# LEGAL EMPOWERMENT OF THE POOR:
# ACCESS TO JUSTICE AND RULE OF LAW

**By Fauz Twaib**

"Right is the rule of law, and law is declaratory of right".
*— Benjamin Whichcote.*[*]

## 1.0. THE BACKGROUND

The above saying sums up the relationship between justice and rule of law. The two concepts almost invariably go together and are inter-related.

This paper aims at pointing out deficiencies that exist within the system of administration of justice in Tanzania that may constitute an impediment to the poor in their pursuit for justice and rule of law.

### 1.1. The Terms of Reference

In light of the foregoing, the paper attempts to provide answers to the following questions constituting the Terms of Reference (TORs):

a) What reforms are necessary to develop transparent legal and institutional arrangements in which the poor have confidence, can access justice and which will generally contribute to a culture of fairness, equity and rule of law?

b) How can citizens and grassroots organizations participate successfully in a transparent reform process? How can their priorities, needs and concerns be

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[*] *Moral and Religious Aphorisms*, 1753, quoted in Frost-Knappman, E. and Chrager, D.S., *The Quotable Lawyer*, Revised Edition, 1999, Universal Law Publishing Co. Pvt Ltd., Delhi, 1999 at p. 309.

heard and incorporated into proposals and action using various tools of participatory governance (for instance public forums/hearings, surveys, citizen report cards, etc)?

c) How can dispute resolution mechanisms support poor people's access to rights in affordable and locally appropriate ways?

d) What special considerations should be given to indigenous peoples' issues, including their customary norms, traditions and legal structures? What barriers preclude them (linguistic, geographic) from accessing the formal or national legal and judicial structures? Does the national government issue indigenous peoples the necessary identity papers or documentation, or recognise local equivalents to ensure their success and judicial institutions?

e) How can improved public administration contribute to transparency and accountability and increase public trust in the formal economic system?

f) What factors and conditions (enabling environment) external to the focus of the Commission's work should be addressed to ensure success (e.g. corruption)?

### 1.2. The Approach and Research Methods

Time constraints have limited the scope of information gathering in the preparation of this work. Hence, the main research method used was an examination of the primary object of the study, i.e., the various statutes, cases, articles and other materials that make up the legal system. My personal experience in the field of study and as a member of the legal profession also constitutes an important input into this work.

## 2.0 THE LEGAL SYSTEM

### 2.1. The Common Law Base

As part of its British colonial history, Tanzania has inherited a legal system based on the English common law. We still maintain the bedrock of the common law with its sub-systems of substantive and procedural law. The procedural rules are basically adversarial, a fact that has been a source of concern for many, because it has not been as "user-friendly" as it should when it comes to poor litigants.

To be able to benefit the majority and to enhance their economic well being, the system must be based on a consensus involving the people who use it.

### 2.2. Legal and Economic Change

Since the early 1980s, Tanzania has been undergoing radical transformation in all spheres—political, economical and social. The law has also seen some drastic changes, especially in the field of human rights and economic law. In 1984 a Bill of Rights was enshrined into both the Union and Zanzibar Constitutions to provide for a wide range of legally enforceable human rights. In July 1992, the Parliament passed the eighth amendment to the Constitution, which introduced a multi-party political system.

In the past twenty years or so, several laws have been enacted that allow for a market-oriented economic system. Many state-owned corporations have been and are still being privatised, and the Government is relinquishing its shareholding in most others. The liberalization of the economy has widened the gap between those who have and those who have not, between the urban and the rural, etc. The changes effected have had significant effects on the system of administration of justice. The landscape in which the law exists is changing. So should the law itself. What is lacking is a system that will ensure equitable participation of small and medium level enterprises, their sustenance and growth.

## 3.0. A JURISPRUDENTIAL OVERVIEW

### 3.1. The Concept of Justice

A famous English Judge once stated:

> "The object of all lawyers should be the attainment of justice. But, as such agencies of the rule of law and justice, lawyers should pursue a kind of justice which will no longer be the "static justice" as set out in statutes, but a justice which "transcends the law courts and finds finer expression in restoring and upholding the dignity of man everywhere…"

As a concept, justice is a highly controversial subject. It has occupied the minds of many a great thinker. What is justice? How do we measure justice? How do we achieve justice? These and many other questions have been variously answered by jurists and non-jurists alike. It is not the intention here to enter that debate. I will therefore adopt a working definition for the purposes of this paper.

### 3.2. Justice at What Cost?

Upon taking oath of office, Judges pledge allegiance to the Constitutions of the countries in which they serve. They declare that they will do justice to all people, without fear or favour, affection or ill will. They will uphold justice according to the country's laws and usages. This solemn commitment to do justice "according to law" is asserted in its strictest form in the maxim *Fiat justicia, Ruat caelum.* It means, "let justice be done, though the heavens fall".

Perhaps the nature of the controversy about the concept of justice is best illustrated in the very circumstances around which it is alleged to have been born. The maxim, a classic expression of the concept of justice, came into being under a most shocking and unjust circumstance:

> A ruler called Piso sentenced a soldier to death for murdering Gaius. He ordered a centurion to execute the sentence. Just before the soldier was executed, Gaius

> himself appeared, alive and well. The centurion reported this to Piso, who sentenced all three of them to death: The soldier was to die because he had already been sentenced. The centurion because he disobeyed orders. Gaius for being the cause of the deaths of two innocent persons. As the excuse for his action, Piso pleaded *Fiat justicia, Ruat caelum.*[1]

Whether the above story is true or not, it nonetheless graphically demonstrates an extreme insensitivity towards the results of "doing justice". This insensitivity has been the cause of some of the blame the ordinary citizen directs towards the legal system and those closely involved in its administration, especially the lawyers. It also serves to illustrate the paradox in which the concept of justice sometimes finds itself. Instead of furthering justice, a strict application of the maxim may have exactly the opposite result—thereby contradicting the very essence of justice. The succinct words of James Read are most instructive in this regard:

> May there perhaps be a danger in the oft-repeated principle—justice must not only be done but must clearly be seen to be done? Emphasis upon the latter part of the principle may be at the expense of the former, and the appearance of justice may be mistaken for the reality.[2]

It would thus make more sense to abandon *Ruat caelum* and keep *Fiat Justicia.* When considering justice for the disadvantaged majority, who must be treated with a certain measure of compassion rather than the aloofness that usually comes with a strict application of the maxim, which application they can hardly afford, our definition of justice must be more rational and sensitive enough to ensure that while justice is being done, the heavens do not fall.

### 3.3. The Attributes of Justice

"Justice" is, perhaps, a term more easily recognizable than definable. Judge Oputa describes justice as follows:

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1 *Seneca 1* Dialogue, III. 18.

2 Read, J.S. (1972): "The Search for Justice", in Morris H.F. and Read, J.S. (1972) *at pp.306-7.*

> [Justice] should be pure, visibly pure, and unadulterated. It should be fair, equitable and impartial. It should be no respecter of persons, personalities, or establishments. It should not be commercialised, nor should it be bought and sold, for nothing is as hateful as venal justice. It should be quick, for delay is certain denial. Legal justice should as closely as possible, resemble the virtue whose name is bears—virtue by which we give to everyone his due.[3]

The common law world has developed a somewhat narrow conception of justice in administrative law, what has come to be known as "natural justice". It consists of only two main principles: the right to be heard (*audi alteram partem),* and the requirement for an impartial tribunal (*nemo judex in cause sua).*[4] In practice, however, the term appears to be much wider. It has thus been concluded that "the nearest we can get to defining justice is to say that it is what the right-minded members of the community—those who have the right spirit within them—believe to be fair".[5]

## 4.0. THE RULE OF LAW

### 4.1. Justice and the Rule of Law

The subject of this paper gives rise to one particular aspect of the principle of justice: Its relation with the law. Here again, views differ as to what should be the position in the event justice and rule of law are found in conflict. On the one hand, there are those who contend that justice is not always achievable in cases where the law is strictly applied. There are those who do not agree with that proposition.

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[3] Oputa, C.J. (1981), *The Law and the Twin Pillars of Justice,* Owerri: Government Printer, at p.71.

[4] One of the recent court decisions in Tanzania in which the rules of natural justice were applied was the case of *Nyirabu Gitano Nyirabu and Ors. v. Board Chairman, Songea Boys Secondary School and 3 Ors, Misc. Civil Application No.3 of 1994, H.C.T.,* Songea, per Samatta, J.K. (as he then was) especially at p.8 of the typed ruling. Nelson Mandela put the situation aptly in his own treason trial when he asked: "What system of justice is this that enables the aggrieved to sit in judgment over those against whom they have laid a charge?": Mandela, N. (1978): *The Struggle is My Life,* London: International Defence and Aid Fund for Southern Africa, at p. 126.

[5] Denning, A. (1955), *The Road to Justice,* London: Stevens, at p.4. This definition, in so far as it refers to "the right-minded person", has itself been the subject of debate.

In his *Administrative Law*[6]. Prof. Henry Wade appears to support the second school of thought. He writes:

> The Government under the rule of law demands proper legal limits on the exercise of power. This does not mean merely that acts of authority must be justified by law, for if the law is wide enough it can justify a dictatorship based on the tyrannical but perfectly *quod principi placuit legis habet vigorem*.[7] The rule of law requires something further. Powers must be approved by Parliament, and must then be granted by Parliament within definable limits. These limits must be consistent with certain principles, for instance with the principles of natural justice.

The late Chief Justice Francis Nyalali also belonged to the second school. Indeed, he goes further than Prof. Wade. He maintains that law and justice are not only capable of being achieved simultaneously, they are inseparable.[8] His argument is that there is no reason why a Judge should not administer justice—*in every situation, and according to law*. His Lordship develops a method of reaching there: The application of what he calls "true law", as opposed to "travesty of law". By true law he means "…. the law that is consistent with the Constitution and Nature as well as Equity and Natural Justice". In his opinion, true law "can never be in conflict with justice". In a word, the Chief Justice was urging for a more vigorous application of the rules of equity and natural justice.

### 4.2. The Functions of Law

The former President of Zambia, Dr. Kenneth Kaunda, sees the law as "perhaps the most important of all instruments of social order". Without it, he says, the whole structure of society will inevitably break down: "It is the means by which order within

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6 Wade, Henry W.R., *Administrative Law*, London: Oxford University Press, 1965. Quoted with approval in *Chumchua Marwa v. Attorney General*, HCT (Mwanza), unreported.

7 Meaning "the will of the Emperor has the force of law".

8 Nyalali, F.L. (1994): "The Changing Role of the Tanzanian Bar", Speech Delivered at the Admission Ceremony of New Advotes, Dar es Salaam, 15th December, 1993, and published in *The Lawyer,* Tanzania, September-December 1994, at p.4.

society is maintained and society itself preserved". [9] Kaunda sees the lawyer's role as mainly two-fold: first, as a technician, and secondly, and more importantly, as a social engineer. To him,

> Laws make possible the existence of organized society, with the consequential release of human energies for constructive efforts in the satisfaction of individual and group needs of society. A peaceful and harmonious living in any society implies the systematic promotion of fair and just treatment of individuals and groups within it, the protection of conduct consistent with, and the punishment of conduct inconsistent with, the declared interests and values of society as well as the existence of a justice system by which the problems of individuals and groups are resolved peacefully. Law is therefore at the heart of the methods by which society meets these needs.[10]

## 5.0. RESPONDING TO THE TERMS OF REFERENCE

In directing my attention to the specific questions posed in the TORs, I will attempt a general discussion of the subject and give my comments on the various aspects raised by the TORs.

### *A. Dispute Settlement*

To a person with a legal problem, the process of solving it involves four main stages:

1. The recognition of the problem as a legal problem;
2. The desire to take steps to solve the problem through means and procedures provided by law;
3. Taking the said steps; and
4. Actually being able to solve the problem through those procedures.

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[9] Kaunda, K. (1971): "The Functions of a Lawyer in Zambia Today", vol.3, No.1 *Zambia L.J.,* p.1 at p.1.

[10] Chenge, A. (1995) "The New Role of the Tanzanian Bar", Address of the Attorney General of Tanzania at the 10th Admission Ceremony of New Advocates, Adr es Salaa, 15th December 1994, published in *The Lawyer Tanzania",*1995 Special Edition, at p.6.

The first stage requires an understanding of the nature of the problem, either through personal knowledge or advice (whether professional or otherwise). Once that has been tackled, the second step follows: A decision has to be made on whether legal measures should be taken. The third stage involves intricate matters that may well prove the main hurdle in the entire process. Matters to consider would include accessibility to dispute settlement institutions, the availability of legal services, the financial and other capacities to undertake the legal measures required, etc. The steps to be taken other than litigation (or before litigation is resorted to), may include seeking an amicable solution through negotiation, mediation or the taking of steps that may be purely administrative. In many instances, these steps may be taken one after the other, sometimes in combination. Usually, parties will start with seeking an administrative solution and only after this and other measures have failed, will they end up with the last resort—litigation.

Hence, the process of getting a solution to the problem depends on the procedure one takes in seeking such solution. In the modern world, the most common is, of course, the court process. But this represents not the success of the legal order, but its breakdown. As Harvey reminds us, contrary to the belief held by many non-lawyers and probably by some lawyers about the law and the legal system:

> The most significant functions of the legal order are not reflected in the processes of litigation, that is, in the adjudication of disputes by courts. In a sense these processes represent, not the successful operation of legal techniques for social ordering, but their breakdown.[11]

In a stable society, therefore, where conflict is kept within bounds, litigation may not be the primary or basic expression of law and justice. Indeed, the court process is evidence of the failure of the legal order to ensure social justice and peaceful co-existence. However, some conflicts in society cannot be resolved through private action, hence the necessity to involve public organs of dispute settlement. The court process thus remains an important and crucial function of the legal system.[12]

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[11] Harvey, W.B. (1975), *An Introduction to the Legal System in East Africa,* at pp. 113-114.

[12] *ibid.,* at p.114.

### *B: The Court System*

One of the areas that need reform is the court system. For the time being, we have a fragmented judicial hierarchy, which is both bureaucratic and cumbersome. The current formal system of dispute resolution begins with the Ward Tribunals, with appeals going to Primary Courts, then the District Courts. The highest court is the Court of Appeal, which hears appeals from the High Court. At the grassroots level, the Ward Tribunals and Primary Courts are relatively accessible. However, there is still a lot of mystique surrounding proceedings in these forums, especially the Primary Courts.

In the higher courts, the problems begin right from the filing of a case. It can take weeks for a litigant to appear in Court for the first mention and the process of filing pleadings, determining preliminary and interlocutory matters may take months if not years. By the time the case is ready to go for trial, so much time would have been wasted that many litigants find it not worth the trouble. Very rarely do cases proceed for trial on the first date set hearing. There is usually one reason or the other for an adjournment. An adjournment may mean a further delay of several months, sometimes years. A hearing, especially where several witnesses are involved, may itself take years to finalize before a date for judgment is set. Again, this may mean months of waiting.

Furthermore, it remains a fact that there is a certain amount of formality inherent in the court system that makes them less accessible to the ordinary citizen. In the villages, even the Primary Court Magistrate is seen as a stranger brought by the Government to enforce the law. As most of the cases handled there are criminal, the general feeling is that the Magistrate's duty is simply to hear criminal allegations against individual citizens, determine whether or not the accused are guilty, and if so, what penal sanctions should be imposed against them.

The Court's duty as civil arbiter, even less as a mediator, is considered secondary and much less important. The situation thus calls for measures that will ensure that this attitude towards courts and the magistrates who occupy them is changed. One way of achieving this is to have separate courts and magistrates dealing with criminal and civil

matters. In other words, the establishment of a criminal division of the courts, and an expansion of the commercial division to cover subordinate courts, especially the district courts and resident magistrate's courts, just like is currently the case in land matters. Though this may turn out to be costly, the potential rewards are invaluable.

The ordinary citizen finds it difficult to understand the rationale behind the existence of many forums with differing procedures depending on the type of dispute (land, tax, labour, commercial, etc.). These specialized tribunals have proved quite advantageous in the process of dispute settlement and there is need for the establishment of more. What is therefore needed is public involvement in the process of reform, and public education thereafter, so that people may be aware of how the law operates.

We should also be mindful of the shortcomings of the land dispute resolution mechanism. The hierarchy involves three different ministries. The Village Land Council and the Ward Tribunals operate under the Ministry of Local Government. The District Land and Housing Tribunals are under the Ministry of Land and Human Settlement Development. The Land Division of the High Court and the Court of Appeal are under the Judiciary. Hence, several institutions are involved at various stages of the system. It remains to be seen as to whether any consistent jurisprudence can develop from them. The administration of the institutions and accountability are also doubtful, since the bottom, medium and higher tribunals are cut away from each other.

### *C: Execution of Court Decrees and Orders*

Even when the litigation comes to an end, another problem usually arises: That of enforcing whatever decree or order a person might have obtained from the Court. The enforcement of judicial decisions poses a significant problem. The execution process is full of procedural complications, especially where, as in most cases, the losing party is not willing to comply with the Court order.

It is important to educate the public on legal issues. Debates on law reform are necessary before any major change in the law is carried out. Usually, the people know

what is best for them, especially once they have been sensitised to understand the nature and necessity of the reforms. That way, they will be more willing to embrace reforms and to strive for their success.[13]

Litigation is indeed a process that consumes so much time that it is sometimes not worthwhile to pursue. But the end victim of this unwieldy process is the country as a whole: economic development is hampered in so many ways. It is hard to measure the exact economic impact of this burdensome system. But considering the role of the law as proposed by President Kaunda (*supra*), the impact must be substantial.

### *D. Legal Technicalities*

The principles of the common law described earlier, as applied by the English Judicature Act of 1873, are applicable to Tanzania by virtue of the Judicature and Application of Laws Act.[14] Principles of natural justice have occupied a prominent place in Tanzanian jurisprudence.[15] Rules of equity, on the other hand, are sparingly invoked. In very rare cases have rules of equity been argued in courts, let alone adopted as part of the decisions of our Courts.[16] It is in fact hard to say whether they really have had much influence in the development of the law in Tanzania.

Be that as it may, the fact that justice (and injustice) is less difficult to recognize than to define makes it safe to assume that there is, indeed, some standard of justice which is objective and quantifiable. It may not necessarily have universal validity, but at least some validity within a particular context. After all, it is accepted as part of the discretion

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[13] See Imanyara, G. (1993): "The Role of the Mass Media and Legal Institutions in Educating the Public on the Rule of Law", Paper Presented at the Workshop on the Role of the Media and Legal Institutions Under Democratic Changes, Arusha, 28th –29th June, 1993 (mimeo).

[14] Cap 453, 2002 R.E.

[15] See Samatta, J.K.'s ruling in *Nyirabu Gitano Nyirabu and 3 Others Vs. Board Chairman, Songea Boys Secondary School and 2 Others,* op . cit.

[16] Honourable Chief Justice Nyalali said that only once had an advocate specifically argued a rule of equity in a case before him: See Nyalali, F.L. (1994), "The Changing Role of the Tanzanian Bar", in Speech Delivered at the Admission Ceremony of New Advocates, Dar es Salaam, 15th December 1994, published as "A Message to the Tanganyika Law Society", *The Lawyer Tanzania"* 1995 (Special Edition).

of the Judge in the common law system that where the strict adherence to procedural law can lead to injustice, the Judge must be able to disregard that procedural provision.[17] Hence, the court must not be fettered by procedural rules. To prevent a miscarriage of justice, the Judge must seek to secure to the utmost the rights of the litigants before him.[18] This is even more pertinent where one or more of the parties are not represented, as is usually the case in Tanzania.

Technicalities of procedure should be applied not as a master, but as a handmaiden of justice. As Judge Mwalusanya says, the Court process "should not be a game of chess where one wrong move determines the fate of the game". Hence, the court must go deeper into the "hall of justice", rather than "stopping merely on the threshold of formalities".[19] If properly applied, these views will provide courts and lawyers alike with the necessary tool with which to reduce the effects of our common law system and adversarial procedure.

### *E. Legal Representation*

Tanzania is unique in having an extremely small number of legal practitioners in Commonwealth Africa. There are many reasons for this.[20] One is the lack of qualified lawyers. Tanzania's population is currently estimated at more than 35 Million. There are only about 500 advocates in full-time practice who offer legal services. Besides, their distribution among the country's population is largely misbalanced. About 70% of all full-time legal practitioners are based in Dar es Salaam, while some regions do not have a single advocate available. It is thus important that deliberate steps are taken to increase

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[17] Wanitzek, U. (1990): Legally Unrepresented Women Petitioners in the Lower Courts of Tanzania: A Case of Justice Denied?" in Abun-Nasr, J.M., U. Spellenberg and U. Wanitzek, *Law, Society and National Identity,* at p.186.

[18] See also, Samatta, J.K.'s ruling in *Mwalimu Paul Muhozya Vs. The Attorney General,* Civil Case No.206 of 1993, H.C.T., Dar es Salaam, especially at pp. 3-4 of the typed ruling.

[19] Mwalusanya, J., in *Khassim Manywele v.R.,* Criminal Application NO.39 of 1990, H.C.T., Dodoma, at p.20 of typed judgment. His Lordship apparently adopted the statement made by the Supreme Court of Israel in Criminal Appeal No.1 of 1948, also cited in Tanzania Gvernment (1977), *Msekwa Commission Report (1977),* op. cit., at p.189.

[20] For an analysis of the contributing factors, See Twaib, F., *The Legal Profession in Tanzania: The Law and Practice*, Bayreuth African Studies, Bayreuth, 1997, Chapters 1 and 5.

the number of advocates practising in the country, especially in the regions and remote districts.

The deficiency in *quantity* also has a direct negative effect on the *quality* of legal services and consequently of the quality of justice. Good numbers of practitioners will reduce the costs of legal services and provide advocates with the required time to offer qualitatively and quantitatively improved services, and strengthen the private Bar. More legal practitioners will mean a reduction in the costs of legal services and more equitable distribution and availability of legal services.

### *F. The Costs of Legal Services*

The cost of hiring a lawyer has provided a fertile ground for critics of the legal profession. In fact, the somewhat unattractive image of the lawyer has not always existed. In the infant days of the legal profession in England, lawyers were not paid fees for their services. They were simply acting as *amicus curiae,* or as *amicus populi* and received "gifts" for his work. The common bitterness towards the lawyer arose when he began receiving payment for his work. So did his prestige in society start to diminish.[21] In Tanzania, cries against exorbitant fees charged by lawyers have been heard. This is one of the obstacles poor people face in their pursuit for justice.

The general feeling has been that legal costs have often been higher than they should, especially where they are offered by advocates. This complaint may hold some truth. Even the drawing of standard form contracts, such as statutory declaration, lease agreements, transfer deeds, etc., which can be drawn by any person who has sufficient experience with them, such as clerical assistants in advocate's chambers, their secretaries and court clerks, can be too expensive for some people. To a large extent, therefore, overpricing is a result of the monopoly position legal practitioners enjoy in the field of law practice[22]

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[21] Anyangwe, C. (1989), *op. cit,* at p.104.

[22] The other reason has been the largely irrelevant scale of charges in the Advocates Remuneration and Taxation of Costs Rules (which have been described by most advocates as incapable of being enforced) and the principles that govern advocates fees and charges.

Some of the ways through which costs can be significantly reduced is the age-old cure for high prices: It is necessary to have deliberate policies to *increase the supply* of legal services and *decrease demand* for them. That means, more legal service providers and less legal work. Advocates should not be the only ones allowed to appear and represent parties in litigation—especially in the lower courts. A lower cadre of legal practitioners, namely para-professionals, should be recognized and given rights of audience. Of course, there should be strict regulations governing practice under this cadre. Only people with recognized qualifications and experience should be admitted, and rules of conduct and ethics should be promulgated, so that the users are protected from unscrupulous para-professionals.

### *G. Alternative Dispute Resolution*

One of the most effective ways of reducing the demand for legal services is to encourage the parties to reconcile and settle their disputes amicably. The court process is not always the best solution to legal differences. Rather, it is more of a necessary evil. There is an inherently primitive nature about court cases: By going to court, you do not only get what you want, you also punish the opposite party.

That was why the old African society preferred solutions of conflict by mutual reconciliation of social disputes. Traditional societies mostly preferred dispute settlement mechanisms other than those of the adversarial system. For centuries, our forefathers have been operating such systems[23] with remarkable success. That way, the parties could live with the end-result, as none became the loser:

> Such be the double verdicts favoured here
> Which send away both parties to a suit
> Nor puffed up nor cast down—for each a crumb

[23] See, for instance, Schapera, I. (1994) *A Handbook of Tswana Law and Custom,* Muenster; Hamburg; Lit Verlag (reprint of 1938 edition) at p. 283-284, and the Financial and Legal Management Upgrading Project (FILMUP), "Legal Sector Study: Dissemination of Legal Information (Legal Literacy) and Legal Aid, Legal Aid Proposals (Proposals for Discussion), at p.8.

Of right, for neither of them the whole loaf.[24]

Under the Criminal Procedure Act, 1985,[25] parties may be advised by the court to settle their differences amicably where the offence in question is a minor offence or an offence of a personal nature, such as a common assault. In civil cases, the Civil Procedure Code also allows for extra judicial settlement in any case.[26] In November 1994, the Chief Justice introduced a compulsory procedure, which seeks for a pre-trial settlement immediately upon a suit being instituted in court.[27] The procedure is called Alternative Dispute Resolution (or ADR)[28]

ADR has so far proved very successful. It deserves the support of all concerned. The importance of out-of-court settlement needs no emphasis. Reconciliation is said to be able to solve about 90% of all the cases handled.[29] That means considerable energy, time and expense is saved. Though we have not yet reached that level of success in Tanzania, parties must be encouraged to attempt amicable solutions to their disputes whenever circumstances allow.

It is significant that the law should facilitate this alternative system by formalizing what is currently informal. It should expand its scope to cover mediations and negotiations outside the court system. Most specifically, it should provide for simple rules regulating the process and a manner of recognizing the outcome of the proceedings once a settlement or decision has been reached. Such recognition should be at least similar to

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[24] The Right of the Book, I, iii, 747-752, quoted in Elias, T.O. (1962), *op. cit.,* at p.270.

[25] Section 163 of the Act.

[26] Rule 3 of Order XXIII of the 2nd Schedule to the Civil Procedure Code, 1966.

[27] Orders XIIIA and XIIIB of the Second Schedule to the Civil Procedure Code, 1966. See also Tanzania Government, The Judiciary, "Chief Justice' Circular No. 5" of 1994, Ref. No. JYC/C40/8/71.

[28] See the Daily News (Tanzania) 21 April, 1993, which reported on a similar system operating in the Superior Courts of the District of Columbia, USA.

[29] The Financial and Legal Management Upgrading Project (FILMUP), "Legal Sector Study: Dissemination of Legal Information (Legal Literacy) and Legal Aid, Legal Aid Proposals (Proposals for Discussion), p. 8.

the recognition currently granted to arbitral awards, which have the force of law and only need registration in Court to be capable of execution.

## *H. Delays*

Long court procedures are what prompts the famous saying that justice delayed in justice denied. In *Allen v. Sir Alfred McAlpine & Sons Ltd.*, Lord Denning considered delay a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time. Dickens tells how it exhausts finances, patience, courage and hope. Lord Simon of Glaisdale put it this way:[30]

> … Delay will make it more difficult for the legal procedures themselves to vouchsafe a just conclusion. Evidence may have disappeared and recollection becomes increasingly unreliable. Speedy rough justice will, therefore, generally be better justice than justice worn smooth and fragile with the passage of years.

But our Civil Procedure Code contains decades-old provisions which, if followed, will be able to solve the problem of case delays to a large extent. Instead, it is the Courts, advocates and parties that have had a hand in the delays. As one senior lawyer puts it: "The problem is not in the rules. The problem is us." Hence, according to him, both the Bench and the Bar are to blame.

The Second Schedule to the Civil Procedure Code provides:

> When a summons to appear has been issued on the day fixed in the summons for the defendant to appear or where a summons to file defence has been issued and a day for hearing is fixed in accordance with the provisions of Rule 15 of Order VIII, on the day so fixed for hearing, the parties shall be in attendance at the court house in person or by their respective recognised agents or by advocates, *and the suit shall then be heard* unless the hearing is adjourned to a future day fixed by the court[291]

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[30] *Central Asbestos Co. Ltd. v. Dodd* [1972] 2 All ER at 1153.

Hence, the law *requires* that every suit should proceed with the hearing on die first day fixed for such hearing. The court is given powers to adjourn the case. But these powers must also be exercised according to law. Adjournments are governed by Rule 1 of Order 17, which provides that the court may adjourn a hearing where appropriate, and appoint another date for the hearing. However, the rule further states:

> Provided that, when the hearing of the evidence has once begun, the hearing of the suit *shall be continued from day to day* until all the witnesses in attendance have been examined, unless the court finds the adjournment of the hearing beyond the following day to be *necessary for reasons to be recorded.™*[2]

It is clear, therefore, that if these provisions were followed, disposal of cases by the courts would have been more expeditious, and matters would have improved substantially. Unfortunately, this is not the case. Adjournments, which were supposed to be the exception, have now become the rule. In fact, adjournments are sometimes made without assigning any reasons. This is an abdication of the discretion and functions of the Court.

One excuse that our courts can and does often give in explaining delays is that they are not properly equipped, in terms of the necessary manpower and facilities, to handle the large number of cases being filed in courts. A look into this area is also notable, if we are to assist the courts in following the procedures that ensure quick disposal of court cases.

## *I. Enforcement of Court Decrees and Orders*

It is meaningless to have a law that recognises a right and yet offers no remedy or relief to the victim. It is just as absurd where such a remedy, though available in law, is practically impossible or extremely difficult to enforce.

In such a situation, what may be rational to lawyers may appear quite the opposite to the layperson. I can do no better than borrow the words of a distinguished jurist, Robert Martin,[31] who wrote:

> Among lawyers, judges and clerks the law is seen as the highest expression of human reason, to the layman caught up in its toils, it is random, capricious and absurd.

The ordinary man in the street wonders at the obvious absurdity of our law. The process of execution of court decrees is one area that requires prompt reform. When someone has won his/her case in court, he/she should be able to enjoy the fruits of his/her decree or order without much ado. Subjecting such a person to another round of endless court proceedings for purposes of execution is unfair, to say the least. Hence, there is need to simplify the execution process by making it simple and straightforward.

Decrees against the Government cannot be enforced in the manner one could enforce a decree against a private individual or corporate body by virtue of the Government Proceedings Act. It is important to make things simpler in that area too. It is understandable that because of the way the Government works, there should be some special procedure to follow before execution can be effected against the Government. But that should not lead to a dead-end—where the decree holder may find it impossible to execute an order against the Government as judgment debtor, unless the judgment debtor consents, as is currently the case.

## 10.0. CONCLUSIONS AND RECOMMENDATIONS

### 10.1. Recommendations

I propose that the following specific measures be adopted:

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[31] Martin, Robert, *Personal Freedom and the Law in Tanzania*, Dar es Salaam, Oxford University Press, 1974, at 25.

1. Reform of the dispute settlement system by adopting into the formal system of dispute settlement a more organized alternative form of dispute resolution, such as arbitration, mediation and reconciliation.

2. Incorporate the informal dispute resolution mechanisms (such as the recent land reconciliation committees) into the formal system by giving them legal recognition and the outcome of their proceedings a legal force akin to court orders and court decrees.

3. Effect changes in procedural law that will reduce technicalities, if not remove them, make it simpler to follow and conduct proceedings by simplifying the same, making it less costly and less complicated.

4. Effect changes in the law of evidence that will give and enhance the evidential value of informal documentation of titles, properties and business ownerships.

5. Increase legal personnel to preside over courts and tribunals, empower them with the necessary facilities and provide motivation that will assist them in carrying out their duties.

6. Improve the quantity and distribution of legal services by increasing the numbers of legal practitioners throughout the country, and recognising a lower cadre to cater for the poor and disadvantaged and improving legal aid services.

7. Translate laws into Kiswahili to enable most Tanzanians to understand the law. The language of the law, even if it is Kiswahili, is difficult on its own. It is even more difficult when it is in English, a language most Tanzanians do not understand.

### 10.2. Implementation

How exactly the proposed reforms are to be effected will have to be determined. However, it should always be borne in mind that, before effecting any changes in

substantive law, legal procedures, institutions and structures, a thorough study of the existing ones must be carried out. Studies should be conducted on the formal court system, the various other formal tribunals and the informal ones, such as sittings of religious leaders, family, clan and village elders. It is important to understand the basis upon which the current systems operate, the reasons for their success or failure, their shortcomings, etc. It is equally important, for any reforms to be adopted, that such measures are taken without compromising on established and accepted principles of fairness and due process—matters such as transparency, adherence to rules of natural justice, non-discrimination, etc.

Furthermore, the pre-reform participation of the end-users of the services is of essence. Their participation should be a two-way traffic. The people will have to be sensitised on the objectives and relevance of the study. They should be given an opportunity to express their views. Such methods should incorporate into the reform process the vast knowledge of the people closest to the current system and is sure to unearth a wealth of information and experience that should prove useful in the reform process. That way, the reforms will also be transparent and will receive the important endorsement of the end-users. It will also ensure the reforms' legitimacy and acceptance—a necessary prerequisite for their successful implementation.

### 10.3. Concluding Remarks

This paper aimed to put a case for changes in the legal regime that would ensure that dispute settlement mechanisms operate within a suitable framework that will be fair and just, effective and transparent. That way, it is hoped, the general populace will have a better understanding of the system, be more prepared to refer their disputes for adjudication or settlement, and generally feel that they are not only part of the system as participants and contributories, but indeed as owners thereof.

The people must feel that the system belongs to them. Only then can they accept the results of the process of dispute settlement with a sense of satisfaction, knowing and believing that justice has actually been done, whatever may be the outcome of the

dispute. Admittedly, such a system is extremely difficult to secure. But it is not impossible. A sense of justice has to be present and is by and large achievable, provided the appropriate mechanisms are put in place. It is hoped that this paper will provoke debate on where and how the required reforms can be made.