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RESEARCH ARTICLE

APPLICABILITY AND CHALLENGES OF BASIC CONSTITUTIONAL PRINCIPLES IN TANZANIA.

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Abstract

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Introduction:-

A Constitution is the most important piece of legislation that any country has. It reflects the history of the nation and mirrors the interests and aspirations of its people with regard to how they wish to be governed. In its simplest form a Constitution is the social contract between those who govern and the governed¹. He further argues that, the Constitution should define the type of government people want, the powers their government should have and the limits of those powers. A Constitution is, in its simplest form, the social contract between those who govern and the governed. As such, the making and remaking of a Constitution is a societal and national project in which all sectors of society must participate².

“Constitutional principles” (sometimes called “guiding principles”) refer to documented principles or concepts that are intended to provide substantive and/or procedural guidance to a constitutional process. Constitutional principles have been used in only a few cases the best known example is in Tanzania. Constitutional principles tend to reflect key aspects of the historical context in which the particular constitution-making process is taking place and also broader international norms, standards and precedents³.

Basic Constitutional Principles

Constitutional Principles are of so many depending with the country perceptivity. As far as Tanzania is concern, the following are the basic Constitutional Principles:-

Rule Of Law

The Rule of law has number of meanings but generally rule of law means that Government should be conducted within a framework of recognised rules and principles which restrict discretionary power. This means that everything must be done according to law, Government should not exercise its discretionary powers to the extent that it breaches its boundaries on limitation of its powers hence the liberty of every individual being at jeopardy⁴.

¹ Chissano, J. 2000; Constitutional Reform Processes and Political Parties Principles for Practice. Netherlands Institute for Multiparty Democracy & the African Studies Centre, 60pp.

² Ibid

³ David Lyons, 2012, Constitutional Principles, *Boston University Law Review* Vol. 92:1237

⁴ Brian Z. Tamanaha, 2012, The History And Elements Of The Rule Of Law, *Singapore Journal Of Legal Studies*, 232–247

Being one of the basic constitutional principles, Rule of law was introduced by Sir Edward Coke as a concept when he was a chief justice during King James I was on the throne. This was against the king, he maintained successfully that the king should be under God and the law, and he established the supremacy of the law against the executive⁵. There after Dicey developed this theory, and according to Dicey Rule of law is one of the fundamental principles of English legal system, where the doctrine comprises of three elements, that is, supremacy of law, equality before the law and predominance of legal spirit⁶.

Traditionally, Rule of law has been taken to denote absence of arbitrary powers and therefore one can denounce the increase of arbitrary or discretionary powers of the administration and advocate controlling it through procedures and other means. It is under the principle of the Rule of law, that courts have power to intervene and control administrative action, thus judicial control is the pivot of administrative law to date. Under Rule of law Executive is regarded as not having any inherent powers of its own but all its powers flow and emanate from the law and this principle plays a vital role in a democratic Government⁷.

Overview of the doctrine of Rule of Law

The rule of law represents one of the most challenging concepts of the constitution. The rule of law is a concept which is capable of different interpretations by different people, and it is this feature which renders an understanding of the doctrine indefinable of all constitutional concepts, the rule of law is also the most subjective and value burdened.

In the current world the notion of rule of law is a vital phenomenon, the rule of law is very important in any democratic state. Aristotle once argued that "The rule of law is better than that of any individual." Also to emphasize on that Lord Chief Justice Coke quoting Bracton said in the case of **Proclamations**, "*The King himself ought not to be subject to man, but subject to God and the law, because the law makes him King*"⁸.

Rule of Law in Tanzania

The concept of "rule of law" per se says nothing of the "justness" of the laws themselves, but simply how the legal system upholds the law. As a consequence of this, a very undemocratic nation or one without respect for human rights can exist with or without a "rule of law", a situation which many argue is applicable to several modern dictatorships. However, the "rule of law" is considered a pre-requisite for democracy, and as such, has served as a common basis for human rights discourse in many countries.

Professor Albert Dicey in his treatise identified three principles of constitution which when combined together they form the rule of law: The absolute supremacy of predominance of regular law as opposed to the influence of arbitrary power; Equality before the law of all classes of people to the ordinary law of the land administered by ordinary courts; and The law of the constitution is the results of rights of individuals as defined and enforced by the courts⁹.

A clearer understanding of the rule of law can be seen when Government (the executive) cannot exercise power which is not authorized by the law, effectively constraining government power. In the case of **ENTICK V. CARRINGTON**¹⁰, a warrant to search and seize private papers for alleged seditious writing was held to be illegal. According to Lord Bridge of Harwich he said that; "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself", in **R V. HORSEFERRY ROAD MAGISTRATES' COURT, ex parte BENNETT**¹¹ where the House of Lords decided a trial could not go ahead where someone was improperly extradited to the UK to face charges.

⁵ Augusto Zimmermann, 2017, Sir Edward Coke And The Sovereignty Of The Law, Macquarie Law Journal, Vol 17

⁶ Michael L. Principe, 2000, Albert Venn Dicey and the Principles of the Rule of Law: Is Justice Blind? A Comparative Analysis of the United States and Great Britain, 22 Loy. L.A. Int'l & Comp. L. Rev. 357

⁷ Ibid

⁸ 1610) 77 ER 1352

⁹ A.V.Dicey, 1885, Introduction to the Study of the Law of the Constitution, London Macmillan and Co.

¹⁰ 1994) 1 AC 42

¹¹ [1765] EWHC KB J98

Lord Griffiths said in the same case “if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law”.

Dicey’s second principle has the resounding title of ‘equality before the law’. Which means; no man is above the law and everyone, regardless of rank, is subject to the ordinary laws of the land. This reflect the famous quote by Thomas Fuller; “Be you ever so high, the law is above you”. This held that the government and its officials should not have any special exemptions or protections from the law. Dicey claimed that “every official ... is under the same responsibility for every act done without legal justification as any citizen”.

In **M V. HOME OFFICE**¹², it was held that the executive was not above the law and that the Secretary of State was not entitled to claim Crown immunity. Dicey also did not like the French system where government activities were dealt with by separate administrative courts. He considered this to be too partial to the government and inferior to ordinary courts of law.

The final principle concerns Individual rights. There is no need for a Bill of Rights because the general principle of the constitution is the result of judicial decisions determining the rights of the private person. The courts protect them in their decisions by developing the common law in a way that respects individual liberty. Parliament legislates on particular problems. In contrast, Bills of Rights are documents which promise all sorts of rights. These promises are so general and capable of so many meanings that they are meaningless. Again the Bill of Rights might not be respected by the government and might be unenforceable. This reveals Dicey's belief that the common law affords greater protection to the citizens than a written constitution.

The present day rule of law is not far from that of Dicey. The Rule of Law insists that any government should be governed by law. The government should be given power (public power) but these powers should not be too wide, there must be legal limit to govern this power.

Professor Wade in his book proposed that “every power has legal limit”, he argued that were there is violence of rule of law by the executive it acts contrary to the law which infringe justice the court will denounce it to be unconstitutional ,this emphasizes rule of law .It was further argued that when the law does not uphold justice then there is no rule of law ,Example The Apartheid regime in South Africa, the state acted according to law but it was injustice since it was discriminative in nature, hence no rule of law.

Mostly important is that, for the existence of rule of law there must be existence of some important constitutional doctrines which are; Separation of powers, Independence of Judiciary and Ministerial responsibility. These doctrines altogether form a bond in which a democratic government shall conduct its activities in accordance with the principle of rule of law.

These principles in **Tanzania** jurisdiction are duly and basically entrenched in and form the provision of Article 13¹³. It is the principles of Fundamental rights that simply translate into the rights of all citizens to be governed under the same known laws and the right to seek redress using the same known and acknowledged processes, avoiding any form of arbitrariness and unfairness.

This provision inter alia provides for presumption of innocence to all people, Nobody should be punished for an act which was committed when it was not a crime/offence (retrospective effect), also it guarantees fair hearing of the cases (there must be equality even if one party is the government), also the laws must be imposed to the public so that all people should know the law.

Extent of the principle of rule of law in Tanzania and its enforcement in the country in ensuring proper administration:-

The principle of Rule of Law is a fundamental principle of contemporary system of a proper administrative system in the world, the rule of law can generally be classified into internal rule which corresponds to the limitations of the

¹² 1994) 1 AC 377 HL

¹³ Constitution of United Republic of Tanzania (Cap 2 R.E 2002)

administrative powers and external legality which is concerned with the regulation of administrative powers and legality of derogation which applies in periods of emergencies¹⁴.

In Tanzania the development of the Rule of Law can be grouped in to two major phase, before 1984 and after 1984¹⁵, whereas before 1984 the Constitution of United Republic of Tanzania of 1977 had no Bill of Rights, and for that rule of law in Tanzania during the time was impotent.

That before 1984 the bill of rights in Tanzania was found only in the preamble of the Constitution of Tanzania of 1965 up to 1977 and in a legal sense preamble does not form part of the constitution and in other¹⁶, preamble is not enforceable and this is shown in the case of **HALIMALI ADAMJI V E.A POSTS AND TELECOMMUNICATIONS LTD**¹⁷, in this case a Tanzanian Asian by origin was compulsory retired in order to facilitate Africanization in government sector. The claimant argued that the policy of Africanization was discriminatory in on ratio basis hence it was not against the rule of law, basing on that argument the Asian petitioned on the court of law and the court held that the preamble of the Constitution is not enforceable and for that the argument failed.

After the year 1984, the Bill of Rights which provides for freedom and rights of individuals was firstly introduced in the constitution of the United Republic of Tanzania of 1977, through the fifteenth (15th) amendments of the constitution of 1984¹⁸. The amendments inter-alia incorporated the Bill of Rights in the Constitution and hence giving rule of law force of law in the country, although Bill Rights was incorporated in the constitution of in 1984 it came in to force from march 1988 and ever since march 1988 up to now the rule of law is part of the basic laws of the land in Tanzania.

There is now party 2 of chapter 1 of the constitution of Tanzania of 1977 which provides Bill of Rights or fundamental rights or individual rights which is rule of law, this part provides for objectives and the directive objective of state policy, the fundamental right, individual rights, and Bill of Rights has been enshrined from article 11 to Article 24 of the Constitution of United Republic of Tanzania¹⁹.

The most important provisions related to fundamental rights in the Constitution of United Republic of Tanzania are two, right to life which is the most important right of all individuals rights and freedoms as provided under article 14 of the constitution however this right has been provided with some limitation as provided also under Article 14, and also equality of citizens before the law, that the constitution recognize also equality of all person before the law without any discrimination under Art 12 & 13 (1) of the constitution²⁰.

In Tanzania the rule of law is enforceable in any case where an individual is curtailed his basic freedom and rights he may petition to the high court. This is provided for under article 30 (3) of the constitution. Again there is another statute which set out procedure to enforce basic right and freedom of individuals this statute is known as the Law Reform Fatal Accidents And Miscellaneous Provision Act²¹, using article 30 (3) of the constitution and the Law Reform Fatal Accident And Miscellaneous Provision Act²² any citizens may enforce his basic rights and freedom in the high court of Tanzania.

¹⁴ Shivji I.G, Constitutional and Legal system of Tanzania.

¹⁵ MugwaiAlute, Forty years of struggles for human rights in Tanzania; haw far we have travelled? In Mchome S.E (ed) taking stock of human rights situation in Africa,

¹⁶ MugwaiAlute, Forty years of struggles for human rights in Tanzania; haw far we have travelled? In Mchome S.E (ed) taking stock of human rights situation in Africa

¹⁷ (1975) L.R.T 6

¹⁸ ibid

¹⁹ Peter, C.M, human rights in Tanzania; selected cases and materials

²⁰ ibid

²¹ CAP 310

²² ibid

There are several cases which exemplify this; in **NHC V TANZANIA SHOE COMPANY**²³ the case envisages the procedures to enforce the basic fundamental right. According to the case enforcement of basic fundamental right is by way of petition which is filed in the high court which is the first court of instance.

Also the question of knowing who has the right to petition when there are infringement of fundamental basic rights was answered in the case of rev **CHRISTOPHERMTIKILA V A.G**²⁴ whereas in the case interalia, the issue was who has the locus standi in matter of infringement of fundamental basic right the high court answered the question by stating that any person who has sufficient personal interest over and above the interest of general public may be a bonafide litigant even where he has no personal interest in the matter.

The doctrine of Rule of Law has been very essential in Tanzania. It has helped to ensure proper administration in the country and above all, preventing despotism. Rule of Law on the other hand has brought about equality to all people.

Challenges on the application and development rule of law

That being the case in most cases the most of the factors for prevalence of rule of law also acts as barriers for expansion of the rule of law in many countries, for example if the doctrine of separation of powers is applied in a strict way it is obviously impossible to take certain actions.

This means if the legislature can only legislate then it can not punish anyone committing a breach of its privilege, more can it delegate only legislative function even though it does not know the details of the subject matter of the legislation and the executive authority has experienced over it nor could the court frame rules of procedures to be adopted by them for the disposal of cases.

Modern states are the welfare states and its have to solve many complex social economic problems and in these states of affairs also it is not possible to stick to this doctrine as justice Frankfurter said and enforcement of a rigid conception of separation of powers would make modern Government impossible, strictly separation of powers is a theoretical absurdity and practical impossible’.

Also parliamentary supremacy is the other obstacle to the rule of law, that is to say when you talk about rule of law it means judiciary should be free but when the judicial review is not exercised in a manner it is supposed to be then it is against the rule of law. Judicial review is the only strong tool the judicial use to control the administrative actions.

The Acts of parliament powers the jurisdiction of the court and exclusion clause are all about restricting the prevalence of the rule of law as it was in the case of **Haruna S/O Nchama And Another V. Republic**²⁵, where Mwaikasu J. held that at this juncture I must point out that this appeal was wrongly admitted the act complained of was principally an administrative once his enquiry is final and therefore cannot be appealed against it is only by way of an application for judicial review that the order complained against could be challenged for illegality or want of jurisdiction therefore such prerogative orders could then issue in respect of such order of the lower court.

Separation Of Power

Separation of power is all about distribution of functions of the Government under three pillars, that is to say, the executive has no right to execute the law and also judiciary should not exercise the functions of the other two pillars. However, the whole the doctrine of separation of powers in its strict sense is undesirable and impracticable and therefore it is not fully accepted in any country. Nevertheless its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive²⁶.

The objective of the Doctrine is to have a Government of law rather than the official will or whim. Montesquieu’s great point was that if the total power of Government is divided among autonomous organs, one will act as a check

²³ (1995) TLR 251

²⁴ (1995) TLR 31

²⁵ [1982] TLR 274

²⁶ Professor Dr JASNA OMEJEC,2015, Principle Of The Separation Of Powers And The Constitutional Justice System

upon the other and in the check liberty can survive. Again, almost all the jurists accept that the most important aspect of the doctrine of Separation of powers is judicial independence from administrative discretion²⁷.

It shows that in order to have Rule of law you must have separation of powers, for example in the case of **Mwalimu Paul John Muhozya v. A.G**²⁸, the issue was separation of power and the court held that the balance of power between the three branches of government namely the legislature, executive and judiciary and the relation of the court to the other branches must be carefully maintained.....one branch of Government should not take over the powers of another branch.

There is no liberty if the judicial power be not separated from the legislative and the executive under **Article 4**²⁹ provides the doctrine of separation of power for prevalence of rule of law. That is how a democratic government behaves, as it is supposed to observe the separation of powers to its three organs of a government. However, when it comes to an authoritarian kind of a government, one can clearly see from its way of conduct that in an authoritarian kind of government, there is no observation of separation of powers. All powers are centred on one person or a group of people, or where there are three organs, all are subject to the commands made by one person or a small group of people.

Does the doctrine of separation of powers exist?

Although Montesquieu separated governmental functions and separated governmental powers, there is no clear one-to-one correspondence between the two because he did not insist on an absolute separation. Thus, although the executive is a separate branch, it properly partakes in a legislative function. This blending or overlapping of functions is in part necessitated by Montesquieu's intention that separation checks the excesses of one or the other branch. Separation of powers here reinforces or even merges into balanced government.

In the case of **Mwalimu Paul John Mhozya V. Attorney General** it was held that the balance of power between the three function of the government , namely the executive, legislative and judiciary must be carefully maintained..... One organ of the government should not usurp the powers of another.

The doctrine of separation of powers originated in France but it spread to other government. The United States of America was among the first governments which applied the theory. Also like other democratic constitution the constitution of the united republic of Tanzania adopted the theory of the separation of powers in both the territories.

That is the United Republic of Tanzania. Article 4 of the constitution provides for the exercise of the state authority of the united republic of Tanzania. That, the executive functions of the state will be carried out by two executive of the state, Union executive and that of the revolutionary government of Zanzibar.

The same applied to legislature, the legislative function will be carried by the Union parliament and house of representative of Zanzibar and judiciary of the united republic and judiciary of revolutionary government of Zanzibar

Also in Tanzania there are special provisions in the constitution which shows that there are separations of powers in Tanzania. Such provisions includes Article 112 {3}of the constitution³⁰ which provides that a person can not be appointed to be member of the judicially services commission if he is member of parliament , Article 84{2}&85{2} respectively provides that a minister or a deputy minister shall not be elected to be a speaker or deputy speaker .and also article 67{2} {g} which provides that a person shall not be elected to be a member of parliament if he holds a senior office in the united republic.

It should be remembered that separation of powers do not mean lack of interaction among the powers of the government, but the main thing in separation of powers is the issue of check and balance. Check and balance do not mean interference, rather than means control by one of the power or authority of the government against the other by making them counteract one another actions.

²⁷ ibid

²⁸ [1996] TLR 130

²⁹ Of the Constitution of United Republic of Tanzania,1977

³⁰ Of the Constitution of United Republic of Tanzania,1977

Through the theory of check and balance each branch controls the other without interfering or influencing the functions of other organ of the state. In this executive checks the function of the legislature, legislative to executive judicial to legislature and judicial to executive. **Madison J.** says in arguing for the separation of powers that: Montesquieu did not mean that these departments ought to have no partial agency in, or no control over the act of each other, but the doctrine was one of mutual restraints or checks and balance.

Check and balance can be seen through the following things:

i) Judicial review

Judicial review is the doctrine under which legislative and executive actions are subject to review (and possible invalidation) by the judiciary. A specific court with judicial review power must annul the acts of the state when it finds them incompatible with a higher authority (such as the terms of a written constitution).

Judicial review is an example of the separation of powers in a modern governmental system (where the judiciary is one of three branches of government). This principle is interpreted differently in different jurisdictions, which also have differing views on the different hierarchy of governmental norms. As a result, the procedure and scope of judicial review differs from country to country and state to state.

For example in **The Election Act** section 112 in the case of **Julius Ndyanabo v A.G** the provision which required a petitioner to deposit a bond of 5 millions shillings in order to file an election petition, and the high court held the provision to be unconstitutional in respect of article (13) of the constitution of the United Republic.

ii) Ministerial responsibility

This means that the respective minister is answerable to the parliament as it provided under article 63 (3) (a) of the **Constitution of the United Republic of Tanzania** that:

“For the purpose of performing its functions, the nation assembly may ask any question to any minister concerning public affairs in the United Republic which is within his responsibility.”

Example the Parliament of the United Republic of Tanzania during the Bunge sessions before the other activities of the Bunge continue like the debate in the Bunge there is time for questions and answer, were by member of a parliament asks the questions to different ministry and answers from those ministry are replied either by minister or a deputy ministers.

Also article 53 of the **Constitution of the United Republic of Tanzania** gives the nation assembly power to pass a vote of no confidence in the Prime Minister.

For example under the supervision of Hon. Zitto Kabwe 70 signature was collected from the member of the parliament to vote for having no confidence to the Prime Minister Hon. Mizengo Kayanza Peter Pinda.

Application of the Doctrine of Separation of Powers in the United Republic of Tanzania

The Constitution of the United Republic of Tanzania (1977) represents a contemporary approach in constitutional doctrine of separation of powers. Essentially, there is no strict separation of powers under the Constitution of Tanzania, both in principle and practice. In the Constitution of Tanzania, the doctrine of separation of power is enshrined under **Article 4** which, inter alia, provides that; 4.-(1) All state authority in the United Republic shall be exercised and controlled by two organs vested with executive powers, two organs vested with judicial powers and two organs vested with legislative and supervisory powers over the conduct of public affairs.

In principle therefore, Article 4 of the Constitution establishes three organs of the state *i.e.* executive, legislature and judiciary. In practice though, there is no strict separation of powers (but rather a mixed form of government with checks and balance) in terms of functions of each organ and personnel conferred with state powers as exemplified below;

Incidences showing there is no strict separation of powers in Tanzania

1. It is the President (executive) who appoints Judges and Justices of Appeal (Judiciary) under **Article 109 and 118**.
2. The President (executive) is also allowed to appoint a certain number of members of the National Assembly (legislature) under **Article 66(1) (e)**.

3. The executive do adjudicate in certain cases under 'administrative tribunals', e.g. Military Tribunal (Court Martial), The Tax Revenue Appeals Board, The Fair Competition Tribunal, and The District Land and Housing Tribunal.
4. Judges, in practice, do make laws.
5. The Chief Justice is allowed to make rules, e.g. Court of Appeal rules (2009) made under the Appellate Jurisdiction Act (RE: 2002, Cap. 141).
6. The Court can nullify Acts of parliament under **Article 64(5)**.
7. Members of the executive such as President, Ministers, Directors and etc., are allowed to make subsidiary legislation as per **Article 97(5)**.
8. The President is part of the Parliament (but not a member of the National Assembly) as per **Article 62(2)**. Ministers (executive) initiate Bills and the President assent to Bills into law or may veto the same [**Article 97(1)(2)**].
9. Ministers (Cabinet members) are also part of the National assembly [see, **Article 55(4)**]. The Attorney General (part of the executive) is also a member of the National Assembly under **Article 66(1)(d)**.
10. President has the power to dissolve the National Assembly [**Article 97(4)**]; likewise the National Assembly can impeach the President, Vice-president and Prime Minister (**Article 38(2)(d), 46A, 50(3) and 53A**).
11. Some members of the National Assembly may also hold posts in the executive such as District and Regional Commissioners [see, **Article 66(3)**].
12. A Judge can also be appointed as an Attorney General (the case of Judge Werema).
13. All in all, the Court of Appeal of Tanzania has also asserted affirmatively the doctrine of separation of powers in its various judgements. For instance, in **DPP v. Daudi Pete [1993] TLR 22 (CA)**, a case which was concerned with restrictions imposed by **Section 148(5)(e)** of the **Criminal Procedure Act, 1985** (on bail), **Nyalali CJ** refuted arguments made by **Mwalusanya J** (High Court), thus laid down circumstances under which the doctrine of separation of powers can be said to have been violated as following;

"In my view, the Doctrine of Separation of Powers can be said to be infringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of the laws and the adjudication of rights and duties in disputes either between individual persons or between the state and individual persons."

Again, in **Attorney General v. Lohay Akonaay and Joseph Lohay [1995] TLR 80 (CA)**, **Nyalali CJ** (as he then was) reiterated his position in **Daudi Pete's** case and noted as follows (in relation to the encroachment of the Judiciary's power by the Executive);

"It is the basic structure of a democratic constitution that state power is divided and distributed between three state pillars. These are the Executive, vested with executive power; the Legislature vested with legislative power, and the Judicature vested with judicial powers. This is clearly so stated under Article 4 of the Constitution. This basic structure is essential to any democratic constitution and cannot be changed or abridged while retaining the democratic nature of the constitution. It follows therefore that wherever the constitution establishes or permits the establishment of any other institution or body with executive or legislative or judicial power, such institution or body is meant to function not in lieu of or in derogation of these three central pillars of the state, but only in aid of and subordinate to those pillars. It follows therefore that since our Constitution is democratic; any purported ouster of jurisdiction of the ordinary courts to deal with any justifiable dispute is unconstitutional." (pp. 92).

Further, in **Mwalimu Paul John Mhozya v. Attorney General (No. 1) 1996 TLR 130 (HC)**, the issue was whether the President may be removed or suspended from office by the Court. **Samatta JK** (as he then was) in relation to the doctrine of separation of powers held that;

"The principle that the functions of one branch of government should not encroach on the functions of another branch is a very important principle, one of the principles which ensure that the task of governing a State is executed smoothly and peacefully. It seems to me to be an incontrovertible proposition of law, having regard to the use of the words 'in accordance with the provisions of this constitution' in s 42(3)(d) of the Constitution, that removal or suspension from office of the President of the United Republic is the legislature's exclusive prerogative. Since s 46A of Constitution lays down the procedure to be used in removing or suspending the President, the attempt to remove or suspend him by a procedure other than that would not be legal." (Pp.137-8).

Recently, the Court of Appeal (under **Ramadhani, CJ**) in **A.G. v. Rev. Christopher Mtikila [Civil Appeal No. 45 of 2009]** reaffirmed the doctrine (though not so expressly) by restricting the role of the Court to that of adjudicating (and not legislating). The Court argued that;

“.....the issue of independent candidates has to be settled by Parliament which has the jurisdiction to amend the Constitution and not the Courts which, as we have found, do not have that jurisdiction.”

Independence Of Judiciary

Independence of judiciary is the other factor for the true existence of rule of law, that is to say the existence of rule of judiciary which administer justice accordingly must be independent from the executive and legislature, political and individual influences.

Application of the Doctrine of Independency of Judiciary in the United Republic of Tanzania

The courts are supposed to administer justice basing on the knowledge of the law, experience of the law and only on the provisions of the constitution and other guiding laws, it has to be free to administer justice in accordance to law. The only tool to achieve judicial review which is active and meaningful is only when judiciary is independent as it was observed in the case of **V.G Chavda v The Director of Immigration Services**³¹, in which the court held that the high court has power to grant an interim interlocutory injunction before hearing an application for leave for a prerogative order even against a decision of the Government.

In this case, the court of Appeal of Tanzania widened the scope of administrative law in Tanzania, hence the true picture of multiple factors for existence of the doctrine of Rule of law. Broadly speaking there is no way out the state can experience rule of law if no independence of the judiciary which administer justice in according to law. Article 107B³² provides for the independence of judiciary in Tanzania and what it is supposed to be and this was also provided in the case of **Hamisi Masisi and six others v. Republic**³³.

It is in a democratic governed state where one can find the elements of independence of judiciary while under authoritarian government, due to the nature of its rule, the judiciary can not be independent as every decision is done under the authority and directives of the person in power.

On the basis of the principle of separation of powers, the State surrenders judicial power to the judiciary, which will have compulsory jurisdiction to inquire into disputes and then give binding, authoritative and enforceable decisions. Independence of the judiciary means every judge or magistrate, as the case may be, is free to decide matters brought before him in accordance with his assessment of the facts and his understanding of the law without any improper influence, inducements, or pressures direct or indirect from any quarter or for any reason. This is in accordance with the oath of office, which they take to do justice without fear or favour, affection or ill will.

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

Independence of the Judiciary is legal doctrine which calls for the freedom of the judiciary in the administration of justice. This freedom includes the court and its personnel such as judges and magistrates in exercising their powers of dispensing justice.

Independence referred here, is not only the independence or freedom from the domination of the executive and legislature, but the freedom of the judges and magistrates to decide the cases brought to them without being intimidated, induced or pressured by any person.

³¹ 1995 TLR 125 (HC)

³² Of the Constitution of United Republic of Tanzania, 1977

³³ [1985]TLR 24

Independence of judiciary should not be mistaken as the freedom of the judges and magistrates to do as they please but to pay adherence to accepted legal values, substantive and procedural rules of law applicable in the country. The doctrine of independence of judiciary in Tanzania was introduced by the Independence Constitution 1961. The vision founded upon inter alia the bed rock of separation of powers and the respect for the rule of law entrenched virtues of racial equality before the law, separation of the executive and judicial function and professionalization of judicial.

One feature of this era, perhaps the most significant is that the Tanzania Judiciary attained a significant level of maturity and an appreciation of the importance of the need for efficiency and effectiveness of delivering of judiciary services. The then independence movement leader Mwalimu Julius K. Nyerere declared that:

“Our judicial at every level must be independent of the executive arm of the state. Real freedom requires that any citizen feels confident that his case will be impartially judged, even if it is a case against the prime minister himself.”

Prerequisites of Independence of the Judiciary (dimensions)

Independence of the judiciary has a number of requisites. The first is that the State should guarantee it by entrenching clauses in the Constitution on the tenure, security, emoluments and independence of judges.

The second is that the State should surrender through constitutional provisions the function of administering justice to the judiciary. It should also guarantee fundamental rights and freedoms of individuals in the Constitution. This is important especially in cases of conflict of interest between the State and an individual or group of citizens collectively.

The third requisite is the relative non-partisanship on the part of the judiciary in adjudication of disputes where individual rights are in conflict with those of the State.

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

Factors undermining the Independence of Judiciary

However, the said independence of the judiciary secured by the Constitution poses a great challenge as to whether it is a reality or a myth due to the nature of the prevailing circumstances in the judicial system in relation to their freedom in the exercise of dispensing justice.

Independence of Judiciary has been facing great impede which has resulted in the violation and undermining of the said independence²⁸.

The factors that pose as elements undermining and/or violating independence of judiciary according to Chris Maina are said to be of two categories; **external factors and internal factors**³⁴.

Under internal factors things which undermine the independence of judiciary includes protection of incompetent judicial personnel by a Superior Judicial Officer in the judiciary or the government (“Godfather” as named by the Chris Maina), marginalization of Judicial Officers through poor or insufficient remunerations and exposing them to economic hardship and lastly Corruption such that accepting or asking for bribe in order for the court to rule in favour of the party giving bribe.

External factors undermining the Independence of the judiciary includes; the supremacy of the Government over the Judiciary such that through appointment of the chief justice and judges of high Court by the president, appointment of courts Assessors in primary courts and High Court and the tendency of the government to induce the courts to rule in their favour without paying regard to the law and rules of natural justice.

³⁴ C. P. Maina, *Independence of the Judiciary In Tanzania: Many Rivers To Cross*, 2012, Pg 2.

Also under External Factors, there is an issue of harassment judicial personnel which is mostly done by the Executive arm of the Government as in the cases of **Ally Juuyawatu vs. Loseria Mollel³⁵ and Republic vs. John Kasella Bantu³⁶**, where the subjected to harassments through being interfered in exercising their judicial functions or by being detained as it was in the case of Kasella Bantu. Other factors includes; Contempt of Court by the Government by not enforcing the court orders. That in several instances, the executive arm of the Government has been failing or refusing to carry out court orders.

Few notable instances include those in **Sheikh Mohamed Nassor Abdulla v. The RPC Dar es Salaam and 2 others³⁷** in which the Government refused to carry out the court order by deporting the Sheikh Mohamed despite the court rejecting the same.

Also in the case of **Lesinoi Ndeinai and Another v. Regional Prisons Officer and Another³⁸** where the courts order requiring the police and prisons officials to release immediately the applicants as they were illegally detained was disobeyed.

Apart from those factors which tend to undermine the doctrine of independence of judiciary in Tanzania, the other aspect that results into the undermining or violation of the doctrine in the practical application in the administration of justice is the **narrow interpretation of the doctrine of independence of judiciary**. This at a large extent is caused by the provision of the constitution being too general and not providing the scope of its interpretation. Hence, the controversy that exists in the interpretation which in most cases is the narrow interpretation leads to great injustice to the citizens of Tanzania.

Lastly, the use of ouster clauses in legislation is another way in which the independence of judiciary is violated or denied by the Government. Several legislations some of which are still in operation, tends to exclude the courts from exercising the power of administering justice.

To name a few, the provisions of the Constitution and the Zanzibar Constitution respectively have denied the courts of law the jurisdiction to determine any dispute arising from the results of the presidential elections from both the United Republic and the Revolutionary Government of Zanzibar. A thing which violates the independence of the judiciary in the administration of justice as the authority with final decision in the exercise of dispensing justice as stipulated by the Constitution³⁹.

Bill Of Rights

Bill of rights as constitutional principle is another factor for expansion and development of the doctrine of rule of law, as it appears it makes distinction between democratic and authoritarian government. Such doctrine manifest in democratic government as the tool of protecting human rights.

Since human rights flows directly from the constitutional principle of the rule of law, the sovereignty of the parliament and the independence of judiciary and it does much to determine the balance of power between the state and the citizen, that is to say for the existence of basic human rights courts of justice are vital engine for the existence of rule of law, so the preference of human rights as provided under constitution intends to expand and develop the doctrine of rule of law under the shadow of judiciary.

Application of the Doctrine of Bill of rights in the United Republic of Tanzania

As it was stated in the case of **Rev. C. Mtikila v. The Editor of Business Times and Agustino Lyatonga Mrema⁴⁰** where it was held that there is no legislation which expressly or by necessary implication takes away rights of a citizen or other person enjoying the protection of the law of this country to sue a government's servant or agent who in the course of his official duties, has allegedly committed a tort against him.

³⁵ 1979) LRT 6

³⁶ 1969) HCD 170

³⁷ 1985) TLR 1

³⁸ Misc. Criminal Cause No. 22of 1979

³⁹ Article 41 (7) and Article 34 (7) the Constitution and The Zanzibar Constitution

⁴⁰ [1993] TLR 60

Also in the case **Rev. C. Mtikila v. A.G**⁴¹, it was held that if there is existence of a law, the operation of which is likely to contravene the basic right is against *Article 30(3)*³⁷ so saying the candidate has no locus standi is to infringe his right. On the other hand, under authoritarian government, there is minimum or no observation at all of human rights. This further means, there is little or no freedom of speech, and no freedom of assembly, that is, inability to hold meetings without the approval of the government.

Challenges on the application of Bill of Right in Tanzania

The Basic Right and Duties Enforcement Act (BRADEA)⁴² have the cumbersome procedures for the enforcement of the guaranteed rights of the individual's person in Tanzania. This has been perceived as the weakness of the Act to create road block for the protection of the individual rights in favour of the violation of the individual rights by the states as well as state authority. Does this can be interpreted under the notion of the limitation on the enforcement of human rights? In the case of **Julius Ishengoma Francis Ndyanabo vs The Attorney General**⁴³

"Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitation must not be arbitrary, unreasonable and disproportionate to any claim of state interest."

The following are the challenges that the Basic Right and Duties Enforcement Act does not advance the protection of human right in Tanzania

Existence of cumbersome procedure for hearing

Under the Basic Rights and Duties Enforcement Act,⁹ provides for the ungainly procedure on the litigating the Rights provided for in the Chapter III of the constitution, which in instigate the decay of the determination of the very promoted and protected human rights in judicial level, when it comes to the procedure of a single judge to determine a prima facie case and later the healing by the full bench.¹⁰

In the case of the **Judge in Charge High Court of Arusha and Attorney General v. N.I.N Munuo Ng'uni**¹¹, was contended that the procedure and requirement for the human rights cases to be referred to the High Court as the court of first instance¹² can lead to the elapse of time in the course of litigation and the adjournment may lead to the loose of the right by individuals.

Number of the high court with their proximity.

It is quite clear that in Tanzania there are few High Courts in number. The High Court are situated in Arusha, Bukoba, Dar Es Salaam, Dodoma, Iringa, Mbeya, Moshi, Mtwara, Mwanza, Songea, Sumbawanga, Tabora, and Tanga⁴⁴. This is quite clear that the BRADEA does not intend to protect human right in Tanzania by directing those case to be instituted in a very few temple of justice in Tanzania. Tanzania has 30 regions but for the entire country within those regions there are only 13 High court registries. How does the justice met to those who are found in the region where there is no High Court?. Under whose expenses they file a case in the high court which requires them to travel from one region to another. Is this way of delivering justice to the people whose rights are likely to be violated by the state?. This leaves lists of question in the mind of people whether the acceptable means of protection of human right in the Tanzania is achievable.

Parliamentary Supremacy

Parliamentary supremacy, it is also an important factor for prosperity of the doctrine of rule of law; supremacy means that the parliament is the only organ which has power to make and unmake laws, and that it can not be interfered by any external force.

However due to the development of administrative law, now there are other organs which can make, unmake and challenge the laws made by the parliament, though the supreme body is still the parliament.

⁴¹ 1995] TLR 31

⁴² No33 of 1994, [Cap3 R.E 2002]

⁴³ Court of Appeal of Tanzania, Civil Appeal No 64 of 2001 (unreported).

⁴⁴ 19The Judiciary of Tanzania, available at http://www.judiciary.go.tz/index.php?option=com_content&view=article&id=44:high-court-of-tanzania&catid=14:the-judiciary&Itemid=67.

Application of the Doctrine of Parliamentary Supremacy in the United Republic of Tanzania

This doctrine means more because through its power, the parliament may make or unmake laws. If the unjust law is enacted then there is no way out rule of law can exist in any state, this simply means parliament must make laws which are not against the constitution which is the only tool declaring superiority of any organ and the source of all other principles

So up to that juncture it should be bear in mind that the parliamentary Acts are subjected to be declared unconstitutional by the judiciary if are contrary to constitution as it was provided in the case of **Chumchua Marwa v Officer Incharge Of Musoma Prison and A.G**⁴⁵ where the Deportation Ordinance⁴⁶ was declared unconstitutional.....the court went further by explaining what the rule of law means, as per Mwalusanya, J. (as he was then) observed that “the rule of law means more than acting in accordance with the law. The rule of law must also means fairness of the government. The rule of law should extend to the examination of idea; and that the law does not give the government too much power. The rule of law is opposed to arbitrary power. The rule of law requires that, the government should be subject to the law rather than the law subject to the government. If the law is enough to justify dictatorship there is no rule of law.

Conclusion:-

Constitution makers should be mindful of the potential drawbacks to using constitutional principles. For instance, the process of negotiating constitutional principles may add another round of costly, time consuming and potentially divisive proceedings at the front-end. In addition, by definition they will limit certain constitutional options and/or create parameters for possible outcomes (though this may be necessary to bring the parties to the table). The principles, likely negotiated between competing elites, will constrain the options of the people later in the process. In extreme examples, constitutional principles may hold back a genuinely democratic process of reform, especially if they are imposed by an outgoing regime or an external actor. Finally, there is the risk that previously agreed upon principles might be unenforceable, as in Colombia.

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⁴⁵ Misc. Crim. Case No 2 of 1988 HC Mwanza Registry (unreported)

⁴⁶ 39The Deportation Ordinance of 1921

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