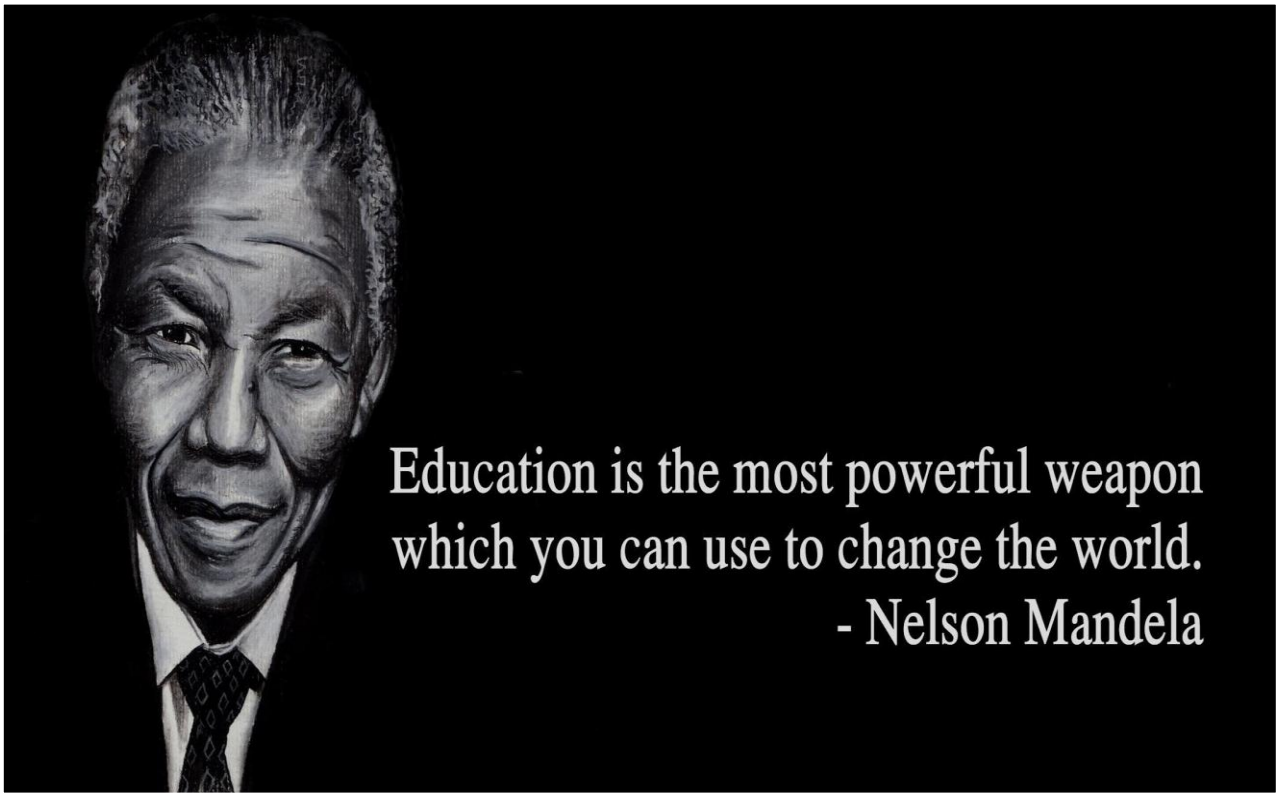

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REVISITING JUDICIAL ACTIVISM AND RESTRAINT IN TANZANIA: HOW IS THE JUDICIARY DOING?

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RESEARCH ARTICLE

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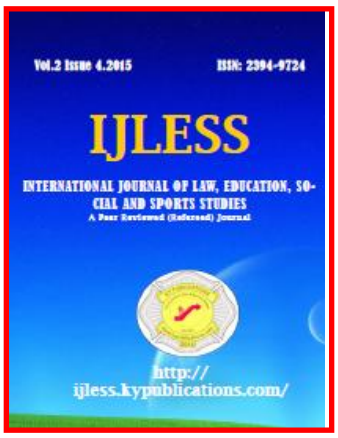

ABSTRACT

This article examines judicial activism and restraint in relation to the High court and the Court of Appeal of Tanzania. It starts by appreciating the manner in which courts in some jurisdictions have been able to accommodate both judicial activism and restraint in their functions, and goes on to examine the situation in Tanzania. The focus of the article is on the Constitution of the United Republic of Tanzania (URT), 1977and the Common Law Principles which were made to apply in Tanganyika (now Mainland Tanzania) after her political independence in 1961. In general, it is observed that although the judiciary of Tanzania attaches great importance to judicial activism and appreciates the need for judicial restraint, it is more identified with restraint than activism in the interpretation of the Constitution and the Common Law Principles. In the interpretation of the constitution, judicial activism is seen in relation to the provisions on the Bill of Rights only. Judicial activism on constitutional provisions relating to social and economic rights is wanting in Tanzania.

On the application of the Common Law principles, the judiciary is yet to come up with new principles other than those inherited from the colonial government. It has only tried to qualify the application of some of these principles.

The article concludes by recommending that, the judiciary of Tanzania needs to play a more active role in the interpretation of the constitution (and mainly the provisions relating to economic and social rights) and some other laws including the Common Law Principles. There is also a need to have in the constitution of Tanzania sufficient provisions on economic and social rights and these provisions, like the other provisions in the constitution touching on other rights, should be interpreted in the light of the Fundamental Objectives and Directive Principles of State Policy enshrined in the constitution.

Key words: Judicial Activism, Judicial Restraint, Constitution, Common Law Principles, Economic and Social rights, Tanzania.

1.0 Introduction

Debates on judicial activism versus judicial restraint are many and their history goes back to the time when the system of judicial review was established. When the system of judicial review was claimed by courts to be part of their functions, other branches of government rose up and claimed that such act amounted to usurpation of powers vested in the other branches of government. Such was seen as an act by the judiciary to transgress its constitutional bounds and interfere with the functions of the other branches of government, as it was not clear the extent to which

courts would be allowed to go in reviewing the acts of the other branches of government. It is from this scenario that the idea of restraint emerged, of which advocates called upon each branch
of government to observe its legal boundaries in discharging its functions and in exercising the powers vested in it to avoid encroaching on the functions and powers of another branch of government. On this ground, the notion of judicial restraint and judicial activism developed within the judicial branch of government. It is not our intention in this article to revisit debates on judicial activism versus judicial restraint as such may not serve any useful purpose at the present era. However, our agreement on at least two things is important: One is the fact that, the contribution of judicial activism to the development of law and establishment of new rights and remedies is undisputable as one may wish to note from the role played by the Common Law and Equity Courts of England in the development of law relating to judicial review. The second thing is that, while the contribution of judicial activism to the development of law and the creation of new rights and remedies is obvious, there is also a widely accepted view that observance by each branch of government of its legal limits in discharging its functions and in exercising the powers vested in it is necessary for peaceful co-existence of all branches of government in their operation. For this reason, it is understood within the judicial arm of the government that, it is improper to involve itself in those cases which, to a reasonable person, would better be attended by any of the remaining branches of government because they suggest so when looking at the nature and scope of functions of such other branch. This view is now enhanced by the principle of comity (as used in administrative law) which, according to Timothy Endicott, demands each public authority to show respect for the work of another public authority (17).

The principle of comity finds its justification in the principle of separation of powers which assigns specific functions to specific branches of government and, at the same time, guards against encroachment by any branch of government on the functions of another branch. It is of great help in the administration of governments because it functions as a constant reminder to each branch on how it should behave in relation to another branch in discharging its functions. It is even more important in our contemporary world where total separation of powers has proved to be unrealistic, nay, impossible to implement in the system of government. As such, the main challenge which the judiciaries all over the world are facing is how to give both judicial activism and judicial restraint the treatment they deserve in their operations. As pointed out above, judicial activism is important for the development of law and the establishment of new rights and remedies. Judicial restraint, on the other hand, helps to maintain harmony between the judiciary and the other branches of government in their operations. The judiciary has the role to interpret and apply the law in a way that will safeguard and promote different forms of rights, but also in a way that will not amount to treading on the functional spheres of the other branches of government. In other words, the judiciary must be seen to be vigorous in developing the law and searching for new rights and remedies but, at the same time, it must abide by the principle of comity. This can only be achieved through careful invocation of both judicial activism and restraint by the courts.

This article seeks to examine the concepts of judicial activism and restraint and how the judiciary of Tanzania has been making use of them to develop the law and search for new rights and remedies. Data for the purpose of this article were drawn from another research in which the author assessed the response of the High Court of the URT on the changing trends in the system of public administration in Tanzania in the exercise of its power of judicial review. In addressing one of the objectives in that study, it was found necessary to further explore the place of both judicial activism and restraint in a State of which government under its constitution is required to function on democratic principles. Tanzania was noted to be one of these States. Tanzania has also a Bill of Rights in its constitution and, through international instruments; she is also committed to observing human rights and building a fair and just society. All these aspects call for the need to examine the role which the judicial branch of government need to play not only for the purpose of safeguarding the rights enshrined in the State Constitution and those arising from its commitment to international instruments, but also for the purpose of searching for new rights and remedies in the interpretation of the Constitution, international instruments and the municipal laws. The need to do this is even more important for a country of which legal system is still dependent on the foundations left by her former colonial government upon political independence. Tanzania is a good example in this case. A country like Tanzania needs to develop her laws and promote justice not only through the legislature, but also through her judiciary in the interpretation of the State constitution, international instruments to which it is committed and the municipal laws.

This matter is examined in detail in the subsequent parts of this article but before going to that; let us first reflect on the methodology which was employed to collect data for this article.

2.0 Methodology

This article involves data obtained not only through library research, but also through field research. The Library research involved a review of secondary materials such as books, journal articles and decided cases. The field research involved interview and administration of questionnaires to respondents who were purposively selected basing on the nature and type of the study. As such, a total of twenty (20) respondents were purposively selected for the purpose of data collection. These were lawyers in some form of legal practice. In particular, the following were involved: Three (3) eminent justices of the Court of Appeal of the URT; Seven (7) judges of the High Court of the URT; Five (5) legal counsels and five (5) senior Resident Magistrates. After collecting data, the data was processed and qualitatively analyzed for the conclusions arrived at in this article.

3.0 Conceptual Framework

As already noted above, judicial activism and restraint are very much related and have more or less the same history. Hereunder is a brief discussion on what is meant by both judicial activism and restraint and the way they relate.

3.0.1 Judicial Activism

According to Honorable Mr. Justice P.N. Bhagwati (the former Chief Justice of India), judicial activism may take different forms. At one level, he observes, it is that freedom of action which is necessary on the part of judges - freedom to choose alternative courses of action. He calls this technical activism and is concerned with keeping juristic techniques open-ended. He illustrates this as follows:

> …[T]he Practice Statement issued by the House of Lords in 1966 that they were not bound by their previous decisions and that they could deviate from the same, did no more than merely declare a freedom from certain constraints that had been imposed by the House of Lords upon itself in 1897. The judges of 1966 could well be regarded as activists but this kind of judicial activism would be nothing more than what I would call "Technical Activism." (1264)

Technical activism is not novel in the practice of the High Court and the Court of Appeal of Tanzania. Courts have been departing from previous decisions to which they were bound by distinguishing between cases which led to such decisions and those before them. In this way courts have been able to decide certain cases otherwise than they would have decided by not drawing such distinction, and at times to the extent of formulating new principles.

At another level, the said former Chief Justice of India (Mr. Justice P.N. Bhagwati) finds that judicial activism is concerned with the creation of new concepts**.** He calls this "juristic activism" and he gives clarification as follows:

> Juristic activism is not concerned merely with appropriation of increased power, but is concerned as well with the creation of new concepts, irrespective of the purpose which they serve. Common law itself is an example of the development of juristic activism. Over the centuries it has been fashioned and refashioned to deal with new claims and demands: it has developed new concepts and invented new principles. The doctrine of common employment enunciated in *Priestly v. Fowler* and the concept of negligence in *Donoghue v. Stevenson* are examples of juristic activism. (1264)

According to Upendra Baxi, juristic activism also involves the introduction and elaboration of new ideas and conceptions without at the same time actually using these in deciding the case at hand. These ideas and conceptions are, by definition, thus not necessary for the decision. They are intended for future creative uses, by the Bench and the Bar, should an occasion arise for their use (xxix). This may be illustrated by looking at the role played by judges of the Common Law and Equity courts. As already pointed out above, the contribution of judges of the Common Law and Equity courts in the development of the legal system of the United Kingdom is one of classic examples of what judges can do to develop the law and search for new rights and remedies for the people in the society. The judges, through their innovative decisions formulated new principles, recognized new rights and provided new remedies to the litigants. More was done by the judges of the Equity Courts who, on establishing that the common law was unnecessarily rigid and gave little or no recognition to the emerging needs of the people in their society, invented new principles, new rights and new remedies. Examples of the creative role of courts which are often cited include the rules established by the English courts in the fields of private law such as the law of contract, torts and property; the

Rule in *Rylands v. Fletcher* in the law of torts; and the Rule in *Hadley v. Baxendale* in the law of contract. All these are just a few examples of how courts can develop the legal system by laying down new principles and inventing new rights and remedies to protect and promote justice in a society. This role is still important in any legal system and more so in a country of which legal system is still connected to that of her former colonial government. Tanzania offers a good example in this case.

It is enough to state here that, examples on judicial activism are many. Courts in England have continued to evolve new common law principles in the light of European Convention on Human Rights or the International Convention on Civil and Political Rights through judicial activism. Even in other countries which belong to the common law family, the contribution of courts in the development of law and in the creation of new rights and remedies is commendable. One good example is India in which judges have developed constitutional and administrative law to a remarkable extent through judicial activism.

Certainly, the trend of judicial activism has evolved from the changing needs in societies. In certain countries, its history is traceable to ancient days but in most other countries, the trend is recent. In India and Australia, for example, courts have been very creative and imaginative in the development of constitutional and common law focusing on the changes and needs in society. The Supreme Court of India in particular, has by a series of landmark judgments established basic principles in the interpretation and implementation of the common law and constitutional law. Examples which are often referred to in different literature on the rights created by the Supreme Court of India include: the right to go abroad in *Satwant Singh Sawhney v. D. Ramarathnam* APO, the right to privacy in *Govind v. State of MP*, the right to protection against solitary confinement in *Sunil Batra v. Delhi Administration*, the right not to be held in fetters in *Shobraj v. Superintendent Central Jail*, the right of an indigent person to have legal aid in *MH Hoskot v. State of Maharashtra*, the right to speedy trial in *Hussainara Khatoon v. Home Secretary, State of Bihar*, the right against handcuffing in *T. Vateeswaran v. State of TN*, the right against custodial violence in *Sheela Barse v. State of Maharashtra*, the right against public hanging in *Attorney General of India v. Lachma Devi*, the right to medical assistance in *Parmanand Katra v. Union of India*, and the right in certain cases to the provision of physical shelter in *Shelter Shantistar Builders v. NK Totame*. Judicial activism has been achieved through different mechanisms, including willingness to hear matters prior to the exhaustion of other remedies; determinations of standing even in the absence of a close personal interest; a relaxed attitude to precedent; the determination of constitutionality strictly on the merits and broad and 'generous' interpretation of rights (Lenta 544). But what is the situation in Tanzania? A brief discussion about Tanzania is made later in this article. Let us first examine the concept of judicial restraint.

3.0.2 Judicial Restraint

As briefly hinted out above, one of the important principles observed by the courts in the context of judicial review of legislative, administrative and judicial actions is judicial restraint. It is based on the recognition of the over-riding need to restrain oneself from the affairs of another branch of State administration. The restraint in some cases is in the form of self-restraint, meaning that it is based on one's own principles while in other cases it is based on the constitution and some other laws enacted by appropriate organ of a government.

Normally courts adopt judicial restraint in discharging their functions and mainly the function of judicial review in order to maintain harmony between themselves and the legislature and the executive. For example, the power of judicial review vested in the court must be exercised with wisdom and self-restraint and not in a spirit of cold war between the judiciary and the Parliament or the Executive. It is believed that harmonious operation among the principal branches of government helps to promote good government. As is common in most written constitutions, sovereignty vests in the people who are represented by three wings of government— the legislature, the executive and the judiciary. In such case no wing can claim supremacy over the other wing. Justice B.N Srikrishna opines:

> …judicial restraint only means that the judge shall stick by the law and decide legal controversies in accordance with established principles of law without foraging the constitutionally forbidden territories reserved for another branch of the government…[T]hat precisely is the role a judge is called upon to play by reason of the oath that he undertakes. A judge is not free to render justice as he thinks, but is required to render justice according to law (14).

It is therefore clear from this quote that, "judicial restraint" is used to imply that judges should confine themselves to the limits imposed by the constitution and some other laws in discharging their functions and in the exercise of their powers and the discretion given to them. Their activities should be limited to the application of posited rules. Some of the mechanisms through which this has been achieved include: ripeness (refusing to hear a matter until the applicant has exhausted all other remedies); standing (refusal to proceed unless the applicant has a close personal interest in the outcome); strict adherence to precedent; the presumption of the constitutional validity of statutes and restricted interpretation of constitutional rights among others (Lenta 544). Whatever form of judicial restraint, the idea is that there is always a limit beyond which courts may not venture in examining matters brought before them for consideration. This limit is set in the State constitution especially where such constitution expressly provides for the separation of powers among the principal branches of government. It is enough to point out here that, in some states like the United States of America, certain criteria have been developed to guide the judiciary while deciding whether to exercise judicial restraint or not. The approach by the USA is commendable as it gives room for both judicial activism and judicial restraint in the work of the judiciary. It is unfortunate that in Tanzania there are no such guidelines. It is in this context that this article seeks, as already pointed out above, to find out how the judiciary of Tanzania has been accommodating both judicial activism and restraint in its function to interpret and apply the constitution and some other laws including the Common Law principles in a way that allows not only for the development of law, but also for the invention of new rights and remedies.

3.0.3 Debates on Judicial Activism and Restraint

Literature on judicial activism and restraint is abundant. Advocates of judicial activism believe that a judiciary committed to judicial activism and social justice is particularly necessary where failure by other state organs to address problems adequately means impairing the rule of law. In *Gupta v. President of India* it was stated that, it is the function of courts to secure fundamental rights to the poor and the disadvantaged (189). They also believe that the answer to the question as to when a court should keep off from certain matters to be found in the constitution.

Activists believe that constitution-makers gave them one of the most remarkable documents in history for ushering in a new socio-economic order and the constitution which they forged for them has a social purpose and an economic mission and, for such reason, the judge in *People's Union for Democratic Rights v Union of India* emphasized that every word or phrase in the constitution must be interpreted in a manner which would advance the socio-economic objective of the constitution (1478). This position is different from that held by proponents of judicial restraint and it is in the light of the same that judicial activism is later examined in this article in relation to the High Court of the URT.

The views of proponents of judicial restraint are summarized by Limb who says:

> …. courts should endeavor to stand aloof from political controversy. Some restraintists would even let social problems fester until the political branches of government set them straight. In other words, advocates of restraint believe in a quiescent role for courts. They are reluctant to read their own attitudes into the law or to judge the wisdom of legislation. They hold dear…the doctrine of separation of powers. They loathe interference – even if justice is not forthcoming from the political process. Legislative representatives must initiate changes designed to protect individual rights, not the courts. (183)

In brief, proponents of judicial restraint see an activist as one attempting to usurp the powers vested in another branch of government. They therefore consider an activist as one attempting to abuse judicial power by straying beyond the bounds of the legitimate, much more passive and impersonal role of applying ascertainable law to the facts of a case. They are strong believers of the doctrine of political question according to which there exist certain issues of constitutional law that may be more effectively resolved by the political branches of government and, as one may wish to note in *Baker v. Carr,* they cannot be appropriate for judicial resolution. As such, courts hold these issues non-justiciable. This means that courts will neither approve nor reject judgments of the political branches and, instead, will let the political process take its course.

Advocates of judicial restraint, therefore, see judicial activism as nothing but an attempt to jump out of the fence. Decisions in favour of judicial restraint allay concerns about the court's usurpation of political functions that fall

properly within the domain of the legislature or the executive. Drawing experience from South Africa, Lenta summarizes the dilemma in which courts find themselves in the following words:

> in exercising restraint the constitutional court has frequently been excoriated for what critics perceive as a failure of nerve - a timid reluctance to scrutinize legislation with sufficient vigour and to provide meaningful and effective protection of rights…When, on the other hand, the court overrides other branches of government by declaring their actions unconstitutional, it is charged by those either sympathetic to the government's policy goals or concerned to preserve the separation of powers between the branches of government, with failing to demonstrate sufficient sensitivity to legitimate legislative decisions about the common good. Contending calls for increased activism and greater restraint place the court in a difficult position, particularly since it cannot (candidly) justify its decisions as being required by the constitutional text itself, and because the reasons it offers in support of its verdicts are the subject of reasonable disagreement. (544- 45)

It is not our intention in this work to exhaust all the points in favour of or against judicial activism and restraint assuming such task to be possible. It is enough to state here that, courts are always required to be careful in deciding the approach to take. The contribution of courts in the effort to realize socio-economic objectives of the constitution must clearly be seen in their interpretation of the constitution. In the next section, attempt is made to find out the extent to which the judiciary of the URT has been creative and imaginative not only in the application of the common law, but also in the interpretation of the constitution of the URT as the mother law in Tanzania. These two areas are important for three basic reasons: First, it was the common law of England on which the legal system of Tanganyika had to proceed and grow after her political independence in 1961 and; Second, the State constitution in Tanzania like in any other State is the basic law from which all other laws derive their strength and justification. It is the judiciary more than any other branch of the government which by virtue of its constitutional powers can provide forceful, meaningful and final interpretation to the constitution. Third, Researches in Tanzania on judicial activism and restraint seem to focus more on the attitude of judges in deciding cases than on their role in the interpretation of the State constitution and some other laws. The impetus to focus on the constitution and some other laws in this article follows the observation by the author that most research findings on judicial activism and restraint in Tanzania are based on decided cases. For example, in assessing the courts and how they came to decision in certain specific cases, Wambali found that "both the High Court and the Court of Appeal of Tanzania are still committed to the conservative positivist approach although there is significant improvement in the High court" (50-58). It is on this observation that first this article seeks to examine judicial activism and restraint in the High court and the Court of Appeal of the URT in the interpretation and application of the Common Law to establish the developments that the High court and the Court of Appeal have so far made in that regard and; second, to examine the state of judicial activism and restraint in the interpretation of the constitution by the High court and the court of Appeal of the URT. But before doing this, let us first see if the above conclusion that the judiciary in Tanzania is still committed to the conservative positivist approach can be supported by empirical data.

4.0 Findings from the Field on the State of Judicial Activism and Restraint in Tanzania

During field research it was of interest to find out if it is judicial activism or judicial restraint which best describes the High Court and the Court of Appeal of Tanzania in interpreting the constitution and some other laws; and in their application of the Common Law principles. The High court was chosen by the fact that it is the only court in Tanzania with unlimited jurisdiction and the power of judicial review. This status is very important in assessing the state of judicial activism and restraint in Tanzania. The Court of Appeal was chosen because it is the highest appellate court in Tanzania.

In responding to the question above, the majority of respondents (53%) expressed the view that though judicial activism may be noted in some decided cases in Tanzania, it can only be seen in a few cases. They felt that judges have been very cautious particularly on political issues, and have been prepared in many instances to take a back seat in policy matters. To illustrate the matter they said: only a few court decisions have contributed to important government policies and ultimately to the enactment of Acts of Parliament in Tanzania. They gave an example of land cases which, through partial influence of court decisions, the land policy and ultimately the current land legislation were passed. In many instances, they opined, courts have been making decisions which are rather

conservative by keeping themselves within the bounds of the law. To them, judicial restraint is more observable in the practice of the High Court and the Court of Appeal of Tanzania than judicial activism.

Only twenty percent (20%) of the respondents were of the view that the judiciary of the URT is best described by judicial activism than judicial restraint. To substantiate their view they argued that there has been an enthusiastic expansion of judicial activism in judicial review cases from the time the Government Constitution of 1977 was passed and especially with the justiciability of the Bill of Rights in the very Constitution. The Bill of Rights was introduced in the Constitution of Tanzania for the first time in 1984 through the Fifth Amendment to the Constitution and became justiciable three years later. Twenty seven percent (27%) of the respondents could not give their judgment on how the scale between judicial activism and restraint weighs in Tanzania.

Efforts were also made to examine the efforts that the High Court has so far made in the application of the Common Law and in the interpretation of the Constitution to develop the law and create new rights and remedies in Tanzania. This was done knowing that the judiciary has the role to give broad interpretation to the constitution to suit the needs of the time. Such is one of the features of an activist. An activist must give priority to fundamental principles of the constitution. It is on this basis that in the following sections judicial activism is examined in relation to the application of the common law and the interpretation of the constitution by the courts in Tanzania.

4.0.1 Judicial Activism in the Application of Common Law

The foundation on which the legal system of Tanganyika (now Mainland Tanzania) was left to grow when the British colonial administration came to an end was section 2(2) of the Judicature and Application of Laws Ordinance (JALO) 1961. This section gave jurisdiction to the High court of Tanganyika which was to be exercised in conformity with the written laws which were in force on the date on which the said Ordinance came into operation. The jurisdiction included the application of the substance of the Common Law, doctrines of Equity and the Statutes of General Application which were in force in England on the twenty-second day of July, 1920. The proviso to section 2(2) was to the effect that the said Common Law, doctrines of Equity and Statutes of General Application were to apply only in so far as the local circumstances of Tanganyika and its inhabitants permitted, and subject to such qualifications as local circumstances rendered necessary. The JALO has been revised into an Act, and the substance of section 2(2) is now found in section 2 (3) of the Judicature and Application of Laws Act (JALA) - Cap 358 R.E 2002. Of specific interest to note in the proviso to section 2(3) of the JALA is that, the proviso provides flexibility to the High court in the application of the Common Law, doctrines of Equity and Statutes of General Application to develop the law, search for new rights and probably create new remedies in Tanzania. The High court is empowered to qualify the substance of the Common Law and doctrines of Equity to suit local circumstances of Tanzania. In essence, this proviso creates a room for judicial creativity through judicial activism in Tanzania. Now the issue is how the High Court and the Court of Appeal of the URT have been able to make the best out of these provisions in terms of developing the law and expanding the rights and remedies in Tanzania.

From literature review it was revealed that there are good efforts that the judiciary of Tanzania has so far made in terms of expanding the horizons of certain Common Law principles. This is reflected in a few decided cases. Examples include: the wider meaning now attached to the concept of "access to justice" by the High court (See *Julius Ishengoma Francis Ndyanabo v. The Attorney General*)**;** the expansion of the concept of "legality" as a ground for judicial review in that, courts now look not only at the legality of the matter, but also at its fairness; the expansion of the rules of *locus standi* in public law proceedings as reflected in *Rev. Christopher Mtikila v. Attorney General & Baizi;* and the expansion of the horizons of the concept of "irrationality" (which is one of the grounds for judicial review) by adding as a mandatory requirement the giving of reasons by the decision-maker for his or her decision. The obligation to give reasons is now given emphasis by courts in Tanzania as reflected in the case of *Tanzania Air Services Limited v. Minister for Labour, Attorney General and the Commissioner for Labour.* In this case the question reviewed by the High Court was the applicability of Common Law in Tanzania and whether there is a duty on the part of public authorities to give reasons for reaching a certain decision. The applicant company, aggrieved by the decision of the Labour Conciliation Board re-instating an employee whose services had been terminated, referred the matter to the Minister for Labour under section 26 of the now repealed Security of Employment Act, 1964 (Cap. 574). The Minister lawfully delegated his power to deal with the reference to the Commissioner for Labour who confirmed the decision of the Conciliation Board but gave no reasons at all for reaching that decision. Section 27(1) of the Act stated that the

decision of the Minister was final and conclusive. The applicant sought an order of *certiorari* to quash that decision contending that the failure to give reasons rendered the decision a nullity. The High Court held that under Common Law, there is no general requirement that public authorities should give reasons for their decisions but that position has been under criticism. The interests of justice call for the existence, in Common Law, of a general rule requiring public authorities to give reasons for their decisions. The High Court further held that the provision that the Minister's decision was final and conclusive does not mean that the decision cannot be reviewed by the High Court; indeed no appeal will lie against such a decision. The requirement of reasons is the development worth noting as a reward of both judicial activism and creativity. Apart from these efforts to develop the horizons of certain Common Law principles, it is hereby submitted that, so far the judiciary of Tanzania has not been able to formulate new principles to add to those inherited from the British colonial government. Certainly the High court can go beyond mere qualification of the Common Law principles inherited at independence and formulate new principles. This important development is yet to be reflected from decided cases and the interpretation of the constitution and some other laws in Tanzania. We can also substantiate our observation by referring to a few constitutional provisions.

4.0.2 Judicial Activism in the Interpretation of the Constitution of the URT

Tanzania is a sovereign State and its government is administered under the Constitution of the URT of 1977. This Constitution has undergone several amendments but some amendments worth noting are: the 1984 amendments (which introduced an enforceable Bill of Rights); the1992 amendments (which introduced the Multi-party system); the 1995 amendments (which addressed the election of the President of the URT and made the President of Zanzibar a member of the Union Cabinet) and; the 2000 amendments (the 13th Amendments) which again were on Presidential elections and other matters such as the number of seats for women in the National Assembly, judicial independence, exclusive powers of the judiciary, and the establishment of the Commission for Human Rights and Good Governance in Tanzania. Of interest to note is that, nearly all these amendments addressed political matters only. Economic matters were not addressed in these amendments. This necessarily invites a question as to whether the place and role of the constitution in socio-economic matters is appreciated in Tanzania. In a constitutional government like Tanzania, the spirit of any law enacted by the law-making authority (such as the Parliament in Tanzania) is rooted in the Constitution. The laws are there to help meeting constitutional promises and, for this reason, the enactment of and amendment to any law by the relevant authority must seek to accomplish the mission of the Constitution. Scanty economic provisions in the current Constitution of the URT constitute the reason why this constitution is perceived by many as a political document only, instead of a political as well as an economic document. This position is also reflected from case law in Tanzania. There do not seem to be any case reflecting vibrant interpretation of Constitutional provisions on economic and social rights. This, in a way, has also made it difficult or unrealistic to examine economic laws made by the legislature in the light of the constitution. Economic laws and their constitutional base in Tanzania remain a grey area for judicial activism and creativity. This is the area in which, even after more than fifty years of political independence, the judiciary of Tanzania cannot claim to have achieved much though the interpretation of the constitution. As a result, economic inequality has continued to gain strength in Tanzania. Economic inequality in any society is certainly a reflection of economic or social injustice.

As a matter of fact, a constitution is both a political and an economic document. It is supposed to contain provisions that support and encourage the form of economy it sanctions. The Constitution of Tanzania, being the basic law of the land must also define the essential features of the economy of Tanzania. What may be of interest to note is that economic matters in the Constitution of the URT 1977 are only superficially mentioned under Part II, a part which, as per Article 7(2) of the very constitution is not enforceable in a court of law. Political matters are treated as primary and economic matters as secondary. An effective Constitution is one which is central to economic development and it can hardly be so if it is silent or it says very little on economic matters. It may be useful to have a separate chapter in the constitution on economic matters including economic policy, state finance and economic rights. What is important to bear in mind is that, legal and political institutions always interact with economic processes. The constitution must provide an institutional infrastructure for economic development and set limits to regulatory authorities. The Constitution of Tanzania does not offer much on all these. It is loaded with provisions which cater for job descriptions for the Executive, the Legislature and the Judiciary, and has very few and ineffective provisions on economic matters. The Constitution has greatly failed to pave the way for effective institutions which, to

use Cornell's words as quoted by Graham and Elder, provide non-politicized justice, discourage corruption, "place buffers between day-to-day business management and politics," and provide opportunities to enhance the capacity of its bureaucracies increase the chance of successful economic development. The share of the constitution to what now appears to be a form of institutionalized socio-economic inequality in Tanzania cannot be taken lightly. So far courts in Tanzania have not been able to come up with authoritative statement on socio-economic inequality in the country through interpretation of the constitution and some other laws. We can substantiate this observation by drawing a few examples from the very constitution. Let us look at the constitutional provisions on national development policy and socio-economic matters so as to get a better picture of the issue under discussion.

The official national development policy of Tanzania which is also stated in her constitution is *Socialism and Self-reliance*. This policy was promulgated through the Arusha Declaration of 1967. The constitutional basis of the term "socialism" was the constitution of TANU (the ruling political party by then) which had been made a schedule to the Interim Constitution of 1965, thus giving it the legal status. The principal aim and object of TANU which was also stated in the Preamble to the TANU Constitution was to see to it that the country was governed by a democratic socialist government of the people. After the Interim Constitution of 1965, the term 'socialism' found its way to the current constitution- i.e. the constitution of the URT, 1977. Under Article 9 it is provided that, the constitution will attain its objects through the pursuit of the policy of Socialism and Self-reliance- i.e. the application of socialist principles while taking into account the conditions prevailing in the URT. In this case, State authority and all its agencies are, *inter alia,* obliged under Article 9 to direct their policies and programmes towards ensuring the following: That government activities are conducted in such a way as to ensure that the national wealth and heritage are harnessed, preserved and applied for the common good and also to prevent the exploitation of one person by another; that corruption is eradicated; that the use of national wealth places emphasis on the development of the people and in particular is geared towards the eradication of poverty, ignorance and disease; that economic activities are not conducted in a manner that may result in the concentration of wealth or the major means of production in the hands of a few individuals and that the country is governed according to the principles of democracy and socialism. All these matters fall under Part II of the very Constitution (which is about Fundamental Objectives and Directive Principles of State Policy (FODPSP)), a part which, as per Article 7(2) is unenforceable in a court of law. These objectives and principles are mere directives which State officials may consider in the formulation and implementation of policy.

What should be noted under Part II of the constitution of the URT and singularly under Article 9 is that, this part is pivotal to social-economic changes and development in Tanzania. Any judiciary which is concerned about the liberation of people from any form of injustice and singularly from economic injustice cannot afford to have important matters like those under Part II of the constitution of the URT going without serious attention of the court in the interpretation of the constitution even if they fall under a part which is not enforceable in a court of law. Let it be emphasized here that, the argument is not that it is bad to have FODPSP in a constitution. Constitutions of several countries, with sound reasons, contain such principles. The argument here is that, provisions such as those under part II of the Constitution of the URT are not immutable. They can be changed depending on the needs and level of development of a country. Even if they are not changed, they must be interpreted in the light of the other provisions in the constitution and some other laws of the country concerned. It is unthinkable to have the provisions which constitute the objects of the State constitution unenforceable in a court of law and the judiciary which restrains itself from the interpretation of such provisions and hope to achieve much from such constitution in terms of socio-economic justice. Courts are required to consider FODPSP in interpreting the other provisions of the constitution. In India, for example, some rights protected as Directive Principles of State Policy have been used for interpreting and understanding the meaning and content of the fundamental rights in the constitution. So, fundamental rights are interpreted in the light of the Directive Principles of State Policy. It is surprising to note that, though the judiciary in Tanzania appreciates this approach, it is yet to demonstrate its seriousness on it. For example, in the case of *Julius Ishengoma Francis Ndyanabo v. The Attorney General* cited above, the former Chief Justice of Tanzania Mr. Justice Barnabas Samatta said that courts have a duty to interpret the constitution so as to further FODPSP but, judging from decided cases in Tanzania, the judiciary does not seem to take this seriously. Judicial activism is very much wanting in interpreting FODPSP provisions in the constitution of the URT.

What is equally interesting to note is that, though socialism and self –reliance is proclaimed in the constitution of the URT to be the official national development policy and that all laws which are enacted by the State legislature are expected to facilitate the implementation of this policy, the policy which is operational and which is being emphasized and encouraged by the government is quite different from the one enshrined in the constitution. This can also be clarified. From the second half of the 1980s, Tanzania began to institute measures designed to revamp her economy following the economic crisis she experienced between the late 1970s and early 1980s as a result of drought, an escalation of oil prices, the impact of war against Idi Amin, the debt burden and poor policies. In addition to these factors, the collapse of the Soviet Block in the early 1990s which was followed by renewed interest in global legal harmonization by international business giants also affected Tanzania and many other socialist developing states in international business. In the view of the western world, poor performance in the economy of socialist developing countries was a result of poor laws and governance procedures. As such, western legal structures such as rights-based commercial law and, above all, the rule of law were part of the recommendations made in the World Bank World Development Report of 1999/2000 to address the ailing economies of developing countries. In 1990s, therefore, western influence on developing countries about market-based legal systems increased, and this was largely supported by 'law and governance' projects sponsored by international agencies. In this respect, many socialist states in the world, Tanzania inclusive, were swept by this wind of ideas. Tanzania became one of those countries which decided to liberalize their economies and allow them to develop along market lines. Since then the government has been encouraging private investment, both foreign and domestic. Measures aimed at doing away with State economic controls were introduced and the private sector for the first time after the Arusha Declaration was openly accepted to be the engine for socio-economic growth and development in Tanzania. One of such measures was the restructuring of state-owned enterprises by privatizing them. Our concern here is not that privatization is bad. The concern is the constitutional base of all these changes. Why? The free market system is regulated by principles which are quite different from those regulating a socialist economy. State controls which are considered to be necessary in a socialist economy are very much unwelcome in a free market economy. Richard Stroup who is quoted by Dorn gives a summary of what one expects in a free market economy. He says:

> ….a free market system…will spur economic growth as entrepreneurs search for new opportunities to engage in mutually beneficial exchange. In the process, lower income households will benefit as well as higher- income households. Thus….a system of limited government and open markets …can be viewed as both free and fair. Furthermore, experience shows that an economic system characterized by private property rights, freedom of contract, and widespread reliance on voluntary exchange is more likely to meet these criteria of fairness than a politically directed welfare state. (298)

As noted earlier, privatization is one of the features of a free market economy. Though privatization can be effected and state control be exercised on privatized entities, state controls in a free market economy are generally unwelcome. Constraints on government power in a free market system are considered important for the development and growth of this system. In other words, a free market economy is incompatible with state interventions. In Tanzania, therefore, the problem is two-fold: First, there is no constitutional correspondence between socialism and the free market system which is actually the one in place. This problem is further compounded by the fact that, there is no constitutional base and definition of a free market economy. Secondly, the constitutional relationship between the free market economy and the government of Tanzania is not clear. Whichever system is in place, the expectation of Tanzanians (and this is based on the country's constitutional policy of socialism and self-reliance) is fairness and, in this case economic fairness in harnessing the national wealth and heritage to ensure that such wealth and heritage are used for the common good. Can this be achieved where there is a mismatch between the language of the constitution and what the government is actually implementing? What is the role of law in this kind of institutional setting? Is the law in Tanzania an explanation of socialist or free market legality? The free market system which is in fact operational in Tanzania has very weak constitutional base and protection though it is regulated by several pieces of local legislation. The people of Tanzania would want to know why and for whose benefit is the free market system which, though its constitutional base is unclear, is the one with stronger government support. How is the judiciary enforcing economic rights in a situation like this where the laws enacted by Parliament are plainly in support of a free

market economy of which constitutional base is unclear? Can the judiciary claim to have been successful in safeguarding and promoting the object of the constitution in Tanzania? It is certainly difficult to hold the answer in the affirmative. However, this situation invites judicial activism and creativity not only at the level of safeguarding and promoting individual rights, but also in safeguarding and promoting socio-economic rights through interpretation of the constitution. Constitutional rights must be interpreted in the light of the object of the constitution.

The active role of the court in the interpretation of the constitution in Tanzania is mainly seen in relation to the constitutional provisions on the Bill of Rights. With the introduction of the Bill of Rights in the constitution, the High Court has been very much committed to enforcing constitutional provisions relating to basic human rights. Section 5 (1) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 provides that, with effect from March 1988 the courts will construe the existing law, including customary law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the provisions of the Fifth Constitutional Amendment Act, 1984, i.e., the Bill of Rights. In this regard, courts are expected to find interpretations for enactments which will promote rather than destroy the rights of the individuals and this is quite apart from declaring them bad or good (Kassam and James 49). This can best be achieved through judicial activism.

In one of the celebrated cases in Tanzania, the case of *Mwalimu Paul John Mhozya v. Attorney General* the learned Chief Justice said that in performing his task in the application made in that case he was, *inter alia,* guided by the following principles:

I. A court will not be deterred from a conclusion because of regret at its consequences: *Hornal v. Neuberger Products* Ltd (1) at 978.
II. It is wrong for a court of law to be anxious or to appear to be anxious to avoid treading on executive toes.
III. A constitution is a living instrument which must be construed in the light of present day conditions. The complexities of our society must be taken into account in interpreting it. A workable constitution is a priceless asset to any country.
IV. A constitution should be given a generous and purposive construction:
1)*Attorney-General of the Gambia v. Momodou Jobe* (2). Respect must, of course, be paid to the language used in the instrument.
V. The balance of power between the three branches of government, namely, the executive, the legislature and the judiciary, and the relationship of the courts to the other two branches must be carefully maintained. Any statutory alteration of that balance must be in unmistakable terms. One branch of government should not usurp the powers of another branch.
VI. Flexibility in the application of procedural law is a desirable thing, for it assists to ensure that at the end of the day justice triumphs. When it comes to the issue of compliance with rules of procedures the instinct for strictness should, where appropriate, be subdued. Substance rather than form should be the courts' primary concern.

Having stated the above principles, the Chief Justice turned to consider the objections raised by the Attorney General and dismissed the petition that had been filed in the High Court for the removal or suspension of the President of the URT.

Certainly, the decision in *Mhozya's case* is a good example of the courts' preparedness to promote judicial activism in Tanzania. Perhaps this is the reason why in some literature and the 20% of the respondents we have seen above hold the view that the progress by the courts in Tanzania on judicial activism is encouraging. For instance, it is noted from one author that "[d]espite ups and downs, Tanzanian courts are moving in the right direction in the enforcement of rights. The various decisions of the High court and the Court of Appeal indicate that, even those of our judges who do not subscribe to the school of bold spirits are far from being categorised as timorous souls"(Mvungi 50). Even though there is truth in this because it is also reflected in some cases such as *Chumchuchua s/o Marwa v. Officer i/c of Musoma Prison and Attorney-General*, it is hereby submitted that courts are generally more cautious especially in the exercise of their power of judicial review. This is reflected in many judicial decisions but for the purpose of this discussion, one example will do. In the case of *Reverend Christopher Mtikila v. The Attorney General and Baizi* the court said:

> The function of courts of law is to settle legal questions. We, therefore, have the doctrine of separation of powers under which the executive, the legislature and the judiciary are as far as possible assigned different duties and enjoined not to trespass into each other's field. In contemporary times executive activism has tended to blur this separation and this has in turn made it imperative for the courts to stand more resolutely between government and the governed.

Judges in Tanzania have been expressing the weight they attach to the doctrine of separation of powers, and have insisted on the need for each branch of government to abide by its legal boundaries in the performance of its functions and avoid performing functions which fall better within the scope of the functions of another branch. Admittedly, this is what the doctrine of separation of powers strives to achieve but separation of powers should not be used to generally justify judicial restraint or insulate courts from judicial activism in appropriate cases. Let us only conclude this part by observing that, though judicial activism is reflected in a few decided cases in Tanzania and mainly those touching on individual human rights; it is not seen in relation to constitutional economic and social rights. Failure by the courts in this area is partly a result of the absence of adequate provisions in the constitution on economic and social rights, and partly a result of the failure by the courts to link the FODPSP provisions with the other constitutional provisions in the interpretation of the constitution. The second observation has already been clarified in our discussion above. As for the first one, it is a fact that many of the provisions in the Constitution of the URT deal with political matters and very few provisions are on socio-economic matters. For this reason, the Constitution of the URT is seen by many as a political document only, and not as a political as well as a socio- economic document. The judiciary of Tanzania cannot claim to be unaffected by the present structure and content of the constitution in its effort to protect and promote certain rights, and mainly economic and social rights. Judicial activism is one of the possible means through which it can free itself from these limitations.

5.0 Balancing Judicial Activism and Restraint

In view of the opposing notions between judicial activism and restraint, and the fact that both judicial activism and restraint are important in the work of courts, the need arises to determine how courts can make use of both approaches and be seen to play their role well. Should the judicial function in a democratic country be characterized by judicial activism or restraint or both? If both, how should the judiciary function to make the best out of the two approaches?

In trying to balance judicial activism and restraint in the light of the opposing notions between them and by taking into account the role that the judiciary must be seen to play in a democratic process, P.N Bhagwati, the former Chief Justice of India had this to say:

> One basic and fundamental question that confronts every democracy governed by the rule of law is: what is the role or function of a judge in a democracy, and that in turn, raises a further question: is the function of a judge merely to declare law as it exists or to make law? The Anglo-Saxon tradition persists in the belief that a judge does not make law. He merely interprets it…This traditional view of the judicial function hides the real nature of the judicial process. This theory has been evolved in order to insulate judges against vulnerability to public criticism and to preserve their image of neutrality which is regarded as necessary for enhancing their credibility…There can be no doubt that judges do take part in the law-making process. It is now acknowledged among the cognoscenti: all perceptive jurists recognize this creative function of the judicial process (1264)

There is no doubt that the doctrine of separation of powers is of great value since it provides effective mechanisms for checking against arbitrary exercise of power by public officials. However, experience from the way state governments operate shows that it is not possible to have watertight separation of powers. This does not mean that functions may not be properly assigned to specific organs of government. What it means is that though a specific function may be said to be the primary function of a particular organ of government, there comes a point where an overlap of functions among the three branches of government is unavoidable. For example, it is no wonder that though the judiciary is entrusted with the function to interpret the law, the executive also does the same in executing some of its functions. But doing what appears to be the function of another branch of government requires some justification, and such has to be done only to the extent that it does not amount to interference with the functions of another branch of government. For instance, though the executive interprets the law in the implementation of its routine functions, it is

one of the primary functions of the judiciary to interpret the law to its finality. Likewise, a binding principle of law formulated by the court under circumstances where no Act of Parliament exists to provide solution on a particular matter, such principle ceases to be a law the moment the Parliament enacts a law on the matter. So, doing what may reasonably be said to be the functions of another branch of government and which in essence can be said to amount to violation of the principle of separation of powers is a matter of degree of what has been done. With this in mind, we can now look at the role of a judge and explore more on the issue of political question which is the main area of controversy between judicial activism and restraint.

The main role of a judge is to interpret the law according to the words used by the legislature. In this case Mr. Justice Holmes says: "A word is not a crystal, transparent and unchanged; it is the skein of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used" (qtd. in Bhagwati 1264). This means, one of the roles of a judge is to give a meaning to what the legislature has said. According to Mr. Justice Bhagwati, this very process is what constitutes the most creative and thrilling function of a judge (1264). But should this be a justification for a judge to tread on political matters? We can very briefly address this issue.

It has correctly been pointed out that, "[e]very constitutional question concerns the allocation and exercise of governmental power and no constitutional question can therefore fail to be political. "Constitutional law," opines Charles Black, "symbolises an intersection of law and politics." And the truth is that law and politics cannot, and at a higher level must not, be kept separate."(Bhagwati 1265). As a matter of fact, the constitution alone cannot act as a brake upon the arbitrary exercise of executive power. The judiciary which is entrusted with the function of interpreting the law must ensure that the executive and legislative powers are exercised in accordance with the constitution. The issue now is whether, by so doing the judiciary is interfering with the functions of the other organs of the government. It is the opinion of the author of this work that it is not. It is only checking against abuse of power by public bodies and this is precisely part of its supervisory jurisdiction. The need for the court to stand between the government and the governed is only for the purpose of ensuring the rule of law - i.e. to protect and promote the rights of individual citizens. The court cannot be expected to go beyond that. So, where the law and its application are alike plain or the rule of law is certain and the application alone is doubtful, there will be no difficulty for the judge. Mr. Justice Bhagwati again observes:

> there are cases where a decision one way or other will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law in the proper direction and it is in these types of cases where the judge has to leap into the heart of legal darkness, where the lamps of precedent and common law principles flicker and fade, that the judge gets an opportunity to mould the law and to give it shape and direction. It is there that the judiciary can play a highly meaningful and activist role by developing and moulding the law so as to make it accord with the needs of the community and promote human rights (1263)

In some cases, judges have presented arguments why the courts should not unnecessarily meddle in administrative affairs. This passive attitude seems to gradually give way to a new judicial attitude which is supportive of active monitoring of virtually all administrative activities. The main reason most often cited to justify this new activist judicial role is that administrative actions which have impact on such basic personal interests as life, health and liberty must be closely scrutinized by the courts (Warren 429).

As already hinted out above, the judicial branch of government in most democratic constitutions is invested with the power of being the final arbiter of constitutional disputes. In such set-up, courts have the power to invalidate legislation on well established grounds. The power of judicial review, therefore, is a powerful weapon in the hands of judges to that end. This power is invoked as an exception to the principle of separation of powers which demarcates distinct areas for the different constitutional authorities to exercise their powers. In exercising this power, judges have a creative function also. One author observes:

> (judges) cannot afford to just mechanically follow the rules laid down by the legislature; they must so interpret as to reconcile the rules to the wider objectives of justice…Since different countries in the Commonwealth have different political expectations, the expectations of the people from the judges may also vary from country to country, though ….there must always be a common denominator which must inspire the judicial tradition to co-relate the constitutional and legal interpretation to the

> control of executive lawlessness and the demand for social justice and basic human rights. This calls for a certain degree of judicial activism (Bhagwati 1263)

This means, therefore, that judges should move from formalism to judicial activism. Judicial activism, in a way, is an indication of effective use of jurisdiction by the courts. It is probably the reason why Marshall, while referring to the court jurisdiction, once said:

> We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given (qtd. in Cardozo 161-62)

The judiciary can no longer obtain social and political legitimacy without making substantial contribution to issues of social justice (Bhagwati 1266). Focusing on the situation in the United States of America, Bonventre writes:

> Activism-whether it be expansive interpretation, or the rejection of legislative or executive action, or the overruling of longstanding precedent, has certainly produced some of America's most cherished landmarks. On the other hand, restraint- …has, in turn, produced some of (the) most regrettable judicial disasters. And, of course, vice versa (564).

Perhaps a caution is necessary on one thing. This is about the power of judicial review and the importance of judicial activism, and their relationship to the doctrine of separation of powers. It is important to note that though judicial review and judicial activism are permissible features in most democratic constitutions, judicial interpretations should not reduce the doctrine of separation of powers to a nullity. Though we have seen that an intersection of law and politics is inevitable, it is cautioned that an explosive admixture of law and politics has a thorough disreputable history in many parts of the world (Srikrishna). While judicial activism remains important, judges should avoid engaging themselves with boundless enthusiasm in complex socio-economic issues raising myriads of facts and ideological issues that cannot be adjudicated by judicially manageable standards.

6.0 Conclusion

It is clear from our discussion that though judicial activism is recognized and appreciated by the judiciary of Tanzania, it is yet to be given the seriousness it deserves in the interpretation of the Common Law and some provisions in the Constitution of the URT, 1977. The judiciary is yet to actively make use of the flexibility afforded to it under section 2(3) of the JALA to formulate new principles independent from those left by the British colonial government based on local conditions and special needs of society. The judiciary has only managed to make slight modifications in the application of some Common Law principles it adopted from the British colonial government.

Another shortfall is lack of rigorous interpretation of the constitution of the URT and especially on the provisions stating the object of the constitution. The judiciary is urged to be more active in the interpretation of the constitution if the constitution is to maintain its status of being the true voice of the people. It must expose and respond on all deficiencies in the constitution, and especially those relating to the object of the constitution and constitutional guarantees. Judges have to know how to demarcate levels of decision-making to determine when judicial activism or restraint would be necessary in each particular case. They must be aware of the creative potential of the legal order and of the vital role of the judicial process within that order. It is doubtful if the judiciary of Tanzania can claim to have achieved much from this. It is enough to conclude here by emphasizing that, since the present state of judicial activism in Tanzania is partly a result of the attitudes within the judiciary itself and partly a result of the content of the constitution which, as we have seen, does not contain enough and effective provisions on certain rights, there is a need for the judiciary to re-examine itself and its role and for the government of Tanzania to ensure that its new constitution which is on the way contains clear and adequate provisions on all rights including economic and social rights. Judges are called upon to display remarkable judicial activism in the interpretation of the constitution and other laws if the object of the constitution is to be realized.

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