

CONSTITUTIONS, CONSTITUTIONALISM AND THE ECONOMY: LESSONS
FROM TANZANIA.

By Dr. G. Mgongo Fimbo*

Introduction:

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Tanzania is a poor Third World country whose people were among the 780 million people who were described by the World of Bank as living in the direst poverty "a condition of life so characterised by malnutrition, illiteracy and disease as to be beneath any reasonable definition of human decency".¹ Third World peoples are not only poor but also live under authoritarian regimes. The people lack human rights and dignity.

This paper traces the history of constitution making in Tanzania in the context of struggles for peoples' economic and political emancipation. The first section sketches the liberal interpretation of constitutionalism and Tanzania's initial rejection of it under the banner of developmentalism in the name of "Ujamaa". The result was the emergence of an authoritarian state. The paper argues that authoritarianism did not bring any noticeable benefits to the people. The second section discusses entrenchment of the Bill of Rights in the Constitution in concession to public demands and addresses itself to the current debate on greater democratisation. The paper notes that the issues raised in the debate go beyond the liberal concept of constitutionalism. In the concluding remarks I make some generalizations which I believe, are applicable to other African states.

Associate Professor of Law, Department of Economic Law,
Faculty of Law, University of Dar es Salaam TANZANIA, LL.B(University
of East Africa); LL.M (London), Ph.D(Dar) Advocate of the High
Court of Tanzania.

The Liberal concept of Constitutionalism versus Developmentalism.

De Smith gives a definition of constitutionalism as:

The principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content... Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty.²

Thus the liberal concept of constitutionalism rests on two main pillars - limited government and individual fundamental freedoms/rights.³ In the words of the US Declaration of Independence and the Declaration of the Rights of Man and Citizen these rights are liberty, the ownership of property, security and the right to resist oppression. I would add that these rights which are normally contained in a Bill of Rights are essentially bourgeois because they collectively form the political framework required to constrain the state on the one hand, and to facilitate extension of capitalist relations on the other.⁴

The above concept of constitutionalism was rejected by the nationalists led by the TANGANYIKA AFRICAN NATIONAL UNION (TANU). During the negotiations for independence the nationalists refused to have a Bill of Rights entrenched into the Constitution. The main ground articulated was that the priority of the new government was economic development; therefore, what was required was a constitution which would not hinder the government in its

endeavours. "Development" was meant to comprise three Key elements, namely, growth, self-reliance and equality of distribution. It was argued that a Bill of Rights would stand in the way of the government in execution of developmental plans.⁵ Accordingly, neither the Independence Constitution in 1961⁶ nor the Republican Constitution in 1962⁷ contained a Bill of Rights. It was in the above Constitutions and in the Interim Constitution, 1965 that fundamental freedoms/ rights were enumerated in the preamble. The legal effect of this tactic was that the rights were not justiciable. In Attorney-General v Lesinai Ndeinai & Joseph Saleyo Laizer and two others, Kisanga, J.A. stated,⁸

It is true that a number of rights have been enumerated in the preamble to the Constitution. These include the right of (sic) freedom to the individual. But this amount only to a declaration of our belief in those rights. It is no more than just that. The rights themselves do not become enacted thereby such that they could be enforced under the Constitution. In other words one cannot bring a complaint under the constitution in respect of a violation of any of those rights as enumerated in the preamble.

The structure of the economy at independence in 1961 reflected a colonial structure with an export - import enclave geared to serving the colonial power, and a large peasant sector supporting the livelihood of over 90 per cent of the population. The income per capita was as low as T.Shs.380 (ie about US \$50 then). Economic activity was concentrated in primary production which dominated both the gross domestic product (GDP) and export. Consumer goods dominated the small manufacturing sector and the imports. Agriculture alone accounted for 50-60 per cent of the GDP while industry, (ie mining, manufacturing, construction and utilities)

contributed 12-15 per cent with manufacturing accounting for only 3.6 per cent of the G.D.P.⁹ Thus the petty bourgeoisie which gained state power in 1961 faced a formidable task of bringing about economic development.

The philosophy which the petty bourgeoisie adopted was that of "Ujamaa" and was adumbrated in three historical documents, Ujamaa, the Basis of African socialism (1962),¹⁰ The Arusha Declaration (1967)¹¹ and Socialism and Rural Development (1967).¹² The development model adopted is that the State assumes a status of a paternal provider of essential services thus creating a patron-client relationship with political leaders as Key actors while citizens become mere spectators. Under/this model the State seeks to score political credits through redistributive policies and essential services become means of political mobilisation and social control. Unencumbered by a Bill of Rights, the petty bourgeoisie set out to implement its philosophy of Ujamaa in earnest. It erected an authoritarian state which used state coercion in organising society. Hereinafter I outline the manifestations of the authoritarian state with regard to individual liberty/personal freedom, freedom of association/ rights to organize and the right to private property.

With regard to personal freedom, I shall discuss preventive detention, the spectre of economic offences and right to bail. The Preventive Detention Act¹³ was enacted

exactly one year after independence. The basic principles were taken from the Preventive Detention Act, 1958 of Ghana. The Act gives the President of Tanzania power to detain any person for an indefinite duration when he is satisfied that such person "is conducting himself so as to be dangerous to peace and good order" or such person "is acting in a manner prejudicial to the defence... or security of the state." Further, even if no such conduct or acts have yet occurred the Act permits the President to detain a person if he is satisfied that it "is necessary to prevent any person acting in a manner prejudicial to peace and good order... or to defence... or security of the state."¹⁴

This Act has been invoked frequently to incarcerate persons involved in anti-government activities on the Mainland and in Zanzibar.¹⁵ In March 1983 over one thousand persons on the Mainland were detained under the Act on suspicion of being economic saboteurs.¹⁶

In Attorney-General v Lesinai Ndeinal,¹⁷ Kisanga, J.A. observed,

There can be no doubt that the Preventive Detention Act confers vast powers of curtailing the liberty of the individual. It empowers the President to detain a person if he is satisfied that certain circumstances specified under it do exist. The issue as to whether those circumstances do exist is entirely subjective... and his decision to detain a person in pursuance thereof cannot be tested or questioned in any court.

The Court of Appeal of Tanzania held that the detention order in that case was invalid on the ground that it did not contain a public seal, as required by the Act. As demonstrated above the Court of Appeal rejected counsel's submission that the Act was unconstitutional.¹⁸ Such submission can legitimately be made after the entrenchment of the Bill of Rights in the Constitution in 1984.

I shall now turn to the spectre of economic offences. Economic growth decelerated in 1970s (from rather respectable rates in the 1960s) and stagnated in the 1980s. The share of the productive sectors, agriculture and industry in the GDP declined starting in the 1970s, reflecting the growth of the services sector at the expense of the productive base.¹⁹ As economic difficulties exacerbated, the state invented the concept of "economic offences". The expression used in the Economic Sabotage (Special Provisions) Act 1983²⁰ was "economic sabotage offence" initially defined as any offence involving or amounting to economic sabotage and later redefined as offence triable under this Act. This Act has been described by the Hon. Mr. Justice Kisanga as "one of the most difficult pieces of legislation that Parliament ever passed during our time. It marks a departure from certain conventional and basic principles in the system of the administration of criminal justice in this country."²¹ This categorization "economic offence" is contained in the Economic and Organized Crime Control Act 1984²² which was "designed to be a permanent weapon of the nation in the war declared last year (1983) against

saboteurs, racketeers, profiteers and other anti-social elements in society. The treatment with abhorrence of acts of that nature, it is now proposed, should be a permanent and ordinary feature of the national ethic."²³

Economic offences are prescribed in the First Schedule to the Act; they are as follows: theft of mail matter, hoarding commodities or money, conveying or being in possession of goods suspected of having been stolen or unlawfully acquired, bribery and corruption (under the Prevention of Corruption Act 1971 Act No.16 of 1971), exchange control offences (under the Exchange Control Ordinance, Cap 294) and many others. The significance of this Act lies in two respects. Firstly, economic offences are triable in the High Court sitting as an Economic Crimes Court²⁴ and applications for bail are determined by the same court. Secondly, the maximum sentence has been enhanced to fifteen years imprisonment.²⁵ Under the penal code, for example, the maximum sentence for the offence of being in possession of, or conveying, or having control over property suspected of having been stolen is three years. Apart from overburdening the High Court unnecessarily, this Act is objectionable on another ground. It is based a questionable premise that severe sentences will curb crimes.

I shall cite two instances with regard to freedom of association or right to organise, namely the adoption of one party state and extinction of trade union autonomy. The one party system was adopted and concretized in the Interim Constitution

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1965 without public and open debate. The decision to introduce the one party system was made by the National Executive Committee of TANU after opposition parties had been harrassed out of existence through detention and deportation of their leaders. Trade union autonomy was lost in the same way, After the army mutiny in 1964 the Tanganyika Federation of Labour (TFL) was banned and legislation was hurriedly enacted establishing one workers' organisation called the National Union of Tanganyika Workers (NUTA).²⁶ Trade unionists who were critical of this step were detained under the Preventive Detention Act. The loss to the workers was enormous. Shivji has eloquently put it,

With the loss of genuine and independent trade unions the working class was left at the mercy of capital. As a result the gains that it had made in terms of increased wages during the late '50s and early '60s were swiftly eroded over the next ten years resulting in the real wages in the early 1970s being lower than those in the early 1960s. Since the loss of trade union autonomy wages have failed to keep pace with the galloping inflation.²⁷

Generally the petty bourgeoisie in Tanzania has paid scant regard to private property, Starting with the Arusha Declaration (1967) it proclaimed that all major means of production must be "controlled and owned by the workers and peasants through the machinery of their Government and co-operatives." Accordingly, the "commanding heights" of the economy were nationalised - industrial/manufacturing plants, banks,²⁸ insurance,²⁹ including buildings³⁰ in urban areas and plantations and estates.³¹ These acquisitions were supported by the masses especially where the dispossessed owners were non-citizens or non-Africans. The masses hoped that the acquisitions would head to the erection of an internally

integrated economy. These hopes have been disappointed in that what we have witnessed is consolidation of state power in the hands of the petty bourgeoisie. I wish to add that the state was able to perform the above acts which are inimical to human rights through state coercion and its ideology of "Ujamaa". As the economic crisis deepened and social services became eroded, the state began tinkering with the economy through Structural Adjustment Programme (SAP), National Economic Survival Programme (NESP), Economic Recovery Programme I and II (ERP), Economic and Social Action Programme (ESAP) and Priority Social Action Programme (PSAP) encompassing trade liberalisation with the IMF at the centre of the stage. And the people made a fervent call for greater democratisation. Included in this call was a Bill of Rights.

Bill of Rights

The bill of Rights was not part of the original proposals of CHAMA CHA MAPINDUZI (CCM) in 1983 for the amendment of the Constitution of the United Republic of Tanzania, 1977. The Bill of Rights was included in the amendment³² partly due to public demand and as a result of pressure from Zanzibar.³³

Contrary to the fears of the government the High Court has not been inundated by petitions for declarations that Acts of Parliament are unconstitutional. There are two explanations for this phenomenon. Firstly, the articles on the Bill of Rights carry extensive qualifications. The principal qualifications are contained in articles 30 and 31 of the Constitution. Secondly, Parliament has not enacted appropriate legislation for the practice and procedure of the High Court with regard to such petitions.³⁴ As a temporary measure the Court of Appeal of Tanzania has held that "until the Parliament legislates under sub-article (4) [of article 30] the enforcement of the Basic Rights, Freedoms and Duties may be effected under the procedure and practice that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought."³⁵

The only case conclusively determined by the Court of Appeal of Tanzania is in the realm of individual liberty: Director of Public Prosecutions v Daudi s/o Pete.³⁶ This was an application for bail. The provision under attack was section 148(5) of the Criminal Procedure Act 1980.³⁷ It states,

148-(5) A police officer in charge of a police station, or a court before whom an accused person is brought or appears, shall not admit that person to bail if-

- (e) the act or any of the acts constituting the offence with which a person is charged consists of a serious assault on or a threat of violence to another person, or of having or possessing a firearm or an explosive.

The Court of Appeal held that the above provision was violative of article 15(2)(a) and was not saved by article 30(2)(b) of the Constitution.³⁸ Thus it was unconstitutional and was struck out of the statute book.

The above decision is a healthy beginning in the struggle for human rights in Tanzania. Already in the current debate on appropriate political system the people are calling for repeal of the Preventive Detention Act and the Deportation Ordinance Cap 38. With regard to freedom of association the issues being raised relate to the abolition of one party system and return to multi-partyism as well as trade union autonomy. The workers' organization, JUMUIYA YA WAFANYAKAZI WA TANZANIA (JUWATA) is demanding total independence from CCM so that it becomes a trade union in real terms. Other issues which may be discerned from the debate go beyond the liberal concept of constitutionalism. Among these are are follows: The Union between Tanganyika and Zanzibar, women's rights, the right to work,³⁹ construction of a nationally independent economy⁴⁰ and a

right to Social Services. The argument for the last one is that the petty bourgeoisie in Tanzania siphons surplus from peasants and grossly underpays workers.⁴¹

Concluding remarks

I wish to make the following generalizations out of materials presented in this short paper. My endeavour is to extract the general from the particular. First, Developmentalism and Constitutionalism are not necessarily contradictory. It is urged that African states should maintain Constitutionalism while pursuing developmentalism. Second, Constitutionalism should go beyond liberalism. It is contended that constitutions of African states should contain special rights to take account of the extreme poverty of most of these states. Third, Constitution making should be preceded by public and open debates throughout the country. Fourth, one partyism is inimical to full realization of human rights as there is a tendency to centralisation of power. Fifth, all rights which are entrenched in the Constitution should be justiciable notwithstanding the peoples lack of accessibility to professional lawyers. I believe that cases which reach the courts act as restraint on the leadership. Sixth, the Constitution as a basic law of the land is not neutral. It is an instrument of the dominant class in class struggles. The Tanzanian experience outlined in paper shows that the petty bourgeoisie in control of state power since 1961 has used the constitution to serve its own interests. It is, therefore, contended that struggles for human rights must focus on constitutions of nation states. Seventh, Constitutionalism without appropriate economic policies is wasted endeavour. The Tanzania case is loud and clear. This paper has

shown that while pursuing its own form of Constitutionalism the state in Tanzania has adopted economic policies which do not lead to peoples' economic emancipation. It is, therefore, contended that African states and peoples' struggles should strive for nationally independent economies. Eighth, the leadership in power cannot, on its own motion, initiate the democratic process or guarantee rights to the masses. The Tanzania case shows that although the Bill of Rights was not on the agenda of CCM it became entrenched in the Constitution due to peoples' demands. It is therefore, imperative for intellectuals in Africa to sensitize classes, groups, social movements, associations etc. which can take up issues of democracy in the political arena of our nation-states.

NOTES

1. World Bank (1980), World Development Report 1980 (World Bank, Washington, D.C) p.32.
2. De Smith, S.A. (1962), Constitutionalism in the commonwealth Today, Malaya Law Review, 4, 2, 205.
3. Shivji, I G. (1990), State and Constitutionalism in Africa: A New Democratic Perspective, International Journal of the Sociology of Law, 18, 381 at p.382.
4. Adelman, S. (1991), Human Rights and Development: The Dominant Discourse as closure (unpublished), p.6.
5. Peter, C.M. (1991), Five Years of Bill of Rights in Tanzania, Drawing a Balance Sheet (unpublished) p.2. Mwaikusa, J.T. (1991) Genesis of the Bill of Rights in Tanzania, (unpublished p. 11.
6. The Tanganyika (Constitution) Order in Council 1961 Statutory Instruments 1961 No. 2274: GN 415/1961.
7. Constitutional Act No. 1 of 1962.
8. [1980] TLR 214 at p. 247.
9. Wangwe, S.M. and Luvanga, N.E., (1990) Technology Transformation in the Third World: The case of Tanzania, Tanzania Journal of Economics, Vol. 2 No.1 (January 1990), p.3 at p.4.
10. Nyerere, J.K. (1962), Ujamaa, Essays on Socialism Oxford University Press, Nairobi, 1968 p.1
11. Ibid. p.13.
12. Ibid p.106.
13. Act No.60 of 1962, Cap 490 as amended by the Preventive Detention (Amendment) Act 1985, Act No. 2 of 1985.
14. Cap 490 section 2.
15. The Act extends to Zanzibar by virtue of Act No. 2 of 1985.
16. Shivji, I.G. (1990) Pre-conditions for a Popular Debate on Democracy in Tanzania (unpublished) footnote 15.

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17. Footnote 8.
 18. at p. 2.
 19. Wangwe, S.M. and Luvanda, N.E. (1990) *Technology Transformation in the Third World: The Case of Tanzania*, op.cit. p.19.
 20. Act No. 9 of 1983 as amended by Act No. 10 of 1983.
 21. Kisanga, R.H., (1983). *The Lawyer and the Society: The Challenge of the Professional and the Academic in Tanzania*, *Eastern Africa Law Review* Vol. 15 (1982) p.1 at p.9.
 22. Act No. 13 of 1984 as amended by Act No. 12 of 1987.
 23. *Objects and Reasons: A Bill for the Economic and Organized Crime Control Act, 1984.*
 24. Its composition is a Judge of the High Court, sitting with two lay members.
 25. Act No. 13 of 1984, section 59(2).
 26. *National Union of Tanganyika Workers (Establishment) Act 1964*, Act No. 18 of 1964.
 27. Shivji, I.G., (1983) *The State of the Constitution and the Constitution of the State in Tanzania*, *Eastern Africa Law Review*, Vol. 11-14 (1978-81) p.1 at p. 17-18.
 28. *National Bank of Commerce (Establishment and Vesting of Vesting of Assets and Liabilities) Act 1967*, Act No. 1 of 1967.
 29. *Insurance (Vesting of Interests and Regulation) Act, 1967*, Act No. 4 of 1967.
 30. *Acquisition of Buildings Act 1971*, Act No. 13 of 1971.
 31. *Specified Coffee Estates (Acquisition and Regrant) Act 1973*, Act No. 31 of 1973.
 32. *Fifth Amendment to the Constitution of the United Republic of Tanzania, 1977*, Act No. 15 of 1984.
 33. Peter, C.M., (1991) *Five Years of Bill of Rights in Tanzania*, *Drawing a Balance Sheet*, op.cit. p.3, Mwaikusa, J.T., (1991), *Genesis of the Bill of Rights in Tanzania*, op.cit. p.18.

34. Article 30(4) of the Constitution.
35. Director of Public Prosecutions v. Daudi s/o Pete, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 28 of 1990. I had the honour of appearing as amicus curiae
36. Footnote 35.
37. Act No. 9 of 1985.
38. Article 15-(2) For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, restriction detention, exile or deprivation of his liberty in any other manner save in the following cases:-
 - (a) in certain circumstances, and subject to a procedure prescribed by law,

Article 30 -(2) It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for-

 - (b) ensuring the interests of defence, public safety, public order...
39. Articles 11 and 22. But see Article 7(2). See also Argustine Masatu v. Mwanza Textiles Ltd, High Court of Tanzania at Mwanza, Civil Case No. 3 of 1986.
40. Shivji, I.G. (1990), State and Constitutionalism in Africa: A New Democratic Perspective, op.cit. p 396.
41. This argument was advanced at the Second Convocation Seminar, whose theme was "The Crisis of Social Services Delivery in Tanzania and Strategies for More Sustainable systems in the 1990s", 3rd - 4th April 1991, Nkrumah Hall, University of Dar es Salaam.



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