POLICY CONSIDERATIONS AND THE RULE
OF LAW IN EAST AFRICA.

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POLICY CONSIDERATIONS AND THE RULE OF LAW IN EAST AFRICA

INTRODUCTION

THE COURTS AND COLONIAL POLICY

The jurisdiction of the British government over the East African Protectorate, Uganda and later over Tanganyika was declared in a series of Orders in Council, Foreign Jurisdiction acts and in treaties with persons who "sought" the protection of the British government. Jurisdiction was given in both civil and criminal matters.

Two major systems of courts were introduced, the native courts which were intended to settle disputes among the natives and in which colonial administrators sat as magistrates, and formal courts, based on the model of the English High Court, which mainly were intended to cater for the Europeans. The latter courts superior to the native courts and could hear appeals therefrom. This article will confine itself to the latter category.

Once established, the courts proceeded to give effect to declarations of the colonial governors who in turn acted on orders from the secretary of state. These declarations which took the form of Orders in Council or Ordinances were intended to regulate relationships between Europeans among themselves and also to establish the understood English nations of law and order. The courts also served to give effect to colonial policies which were reflected in the law.

LAND POLICY: An important aspect in the process of establishing colonies was the acquisition. This was usually achieved by signing treaties with the local people.

Acting on instructions from the secretaries of state, and under powers granted in the Foreign Jurisdiction Act 1890, the governor of the East African Protectorate entered into an agreement with the Masai in 1904. It provided that the Masai had, of their 'own free will' decided to vacate some of their fertile grasslands in the Rift Valley and to move to two Reserves in the North and South of the Railwayline.
The land was to be used for farming by the settler community. It further provided that:

"the settlement now arrived at shall be enduring so long or other and that European or other settlers shall not be allowed to take up land in the settlements".

Before long the settler community was pressurizing the government for more farmland. Another agreement was therefore entered into with the Masai providing for them to move out of the northern reserve. This second treaty was signed amidst serious disagreement among the Masai, and after the government had exerted undue influence on the Laibon, Lenana and on the other Masai signatories to the Agreement.

Ole Njogo brought a representative action challenging the validity of the 1911 agreement. He sought a declaration that the 1904 agreement was still subsisting, and that the second treaty was null and void and of no legal effect since those who signed it lacked the authority to bind all the Masai; and also because they had signed it under duress. He also claimed damages for livestock which had been confiscated from some Masai who had refused to abide by the 1911 treaty.

The significance of this case was that it brought to light the illegal methods used by colonial authorities to acquire land and the means which were used to enforce such agreements.

The court declared that the agreements were in fact treaties between the Masai and the British government, and not contracts. The alleged confiscation of livestock was an Act of State. Both of these findings had the effect that the court did not have jurisdiction, to determine the dispute.
The court rejected the appellant's argument that the agreements could not amount to treaties signed between the two sovereign states because the Masai were under British rule, and the court exercised jurisdiction over all the British subjects in the colony.

This decision was reached despite glaring evidence to the contrary. For example, it was evidently clear to the court, from the manner in which the Masai were administered that they had no amount of sovereignty left and therefore lacked capacity to sign any treaties.

The court by coming to such a decision showed that it would not review any governmental action however illegal it had been. It also gave the government a blanket defence of 'Act of State' in any excesses which its officers might go into in the pursuance of their colonial aims. It amounted to saying that confiscation of land and property by the colonial government was unquestionable and unchallengable.

The court quoted with approval the Secretary of State "SAHABA3".

"It (the government's action) might have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole to those whose interest are affected. These are considerations into which this court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal court can afford a remedy".

...../4.
The Masai case clearly showed that the courts were part of the colonial government, and that in any dispute between the government and the natives the letter were bound to lose.

**FAMILY LAW:** If the courts were enforcing the government's policy in the Masai guidelines as to the government's policy in the personal laws of the natives, This lack of any guidelines meant that the courts were given a free hand to evolve their own policy towards customary family laws. The attitude of the courts was first laid down in *R v AMKEYO*.

The courts refused to extend the privileges enjoyed by persons who had entered into a monogamous christian or civil marriage as recognised in England. One of these privileges, that a 'wife' cannot give evidence against her husband could not extend to potentially polygamous marriages. According to Hamilton, C.J a marriage under customary law was not a marriage at all and 'wife' purchase came much nearer to the idea of a customary marriage than that of 'marriage as understood among 'civilised people:

"Women so obtained by a native man are commonly spoken of, for want of a more precise term as 'wives' and as 'married women' but having regard to the vital difference in the relationship between the parties to a union by native custom from that of the parties to a legal marriage, I do not think it can be said that native custom approximates in any way to the legal idea of marriage".
It must however be pointed out that this was the view only of the higher judiciary and not of the native courts.

The official government policy when introducing the marriage ordinances was to facilitate the performance of sanctionable marriage rites between the Europeans and also among Goans in the colony. The missionaries who had done much especially in Uganda, in securing British rule over the protectorate demanded the enactment of native Christian marriage acts which were simpler than the 1902 marriage ordinance.

To the missionaries customary marriage which was potentially polygamous was both uncivilised and abhorrent. The missionaries were also against the payment of marriage consideration, and also the fact that the bride's consent was not necessary to the validity of a marriage.

The position of the higher judiciary was restated in BISHAN SINGH v R. An African had married under customary law a wife who later had sexual relationships with a Sikh. The husband instituted proceedings against the Sikh under the Uganda Penal Code which made adultery a criminal offence.

Justice Guthrie Smith who heard the case on appeal quashed the conviction on the ground that the marriage ordinances:

"are imperative as to native christians and so a marriage between Christians celebrated according to native customs is a nullity and no rights can be acquired thereby."
He held that the marriage between the complainant and the woman was a nullity and that therefore the Sikh had committed no offence. Christian Africans were taken as having abandoned their right to marry under customary law, considered by the judge as 'non permanent'.

The policy of the appellate courts can only be understood against the background of their legal and religious training.

The superior courts regarded customary law with contempt as evidenced by the language used in the two cases discussed above. They regarded customary law as immoral, and agreed with the missionaries that the state was under a duty to 'civilise' the natives. In this respect the courts repeatedly applied the English law on marriage and disregarded customary law.

On the other hand the native courts were more lenient to customary law marriages over which they had jurisdiction. Their position was made more difficult owing to the fact that all ordinance marriages between Africans were combined with customary marriage rites. Although the general judicial view was that the native courts had no such jurisdiction, it was widely exercised. The native courts felt that it was proper for them to treat customary marriage contract separately from the ordinance marriage. Despite opposition from the missionaries, most native courts were of the opinion that ordinance marriage was not sufficient to prevent Africans from ending their marriage. An African who wished to end his marriage very often would marry other wives under customary law.
The appellate courts have not been very strict on applying the above reasoning to cases which have involved Mohammedans.

The two views of the courts are illustrated by two cases which came to opposite conclusions.

In *Rattansey v Rattansey*, the petitioner who was a Muslim at all times married a Christian under the marriage ordinance of Tanganyika, in 1950. Later the respondent converted to Islam and the two went through a marriage ceremony according to Muslim law. In 1959 the petitioner divorced the respondent by talak and petitioned the high court to declare that the divorce was recognized by the law of Tanganyika. Here the court was being asked to recognize a change of status as affecting the two parties in matters which were peculiarly religious and which governed their religious beliefs. The court agreed that "the validity of a divorce of persons domiciled in Tanganyika must be decided according to the personal law to which the parties are subject at the time of the divorce, unless there is express statute law to the contrary." The declaration was made.

The dicta in *Rattansey v Rattansey* was rejected in *Ayoob v Ayoob* where the petitioner, a Sunni Muslim, married a Shia Muslim under the marriage act. The respondent subsequently adopted the Sunni sect and the parties went through another Muslim marriage according to Mohammedan law. The petitioner pronounced irrevocable divorce by 'talak' 16 years later and asked for a declaration that the talak divorce was also recognised by the law of Kenya as dissolving their first and second marriage.
The Court dismissed the petition holding that it would be wrong to introduce religious beliefs into marriages performed under the marriage act. If divorce was to be sought it could only be granted under provisions of the matrimonial Causes Act which was complementary to the marriage act.

It appears that in the sphere of personal law where the government did not grant a clear-cut policy, the courts on the whole tended to favour the English concepts of personal laws to the local circumstances.

The reaction of the African population was to continue to marry under any form of marriage which suited them most without regard to the statutory provisions. The provisions in the status which prescribed penalties were never enforced by the authorities. The situation remains unclear and it is hoped that Kenya will enact a Marriage Act which is uniform and applicable to all persons without regard to religion or race.

Strating from the 1960s when the East African States gained their independence the Municipal courts have gradually changed the strict observance of R v Amkeyo is an effort to reconcile their views with public policy.

This trend first became evident in 1961 when Sheridan J took into account 'the circumstances of the (Uganda) Protectorate and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances render necessary', where the deceased has left three widows only one of whom was married in church, the court extended the benefit of the Fatal Accidents act to all the three wives without distinguishing the strict of 'wife' under the laws of Uganda.
In *Muwanga v Jiwani*, damages were claimed for negligence which resulted in the death of a 13 year old girl who had died in a car accident collision. Udo Udoma C.J. extended the provisions of workmen's compensation ordinance which defines members of the family who can claim damages to include the uncle of the deceased. He also took judicial notice of the fact that the deceased provided domestic services to her mother and that had she stayed alive and got employment she would have contributed towards the maintenance of the family, and accordingly awarded damages, without regard to cases from England which were referred to him.

In later case *ALAI v UGANDA* where the accused of having had sexual intercourse with a married woman contrary to s. 150 of the Uganda Penal Code, raised the argument that since the woman was married under Mohammedan law and the marriage was potentially polygamous, the Penal Code could not apply because it defined 'wife' as the wife of a monogamous marriage.

Sir Udo Udoma, C.J. extended the definition of wife to cover all types of marriages practiced in Uganda "having regard to the situation and social structure and complex forms of marriage recognised by the law of Uganda".

It was the duty of the court to interpret the law in the such a manner so as not to defeat the intention of parliament. The definition of 'wife' in the Penal Code must be presumed to include any married woman whose marriage is recognised in Uganda.
From the foreign it has been shown that the courts have stretched justice and the law to legalise otherwise illegal acts of the government. Where the courts were left to formulate their own policy in family law they were unable to develop it until the 1960s.

The recommendations of the commission on marriage and Divorce in Kenya which merge certain aspects of customarily and received family law will go a long way towards solving the problem.

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THE COURTS ATTITUDE TO BREACHES OF FUNDAMENTAL HUMAN RIGHTS.

CHAPTER II (1) RACIAL DISCRIMINATION:

A notorious feature of the colonial courts in East Africa and especially in Kenya was its application of double standards in the administration of justice. The law was applied unequally so that Europeans were afforded greater protection, and at the same time allowed to escape legal consequences of deliberate breaches of the law against persons of African origin. This amounted to conscious violations of the principle of the role of law. The courts' light treatment of such offenders clearly showed that they were not apposed to the continuation of that policy as is shown by a succession of cases decided during the period.

In R v GRAY and R v GROGAN the two accused who were Europeans had proceeded to the Law Courts in Nairobi and there whipped an African until he lay unconscious. The accused were charged with the offence of participating in an unlawful assembly. They were not charged with causing grievous bodily harm or of contempt of court. The trial magistrate sentenced the two accused to one month's imprisonment against which they appealed on the grounds that the magistrate had no jurisdiction to try a lesser offence than the evidence disclosed. The appeal succeeded where laws were not expressly discriminatory colonial administrators were given wide discretion when such discretion was exercised in a discriminatory manner, the courts refused to invalidate such abuse of discretion for being repugnant to public policy.

IN COMMISSIONER FOR LOCAL GOVERNMENT, LANDS AND SETTLEMENT v KADERBHAI.

The commissioner had given notice of an auction sale of town plots at Mombasa. Among the conditions of sale was that only Europeans would be allowed to bid and purchase at the auction. There was also a condition that after the purchase of the plot, the buyer would be bound by a restrictive covenant which provided that no persons of African or Asiatic Origin other than domestic servants would be allowed to reside on
the plot during the term of the grant. The appellant an Asian sought an order for mandamus to allow him to bid and purchase at the auction. He also sought to have the court direct the respondent to annul or remove the discriminatory provisions. The appellant also argued that under the Crown Lands Ordinance the Commissioner was bound to permit all persons, in the Colony to bid and purchase at auctions without imposing restrictive conditions which were racial. LORD ATKIN in rejecting the appeal said, "It is desirable to point out that the courts are only concerned with the bare questions of law... Questions of policy, or, in other words how the legal powers shall be exercised are not matters for the legal tribunal, but have to be determined by the appropriate constitutional authority."

The courts then gave the commissioner almost unlimited power by holding that the Crown had the right to make the disposition of land in the way that appeared best to him (the commissioner) in the interests of the Crown.

Lord Atkin, seems to have changed his views as evidenced by a dissenting judgement which he delivered and which involved the liberty of the individual:

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject (of the Crown) show themselves more executive minded than the executive.... It has been one of the principles of liberty that judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive....... I protest, even if I do it alone, against a strained construction put on words with the effect of giving the power...... to the minister."

Even as late as 1961 the courts were not ready to dispense with statutes which were evidently racial. By then it had become obvious to everyone that Kenya was to be granted independence, and by the 1958 Kenya (constitution) order in Council any written
law which was discriminatory i.e. which offered different treatment to different persons mainly on grounds of their race was unconstitutional. However in AG v KATHENGE, the respondent was accused of contravening the provisions of a curfew order issued under the Public Order Ordinance 1950 (as amended) which provided that in the areas specified and within the hours of 7pm to 6am "every African" shall remain indoors at the premises which he normally resides. The trial magistrate observed obiter that the order was ultra vires the 1958 constitution for racialism and dismissed the accused on technical grounds. On appeal to the High Court it was held that it was beyond the power of the Court to inquire whether the governor had complied with the constitution and the magistrate was bound to enforce the ordinance which was intravires the constitution.

With the enactment of the Republican constitution of Kenya racially discriminatory laws are deemed unconstitutional under S. 82 (1) and (2). One of the provisions held void is S.15 of the stock and Produce Theft Act which provided that upon a complaint of stock theft a magistrate could order members of the community suspected of the theft to pay compensation to the aggrieved party. It was held in MUHURI v AG (CC 1201/1964 unreported) that it amounted to a deprivation of property arrived at without judicial determination. The provisions were therefore void.

Other discriminatory provisions which were removed included part of the Criminal Procedure Ordinance of 1914 which provided for separate trial of Europeans by juries. Announcing the removal of the provisions, Tom Mboya, then Minister for Justice and Constitutional Affairs said:

"For a long time in this country it has been the custom that a person of European origin was tried by jury; i.e. he could choose to be tried by jury. This was not available to those of African origin. Clearly it is a discrimination which has existed and cannot be allowed to carry on".

The effect of trial by jury for Europeans was that it gave a power of veto to the settlers to determine whether their fellow Europeans were given severe punishment.
The juries repeatedly found Europeans not guilty of offences committed against Africans, and it was not until 1960 that a European was found guilty of murder.

Trial by jury has not survived the era of independent governments in commonwealth Africa. Instead the use of assessors has been preferred for being less cumbersome.

The court confirmed that trial by jury had been abolished in R v WILKEN. The accused who was of European Origin was charged with the murder in a box with insufficient air until he died. Counsel for the accused submitted that the practice of the court in selecting assessors who would assist, the court was bound to apply the test "of what is fair to the accused person keeping in mind the principles of natural justice" and that by this test the assessors should all be Europeans.

The court rejected the Counsel's Submission, without giving any substantive reasons. The court must have seen that any such argument would amount to giving the accused preferential justice which had been abolished earlier, and decided that it would be against public policy.

Instead of declaring discriminatory laws as ultra vires the constitution the courts have directed that the discriminatory provisions be construed as to apply to all people instead of only a section of the people. In RE MAANGI the appellant applied for the grant of letters of administration over the estate of her deceased husband. Previously the court was precluded from applying Indian acts to Africans except for certain specified acts. The Indian Acts (Amendment) Act, Cap 2 of the Laws of Kenya 1948 section 9 reads:

(1) The provisions of all Indian Acts already applied or hereafter to be applied in (the Colony) shall apply to Africans to the extent herein provided or as may be expressly declared by (Ordinance) but not otherwise.

Subsection (2) Then lists the Indian enactments extended to Africans and does not include the Indian Probate and Administration Act 1861.

Section 26 of the 1964 constitution defines 'discriminatory' as:
"(3) In this section the expression discriminatory means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description".

The court held that 5.9 of the Indian Acts (Amendment) Act, so far as it had the effect of precluding the application of the Indian Probate and Administration Act to Africans was discriminatory and that it must be read as if it were mentioned in subsection 2 of the section so as to be in conformity with the constitution. Recent government policy in trade practices has been challenged in the courts. One of these policies is the Africanisation of commerce. In WADERWA v NCC (1968) E.A. 406 the plaintiffs were holders of stalls in the municipal market on a monthly basis from the City Council of Nairobi. All of them were non citizens. The council subsequently adopted the government policy and resolved that all non citizens in the market were to be served with a three months notice to terminate their tenancies. In subsequent correspondence the Council confirmed that its policy was to allocate the stalls to "Kenyans of African Origin". The plaintiffs then brought action for declarations that the resolution and policy of the council were void and unconstitutional as they would violate SS.14 and 26 of the constitution of Kenya and that their application would amount to unlawful discrimination and an infringement on the plaintiffs constitutional rights.

The court held that the resolution was 'discriminatory' by reason of the preference shown in favour of those persons of African Origin, and the serving of quit notices in pursuance of the resolution amounted to treating the plaintiffs in a discriminatory manner. On the point as to whether the policy itself was discriminatory the observed:
".....the formulation of policy and the passing of a resolution as distinct from the implementation of the one or of the other, one primarily intellectual or mental exercises rather than physical overt acts and it is not clear that prima facie either could be said strictly to be unlawful per se by virtue of S. 26(2) (of the constitution) designed as it is, to prohibit be actual 'treatment' of a person in a discriminatory manner..... This aspect ...... of the matter is largely academic, and, there being no suggestion of a procedural irregularity relating to the formulation of policy, I am not prepared, in the absence of any persuasive authority to declare that the policy or the resolution ....... was in itself unlawful.

The high court also came to a similar conclusion in FERNANDES 1968) E.A. 640 v KERicho Liquor Licensing Board. The appellant who was not a Kenya citizen received a circular requesting him to forward a photostat copy of his Kenya citizenship to the licensing court for the consideration of the renewal of his liquor licence. As he was not a citizen he could not produce the certificate and his licence was not renewed. He appealed against this refusal to the court. His appeal was allowed and he was granted renewal of the licence. The action of the board was unconstitutional.

In SHAH VERSI v TLB (1971) E.A. 269 where the applicants applied for an order of certiorari to quash the decision of the TLB. The applicant company had been refused the renewal of some of its transport licences and had its area of operation reduced on the ground that it was necessary to remove imbalances between Kenya Citizens. The TLB relied on a new regulation which read:

"15(3) The Licencing authority shall, in the exercise of its discretion to grant or refuse any application of to grant a licence subject to such conditions as it may see fit to impose have regard to whether the applicant is a citizen of Kenya or, if the applicant is a Company to whether the members and employees of that company are citizens of Kenya".
The new regulation (L.N. 264/1968) purported to be made under the authority of the Transport Licencing Act, Section 30 of which empowers the minister to make regulations "for any purpose for which regulations may be made under this act and for prescribing anything which may be prescribed in this Act and generally for the purpose of carrying this act into effect".

The court ruled that the Board ought to have acted in the interests and convenience of the inhabitants of Kenya as a whole. The company which came within the definition of 'person' in S.70 of the constitution had been discriminated against, and therefore the TLB was prohibited from treating the Company in a discriminatory manner while acting by virtue of a written law.

The order of certiorari was accordingly granted. We have seen that since independence the courts have struck down all discriminatory practices which have been purportedly done under the law. The courts have however not been as vigilant in enforcing other rights guaranteed under the constitution.

**FREEDOM OF MOVEMENT:** The denial of personal liberty by the government is a precautionary measure to avoid the commission of an act prejudicial to public order, security of the state, public safety, public health etc. Detention for reasons of state necessity has been resorted to in both times of war and peace. It is a subject of peacetime legislation in most Commonwealth countries. It is therefore not repugnant to the Kenya and Uganda constitutions which contain elaborate Bills of Rights and guarantee against the deprivation of life and personal liberty of any person save by procedure established by law. These safeguards amount to a limitation on the otherwise wide discretionary powers of the government. The Government must act under a validly enacted law and must strictly adhere to the procedure laid down to justify its action on the express statutory grounds. We shall examine the extent to which the courts in East Africa have exerted control on the executive and how strictly they have insisted on the condition of following the procedures established by law.
In IBINGIRA v UGANDA the appellants were held in detention under the Deportation Ordinance (Cap 46) which had been enacted under the colonial government. On an application for a writ of habeas corpus the deportation order was challenged on the grounds that the Deportation Ordinance was void for inconsistency with the provisions of the 1962 constitution of Uganda. Section I of the constitution reads:

1. "This constitution is the supreme law of Uganda and subject to the provisions of 5.5 and 5.6 of this constitution, if any other law is inconsistent with this constitution this constitution shall prevail and the other law shall, to the extent of the inconsistency be void."

The court of Appeal found that the detention amounted to a violation of the right of freedom of movement. The writ of habeas corpus was issued. The accused were then flown to Entebbe, released temporarily and were then rearrested and served with detention orders made by the Minister of Internal Affairs under the provisions of the Emergency Powers (Detention) Regulations 1966 which only applied within Buganda. Fresh applications were made claiming that the detention was unlawful for being ultra vires the constitution. The court of Appeal concluded that the authorities had not acted in bad faith by first bringing the accused into Buganda before freeing them and laying blame on the High Court for not following the proper procedure i.e. demanding that the accused be physically produced before the court. Bad motive could also not be imputed because the High Court did not hear the evidence of the Minister and Permanent Secretary to the Ministry of Internal Affairs.

That the court came to two different findings on the same case reflected the court's unwillingness to challenge the executive even where it was obvious that bad motive was involved.

In OCHIENG v UGANDA the appellant was convicted of murder on evidence which consisted principally of a confession which he had been kept in custody for nine days where he had been interrogated repeatedly. This amounted to be a complete denial of a citizen's right to personal liberty as provided in article 19 of the constitution of Uganda. The appellant had been kept...
in custody pending investigations, and had not been brought to court within a reasonable time. The court distinguished an earlier case, Njuguna v R16, which would have allowed the appeal and held that although the constitutional safeguards had not been complied with, it did not prevent the acceptance of the confession made by him being used as evidence against him:

"The fact that the necessary (constitutional) safeguards provided for by law had not been carried out following his arrest would not in itself prevent a voluntary confession of guilt by an accused person being accepted as evidence against that person."...

The courts in East Africa have not insisted on the strict observance of the procedure to be followed when a person is detained.

The intention of parliament when it included these procedures in the constitution was to ensure that the person vested with authority to detain must be honest, act bona fide and to his best judgement. It is required that the grounds for detention must be communicated to the detainee within a reasonable time. Such grounds must have a bearing on the necessity for the detention of the detainee. While usually the courts will not question why an individual was detained a valid detention order must be served on the detainee.

In Ooko v R18 the High Court of Kenya did not insist on the strict adherence to the requirements set out in S.83 of the Constitution of Kenya. Ooko was served with a detention order in the wrong name and was not given reasons for his being detained within the prescribed time. When the reasons were given later they were not as detailed as required by the constitution. The court noted that if a warrant of arrest is issued in the wrong name it does not justify the remand of an accused, but did not extend the same reasoning to the more important detention order.

While noting that the grounds for detention were not served on time, and that they were not sufficiently detailed when they were served, it held that these could be cured by an order by the court that a correction be made. The court did not issue the writ of habeas corpus.
The High Court of Zambia has however shown that it will not tolerate the breaches of constitutionally guaranteed rights especially as to procedure in CH.PANGO v AG ZAMBIA 19. The appellant after his detention was not served with the grounds for his detention within the statutory fourteen days; and the grounds were given to him in a language he did not understand and that notice of his detention was published after the statutory period of one month. The Zambian High Court held that the constitutional conditions subsequent to arrest are all mandatory and that non compliance rendered further detention unconstitutional and unlawful. In so holding it disagreed with the finding in UGANDA v COMMISSIONER OF PRISONS 20 that insufficiency of the statement of grounds of detention served on the applicant was a mere matter of procedure, subsequent to the detention and was curable by the High court. Chipango was accordingly released.
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Perhaps the most unique aspect of the courts in independent Africa is that they are seen by the executive as a channel through which its excesses of power are given legal force and political effect. The courts are not viewed as deriving their legality from the constitution and their proper function, if properly understood, is often abused whenever the courts reassert it. The reaction of the courts has been irregular depending on the issues involved and the circumstances prevailing in the country.

The only explanation that can be given is that the African countries have had many political crises in their short period of constitutional governments. The courts are therefore expected to take a low profile in any issue which may embarrass the government and, secondly, to reflect the policy of those governments. Where the courts have come out and exercised their constitutional independence, the consequences have often been detrimental to the courts and to society. The courts have yet to agree to the broad policy which was laid down by the former Chief Justice of Tanzania:

"A judge should recognize that his discretion must affect the society; so that such (constitutional) discretion as he has should be exercised toward helping rather than hindering the solution of social problems. To fail to recognize this can only lead to an unhappy conflict between the Judiciary and the Executive which too often leads to a lowering of its prestige."

When, as often happens, judges are called upon to validate acts of the government which acts are motivated by mala fides, and which are expressly against the law, then even at the cost of "lowering the prestige" of the court, they have to pronounce the law. The consequences can often be drastic, as was aptly demonstrated in Swaziland. In Ngwenya v. The Deputy Prime Minister and The Chief Immigration Officer, the appellant was the only member of an opposition party in Parliament. The government of King Sobhuza II, not
wishing to have any opposition, declared that the appellant was not a citizen of Swaziland and ordered his deportation. It followed therefore that not being a citizen, he was not eligible for election as a member of parliament. He appealed to the High Court against the order seeking to have it set aside. The Court, after hearing oral evidence, set aside the deportation order.

The reaction of the government was that it pushed through parliament Act No. 22 of 1972 which introduced into the Immigration Act of 1964 a new section which read:

s. 2(1) There is hereby established a tribunal of five persons to be appointed by the Minister—.

(2) In the event of any doubt as to whether or not a person is a citizen of Swaziland in terms of s. 10(a), the issue shall be referred to such Special Tribunal—.

(6) No decision of such Special Tribunal— shall be subject to appeal to any court.

(8) Any decision made— by the Special Tribunal— shall be deemed to supersede and render such previous judgement, decision or order (of court) of no force and effect.

The effect of this new section was that the Tribunal could declare any person to be a non-citizen without recourse to the courts. Under the constitution, this (deciding whether or not a person was a citizen, if and when the issue arose) was the proper function of the courts, and the section therefore amounted to an amendment of the constitution. The amendment had been carried in both Houses in the usual way, both Houses voting separately and without the requisite two-thirds majority.

The appellant challenged the amendment on the ground stated above. The Swaziland Court of Appeal held that the amendment was unconstitutional and of no legal force. Shortly after this judgement, King Sobhuza suspended the constitution, arguing that the constitution had failed to maintain the rule of law!

The East African Court of Appeal has been barred from hearing any appeals arising out of proceedings where a person has been charged with treasonable felony, misprision, promoting warlike activities, inciting mutiny, helping soldiers or police officers to mutiny, helping prisoners of war to escape or offences which are provided for
ences in the National Security Act. This came after the Court of
Appeal's decision to set free three persons who had been convicted
of treason: the High Court of Tanzania had convicted four of the
accused and sentenced them to life imprisonment on grounds of trea-
son contrary to s.39 of the Penal Code (as amended retrospectively
by Act No.2 of 1970). Another two of the accused were found guilty
of misprision contrary to s.41(b) of the Penal Code and were sen-
tenced to ten years' imprisonment each.

The charges arose out of events which were said to have ta-
ten place between March 1968 and October 1969 and heavy reliance was
put on the evidence of the principal witness. The court had earlier
dismissed an appeal by one of the counsel for the appellants again-
st a declaration that he was a prohibited immigrant. The court noted
that:

"we are doubtful if the notice served on the applicant was a
valid one since it does not comply with Regulation 13 (of
the Immigration Regulations) under which it purports to be
made, but it does recite that the Minister has declared the
applicant a prohibited immigrant and the powers of the Mini-
ster under the Immigration Act are so wide that any or-
der we might make could be rendered ineffectual by a depor-
tation order any moment".4

In fact the decision to allow the appeals of the three accused
was rendered ineffectual by their immediate rearrest and detention.5

To add to the discomfort the judges find themselves in when
they have to pronounce on what are essentially political conflic-
ts, they have also been appointed to head commissions of inquiry. In
itself not properly a judicial function, but judges have been ap-
pointed in their judicial capacities to head these Commissions of In-
quiry to make findings on issues which threaten to bring political
conflict. More often than not the intention of the government in in-
truding such inquiries is to seek a temporary compromise between
itself and public opinion. When the inquiry produces the report, the
issue is conveniently shelved and the government does not act on
the recommendations. Britain did not act on the recommendations of
two commissions appointed to look into the discontent of colonial peoples in Nyasaland (Malawi) and, more recently, on the Pearce Commission on Rhodesia.

A judicial commission of inquiry was appointed in 1966 to investigate allegations of gold and ivory smuggling in Uganda the then President Obote and the Head of the Armed Forces, Col. Amin. The findings of the Commission were never made public. After the military coup of January 25, 1971, two Americans, a journalist and a university lecturer, disappeared while investigating rumours of inter-tribal strife in the army. After considerable pressure from the USA and amidst strong rumours that the two Americans had been killed and disposed of by the army, a Commission of Inquiry headed by Justice Jeffreys Jones of the Uganda High Court was appointed to inquire into all aspects of the disappearance of the two Americans.

The task of the Commission was made difficult by complete lack of co-operation from the army and the police. "The police seemed too unwilling/frightened--possibly both--to assist," and the witnesses were also unwilling to give evidence. Before the Commission could finish its work, it was accused by the President of holding its inquiry "in secret" to which the Commission replied:

"The criticism, with respect, was unfair and unwarranted in fact, and wrong in law," as he had been empowered *empowered* by Legal Notice No. 10 of 1971 to hold the inquiry at such times and such places as he may determine, whether in public or in private. The Commission was further warned to keep the government informed of its progress else "we, the government, may feel that the Judges are not with us." To this the Commissioner replied:

"If the warning meant that the judges must be with the government, that would be a serious inroad into the independence of the Judiciary, which independence is enshrined in the Constitution, still extant. The judges are not for or against anyone. They, by their very judicial oath, are enjoined 'to do right unto all manner of people, without fear or favour, affection or ill will. Right is the operative word. Traditionally, they have stood as a bulwark between the executive and the people, within that terms of their oaths. Long may that
it be so. Any weakening of that resolve would lead to tyranny. If this phrase meant that I should, in the interests of government, or indeed anyone else, betray trust to my oath, and did so, I would be a wilfully perjured individual, devoid of moral worth."

"---that I (have taken my oath as a judge and under the Commissions of Inquiries Act) and shall always try to be, and I serve notice on all and sundry that my integrity is unpurchasable."

The Commission was never given enough time to complete its inquiry and the President was quoted in the press as saying that an affidavit on which the commission relied was false. The Commissioner noted in his report that this amounted to an interference in a matter which was sub judice and which was for the Commissioner to decide. The Commissioner also remarked that the degree of civilisation in any country can be gauged by the standard set by, and the respect paid to, the Judiciary.

The Commission of Inquiry concluded that the two Americans had been killed by the army at Mbarara. Both the judge and counsel to the Commission escaped from Uganda and sent their report from Nairobi. Shortly after this the near absolute derogation from the rule of law was demonstrated by the brutal murder of both the Chief Justice, Ben Kiwanuka, and the President of the Industrial Court, Apollo Kagwa.

The courts have nevertheless broadly taken the view that any direct confrontation with the governments lead to the demise of the courts and have devised various ways of avoiding this.

The first has been to give legal effect to extra-constitutional issues. In Uganda v. Commissioner of Prisons, ex parte Ntovu the applicant sought a writ of habeas corpus on the grounds that he had not been given adequate reasons for his detention, that his detention order was not published on time, that the tribunal which reviewed his detention was biased, and that he was not allowed to consult with his counsel in private. The court, of its own motion, inquired into the legality of the 1966 constitution. The court accepted that there had been a successful revolution which had overthrown the
1962 constitution in a way which the former constitution itself had not anticipated and that the new constitution and government were effective, both de facto and de jure. The court had therefore to give recognition to it. The court then held that the Emergency Powers Act and the Emergency Powers (Detention) Regulations, 1966 were ultra vires the constitution; that the tribunal which had been made up of a judge and two civil servants was not impartial; and that although the accused had not been served with a statement which sufficiently set out the grounds for his detention, it was a condition precedent to his detention and therefore merely procedural. However, the Minister was directed to furnish the detainee with the complete statement.

The court was called upon to calculate the effects of holding otherwise and ordering the release of the detainee (applicant). That the liberty of the individual was sacrificed in order to give legal effect to the new constitution is a factor which courts in many countries have had to face. In such situations the courts are overtly changing their allegiance from one constitutional order to the other, and in so doing give that extra-legal act legal force.

Where the court has been of the opinion that its finding may not be given legal force, it has denied itself the right of entertaining such appeals. In A-G. (Uganda) v. Shah (No. 4), the respondent had been granted an order of mandamus directing the treasury to pay him some monies which were owed to him under a contract which he had entered into with the Buganda government before it was abolished. After its abolition, the government had agreed to be liable for any contracts entered into by the former government. After judgement in its favour, the government had enacted new provisions in the Local Administrations Act which would have rendered the judgement null and void. This enactment was held by the court to be unconstitutional and of no legal effect. Mandamus was then reissued to compel the treasury to pay the money owing to Shah. The Attorney-General
appealed against the order to the Court of Appeal which however
dismissed the appeal on the ground that it had no jurisdiction to
hear appeals on decisions or orders of the High Court when exercis-
ing its jurisdiction in relation to prerogative orders. The deci-
sion of the Court was reached despite a provision in the constitut-
ion which empowered the Court of Appeal to hear all appeals other
than questions arising out of the interpretation of the constitut-
ion.

That the courts have taken a low profile and not played the-
ir full role in politically sensitive issues does not mean that
they have been unable to develop and enhance the role of law in o-
ther areas. The Court of Appeal for East Africa has stressed that
it will feel free to exercise its jurisdiction in constitutional i-
ssues where they have not been raised at the High Court. It has
also shown that in cases where the liberty of the individual is in
question, it will give any benefit of doubt in the law to the accu-
sed.
REFERENCES:


Georges: The Court and the Tanzania One Party State.

2. Civil App. No. 1 of 1973 (Swaziland)


5. For general comments see Vol. 43; Transition on the article by Katende & Kanyeihamba: Legalism and Politics in East Africa.

6. Legal Notice No. 10 of 1971


8. ibid., para. 71

9. ibid., para. 75

10. See also Veitch: Justice at the End of its Tether (Public Law 1973 at p. 40).

11. (1966) E.A. 514

12. (1971) E.A. 50


CONCLUSION:

The preceding two chapters have aptly demonstrated that the courts, as provided for in the constitutions, have not succeeded in establishing respectability and credibility with governments. It is therefore imperative that a radical re-examination of the proper role of the courts in developing countries be made, so that the courts cease to be seen by governments as hindering the development and implementation of government policies. If we accept that the constitution is the ultimate reflection of the policies of any government will seek to pursue and implement, it becomes necessary to seek the standard which the courts will pursue in their implementation of these policies.

Dicey, the most vocal exponent of the rule of law, said that no government could claim to uphold the rule of law unless the courts are left free to ensure that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner. This means that the regular law should prevail over the use or influence of arbitrary power on the part of the government.¹

The rule of law was redefined by the International Congress of Jurists meeting in New Delhi, 1959, as:

a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised.²

Governments have taken this to mean that the courts should be in 'ideological parity' or agreement with the government in power. This suggestion was made by a member of the Presidential staff in Uganda in 1968³ after the High Court acquitted two European mercenaries who had illegally crossed into Uganda from the Congo where they had been fighting against the government. Picho Ali, who had made the suggestion argued that the court should have taken into consideration the political issues involved, i.e. that
the mercenaries had been fighting against a friendly African country and therefore deserved the maximum punishment under the law. A prominent lawyer and member of parliament at the time did not think that political considerations should influence the court:

"The determination of a suitable sentence imposed in each set of circumstances is a judicial, not an arbitrary, act, governed by clearly laid down principles. Our Republican constitution clearly stipulates that no man is to be punished, except for violation of a known written law. Until parliament makes a law for the punishment of mercenaries operating in other parts of the world, it (the consideration of the political ideology) would be a subversion of our laws and liberties." 4

Argument on this issue raged in the Transition magazine until the editor and Abu Mayanja were taken to court on charged of sedition. The court ordered the release of the accused but they were subsequently detained.

A similar situation arose in Zambia after the High Court ordered the deportation of two Portuguese soldiers who had crossed illegally into Zambia. The High Court, for this decision, was criticised by both the ruling party and even by the President himself. This prompted the resignation of the Chief Justice. President Kaunda later remarked that:

"Judges—-are the production of their society and of their time; a judiciary which is not in tune with its society cannot play its full part in the development of the law. The independence of the judiciary does not mean that the judiciary is independent of, or stands apart from, society—that judges and magistrates are a special species of person by virtue of their function in society." 4(h)

President Nyerere has also cautioned the courts to identify themselves with the aspirations of the people. The purpose of the courts is to ensure that justice should apply to all people equally; and that justice must achieve its ends—it must be understood and appreciated by the people: 5

"It demands an understanding by the judiciary of the people and by the people of the judiciary; for without this mutual understanding the people's basic sense of justice in their relations with each other may be outraged by the very instrument which they created to implement justice."

Therefore justice is dependent upon the interpretation of
the people; a judge might reach a decision which he considers is the right one and at the same time be making a decision which is completely contrary to the notions of justice of that society. The judges are made independent of power politics to help them secure impartiality in reaching their decisions. But they should not be independent on the basic issues which concern that society. They are a product of society and should interpret the law from that standpoint:

"Their interpretation (of the law) must be made in the light of the assumptions and aspirations of the society in which they live. Otherwise their interpretations may appear ridiculous to that society and may lead to the whole concept of law being held in contempt." 6

The courts have been hostile to any criticism. In Zambia, a youth wincer who criticised the High Court was sentenced for contempt. And in Uganda, the Chief Magistrate condemned Ficho Ali's criticism of the courts as being repugnant in the extreme, a cry in the wilderness which deserved all the indignation, wrath and criticism which descended on him.7

A former President of the Court of Appeal for East Africa has stated that public policy or political expediency cannot be allowed to be a ground of a judicial decision. The judges is only concerned with expounding the law. Judges must remain independent of political considerations, else they will be subject to the whims of the executive when they begin to take into consideration the political philosophy of the country.8

This has been the basic policy of the courts since the East African states became independent and it has unfortunately back-lashed against the Court of Appeal. Had the Court taken into consideration the political issues which led to the attempted coup d'etat in Tanzania, and gauged the popularity of the government in power at the time, it might have come to a different finding and saved itself from the near disastrous consequences to itself. In the debate that preceded the debate that ousted the jurisdiction-
tion of the Court to entertain any appeals relating to treasonable offences, the Court was accused of unpatriotism and of having displayed disrespect to the wishes of the people of Tanzania. It was even alleged that the Court might have been influenced by ill feeling:

"If any of the judges has an ideological difference to ours, he might twist the issue—maybe they have sent him. Or if they have not sent him, any such (judgement) by him could be beneficial to his own country. Even though we are in the East African Community, our political ideologies are different. A judge from one such country (in the E.A.C.) may laugh at what is happening to us. Even though he sees the offence committed against us he may order the release of an accused."

The position in which the courts find themselves is not of their own making, and the solution lies in the hands of the executive and the people. The Westminster Model Constitution, which embodies the liberal ideas of the European political thinkers expressed in the last century, emphasises individual worth, human dignity and the protection of property. Do the East African states need such constitutions?

The report of the Presidential Commission for the Establishment of a Democratic One-Party State recommended that a justiciable Bill of Rights could be a hindrance to social progress. The state should place emphasis on social progress rather than on individual freedom; decisions concerning the extent to which individual rights must give way to wider considerations of social progress are not properly judicial decisions. They are political decisions best taken by political leaders responsible the electorate.

Claire Palley observed that the Westminster Constitution model did not alter the colonial structure of government so that the newly independent states inherited much of the colonial doctrine of separation of powers, an authoritarian bureaucracy and the economic structure was preserved, so that the constitutional protection of property clause ensured that the government would
be unable to achieve an equitable distribution of wealth and opportunities. In order to achieve that objective, Tanzania has not contemplated the inclusion of a Bill of Rights in her interim constitution.

Another feature not contemplated by the Westminster Constitution is the one party state in Kenya and Tanzania and the coup d'etat in Uganda. The party dominates every aspect of public life and formulates the policies adopted by the government.

The interim constitution of Tanzania does not include a justiciable Bill of Rights. It has been excluded mainly because it was felt that in a country like Tanzania which is committed to rapid social progress, it would only invite conflict between the courts and the executive. This fact becomes more important when it is accepted that the East African states are avowedly committed to achieving socialist ends. Socialism cannot achieve its ends unless the rights of the individual give way to the wider considerations of social progress.

It is therefore important that our constitutions should reflect the relative importance of the state rather than the rights of the individual. The rights of the individual must therefore be judged from the point of view of the society as a whole and not from the point of view of the individual. The state is more important than the individual.

While accepting that the rule of law is a universal concept, the Judiciary must be prepared to adapt its understanding of that principle to local circumstances, without sacrificing its personality. With this understanding, the Judiciary will understand better the policies pursued by the governments in their attempts to effect equitable distribution of wealth and other social benefits. In times when the security of the state is threatened, the courts should look at the broader effects of social disorder rather than the immediate rights of the individual.
REFERENCES:

4b.
6. ibid.
9. The Administration of Justice (Amendment ) Act, 1971
12. Palley: Rethinking the Judicial Role: 1 Z.L.R.1
13. supra.,n.11 (above).