

**JUDICIAL REVIEW OF ADMINISTRATIVE ACTION AS THE  
PRIMARY VEHICLE FOR THE PROTECTION OF HUMAN RIGHTS  
AND THE RULE OF LAW**

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**1. INTRODUCTION:**

It may be boring but it keeps us in step when we agree briefly on what we are talking about and so, define our terms. Let me start by saying what in this paper I mean by judicial review of administrative action. That will be followed by a cursory look at human rights and an appreciation of the essentials of the rule of law. I shall then take a glance at the enabling legal provisions in Tanzania before I mould all that when considering a few cases of judicial review of administrative actions in Tanzania, and how those have protected human rights and the rule of law.

**2. JUDICIAL REVIEW:**

Judicial review is a specialised remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies<sup>1</sup>.

The Court is concerned with evaluating fairness as Lord Hilsham L. C. ably puts it in Chief Constable of North Wales Police v. Evans<sup>2</sup>:

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<sup>1</sup> Judicial Review: Law and Procedure, Richard Gordon Q. C. 2<sup>nd</sup> Ed. (Sweet & Maxwell, 1996) p. 1.

<sup>2</sup> [1982] 1 W. L. R. 1155 at 1160

“It is important to remember in every case that the purpose ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that authority constituted by law to decide the matters in question.”

Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service<sup>1</sup> outlined three grounds for judicial review of administrative action: illegality; irrationality; and procedural impropriety.

### **3. HUMAN RIGHTS:**

Paul Sieghart<sup>2</sup> distinguishes human rights from other rights in two ways: One, other rights are acquired and are created by some act or event, for example, by a contract or inheritance or a tort. So, those rights can be transferred, disposed of or extinguished by other acts or events. Human rights, on the other hand, are not acquired and so cannot be extinguished or transferred by any act or event. Human rights are said to inhere universally in all human beings by virtue of their humanity alone and are thus inalienable. Two, that the primary correlative duties of human rights fall on States and public authorities and NOT on individuals.

### **4. THE RULE OF LAW:**

The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and

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<sup>1</sup> [1985] A. C. 374 at 410.

<sup>2</sup> The International Law of Human Rights (Clarendon Press, Oxford, 1985) p. 17.

creating order and predictability regarding how a country functions<sup>1</sup>. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.

In his book The Morality of Law, Lon Fuller identified the following eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law:

- i. Laws must exist and those laws should be obeyed by all, including government officials.
- ii. Laws must be published.
- iii. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
- iv. Laws should be written with reasonable clarity to avoid unfair enforcement.
- v. Law must avoid contradictions.
- vi. Law must not command the impossible.
- vii. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.
- viii. Official action should be consistent with the declared rule.

## **5. THE ENABLING LEGAL PROVISIONS IN TANZANIA:**

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<sup>1</sup> *The Rule of Law as a Goal of Development Policy* by Helen Yu and Alison Guernsey  
[http://www.uiowa.edu/ifdebook/faq/Rule\\_of\\_Law.shtml](http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml)

The Constitution of the United Republic of Tanzania, 1977, provides for judicial review in the following terms:

Where a person alleges that any provision of this part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened in relation to him in any part of the United Republic, he may, without prejudice to any other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court<sup>1</sup>.

The part referred to in the quoted clause deals with basic rights and duties, that is, the bill of rights. I have already said that the primary correlative duties of human rights fall on States and public authorities and not on individuals. Therefore, this clause provides for judicial review of administrative actions as I shall soon demonstrate.

There is also The Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 (RE 2002), which provides<sup>2</sup>:

(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case where the High Court would but for subsection (1) have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court for any purpose, the Court may make an order requiring the act to be done or prohibiting or removing the proceedings or matter, as the case may be.

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<sup>1</sup> Article 30 (3).

<sup>2</sup> section 17.

(3) ...

(4) In any written law, references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

(5) Any person aggrieved by an order made under this section may appeal therefrom to the Court of Appeal.

Then section 18 stipulates that the Attorney-General has to appear as a party in any civil matter seeking for such orders against the Government which term has been defined in sub-section (3):

For the purposes of this section the term "Government" includes a public officer and any office in the service of the United Republic established by or under any written law.

## **6. THREE EXAMPLES OF CASES OF JUDICIAL REVIEW:**

### **a) Festo Barege and 794 others v Dar es Salaam City Council<sup>1</sup>,**

The applicants were residents of a suburb of Dar es Salaam where the City Council dumped waste and refuse which attracted swarms of flies. When the rubbish was set on fire, a lot of smoke and foul smell was produced and inconvenienced the neighbourhood. The applicants applied for orders of certiorari to quash the decision of the City Council of dumping waste; prohibition, to stop the City Council from continuing that nuisance; and mandamus, to compel the respondent to

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<sup>1</sup> Misc. Civil Cause No. 90 of 1991, High Court of Tanzania at Dar es Salaam (unreported).

discharge its functions properly by establishing and using an appropriate site.

The application was granted by the High Court. A number of findings were made: One, the City Council's action was *ultra vires* the Local Government (Urban Authorities Act, 1982. Two, the action was contrary to the City's Master plan. Three, it was not a statutory duty of the respondent to create nuisance but to stop it and avoid to endanger the residents' health. Four, Article 14 of the Constitution, which guarantees the right to life and its protection by the society, was breached.

**b) Edward Mlaki Liston Matemba v The Region Police Commander<sup>1</sup>**

There was an allegation that the applicant's two vehicles were involved in transporting smuggled goods. The Regional Police Commander of Kilimanjaro Region, pursuant to the instructions of the Secretary to the Regional Security Committee, arrested and detained the vehicles. The applicant was later summoned to appear before the Region Security Committee where he denied the allegations. He was told that he would be informed of the outcome but that was not done. The vehicles remained in police custody though no criminal charges were preferred against him.

The High Court held that in the absence of any pending criminal matter the respondents had no power to detain the

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<sup>1</sup> Misc. Civil Application No. 38 of 1979 (unreported).

applicant's vehicles, and an order of *mandamus* was issued to release the vehicles.

**c) Palm Beach Inn Ltd and Another v Commission for Tourism and Two Others<sup>1</sup>,**

The second applicant, Ms. Naila Majid Jiddawy, was operating a tourist hotel, on the eastern coast of the Island of Zanzibar. The first respondent's employees ordered the closure of the hotel, cancelled her business licence, and ordered her to vacate the premises for good.

The applicants challenged those three orders in the High Court of Zanzibar which made a number of findings: One, the respondents exceeded their powers in closing the hotel and revoking the applicants' licence. Two, the respondents' actions were *ultra vires*. Three, the deportation order served on the second applicant deprived her of freedom of movement. Four, the applicants were denied the right of a hearing in spite of their demands to know what were their faults.

Orders of *certiorari* were granted to quash the 2<sup>nd</sup> respondent's decisions to close the hotel and cancelling the licence. A prohibition order was also issued to restrain the 2<sup>nd</sup> respondent from purporting to act as the Commission for Tourism while no commissioners had been appointed.

## **7. CONCLUSION:**

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<sup>1</sup> Civil Application No.30 of 1994 of the High Court of Zanzibar (unreported).

All three cases cited above bear witness to the legal position that: One, the rule of law extends beyond mere regulations and is shaped by some institutional constraints on government. Among such institutional constraint is the existence of an independent judiciary which exercises judicial review to ensure the observance of the rule of law. Two, what are referred to as the prerogative writs are the vehicles of judicial review. Three, judicial review ensures that the State and their public authorities by their actions do not dispose individuals of their human rights for whatever reasons.

It is abundantly clear that judicial review of administrative action is indeed the primary vehicle for the protection of human rights and the rule of law.

**THANK YOU.**