

MZUMBE UNIVERSITY

RESEARCH REPORT

ON

**ANALYSIS OF THE POWER OF THE HIGH COURT TO INVALIDATE THE
LAWS ENACTED BY THE PARLIAMENT IN TANZANIA MAINLAND.**

A CASE STUDY: HIGH COURT OF TANZANIA AT MBEYA

BY

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CERTIFICATION

We the undersigned, certify that I have read and hereby recommend for acceptance by Mzumbe University, a research paper titled on **ANALYSIS OF THE POWER OF THE HIGH COURT TO INVALIDATE THE LAWS ENACTED BY PARLIAMENT IN TANZANIA MAINLAND, CASE STUDY IN MBEYA** in partial fulfillment of the requirement for the award of the degree of bachelors in law (LLB) of Mzumbe University.

ThisDay of.....2020

Signature

.....

DR FRANK MCHOMVU

Signed thisday of2020

Signature

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DECLARATION

I, IMANI FESTO ABDALAH, I hereby declare that this work submission in this research paper is my own original work that has never been presented and shall not be presented to any other university or other higher learning institution for the purpose of the award of degree or other degree award.

Signature.....

Date.....

DEDICATION

I dedicate this work to my father Festo Abdalah, my mother Fainiess, my uncle professor William Anangisyewho financially support me in my study, my young brother Joshua MoshiFesto Moshi and my sister Happy Festo, Gloria peter Masterand Lilian Mushi for their encourage me

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In achievement of this research paper has not been totally individual work. Contribution in one form or another has been done by many people whom I cannot list them all. But for sure they are to remain in my memory. I must be thankful for that, without their support both morally and materially my work could have been difficult or even impossible.

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Last but not least, I thank my fellow students, for their vital role in the group discussion and supplying me with relevant notes. Having said the above, none of the mentioned persons or institution, shares any responsibility arising there from. I solely to be responsible for anything arising out of what is contained in this research work

ABBREVIATIONS

AG-Attorney General

CAP- Chapter

DPP-Director of Public Prosecutor

ICC- International Criminal Court

MP'S-Member of Parliaments

TLR-Tanzania Law Report

R-Republic

URT-United Republic of Tanzania

UK- United Kingdom

INTERNATIONAL LAWS

The International Court of Justice

The Constitution of Kenya of 2010

LIST OF STATUTES

The Constitution of United Republic of Tanzania of 1977 as amended time to time

The Basic Rights and Duties Enforcement, CAP 3 RE 2019.

LIST OF CASES

D.P.P VS DAUDI PETE [1993] TLR 22

JULIUS ISHENGOMA NDIYANABO VS ATTORNEY GENERAL AT THE COURT OF APPEAL OF TANZANIA AT DAR -ES- SALAAM CIVIL APPEAL NO. 64 OF 2001 (UNREPORTED).

KUKUTIA OLE PUMBUN AND ANOTHER VS AG [1993] TLR 159

MWALIMU PAUL JOHN MHOZYA VS AG (1993) TLR 8

MBUSHUU DOMINIC MNYAROJE AND ANOTHER VS R. [1994] TLR, NO 44

PETER NG'OMANGO VS GARSON MWANGWA AND A.G [1993] TLR

MJOMBA MJOMBA MISCELLANEOUS, CIVIL CASE NO. 8 OF 2019

REBECA GYUMI V ATTORNEY GENERAL, MISCELLANEOUS CIVIL CASE NO.5 OF [2016]

ADECON FISHERIES TANZANIA LTD vs DIRECTOR FOR FILLING (1996) TLR 352

ABSTRACT

This research report examines the analysis of the power of the high court to invalidate the law enacted by the parliament in Tanzania mainland, taking Mbeya as the case study. The Topic by this is about the effectiveness of the power of high court to declare the law enacted by the parliament to be unconstitutional. In addressing this problem, the study under this research raised different hypotheses such as the power of the high court to invalidate the law enacted by the parliament in Tanzania mainland are not effective.

In follows consequently that in addressing the said problem the paper goes follows, the research addresses the general introduction in which different methodological issues such as background of the problem, statement of the problem, Hypothesis, Significant of the study, objective of the study, Literature review, research methodology.

This research further addresses the conceptual framework of the power of the High court to invalidate the law enacted by the parliament in Tanzania mainland, and mining of different terms and conceptualize on different concept relating to the problem of this research.

And also the Research provides legal frame of the power of the high court to invalidate the law enacted by the parliament in Tanzania mainland, it provide different laws which govern the power of the high court to invalidate the law enacted by the parliament in international level, regional level and Tanzania mainland position.

Moreover, it provides for the research findings and data analysis on the power of the high court to invalidate the law enacted by the parliament in Tanzania mainland, findings in this chapter are solely basing on the research question which the research provides for the conclusion and recommendation in which inter alia the statement of the problem and thesis statement have been revised.

Conclusively this research after strong observation recommend on the Bill which govern the power of the high court to invalidate the law enacted by the parliament and recommends on reform of some provision in the bill before come into force so that it can well protect an ensure the administration of justice in the court of law.

CHAPTER ONE

GENERAL INTRODUCTION

1.0 Introduction

Researcher was writing a research on the examineto make assessment on the power of the High Court to invalidate the law enacted by the Parliament in Tanzania Mainland. This research was conducted at Mbeya District in Mbeya region as the study of that place where researcher was collected data from different person of the said region. In any democratic state like Tanzania, all individual has equal rights before the court of laws and the parliament had given power to enact laws. As the part of interpreting laws which infringes the basic human rights or otherwise the court had been vested such a power.

The High Court of Tanzania was established under Article 107¹ and it has unlimited original jurisdiction to entertain all types of cases. The High Court's exercise original jurisdiction on matters of a Constitutional nature and have powers to entertain election petitions. The High Court's Main Registry, (which includes the sub-Registries) caters for all civil and criminal matters. The High Court (mainland Tanzania) has established 10 sub Registries in different zone of the country. It also has two specialized divisions, the Commercial Division and the Land Division. All appeals from subordinate courts go to the High Court of Tanzania².

The generally overview of the research report examines deeply the powers of the High court to invalidate, the laws enacted by Parliament. Hence the High Court has been vested power to declare any Act enacted by legislature which is inconsistence with the Parent Act (constitution) as unconstitutional. And the High court will come up with that decision if satisfied that such law is repugnant to the constitution and in all circumstances it infringes the basic individual human rights.

¹ The Constitution of United Republic of Tanzania of 1977, Cap 2

² Issa O, (2017) CIVIL PROCEDURE Preliminaries to litigations, 2nd Ed, Wazo Publishers, Mbeya

Thereafter, the Parliament has been vested with power to make or unmake law that has to be interpreted by the court in order to administer justice to people. Then if the court declared that certain law is void, and the Parliament has the duty to make amendments or alter that law. The constitution provides the procedures for alteration of the constitution or certain provision of this constitution. For instance presenting, debating and passing of bills by members of parliament, assent of bills by president and lastly publication of bill into the public Gazette so as to become law.³

1.1 Background of the Problem

Pre-colonial Period Administration of justice during this time depended heavily on the social economic and political organization of the society in Tanganyika. Two systems of administration of justice namely; The Centralized and the Non centralized systems could be identified at the time. The Centralized Systems was applicable to societies with chiefs who played both roles of adjudicators and that of governors. In the Non-Centralized systems, the entire community took part in the adjudication of disputes. However, in both systems there were no formalization of procedure in adjudication, the customs of the respective societies prevailed in the process.

Colonial Period, the German Colonial Period the Land currently covering Tanzania Main Land. During this Germany Colonial Rule, the Administration of Justice was basically racial; there were two systems, one for Natives and another for Non-Natives. The adjudication at this time was made by the Governor and other Administrative Officers. The law applicable in matters relating to Native was actually vague. The Germans left behind a Three-tier Court System; one for Europeans, a second under the Local Authorities and the Military Commanders for the Natives in effectively occupied areas and lastly, the Traditional Judicial Institutions in areas without effective German Control. The German Colonial Administration successfully attempted to impose upon the Natives a Pan-Territorial Legal System for the first time in the area though the system was strange to them, discriminatory and brutally applied by law enforcers⁴.

³Issa O , (2017) CIVIL PROCEDURE Preliminaries to litigations, 2ndEd, Wazo Publishers, Mbeya

⁴Shivji I. et al, (2004) 'constitutional and legal systems of Tanzania', Mkukinyota publishers, Dar es Salaam. Pg 55

The British Colonial Rule Britain was given mandate to administer the then German East Africa (the area currently covering Tanzania Mainland inclusive) after Germany had lost the First World War vide article 22⁵, this part of the World was renamed Tanganyika Territory following the Tanganyika Order in Council of 1920. In 1945 however, Britain opted to rule the Land as a Trust Territory, and this was so until the 9th of December, 1961 when Tanganyika Territory became independent. The British Rule introduced two separate structures of judicial hierarchies and this was done through the above cited Tanganyika Order in Council 1920. The two hierarchies constituted a limb which had the High Court and Subordinate Courts which operated according to English law on one hand, and the limb which catered for matters where both disputants were natives applying customary law on the other. Despite several amendments to the law the administration of justice during British rule never did away with the racial discrimination.

In areas where the traditional system of courts existed there was no disruption of the indigenous society, the laws administered were known and accepted by the people and the Court Holders were familiar to the people, the system thus operated as a cushion to the impact of foreign domination. However, at this period, there was a combination of Executive and Judicial functions, this meant that majority of the people were condemned to executive justice in which impartiality and fair play could not be guaranteed. Post-independence (from 1961) As hinted herein above, Tanzania mainland attained its independence in December 9th, 1961. In 1963 the courts system was integrated and racism was eliminated in the administration of justice by the enactment of the Magistrates Courts Act of 1963. This system remained undisturbed until 1984 when the present court system was introduced through The Magistrates Court Act 1984⁶.

In 1964 Tanganyika and Zanzibar formed the United Republic of Tanzania. After the Treaty of the Union, the two countries continued to remain with their own legal systems including court structures. However, there was significant development in 1977 when the Constitution of the URT came into force and in 1979 when the Court of Appeal of Tanzania was established. These particular developments created the High Courts of Tanzania Mainland that of Zanzibar and the

⁵The Covenant of the League of Nations

⁶Issa O , (2017) CIVIL PROCEDURE Preliminaries to litigations, 2ndEd, Wazo Publishers, Mbeya

Court of Appeal, a union matter. The Principal Judge is the Head of the High Court of Tanzania (Mainland). As I said above, appeals from both the High Courts of Tanzania (Mainland) and that of Zanzibar go to the Court of Appeal of Tanzania. In the Constitution of the United Republic of Tanzania⁷, the High Court of Tanganyika whose jurisdiction was and still is territoriality limited to Tanzania Mainland (formerly Tanganyika) was called the High Court of Tanzania and the High Court of Zanzibar retained its original name. It is essential to note that the High Court of Tanzania only has territorial jurisdiction over legal issues arising in Tanzania Mainland and the High Court of Zanzibar has territorial jurisdiction over legal issues arising in Zanzibar.

The Courts of the United Republic of Tanzania are established by the Constitution and municipal laws of Zanzibar and Tanzania Mainland. In Tanzania Mainland, the High Court of Tanzania has four divisions, namely the Commercial Division (the Commercial Court), the Land Division (the Land Court) and the Labour Division (the Labour Court) and Economic Division (the Economic Crimes). The High Court of Tanzania is established under article 108(1)⁸. It is the predecessor to the High Court of Tanganyika and later Tanzania, which was established under article 17 (1)⁹. The High Court is described as a superior court having full jurisdiction by virtue of section 2 (1)¹⁰. It has now developed forming a different structure to the former, where it has the ordinary court, and the two special divisions that is Commercial Division and Labour Division. However it is subject to the Jurisdiction of the Court of Appeal as stipulated under the constitution and any other written laws.

The court is also known as a court of record where it is required to keep records of its own proceedings and that it may fine or imprison but also as a court of admiralty it can adjudicate disputes arising in the high seas and inland waters. The high court is vested with general powers of supervision and revision over all districts courts and courts of resident Magistrates in the exercise of their appellate jurisdiction on matters originating from primary courts as well as in exercising their original jurisdiction. Where in exercise of such re-power the high court may either call to inspect the record of any proceedings, direct any district court to call for and inspect

⁷ Cap 2

⁸The Constitution of the United Republic of Tanzania CAP 2.

⁹ The Tanganyika order in council, 1920.

¹⁰The Judicature and Application of Laws Act, chapter 358 RE: 2019

the records of any proceedings in a primary court, or it is able to itself revise any such proceedings.

1.2 Statement of the Problem

The power of making laws is vested to the legislature and the duty of making interpretation of laws is also vested to the Judiciary. Thus Article 30(5)¹¹ gives power to the High court to declare any Act of Parliament as unconstitutional, as for the sake of ensuring administration of justice to individuals, court is the only organ to make sure that people enjoy their rights. Then soon after declaration by the competent court that certain act of Parliament is void, then court has discretionary power in an appropriate case to consult the members of Parliament to correct any defect in the impugned law by providing certain period of time or otherwise as provided under section 13(2) of Basic Rights and Duties Enforcement Act. Henceforth what follows after court's decision is nothing than seeing changes? Also those law which gives the powers to the high court does not provide the specific time limit such law to be amended by the Parliament.

The Parliament has power to amend, alter, correct or repeal any law if it conflicts with the Constitution in order to ensure preservation of basic human rights. Due to delay of amending those unconstitutional laws, the Constitution provides clearly the procedures to be followed by Parliament hence cause infringement of human rights. But among the problem the researcher seeks to examine is the effectiveness of the law declared unconstitutional by High Court to the society, the legal action done by the high court in case the laws is unconstitutional and to examine the specific time of amendment of the law by the Parliament.

1.3 Hypothesis

- i. Whether the power of the High Court to invalidate the law enacted by the Parliament in Tanzania Mainland is not effective.
- ii. What the court could do in case the law is unconstitutional.
- iii. Whether the laws does not provide the specific time to the parliament to amend the law which invalidate by High Court.

1.4 Objective of the Study

¹¹ The Constitution of United Republic of Tanzania of 1977, Cap 2

The object of the study was base into general objective and the specific objective

1.4.1 General Objective

To make assessment on the power of the High Court to invalidate the law enacted by the Parliament.

1.4.2 Specific Objective

- i. To examine the effectiveness of the law declared unconstitutional by the High court to the society.
- ii. What is the legal action by the High Court in Case the law is unconstitutional.
- iii. To examine the specific time limit of amendment of the law by the Parliament.

1.5 Significance of the study

The study was enhancing community awareness including the lawyers with the laws which regard to the power of the high court to invalidate the laws enacted by the parliament. Since the third world countries like Tanzania do need to exercise checks and balance of the organs of the state, it will be helpful through this research to give advice to the Government of Tanzania mainland to exercise separation of power rather than interference of these organs i.e. Judiciary and Legislature while in fact it is difficult to exercise it.

To the community, due to fact that the in any process of making law by Parliament there's a need to consult individuals before making it as provided under the Constitution. Thus because of invalid laws that infringes human rights the community had been enjoying their individual rights from the laws enacted by parliament.

1.6 Literature Review

Basically literature review expresses opinions of the experts; hence their number of scholars who vested their knowledge in regard to the doctrine of separation of power, and purposely to enable the researcher to establish the knowledge gap that had to be researched on. Those writers are explained herein below,

Shivji I.G¹² identified that the High Court has the supervisory jurisdiction that is the power to hear and determine the legality of any official or administrative bodies upon the laws enacted by them through the delegation by Parliament which is invalid thereto. The power conferred to the court is only to interpret laws enacted by Parliament in case does not tally with the constitution or it infringes the basic human rights.

Jowell.J. & Dawn Oliver¹³ they had this to say “the court may influence the content of the legislation; by deciding how applies in specific situation, the Judge may themselves affects the need for a legislation form”. And plainly both courts and legislative must co – exist, whatever deciding line between their respective functions”, while looking between the two authors both identifies the power of courts in declaring the constitutionalism of the acts of Parliament but does not provide for the steps a head towards the legislature when amending those laws because they do not fit in certain areas.

Furthermore, they stated that new Act of parliament will be obeyed by the courts or in other words will be enforced by the courts in contravention of an Act of parliament. In application the court has the power to declare any Act of parliament as unconstitutional hence the Parliament has the duty to amend such law despite the fact that no time limit provided but automatically is void before the eyes of law.

Wheare K.C¹⁴, observed that judge had given power to interpret the laws and when it appears that such law conflicts with the constitution then it will be regarded as unconstitutional, the author said; ...this is of the very essence of Judiciary duty and the Jurisdiction of the High court shall extend to the questions of validity of any law with regard to the constitution. It amplifies that once a court declared certain law unconstitutional and because it infringes the basic human rights then amendment should be made by legislature and not the court though no clearly procedures known to the court one did so but is of the Parliament.

Wade E.C.S & A.W. Bradley¹⁵, they argued that the Judges interprets the laws which parliament enacts and parliament alter the law, the alteration of any act of parliament should be conducted within a reasonable time whereas the need of the court is only to see that amendment

¹²(Ed) et al (2004), Constitutional and legal system of Tanzania, Mkuki na Nyota, Publishers, Dar es Salaam. pg. 227

¹³(2000)The changing constitution 4thEd, Oxford university press. New York. pg. 24 to 27

¹⁴(1967), Modern constitutional, 2nd Ed Oxford University Press, London, pg. 10

¹⁵(1971), Constitutional law 2nd Ed Lowe and Brydon (Printers)Ltd, London

is done fairly so as not to infringe the human rights, what follows after courts declaration is nothing that seeing changes.

Keir D. L & F.H. Lawson¹⁶, briefly in case any act of parliament had been obtained improperly it is the duty of the parliament to correct it by repealing it so long it exists as long it exists as law, since any law exists as part and parcel of the principals of natural justice then in case applies in contrary to the mother law thus the parliament must repeal it. They further said“...under tittles that the parliament through express words of the statute or necessary implication that had intended in do to do changes which termed by the maxim CADIT QUAESTIO.

1.7 Research Methodology

Relevant information in this study has been collected by Field work and literature review. In field work the researcher employed three methods of data collection, which are questionnaires, interviews, and observation.

1.7.1 Research Design

A case study design was used by the researcher simply because the researcher conducted his research for a specific period of time and visited specific area which he was supposed to conduct his research

1.7.2 Study types

The nature of the study was confirmatory. Where the researcher formed some hypotheses, and the purpose of the study was to confirm or disconfirm the hypothesis through field work and literature review.

1.7.3 Scope of the Study

The time constraint, in any field work demands time so as to complete it successful. The researcher needs more time so as to get to know the respondents and its accessibility to the respondents to accept the researcher. The time schedule for my research is only seventy days; consequently, the time is not enough to exhaust many information and relevant materials to be obtained. For instance, the researcher failed to interview the Members of Parliament because their Parliamentary session was over thus relevant information from them was not obtained.

¹⁶(1948), Constitutional law 3rd Ed Byword Printers Ltd, London, pg. 156

1.7.4 Unity of Inquiry

Due to the nature of the topic covered influenced the researcher the choice of the persons to whom had to be interviewed. Therefore, the researcher interviewed two (2) Resident Magistrates Five (5) state attorney, (8) advocates andAlso the researcher was required to inquire into various documents in relation to the topic; this includes books and journal articles.

1.7.5 Sampling

1.7.5.1 Sampling Size

The sample size the researcher selected a sample size which will be reasonable. The sample sizes of the study contain the people with knowledge of law and those without knowledge of law. The total was fifteen (15) respondents who were divided on the following division, Eight (8) the Advocates, five (5) State Attorneyand (2) Resident Magistrates

1.7.5.2 Sampling Procedure

The researcher usedResident Magistratessampling, where he picked specific types of people to do research upon. This was preferred by the researcher compared to random sampling due to the nature of the study. Because the study it focused on effective law.

1.7.5.3 Sampling Frame

As point the research was conducted within Mbeya district at Mbeya Region the number of state attorney, magistrates, advocates and was interview in relevant with the research on the power of the high court to invalidate the law enacted by parliament in Tanzania.

1.7.6 Method of Data Collection

Different methods of data collection were used by the researcher in collection of data required the methods are primary and secondary data collection as elaborated below. The purpose of using all these methods of data collection is assisting the researcher to come up with the relevant information that was been reliable.

1.7.6.1 Primary Data

In this part various data collection methods were used by the researcher. The researcher managed to meet with various respondents. Through various method that's was used in collection of data of primary source by the researcher, the following are primary data method used.

1.7.6.1.1 Interview

The researcher chose to collect data from the field through interviews because interviews were the best way to get firsthand experience with the subjects and provided the researcher with flexibility. Through interviews the researcher was able to tune the questions and conversations depending on the mood of the subjects in order to effectively collect the research data.

The researcher used unstructured interviews, where in these interviews the researcher did not have a set number of common questions that were asked in a specific order to all the subjects. But instead the researcher asked the questions in no particular order, and the way they were asked also differed. However, the main point which the questions sought to address was the same. Also, since the researcher was going to question his subjects on the non-compliance of a law, interviews were the best tool to ease the tight, official and mysterious environment which might lead them to mistake the researcher for a government spy, and hence be open to share with the researcher their real experiences without fear that they are being investigated.

1.7.6.1.2 Questionnaire

In using questionnaires, the researcher designed several questionnaires and gave them to Resident Magistrates, state attorney and advocates the questionnaires were used to get very specific answers. Those subjects who were able to read and write and also willing to fill a questionnaire were given a questionnaire to fill by the researcher. The questionnaire contained closed ended questions, with only two choices of answers which were YES or NO.

1.7.6.1.3 Observation

The researcher also made several observations in the field which helped him to collect data. The researcher had been on site over a period of time which made him to get familiarized with the community in Mbeya city. After getting involved with the subjects for some time the researcher

was able to observe their ways of performing the function and hence collect data. The researcher used non-participatory observation.

1.7.6.2 Secondary Data

In the secondary data sources, several method of data collection were used including library research and some extentelectronic source that is the used of internet, in library the researcher obtained relevant materials and court decision, presentations papers, articles. Newspapers, books, journals. Reported and unreported case laws

1.7.6.2.1 Documentary Review

The researcher also collected relevant information of this study through literature review. Various works including books, articles, journals, cases and manuals on judiciary and parliament system have been reviewed. Since the study is centered on judiciary and parliament, relevant instruments issued by the Judiciary and several writings of local and international judiciary and parliament expert have also been reviewed.

The researcher made literature review by visiting libraries of Advocates, and the High court library of Mbeya and also utilized the Shaaban Robert library at Mzumbe University Mbeya Campus College (MCC). Also the researcher used the Judiciary website (www.judiciary.go.tz) to access several instruments which are issued by the Judiciary

1.7.7 Method of Data Analysis

In this study the researcher used Qualitative method of data analysis; this is because this method is the best for conducting legal study. In this study the researcher dealt only with non-numerical data that were written by the researcher in form of field notes in the course of observations, interviews, and reviewing various documents on the study.

1.8 Limitation of the Study

This study proceeds to explain much on the concept of the power of the High Court to invalidate the law enacted by the parliament in Tanzania. It takes a preliminary position that for the problem in question to be addressed effectively, the law itself should reflect the existing social situation. The study was limited by a number of factors. Firstly, since the study was conducted in Mbeya, which means that the findings in Mbeya might not necessarily be the general case. The

study was also constrained in time and resources. The time within which the study was supposed to be accomplished was not sufficient especially taking into account the significance and intensive nature of the study. The study was also limited in terms of volume (number of pages); this means that the researcher had to leave out some of the information that could have been useful for want of space so as to comply with the requirement. Also the study was constrained by resources since there is no fund dedicated for this study, as a result the researcher had to get most of the information through library and internet research

1.9 Conclusion

The research paper was fixing the assessment of the power of the High Court to invalidate the law enacted by the parliament in Tanzania should be legal given and proved in written laws and been practiced according to what the laws direct. By having those legal changes, the parliament has all the general knowledge to ensure justice around their country.

CHAPTER TWO

CONCEPTUAL FRAMEWORK OF THE POWER OF THE HIGH COURT TO INVALIDATE THE LAWS ENACTED BY THE PARLIAMENT IN TANZANIA MAINLAND

2 Introduction

This chapter intends to explain much on the concept of the power of the High Court to invalidate the law enacted by the parliament in Tanzania. These concepts will make us understand better the study. First the researcher gives a general understanding of the concept of Judiciary, The Function of Judiciary, The Judiciary Reviews, Court, High Court, The Power of the High Court, The Local Precedent, Legislation\ Parliament, The Parliament sovereignty, Principal Legislation, Subsidiary Legislation, The Power of Legislation or Parliament and The Relationship between Judiciary and Legislation.

2.1 The definition of Judiciary

The legal system of Tanzania is largely based on common law, as stated previously, but is also accommodates Islamic or customary laws, the latter sources of law being called upon called upon in personal or family matters. The judiciary is formed by the various courts of judicature and is independent of the government. Tanzania adheres to and respects the constitutional principles of separation of powers. The Constitutional makes provision for the establishment of an independent judiciary, and the respect for the principles of the rule of law, human rights and good governance.¹⁷

The Judiciary in Tanzania can be illustrated as follows. The Judiciary in Tanzania has four tiers: The Court of Appeal of the United Republic of Tanzania, the High Courts for Mainland Tanzania and Tanzania Zanzibar, Magistrates Courts, which are at two levels, i.e. the Resident Magistrate Courts and the District Court, both of which have concurrent jurisdiction. Primary Courts are the lowest in the judicial hierarchy.

2.1.1 The Function of Judiciary

¹⁷Shivji I. et al, (2004) , Constitutional and Legal systems of Tanzania, Mkukina nyota Publishers, Dar EsSalaam.

There number of functions of Judiciary including the following, the primary function of the judiciary is to adjudicate legal disputes; this blessing of solving different legal disputes is only made through the courts of law by providing various decisions of cases. It is the Judiciary which has been vested with powers to law proceedings and finally determine on the rights of the parties to such proceeding¹⁸.

Thereafter Judiciary has authority with final decision in the dispensation of Justices in the United Republic of Tanzania and in exercising the powers of dispensing justice all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those laws of the land. The Judiciary is also responsible for interpreting the law, the judiciary is the only organ vested with the power and function of construing all the laws enacted by legislature so as to be well understood to the individuals and the community as a whole¹⁹.

2.1.2 The Judiciary Reviews

Judicial review is a process under which executive or legislative actions are subject to review by the judiciary. A court with authority for judicial review may invalidate laws, acts and governmental actions that are incompatible with a higher authority: an executive decision may be invalidated for being unlawful or a statute may be invalidated for violating the terms of a constitution. Judicial review is one of the checks and balances in the separation of powers: the power of the judiciary to supervise the legislative and executive branches when the latter exceed their authority. The doctrine varies between jurisdictions, so the procedure and scope of judicial review may differ between and within countries as in case of **COUNCIL OF CIVIL SERVICE UNIONS vs MINISTER FOR THE CIVIL SERVICE**²⁰. Judicial review can be understood in the context of two distinct but parallel legal systems, civil law and common law, and also by two distinct theories of democracy regarding the manner in which government should be organized with respect to the principles and doctrines of legislative supremacy and the separation of powers.

2.2 The definition of Court

¹⁸Legal and Human Rights; Annual report 2008 at pg 151

¹⁹As provided under Article 107A & B of the Constitution of URT as amended in 2008

²⁰(1985) AC 374 .

A court is any person or institution often as a government institution, with the authority to adjudicate legal disputes between parties and carry out the administration of justice in civil, criminal and administrative matters in accordance with the rule of law. In both common law and civil law legal systems, court are the central means for dispute resolution, and it's generally understood that all people have an ability to bring their claims before a court. Similarly, the rights of those accused of a crime include the right to present a defense before a court. The system of courts that interprets and applies the law is collectively known as the judiciary. The place where a court sits is known as a venue. The room where court proceeding occur is known as a courtroom, and the building as a courthouse, court facilities range from simple and very small facilities in rural communities to large building in cities.²¹

2.2.1 The High Court

The High Court of Tanzania was established under Article 107 of the Constitution of United Republic of Tanzania²² and it has unlimited original jurisdiction to entertain all types of cases. The High Court's exercise original jurisdiction on matters of a constitutional nature and have powers to entertain election petitions. The High Court's Main Registry, (which includes the sub-Registries) caters for all civil and criminal matters. The High Court (mainland Tanzania) has established 10 sub Registries in different zone of the country. It also has four specialized divisions, the Commercial Division, Labor Division, Economic Crime Division and the Land Division. All appeals from subordinate courts go to the High Court of Tanzania.

2.2.2 The Power of the High Court

The High Court of the United Republic of Tanzania (URT) has been established under Article 108(1) of the Constitution of United Republic of Tanzania 1977²³ that there shall be a high court of the United Republic of Tanzania (to be referred to in short as "the High Court") the jurisdiction of which shall be specified in this constitution or any other law". Generally, in Tanzania the High Court has been vested with power of having unlimited original jurisdiction to hear and determine every matter of such type, similarly to deal with any matter which according to legal traditions obtaining in Tanzania, is ordinarily dealt with by a high court.

²¹Shivji I. et al, (2004) ,constitutional and legal systems of Tanzania, Mkukina Nyota publishers, Dar Es Salaam

²² Cap 2

²³ Cap 2

The High Court has exclusive jurisdiction in entertaining matters of constitutional nature , in application all the matters regarding all the laws which are against of inconsistency with the constitution would be termed as unconstitutional and only high court has the power intention matters of constitutional nature as found in the decision in the case of **MBUSHUU @ DOMINIC MNYAROJE AND ANOTHER vs. REPUBLIC**²⁴ ,the court stated inter lia that the death penalty is cruel, in human and degrading punishment; and in that it offends the right to dignity in the course of executing the sentence, the death penalty infringes right to life, is not public interest, thus unconstitutional and hence null and void.

In extensor the High Court has power to hear and determine election petitions²⁵, as in the **RE. CHRISTOPHER MTIKILA vs A.G**²⁶ where by the High Court of Tanzania allowed a petition for recognition of the right of a citizen to contest in election as Private Candidate as stated in the case of **LAWYERS ENVIRONMENTAL ACTION TEAM (LEAT) & NATIONAL ORGANIZATION FOR LEGAL ASSISTANCE (NOLA) vs ATTORNEY GENERAL**²⁷, where the held that; it shall be lawful for independent candidates along with candidates sponsored by political parties to contest, presidential, parliament and local council election.

Thus the High Court shall have and may exercise original jurisdiction to hear and determine any application made by any person, in pursuance of section 4 which provides that any person who alleges that his rights as under Article 12 up to 29 of Constitution of United Republic of Tanzania of 1977²⁸ has been infringed may apply to the high court for redress.

2.2.3 The Local Precedent

The Precedent are the Rules and Principles which are formulated by the Court of Record when deciding various cases. These are cases from the High Court and Court of Appeal which are either reported or unreported and are be used as precedents, and bind lower courts thereto. When these Court interpret laws, be it constitution, the Principles Legislation, the Subsidiary legislation, the customary laws or Islamic law in the process of administrative of justice, they formulate rules which then binds all courts bellows them in the rule of stare decisis as in the case

²⁴[1994] TLR,HCT 44 at Dodoma, Crim. Case No 44 of 1991 reported in [1994]2 LRC 335

²⁵Legal & Human Rights center; Annual Report 2008

²⁶High Court of Tanzania at Dodoma, Civil case no 5 of 1993 (unreported)

²⁷In the High Court of Tanzania at Dar Es Salaam, Misc. civil case no 77 of 2005(unreported).

²⁸ Cap 2

of **JINGLANG LI vs NATIONAL HOUSING CORPORATION and LARS ERIC HULSTROM**²⁹, “*that the Doctrine of stare decisis applies to courts in Tanzania Mainland, which means that courts subordinate to the Court of records (Court of Appeal and High Court) are required to maintain what has been decided by the court of record and not alter that which this has established by the court of records to be law..... the subordinate courts, inevitably have to interpret principles of law enunciated by court of record, the laws which Judges apply to the proven facts may be statutory laws or principles of law propounded down by this court.*” This Reported Tanzanian cases are found in the Tanzania Law Reports, High Court Digests and East Africa Law Reports.

2.3 The Definition of Legislation\ Parliament

The Legislature, or the Parliament of the United Republic of Tanzania, consists of two parts, i.e. the President and the National Assembly. The President exercises authority vested in him by the Constitution to assent to bills by Parliament in order to complete the enactment process before they become law. The National Assembly, which is the principal legislative organ of the United Republic, has authority on behalf of the people to oversee and the accountability of the Government of the United Republic and all its organs of their particular duties as per Article 62³⁰

The Parliament is headed by the Speaker as Article 84 of Constitution of United Republic of Tanzania³¹, who is assisted by the Deputy Speaker, and the Clerk as the head of the Secretariat of the National Assembly. The National Assembly also has various standing Committees to support in its various functions. The National Assembly of Tanzania is constituted by one chamber, with members elected from various constituencies across mainland Tanzania and Zanzibar. Under the Constitution, women’s representation is provided for as a special category, in order to increase the participation of women in national politics. Elections are supervised by the National Electoral Commission which is established under the Constitution.

2.3.1 The Parliament sovereignty

Parliamentary sovereignty (also called parliamentary supremacy or legislative supremacy) is a concept in the constitutional law of some parliamentary democracies. It holds that the legislative

²⁹ Civil Revision No. 1 of 2013, Court of Appeal, Dar Es salaam (Unreported)

³⁰The Constitution of United Republic of Tanzania Cap 2

³¹ Cap 2

body has absolute sovereignty and is supreme over all other government institutions, including executive or judicial bodies. It also holds that the legislative body may change or repeal any previous legislation and so it is not bound by written law (in some cases, even a constitution) or by precedent. In some countries, parliamentary sovereignty may be contrasted with separation of powers, which limits the legislature's scope often to general law-making and judicial review, where laws passed by the legislature may be declared invalid in certain circumstances³².

2.3.2 Types of Legislation

The Laws Revisions Act of 1994³³ established that all legislations previously known as Ordinances, i.e. those which were enacted by the pre independence colonial administration, as Orders in Council, can now be legally recognized as Acts. These principal legislations and subsidiary legislations thereto, are published in the Government Gazette and printed by the Tanzania Government Printers. They are two types of legislation which are Principal and Subsidiary legislation in Tanzania Mainland.

2.3.2.1 Principal Legislation

The Principle legislation is the laws enacted by the legislature of the United Republic of Tanzania. This laws are knowing as Act of Parliament and are found in form of books which in laws are knows as Statutes. There are many statutes which provide rules and laws. The Principal legislation includes, but not limited to the Criminal Procedure Act³⁴, Civil Procedure Code Act³⁵, Magistrates Court Act³⁶, through these statutes and many others of similar nature, justice id administered by the courts of law of the country.³⁷

2.3.2.2 Subsidiary Legislation

³²Burnham, William (2006). *Introduction to the Law and Legal System of the United States* (4th ed.). St. Paul (Minn.): Thomson-West

³³Chapter Four of the laws of Tanzania [R.E. 2002,]

³⁴ Cap 20 RE 2019

³⁵ Cap 33 RE 2019

³⁶ Cap 11 RE 2019

³⁷Omari Issa , (2017) CIVIL PROCEDURE Preliminaries to litigations, 2nded, Wazo Publishers, Mbeya

The subsidiary legislation is laws which are formulated by other bodies than the legislature. Pursuant to Article 97(5)³⁸, the legislature enacts laws which contain provision which gives power to department of the government, Ministers and other bodies/ persons to make subsidiary legislation. Among the laws made by such departments, persons and ministers are those which have rules, regulations and orders, by laws, Government Notice and Circulars. Examples are the High Court (Commercial Division) Procedure Rules of 2012³⁹. The subsidiary legislation also is useful in ensuring justice in court.

2.3.3 The Power of Legislation\ Parliament

Legislative power in relation to all Union Matters and also in relation to all other matters concerning Mainland Tanzania is hereby vested in Parliament. Legislative power in Tanzania Zanzibar over all matter which are not Union Matters is hereby vested in the House of Representatives⁴⁰. Where any law enacted by the House of Representatives concerns any matter in Tanzania Zanzibar which is within the legislative jurisdiction of Parliament, that law shall be null and void, and likewise if any law enacted by Parliament concerns any matter which is within the legislative jurisdiction of the House of Representatives that law shall be null and void Article 64⁴¹.

Any law enacted by Parliament concerning any matter shall not apply to Tanzania Zanzibar save in accordance with the following provisions, such law shall have expressly stated that it shall apply to Mainland Tanzania as well as to Tanzania Zanzibar or it replaces, amends or repeals a law which is in operation in Tanzania Zanzibar, such law replaces, or amends or repeals a law which was previously in operation in Mainland Tanzania and also in operation in Tanzania Zanzibar pursuant to the Articles of the Union of Tanganyika and Zanzibar, or pursuant to any law which expressly stated that it shall apply to Mainland Tanzania as well as Tanzania Zanzibar; or such law relates to Union Matters; and whenever reference is made to the term “Tanzania” in any law, it is hereby declared that such law shall apply in the United Republic in accordance with the interpretation contained in the provisions of this Article 64(4)⁴². Also on the

³⁸The Constitution of United Republic of Tanzania of 1977, Cap 2

³⁹ GN NO. 250 OF 2012.

⁴⁰Omari Issa , (2017) CIVIL PROCEDURE Preliminaries to litigations, 2nded, Wazo Publishers, Mbeya

⁴¹The Constitution of United Republic of Tanzania of 1977, Cap 2

⁴²The Constitution of United Republic of Tanzania of 1977, Cap 2

application of the Constitution of Zanzibar in accordance with this Constitution shall have the force of law in the whole of the United Republic, and in the event any other law conflicts with the provisions contained in this Constitution, the Constitution shall prevail and that other law, to the extent of the inconsistency with the Constitution, shall be void as per Article 64(5)⁴³ and in the case of **JULIUS NDYANABO ISHENGOMA vs AG**⁴⁴.

2.4 The Relationship between Judiciary and Legislation

It is of greatest importance to have a look on the relationship between Judiciary and legislature due to the fact that in Tanzania there is no clear separation of powers between the three organs of the state that is Executive, Judiciary and Legislature, but there's overlapping of powers or checks and balance between them. Albeit each organ owes the duty to exercise its power vested by the constitution. For instance, courts have been vested power to interpret or construe and apply the law enacted by parliament in the process of resolving disputes and parliament has been vested power to make different laws as well as to amend the unconstitutional laws as commented by the court especially High court. In a foregoing statements herein below are the court's decision through case laws whereby the Judges have tried to identify the relationship between courts and legislature and the power conferred to them by the Constitution as in the case of **MWALIMU PAUL JOHN MHOZYA vs AG**⁴⁵ the court held that, *the principle that one branch of Government should not encroach on the functions of another organ is a very important principle, furthermore the court said, if the parliament intended the court to exercise concurrent jurisdiction of dealing it political offences by president it would have said so when enacting the provision.*

In submission from the said observation the court owes the duty only to interpret the laws enacted by Parliament once there's dispute between the parties and not to add more provisions or otherwise but the best thing is that the Parliament when enacting certain law, that law must disclose its applicability example the power of president in political matters. Thereafter in case of **ADECON FISHERIES TANZANIA LTD vs DIRECTOR FOR FILLING**⁴⁶, the court stated inter his that *"It might be borne in mind that the court is not supposed to use the powers of*

⁴³The Constitution of United Republic of Tanzania of 1977, Cap 2

⁴⁴Court of Appeal of Tanzania at Dar es salaam, Civil appeal no 64 of 2001(unreported)

⁴⁵ In the High of Tanzania at Dar esSalaam, civil case no 206 of 1993 (unreported)

⁴⁶ (1996) TLR 352 esp. 359

other organs which powers are vested on them by law, the court only has the duty to see that powers conferred to them are used properly. It could be reminded that the court is very smart to see that the power vested to it is properly addressed with respect to their power conferred the parent Act and for the sake of making sure that administration of justice is done.”

Then in the case of **JULIUS NDYANABO ISHENGOMA vs AG**⁴⁷, the same concept of interrelated powers between courts and Parliament distinguished, the court observed that “*it is no within the competent of this court or any other court to armed the law but within the Legislature*”. Through the power of the court in consisting the laws enacted by Parliament where there’s dispute is in this point where the judiciary can nullify certain law which is inconsistency with the constitution or it infringes the basic rights of individuals, then the order from the competent court is only to refer to the parliament to amend those unconstitutional laws and not courts of laws.

CHAPTER THREE

⁴⁷Court of Appeal of Tanzania at Dar es salaam, Civil appeal no 64 of 2001(unreported)

LEGAL FRAMEWORK OF THE POWER OF THE HIGH COURT TO INVALIDATE THE LAWS ENACTED BY THE PARLIAMENT IN TANZANIA MAINLAND

3 Introduction

In this chapter the researcher provides all laws and present institutional frame which govern the power of the High Court to invalidate the laws enacted by the parliament in international level, regional level and state of Tanzania Mainland in order to have an effective on the power of High Court to invalidate the laws enacted by the parliament in Tanzania in ensuring justice it's important to evaluate the legal frame work governing it. In a democratic country the Judiciary is instituted as the sole arbiter of the constitution, the authoritative interpreter o of the will of the people and the sovereign protector of the freedom and liberty. It is the judiciary which is the ultimate authority to restrain any exercise of absolute, conspires and arbitrary exercise of power that is legislative and executive action is counter balance by judicial verdict.

3.1 International Level (Treaties and Conventions)

International Laws, that is, Treaties and Conventions, are not self-executing. The Act of Parliament can apply treaties and conventions to which Tanzania is a party in the Courts in Tanzania only after ratification. A treaty is an agreement under international law entered into by actors in international law, namely sovereign states and international organizations. A treaty may also be known as an (international) agreement, protocol, covenant, convention, pact, or exchange of letters, among other terms. Regardless of terminology, all of these forms of agreements are, under international law, equally considered treaties and the rules are the same. Treaties can be loosely compared to contracts: both are means of willing parties assuming obligations among themselves, and a party to either that fails to live up to their obligations can be held liable under international law.⁴⁸

3.1.1 The International Court of Justice.

⁴⁸Neubauer, David W.; Meinhold, Stephen S. (2012). *Judicial Process: Law, Courts, and Politics in the United States* – David W. Neubauer, Stephen S. Meinhold

Declarations made under Article 36⁴⁹ of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

3.3 The Law Governing the Power of High Court in Position in Kenya

The case of Kenya gives a useful overview of the legal framework on the power of the High court to invalidate the laws enacted by parliament in Kenya. The Kenyan Legal System is based on English Common Law. The Kenyan Constitution is the supreme law of the land, and any other law that is inconsistent with the Constitution, shall, to the extent of the inconsistency, be null and void. The Constitution of Kenya is divided into eleven parts. The independence Constitution was enacted on the 12th of December 1963. There have been several amendments to the Constitution since then, and a failed attempt to have the whole constitution amended.

3.3.1 The Constitution of Kenya of 2010

The High Court of Kenya was established under article 165⁵⁰ of. It has supervisory jurisdiction over all other subordinate courts and any other persons, body or authority exercising a judicial or quasi-judicial function. It has unlimited original jurisdiction and carries out supervisory roles. It was known as the Supreme Court of Kenya until 1964 and its name has remained unchanged since then. The High Court has several departments established under it Family Court, Commercial and Admiralty Court, Constitutional and Judicial Review Court, Land and Environment Court - Land and environment matters, including appeals from land tribunals, Criminal Court, Industrial Court - Labour and employment matters.

3.4 The Law Governing the Power of High Court in Position of Tanzania Mainland

In Tanzania we have numbers of pieces of legislation which provide about the power of High court in Tanzania but these instrument does not provide direct and clear position of such power of high court as compared to other countries. Tanzania we have various legislation instrument which provides for some basic to the high court power mechanism through not clear and wide

⁴⁹International court of Justice

⁵⁰The constitution of Kenya of 2010

state these include, the Constitution of the United Republic of Tanzania of 1997⁵¹ and the Basic Rights and Duties Enforcement Act⁵²

3.4.1 The Constitution of the United Republic of Tanzania of 1997⁵³

Under the Constitution of United Republic of Tanzania of 1977 as amended from time to time contains a preamble statement which partly and clearly states that, Tanzania is the country which adheres to the principle of freedom justice, fraternity and concord... which judiciary has given power to dispense justice without fear or partiality of any kind per under Article 107A (1) and (2)⁵⁴. Then the constitution provides that, in exercising the power of dispensing justice, all courts shall have freedom and shall be required only to observe the provision of the constitution and those of the laws of the land as under Article 107B⁵⁵.

The High Court of Tanzania has been established under the constitution which provides that ‘There shall be a High court of URT (to be referred to in short as ‘High court’) the jurisdiction of which shall be as specified in the constitution or any other law as provided per Article 108(1)⁵⁶. Furthermore, subject to the provisions of the constitution the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this article, and the state authority may enact legislation for the purpose of ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties to individuals. It should be noted that in Tanzania mainland High Court is the only organ to make sure that people or individuals do enjoy their basic rights and purposely this court must exercise its power effectively as not to delay dispensation of justice.

The Constitution of United Republic of Tanzania of 1977 which is the mother law of all laws in Tanzania provide that the Equality before the law as under Article 13(2) of the Constitution United Republic of Tanzania of 1977 reading to gathers Article 64 (5)/of the Constitution of United Republic of Tanzania of 1977 that “*this Constitution shall have the force of law in the whole of the United Republic and in the event any other law conflicts with the provision*

⁵¹The Constitution of United Republic of Tanzania of 1977Cap 2

⁵²Cap 3 RE 2019

⁵³The Constitution of United Republic of Tanzania of 1977Cap 2

⁵⁴The Constitution of United Republic of Tanzania of 1977Cap 2

⁵⁵The Constitution of United Republic of Tanzania of 1977Cap 2

⁵⁶The Constitution of United Republic of Tanzania of 1977Cap 2

contained in this constitution, the constitution shall prevail and that other law to the extent of the inconsistency with the constitution shall be void.”

Henceforward this court had been given power by the Constitution under special and reasonable reasons to declare any act of parliament as unconstitutional. Besides, there procedures lay down by the constitution for alteration of certain laws, that the alteration of the provision of the law shall be understood to include modification or correction of those unconstitutional laws or repeal and the application of the provisions. Thus our Constitution provides clearly the way forward or procedures which are inconsistency or void and they directly infringe or abridge the basic rights and freedom of individuals per se. under the powers of High Court as provided in that part of Article 30(5) which says “*such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High court lapses. Whichever is the earlier*”.

3.4.2 The Basic Rights and Duties Enforcement Act⁵⁷

The Basic Rights and Duties Enforcement Act⁵⁸. Provides the Jurisdiction of High Court that the High court shall have and may exercise original jurisdiction to hear and determine any application and to determine any question arising in the course of trial as to the effect that is appropriate to secure the enforcement of any of the provision of Article 12 to 29⁵⁹.

Quietly significant the Act empowers the High Court the power in making decisions. That in making decisions in any suit filed whereby it comes to the conclusion that the Basic rights, freedom and duties are unlawfully denied, it shall make order as necessary and appropriate to secure enjoyment of the basic rights as imposed as per Section 13(1)⁶⁰. On the protection of which the person concerned is entitled so in case of any law which is termed as void and the court may exercise its original jurisdiction and power to protect the rights of individuals. In appropriate case, the foregoing statement implies that the High Court has discretionary power to consult the relevant authority to correct any defect in impugned law.

⁵⁷ Cap 3 RE 2019

⁵⁸ Cap 3 RE 2019

⁵⁹ The Constitution of United Republic of Tanzania of 1977 Cap 2 Cap 2

⁶⁰ Basic Rights and Duties Enforcement Act, Cap 3 RE 2019

Also the same powers of High Court as provided in that part of section 13(3)⁶¹ which says “*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*’. Preferably the above statements empower the High court if it deems fit before the eyes of law that certain law is inconstitence with the constitution and under special circumstance to be declared as void, and provide specific period to the specific authority to rectify the defects while failure to amend then that law will declared as unconstitutional.

3.5 Conclusion

Generally, in this chapter we explored on the law which provide for the power of the High Court to invalidate the laws enacted by Parliament in the Tanzania, under this chapter it has try to cover some issue like the legal framework covering thepower of the High Court to invalidate the laws enacted by Parliament in the Tanzania. The legal power of the high court invalidate the enacted laws of parliament is being governing by the Constitution of the states and other laws.

⁶¹Basic Rights and Duties Enforcement Act, Cap 3 RE 2019

CHAPTER FOUR

RESEARCH FINDINGS AND ANALYSIS

4 Introduction

The researcher in this chapter intends to show various findings of data collected from the field by using different methods, and forms of data collected which has been stipulated in chapter one above. During the field research the researcher was able to collect data from different sources including different respondents and books, the research findings discuss much and come with the different views from the respondents. The sample size the researcher selected a sample size which will be reasonable. The sample sizes of the study contain the people with knowledge of law. The total was fifteen (15) respondents who were divided on the following division, eight (8) the Advocates. Two (2) magistrates, five (5) State Attorney

This research was guided by the main objection which was to examine the Effectiveness of the Law declared Unconstitutional by the High Court and to examine the specific time of amendment of the law by the Parliament. Also to The researcher collected data from respondents by using questionnaires, interviews, also from secondary data. Therefore from the said hypotheses below are the responses and findings presentation.

4.1 Research Finding

4.1.1 To Examine the Effectiveness of the Law declared Unconstitutional by the High Court to the society

In researching, the researcher had access to respondent⁶², who had this to say that, the court has to take into account and strike a balance between the interests of the individuals and those of the society of which the individual is a component. So the effects are that no right of access to the courts once the court declares certain law as unconstitutional. Due to that consideration of the court the court feels proud when the individual or society do enjoy their rights, therefore the society is affected when there is deprivation of rights due to unconstitutional and courts decision will not be based on the void laws till amendment is done.

⁶² Responses from the respondent (advocate) living in Mbeya. Interviewing the on 15th may 2020

Also the respondent stated there limitation of rights to individuals or society when the court says the law is null and void, by making reference in the case of **REBECA GYUMI vs ATTORNEY GENERAL**⁶³ the case was on behalf of all children at risk of child marriage challenged the constitutionality of child marriage in Tanzania. As a result, the High Court declared as discriminatory and unconstitutional sections 13 and 17⁶⁴ that set different minimum age for marriage for boys and girls.

Also in case of **MJOMBA MJOMBA**⁶⁵ the Court sided with the Petitioner agreeing that *”the provisions of section 148(5) are unconstitutional contravening Articles 13 and 15 of the Constitution, that in accordance with Article 30(5) of the Constitution, the Government is required within 18 months to rectify section 148(5) failure of which the section shall be automatically expunged, and the 18-month period above shall not be applicable to the offence of armed robbery (see Mjomba case supra) as the Government had been granted an 18-month period before and has failed to rectify the provision, meaning that it is now expunged”*

Moreover respondent⁶⁶, was of the view that always the society’s rights are delayed to be done or in simple words there what known as “Pending rights’ to the community. Due to ignorance of the law to them they do believe that the court did that intentionally not to grant them their rights at the right time. So practically there delaying of justice to be done to them because the decision of the court will be based on the void law till there rectification or amendment is done.

4.1.2 The Legal Action done by the High Court in Case the Laws is Unconstitutional

Through this research researcher found that, the Judiciary has been vested power to interpret the laws made by Parliament and to settle disputes among individuals. And for the purpose of ensuring administration of justice is done and the power vested to it with the Constitution to declare any Act of parliament which is in inconsistency with constitution as void then the court after satisfying itself as to the defects of that to be declared as unconstitutional.

⁶³ Miscellaneous Civil case No. 5 of 2016

⁶⁴ Law of Marriage Act Cap 29 R.E. 2002

⁶⁵ Miscellaneous Civil case No. 8 of 2019

⁶⁶ Responses from the respondent (magistrate) living in Mbeya. Interviewing the on 20th May 2020

On this research, the researcher succeed to have a brief discussion with the respondent⁶⁷, whereby he observed that, any law enacted is always tested against the Constitution and it once more time that if it is inconsistent therewith, then the extent of its inconsistency is void. Now the determination in identifying these unconstitutional laws by the High Court is only of two kinds either in suo motto or through petitions filed by the petitioner as to the effect that certain law that infringes basic human rights. Therefore the court before declaring certain law as unconstitutional must in all circumstances satisfy itself as to the inconsistency of that law and the decision thereon will be that the law is void.

In addition submitted that, in order to ensure independency of judiciary while reaching the impartial decision, Article 30(5)⁶⁸, provides openly that in all circumstances the court make consultation with relevant authority to amend the defects within a specified period, but the problem is within the legislature in obeying the order of the court to the Parliament always delays. Also the court after its decision wants to see changes and not what do the Parliament considers in making amendments. Due to that problem with legislature there were notable reaction has been reversal of judicial decision by legislative amendments. By mentioning the case of Rev.Mtikila's and Julius Ishengoma Ndyababo.

Another limitation is that, the court has no power to mandate the legislature or to force them after its decision in the alteration, amendment or correction of unconstitutional laws because the two organs have quietly distinct functions and powers.

4.1.3 To examine the specific time limit of amend the law by the Parliament which was unconstitutional.

The respondent⁶⁹, commended that the law have gives the power to the high court as under Article 30(5)⁷⁰ and section 13⁷¹. But these law have fails to provide the specific time limit such law which is unconstitutional to be amended and have left the gap, but in practice the court seeing that it has try to put the limitation of time in every decision when it came to the court of law to declare the parliament act to be unconstitutional, as been seen in the case of MJOMBA

⁶⁷ Responses from the respondent (advocate) living in mbeya. Interviewing on 11th may 2020

⁶⁸ The Constitution of United Republic of Tanzania of 1977, Cap 2

⁶⁹ Responses from the respondent (Judge) living in mbeya. questionnaire on 14th may 2020

⁷⁰ The Constitution of United Republic of Tanzania Cap 2

⁷¹ Basic Rights and Duties Enforcement Act, Cap 3 RE 2019

MJOMBA⁷²that ‘*the Government is required within 18 months to rectify section 148(5) failure of which the section shall be automatically expunged, andthe 18-month period above shall not be applicable to the offence of armed robbery (see Mjomba case supra) as the Government had been granted an 18-month period before and has failed to rectify the provision, meaning that it is now expunged*’

⁷²Miscellaneous Civil case No. 8 of 2019

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This research report examines deeply the powers of the High court to invalidate, the laws enacted by Parliament. Therefore the High Court has been vested power to declare any Act enacted by legislature which is inconsistency with the Parent Act (constitution) as unconstitutional. And the High court will come up with that decision if satisfied that such law is repugnant to the constitution and in all circumstances it infringes the basic individual human rights. There after the Parliament has discretion power to amend or un amend that law has to be interpreted by the court in order to administer justice to people. Then if the court declared that certain law is void, and the Parliament has the duty to make amendments or alter that law. The constitution provides the procedures for amendment or alteration of the certain law which is unconstitutional. Also this research examines the effects of unconstitutional laws to the individuals the society. Those effects include the deprivation of individual rights, delaying of justice to be done in the sense of pending rights of individuals and society. Therefore our country as a democratic state that adheres to the principle of rule of law and in order to ensure administration of justice, needs to have the effectiveness of its procedures to amend the laws.

5.2 Recommendations.

Recommendable this research would be helpful and useful to the coming generations in the sense that there developments of laws because law is practice so as to ensure rule of law to the third world countries. Hence preferably the researcher has the following recommendations as elaborated herein below.

5.2.1 Amendment of laws

Article 98⁷³ and Section 13⁷⁴ these laws they give power to the High Court to invalidate the law which enacted by parliament if that law it is unconstitutional or if it create injustices to the societies so in order to insure that justice to be done to the societies it batter to amend these two

⁷³Cap 2

⁷⁴Basic Rights and Duties Enforcement Act, Cap 3 RE 2019

laws in order to allow the applicability of the case or precedent which is declared by the court to invalidate the law which is unconstitutionally or which creates injustice to the societies to operate soon as possible such as within one month or not to exceed two months, this amendment will help the court to decide or make the decision of the new cases which will be instituted or filling to court and also such court shall make decision based on the previous case or precedent but not the law which is defective. Due to this amendment the court shall create justice and not injustice to the societies

5.2.2 The special committee

The lastly is Article 98⁷⁵ and Section 13⁷⁶ it gives power to the High Court to invalidate the law which enacted by parliament if that law is unconstitutional or if it creates injustices to the societies so that these two laws they give discretion to parliament either to amend or not to amend that law which is declared by the court to be invalid, so that the High Court it does not have the power to compel the parliament in order to amend the law which it has the defect. Under this circumstance it better for the government to create the special committee which it will deal with these amendments of the laws which have the defect and also this special committee it better to be under the minister of Legal and Constitution Affairs

5.2.3 Amendment of laws

Any country there Constitution that governs that Government and that Constitution is regarded as the mother law. So any other laws of the land should comply with the Constitution. In the Constitution of United Republic of Tanzania under Article 98⁷⁷ and Section 13⁷⁸ provides the procedures for amend or altering the certain laws but these two laws does not provide limitation of time for amend the law which is declare by the court to unconstitutional. Therefore the Constitution and Basic Right and duty Enforcement Act should provide not limitation of time for amend the law. That limitation of time will assist the members of Parliament or to enable them amendments the law which is declared by the court to be unconstitutional without any delaying in order to ensure affective administration of justice to individuals.

⁷⁵Cap 2

⁷⁶Basic Rights and Duties Enforcement Act, Cap 3 RE 2019

⁷⁷Cap 2

⁷⁸Basic Rights and Duties Enforcement Act, Cap 3 RE 2019

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REPORTS

Legal and Human Rights Centre,2008 public engagement justice watch report Annual report

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APPENDIX 1

INTERVIEW GUIDE

Introduction

I am a student of Mzumbe University, Mbeya campus pursuing bachelor of law, I am doing my research on the study on Analysis of the power of the High court to invalidate the laws enacted by parliament in Tanzania Mainland, The Case Study of Mbeya. This is purely research undertaken as partial fulfillment of my bachelor in law. Your information which will be answered is for the purpose of study and not otherwise.

You may or not provide your name,

Name

Age

Sex

Position

1. Do you know the term judicial?

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2. Do you know the term high court?

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3. Do you know the term legislation?

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4. Do you know the term local Precedent?

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5. Do you know the term constitution?

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6. Do you know any Judiciary function in Tanzania? (Mention)

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7. Do you know any High court powers in Tanzania? (Mention)

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8. Do you know any legislation function in Tanzania? (Mention)

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9. Do you think the laws are adequate in the power of high court to invalidate the laws enacted by Parliament in Tanzania?(give reason)

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10. What are legal problems encountered in implementation of law? (Give reason)

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11. What is the legal action done by the high court in case the laws are unconstitutional? (Mention and Give reason)

Thanks for your cooperation

APPENDIX 2

2. QUESTIONNAIRE

Introduction

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You may or not provide your name,

Name

Age

Sex

Position

PART A

1. Do you know the term judicial?

(A) YES

(B) NO

2. Do you know the term high court?

(A) YES

(B) NO

3. Do you know the term legislation?

(A) YES

(B) NO

4. Do you know the term local Precedent?

- (A)YES
- (B)NO

5. Do you know the term constitution?

- (A)YES
- (B) NO

PART B

6. Do you know any Judiciary function in Tanzania? (Mention)

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7. Do you know any High court powers in Tanzania? (Mention)

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8. Do you know any legislation function in Tanzania? (Mention)

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9. Do you think the laws are adequate in the power of high court to invalidate the laws enacted by Parliament in Tanzania?(give reason)

.....
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10. What are legal problems encountered in implementation of law? (Give reason)

.....

11. What is the legal action done by the high court in case the laws are unconstitutional? (Mention and Give reason)

Thanks for your cooperation