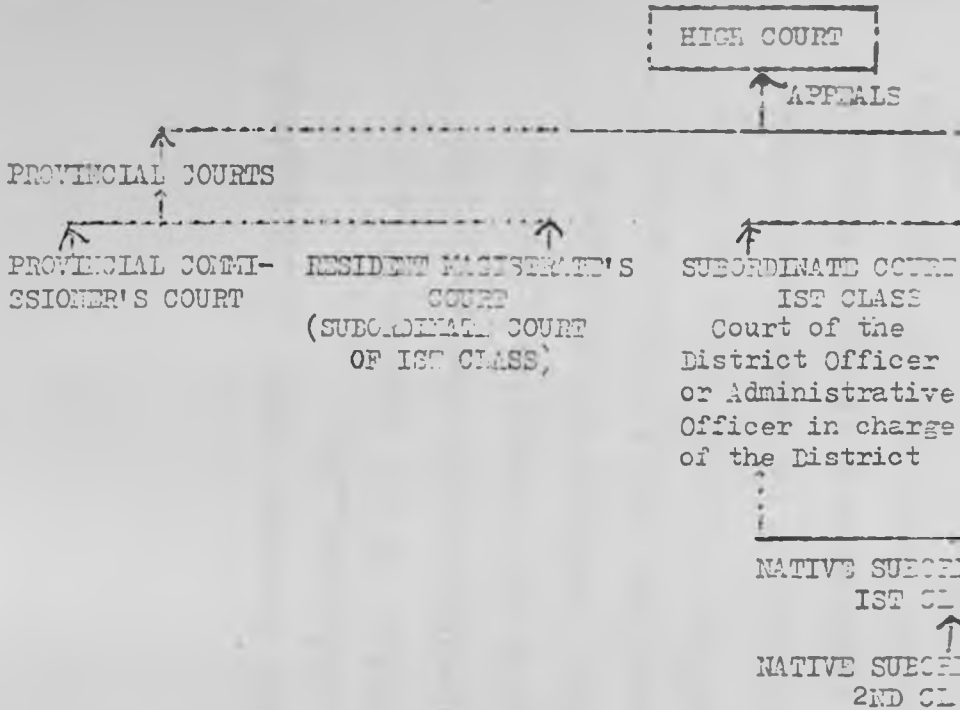
Subordinate courts of the First, Second, and Third classes exercised territorial jurisdiction within the district in which they were

established.¹⁶ However, although the Resident Magistrate's court was a subordinate court of the First Class, it exercised jurisdiction throughout the province in which it was established.¹⁷ This meant that the court of the Resident Magistrate and that of the Provincial Commissioner were Provincial courts with concurrent jurisdiction, subject to the power of the Resident Magistrate to order transfer to himself.¹⁸

Pecuniary jurisdiction of all subordinate courts was enhanced to shs. 4,000/= in case of Subordinate courts of the First Class, Shs. 2,000/= for Subordinate courts of the Second Class, and shs. 1,000/= for subordinate courts of the Third Class.¹⁹

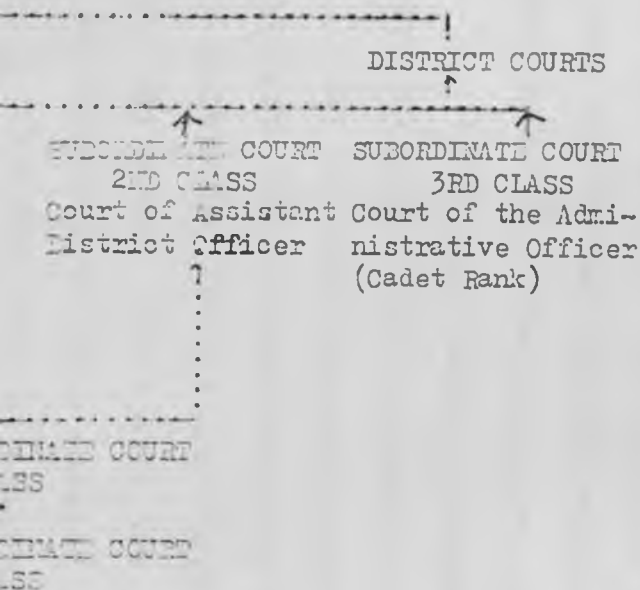
From the above, it can very clearly be seen that the only significant change which was introduced by the Courts Ordinance 1930 was the establishment of the court of the Provincial Commissioner.

The Chart below presents a diagram of the Court Structure under the Courts Ordinance 1930.



- Notes: (i) Appeals from the High Court went to the Eastern Privy Council. This is not shown here because it is the first instance.
- (ii) Except in respect of Native Subordinate Courts, under the Courts Ordinance 1930 had appellate jurisdiction.

the Courts Ordinance 1930



Africa Court of Appeal thence to the
did not affect procedure at the

no court which was established
jurisdiction over another.

3.2.3 The Court Structure under the Subordinate Courts Ordinance, 1941

The structure of the Subordinate Courts under the Subordinate Courts Ordinance 1941²⁰ was the one which the independent government adopted in 1961. Although the subordinate courts Ordinance 1941 repealed the courts Ordinance 1930²¹ the existent court system before the enactment of the subordinate courts Ordinance was maintained by the said Ordinance.

A Subordinate Court known as the District Court was established in every district.²²

Two classes of persons could be appointed as magistrates to man this court. First the Provincial Commissioners, Deputy Provincial Commissioners, Resident Magistrates, District Officers, Assistant District Officers and Administrative Officers of the Cadet rank were designated magistrates by the Ordinance.²³

Second, the Governor could with the concurrence of the Chief Justice appoint persons who were not holders of administrative offices into the magistracy.²⁴

The powers and jurisdiction of the District Court depended on the class of the

presiding magistrate. The Ordinary jurisdiction of a district court when presided over by a Resident Magistrate in suits and proceedings of a civil nature, was limited to shs. 15,000/=, whereas a District Court presided over by a first class magistrate other than a Resident Magistrate was limited to shs. 4,000/=. A district court, when presided over by a second class magistrate had jurisdiction limited to shs, 2,000/= while a district court when presided over by a third class magistrate had jurisdiction limited to one thousand shillings.²⁵

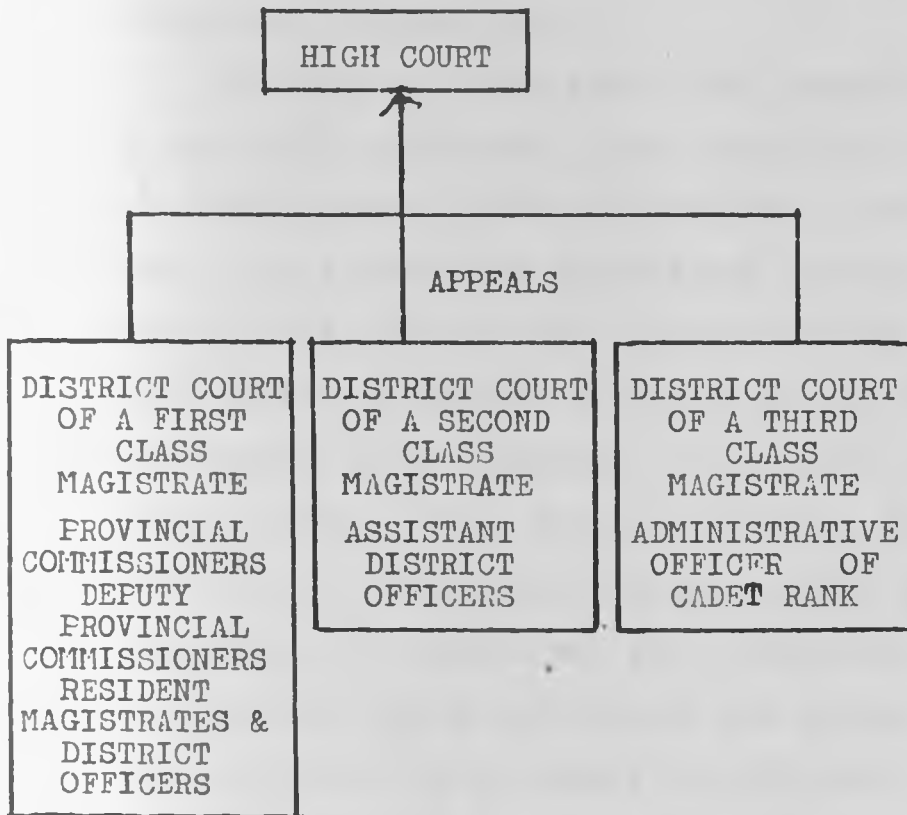
The provisions of Section 3(2) of this Ordinance deserve special mention. Under this section the Governor was empowered to establish "any other court subordinate to the High Court to exercise jurisdiction throughout the territory or in any local area." The section went further to provide that such courts were to have such designation and were to be presided over by such magistrate or magistrates as may be specified in the Order establishing them. The Preamble to all Orders establishing courts styled courts of the Resident Magistrate

indicate that these courts were established under this section. At the beginning, such courts were established in Dar es Salaam, Mwanza, Arusha, Mbeya and Tanga and were styled Courts of the Resident Magistrate of the respective areas.²⁶ Their jurisdiction was provincial, that is, Eastern Lake, Northern, Southern Highland and Tanga provinces respectively.²⁷ Their pecuniary jurisdiction was limited to that of the First Class Magistrate in the district court.²⁸ In other words, the district court and the court of the Resident Magistrate had concurrent jurisdiction.

Appeals from the District Courts went directly to the High Court regardless of the class of the magistrate who presided over the original proceedings. The High Court retained its general powers of supervision over all subordinate courts. These included the powers to call for and inspect or direct the inspection of all or any records of such court.²⁹

Below is a schematic diagram of the Court Structure under the Subordinate Courts Ordinance, 1941.

Chart No. III: The Court Structure Under the
Subordinate Courts Ordinance,
1941



Notes: From the High Court Appeals went to the Eastern Africa Court of Appeal thence to the Privy Council. These courts had appellate jurisdiction only. For this reason they are not shown here because they did not affect procedure at the first instance.

3.3.0 The Native Court System

The Second structure of courts during British rule existed parallel to the English Courts System. As was the *case* under German rule, this structure was reserved for the indigenous peoples only.

The Native Courts were first established by the Courts Ordinance, 1920 immediately after the establishment of the Trusteeship. Section 3(4) of this Ordinance established courts of a Liwali, Cadi, Akida, Chief, Headman or any other person or persons specially empowered in that behalf by the Governor. These were styled Native Courts. Under Section 10 of the same Ordinance, a Native Court was to be held by such person or persons and was to exercise jurisdiction within such limits and subject to such conditions as to appeal or otherwise according to the directions of the Governor. Supervisory powers over these courts were given to Political Officers of the District in which these courts exercised jurisdiction.³⁰

It is therefore clear that apart from establishing the Native Courts, the Courts

Ordinance 1920 contained no provision providing for their jurisdiction, personnel and appeal system. These matters were left to the Governor who was empowered *by* section 10 to make provision for them.

3.3.1 The Native Courts Proclamation, 1925

We have already stated that although the Courts Ordinance 1920 established courts of a Liwali, Cadi, Akida, Chief and Headman as Native Courts the Ordinance was silent on both the territorial and pecuniary jurisdiction of these courts as well as their appeal system. This is what prompted the Governor to invoke his powers under §. 10 and promulgate the Native Courts Proclamation 1925.³¹ These regulations provided for the jurisdiction and appeal system of the Native Courts and other matters incidental thereto.

Clause 2 of this Proclamation defined who was a native and therefore subject to the jurisdiction of the Native Courts. A native was defined to include "a Native of the Tanganyika Territory and any member of an African race (including any Swahili or Somali) with a

permanent residence in the Territory."

Under this Proclamation Native Courts were classified into two: First, a Native Court which was declared to be a Native Court of the First Class.³² This Court had jurisdiction to hear and decide civil cases in which the amount or subject matter did not exceed the value of six hundred shillings, or civil cases relating to personal status, marriage and divorce under Mohammedan or native law or relating to inheritance which was not governed by the provisions of the Deceased Natives Estates Ordinance.³³

The second category of Native Courts was styled Native Courts of the second class.³⁴ These had jurisdiction to hear and decide civil cases in which the amount or value of the subject matter did not exceed shs. 200/=-, or civil matters relating to personal status, marriage and divorce under Mohammedan or Native law, or civil matters relating to inheritance which was not governed by the provisions of the Deceased Natives Estates Ordinance.³⁵

Appeals lay from a Native Court of the second class to a Native Court of the First Class, then to a subordinate court of the First or Second Class.³⁶ *The* Proclamation provided further that an order creating a Native Court of the Second Class could direct an appeal to lie from the Native Court of the Second class to a Subordinate Court of the First or Second Class instead of going to a Native Court of the First Class.³⁷ An Order creating a Native Court of the Second Class could also direct an appeal to lie to a Native Court of the First Class instead of a subordinate court of the First or Second Class without prejudice to the further right of appeal to a subordinate court of the First or Second Class.³⁸ Under clause 5 of the Proclamation, the Supervisory Court, the Court of the Administrative Officer in Charge of the District, was empowered to direct to which subordinate court an appeal was to lie. In the absence of any such direction an appeal lay to any subordinate court of the First or Second class in the District.

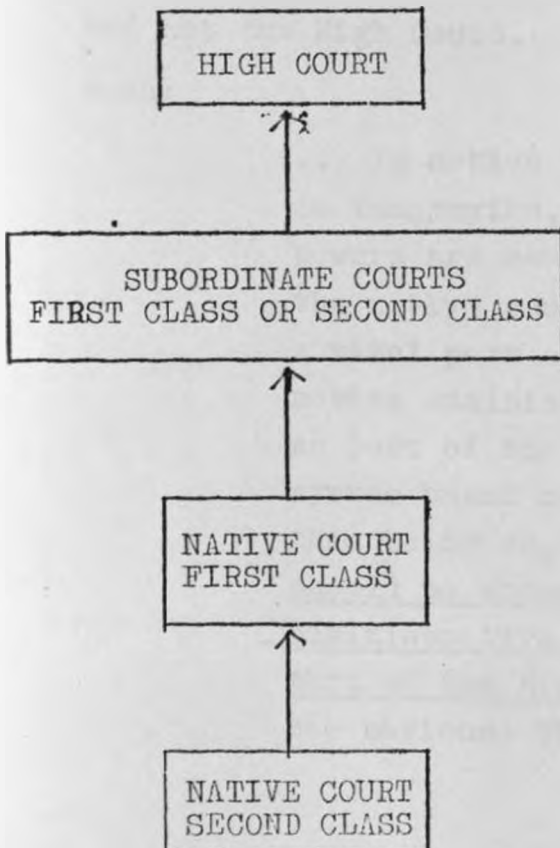
The Native Courts Proclamation, 1925 gave enormous powers to Administrative officers over Native courts. The District Officer in his judicial capacity had *general* supervisory powers over Native Courts.³⁹ He also had powers to sanction appeals from the Native Courts to the High Court.⁴⁰ Under Clause 9 the supervisory court could on its own motion or on a petition, revise the proceedings of any Native Court. Clause 14 conferred upon the supervisory court powers to restrict the jurisdiction of any Native Court subject to the directions of the High Court. Clause 5 empowered the supervisory court to direct to which subordinate court of the First or Second class an appeal was to lie. Under Clause 13 an Administrative Officer could sit in any Native court as an adviser subject to the direction of the Supervisory Court.

It will be argued later that the enormous powers given to Administrative Officers in their judicial capacity over Native courts had the ultimate effect of eroding the existing customary laws and modes of dispute settlement

and slowly but surely replacing them with the English laws and the adversarial system of dispute settlement.

The Chart below shows ~~the~~ Native Court Structure under the Native Courts Proclamation 1925.

Chart No. IV: The Court Structure under the Natives Courts Proclamation 1925



3.3.2 The Native Courts Ordinance, 1929

The Native Courts Ordinance, 1929⁴¹

marked a further development of the Native Court System. This Ordinance was a result of a debate between the Executive on the one hand and the Judiciary and the Colonial office on the other, which started in 1923 and culminated in Sir Cameron's recommendations of 1929 to the Secretary of State. In his recommendations Cameron suggested that Native Courts should be part of the native administration and not of the state judicial machinery and hence should be under the supervision of the Native Administrators and not the High Court. In this despatch, Cameron said:

... In native tribes such as those in Tanganyika, judicial and executive powers are combined in the chiefs and the native courts which we have are a **vital** part of the machinery of native administration. They are no part of the ordinary judicial system based on European ideas, and this being so, the native courts should be under the supervision of the administrative officers and not under that of the High Court. The reasons are obvious: The judges of the High

Court know nothing of the language the customs and the modes of life and thought of the natives, whereas on the other hand, the natives know nothing of the High Court and do not understand its intervention between themselves and their administrative officers who in their eyes represent the Governor.

Moreover, there is always a tendency for the stronger superior court to overshadow and dominate the weaker inferior court... 42

[Emphasis provided]

Sir Donald Cameron's idea was to have a legislation dealing solely with native courts, whose control was to be entirely the responsibility of the administration, with a chain of appeals lying through the members of the Provincial administration (acting as administrative officers and not as magistrates) to the Governor, and leaving the High Court with no powers either of supervision, revision or appeal.

Cameron's despatch concluded by asking for authority to introduce a Native Courts Ordinance, embodying the various principles which he had indicated. This approval was accordingly given by the Secretary of State. With this approval the Native Courts Ordinance was enacted in 1929

despite some bitter opposition and criticisms from various quarters including the then Chief Justice.⁴³

Under this Ordinance, the Provincial Commissioner as a representative of the Governor was directly responsible for the over-all supervision and conduct of the Native Courts in his Province. He had revisionary powers and was also an appellate authority in respect of any order or decision of a district officer.⁴⁴ The Provincial Commissioner, subject to the approval of the Governor, was empowered to establish within his Province by warrant such native courts as he deemed fit. These courts were to exercise jurisdiction over natives and within such limits as was to be defined by the warrant establishing them. The Provincial Commissioner could at any time suspend, cancel or vary any warrant establishing a native court or defining the jurisdiction of any such court or the limits within which such jurisdiction was to be exercised.⁴⁵ Under S. 25 of this Ordinance, a Provincial Commissioner could sit as an adviser in any native court in his Province. This authority was also conferred on the District officer in respect of any native

court in his District, subject to the directions of the Provincial Commissioner. Section 30 gave powers to the Provincial Commissioner upon an application by the defendant in any case, to transfer a case from a native court to a subordinate court of competent jurisdiction. In addition section 23 required all native courts to submit a report of all cases tried in such court to the Provincial Commissioner or the officer in charge of a District. Section 32 gave power to every Provincial Commissioner and District Officer to sit in the native courts in his Province and to inspect the records of such courts. The section went further and gave Provincial Commissioners revisionary powers,⁴⁶ power to order retrial⁴⁷ and power to transfer any cause or matter from a Native Court to any subordinate court of the First or Second class.⁴⁸

Although native courts had full jurisdiction over causes and matters in which all the parties were natives resident in the area of the jurisdiction of the court,⁴⁹ the Governor could direct that any native or class of natives should not be subject to the jurisdiction of native courts

except with their consent or the consent of the Provincial Commissioner.⁵⁰ This provision was intended to cater for situations in which customary law was not applicable because the parties had opted out of it.

The Civil jurisdiction of native courts extended to the hearing, trial and determination of all civil suits and matters in which the defendant was ordinarily resident within the area of the jurisdiction of the court or in which the cause of action had arisen. An exception was in respect of civil proceedings relating to immovable property which had to be taken in the native court within the area of whose jurisdiction the property was situated.⁵¹

Section 33(1) of the Native Courts Ordinance empowered the Provincial Commissioner, with the approval of the Governor, to appoint a native court as a court of appeal from all or any of the causes arising therein. In the absence of such a court the Provincial Commissioner could direct an appeal to lie from the Native Court of first instance to the District Officer.⁵²

The appeal system of the Native Courts was spelt out under section 33 as follows: A person

aggrieved by an order or decision of a native court of the first instance could appeal to the Native Court of appeal within thirty days from the date of such order or decision. An appeal lay from the Native Court of first instance to the District officer where there was no native court of appeal or where the Provincial Commissioner had so directed under Section 33(1).⁵³

From the Native Court of Appeal, appeals lay to the District Officer within thirty days from the date of the order or decision appealed against.⁵⁴

From the District Officer appeals lay to the Provincial Commissioner within thirty days from the date of the order or decision appealed against regardless of whether the order or decision was made or given upon appeal from a native court of first instance or upon appeal from a native court of appeal.⁵⁵ From the Provincial Commissioner an appeal lay to the Governor within thirty days from the date of the order or decision appealed against.⁵⁶

The governor delegated his appellate powers to a Board called the Governor's Appeal Board. This Board was formed in 1940 and consisted of the Attorney General, the Secretary

for Native Affairs and a Provincial Commissioner. Unlike previously where appeals were dealt with administratively, the Board was supposed to conduct a judicial inquiry and submit its findings to the Governor for approval⁵⁷. The Board operated effectively from then on until the Native Courts Ordinance, 1929 was repealed and replaced in 1951.

At this juncture it may be observed that under the Native Courts Ordinance, 1929, Native Courts were exclusively supervised by the administration, leaving the High Court with no part to play. To this extent therefore one cannot but conclude that these courts were an essential part of the Native Authority machine dealing with the bulk of the administration of justice in the country. Indeed, Sir Cameron had expressed his desire to make these courts a vital part of the machinery of native administration and not part of the Ordinary judicial system as early as 1927 in his despatch to the Secretary of State⁵⁸. The enormous powers conferred on the administration by this ordinance was therefore not accidental but designed to fulfil this aim. By 1929 Native Courts had become a Provincial Administrative preserve.

The Courts Ordinance 1930 deserves a special mention in view of what the High Court had interpreted its provisions relating to Native Courts to be. This Ordinance repealed the Courts Ordinance 1920⁵⁹ which as already stated, established Native Courts for the first time. The Courts Ordinance 1930 styled native courts "Native Subordinate Courts." It was however completely silent on native courts established by the Native Courts Ordinance 1929.

The question which follows is whether there were two types of native courts, one established by the Native Courts Ordinance, 1929 and the other established by the Courts Ordinance 1930 styled Native Subordinate Courts. If so what was their appeal system? These questions can be answered by analysing the decisions of the High Court in the following cases.

In Kitenge Binti Hamisi v. Ali bin Said⁶⁰ the applicant filed a petition in the High Court for the revision of a decision of the First Class Subordinate court of the District Officer of Dar es Salaam to dismiss his appeal from the Native Subordinate Court of the Liwali. It was not in dispute that the Liwali's court

was a native subordinate court under section 3(e) of the Courts Ordinance 1930. It was also undisputed that section 17 of the same Ordinance gave the High Court revisionary powers in civil cases to which a native was a party if it appeared that there was an error material to the merits of the case involving grave injustice. Section 10 of the repealed Courts Ordinance 1920 empowered the Governor to give directions on appeals from native courts established under that Ordinance. The Native Courts Proclamation 1925 was made by the Governor under this section and Clause 11 of this Proclamation, which was still in force, save in so far as its provisions were inconsistent with the provisions of the Courts Ordinance 1930, provided for further appeal from the subordinate court to the High Court but only with the sanction of the supervisory court. Under this clause, the petitioner applied for leave to appeal to the High Court after the first class subordinate court had dismissed his appeal. This application was refused on the ground that the amount in dispute which was shs. 40/= was too small. Delivering its ruling, the High Court held that revisionary powers of the High Court

were now provided for under section 17 of the Courts Ordinance 1930 which was much more restricted in extent than Clause 12 of the Native Courts Proclamation, 1925 and therefore the revisionary powers were to be found in that Ordinance alone and not in the Proclamation. The Court held further that although the petitioner was entitled to apply for revision to the High Court under Section 17 of the Courts Ordinance 1930, she had to establish that there had been an error in the Liwali's decision which involved grave injustice to her, which she didn't and therefore the petition was dismissed.

The interesting part of this judgment in our context is the one drawing a distinction between Native Subordinate Courts and Native Courts. The High Court held that in respect of Native Subordinate Courts the High Court was with leave the final court of appeal and in respect to Native Courts established under the Native Courts Ordinance 1929, the High Court had no control or supervision. In the latter case, the final court of appeal was the Governor. According to this case, therefore, the Courts Ordinance 1930 established another Native Court

styled Native Subordinate Court whose appeal lay to the High Court, in addition to the Native Courts established by the Native Courts Ordinance 1929 whose appeal lay to the Governor.

A contrary view was advanced in the case of Benjamin Chinjate Kassambara v. R.⁶¹ Although this was a criminal appeal, the High Court had the opportunity of discussing all relevant provisions relating to appeal under the Courts Ordinance 1930 and the Native Courts Proclamation 1925.

The appellant in this case was convicted by a Native Subordinate Court of the Liwali of Morogoro for adultery and was sentenced to pay a fine of shs. 35/= or to serve one month's imprisonment in default. He appealed to the First Class Subordinate Court which dismissed the appeal. Relying on Clause 11 of the Native Courts Proclamation 1925 which gave the supervisory court powers to give sanction for an appeal to be allowed to the High Court, the appellant appealed to the High Court. A preliminary point was raised that the High Court did not have appellate jurisdiction in matters originating from Native Subordinate Courts. The

Acting Solicitor General appearing on behalf of the Attorney-General for the Crown argued that appeal lay to the High Court, since, by Article 22(2) of the Tanganyika Order-in-Council 1920, provision could be made by Ordinance for the hearing and determining of appeals from courts subordinate to the High Court by the High Court or otherwise. He argued further that courts of a Liwali were constituted courts subordinate to the High Court to be called Native Courts by Section 3 of the Courts Ordinance 1920, and by Section 10 of that Ordinance, and Clause 11 of the Native Courts Proclamation 1925, provision was made for appeals from Native Courts to the High Court. He concluded his submission by contending that the Native Courts Proclamation 1925 was saved and kept in force by Section 22 of the Courts Ordinance 1930. This Ordinance repealed the Courts Ordinance 1920 but reconstituted the Native Courts and styled them Native Subordinate Courts. Thus, he argued, the provision relating to appeals from Native Courts to the High Court under the Native Courts Proclamation 1925 was still operative and therefore even under the Courts Ordinance 1930 appeal lay from Native Subordinate Courts to the High Court.

Reacting to these submissions, the High Court said that in so far as provision for the hearing and determination of appeals from Courts subordinate to the High Court was concerned, such provision had to be made by Ordinance. The Court held further that although it was true that the Native Courts Proclamation 1925 contained provision whereby a supervisory court could, in certain circumstances, give sanction for an appeal to be allowed to the High Court but in view of the provisions of Article 22(2) of the Tanganyika Order in Council 1920 this was not. Accordingly, Native Courts Proclamation 1925 was ineffective to create a right of appeal to the High Court. It is clear that both under Section 2 of the Courts Ordinance 1920 and later under Section 3 of the Courts Ordinance 1930 the court of the Liwali was constituted a court subordinate to the High Court under the former Ordinance it was styled a "Native Court" while under the latter Ordinance a "Native Subordinate Court." However, under neither of these Ordinances was provision made for the hearing and determination of appeals from native courts or native subordinate courts by the High Court. Neither in Section 10 of the

Courts Ordinance 1920 nor in Section 15 of the Courts Ordinance 1930 was any mention made of the High Court. Dismissing the appeal the court finally held that no appeal lay from the Native subordinate court to the High Court.

It can be seen that both these cases held that in fact there were two types of native courts. The first was the one established under S. 3(4) of the Courts Ordinance 1920 styled Native Courts which were reconstituted and restyled Native Subordinate Courts by Section 3(e) of the Courts Ordinance 1930.

The second was Native Courts established by the Native Courts Ordinance 1929. The only conflicting issue in these cases is the question of the appeal system for these two types of native courts. In the first cited case the High Court held that appeal lay to the High Court from Native Courts or Native Subordinate Courts established by the Courts Ordinance 1920 and the Courts Ordinance 1930 respectively. On the other hand, appeals from native courts established by the Native Courts Ordinance 1929 lay to the Governor. In the second cited case the High Court held that no appeal lay to the High Court

from native courts regardless of whether such native courts were established by the Courts Ordinance 1920 and the Courts Ordinance 1930 or the Native Courts Ordinance 1929.

It is submitted with respect that Benjamin's case was wrongly decided is so far as the question of the appeal system of the Native Subordinate Courts established by the Courts Ordinances of 1920 and 1930 is concerned. We are of the opinion that had the legislature intended to merge Native Subordinate Courts established by the Courts Ordinances of 1920 and 1930 with native courts established by the Native Courts Ordinance 1929 it would have stated so in very clear terms either in the Native Courts Ordinance 1929 or in the Courts Ordinance 1930. On the contrary, it seems that the intention of the legislature in view of the dispute between the Executive and Chief Justice Russell was to have the two types of native courts co-exist parallel to each other as a compromise. One need only remind oneself of the fact that the Native Courts Ordinance 1929 was enacted amidst criticisms from various quarters.⁶²

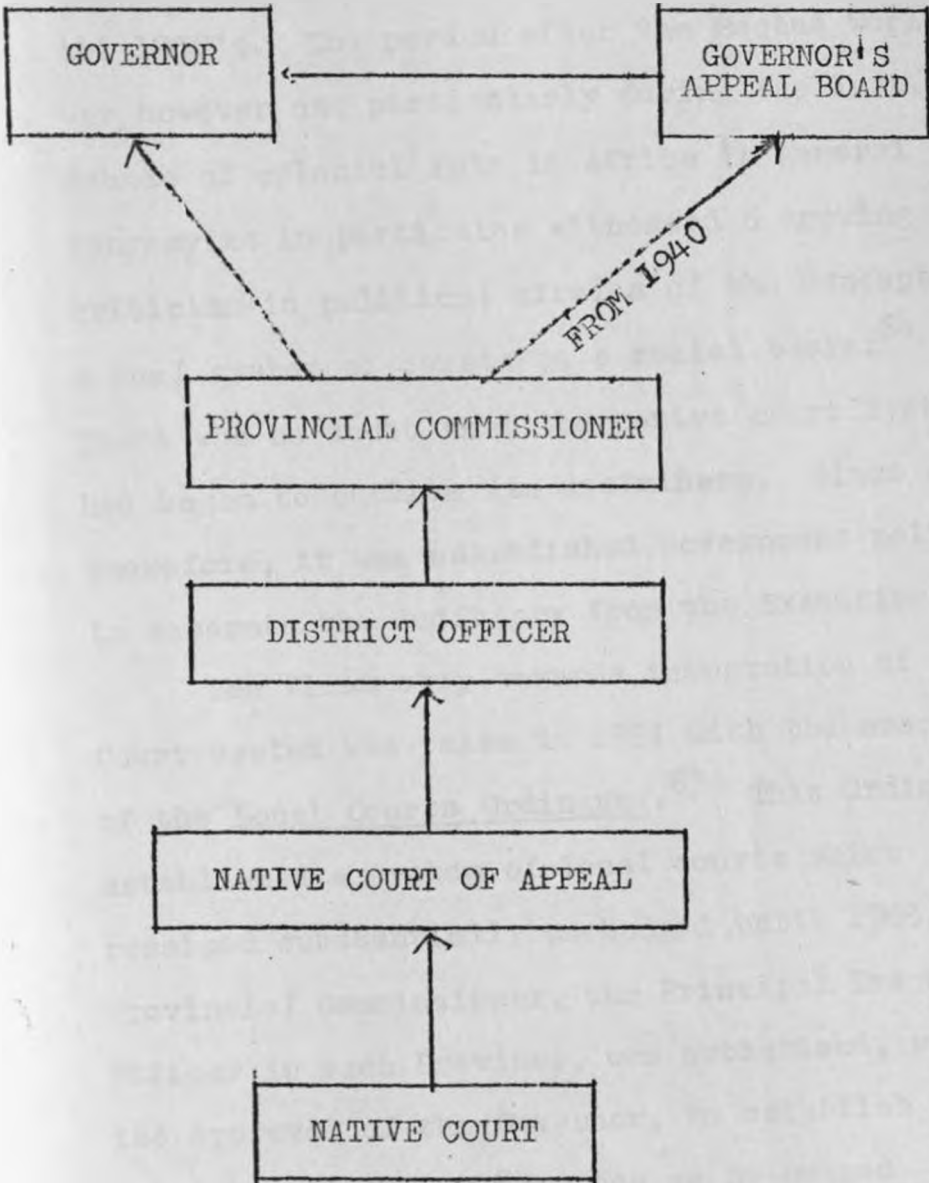
Indeed, Native Courts established by the Courts Ordinance 1920 were recognised by the

Native Courts Ordinance 1929. Under this Ordinance the Governor could declare all or any native courts established under the Courts Ordinance 1920 to be Native Courts established under the Native Courts Ordinance 1929. Once he did so, such courts were for all intents and purposes to be governed by the Native Courts Ordinance 1929 and not the Courts Ordinance 1920.⁶³ This implied that if the Governor never chose to exercise these powers, Native Courts established by the Courts Ordinance 1920 continued to co-exist parallel to the native courts established by the Native Courts Ordinance 1929. These Governor's powers were left intact by the Courts Ordinance 1930.

To conclude this part, we may restate our position as follows: In respect of Native Subordinate courts established by the Courts Ordinances 1920 and 1930, the High Court was with leave the final court of appeal, whereas in respect of Native Courts established under the Native Courts Ordinance 1929, the High Court had no control or supervision. In this case the final court of appeal was the Governor.

Below is a diagram showing the Court Structure under the Native Courts Ordinance 1929.

Chart No. V: The Court Structure Under The
Native Courts Ordinance, 1929



3.3.3 The Local Courts Ordinance, 1951

The development of Local Courts in Tanganyika was closely connected with the policy of indirect rule. This phenomenon continued until the 1950's. The period after the Second World War, however, and particularly during the last decade of colonial rule in Africa in general and Tanganyika in particular witnessed a growing criticism in political circles of the concept of a dual system of courts on a racial basis.⁶⁴ There was no doubt that the native court system had began to outlive its usefulness. Since 1949, therefore, it was established Government policy to separate the Judiciary from the Executive.

The first step towards integration of the Court system was taken in 1951 with the enactment of the Local Courts Ordinance.⁶⁵ This Ordinance established a system of local courts which remained substantially unchanged until 1963. The Provincial Commissioner, the Principal Executive Officer in each Province, was authorised, with the approval of the Governor, to establish such Local courts in his Province as he deemed necessary.⁶⁶ With the approval of the Governor, he could also revoke, suspend or vary the

warrant of any court.⁶⁷ These courts had jurisdiction over causes or matters in which the party or parties were African.⁶⁸ An African was defined as a person whose tribe was a tribe of the Territory or of the colony and Protectorate of Kenya, the Uganda Protectorate, Zanzibar, Northern Rhodesia, Nyasaland, the Sudan, the Belgian Congo, Ruanda - Urundi or Portuguese East Africa, and included a Swahili.⁶⁹ Arabs, Baluchis, Comoreans, among others, could consent to the jurisdiction of the local courts. In effect this meant that Europeans and Asians were not subject to the jurisdiction of local courts.⁷⁰ These courts were given warrants to be courts of First instance or Courts of Appeal as the case may be.⁷¹

The civil jurisdiction of a Local Court extended to the trial of all civil suits and matters in which the cause of action arose or the defendant was ordinarily resident within the area of the jurisdiction of such Local Court, except in civil proceedings relating to immovable property which were to be taken to the local court within the area of the jurisdiction of which the property was situate unless the

District Commissioner otherwise directed.⁷²

Under Section 12(3) of this Ordinance civil proceedings in respect of customary marriage or inheritance, immovable property other than freehold land, leasehold property or land held under a right of occupancy for a term of years could only be commenced by an African in the Local Court having jurisdiction.

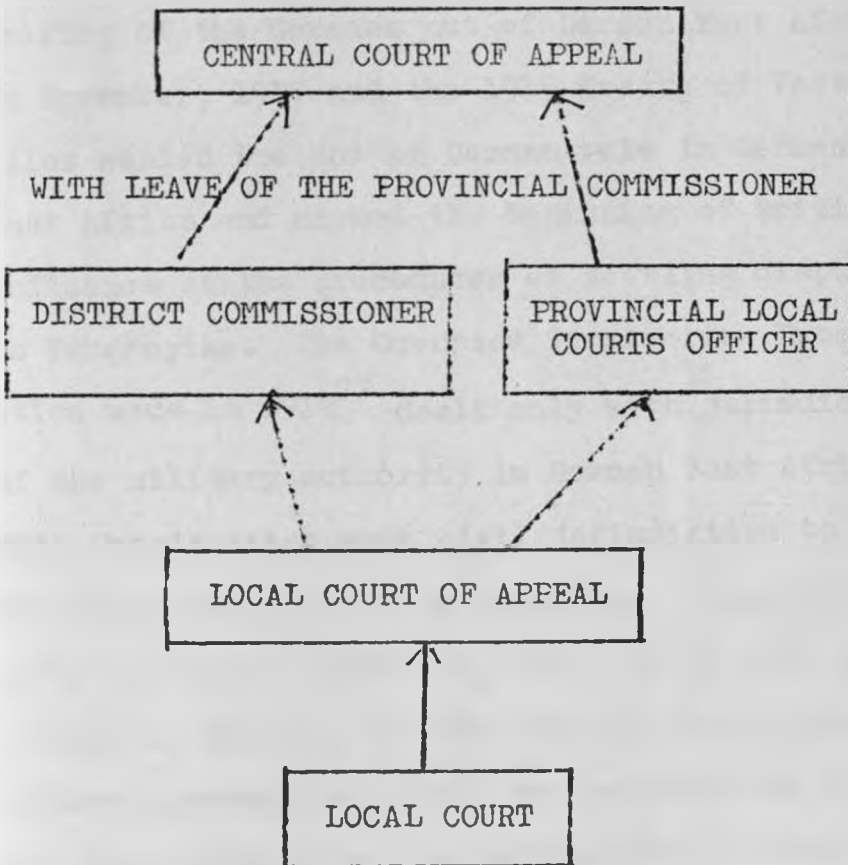
Appeals went from the court of first instance to a Local Court of Appeal. From there, appeal lay to the District Commissioner who also had wide powers of supervision over the work of these courts or the Provincial Commissioner. The Central Court of Appeal was the final court of appeal.⁷³ Leave to appeal to this court had to be obtained from the Provincial Commissioner. The Central Court of Appeal replaced the old Governor's Appeal Board. It was presided over by a Judge of the High Court, while the Minister for Provincial Affairs and the Local Courts Adviser sat as members.⁷⁴

Thus, Local Courts were but lineal descendants of the Native Courts and the Liwali's courts. In practice, this did not mean much more than a change in terminology since the Local

courts in general were of similar composition and had similar powers as those of their predecessors.⁷⁵ Provincial Commissioners under the Local Courts Ordinance 1951 retained general supervisory powers but ceased to be appellate authorities.⁷⁶ Provincial Court Officers, on the other hand, were given supervisory, revisionary and appellate powers.

This was the court structure which Tanganyika inherited at independence in 1961. It was a dual system of local courts and subordinate courts which featured a differentiation between the administration of justice to Africans and non-Africans. This is diagrammatically presented in the chart below. It remains to be seen what the procedure of settling disputes in both types of courts was.

Chart No. VI: The Court Structure Under The
Local Courts Ordinance, 1951



Note: The Central Court of Appeal replaced the Governor's Board established in 1940.

3.4.0 PROCEDURES OF DISPUTE SETTLEMENT IN BRITISH COLONIAL TANGANYIKA

3.4.1 Procedures of Dispute Settlement in the English Courts

The outbreak of the First World War, the driving of the Germans out of German East Africa in November, 1917 and the 1919 Treaty of Versailles sealed the end of German rule in German East Africa and marked the beginning of British influence on the procedures of settling disputes in Tanganyika. The Occupied Territories Proclamation made in 1919⁷⁷ dealt only with jurisdiction of the military authority in German East Africa. This Proclamation gave civil jurisdiction to Political Officers to be exercised in accordance with the German Decree of 1891. There were no courts to exercise jurisdiction in civil cases between non-natives until the promulgation of the Tanganyika Order in Council 1920. German procedures ceased to be applied in Tanganyika from 1919 except where they were retained by the Proclamation of 1919 for the natives.

We have already stated that the Tanganyika Order in Council 1920 established the High Court in Tanganyika with unlimited jurisdiction.

The Order in Council also gave the local administration powers to establish courts subordinate to the High Court by Ordinance.⁷⁸ In this part we discuss procedures of dispute settlement in English Courts. These are the High Court, and the Subordinate Courts which exercised jurisdiction mainly over non-natives and applied mainly English Law.

Unlike the Germans, the British considered themselves veterans in colonial administration. They imposed civil procedure laws of considerable width upon the people of Tanganyika through India.

British capital was formally ushered in India on the 31st day of December, 1600 through merchants trading under the British East India Company incorporated in England in 1600 by a Charter of Queen Elizabeth I. At this time the Indian natives had their own traditional though multifarious methods of settling disputes which the company allowed to continue for a while. But with the acquisition of territories by the Company, jurisdiction over natives of the areas which were controlled by the Company came to be exercised by Company officials, unlike before, when the company authorities exercised jurisdiction over British

subjects only. The existence of an already established native legal system which had militated against having a completely new procedure for the natives was no longer a hindrance. The Company had no longer any interest in retaining some of the native procedures and instead introduced a blend of the English system and some innovations of the Company itself.⁷⁹

Slowly, a movement towards codification of the law started. The administrators wanted to develop a system of uniform law. Since the law of Civil Procedure was one of the priorities, the multiple procedures applicable by then were unacceptable to them. It was thought therefore that a system of uniform law could only be achieved through codification. Within two hundred years of the imposition of capitalist relations of production upon the Asiatic mode of production which had subsisted in the Indian Subcontinent for millenia, the need to have a Code of Civil Procedure was felt. By early 1850s the administrators thought a Code of Civil Procedure had become necessary in India "to prevent endless litigation, ruinous losses and manifold embarassments."⁸⁰ But we are saying

that a Code of Civil Procedure was necessary at that time because capitalism had done its job well, and its laws had now to come and regulate the relations which colonialism had nurtured.

On the 10th of July, 1833 Lord Thomas Macaulay addressed the House of Commons saying;

I believe that no country ever stood so much in need of a Code of Laws as India ... Our principle [in formulating the Code] is simply this - Uniformity where you can have it, diversity where you must have it - but in all cases certainty.⁸¹

Jain explains how badly India needed a Civil Procedure Code after being weaned from her archaic property relations.

Before the passage of the Code of Civil Procedure law on this important branch was almost chaotic [sic]... The whole system of Civil Procedure was in a deplorable state. There was no certainty order or accuracy in the procedure of courts. Its want of uniformity was equally incontestable.⁸²

Through a long process of deliberation and investigation India finally got her first Code of Civil Procedure Act entitled "An Act for

Simplifying The Procedure of the Courts of Civil Judicature not established by Charter."⁸³ After numerous amendments and consolidations the Code of 1908 came into being. This marked the introduction of the adversarial system in India.

A substantial part of the Indian Community found the law of civil procedure complicated, complex and technical.⁸⁴ As a result of this complicated law of civil procedure which needed expert advice and assistance in the prosecution of cases, the majority of people were forced to prosecute their cases in the cheaper and less competent courts, a state of affairs which obviously led to miscarriage of justice. This fact was accepted by the Secretary of State in his communication to the Law Commission in which he wrote;

It is obviously most desirable that a simple system of pleading and practice, uniform as far as possible, throughout the whole jurisdiction, should be adopted, and one which is capable of being applied to the administration of justice in the inferior courts of India.⁸⁵

It was this law which was developed under these circumstances which was later to be transposed and applied in British ruled Tanganyika.

In 1920, Great Britain was given a Mandate to administer German East Africa under Article 22 of the Covenant of the League of Nations. Article 17(2) of the Tanganyika Order in Council was accordingly promulgated. It provided inter alia, that civil jurisdiction, so far as circumstances admit, was to be exercised in conformity with the Civil Procedure Code of India (1908). This Code was applied to Tanganyika by Ordinance, the Application of Laws Ordinance, 1920.⁸⁶ Four hundred and twenty years of the Indian Civil Procedure legacy was accordingly formally imported to Tanganyika.

Apart from both being British administered, the colony of India had little in common with the Mandate Territory of Tanganyika. Among all the differences, the most basic was obviously enough, that India had far more developed capitalist relations than newly colonised Tanganyika. No wonder, not long after it was made applicable in Tanganyika, the Indian Civil Procedure Code of 1908 was criticized as being completely

incomprehensible to African litigants.⁸⁷ The administrators who were not trained as lawyers and thus least interested in the delicate balances of the law made a determined attempt to simplify the rules of Civil Procedure and thereby make them firstly easy to use and secondly fit for the still immature capitalist property relations.

There was also an attempt by the administration to codify customary procedures into the Code. In 1926 the Secretary for Native Affairs, Mr. Philip Mitchell (later Sir Philip) sought to simplify Civil Procedure on the ground that the Order in Council of 1920 recognized the status of the substantive customary law, and that therefore, customary procedure should be a guide to superior courts where parties to a case were natives. Mr. Mitchell had the whole-hearted support of the Attorney General, Mr. Jackson.⁸⁸

The two administrators were strongly opposed by the Judiciary led by the then Chief Justice Russell, who maintained that the Indian Civil Procedure was simple and expeditious and he could not fathom how the idea that it was technical had developed. Morris and Read say that letters passed between the Governor and

the Chief Justice, and since neither could accept the other's point of view the matter was eventually dropped.⁸⁹

There is a strong indication that the settler population also opposed the application of the Code to their civil disputes. The reason for this could well be chauvinistic, but one must also bear in mind that the law especially during the early colonial days was mostly administered by administrators - cum magistrates who were only led by the forces of colonial expediency and necessity rather than the necessities of the law.⁹⁰ The settler population with its overpowering superiority complex were not ready to be given the same dose of law as that given to the "natives." From the petition of 1905 by the Colonists Association of British East Africa to the Secretary of State, we learn alot about settlers' attitude towards the Civil Procedure Code of India. Though this took place in the present day Kenya, the petition is representative enough to indicate the feelings of the settler population in Tanganyika when the same Code was made applicable here: The petition read;

... To the Indian Procedure Code
and to other Ordinances relating

to civil matters such as the Indian Contract Act and the Indian Evidence Act ... The strongest objection is also felt ... Perhaps the crowning demerit of the Indian Civil Procedure Code is the elimination of trial by jury. The colonists regard trial by jury, as well in civil as in criminal cases, as their inalienable right and no system of law or legal procedure can be satisfied unless it provides for disputed questions of fact in all cases, however small being tried, if the parties so desire it, by a jury.⁹¹

The tug of war continued up to the time of independence. However, it is important to note that the High Court was the only court which was required by law to apply the provisions of the Civil Procedure Code strictly.⁹² On the other hand, the Subordinate Courts were only required by law to exercise their jurisdiction "according to the principles of the Code."⁹³

3.4.2 Native Procedures of Dispute Settlement in the Subordinate Courts

It has already been shown that the Courts Ordinance 1920 established two types of Subordinate Courts.⁹⁴ The first one was Subordinate Courts which had jurisdiction over all persons

within their territorial limits and were manned by European officers. These courts were required to follow the "principles laid down in the Civil Procedure Code so far as the same may be applicable and suitable."⁹⁵ It may be recalled that the Tanganyika Order in Council 1920 provided that the exercise of jurisdiction over natives had to be guided by native law and custom and had to be done without undue regard to technicalities in law.⁹⁶ This meant that although the Subordinate Courts and the High Court had jurisdiction over natives, civil jurisdiction was not to be exercised according to the applied law. However, the application of native law and custom was not without its restriction. These were to be applied subject to the proviso that they were not repugnant to justice and morality. This meant that the courts were obliged to consider only such customs as were not repugnant to justice and morality. Thus, no matter how well established a custom was, its application in any particular case depended on the discretion of the judge before whom the issue arose. It is submitted that this phrase was more often than not used as a blunt instrument to strike down

any customary law of which the British administrators and magistrates disapproved. The result therefore was that the touchstone of the fitness of local laws for application to local peoples was the British standard of justice. It is submitted further that the indiscriminate and invariable reference of local customs to British standards was unjustifiable and led to the erosion and finally extinction of customary laws and procedures of dispute settlement and their replacement by British laws and procedures of dispute settlement.

The case of Gwao bin Kilimo v. Kisunda bin Ifuti⁹⁷ neatly illustrates this point. This was an application for revision of a decision of the Second class subordinate court at Singida ordering the seizure of a father's heads of cattle in compensation for theft committed by his son. The facts of the case briefly stated were as follows: A government tax clerk named Mange in the ordinary course of his duty collected shs. 10/= from the respondent for poll tax and issued him a forged receipt and converted the money to his own use. For this action Mange was tried in a criminal court and duly punished. The respondent then

successfully sued him in a civil court for the return of the shs. 10/=. In execution of the decree, the respondent caused to be attached by court process two heads of cattle which were admittedly the property of the judgment debtor's father, Gwao, the applicant. Gwao unsuccessfully objected to this attachment before the lower court and hence petitioned to the High Court for the revision of this decision and an order that his cattle be returned to him.

In deciding this application the court correctly appreciated that there were two questions which it had to decide. The first one was whether there was an authentic native law of the Turu tribe which allowed the seizure of a father's property in compensation for a wrong done by his son, and secondly, if that was so, was this law one by which a British court could and should properly be guided with? On the first issue the court found that the evidence was so conflicting that it was not prepared to establish a precedent of such far-reaching importance. The court went further and held that even if the fact of the existence of such a provision of native law had been established beyond doubt which

- 120 -

was far from being the case, there still remained the question of whether a British court should be guided by and should apply such native law. This question depended on the interpretation of Article 24 of the Tanganyika Order in Council 1920.

Wilson, J. answered it in the following words:

I hold more positive views, though I am far from being unmindful of the difficulty of construing the meaning of that phrase. Morality and justice are abstract conceptions and every community probably has an absolute standard of its own by which to decide what is justice and what is morality. But unfortunately the standards of different communities are by no means the same. To what standard then, does the Order in Council refer - the African standard of justice and morality or the British standard? I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. [Emphasis provided]

After having held thus, the court went further to dispose of the application according to British standards in the following words:

Is it just according to our ideas to take a man's property in order to compensate a party who has suffered injury at the hands of the man's son, the son being of full age and fully responsible in law for his own actions? I hold strongly the opinion it is not just ... It is against our general ideas of justice that a man should suffer or be punished directly either in person or in property for some wrong which he has not done himself ... But it is certainly contrary to the principles of British justice that the sins of the sons should be visited on the fathers when the sons are themselves fully responsible persons in law. [Emphasis provided]

The court accordingly reversed the decision of the lower court on the objection application, allowed the objection and ordered the restoration to the applicant of his two heads of cattle which according to the court were wrongly seized.

The procedural importance of this case is that once it is held that a father cannot be held liable for torts committed by his son, then

he cannot legally be regarded as a necessary party to a suit in which his son is involved.

It is submitted that this judgment displays two of the dangers inherent in the exercise of the discretion to reject custom on the grounds of repugnancy. The first one is the substitution of English conceptions of justice and morality for the African conceptions of justice and morality, and the second one is the failure to appreciate the nature of rules in their respective social context. It is apparent in this case that the judge failed to appreciate the communal ownership of property among the Wanyaturu customary law. Why shouldn't a father be liable in a community where property is usually communally owned, though controlled by the father? At any rate, if customary law was to be subject to English law, then wherein lay the preservation of customary law for native parties? In any case even under English law, the fact that the servant is fully responsible in law for his actions does not overrule the vicarious liability of the master. All that said, it must not be forgotten that these courts were manned by people of different cultures whose societies had already become individualised.

Accordingly, they administered the justice and morality they knew, that is individual justice and morality. The principle of communal liability was incomprehensible to them.⁹⁹

In summary, one may say that as far as subordinate courts manned by European officers were concerned, there was no uniform procedure followed in native cases. In most cases it was the presiding magistrate who determined what procedure to follow, although invariably the magistrate tried to adjust the procedures which they followed in non-natives cases to native cases.¹⁰⁰

One thing which can be stated with certainty is that after the post war period subordinate court magistrates became more technical in the way they conducted proceedings before them. English law and procedure was being applied with even more rigidity than before. As a result the legacy of Indian legislation was steadily eroded and an ever-increasing attention and authority was accorded to the decisions of the English courts.¹⁰¹

large proportion of judges and magistrates who were inexperienced because of their brief service in Tanganyika, being remote from and ignorant of the social life of the indigenous people and were not interested in the individual relationships between the people they administered.¹⁰²

The Native Subordinate Courts were the second form of subordinate courts established by the Courts Ordinances of 1920 and 1930. These courts were manned by natives only. They were to be under the supervision of the subordinate courts of the first category and were required "to conform with the procedure, practice and rules as may be prescribed by the High Court." However, research has failed to discover any procedure practice and rules prescribed by the High Court for this purpose. It appears that these courts followed the procedure of the first type of subordinate courts very closely. These courts continued to exist until the enactment of the Subordinate Courts Ordinance, 1941.

Section 11 of the Courts Ordinance, 1920 recognized the traditional tribunals of the Headman and Native Authorities whose practice and procedure, like those of the Native Courts

were to be regulated by the High Courts.¹⁰³
Section 12(1) allowed the traditional authorities, pending the making of such rules by the High Court, to regulate their practice and procedure. It provided that, "the procedure hithertofore followed by the tribal authorities was to be followed by these courts in the interim. In effect this section implied that the procedures which were being followed by the traditional tribunals before the establishment of British rule would temporarily be followed and hence allowing room for the traditional dispute settlement procedures to coexist with the Indian Procedure Code. The administrators however, forgot that the traditional dispute settlement procedures had already been disrupted by German rule.

The original position of the British colonial administrators was to have a uniform system of procedure for the native courts while the Indian Civil Procedure Code applied in suits between foreigners only. But it has been shown that no such rules of procedure were made for the Native Courts. It is observed that this state of affairs led these courts in most cases to regulate their own procedure,¹⁰⁴ subject to the supervisory jurisdiction of the subordinate courts which were

1
ce
ln
0
t.
s

not to unduly interfere with the procedures of these courts unless they were contrary to justice and morality or statute law.¹⁰⁵

The enactment of the Native Courts Ordinance 1929 was yet another attempt by the British Colonial government to preserve traditional African law and custom. The Attorney General's speech to the Legislative Council on the Native Courts Bill 1929, stated that the government considered that a person who had justice done to him according to someone else's ideas of justice and not according to his own was apt to feel some doubts as to whether justice had been done to him at all. He argued that the government therefore did not intend to do injustice by forcing the natives to settle their disputes according to English procedures.¹⁰⁶ The Native Courts Ordinance 1929 was therefore enacted with the purpose of retaining native procedures. Section 22 of this ordinance purported to provide for the traditional native procedures to be followed by the Native Courts. It stated;

Subject to such rules as may be made under section 41, the practice and procedure of native courts shall

be regulated in accordance with native law and custom.

It is submitted that the above quoted section did not and could not achieve this purpose for several reasons. In the first place native procedures were only to be retained subject to rules made by the governor. Secondly, changes in the traditional procedures of the traditional Native Tribunals were inevitable due to the changing circumstances. Society was not static. The new socio-economic relations created by colonialism made the communal procedures of the traditional tribunals inapplicable.¹⁰⁷ To crown it all, it must not be forgotten that the British colonial administrators were fully engaged in introducing a new judicial structure in Tanganyika, a structure characterised by a bureaucratic specialisation of function, power of enforcement, standards of judicial conducts, and orderly courtroom procedure far from that previously known to African societies."¹⁰⁸ The Native Court legislation's impact on the traditional procedures cannot be over-emphasized. This legislation gave district officers very wide powers of supervision and appeal. Under their detailed guidance the

native courts were in the course of time transformed from simple customary tribunals into systematised courts of justice, with written records, court officers, and a procedure closely modelled on that prevailing in the Magistrates' Courts, though in a simpler form. Eventually, when more and more of the details of British court procedure had been assimilated by the native courts, there was little in principle to distinguish the procedure in the native courts from that in the magistrates' courts.¹⁰⁹

It can therefore be stated that the pre 1960 era witnessed several changes in relation to customary law. The most important change to customary law during this time was the departure from the patterns of dispute settlement. A radical change occurred gradually as a result of the introduction of a system of courts which, though originally was based on existing institutions, tended gradually to become more and more westernized.

Professor William Twining commenting on this aspect had this to say;

With the introduction of a local courts system set up and supervised

by the colonial rulers there were radical departures from indigenous patterns ... To everybody the local courts system presented at least some unfamiliar features and to some people the whole idea was totally and incomprehensibly alien. Judicial bodies with defined jurisdiction and fixed personnel were superimposed on less clearly defined institutions and often the geographical area of jurisdiction cut across tribal and even ethnic boundaries. The personnel of the courts were by no means always elders according to native law and custom and in a number of places government-appointed chiefs owing greater allegiance to government than to tribe exercised judicial powers. Moreover, the functions that those bodies were required to perform were not identical with those of the indigenous institutions that were being built on.¹¹¹

The net result was that although both the Germans and British tried to retain the traditional dispute settlement procedures, these were disrupted on a grand scale by the imposition of alien domination. By the time Tanganyika gained

independence from Britain, adversarial procedures in one form or another were being followed by all the courts in the country in different degrees. It remains to be seen what the reaction of the independent government to these procedures was. This discussion will be undertaken in the next chapter.

NOTES

1. Trusteeship Agreement - Imperial Laws
1920 - 1957
2. J.P. Moffet, Native Courts in Tanganyika.
"A History of the Development of Native
Courts from the German Times." Journal of
African Administration, January, 1952 Vol.4
No. 1 pg. 8
3. Promulgated on the 22nd day of July 1920
4. No. 6 of 1920 Cap 3
5. Ibid S. 3
6. Ibid S. 18 and Schedule
7. Ibid S. 5
8. Article 17(2) Tanganyika Order in Council
1920 and The Application of Laws Ordinance
1920, Ordinance No. 7 and S.2 of the Courts
Ordinance 1920 op. cit. respectively
9. The Court in the Tanzania-One-Party state
by The Hon. Mr. Justice P.T. Georges, in
East Africa Law and Social Change, The East
African Institute of Social and Cultural
Affairs. (G.F.A. Sawyers, ed.) pg. 33
10. No. 13 of 1930, 27th day of February, 1930
11. Ibid S. 22
12. Ibid S. 3(a)
13. Ibid S. 3(b)
14. Ibid S. 3(c)
15. Ibid S. 3(d)
16. Ibid S. 5

17. The Courts (Ammendment) Ordinance No. 7 of 1935
18. See Civil Procedure Code (Transfer of Suits) Ordinance, 1935 No. 8 of 1935
19. See Schedule to S. 12(1) of the Courts Ordinance, 1930 op. cit.
20. Cap 3, No. 15 of 1941
21. S. 20(1) of the Subordinate Courts Ordinance 1941 op. cit.
22. Ibid S. 3(1)
23. Ibid S. 5(1) (3) (4) & (5)
24. Ibid S. 5(6)
25. Ibid Schedule to S. 4(4)
26. Subordinate Courts (Resident Magistrates) Order 1941 G.N. 235 of 1941
27. Ibid S. 2
28. Ibid S. 3
29. S. 15 Subordinate Courts Ordinance, 1941 op. cit.
30. See S. 12(1) of the Courts Ordinance 1920
31. G.N. No. 7 of 1925
32. Ibid Clause 3
33. Ibid Clause 3 read together with the First Schedule (1) (a) (b) & (c)
34. Ibid Clause 4
35. Ibid Clause 5 read together with the Second Schedule (1) (a) (b) & (c)
36. Ibid Clause 6(1) & (2) respectively
37. Ibid Clause 6(3)

38. Ibid Clause 6(4)
39. Ibid Clause 2 & 7(1)
40. Ibid Clause 11
41. Ordinance No. 5 of 12th April, 1929 Cap 73
42. Sir Donald Cameron's Dispatch to the Secretary of State of 17th February, 1927 C.O. 691/88/18087 and D.S.A. 11126
43. See H.F. Morris and James S. Read: Indirect Rule and the Search for Justice. Essays in East African Legal History. Clarendon Press Oxford 1972 pp. 146 - 147
44. S. 3(1) Native Courts Ordinance, 1929
45. Ibid S. 3(2)
46. Ibid S. 32(a)
47. Ibid S. 32(b)
48. Ibid S. 32(c)
49. Ibid S. 8
50. Ibid S. 9
51. Ibid S. 11
52. Ibid S. 33(2)
53. -Ibid S. 34(1)
54. Ibid S. 34(2)
55. Ibid S. 34(3)
56. Ibid S. 34(4)
57. S. 34(4) Proviso of the Native Courts Ordinance 1929 empowered the Governor to establish an Appeal Board

58. Sir Donald Cameron's Dispatch to the Secretary of State of 17th February, 1927 op. cit.
59. See S. 22 of the Courts Ordinance 1930
60. (1937) I TLR (R) 401
61. (1940) TLR (R) 249
62. See footnote 43
63. S. 40(1) of the Native Courts Ordinance 1929
64. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice. Essays in East African Legal History op. cit pg. 135
65. Ordinance No. 14 of 27th February 1951 Cap 299
66. Ibid S. 4(1)
67. Ibid S. 4(3)
68. Ibid S. 10(1)
69. Ibid S. 2
70. Ibid S. 10(2)
71. Ibid S. 4(1) and 4(2) respectively
72. Ibid S. 12(1) and Proviso
73. Ibid S. 38(1)
74. Ibid S. 39(1) & (2)
75. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice op. cit. pg. 160
76. For general powers of the Provincial Commissioner, see ss. 4(1) (2) & (3); 6(1) 34(1) & (3) and S. 35
77. Proclamation No. 4 of 1919

8. Article 17 and 21 respectively of the Tanganyika Order in Council, 1920 G.N. No. 8 of 22nd day of July, 1920
79. M.R.M. Lamwai; The Development of The Administration of Civil Justice in Kenya and Tanzania. A Critical Analysis. Ph.D. Thesis School of Oriental And African Studies, London University, 1983 pp. 52 - 53 (mimeo)
80. Quoted by Sir John Macdonell and Edward Manson (eds) in Great Jurists of the World, Little Brown & Co. Boston, 1914 pg. 158
81. Quoted by M.P. Jain in Outlines of Indian Legal History, N.M. Tripathi Ltd. Bombay, 1952 pg. 453
82. Ibid pg. 456
83. The Code of Civil Procedure Act, 1859 No. VIII of 1859
84. M.R.M. Lamwai, Ph.D. Thesis, op. cit. pp. 60 - 61
85. Sir Charles Wood "Minute to the Indian Law Commission 1854" quoted by M.R.M. Lamwai, Ph.D. Thesis op. cit. pg. 71
86. Ordinance No. 5 of 1920 Schedule
87. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice op. cit. pg. 97
88. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice op. cit. pg. 97
89. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice op. cit. pg. 97
90. There were professional magistrates in the High Courts, and Resident Magistrates' Courts. These were few and as a result most of the judicial work was done by semi-professional magistrates.

91. Quoted by A.F. Morris and J.S. Read in Indirect Rule and the Search for Justice op. cit. pg. 118
92. Article 17(2) of the Tanganyika Order in Council, 1920 op. cit.
93. See SS. 2 & 15(1) Courts Ordinance, 1920 op. cit.
SS. 2 & 13 Courts Ordinance, 1930 op. cit.
and SS. 2 & 6(2) Subordinate Courts Ordinance, 1941 op. cit.
94. S. 4 Courts Ordinance, 1920 op. cit. This provision was retained under S. 4 of the Courts Ordinance, 1930 op. cit.
95. See footnote 89
96. Article 17 of the Tanganyika Order in Council 1920 op. cit.
- 97.. (1938) I TLR (R) 403
98. See also Lamwai's observation on this point. M.R.M. Lamwai Ph.D. Thesis op. cit. pg. 167
99. Ibid pg. 168
100. Ibid pg. 168
101. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice, op. cit. pp. 103 - 104
102. M.R.M. Lamwai, Ph.D. Thesis op. cit. pg. 169
103. S. 12(1) of the Courts Ordinance, 1920 op. cit.
104. M.R.M. Lamwai, Ph.D. Thesis op. cit. pg. 170
See also H.F. Morris and James S. Read Indirect Rule and the Search for Justice op. cit. pg. 132
105. S. 14 Courts Ordinance, 1920 op. cit.

106. Attorney General's Speech to the Legislative Council on the Native Courts Bill, Appendix to the Governor's Memorandum on the Native Courts Bill, Dispatch of 4th February, 1926 Co 397/927073
107. M.R.M. Lamwai, Ph.D. Thesis op. cit. pg.174
108. P. Rigby: "Gogo Kinship and Social Structure" in Changes in Local Government, Ithaca, Cornel University Press 1969 at pg. 89
109. H.F. Morris and James S. Read, Indirect Rule and the Search for Justice op. cit. pg. 132
110. William Twinning "The Place of Customary Law in the National Legal System of East Africa." Lectures delivered at Chicago Law School in April - May 1963, The Law School, University of Chicago pp. 9 - 10.

CHAPTER FOUR

INDEPENDENCE AND AFTER

4.1 Introductory Remarks

The ending of colonial rule in Tanganyika was not followed by any move to break away from or even drastically to modify the legal structure established in the earlier period.¹ The Tanganyika (constitution) Order in Council 1961² created only a de jure independent state within the commonwealth. This process was completed on December 9th, 1962 when Tanganyika attained a Republican status.³ It is our contention that not only did the whole colonial state apparatus pass into the local petit-bourgeoisie unscathed, but also that the colonial law was maintained. The law of Civil Procedure as we shall endeavour to show, was not an exception to this.

4.2 Integration and the Court System

We have seen that the process of integrating the native courts into the general court system had began long before independence. As a matter of fact a clear policy of integrating these courts had been expressed by the colonial government as early as 1950s. In the Local Government

Memorandum published shortly after the enactment of the Local Courts Ordinance, it was stated that the policy of the separation of the Judiciary and the Executive should be implemented and that every opportunity should in future be taken to relieve Chiefs of as much court work as possible. The memorandum stated as follows:

The dispensation of justice without regard to administrative convenience is another long term aim which will not be easy of achievement but which nevertheless must not be lost sight of. It will not be easy to achieve because of the combination of judicial and executive functions in both court holders and supervising officers ...⁴

Independence however, came before this process was complete. Hence, this policy was to see its fruition shortly after independence when the native courts were replaced by an integrated court system for the whole of Tanganyika.

In 1961 plans were formulated by the independent government for the complete integration of the court systems. The policy behind this plan was stated by the Minister for Justice in the following words:

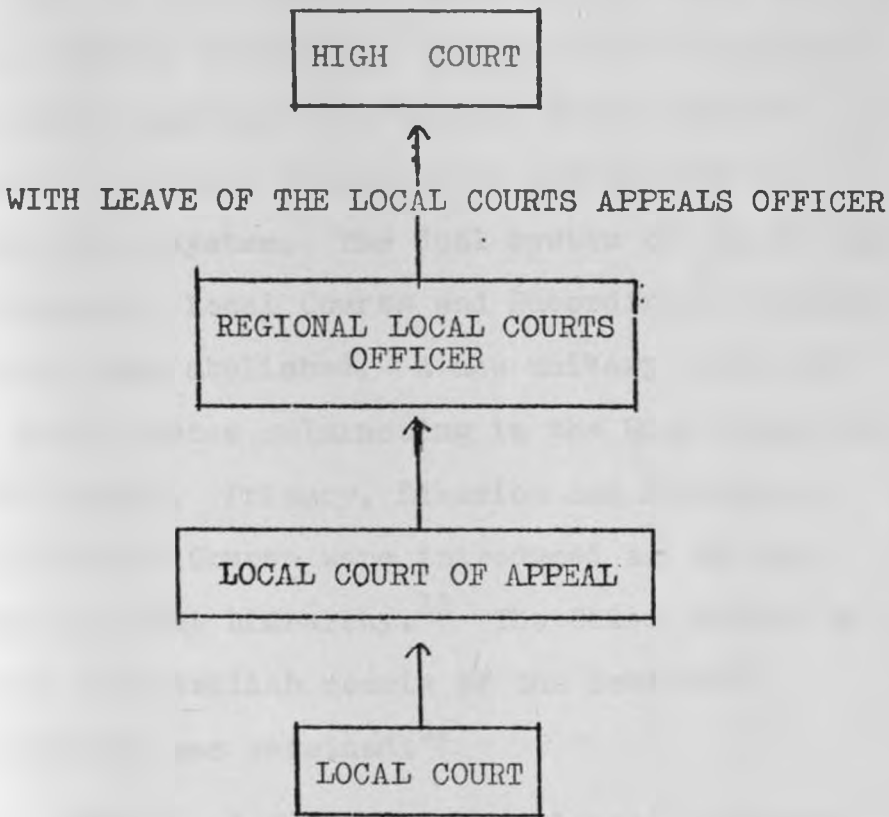
..... The origin and purpose of the integration of the court systems is the desire to remove the system of having a dual system of courts which operate along different lines. One system comprising of the High Court and its subordinate courts and another comprising of the Local Courts with jurisdiction only over Africans. The government decided from as early as 1961 to change this system so as to enhance our national respect and with the intention of improving the administration of justice.⁵

The first step towards integration which became effective from 1st January 1962 was the abolition of the Central Court of Appeal. The High Court became the final Appellate Court for matters decided in the Local Courts.⁶

The second step which became effective from 1st July 1962 was the abolition of the office of the Local Courts officer which had existed from 1951 and its replacement by a Judicial officer responsible to the High Court called the Local Courts Appeals officer.⁷ Also the power to establish Local Courts was vested in the Minister for Justice instead of the Provincial Commissioner.⁸

At the same time, radical changes were made in the system of administration by the newly independent government. The offices of District and Provincial Commissioners were abolished and in their places were created the posts of Area Commissioner and Regional Commissioner. The functions of these new officials were both political as well as administrative. The disability from being members of parliament did not apply to them and many were in fact not only party officials but also members of the legislature. All Regional Commissioners, for instance are up to now ex-officio members of parliament.⁹ It was felt that it would be inappropriate for such functionaries to wield judicial powers. Below we present a diagram showing the Court Structure under the Local Courts (Amendment) Ordinance, 1961.

Chart No. VII: The Court Structure under the
Local Courts (Amendment)
Ordinance, 1961



- Notes:
- (i) The Central Court of Appeal was abolished and the High Court became the final appellate court for matters decided in the Local Courts.
 - (ii) The Local Courts officer was replaced by the Local Courts Appeals officer. This was a Judicial officer who was responsible to the High Court.
 - (iii) The provincial commissioner who formerly had been a "filter" for appeals dropped out and was replaced by a Judicial officer.

The last stage of integrating the court systems was effected by the enactment of the Magistrates Courts Act 1963 which became effective on 1st July 1964.¹⁰ This Act repealed the Local Courts Ordinance, transferred all judicial powers to members of a unified judiciary and created a single hierarchy of courts with a three tier system. The dual system of courts was abrogated. Local Courts and Subordinate regular courts were abolished. A new unitary hierarchy of court system culminating in the High Court was established. Primary, District and Resident Magistrates Courts were introduced as the new rungs in that hierarchy.¹¹ The Chief Justice's power to establish courts of the Resident Magistrate was retained.¹²

The Local Courts were replaced by Primary Courts. Unlike their predecessors they did not administer customary criminal law. On the contrary, they administered the Penal Code¹³ and customary civil law. Their jurisdiction extended to all persons. The constitution of the District Courts remained substantially the same, but ceased to be classified. Significant changes in the personnel were introduced. Administrative

officers no longer had judicial powers. A new group of District Magistrates was created to do the work formerly done by District Commissioners in their judicial capacity. The semiprofessional nature of the magistracy was, however, maintained. The supervisory powers which had been exercised by the District Commissioner were now exercised by the District Magistrates in respect of Primary Courts. Supervisory powers in respect of District and Resident Magistrates' Courts were to be vested in the High Court.¹⁴

Appeal from the Primary Court went to the District Court. Appeal from the District Court lay to the High Court with a possible final appeal to the East African Court of Appeal. Since 1979, however, the Tanzania Court of Appeal became the final appellate authority in Tanzania.¹⁵

Section 29 of this Act provided that "no Advocate or Public Prosecutor as such may appear or act for any party in a Primary Court." However, a relative or member of the household of a party to a civil proceeding could appear on his behalf. In the statement of Objects and Reasons for the Magistrates' Courts Bill, it was stated that the

exclusion of Advocates and Public Prosecutors was intended to be a temporary measure and it was hoped that "this will be changed when the Primary courts have more experience." Ironically the position remains the same today, twenty years after the act came into operation and there is no sign that it is going to change in the near future.¹⁶ It appears that what was intended to be a temporary measure has become a permanent measure despite the fact that all Primary Court Magistrates have attended a nine months training programme at the Institute of Development Management, Mzumbe - Morogoro. One wonders when these Primary Courts "will have more experience" to allow Advocates and Public Prosecutors appear in Primary Courts.

From the above exposition one can say that the integration of the court system did not fundamentally alter the legal system which existed before independence. The District Courts remained with the same role as that of the District Magistrates of the colonial times, so did Primary Courts which were successors to the Local Courts. The Magistrates' Courts Act 1963 therefore in effect maintained the systems of courts which had

existed under the Subordinate Courts Ordinance 1941 and the Local Courts Ordinance 1951. The situation was not changed by the enactment of the Magistrates' Courts Act 1984.

Below is a Schematic diagram of the Court Structure under the Magistrates Courts Act, 1963.

4.3.0 Jurisdiction of the Courts

The question which court has jurisdiction to entertain a certain matter is of utmost importance. This question has caused more problems to parties to civil proceedings than to parties in criminal proceedings for obvious reasons. Firstly, the law relating to instituting criminal proceedings is straight forward. Part I of the First Schedule to the Magistrates' Courts Act provided for criminal jurisdiction of Primary Courts under the Penal Code,¹⁷ while Part II of the same schedule provided for the criminal jurisdiction of Primary Courts under other laws. The Criminal Procedure Code¹⁸ also provided for criminal jurisdiction of other courts in Part A of the First Schedule.

Secondly, criminal proceedings are instituted by the state, which except in Primary Courts, is also the prosecutor. Hence the determination of which court has jurisdiction to try a certain offence does not present much problem. The state has enough legal personnel to do so. This applies also to Primary Courts, for although Public Prosecutors and Advocates are barred from appearing in these courts the charges are in practice mostly brought by the Police.

The position is different in civil proceedings where the aggrieved party not only institutes but also has to prosecute the suit.¹⁹ Thus knowledge of the jurisdiction of the court becomes important, for the consequences which follow in case a suit is instituted in a court which has no jurisdiction are very far reaching. The suit is either dismissed for want of jurisdiction, or in case the court inadvertently or otherwise entertains it, a higher court in the exercise of its revisionary or appellate powers will have no alternative but to declare the whole proceedings a nullity. It will quash the decision and return the case for trial before a court with competent jurisdiction.²⁰ In such a case, the inconveniences to be suffered in terms of costs and time may be unbearable to the plaintiff. There is also a possibility of the suit being time barred for time does not stop running against the plaintiff on the institution of proceedings which are subsequently declared a nullity.

4.3.1 Jurisdiction Defined

Jurisdiction is an expression which is used in a variety of senses and takes its colour from its context. Others prefer the term "statutory

jurisdiction" in the sense of "authority conferred by statute or some other instrument on a court, tribunal or a person to determine, after inquiry into the case of the kind described in the statute or any other instrument conferring that authority and submitted to that court, tribunal or person for decision."²¹ Generally speaking however, the term jurisdiction normally means an authority which the court has to decide matters litigated before it.²²

The question of jurisdiction is determinable at the commencement not at the conclusion of the inquiry.²³ Its test is whether the tribunal, court or commission has power to enter on the inquiry and make a determination or decision and not whether their determination or decision is right or wrong in fact or in law. This was succinctly stated by Lord Denman, C.J. in R.V. Bolton.²⁴

The question of jurisdiction does not depend on the truth or falsehood of the charge but on its nature; it is determinable on the commencement not at the conclusion of the inquiry.

Although Lord Denman, C.J. was dealing with a criminal case, we submit that this proposition

applies to civil cases also. Jurisdiction, in other words, does not depend upon the regularity of the exercise of that power, or upon the correctness of the decision. In fact, once a court has jurisdiction it can act in two different ways. The competent court can decide the case correctly or it can decide it wrongly and that is why we have the appellate system.

Caselaw has established that neither can parties confer jurisdiction on a court by consent nor can the court confer upon itself jurisdiction which it does not possess. In the case of Mariambai Rajabali v. John P. Curties,²⁵ a Primary Court granted a divorce purportedly under Islamic Law. The petitioner later claimed maintenance due to her during the subsistence of the marriage to the respondent. The petitioner was an Asian while the respondent was not. The Magistrates' Court Act, 1963 provided inter alia for the jurisdiction of Primary Courts over all proceedings of a civil nature where Islamic law is applicable. An exception to this general rule was provided in respect of disputes in which Islamic law is applicable by virtue of the provisions of the Non-Christian Asiatics

(Marriage, Divorce and Succession) Ordinance Cap 112. In such a case jurisdiction was expressly conferred on the High Court. On appeal, the High Court expressed doubt on the jurisdiction of the Primary Court to grant a divorce under the ordinance in the following words:

... The jurisdiction of the primary court to grant a divorce was at best doubtful. The parties cannot confer jurisdiction on the primary court merely by appearing before it.

Emphasis provided

In yet another case, Bartholomew Richard, De Souza v. L. De Costa and J.J. Pereira,²⁷

Gamble Ag. J. dealing with an attempt by the court to confer jurisdiction on itself with the consent of the parties stated as follows:

... Parties' advocates cannot by agreement or in any other manner enlarge the jurisdiction of a court. When a limited court takes upon itself to exercise jurisdiction it does not possess its decision amounts to nothing.

According to these cases, parties cannot by consent give jurisdiction to a court.

The jurisdiction of any court is statutory and does not depend on the parties.

However, once the proceedings are properly initiated the determination shall not be regarded as without jurisdiction on account of any procedural defect in the course of the trial or inquiry^{or} because of the incorrectness of the decision be it of fact or law or both. This assertion is made with full knowledge of a contrary view enunciated by the English Court of Appeal in Anisminic Ltd v. Foreign Compensation Commission and Another.²⁸ In this case their Lordships held that a tribunal may originally have jurisdiction but in the course of the hearing step out of its jurisdiction. "It steps out of its jurisdiction hence denies itself of its jurisdiction when it asks itself wrong questions or it takes into account of matters which it was not directed to take and when it makes orders it had no jurisdiction to make." With all due respect to their Lordships, we are unable to agree with this proposition. A tribunal or court of competent jurisdiction cannot deny itself of that jurisdiction simply by asking itself wrong questions or taking account of

matters which it was not directed to take account of or basing its decision on a matter which it ought not to have taken into account. Jurisdiction is conferred by statute or some other instrument and is determinable at the commencement, not at the conclusion of inquiry. Any move taken by the tribunal or court of competent jurisdiction cannot per se, in any way, oust that jurisdiction which that tribunal or court had in the first place. Thus we submit that the proposition put forward in Anisminic's case is not only bad law in Tanzania in so far as the issue of jurisdiction is concerned, but is at best of purely academic interest by virtue of the reception clause, it having been decided after the reception date.²⁹

4.3.2 Territorial and Pecuniary Limitations

Whereas the High Court has unlimited original jurisdiction, courts subordinate to it are courts of limited jurisdiction unless expressly provided otherwise by law. The Magistrates' Courts Act 1963 limited the jurisdiction of these courts territorially and in ~~this~~ respect of the value of the subject matter they can inquire into.

Primary and Districts Courts established by the Magistrates' Courts Act³⁰ do not have jurisdiction outside the District for which they were set up. On the other hand the territorial jurisdiction of Courts of the Resident Magistrate is limited to areas specified in the Chief Justice's Orders establishing them.³¹

Secondly, the subordinate courts are also limited in terms of their pecuniary jurisdiction. There is a maximum monetary value of the subject matter of the dispute which gives the court its pecuniary jurisdiction. The Magistrates' Courts Act fixes the jurisdiction of the Primary, District and Resident Magistrates' Courts as follows. The pecuniary limit of the Primary Court under the Magistrates' Courts Act 1963 was two thousand shillings for the recovery of civil debts, rent or interest due to the Republic, Government or any Municipal town or District Council and one thousand shillings for the recovery of any civil debt arising out of contract. These have been enhanced to twenty thousand and ten thousand shillings respectively under the Magistrates' Courts Act 1984.³²

The pecuniary limit of the jurisdiction of the District Court and the Court of the Resident Magistrate was two hundred thousand shillings in proceedings for the recovery of possession of immovable property and twenty thousand shillings in any other proceedings. This has also been enhanced to three hundred thousand shillings and two hundred ^{thousand} shillings respectively.³³

4.3.3 Concurrent and Exclusive Jurisdiction

Where more than one court of different grades have the same original jurisdiction in respect of the same proceedings each court is said to have concurrent jurisdiction therein. For instance, under the Magistrates' Courts Act the Primary Court has unlimited original jurisdiction over matters arising from customary and Islamic law.³⁴ District Courts when held by civil magistrates on the other hand have limited original jurisdiction in proceedings of a civil nature save where it is conferred exclusively on some other court.³⁵ Since Section 14 of the Magistrates' Courts Act 1963 and later S. 18 of the 1984 Act respectively did not give Primary Courts exclusive original jurisdiction over suits

involving customary and Islamic law, Primary Courts and District Courts have had concurrent original jurisdiction in these matters.³⁶ The Primary Court has also had concurrent jurisdiction with the District and High courts under the provisions of the Law of Marriage Act.³⁷

Where, however, jurisdiction in respect of some matters is conferred on one court only, the court is said to have exclusive jurisdiction over that matter and no other court can hear and determine it. For example in Abifalah v. Rudnap Zambia Ltd³⁸ the court of Appeal for East Africa held that jurisdiction in respect of Workmen's Compensation is, by the clear intendment of the Ordinance, exclusively reserved to the District Courts, except to the extent that provisions to the contrary is specifically made in the Ordinance."³⁹

The High Court of Tanzania enjoys exclusive jurisdiction over the following: Admiralty,⁴⁰ Adoption,⁴¹ Advocates Ordinance,⁴² Companies Ordinance,⁴³ Bankruptcy Ordinance,⁴⁴ Election Petitions Act,⁴⁵ Land Acquisition Act,⁴⁶ and Taxation of Bills Ordinance.⁴⁷

4.3.4 Express and Implied Bar of Jurisdiction

Proceedings, whether of a civil or criminal nature, may be expressly barred from the courts of law if the statute in express and unequivocal terms states so. One of such statutes is the Security of Employment Act.⁴⁸ Section 28(1) of this Act enacts.

No suit or other civil proceedings (other than proceedings to enforce a decision of the Minister or the Board) shall be entertained in any civil court with regard to summary dismissal or a deduction by way of a disciplinary penalty from the wages of an employee.

It can be seen that the jurisdiction of the courts has been entirely ousted under this provision on all matters relating to summary dismissal and the courts have found no difficulty in construing it to the same effect. In Kitundu Sisal Estate and Others v. Shingo Mshuti and Others⁴⁹ the respondent employees filed a suit in the District Court against the appellant employers claiming damages for alleged termination of service without notice. The appellants argued that by reason of S. 28 of the Security of Employment Act, the court's

had no jurisdiction to entertain the suit. This argument was upheld by the Court of Appeal for East Africa. Georges C.J. held the same in the case of Mapande v. The Manager, East African Airways.⁵⁰

It is noted that the legislature may, and in fact often oust the jurisdiction of the court in certain matters by the use of what are invariably termed exclusion, ouster or finality clauses.⁵¹

A matter is said to be impliedly barred from courts if a statute creates a new offence, or a new right and prescribes a particular penalty in respect of the offence or a special relief or remedy in respect of the right together with a special procedure to be followed before the penalty can be imposed or the remedy or relief can be granted. For instance, The Tanzania Zambia Railway Act,⁵² the statute creating TAZARA stipulates:

In the event of disagreement by the contracting Governments with respect to the interpretation of the provisions of this Agreement or the provisions of any legislation enacted under Article IX(d) such disagreement shall be referred to an arbitrator or Board

of Arbitrators appointed by the contracting Governments.

This provision has the effect of impliedly barring matters concerning the interpretation of the Articles of this Agreement and all legislations enacted under it from courts of law and refers the same to an Arbitrator or Board of Arbitrators to be appointed by the respective contracting governments. This means that courts of law cannot entertain these matters before being referred to an arbitrator or Board of Arbitrators.

Although the jurisdiction of courts can be expressly or impliedly barred by statute there is a presumption in favour of jurisdiction. Courts have been very reluctant to accept the ouster of their jurisdiction. It is the traditional attitude of courts that any attempt to oust their jurisdiction should be viewed with hostility as was succinctly stated by Lord Viscount Simonds in Smith v. East Elloe Rural District Council and Others.⁵³

My Lords, I think any one bred in the tradition of the law is likely to regard with little sympathy legislative

provisions for ousting the jurisdiction of the court whether in order that the subject may be deprived altogether of remedy or in order that his grievances may be remitted to some other tribunal.

Biron, J. came out more clearly with the courts' hostility on ouster clauses in the case of Mtenga v. The University of Dar es Salaam.⁵⁴

In this case the plaintiff who was engaged on a Probationary basis as an administrative assistant by the University of Dar es Salaam claimed damages for wrongful dismissal. One of the defences of the defendant was that the court had no jurisdiction to hear the suit which was based on Section 27(1) of the Permanent Labour Tribunal Act which provides:

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

Biron, J. reacting on this *provision* stated as follows:

The court is 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.⁵⁵ /emphasis provided

Despite the hostility expressed by courts on ouster clauses, these clauses still continue to operate and can still be found in a number of Acts. All the courts can do about them is to declare whether or not a particular ouster clause has been couched in certain and in the most unequivocal terms so as to effectively oust their jurisdiction.⁵⁶

4.4.0 Jurisdiction of the Courts under the Magistrates' Courts Act, 1963

Courts jurisdiction in Tanzania follow the hierarchical order by which the courts are arranged. We are going to discuss the jurisdiction of the different courts under different headings below.

4.4.1 Jurisdiction of Primary Courts

It seems that Parliament's intention for establishing the Primary Courts under the Magistrates' Courts Act, 1963 was to have a court

within the three tier system which would succeed the Local Courts. The Minister for Justice, the late Honourable Amri Abeid when introducing the Bill to Parliament said:

Primary Courts will be presided over by native Magistrates who shall have jurisdiction over civil and criminal matters arising out of the existing customary law which shall be codified in due course.⁵⁷

To implement its intention Parliament enacted Section 14(1)(a)⁵⁸ giving Primary Courts unlimited original jurisdiction in all proceedings of a civil nature where the law applicable was customary law or Islamic law. This section, however, has in practice raised two problems. One is whether the section gives Primary Courts exclusive original jurisdiction in all matters arising out of customary and Islamic law. This problem seems to be compounded by section 13 of the Civil Procedure Code⁵⁹ which requires all suits to be instituted in the court of the lowest grade competent to try them. The later section may appear to complicate matters in view of the fact that under the Tanzania three tier system the court of the lowest grade is the Primary

court. A blind adherence to section 13 of the Civil Procedure Code would mean that where customary and Islamic law are concerned, such suits must be instituted first in the Primary Court and go up the appellate ladder. It is our submission that the law does not expressly or impliedly bar the District Court from exercising original jurisdiction in matters arising out of customary and Islamic law. The High Court has on many occasions held that the District Court has concurrent jurisdiction with the Primary Court in matters arising out of customary or Islamic law. In the case of Francis Mwijage v. Boniface Kabalemeza,⁶⁰ the High Court said:

Under S. 13 of the Civil Procedure Code, every suit shall be instituted in the court of the lowest grade competent to try it, which was in this case, a Primary Court. Section 13, however, is a rule of procedure, not of jurisdiction, and does not deprive higher courts of jurisdiction which they already possess. Further under S. 35(2) of the Magistrates' Courts Act, District Courts have limited original jurisdiction in proceedings save where it is conferred exclusively on some other

court; and S. 14 of that Act does not appear to give primary courts exclusive jurisdiction over suits involving customary law. [Emphasis provided]

This case fortifies the contention made earlier that customary law disputes are not justiciable only in the Primary Court. The same applies to matters arising out of Islamic law as was succinctly elaborated by the High Court in the following passage:

The primary courts jurisdiction over civil proceedings under Islamic law is not exclusive; The concurrent jurisdiction of the District Court is secured by SS. 36 and 35(2) of the Magistrates' Courts Act ... Section 13 of the Civil Procedure Code, 1966 requires all suits to be instituted in the court of the lowest grade competent to try it, but S. 57 provides that S. 13 shall not be read to require any proceedings of a civil nature to be commenced in the Primary Court. It would appear therefore, that once a District Court has jurisdiction and prior permission is not required under S. 57 a party can file an action in the District Court if he so chooses even though the Primary Court also has jurisdiction.⁶¹

Thus, the popular opinion that Primary Courts have exclusive original jurisdiction in customary law and Islamic law matters is a fallacy and a grave mis^statement of the law.

The second problem which arises from the wording of section 14(1) of the 1963 Act is whether or not Primary Courts have civil jurisdiction in matters which do not arise from customary law or Islamic law. Under section 14(1)(ii) of the 1963 Act, Primary Courts, apart from matters which arise out of customary law and Islamic law, had and could exercise jurisdiction "for the recovery of civil debts, rent or interest due to the Republic, the Government of any municipal, town or district council, under any judgment, written law, right of occupancy, lease, sublease or contract if the value of the subject matter of the suit did not exceed two thousand shillings and any proceedings by way of counter-claim and set off therein of the same nature and not exceeding such value." This provision implies that, in so far as private persons were concerned, Primary Courts had no jurisdiction in any matter which was outside the purview of customary law and Islamic law. Indeed, according

to the rules of statutory interpretation, what is not expressly provided for is impliedly excluded. "Expressio unius exclusio alterius." This interpretation was favoured by the High Court in a number of cases. In Gaudensia Samwel v. Mechior Marcel⁶² the plaintiff sued the defendant in the Primary Court of Bukoba on an account for goods sold and delivered to the defendant's father. On appeal the High court stated that under S. 14 of the Magistrates' Courts Act, it was doubtful whether the Primary Court had jurisdiction to entertain a suit for the recovery of a private debt which was not the subject of customary law or Islamic law.

This doubt was resolved in the case of Walumu Jilala v. John Mongo⁶³ where the plaintiff had sued the defendant in a primary Court seeking damages of shs. 5,240/= from a claim which arose out of contract under which the defendant had agreed to transport bags of millet for the plaintiff. Judgment was given in favour of the plaintiff, and the defendant appealed first to the District Court and then to the High Court. The issue before the High Court was

whether a Primary Court had jurisdiction over matters relating to private debts. The court stated as follows:

A primary court has no jurisdiction to try civil cases unless customary law is applicable or the proceedings are for the recovery of civil debts or interest due to the Republic ... The Magistrates' Courts Act Section 14(1)(ii) provides that a primary court magistrate has jurisdiction in respect of civil suits not exceeding shs. 2,000/=. This section does not confer power to hear civil suits other than those mentioned above, but merely places a monetary limit on the jurisdiction of the court in those cases which it has jurisdiction to hear. [Emphasis provided]

The above cited cases have held that jurisdiction in private matters under the general law had been effectively taken away from the Primary Courts. Indeed, this position was restated more succinctly by Mustafa, J. in the case of Edward Kalemela v. Muyebe Rwenjege,⁶⁴ a decision which led to the amendment of the Magistrates' Court Act. This amendment was intended to give Primary Courts additional jurisdiction to hear and determine

civil claims of a private nature. The reasons for the ammendment were summarised thus:

.... It is proposed that primary courts be given jurisdiction to entertain cases arising out of contract. Presently such cases have to be filed in the district court so as to reduce the problem incidental to such a requirement it has been opined that primary courts should also have jurisdiction except where there are complicated issues of law. Primary courts should be able to entertain claims up to shs. 1,000/=.....⁶⁵

The Magistrates' Court Act was thus amended by the Written Laws (Miscellaneous Amendments) Act⁶⁶ and a new subparagraph (iii) to section 14(1) was added. This addition gave the Primary Court jurisdiction in suits for the recovery of "any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed shs. 1,000/- and any proceedings by way of counterclaim or set-off therein of the same and not exceeding such value."

The new subparagraph was brought before the High Court for interpretation in the case of Zephrin Mgabona v. Jones Kalumuna.⁶⁷ Zephrin,

the appellant in this case appealed against the attachment of his property in execution of a decree made under rule 17 of the Magistrates' Courts (civil Procedure in Primary Courts) Rules.⁶⁸ The decree had been made in a civil case which Jones, the respondent filed to recover a loan of shs. 1,515/=. The appellant argued in his memorandum of appeal that the Primary Court had no jurisdiction to hear the case. The High court quoting Edward Kalemela v. Muyebe Rwenjega⁶⁹ with approval upheld this argument and stated thus:

.... Section 14 of the Magistrates' Court Act has been amended by the written laws (Miscellaneous Amendment) Act No. 50 of 1968. The amendment adds a new subparagraph (iii) to subsection (1) of Section 14 giving additional jurisdiction to the primary courts in civil proceedings
It seems that the Written Laws (Miscellaneous Amendment) Act No. 50 of 1968 has not affected the position... that a primary court has no jurisdiction to entertain claims like a loan between private individuals, unless such a loan arises out of contract and does not exceed shs. 1,000/=. [Emphasis provided]

We are in total agreement with the interpretation given by Seaton, J. in this case. It is submitted that the intention of Parliament in giving general civil jurisdiction to primary Courts over matters other than those involving customary law and Islamic law as far as private persons are concerned was not reflected in the wording of the newly added subparagraph to section 14(1). All that this amendment did was to allow primary courts to entertain private debts if they arose out of contract and were of a liquidated amount of money not exceeding shs. 1,000/=. The law as such was not changed except that primary Courts now had two monetary limits to their jurisdiction, that is, shs. 2,000/= for public debts and shs. 1,000/= for private debts arising out of contract.

It is worth noting, however, that in practice Primary Courts do adjudicate over matters in respect of which they have no jurisdiction. This practice remains unchecked despite the fact that District Courts have supervisory powers over them. Indeed the High Court has more often than not stated in no uncertain and in the most unequivocal terms that these courts do not

have such jurisdiction. It is therefore submitted that the adjudication by Primary Courts of matters not within the purview of customary law and Islamic law as far as private persons are concerned is illegal for want of jurisdiction. The relevant authorities are therefore called upon to put an end to this practice either by administrative action by directing Primary Courts to stop adjudicating over these matters or by legislative action by conferring them with jurisdiction so that they continue with this adjudication legally. This latter alternative of course entails as of necessity amendment of the Magistrates' Court Act and including a specific provision to that effect.

At present the second alternative is more desirable in view of the fact that a significant training programme for Primary Court magistrates has been developed. Apart from attending a nine months law course at the Institute of Development Management at Mzumbe, Morogoro, The University of Dar es Salaam offers a part-time two year course at the Institute of Adult Education at Lumumba, Dar es Salaam and Arusha centres leading to the award of a certificate in law. In the latter

case, the following subjects are taught: Public Law as a compulsory subject and either Criminal Law or Private Law as optional subjects for all First Year Students. Second Year Students have to opt for any two of the following three subjects: Labour Law, International Law and Commercial Law comprising of Elements of the Law of Insurance and the Sale of Goods. The Institute of Development Management Mzumbe, Morogoro in collaboration with the Judiciary has just introduced a two year full time course leading to the award of a Diploma in Law where the following Compulsory subjects are offered: Criminal Law, Criminal Procedure, Legal Method and Research Methodology, Contract, Family Law, Torts, Civil Procedure, Land Law, Constitutional and Administrative Law, Evidence and a Dissertation. Students are also required to opt for one among the following subjects: Labour Law, Succession and Trusts, Parastatals and Co-operatives, Criminology and Penology and Commercial Law. A number of Primary Court magistrates can now be enrolled in these courses and hence displace the argument that they are incapable of dealing with subtle and technical issues of law.⁷⁰

4.4.2 Jurisdiction of District Courts

District Courts which were established for every district in the country⁷¹ when held by a civil magistrate had limited civil jurisdiction in every district in the following matters:

(a) In proceedings for the recovery of possession of immovable property to which the Rent Restriction Act⁷² does not apply to the value of shillings two hundred thousand,⁷³ and

(b) In other proceedings where the subject matter is capable of being estimated at a monetary value up to shillings twenty thousand.⁷⁴

In cases involving customary law and Islamic law, District Courts had concurrent jurisdiction with Primary Courts.⁷⁵ In addition District Courts also had jurisdiction in all other proceedings under any Written law which was then in force, subject to the pecuniary and territorial limitations of these courts.⁷⁶ Examples of such jurisdiction included all matrimonial proceedings under the Law of Marriage Act. It had thus concurrently with the Primary Courts, and the

High Court.⁷⁷ The Land Ordinance also conferred jurisdiction on a District Court to determine disputes over Right of Occupancy to a native and to determine claims to rights acquired under a right of occupancy against the Government with no right of appeal, and to determine issues arising out of unlawful occupation of Government Land.⁷⁸ The position discussed above was retained by the Magistrates' Courts Act 1984 subject to the enhanced jurisdiction.

It is important to point out that there are two types of District Magistrates. There are ordinary District Magistrates and those designated "civil magistrates" by the Chief Justice.⁷⁹ When a District Magistrate is designated a civil magistrate he acquires a wider civil jurisdiction than an ordinary District Magistrate. There has been a tendency of making a blanket statement that District Courts when not held by a civil magistrate or a Resident Magistrate have no civil jurisdiction. This is a misstatement of the law. One must make a distinction between general civil jurisdiction conferred on District Courts when held by a Civil Magistrate or a Resident Magistrate by S. 35(2) of the Magistrates' Court Act 1963 and specific

civil jurisdiction conferred on a District Court whether or not held by a civil magistrate or Resident Magistrate by S. 35(1)(b) of the Magistrates' Court Act, 1963.⁸⁰ The District Court has no general civil jurisdiction when not held by a civil magistrate or a Resident Magistrate, but has specific civil jurisdiction conferred upon it by specific statutes regardless of whether the District Court is held by a civil magistrate or Resident Magistrate. Examples of statutes conferring specific civil jurisdiction on District Courts whether or not held by a civil magistrate or a Resident Magistrate include The Land Ordinance,⁸¹ The Affiliation Ordinance⁸² and The Employment Ordinance⁸³ to mention but a few.

Jurisdiction conferred by such statutes to District Courts is limited to the same extent as that of a District Court presided over by a civil or Resident Magistrate.⁸⁴

4.5.0 Jurisdiction of the Courts Under The Magistrates' Court Act 1984

4.5.1 Jurisdiction of Primary Courts

Section 14(1) of the Magistrates' Courts Act, 1963 has been repealed and replaced by

Section 18(1) of the Magistrates' Courts Act with almost a similar wording. The pecuniary jurisdiction of Primary Courts⁸⁵ has been enhanced in two ways: In proceedings for the recovery of civil debts, rent or interest due to the Republic or Local Authorities, pecuniary jurisdiction has been enhanced from shs. two thousand to shillings twenty thousand, whereas in civil proceedings for the recovery of a debt arising out of contract its jurisdiction has been enhanced from shillings one thousand to ten thousand. Explaining the reason why the pecuniary jurisdiction of Primary Courts had to be enhanced, the Minister for Justice stated as follows:

It is proposed that primary courts be given a pecuniary jurisdiction of shs. 20,000/-. This change takes into account the special changes which resulted from the implementation of the policy of self-reliance and decentralisation of Government administration One of the reasons why cases accumulate in the district courts is the fact that primary courts have very low pecuniary limit to their jurisdiction. Since economic activities in the villages have increased significantly and because the nearest

court in the villages is normally the primary court, it will be very proper if the pecuniary limit of the jurisdiction of the primary court is enhanced. We believe that, doing so would assist villagers by making them able to sue in their villages instead of leaving their work and go to the towns in search of justice.⁸⁶ [Emphasis provided]

It is submitted that the intention of the government as stated in the Minister's speech is not reflected in section 18(1)(a) (ii) and (iii) of the Magistrates' Courts Act, 1984. While it may be true that one of the reasons why cases accumulate in the *District Courts* is the fact that Primary Courts have very low pecuniary limit to their jurisdiction, the new Act has not provided a solution to this problem. The enhanced jurisdiction of Primary Courts concerns only proceedings for the recovery of civil debts, rent or interest due to the Republic, or Local Authorities and civil proceedings for the recovery of debts arising out of contract. In other words, the 1984 Act has not changed the legal position in so far as jurisdiction of Primary Courts over private persons in matters which do not arise out of Customary Law or Islamic Law or debts which do not

arise out of contract. There is no doubt that circumstances have changed since the interpretation by the courts of S. 14(1)(B) and subpara (iii) of the 1963 Act. However, it is suggested that Section 18(1)(a)(iii) of the 1984 Act should mutatis mutandis be given the same interpretation as the one given to S. 14(1)(B)(iii) of the 1963 Act. On the same reasoning the proposition that the new Act will assist villagers by making them able to sue in their villages instead of leaving their work and go to the towns in search of justice also fails.

4.5.2 Jurisdiction of District Courts

The jurisdiction of the District Courts has not been altered by the Magistrates' Court Act 1984. The Act has, however, enhanced their pecuniary limit from two hundred thousand shillings in cases involving immovable property, ^{to three hundred thousand shillings} and twenty thousand shillings to two hundred thousand shillings in other proceedings where the subject matter is capable of being estimated at a money value.⁸⁷ This is a step towards the right direction and is in fact long overdue, for such a move will alleviate the workload of the High Court.

In conclusion, one may say that the Magistrates' Court Act 1984 has neither changed the court system nor introduced any fundamental changes as far as the original jurisdiction of subordinate courts is concerned. One would even venture to say that the Act deserves the title it bears "An Act to repeal and re-enact with certain modifications, the Magistrates' Courts Act, 1963." At most the Act has enhanced the pecuniary jurisdiction of these courts leaving all other matters intact. Of course, the enhancement of the pecuniary jurisdiction of these courts, and especially the District and Resident Magistrates' Courts is a welcome step and is in fact long overdue. This no doubt, will help to ease the congestion of cases in the High Court which has resulted in long delays in their final determination. The enhanced pecuniary jurisdiction will also help to implement the principle of easy access to justice for more cases can now be heard by the subordinate courts especially the District and Resident Magistrates' Courts which are numerous in number compared with the few High Court centres.⁸⁸

The failure of the legislature to confer

general civil jurisdiction to Primary Courts, however, is highly regretted. It has been argued with the support of case law that Primary Courts have never had general civil jurisdiction. An attempt by Parliament to confer such jurisdiction on these courts by the 1968 Amendment did not receive the approval of the High Court. One would have thought that after failing to do so in 1968, the 1984 Act would have contained an express provision to that effect. In the absence of such a provision, the enhanced pecuniary jurisdiction will not help in easing the congestion of cases in the District and Resident Magistrates' Courts nor bring justice more closely to the people. This is because although Primary Courts are many in number compared to all other courts, they can only entertain claims arising out of contract or matters arising out of customary law and Islamic law. In other words, although Primary Courts are the nearest courts to the villagers, people will not be able to sue in their villages as envisaged by the Minister for Justice in his speech to Parliament. Instead, they will still have to leave their work and go to the towns in search of justice on all matters which do not arise out of Customary Law and

Islamic law. This will be contrary to the intention of the Minister. Alternatively, we are apt to condone the present practice of Primary Courts assuming general civil jurisdiction, which as stated earlier is illegal.

Having discussed the court system and the jurisdiction of the courts after independence, it is pertinent now to discuss the procedures of dispute settlement of these courts especially after the completion of the process of integration so as to establish whether or not there were any changes from those procedures which existed before independence.

4.6.0 Procedures of Dispute Settlement after Independence

The laws providing for the procedure of dispute settlement in the High Court and the subordinate courts are embodied in different enactments. While S. 60 of the Constitution of Tanganyika established the High Court it did not provide for its jurisdiction. The Judicature and Application of Laws Ordinance⁸⁹ gave the High Court jurisdiction as the one vested in the High Court of Justice in England. The High Court was required to exercise jurisdiction according to

Statute Laws, Applied Laws, Statutes of General Application, Principles of Common Law and Doctrines of Equity as they were in England on 22nd day of July, 1920.⁹⁰ Section 2(2) of this Ordinance provided that "The jurisdiction of the High Court shall be exercised in conformity with written laws which are in force in Tanganyika on the day this Ordinance comes into operation." This meant the continued application of the Indian Code of Civil Procedure Act 1908. This code was supplemented by the practice and procedure followed by the English courts on the Reception date by virtue of S.2(2) of the Judicature and Application of Laws Ordinance.

On the other hand, the Magistrates' Courts Act provided for the law governing the procedure of dispute settlement for subordinate courts. S.37 of this Act⁹¹ required District and Resident Magistrates' Courts to follow the Indian Code of Civil Procedure Act.⁹² However, this section does not make it mandatory for the District and Resident Magistrates' courts to apply the Code. They are only required to follow the code in so far as it is applicable and suitable. Thus in law, the District and Resident Magistrates' Courts

can depart from the Code by declaring it inapplicable and/or unsuitable to the proceedings at hand. It may be recalled that the subordinate courts Ordinance,⁹³ one of the laws replaced by the Magistrates' Courts Act contained the same provision under S. 6(2).

In summary, therefore, one may say that as far as the High Court, District and Resident Magistrates' Courts were concerned, there was in essence no change from the procedures which were followed before independence.

Primary Courts on the other hand were given supposedly different rules to follow in the procedure of dispute settlement. These rules were embodied in the Magistrates' Courts (Civil Procedure in Primary Courts) Rules.⁹⁴ These rules are in fact a simplified version of the Civil Procedure Code, covering inter alia, res judicata, stay of suits parties to suits, injunctions, summons, appearance etc.

Although fundamentally there is no distinction between the procedures which are followed in the other courts and those applied in the primary Courts there are useful departures which are worth discussing. The first important departure is the provision which allows proceedings to be initiated

in Primary Courts by "application" and not complaints.⁹⁵ Such applications may be written or oral. This departure definitely serves well many litigants who invariably act in person and are mostly ignorant of the requirements of pleading and other aspects of the law. When the party's complaint or defence is made orally, the magistrate or court clerk is required to record and sign it. As a result the application cannot be a cause of any party being non suited on account of some legal technicalities.

Another useful provision of the rules is that after the decision, the court is required to conduct an inquiry into the means of the judgment debtor to satisfy the judgment. This is for the purpose of enabling the court to fix both the period of time and the means by which the decree is to be satisfied. This procedure is more comprehensible to both the successful and the unsuccessful litigant compared to the formal alternatives under the Civil Procedure Code relating to execution of decrees.

Primary Courts are unlike other courts expected to take a very active role in the proceedings. This includes assisting parties with complaints, appeals as well as with the presentation of their cases.⁹⁶

It is submitted, however, that despite several steps taken by the government in order to have justice administered to the litigants in the way they are used to,⁹⁷ one cannot say that the procedure followed in the primary court is or resembles customary procedures. The atmosphere of the court itself and the manner of conducting trials are different from traditional ones. The personnel of the court which now includes semi-trained magistrates has made the character of primary courts proceedings depart from the customary procedures, and has become more formal and rule conscious. It follows that the procedures in the primary courts are quite different from what a person familiar only with indigenous dispute settlement procedures would know.

There is also the limitation as to who may participate in the court's proceedings. In the primary courts members of the audience who are neither parties nor witnesses in the case may not ask questions or give opinions, unlike in indigenous dispute settlement proceedings where all those in attendance had a right to participate. Furthermore, the primary court is further limited by procedures intended to designate one party in

the dispute as the winner and another as the loser. In customary proceedings the purpose of the dispute settlement proceedings was to reconcile the parties, and maintain the **social** equilibrium thus the notion of win a little, and lose a little.

To conclude, one may say that the inclusion of a simplified Code of Civil Procedure for Primary Courts has not brought the desired effect of either making proceedings under these rules informalised or of making Primary courts successors of the Local Courts which they replaced. Even if it is argued that primary courts are distinct in character from the superior courts, still they are by no means identical to the customary process they replaced. The fact is that primary courts have basically moved away from traditional methods of settling disputes towards the adversarial system of dispute settlement. The duality of procedure which was intended to be between primary courts and the other Higher courts is therefore more imagined than real. It is interesting to note at this juncture that the enactment of the Magistrates' Courts Act 1984⁹⁸ has not altered the above discussed position.

We have seen that basically there was no fundamental change in the laws regulating procedures of dispute settlement both in the High Court, the District and Resident Magistrates' Courts after independence. What remains now is to discuss whether the enactment of the Civil Procedure Code Act in 1966 by the independent government introduced any changes in the law regulating procedures of dispute settlement in the above mentioned courts. This discussion will also entail evaluation of the relevance *efficacy* and suitability of this law to the prevailing conditions in Tanzania.

4.7.0 The Civil Procedure Code Act, 1966

In October 1966 Tanzania was on the threshold of the Arusha Declaration. The country - at least its parliament was full of nationalist sentiments. These can be seen in the debate on the Civil Procedure Code Bill which was proposed to "replace" The Indian Code of Civil Procedure.

On 28th September, 1966 the Attorney General introduced it to Parliament stating as follows:

... Apart from such laws not being effective, there is another reason

why the laws should be reexamined. Tanzania, Mr. Speaker, is presently self-ruled. There is no reason why her laws should have foreign names. Our laws must be Tanzanian.⁹⁹

Indeed, the Tanzanian Code had no other difference from its Indian predecessor apart from their names. This, according to the Attorney General was having our own Civil Procedure Code and a rejection of foreign law which according to him entailed importing foreign expertise to come and interpret it for us. He went on to say;

I am sorry the Bill is long, but apart from this, it does not have any frightening things amambo ya kutisha

After emphasizing on its "ordinariness" he advised;

.... If the members see that it is too technical, then they should not be surprised, for even lawyers themselves have to really read it in order to understand it.¹⁰⁰

The debate went on in this nebulous vein.

One member, Honourable Mr. Kwilasa, congratulating the Attorney General for "changing the laws which used to go the Indian way" and asserting that the

Bill fitted our Tanzanian way of life. Upon the second reading of the Bill there was not much debate. The Bill was passed after only one member (The Minister for Regional Administration) saying one word "Naafiki" (I second). This is how Tanzania got its present Code of Civil Procedure,¹⁰¹ a replica of its predecessor. It may be recalled that this Code was a subject of severe attack from different quarters when it was first introduced in 1920. Was the independent government justified in reproducing it wholesale in 1966, or did Parliament squander a good chance of effecting useful and substantial changes in this law? To answer *this* question, a critical analysis of the Civil Procedure Code in the light of the prevailing material conditions in Tanzania is inevitable. But since it is impossible in this work to undertake such a task, this discussion will be confined to few selected areas from which a general conclusion will be drawn. With these remarks, the discussion can now commence.

Under the adversarial system of dispute settlement courts do not start lawsuits. Their sole duty is to decide cases that are brought

before them. For any action to commence, it is therefore incumbent upon the plaintiff to set the procedure in motion. From the beginning up to the end of the proceedings, the parties are the masters of the procedure. The court plays a minimum role of regulating the procedure according to law. It will not take any procedural step in the proceedings unless it has been invited to do so by the parties themselves. In the same vein, the plaintiff is the one who chooses the forum, initiates the proceedings and proves his case against the defendant.

4.7.1 The Choice of Forum

The question of deciding which court to institute a suit is of utmost importance and highly technical. This is so because there are various courts in Tanzania with different powers. The powers of these courts have both territorial and pecuniary limits prescribed by the legislature. We have argued in this chapter that such powers cannot be conferred or enhanced by either the parties themselves nor assumed by the court itself. Proceedings instituted in a court without competent jurisdiction are a nullity.¹⁰²

In deciding where to file a suit, therefore, one has to take into account the nature of the subject matter of the dispute.

In cases concerning immovable property S. 14 of the Civil Procedure Code requires such suits to be filed in the court within whose local limits of jurisdiction the property is situated, subject to the subject matter not exceeding the pecuniary limitation of the jurisdiction of such court.¹⁰³ Under the same category if the suit is for the purposes of obtaining relief or compensation can be entirely obtained through the defendant's personal obedience, such a suit may be instituted in the court within whose local limits of jurisdiction the property is situated or the defendant actually resides or carries on business for gain. Section 15 of the Code deals with a situation where the property is within the jurisdiction of different courts. In such a case the suit may be instituted in either of the courts. Where there is uncertainty as to which court has jurisdiction over the subject matter (which must be an immovable property) within the local limits of the jurisdiction of two or more courts in which the immovable property is situated,

any one of those courts, may entertain any suit relating to that property.

As far as suits for compensation for wrongs done to the person or to immovable property are concerned, the position is different. In cases of wrongs committed in an area which is within the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the plaintiff has the option of filing the suit in the court which exercises jurisdiction over the area in which the wrong was committed, or he may file it in the court exercising jurisdiction in the area in which the defendant resides or carries on business for gain.¹⁰⁴ In all cases the choice of the court for purposes of filing a suit always depends on where the cause of action arose and/or where the defendant resides or carries on business for gain and never on where the plaintiff resides.¹⁰⁵

4.7.2 Appearance of the Defendant

After the plaintiff has selected the court with competent jurisdiction and filed his suit the next stage is to secure the appearance of

defendant. This stage is equally important because the purpose of civil litigation is to have an enforceable decision. Thus, it is important from the outset to make sure that either the defendant or the property involved can be found within ~~the~~ limits of the court's jurisdiction so that the judgment of the court can be enforced. That is why the rules provide that a suit should be filed either where the defendant resides or works for gain or where the cause of action arose. This is intended to facilitate quick and easy access to either the property or the person of the judgment debtor.

Securing the attendance the defendant in civil cases unlike in criminal cases is ordinarily symbolic. A summons is served on the defendant which serves as a notice that a lawsuit has been instituted against him and in what court and by whom. The summons does~~not~~, however, compel him to attend court. The only result of disregarding a summons is that judgment may be entered against the defendant by default.¹⁰⁶

4.7.3 Stating the Claim

The plaintiff must tell the court and the defendant what is that he complains of and what

he wants the court to do about it. In other words, the plaintiff must show a cause of action against the defendant and the relief which he seeks from the court.

This is done well in advance of the trial, by the parties narrowing down the issues of fact and law on which they differ by exchanging written statements of their respective claims. The written statements that are exchanged by the parties are called pleadings. The plaintiff is the first to state his claim and request for relief in a written document called a plaint.¹⁰⁷

Once the defendant finds what the dispute is all about, and does not admit it he has to file an answer in a formal document called a Written Statement of Defence. This states the defendant's position in the controversy, in which he has to reply to all allegations made by the plaintiff in his plaint.¹⁰⁸

4.7.4 Hearing

The issue(s) on which the parties are in dispute are disposed of by the proceedings during trial. This consists chiefly of the presentation by the two competing parties of their view on the facts, through documents, physical exhibits and

the oral testimony of witness.¹⁰⁹ The decision of the court is based on what the parties have offered. The Court is not supposed to make any independent investigations.

After hearing the issues of law or of fact the court makes a finding which is reduced into writing and is called a judgment. The judgment is given on the basis of winner-gets-all and no compromise is envisaged.

4.7.5 Enforcement of Judgments

Litigants go to court to seek redress because they have confidence that the court will not only declare their rights as far as they can be ascertained, but also that the court will pronounce and enforce a relief prayed for. The implementation of the court's decrees and orders is facilitated by the law governing the enforcement of judgments.

Judgment for the defendant is the simplest one to enforce. There is no need for any private or public person to do anything to enforce it. In case the plaintiff continues to assert the same claim or institutes another suit on it, the defendant will simply plead the prior judgment in defence. That is the plea of res judicata.

If it is proved that the suit

is based on the previous claim and between the same parties then the plaintiff will automatically be nonsuited.¹¹⁰

Judgment for the plaintiff is the most difficult one to enforce. Normally there are two types of judgments. The first type deals with recovery of money. This is a decree issued ordering the payment of money by the judgment debtor to the decree holder. It must be noted that the court's judgment that the plaintiff is entitled to be paid is not an order by the court to the defendant to pay the money. On the contrary, it is simply a declaration by the court that the law applicable to the facts obligates the defendant to pay the plaintiff a certain sum. Thereafter the court does not concern itself with seeing to it that the defendant satisfies his legal obligation to the plaintiff. It is upon the plaintiff now to take the necessary steps in order to ensure that his judgment is satisfied.

Judgments are normally followed by an order or a decree of the court requiring the judgment - debtor to pay a specific sum or sums of money to the decree - holder or holders. On the

application of the judgment creditor, the court has the power to order the execution of the decree. The application for the execution of money judgments must be made to the court which passed the decree or to the court to which the decree has been ^atransferred. The general rule is that such applications must be in writing specifying several matters and wherever it is desired by the court the applicant should produce a certified copy of the decree.¹¹¹

Where the decree is for the payment of money an oral application may be made to the appropriate court at the time of passing the judgment. In that case, the court may order the arrest without warrant of the judgment debtor if he is still within the precincts of the court.

The second type of judgments are non-money judgments such as possession of goods and land, specific performance, injunctions etc. In these cases the court will give an order to the defendant according to the relief sought by the plaintiff. If the defendant refuses to obey the court's order, he will be punished by fine or imprisonment for contempt of court. Since the court has given him a specific command, his

disobedience is an affront to the dignity of the court and, indirectly a challenge to the state; and therefore he has to be punished.

From the above discussion, it is clear that the present law of Civil Procedure, based on the adversarial system of dispute settlement is governed by what may be called the rules of party presentation and party prosecutions. The parties are required to do everything during the whole proceedings. These rules presuppose that the parties are literate, have enough legal knowledge or in short, know all the technicalities of the law. We are of the opinion that the situation in Tanzania does not allow the application of such rules without causing injustice. The majority of the people know very little about legal technicalities, and persons endowed with legal knowledge are very few and where private advocates are available, they are also few and expensive and so the majority of the litigants cannot afford to engage them. This raises one fundamental question, that is, whether the adversarial system of dispute settlement, a procedure in which the court plays the role of the umpire, is really suitable to the Tanzanian

situation. One may hasten to say that the Magistrate in Tanzania should participate more actively in the course of the case to ensure that all facts are placed before him particularly where one or both parties might otherwise fail to do so due to lack of legal knowledge or adequate legal representation.

As a matter of fact one of the problems which cause trouble in courts and lead to loss of efficiency is that fundamentally "we are operating an adversary system in conditions where often there can be no argument because one side or both of them are not represented. Instead of having two or more trained people arguing vigorously hence enabling the judge or magistrate to make decisions after having the whole field explored for him, the judge or magistrate too often has to attempt to do everything himself."¹¹³

It is submitted that this is the greatest weakness of the adversarial system at the moment. We are operating it on the basis that is not factual and "it is always dangerous to operate a system in circumstances which are substantially different from those in which it is intended to operate. There is no doubt that the majority of

people in Tanzania cannot afford the services of private advocates or those offered by the Tanzania Legal Corporation." It is contended that this system as it operates at present is often apt to lead to miscarriage of justice.¹¹⁴

It is however encouraging that the government has at last realised the problems emanating from the present Law of Civil Procedure. One of present task of the Law Reform Commission of Tanzania is to advise the government on changes which can be made in the Civil Procedure Code Act of 1966 in order to hasten the process of civil litigation.¹¹⁵ It is hoped that the Commission which has already started soliciting views on this will also make the necessary recommendation of enabling the court to play a more active role than its present role of an umpire.¹¹⁶

NOTES

1. H.F. Morris and S.J. Read - Indirect Rule and The Search for Justice Clarendon Press Oxford 1972 pg. 104.
2. Statutory Instruments, 1961 No. 2274.
3. The Republic of Tanganyika (Consequential Transitional and Temporary Provisions) Act, 1962¹ Act No. 2 of 1962.
4. The Local Courts Memorandum No. 2 of 1951 at pg. 17.
5. Hansard: Report on Debates in the National Assembly Dar es Salaam Government Printer, 1963. Column 908.
6. S. 12 and 39D respectively of the Local Courts (Amendment) Ordinance No. 38 of 1962.
7. S. 3(1) of the Local Courts (Minister for Justice and Regional Local Courts Officer) Act No. 16 of 1962.
8. S. 2 of the Local Courts (Amendment) Ordinance 1962.
9. Presently there are Area Commissioners and District Party Secretaries in each District; and Regional Commissioners and Regional Party Secretaries in each Region. Regional Commissioners are ex-officio members of the Parliament. See also S. 19(1) & 23(1)(e) of the Constitution of the United Republic, 1977. S. 64(1) The Constitution of CCM 1982.
10. Cap 537.
11. Ibid S. 4(1); and 5(1) respectively.
12. Ibid S. 6(1)

13. Ibid S. 66 (1) and Schedule I 26(1) read together with S. 39(1)(a) respectively.
14. S. 16 of the Magistrates Courts Act 1963.
15. S. 16(1)(a) & (b) The Court of Appeal of the United Republic of Tanzania was established after the break up of the East African Community in 1977 See S. 68A of the Constitution: It was inaugurated on the 22nd day of October, 1979 by the President of the United Republic of Tanzania.
16. The Magistrates Courts Act 1984 Act No. 2 which repeals and replaces the Magistrates Courts Act 1963 retains the same position under S. 33(1).
17. Cap 16 of the Laws (Revised).
18. Cap 20 of the Laws (Revised) Repealed and Replaced by Criminal Procedure Act, 1985.
19. Order 9 rule 8 of the Civil Procedure Code Act No. 49 of 1966. See also Abdallah Habib v. Harben [1960] E.A. 325.
20. O.7 r. 10(1) of the Civil Procedure Code op. cit.
21. See Lord Diplock, C.J.'s judgment in Anisminic Ltd v. The Foreign Compensation Commission and Another [1967] All E.R. 986 at pg. 994.
22. Mulla, D.F. Code of Civil Procedure Act of 1908, N.M. Tripathi Private Ltd, 1965.
23. See Sellors J.'s Judgment in Anisminic Ltd v. The Foreign Compensation Commission and Another op. cit. at pg. 990.
24. [1841] I Q.B. 66 at pg. 74.
25. [1968] HCD n. 120.
26. S. 14(1) of the Magistrates Courts Act 1963 op. cit.

27. [1934] 16 K.L.R. 47 at pg. 48.
28. [1967] 2 All E.R. 986 op. cit.
29. The Judicature and Application of Laws Ordinance Cap 531 of 1961 as ammended by the Magistrates Courts Act, 1963 S. 2(2) Reception date is 22nd day of July 1920.

This clause adopts English law which was in force before independence. Its effect is that courts in Tanzania can apply English law which has already been repealed in England.
30. See S. 4(1) and S. 3(1) of the 1963 Act and 1984 Act respectively and S. 5(1) and S. 4(1) of the 1963 and 1984 Act respectively.
31. See S. 6(1) and S. 5(1) of the 1963 Act and 1984 Act respectively.
32. S. 14(1) (ii) & (iii) and S. 18(1)(ii) & (iii) respectively.
33. S. 35(2)(a) & (b) and S. 40(2)(a) & (b) respectively.
34. S. 14(1)(a)(i) and S. 18(1)(a)(i) of the 1963 Act, and 1984 Act respectively.
35. S. 35(2) and S. 40(2) of the 1963 Act and 1984 Act respectively.
36. * See S. 57(1) and S. 63(1) of the Magistrates' Courts Act, 1963 and 1984 respectively. See also Francis Mwijage v. Boniface Kabalomeza [1968] HCD n. 341.

Kulthum Ally Kara v. Yasin Osman
[1968] HCD n. 340.
37. Act No. 5 of 1971 SS. 75(2) and 76.
38. [1971] HCD n. 166.

39. See SS. 20, 21 & 24 of The Workmen's Compensation Ordinance Cap 263.
40. Cap 453 S. 3.
41. Cap 335.
42. Cap 341.
43. Cap 212.
44. Cap 24.
45. Act No. 25 of 1970 S. 25.
46. Act No. 47 of 1967 S. 13.
47. Cap 431.
48. Cap 574, 1964.
49. 1970 HCD n. 242
See also Mohamed & Others v. The Manager Kunduchi Sisal Estate 1971 HCD n. 430.
50. 1970 HCD n. 24.
51. Examples of statutes with finality clauses are Tanzania News Agency Act, No. 14 of 1976 S. 7(4) P
Private Hospitals (Regulation) Act, No. 6 of 1977 S. 14
Preventive Detention Act, No. 60 of 1962 S.3
Civil Service Act, No. 11 of 1962 S. 27(1)
Permanent Labour Tribunal Act, 1967 S. 9B
52. Act No. 23 of 1975 Ist Schedule Article XIX.
53. 1956 I All E.R. 855 at pg.
See also The State and Statutory Exclusion of Judicial Review by S.E. Mvungi: Course-work Paper submitted in partial fulfilment of Master of Laws Degree Course of the University of Dar es Salaam, 1983/84 (mimeo).

54. [1971] HCD n. 247.
55. [1971] HCD n. 247 at pg. 173.
56. For more discussion on ouster clauses
See also M.R.M. Lamwai; The Development of
The Administration of Civil Justice in
Kenya and Tanzania: A Critical Analysis:
Ph.D. Thesis, School of Oriental And
African Studies, London University,
November 1983 pg. 300 (mimeo).
57. Hansard 24th June 1966 7th Meeting Column
909 (Unofficial translation).
58. of the Magistrates' Courts Act 1963 op. cit.
59. Act No. 49 of 1966 op. cit.
See also Tanzania's Law of Civil Procedure
in A Historical Socio-Economic Context.
Lamwai, M.R.M. LL.M. Dissertation,
University of Dar es Salaam, 1978 pp. 77 -
78 (mimeo).
60. [1968] HCD n. 341.
61. Kulthum Ally Kara v. Yassin Osman
[1968] HCD n. 340.
62. [1967] HCD n.. 331.
63. [1968] HCD n. 81
See also
Ephrain Obongo v. Naftael Okeyo
[1968] HCD n. 288
Hassan s/o Sefu v. Muru s/o Mohamed
[1968] HCD n. 445
Endoshi v. Lema [1971] HCD n. 445
Bicoli v. Mahemba [1971] HCD n. 420.

64. [1968] HCD n. 80.
65. Hansard 14th Session, 1st October, 1968 - 3rd October, 1968 Column 53.
66. Act No. 50 of 1968.
67. [1970] HCD n. 12.
68. G.N. No. 310 and 312 of 1964.
69. [1968] HCD n. 80 op. cit.
70. per Seaton, J. in Ephraim Obongo v. Naftael Okeyo op. cit.
71. S. 5(1) of the Magistrates' Courts Act 1963 op. cit.
72. Cap 479 of 1962 as ammended by
73. S. 35(2)(a) of the Magistrates' Courts Act 1963 op. cit.
74. S. 35(2)(b) Ibid.
75. See Kulthum Ally Kara v. Yassin Osman op.cit. and Francis Mwijage v. Boniface Kabalemeza op. cit.
76. S. 35(1)(ii) of the Magistrates' Courts Act 1963 op. cit.
77. Act No. 5 of 1971 S. 76.
78. S. 22(1) & S. 23(1) of the Land Ordinance Cap 113.
79. S. 2 and S. 2 of the Magistrates' Courts Act, 1963 and 1984 respectively.
80. S. 40(2) and S. 40(1)(b) of the Magistrates' Court Act, 1963 and 1984 respectively.
81. Cap 113, SS. 22(1) & 23(1).
82. Cap 278 S. 2.

83. Cap 366 S. 133(1).
84. S. 35 proviso(ii) and S. 40 proviso(ii) of the Magistrates' Court Act, 1963 and 1984 respectively.
85. established under S. 3(1) of the Magistrates Court Act, 1984 Act No. 2.
86. Minister's Speech to Parliament on the first reading of the Magistrates' Courts Act Bill, 1984 (unofficial translation).
87. S. 40(2)(a) and (b) respectively of the Magistrates' Courts Act, 1984.
88. See Appendix I for number of subordinate Courts and High Court centres.
89. Cap 453 of 1961 S. 2(2).
90. Confer Article 17(2) of the Tanganyika Order in Council, 1920.
91. Cf. S. 42(b) of the Magistrates' Court Act 1984.
92. After 1966 they follow the Civil Procedure Code Act, No. 49 of 1966.
93. Cap 3 No. 15 of 1941.
94. G.N. No. 310 of 1964. Appears in the 4th Schedule of the Magistrates' Court Act. The Primary Courts (civil Procedure) Manual 1964 was published to guide Primary Court Magistrates in applying these rules.
95. rr. 15 and 16 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules op. cit.
96. rr. 4 and 11(1)
See also rr. 36, 37, 41, 47 and 49.
97. Ibid rr. 5, 15 and 16.

98. Act No. 2 of 1984 applied from 1st July, 1984 by G.N. 112 of 1984 repealed and replaced the Magistrates' Courts Act, 1963 Act No. 15 of 1963 Cap 537.
99. Hansard 11/9/1966 - 27/9/1966, G.P. Dar-es Salaam, pg. 32 (This is the author's translation of the Swahili Speech.
100. Ibid pp. 32 - 33.
101. The Civil Procedure Code, 1966 Act No. 49 of 1966.
102. See pp. 149 - 182
103. See S. 14 & S. 15 of the Civil Procedure Code Act, 1966 for the list of suits under this category.
104. Ibid S. 17
105. Ibid S. 18 see also explanation I & II of this section.
106. Ibid. O IX rr 11 & 12 Schedule I
107. Ibid S. 22 read together with O. VII See also O VI on Pleadings generally.
108. See Ibid O. VIII for requirements of the defendant's pleadings.
109. Ibid S. 26 & 27; O.XI, XVIII, O.XVI rr I & 2(1)
110. Ibid S. 9
See also. The Doctrines of Res Judicata and Res Subjudice. L.X. Mbunda, Coursework paper submitted in part fulfilment for the degree of Master of Laws of the University of Dar es Salaam (mineo)
111. O. XXI r. 10 Schedule I Civil Procedure Code, op. cit.

112. Report on Judges' and Magistrates' Conferences, Nov. 1967 - March 1968 (1968) I E.A.L.R. 167, 174
113. The Law & You
Sunday News, September 30th 1984 pg. 8
114. See Appendix II for number of Advocates and the Literacy rate in Tanzania.
115. The Law Reform Commission of Tanzania was established by the Law Reform Commission of Tanzania Act. No. II of 1980. The Act became operative on August, 15th 1983, and the Commission was formally launched on October 21, 1983. See also:
The Law Reform Commission takes off:
Sunday News, June 17th 1984
116. See The Law Reform Commission of Tanzania Delays in Civil suits. Daily News, Thursday, April 18th 1985 pg. 4.

CONCLUSION

This work has attempted to argue that the law of Civil Procedure in Tanzania is alien and was imposed by a foreign power. It has been shown that before the imposition of the present law, the indigenous people had different procedures of dispute settlement depending on whether the society was centralised or non-centralised. The level of the development of the productive forces in each particular society is what determined the procedure of dispute settlement

We have argued in this dissertation that to understand traditional dispute settlement procedures it is important to give an outline of the socio-economic basis from which dispute settlement procedures arose. Our assertion is that traditional societies in Tanganyika before colonialism was characterised by primitive mode of production whereby man had not yet fully attained a mastery over nature. His tools were still simple and in the main consisted of sticks, stones and where further development had taken place arrows and spears. Man mainly lived by simple appropriation, a mode of life of which collective labour by

the community was a necessity. The only division which existed was based on sex. On the whole each able bodied member of the group participated in the production process. Distribution of property was equal. There was no surplus.

Production relations corresponded to the level of development of the productive forces. The means of production, that is land, was owned collectively and so were the tools of labour.

The social organisation of the traditional societies was characterised by social homogeneity. There was no institutionalisation of differences, no antagonistic classes and exploitation of man by man. There was no public power as such, hence, there was group solidarity and participation by all adult members of the community in the affairs of such a society. This was done through the observation of social customs, usages and taboos, manifest in religious beliefs which were known by each and every member of that society.

Traditional dispute settlement procedures were not administered by a special public power or institution except for the few centralised societies where power was concentrated.

ted in a nascent bureaucracy. These procedures were characterised by arbitration, compromise oath, ordeal and conciliation. There were as many dispute settling institutions and procedures as there were tribes. The right to appear and prosecute one's own rights as pronounced in the adversarial system did not exist in these societies. Instead, representation procedures were most common. Parties to a suit, though present, did not appear in person but were represented by what may be equated to the present day paid advocates. The main purpose and therefore the role of these procedures was to effect reconciliation between the parties and not to punish the offender as is the case in modern methods of settling disputes. To further the aim of reconciliation judgment was given on the basis of win-a-little and lose-a-title, unlike at present where judgment is given on the basis of winner-gets-all.

Although pre-colonial Tanganyika was not wholly free from class contradictions, these contradictions were minute compared to those which were subsequently imposed by colonialism. As a result, even in those societies with centralised authority, procedures of dispute settlement were geared towards balancing and maintaining the equilibrium of these societies

by arbitration and reconciliation through compensation and restitution of property.

The coming of the Germans into German East Africa marked the disintegration of both the political and social organisation as well as the traditional procedures of dispute settlement. In its place, the adversarial system of dispute settlement was introduced. Although the German colonists attempted to classify procedures into those which applied to the natives and those which applied to other non-Europeans, this did not halt the integration of the indigenous native laws and procedures into German Laws and procedures.

German rule in German East Africa, however, was too short lived to establish a well defined Code of Civil procedure. Much of the tribal dispute settlement were left in the domain of customary law without much interference by the colonial masters except in few areas where the Germans established their residence and colonial administration.

Unlike the Germans, British colonialism established a well entrenched colonial state in Tanganyika. The British colonial administration contributed significantly to the erosion of the then already established indigenous procedures of dispute settlement.

This erosion resulted from the radical alteration of the existent social organisation. The British entrenched the newly introduced capitalist mode of production into the tribal structures. This necessarily corroded the traditional legal systems and established ground for the functioning of an alien legal system. The present legal system in post colonial Tanzania is therefore a direct result of colonialism. Pre-colonial Tanganyika knew no codified laws as we know them today. Law became more pronounced and definite with the growth of private property, something which pre-colonial Tanganyika was not familiar with.

British colonialism began with a systematic development of the court system with two separate structural hierarchies. One structure applied to non-natives and the other one applied to natives. The former applied English law and the latter applied native laws. In the same vein the procedures of settling disputes were also different. The Indian Code of Civil Procedure applied in the English Courts, while the native courts were left to regulate their procedures according to native law and custom with the proviso that such native laws and customs were not to be repugnant to justice and morality. We have shown how this

repugnancy clause became an instrument of sweeping away traditional procedures of dispute settlement and replacing them with English procedures of dispute settlement.

Like the Germans, the British also tried to retain traditional dispute settlement procedures. However, we have shown that for various reasons, the retention of these procedures proved impossible. At independence, most of the traditional procedures of dispute settlements had been swept away, ^{and} adversarial procedures in one form or the other were being followed by all the courts in the country.

The attainment of independence did not change the colonial legal system. More than twenty years after independence, the Tanzania Legal System has not been able to depart from the inherited common law system. The entire system of law which operated before independence has been carried over. This means the traditional Western concepts of law and justice are still applicable. The adversarial system has been accepted as the basis of settling disputes.

The Indian Code of Civil Procedure continued to be applied until 1966 when the Civil Procedure Code Act was enacted. We have

Seen that this was a wholesale reproduction of the Indian Code except for the name. This was the confirmation of the acceptance of the adversarial system of dispute settlement.

The question now is whether the prevailing circumstances in Tanzania have the necessary requisite upon which the adversarial system operates. We find it unreasonable and indeed objectionable for a country like Tanzania to be using another country's laws. Was the change of name enough to make what would otherwise have been a "foreign law" Tanzanian law? What is in a name? It is contended here that Parliament squandered a good chance to effect useful and substantial changes in the law of Civil Procedure. For instance, couldn't Parliament enact a Code which would allow active participation of the courts in civil litigation considering both the ignorance of the parties and the fact that most of them are invariably not represented by legal counsel? Why didn't Parliament think of incorporating provisions which would allow any person considering himself competent to represent another in a civil suit? The present rule adopted from the Indian Code that parties must appear either by themselves or by an advocate duly instructed or by a

Recognized Agent with the exception to suits by minors and persons of unsound mind who can be represented by a "Next Friend" or a guardian ad litem cannot be defended. This rule excludes not only many other legally qualified people who are not registered as advocates from appearing and addressing the court thus denying many litigants from getting legal advice and assistance, but also prevents other persons who may be comparatively more competent to prosecute a case on behalf of a party than ^{the} party himself. It is common knowledge that Tanzania does not have enough private legal practitioners. The possibility of their number increasing in the near future is also slim considering the output of law graduates from the Faculty of Law, University of Dar es Salaam. As a matter of fact, a Committee is at present working on the abolition of private legal practice in Tanzania. Even if it is not abolished the few number of advocates available, coupled with the high costs of hiring them, make the private bar unreliable to offer adequate legal services to the people, which however is the basis upon which the adversarial system operates.

What we, however, consider to be the most unfortunate omission was the exclusion of the principles of conciliation. This,

as we have well seen, is not a new thing among the people of Tanzania, and is not retrograde either. If Ujamaa literally means brotherhood, one of the ways of implementing this socialist ethic should have been incorporating conciliation in settling disputes as useful procedures in our Civil Procedure. The police, party cadres, mass organisations, local groups and other extra-judicial agencies may help to solve many disputes. Over and above these the law could have established numerous semi-official conciliation committees specifically charged with resolution of civil disputes.

We however point out here that the effort of indicating what we missed and what we could have adopted is quite apart from suggesting that Tanzania should henceforth turn to reconciling litigants. This cannot be. Our laws must be a reflection even if distant - of the capitalist relations to which we are party. But if we take into consideration the repeated assertions by the party and the Government that we are building Ujamaa - which is at the very least not capitalism and at best a brand of socialism, an old colonial Civil Procedure Code which has been cosmetically "Tanzanianised" by having its name changed

is an embarrassing anachronism.

To sum up it can now ^{be} stated that it is now settled that historically the mode of production and exchange existing in Tanganyika at present was superimposed, and is still maintained by imperialist forces. The rules and orders for regulating the property relations were correspondingly imposed, and in fact are still imposed on the independent state of Tanganyika. Therefore in as much as the socio-economic relations remain basically unchanged it necessarily follows that the validity of the present Civil Procedure Code remain largely uncontradicted.

APPENDIX 1

NUMBER OF COURTS OF DIFFERENT GRADES AND THEIR
PERSONNEL/AT JANUARY, 1985.

TYPE OF COURT	TOTAL NUMBER	NUMBER OF MAGISTRATES/JUDGES
1. PRIMARY COURT	838	872
2. DISTRICT COURT	79	127 ^X
3. RESIDENT MAGISTRATES COURT	25 ^{XX}	73
4. HIGH COURT CENTRES	8 ^{XXX}	25

X Out of these 34 are District Magistrates with Civil Jurisdiction.

XX Resident Magistrates' Courts are established in the following centres.

Arusha, Bukoba, Dar es Salaam, Dodoma, Geita, Iringa, Kigoma, Kilosa, Korogwe, Lindi, Maswa, Mbeya, Morogoro, Mtwara, Musoma, Mwanza, Nzega, Shinyanga, Singida Songea, Sumbawanga, Tabora, Tanga, Tarime and Tukuyu. See The Magistrates' Court (Courts of a Resident Magistrate Consolidation) Order, G.N. No. 137 of 1977.

XXX High Courts are found in the following centres.

Mtwara, Mbeya, Dar es Salaam, Tabora, Tanga, Arusha, Mwanza and Dodoma.

Source: The Registrar, High Court of Tanzania, Dar es Salaam.

APPENDIX II

ADVOCATES IN TANZANIA ACCORDING TO THEIR AS STATIONS/AT JANUARY, 1985.

PLACE OF BUSINESS	NUMBER
ARUSHA	11
BUKOBWA	2
DAR ES SALAAM	50
DODOMA	3
IRINGA	2
MBEYA	3
MOROGORO	1
MTWARA	1
MUSOMA	1
MWANZA	5
SHINYANGA	2
SONGEA	1
TABORA	3
TANGA	5
TOTAL	98

Notes: (i) The figures include Advocates practicing privately i.e. self employed and those of the legal aid.

(ii) Advocates of the Tanzania Legal Corporation are not included in these figures. In this case the Advocate is the Corporation.

Source: Tanganyika Law Society Records.

(iii) The total population of Tanzania in 1978 was 17,512,610.

(iv) The Literacy Rate of Tanzania Mainland was 8,536,527 which is 51.6% of the total population. This is the population aged 10 years and above, as was in 1978 who could read and write in Kiswahili Language.

Source: United Republic of Tanzania 1978 Population Census, Volume VIII Bureau of Statistics, Planning and Economic Affairs, Dar es Salaam, 1983.

19. Marx, K. & Engels, P. Selected Works in one Volume, Progress Publishers, Moscow, 1968.
20. Maureen, C. & Kalmar, K (eds) Dispute and the Law (Akadémiai Kiadó, Budapest) 1983.
21. Morris, H.F. & Read, J.S. Indirect Rule and the Search for Justice. Essays in East African Legal History. London, Oxford University Press, 1972.
22. Mulla, D.F. Code of Civil Procedure Act 1908, N.M. Tripathi Private Ltd, 1965.
23. Nyerere, J.K. Freedom and Unity (Uhuru na Umoja) Dar es Salaam, Oxford University Press, 1966.
24. Outline of Indian Legal History, N.N. Tripathi Ltd:, Bombay, 1952.
25. Pollock & Mattland. History of English Law, 2nd. Ed. (1899) Cambridge University Press.
26. Rigby, P. "Gogo Kinship and Social structure" in Changes in Local Government, Ithaca, Cornell University Press, 1969.
27. Sawyerr G.F.A. (ed) East Africa and Social Change, The East African Institute of Social and Cultural Affairs, Nairobi E.A.P.H. 1971.

BIBLIOGRAPHY:

A: BOOKS:

1. Agarwala, R.D. The Code of Civil Procedure, Hindu Publishing House, 1968.
2. Allot, A.N. Adaptation and Development in African Law, 1965, H. Kuper & L. Kuper (eds) Essays in African Law, London, Butterworth & Co. (Republishers) Ltd. 1960.
3. Black's Law Dictionary 4th. Edition.
4. Burke, J. Osborn's Law Dictionary 6th. Ed. London, Sweet & Maxwell, 1976.
5. Cliff, L. & Saul, J (eds) Socialism in Tanzania Vol. 1 E.A.P.H. 1973
6. Elias, T.O. The Nature of African Customary Law, Manchester University Press, 1956.
7. Engels, F, Selected Works in Three Volumes Vol. Three, Progress Publishers, Moscow.
8. Extracts from German Ordinances and Decrees of German East Africa, The Standard Printing and Publishing Works, 1916
9. Gluckman, M. Ideas and Procedures in African Customary Law, London, Oxford University Press 1966.

Judicial Process Among the Barotse
of Northern Rhodesia, Manchester
University Press, 1955.

10. Gulliver, P.H. Social Control in an African
Society; A Study of the Arusha.
London, Routledge & Kegan Paul, 1963.
11. Hans, C. Sheria na Kawaida za Wanyamwezi;
DSM, G.P. 1955
Sukuma Law and Custom, Oxford Uni-
versity Press, 1953.
Customary Law of the Haya Tribe,
London, Frank Cass, 1971.
12. Haydon, E.S. Law and Justice in Buganda, London,
Butterworth, 1960.
13. History of East Africa, Vol. 11, Oxford University
Press, 1965.
14. James, R.W. & Kassam, F.M. Law and its Admini-
stration in One Party State, DSM.
E.A.L.B. 1973
15. Lenin, V.I Selected Works, Vol, 2 Progress
Publishers Moscow.
16. Maine, Early Law and Custom 1890. John
Murray 1907 (ed.)
17. Manson, E. & (eds) Great Jurists of the World,
Sir John, M. Little Brown & Co. Boston. 1914
18. Marx, K. A Contribution to the Critique of
Political Economy, Progress Publishers
Moscow, 1970.

19. Marx, K. & Engels, F. Selected Works in one Volume, Progress Publishers, Moscow, 1958.
20. Maureen, C. & Kalmar, K (eds) Dispute and the Law (Akadémiai Kiadó, Budapest) 1983.
21. Morris, H.F. & Read, J.S. Indirect Rule and the Search for Justice. Essays in East African Legal History. London, Oxford University Press, 1972.
22. Mulla, D.F. Code of Civil Procedure Act 1908, N.M. Tripathi Private Ltd, 1965.
23. Nyerere, J.K. Freedom and Unity (Uhuru na Umoja) Dar es Salaam, Oxford University Press, 1966.
24. Outline of Indian Legal History, N.N. Tripathi Ltd., Bombay, 1952.
25. Pollock & Matland. History of English Law, 2nd. Ed. (1899) Cambridge University Press.
26. Rigby, P. "Gogo Kinship and Social structure" in Changes in Local Government, Ithaca, Cornell University Press, 1969.
27. Sawyerr G.F.A. (ed) East Africa and Social Change, The East African Institute of Social and Cultural Affairs, Nairobi E.A.P.H. 1971.

28. Schapera, T. A Handbook of Tswana Law and Custom, 2nd Edn. Oxford University Press Press, 1959.
29. Social History of English Law, Penguin 'Books', Harmondsworth, 1966.
30. Tanganyika Law Reports (Revised) Vol. 1 (1921-1952)
31. Thompson, G. "The Pre-historic Aegean" Lawrence and Wishart Ltd. London.
32. Weber, M. Law in Economy and Society (1954) Harvard University Press.

B. DISSERTATIONS, THESES:

1. Lamwai, M.R.M. Tanzania's Law of Civil Procedure in A Historical Socio-Economic Context. LL.M. Dissertation, University of Dar es Salaam, 1978 (mimeo)
- The Development of the Administration of Civil Justice in Kenya and Tanzania. A Critical Analysis. Ph.D. Thesis, School of Oriental and African Studies, London University, 1983 (mimeo)
2. Manunba, R.S. & Senguji, A.H. The Relationship between the Ten Cell System, The Traditional Mode of Dispute Settlement and the Modern Courts of Law.

Third Year Compulsory Research Paper, University of Dar es Salaam, 1983 (mimeo).

3. Mbunda, L.X. The Doctrines of Res Judicata and Res Subjudice. LL.M. Coursework Paper, University of Dar es Salaam 1983 (mimeo)
4. Mvungi, S.E.A. The State and Statutory Exclusion of Judicial Review. LL.M. Coursework Paper, University of Dar es Salaam, Faculty of Law, 1984 (mimeo)
5. Mwipopo, E.L.K. Criminal Prosecutions in Tanzania, LL.M. Dissertation, University of Dar es Salaam, 1980 (mimeo)
6. Tenga, R.W. Custom and Law with Reference to Tanganyika Legal System, J.S.D. Thesis Faculty of the Graduate School, Cornell University, 1985 (mimeo)

C. ARTICLES:

1. Bush, R.A. "Access to Justice Vol. III Emerging Issues and Perspectives", M. Cappelletti & B. Garth (eds)

"Modern Rules of Customary Justice. The Intergration of Civil Procedure in an African Court." Vol. 26 Stanford Law Review. 123.
2. Cappelletti, M. "Social and Political Aspects of Civil Procedure-Reforms and Trends in Western and

Eastern Europe" (1971) Michigan Law Review.

3. Cotran, E. "Integration of Courts and Application of Customary Law in Tanganyika" [1965] Vol. I.E.A.L. J. 105.
4. Cross F. I.U "Procedure in First Instance in the Courts of the United Republic of Tanzania" 1974, Faculty of Law, University of Dar es Salaam (mimeo)
5. Katende, J.W. "Why were Punishments in Pre-European Africa Mainly Compensative Rather than Punitive" (1967) Journal of the Denning Law Society.
6. Moffet, J.F. "Native Courts in Tanganyika, A History of the Development of Native Courts from the German Times" Journal of African Administration January, 1952, Vol. 4.
7. Rahim, A.B. "Civil Procedure in Tanzania" [1968] Vol. 1 E. .L.P. 300
8. Read, J. "Crime and Punishment in East Africa, The Twilight of Customary Law" [1964] Howard Law Journal
9. Trinnings, W. "The Place of Customary Law in the National Legal System of East Africa" The Law School, University of Chicago.

D. OFFICIAL PAPERS:

1. African Conference on Local Courts and Customary Law. Record of Proceedings, Dar es Salaam, G.F. 1964.
2. Hansard Report on Debates in the National Assembly, DSM G.F. 1963.
- Hansard Report on Debates in the National Assembly, DSM, G.F. 1966.
- Hansard Report on Debates in the National Assembly, DSM, G.F. 1968.
3. Local Government Memorandum: Local Courts, DSM, G.F. 1957.
4. Local Government Memorandum No. 2 Native Courts 2nd ED. DSM G.F.
5. Reports of the Tanzania Judicial System Review Commission, 1977, DSM; G.F
6. Tanganyika District Books, 1927, Tanzania National Archives.

E. NEWSPAPERS:

1. Daily News, Dar es Salaam, April 18th. 1985.
2. Daily News, Dar es Salaam, June 17th. 1984.
3. Sunday News, Dar es Salaam, September 30th. 1984.