"JOIN A PARTY OR I CANNOT ELECT YOU": THE INDEPENDENT CANDIDATE QUESTION IN TANZANIA

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Abstract

Independent candidates are not allowed in Tanzania. This restriction has raised debate which dominates multipartism and its efficacy in the country. Since the inception of multipartism in 1992, there have been three major cases on independent candidates. In the first two cases, the High Court ruled in favour of independent candidate. However, in the third case, the Court of Appeal, while subscribing to the need of independent candidates, it nullified the previous judgments by the High Court on the ground that the court had no jurisdiction in declaring a constitutional provision to be unconstitutional; and that the independent candidate issue being political and not legal should be resolved by the parliament. I argue that the Court of Appeal failed to exercise its mandate in administering justice. I further argue that such failure is attributed to the fear by the justices from the ruling party and its government.

Keywords: Independent candidate, Tanzania, Mtikila, democracy, court

1. Introduction[1]

Independent candidates are a common phenomenon in a democracy. In practice, however, some governments, particularly in new democracies, resist its inclusion in their respective electoral systems. The usual grounds for such exclusions are that

1 I wish to thank Mr. Alex B. Makulilo who is an advocate of the High Court of Tanzania and a PhD candidate at the University of Bremen, Germany for commenting on this article from a legal perspective and for providing me with necessary legal documents.

independent candidates would compromise unity and sometimes jeopardize electoral systems. In a country such as Tanzania, the claim for jeopardy is grounded on the fact that it would trigger the issue of ethnicity and personality politics. In Australia, for example, it was observed that independents have been more important than is generally recognized: two of them brought down a federal government in 1941 and from the late 1930s to the 1960s successive Liberal Country League governments in South Australia were dependent on independent support to stay in office.[2] Admittedly, independent candidates across the world's political systems have had varied impact. In Pakistan and Russia, for example, independents win as many as 20 to 40 percent of the vote while in the United States they win less than 1 percent of the national vote on average.[3]

Australia is regarded as the home to more independent parliamentarians than any other comparable Western country. Since 1980, for example, an unprecedented 56 independents have served in Australian parliaments.[4] In Africa, independent candidates are visible in Zambia, Malawi, the Republic of South Africa, to mention just a few countries. Nonetheless, the general impression is that in such countries they pose little threat to political parties. This article examines the issue of independent candidates at all levels of presidential, parliamentary and council elections in Tanzania and focuses on three major court decisions. In the first two decisions the court ruled in favour of the independent candidates. In the third case it reversed the previous judgments. I argue that the Court of Appeal failed to exercise its mandate of administering justice in the country so as to ensure independent candidates maintain their rights to contest elections. I further argue that such a failure was attributed to the fear by the justices from the ruling party and its government which are reluctant to endorse independent candidates. I use statutes,

2 Jennifer Curtin, "Independents in Federal Parliament: A new challenge or a passing phase?" Politics Program, School of Political and Social Inquiry, Monash University, Melbourne, Australia, 2004.

3 Dawn Brancati 2008 "Winning Alone: The Electoral Fate of Independent Candidates Worldwide," Journal of Politics, 70 (3): 648–662.

4 Jennifer Curtin, "Independents in Federal Parliament…", 2004.

parliamentary Hansards, government and ruling party reports, international conventions and case law to authenticate my stand. For smooth execution of this work, I divide the article into five phases: independent candidate as a right; the history of independent candidate since independence; issues and verdicts in the three landmark cases of independent candidates; discussion, and concluding remarks.

2. Independent Candidate as a Right

The term "independent candidate" refers to an individual who contests an election without political party support structures. This phenomenon is one of the basic political rights that people should enjoy and international instruments provide that persons should not be compelled to be members of political parties in order to have the opportunity to be leaders in their respective countries. To be sure, in its 154th session in Paris, the Inter-Parliamentary Council adopted the Declaration on the Criteria for Free and Fair Elections. In this Declaration, the Council stated that everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election, either as an independent candidate or through an organization for the purpose of competing in an election. The above criterion is clearly stipulated in Article 25(1) of the United Nations International Covenant on Civil and Political Rights (CCPR) of 1966 which states that every citizen shall have the right and the opportunity, and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. What it means here is that restrictions may be allowed only to the extent that they are objective and reasonable. For example, conditions such as age, mental health and citizenship can reasonably prevent individuals from voting or being voted for in public offices. However, it was in 1996 that the United Nations (UN) General Comment No. 25 on the CCPR made it explicit that political party membership as a qualification for participation in public affairs is unreasonable. Section 17 of the Comment provides, "the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties".

However, one significant shortcoming of international instruments is that they become binding once ratified by a specific country. Hence, individual countries may choose to be or not to be part of these instruments.

3. Independent Candidates in Tanzania: A Historical Perspective

Upon receiving its independence on 9th December 1961, Tanganyika (later the United Republic of Tanzania) was a multiparty democracy. At least four political parties existed by then: the Tanganyika African National Union (TANU), the African National Congress (ANC), the United Tanganyika Party (UTP), and the All Muslim of National Union of Tanganyika (AMNUT). Although it did not spell out the term "independent candidate," the Tanganyika (Constitution) Order in Council, 1961 as published by the Government Notice No. 415 of 1st December 1961 allowed such a candidate during elections. To be sure, Sections 18 and 19 of the constitution stipulated qualifications and disqualifications for election to the National Assembly:

> Subject to the provisions of Section 19 of this Constitution, any person who (a) is a citizen of Tanganyika, (b) has attained the age of twenty one years, and (c) is able to speak, and unless incapacitated by blindness or other physical cause to read the English language with a degree of proficiency to enable him to take an active part in the proceedings of the National Assembly; shall be qualified for election as a member of the National Assembly, and no other person shall be so qualified.

Yet, Section 24 of the Republican Constitution of Tanganyika (Constitutional Act No. 1 of 1962) retained the same requirements for the post of the National Assembly. Furthermore, the constitution introduced qualifications to the new post of the presidency. Section 4(3) read:

> Any citizen of Tanganyika who: (a) is qualified to be registered as a voter for the purposes of elections to the National Assembly, (b) has attained the age of thirty years

> and, and (c) in the case of elections held on a dissolution of Parliament, is nominated by not less than one thousand persons registered as voters for the purposes of elections to the National Assembly shall be qualified for elections as President.

Two observations can be made from the Independence and Republican constitutions. That, the independent constitution was based on the Westminster principles with relatively robust features of democracy. However, the Republican constitution marked the beginning of the erosion of democracy for centralizing and concentrating power to the executive arm of the government and the ruling party to the extent that it made the Tanzania of the time a *de facto* one party state. Notwithstanding such tendencies, it is imperative to point out that in the 1960 elections, Herman E. Sarwatt, an active member of TANU, vied for the post of member of the National Assembly as an independent candidate in the Mbulu constituency. TANU's candidate was unpopular and TANU members in Mbulu demanded another candidate. TANU leaders rejected their request by saying that they were tribalist. Interestingly, Sarwatt won the seat against the TANU nominated candidate. This victory was significant and historic since TANU won all the contested seats except the Mbulu constituency. President Nyerere once remarked that, in the history of the House, only one person managed to outcompete a TANU sponsored candidate in elections.[5] TANU leaders were generally unhappy with this phenomenon though it should be emphasised here that Mr. Sarwatt did not cease to be a member of TANU and, in fact, during his campaigns he mobilized a lot of people to join TANU.[6]

In dealing with any form of opposition, from both within and without TANU, president Julius Nyerere formed a commission to

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5 See Hotuba ya Rais, Mwalimu Julius K. Nyerere katika Bunge, Kuhusu Siasa ya Serikali, 8 Juni, 1965.

6 It was admitted so by Mr. Sarwatt himself during the parliamentary sessions. See the Parliament of Tanzania, Proceedings of the National Assembly, Seventeenth Meeting, First Sitting 8 June 1965, (Hansard).

work out for a one party system.[7] One of the issues addressed was: "Should all candidates for election to the Legislature and local government bodies be members of TANU?" The commission recommended without hesitation that all candidates for election to the National Assembly should be members of TANU since that was an inherent element of the one party state.[8] For the post of presidency, however, the commission recommended that the National Executive Committee of TANU and Afro-Shiraz Party (ASP) should jointly be charged with the duty of nominating a single candidate for the presidency of the United Republic. Following the recommendations made by the commission on 10th July 1965, the United Republic became constitutionally a one party state. Article 3(1) of the Interim Constitution of 1965 provided, "there shall be one political party in Tanzania." Section (3) added further that all political activities in Tanzania, apart from those of the organs of the state of the United Republic of Tanzania and Zanzibar, should be conducted by or under the auspices of the party. As can be seen, the main intention of this article was to completely destroy any opposition to TANU. Externally, all political parties and civil societies were disbanded. Internally, political competition for elective posts in the government were attached to party membership. Nyerere argued that one party system was necessary for unity and development of new nations like Tanzania.[9] Thus, the major impact of one party state was the introduction of authoritarian politics where all political activities could only take place through TANU. It was at this juncture where party membership as a qualification by candidates during elections was introduced. Article 27 of the Constitution, for instance, introduced party membership as a qualification for candidates for the National Assembly, stating:

> "Any citizen of Tanzania who has attained the age of twenty one years and is a member of the Party shall, unless he is

7 United Republic of Tanzania, Report of the Presidential Commission on the Establishment of a Democratic One Party State 1965. Dar es Salaam: Government Printer.

8 United Republic of Tanzania, Report of the Presidential Commission on the Establishment of a Democratic One Party State…" 1965.

9 Tanganyika African National Union Annual Report 1965.

> disqualified under the following provisions of this section or an Act of Parliament to which this section refers be qualified for election as a constituency member, and no other person shall be so qualified."

Similarly, Article 7(3) of the constitution provided for a party membership qualification for the presidency. It stated that whenever an election of the President is held, "an Electoral Conference of the Party, constituted in accordance with the provisions in that behalf, in the constitution of the Party, shall meet; and such Electoral Conference shall nominate a citizen of Tanzania who has attained the age of thirty years and is a member of the Party, as the sole Presidential Candidate." The nominating authority for the presidential candidate was the Electoral Conference of TANU as defined in Part E Section 3 of the party's constitution appended to the Interim Constitution as a schedule. Section 3(1) stated, "An Electoral Conference shall be held whenever a Presidential election is contemplated." Furthermore, Section 3(4) provided the function of the Electoral Conference as it held "the sole function of the Electoral Conference shall be to select the name of the candidate for election to the office of President of the United Republic."

In 1975 the party became a supreme organ constitutionally.[10] Article 3(3) of the Interim Constitution provided that all activities of the organs of the state of the United Republic of Tanzania should be conducted by or under the auspices of the party. It meant that the parliament, executive, judiciary or any other institution of the state could be summoned by the party. This development came to be described as "state-party", where the line between the state and the party was blurred. It was on 5th February 1977 that TANU and ASP merged to form Chama Cha Mapinduzi (CCM), not a new party but rather a consolidation of the

10 See Jamhuri ya Muungano wa Tanzania "Chama Kushika Hatamu" Hotuba ya Waziri Mkuu na Makamu wa Pili wa Rais, Ndugu Rashidi Mfaume Kawawa akiwakilisha katika Bunge Muswada wa Kubadili Katiba ya Muda, Tarehe 3 Juni 1975. Imepigwa Chapa na Mpigachapa wa Serikali, Dar es Salaam, Tanzania, p. 2.

TANU/ASP alliance.[11] It is interesting to note that a team of twenty people, ten from each party was the very same that was entrusted with the role of making the permanent constitution of the United Republic of 1977. This is significant because the Tanzania's constitution of 1977 was constructed to reflect a party supremacy framework. Arguably, it was essentially a party document, albeit under the guise of the state. The one party state, as well as the party supremacy clauses, were retained in the permanent constitution as per articles 3(3) and 10(1) respectively. In 1984, the permanent constitution was amended to introduce a Bill of Rights. However, the membership qualification to be elected for the post of National Assembly member (as per Article 67(1)) and president (as per Article 39) were maintained. In contrast, Article 20(2) stated that no one should be compelled to be a member of any political party. Furthermore, Article 21(1) provided that: "Every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people in conformity with procedures laid down by, or in accordance with, the law."

With the advent of multipartism in 1992, the one party and party supremacy clauses were repealed though Articles 20 and 21 were retained. For the post of the presidency, the amended Article 39 retained paragraph (c) which required a candidate to be a member of and be sponsored by a political party. Likewise Article 67(1)(b) retained the membership qualification for the post of member of National Assembly.

4. The Three Landmark Cases: Issues and Verdicts

This section presents the three landmark cases on independent candidates. It summarizes key issues and court rulings on the independent candidate issue. It is important to note that in the literature of democracy and court archive, these cases are popularly known as "Mtikila" cases since they involved Rev. Christopher Mtikila. The first and second independent candidate

11 CCM Constitution 1977; See also CCM Manifesto 2005.

cases (*Mtikila 1 and Mtikila 2* respectively*)* involved Mtikila as a petitioner against the Attorney General as a respondent. However, the third case was an appeal by the Attorney General against *Mtikila 2*. This appeal involved Mtikila as a respondent hence *Mtikila 3.*

Mtikila 1

Rev. Christopher Mtikila v. the Attorney General[12] (hereinafter *Mtikila 1*) is the first case to consider the issue of independent candidate in Tanzania. This case was instituted in 1993 immediately after the inception of multiparty politics. Although in this case the High Court of Tanzania considered a number of legal issues, the one of independent candidates featured prominently. In this case, the facts of the petition were as follows. The Petitioner, Rev. Christopher Mtikila, was the Chairman of the Democratic Party (DP). After the adoption of multiparty politics in July 1992, his party was denied registration. As the electoral laws required a person wishing to be elected as President, a member of parliament or to a local government council to belong to a political party, Mtikila considered this an infringement of his right to freedom of association as well as his right to participate in national public affairs and therefore instituted this petition.

The main issue considered by the Court was whether the amendments to Articles 39, 67 and 77 of the Constitution as well as section 39 of the Local Authorities (Elections) Act, 1979 brought by the Eighth Constitutional Amendment Act, 1992 (*Act No. 4 of 1992*) were unconstitutional for abrogating the provisions of Articles 20 and 21(1) of the Constitution which guarantee person's freedom of association and freedom to participate in

12 [1995]TLR 31; Also note that Mtikila 1 was decided by a single judge of the High Court of Tanzania, at Dodoma District Registry. At this time, there was no specific legislation prescribing the procedure for a party whose basic right and freedom in articles 12 to 29 of the Constitution has been violated to follow. This law, the Basic Rights and Duties Enforcement Act,1994(Act No. 33 of 1994) came subsequently. Under this law, a person aggrieved of infringement of his basic right and freedom in Articles 12 to 29 of the Constitution is required to file a constitutional petition. In hearing the petition a quorum of three judges of the High Court of Tanzania is required.

public affairs respectively. These amendments restricted an independent candidate from contesting presidential, parliamentary or local council elections unless he or she was a member of a political party.

In *Mtikila 1* the Court held that the amendments introduced by the Eighth Constitutional Amendment Act,1992 by the Parliament were valid. Here, the Court avoided declaring Act No. 4 of 1992 unconstitutional because once amendments to the constitutional have been made, the amending law itself becomes part and parcel of the constitution itself. By implication, the Court was saying where a constitutional provision conflicts with any constitutional provision guaranteeing individual basic rights and freedom in Articles 12 to 29 of the Constitution, the Court can not declare the former unconstitutional. However the Court went further and considered the practical implications of the amendments which compelled an individual to be a member of a political party before he could contest for presidential, parliamentary or local council elections. These practical implications were weighed against the rights to freedom of association and the right to participate in public affairs in Articles 20 and 21(1) of the Constitution respectively. The Court observed that it would be illogical for a law to provide that no person should be compelled to belong to a political part in order to contest presidential, parliamentary or local council elections and at the same time to provide that no person should run for office except through a political party. The Court further observed that if it were the intention of the Parliament to exclude non-party members from participating in the government of their country, it could easily have done so through the same Eighth Constitutional Amendment Act,1992 by removing the generality in Article 21(1) of the Constitution. The Court thus held:-

> The amendments made in Articles 39,67 and 77 of the Constitution, restricting the right to contest in elections to political party candidates only, are capable of being abused to confine the right of governing to a few and render illusory the emergence of a truly democratic society; notwithstanding

those restrictions, it shall be lawful for private candidates[13] to contest elections along with political party candidates.

Mtikila 2

Dissatisfied with the judgment in *Mtikila 1*, the government, through the Attorney General, filed an appeal. However, before this appeal was heard, the government withdrew it and sent a Bill to the Parliament to legislate in anticipation of the decision of the Court.[14] The legislation which was the outcome of this Bill became the subject of *Mtikila 2*.[15] The former case was instituted in 2005.

In *Mtikila 2*, the petitioner's claims were more or less the same as in *Mtikila 1*. Here Rev. Christopher Mtikila petitioned for a declaration that the amendment to Articles 39 and 67 of the Constitution of the United Republic of Tanzania as introduced by amendments contained in Act No. 34 of 1994 were unconstitutional. He also petitioned for a declaration that he had a constitutional right under Article 2(1) of the Constitution of the United Republic of Tanzania to contest the post of the president of the United Republic of Tanzania and/or the seat of a member of parliament of the United Republic of Tanzania as an independent candidate. In short, the contention between the parties in this petition was whether the amendment to the Constitution introduced by Act No. 34 of 1994 was constitutional.

After long submissions from both parties, the Court observed that Act No. 34 of 1994 which amended Article 21(1) so as to cross refer it to Articles 5, 39, and 67 which introduced into the

13 Though "independent candidates" is a commonly used term, in this article it is used interchangeably with "private candidates."

14 In Mtikila 2 the Justices remarked "the amendments referred to in the judgment of the Court of Appeal are those made by Act No. 34 of 1994 which as observed, was passed by the Parliament on 16/10/94 while the Ruling of Lugakingira J (as he then was) was handed down on 24/10/94, as it was still pending when the Parliament enacted the law. As a matter of procedure, we must, at once condemn this act of the Respondent as being contrary to the dictates of good governance."

15 Rev. Christopher Mtikila v. the Attorney General, Misc. Civil cause No. 10 of 2005, High Court of Tanzania(Dar es Salaam, District Registry), at Dar es Salaam,(Unreported). Note that at the time when Rev. Christopher Mtikila instituted this petition his part(Democratic Party) had already acquired registration.

Constitution, restrictions on participation of public affairs and the running of the government to party members only was an infringement on fundamental rights and that the restriction was unnecessary and unreasonable and so did not meet the test of proportionality. It therefore declared that the said amendments to Articles 21(1), 39(1)(c), and 67(10)(b) were unconstitutional. The Court went further to declare that, in principle, it should be lawful for private candidates to contest the posts of President and Member of Parliament along with candidates nominated by political parties. However, in contrast to *Mtikila 1*, in *Mtikila 2* the Court ordered the government to put in place a legislative mechanism that would regulate the activities of private candidates. This order had a deadline of the 31st October 2010, the date of the General Election.

Mtikila 3

As was the case with *Mtikila 1*, the government immediately appealed against the decision of the High Court (*Mtikila 2*) to the Court of Appeal of Tanzania.[16] This appeal is commonly known as *Mtikila 3*. As the Court of Appeal of Tanzania is the supreme court of the country, *Mtikila 3* attracted more attention from academics, politicians, lawyers and members of the general public. In contrast to the ordinary sitting of the Court of Appeal of three judges, in *Mtikila 3* the Court of Appeal sat as the full bench of seven justices of appeal. Moreover, the Court invited four *amicus curiae* namely Mr. Othman Masoud, the Director of Public Prosecutions, Zanzibar; Prof. Palamagamba Kabudi;[17] Prof. Jwan Mwaikusa[18] and the Chairman of the National Electoral Commission, who was represented by the Director of Elections, Mr. Rajabu Kiravu.

16 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45 of 2009, Court of appeal of Tanzania, at Dar es Salaam, (Unreported).

17 Dean, School of Law, University of Dar es Salaam and the Advocate of the High Court of Tanzania.

18 School of Law, University of Dar es Salaam and the Advocate of the High Court of Tanzania.

Two issues were important in deciding this appeal. These were the first and second issues in the seven grounds[19] of appeal filed by the Attorney General. The first issue stated as follows:- *"That the High Court wrongly assumed jurisdiction in entertaining the Petition."* Dismissing this ground of appeal, the Court held that the High Court had jurisdiction to entertain the appeal instituted by Mtikila. This jurisdiction arises from the fact that there is no express provision in the Constitution which limits the jurisdiction of the High Court of Tanzania from determining Mtikila's petition. Additionally, the Court of Appeal held that the High Court had jurisdiction to adjudicate Mtikila's petition because of the constitutional construction of the United Republic of Tanzania: the High Court of Tanzania is both for the Mainland Tanzania and for the Union on matters pertaining to the Constitution such as the matters raised in Mtikila's petition.

The second ground of appeal stated, *"That the High Court erred in law in nullifying the provisions of the Constitution."* To this ground, the Court of Appeal observed that the High Court did not nullify the provisions of the Constitution but only declared them unconstitutional. The Court went on to consider whether the High Court of Tanzania or the Court of Appeal itself has jurisdiction to declare a provision or provisions of an article or articles of the Constitution to be unconstitutional. The Court responded to the above question in the negative. Its reasoning was that Article 30(3) of the Constitution, which led the High Court of Tanzania to conclude that it may indeed declare some provisions of the Constitution unconstitutional, does not give the Court such jurisdiction. The Court went further to hold that since the Parliament is the only organ with powers to amend any provision of the Constitution (including those on basic rights and freedom), then where the Court finds that two provisions of the Constitution are irreconcilable it has to leave to the Parliament to reconcile such provisions by amending the Constitution. To quote the finding, "if there are two or more articles or portions of articles which cannot be harmonized, then it is Parliament which will deal with the matter and not the Court unless that power is expressly

19 Note that all other grounds were dismissed by the Court.

given by the Constitution, which, we have categorically said, it has not".[20] However, the Court made one exception to the above holding that where a constitutional amendment has been effected in contravention of the procedure provided in Article 98 of the Constitution, the High Court can nullify a constitutional provision as being unconstitutional. The Court illustrated this in a situation where a constitutional amendment is challenged on the grounds that it did not obtain the prerequisite number of votes according to Art. 98(1)(a). The Court said that in such a situation it will be performing its constitutional function of maintaining checks and balances. Based on the above premises, the Court laid down the principle that "*a court cannot declare an article of the Constitution to be unconstitutional except where the article has not been enacted in accordance with the procedure under Art 98(1)(a) and (b).*"

In conclusion, the Court held that the issue of independent candidates is political and not legal. However it went further to say:

> We give a word of advice to both the Attorney General and our Parliament: The United Nations Human Rights Committee, in paragraph 21 of its General Comment No. 25, of July 12, 1996, said as follows on Article 25 of the International Covenant on Civil and Political Rights, very similarly worded as Art 23 of the American Convention and our Art 21: The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. Tanzania is known for our good record on human rights and particularly our militancy for the right to self determination and hence our involvement in the liberation struggle. We should seriously ponder that comment from a Committee of the United Nations, that is, the whole world.

The table below summarizes issues and verdicts on independent candidate cases in Tanzania since the introduction of multipartism.

20 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

Table1. Comparison of the three landmark cases

Items	**Mtikila 1**	**Mtikila 2**
Court which heard the case	*HCT(Dodoma), 1993-1994*	*HCT(Dar es Salaam), 2005-2006*
Background	Following the adoption of multiparty politics in Tanzania in 1992, election laws were amended. The major amendment required that all persons aspiring to contest in an election must be sponsored by a political party. Mtikila was aggrieved by this amendment and challenged its constitutionality.	In 1994, the Government amended the Constitution and other election laws to circumvent the judgment of HCT in Mtikila 1. Aggrieved with this amendment, Mtikila filed a fresh case in HCT to challenge the constitutionality of the second amendment.
Main question(s) decided	whether the amendments complained were unconstitutional for curtailing the Constitutional rights to person's freedom of association and freedom to participate in public affairs.	whether the amendments complained were unconstitutional for curtailing the Constitutional rights to person's freedom of association and freedom to participate in public affairs.
Findings/Opinion/Judgment	- HCT found the amendments contravening freedom of association and freedom to participate in public affairs. - Instead of declaring them unconstitutional, HCT held that it would also be lawful for an individual to contest in an election as an independent candidate. - HCT did not make a time frame for the Government to implement its order.	-HCT found the amendments unconstitutional. -HCT held that it would be lawful for an individual to contest in an election as an independent candidate. -HCT made an order against Government to implement a mechanism that would make operational the participation of an independent candidate before the General Election 2010.

Items	Mtikila 3
Court which heard the case	*CAT(Dar es Salaam), 2006-2010*
Background	This was an appeal by the Government arising from Mtikila 2, after HCT had ruled in favour of Mtikila.
Main question(s) decided	-whether HCT had jurisdiction to determine Mtikila 2. -whether HCT was right to nullify the provisions of the Constitution.
Findings/Opinion/Judgment	-CAT held that HCT had jurisdiction to entertain Mtikila 2. (Same implication for Mtikila 1). -CAT held that HCT had no jurisdiction to declare a provision of an amendment of a constitution to be unconstitutional unless Parliament did not abide to a prescribed procedure for making such amendment. -CAT held that HCT had no jurisdiction to nullify constitutional amendments. -CAT found that the entire issues raised in Mtikila 2(same implication for Mtikila 1), were political and not legal, hence HCT/CAT had no jurisdiction to entertain it. -CAT found that the jurisdiction to decide issues of independent candidate resides in the Parliament. -CAT advised the Government and Attorney General to adopt provisions for independent candidate in Tanzania.

Note: HCT means High Court of Tanzania; CAT means Court of Appeal of Tanzania.

5. Discussion

As it can be noticed, the main issues in *Mtikila 3* hinged around jurisdiction of the court. Ground one of the appeal stated, "that the High Court wrongly assumed jurisdiction in entertaining the Petition."[21] Responding to this ground, the Court of Appeal held "the High Court had jurisdiction to entertain the petition and ground one is dismissed to its entirety."[22] Nonetheless, in reaching its verdict, the Court of Appeal maintained "ground one

21 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

22 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

is, therefore, allowed: a court cannot declare an article of the Constitution to be unconstitutional except where the article has not been enacted in accordance with the procedure under Art 98(1)(a) and (b)."[23] In allowing "ground one" the Court's reasoning was that there is no specific provision in the Constitution which gives the High Court or the Court of Appeal such jurisdiction. The Court faulted the High Court on relying upon Article 30(3) of the Constitution as the source of its legal powers to declare a provision of the Constitution to be unconstitutional.

From this conclusion arise a litany of questions. Firstly, how is it possible for one to dismiss the first ground of appeal in its entirety and allow it at the conclusion of the second ground of appeal? This is inconsistent since that ground would not exist in the first place and dismissing the first ground of appeal made the second ground of appeal redundant. It can be noted here that the second ground for appeal was subsumed in the first ground, and the two could not be separated. Perhaps that was why the Attorney General argued the two grounds of appeal as one thing but the Court, without explanation, treated them separately. The approach of the Court was wrong since it would be illogical for the Court to possess jurisdiction to hear and determine *Mtikila 2/Mtikila 3* including jurisdiction to find that the amended law is invalid or unconstitutional, as we shall see shortly, and lose such jurisdiction in the end. It should be emphasized that jurisdiction can never be limited to hearing and determining the constitutional petition and be denied in making consequential orders that are authorized under the law. It is therefore beyond reasonable doubt that the conclusion of the Court in ground two would not only be invalid but also unsound. Indeed, this shortcoming challenges the claim by the sitting judges that "the Court of Appeal contains part of the cream of legal minds in this United Republic."[24]

23 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)...2009.

24 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)...2009.

Secondly, the exception provided by the Court as to its jurisdiction leaves a lot to be desired. As was the case with the High Court (in *Mtikila 2*), the Court of Appeal also failed to point out any specific provision in the Constitution which gives it such exceptional jurisdiction. As can be noted, the core problem under discussion is the legal source of jurisdiction by the High Court to declare a provision of constitution to be unconstitutional. By reading the judgment of the Court of Appeal, it appears that such a source is only found in the Constitution. However, this is not the only source of jurisdiction for the High Court. Article 108(1) of the Constitution of the United Republic of Tanzania states "there shall be a High Court of the United Republic (to be referred to in short as "the High Court") the jurisdiction of which shall be in this Constitution or in any other law." So, the jurisdiction of the High Court is either to be found in the Constitution itself or any other law. This "any other law" in relation to the point at issue can be Section 8 of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002. It is the most relevant law for discussion:

> *8(1) The High Court shall have and may exercise original jurisdiction–*
>
> *(a) to hear and determine any application made by any person in pursuance of section 4(which states if any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.)*
>
> *(b) to determine any question arising in the course of the trial of any case which is referred to it in pursuance of section 6, and may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 12 to 29 of the Constitution, to the protection of which the person concerned is entitled.*

> *(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.*

This provision vests in the High Court of Tanzania jurisdiction to hear and determine any application alleging breach of fundamental rights in the Constitution under Articles 12 to 29 irrespective of the means involved in such breach. Thus, even where a breach has been committed by restricting fundamental rights through amendment of the Constitution, the Court still possesses jurisdiction to hear and determine such matters. The only instances where the Court lacks jurisdiction to entertain such applications are where there are alternative means of adequate redress in any other law or the application for redress is merely frivolous or vexatious. So, under this section, there is no place where the jurisdiction of the Court can be contested on the ground that the subject matter of the application is political and not legal as their Lordships in *Mtikila 3* concluded in declining their jurisdiction. Here the judgment by the Court of Appeal entered into an endless debate when the Court stated "thus the issue of independent candidates is political and not legal."[25] Since laws are made through political processes usually initiated by an executive branch of a government and later on discussed and passed by a legislature, separating "the legal" from "the political" is arbitrary and artificial. By establishing a line between "the legal" and "the political" their Lordships simplified their reasoning by subjecting the Court to an inferior status before "the legislature". In the context of Tanzania's laws such an attempt is misleading.

It has also to be noted that jurisdiction of the Court under section 8 of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002 is not only limited to hearing and determining breaches of

25 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

fundamental rights under Articles 12 to 29 of the Constitution. Section 13 of that Act provides the powers of the Court to make decisions and enforce them:

> *13. Power of High Court in making decisions*
>
> *(1) Subject to this section, in making decisions in any suit, if the High Court comes to the conclusion that the basic rights, freedoms and duties concerned have been unlawfully denied or that grounds exist for their protection by an order, it shall have power to make all such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms and duties conferred or imposed on him under the provisions of sections 12 to 29 of the Constitution.*
>
> *(2) Where an application alleges that any law made or action taken by the Government or other authority abolishes or abridges the basic rights, freedoms or duties conferred or imposed by sections 12 to 29 of the Constitution and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional, then the High Court shall, instead of declaring the law or action to be invalid or unconstitutional, have the power and the discretion in an appropriate case to allow Parliament or other legislative authority, or the Government or other authority concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court, whichever be the shorter, be deemed to be valid.*
>
> *(3) The power of the High Court under this Act shall include the power to make all such orders as shall be necessary and appropriate to secure the enjoyment by the applicant of the basic rights, freedoms and duties under the provisions of sections 12 to 29 of the Constitution should the Court come to the conclusion that such basic rights, freedoms or duties have been unlawfully denied or violated or that grounds exist for their protection by an order.*

In section 13 (1) & (3) above, the Court is empowered to make "all such orders as shall be necessary and appropriate" when it comes to the conclusion that the basic rights, freedoms and duties concerned have been unlawfully denied or that grounds exist for their protection by an order. The phrase "all such orders as shall be necessary and appropriate" includes a declaration that a provision of the Constitution is unconstitutional. Support of this view is found in reading section 13(1) & (3) in conjunction to section 13(2) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002. As it can be noticed, section 13(1) & (3) provide that the Court may make "all such orders as shall be necessary and appropriate." In section 13(2) the phrase "instead of declaring the law to be invalid or unconstitutional" specifies examples of orders that the Court may make in section 13(1)& (3). However, these are not the only orders the Court may make under section 13(1) & (3). The Court may make orders other than these as section 13(1) & (3) is wide enough to encompass any order. The only orders which are excluded from the jurisdiction of the Court in this context are prerogative orders. Section 8(4) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002 states categorically, "for the avoidance of doubt, the provisions of Part VII of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act 310, which relate to the procedure for and the power of the High Court to issue prerogative orders, shall not apply for the purposes of obtaining redress in respect of matters covered by this Act."

It is arguable that if the provisions of section 13 of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002 exclude the powers of the High Court from declaring provisions of the Constitution to be unconstitutional, it could have said so in clear and specific terms as is the case with prerogative orders. It must, however, be noted that where the Court is satisfied that the law is invalid or unconstitutional it may, instead of declaring it invalid or unconstitutional, have the power and the discretion to allow Parliament or other legislative authority, or the Government or other authority concerned, to correct any defect in the impugned law. Principally, the Court gives time limit and conditions for correcting the defective law. However, the law or action

impugned shall until the correction is made or the expiry of the limit set by the High Court, whichever be the shorter, be deemed to be valid. *Mtikila 2*, followed this approach though it had already declared the provision of the Constitution to be unconstitutional. This resulted in logical confusion in that while the High Court declared the provision of the Constitution limiting contestants sponsored by political parties in an election to be unconstitutional, it allowed the same provision to co-exist with independent candidates. In contrast *Mtikila 1* did not make such a declaration nor an order against the government to amend the law. To me this was not proper as the Court's decision could have not been enforced easily.

In *Mtikila 3*, the Court of Appeal went too far in assuming the powers of the Attorney General, that is, the powers of advising the government on legal matters. Article 59(3) of the Constitution states that the Attorney General shall be the advisor of the Government of the United Republic on all matters of law. While commenting on the judgment in *Mtikila 2*, the learned Judges in *Mtikila 3* admitted quite clearly that such mandate is vested in the Attorney General as they once put "the [Attorney General], the chief legal advisor of the Executive was to take the necessary steps to amend the laws and the Constitution so that independent candidates could be permitted."[26] Surprisingly, in giving its judgment in *Mtikila 3*, the Court of Appeal submitted "we give a word of advice to both the Attorney General and our Parliament" to adhere to the international instruments and be like others in the world.[27] This is inconsistent to the role of the Court to "hear", "determine", and to give "orders" and "directives." In short, the Court should order or direct but not to advise. This was a shortcoming since there are laws that would have assisted the appellate court to assert its powers. Such laws can be Article 107A(1) of the Constitution which states that "the Judiciary shall be the authority with final decision in dispensation of justice in

26 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

27 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

the United Republic of Tanzania" and the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002.

Thirdly, assuming that the Court had such exceptional jurisdiction as to declare a provision of the Constitution to be unconstitutional, it would have unreasonably and deliberately limited its mandate to oversee the procedure in amending the Constitution. Here, the content of the amended laws is beyond the jurisdiction of the Court, something which is logically incorrect. In other words the Court was saying that the powers of Parliament in amending the Constitution are unlimited, implying that Parliament can even enact a discriminatory law and that law be valid so long the procedure laid down in the Constitution for effecting such amendments is followed. This legal principle contradicts the long established principle of this Court which states, "a law which seeks to limit or derogate from the basic right of individual on ground of public interest, will be saved by Article 30(2) of the Constitution if it satisfies two requirements. Firstly, such law must be lawful in the sense that it is not arbitrary. Secondly, the limitation imposed must be more than necessary to achieve the legitimate object. This is also known as the principle of proportionality."[28] It is submitted that lawfulness of the law is one thing and its proportionality is yet another thing. Each of these criteria has to be evaluated independently against any law which limits the exercise of the fundamental rights. Thus, the exceptional jurisdiction claimed by the Court in case of a failure of procedure in amending the Constitution while leaving unchallenged the logic, reasonableness and proportionality of that law is a clear attempt by the highest court to avoid its basic duty of checking the powers of the Parliament under the doctrine of separation of powers. This judicial fear by their Lordships questions their independence from interference by the ruling Party and its government. It is forcefully argued that "the state in

28 See for example, Kukutia Ole Pumbun and Another v. Attorney General and Another [1993]TLR 159; and Julius Ishengoma Francis Ndyanabo v. Attorney General, Civil Appeal No. 64 of 2001, Court of Appeal of Tanzania, at Dar s Salaam(Unreported).

Tanzania is in the pocket of the ruling party."[29] The fusion between the state and the ruling party is so complete as to be described as a *de facto* one party state.[30] This implies that if the ruling party holds a position, it would use every mechanism at its disposal to defend it.

For completeness of discussion let me revert to semantics of some terms in the second ground of appeal which we need to be cautious when reading *Mtikila 3*. Their Lordships stated, "ground 2 was formulated in the following way: that the High Court erred in law in nullifying the provisions of the Constitution."[31] The learned justices of appeal faulted this ground on the outset by stating "may be we start by saying that it is doubtful whether their Lordships nullified the provisions of the Constitution. As we have already said they certainly declared them unconstitutional. Their Lordships, after the declaration, did not take the next step to nullify or strike out the articles they found to be objectionable." After such observation their Lordships rephrased the second ground of appeal: "whether the High Court of Tanzania or this Court has jurisdiction to declare a provision or provisions of an article or articles of the Constitution to be unconstitutional." It can be noted here that a declaration that the law is unconstitutional remains an empty statement if no further order to either nullify it or strike it out is made. This is logically incorrect. A declaration that a particular law is unconstitutional makes such law lose any legal force from the date of its enactment. I argue that the phrases "nullify" or "strike out" are the ones which are empty words as they do not add any value to the law which has already lost its legal force by being unconstitutional. In *Julius Ishengoma Francis Ndyanabo v.*

29 Hyden, Goran, Hyden and Max, Mmuya 2008. Power and Policy Slippage in Tanzania-Discussing National Ownership of Development. Sweden: Swedish International Development Cooperation Agency (SIDA) Studies, No. 21.

30 Richard, Whitehead, L. 2009. Single-party rule in a Multiparty Age: Tanzania in Comparative Perspective, PhD Dissertation: Temple University; See also Alexander, Makulilo B. 2008 Tanzania: A De Facto One Party State?, VDM Verlag Dr. Muller Aktiengesellschaft & Co. Kg, Germany.

31 The Attorney General v. Rev. Christopher Mtikila, Civil Appeal No. 45, (Mtikila 3)…2009.

Attorney General the Court of Appeal of Tanzania declared Section 111(2) of the Elections Act, 1985, unconstitutional without "nullifying" or "striking it out."[32] Interestingly, the phrase 'striking down' was used to suggest that the law was automatically taken out of the statute book as being unconstitutional.

6. Concluding Remarks

This paper was set to address the question of independent candidate in Tanzania particularly on the failure of the Court of Appeal to asset its powers in safeguarding the right of individuals to contest during elections. It was observed that though the Court had powers to resolve the matter, it declined that jurisdiction. It was further observed that the ruling party which has been reluctant to welcome independent candidates uses the government to prevent that democratic development. It should be pointed out that in Tanzania, the legacy of one party state which fused the ruling party to the state works as a hindrance towards the independence of the court particularly when the ruling party has vested interests in a given case.

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