Rev. Christopher Mtikila v. the Attorney General, Civil Case No. 5 of 1993, High Court of Tanzania

(Unreported)

IN THE HIGH COURT OF TANZANIA

AT DODOMA

CIVIL CASE NO. 5 OF 1993

REV. CHRISTOPHER MTIKILA . . . . . PLAINTIFF

Versus

THE ATTORNEY GENERAL . . . . . DEFENDANT

RULING

LUGAKINGIRA, J.

This was an unusual petition. In its content and depends it constitutes several petitions in one which range from challenges to the validity of divers laws to the protection of the Constitution and legality. The petitioner, the Rev. Christopher Mtikila, is a human rights campaigner-cum-political activist and was represented by learned counsel Mr. Ikumimit-Mbarat who was assisted by Mr. Richard Rweyongoza. The respondent Attorney General was represented by Mr. Kipenka Msememba Mussa a Senior State Attorney. I wish to commend them all for the industry and brilliance that went into the preparation and presentation of arguments.

The petition originally raised very diverse issues, many of them usher political in flavour and substance, and this prompted Mr. Musasa [sic] to raise a litany of preliminary objections which the Court resolved in the early stages of the proceeding. The objectives were grounded in questions of the petitions locus standi, cause of action and justiciabilty of some of the issues. At the end of the day a number of matters were struck out and issues were then framed for the survivours [sic]. In view of the character of the petition which had to be amended several times it is better to paraphrase these issues rather than merely . . . . . them.

The first issue is a general one and is tied up with the second and fifth issues. It seeks to establish generally whether the fundamental rights guaranteed in Part III, Chapter One of the Constitution of the United Republic, 1977 are immutable. The inquiry is prompted by a set of amendments to the Constitution vide the Eight Constitutional Amendment Act, 1992 (No. 4). The Act amends Articles 39, 67 and 77 in a manner which appears to

infringe the right of participation in national public affairs which is guaranteed in subpart (1) thereof. To put it differently, the problem posed in the first issue is whether the amendments to the Constitution were validly made and, if not, whether they can be declared void pursuant to the provisions of Art. 64(5).

The second issue turns on the provisions of ss. 8, 9, 10 and 15 of the Political Parties Act, 1992 (No. 5) which was enacted pursuant to the amendment to Art. 20. These provisions are alleged to inhibit the formation of political parties and therefore to infringe the freedom of association. I am called upon to declare them unconstitutional and void. The fifth issue arises from the amendment to Articles 39, 67 and 77 as well as s. 39 of the Legal Authorities (Elections) Act, 1979. These amendments renders [sic] it impossible for independent candidates to contest presidential, parliamentary or local council elections. I am again called upon to remedy the situation.

In the third issue the petition takes on ss. 5 (2), 13, 25, and 37-47 of the Newspapers Act, 1976 (No. 3). Section 5(2) empowers the Minister responsible for matters relating to newspapers to exclude any newspaper from the operation of any of the provisions relating to the registration of newspapers. Section 13 empowers the Minister to require any publisher of a newspaper to execute and register a bond in the office of the Registrar of Newspapers. Section 25 empowers the Minister to order cessation of publication of any newspaper. Sections 37-47 are concerned with defamation and the punishment for libel. Finally, the petition takes on para 12 (1) of Government Notice No. 166 of 1977 which empowers the Registrar to refuse registration of a newspaper. It is contended that all these provisions are arbitrary and liable to abuse and constitute an infringement to the freedom of expression which is guaranteed under Art. 10 (1).

A fourth issue turns on the freedom of peaceful assembly and public expression and questions the constitutionality of ss. 4, 41, 42 and 43 of the Police Force Ordinance, Cap. 322, as well as s. 11 (1) and (2) of the Political Parties Act. These provisions make it necessary for permits to be obtained in order to hold meetings or organise processions and also provide for police duties in relation thereto. In the sixth and final issue a declaration is sought on the constitutionality of the appointment of Zanzibaris to non-Union posts on the Mainland.

In my ruling in the preliminary questions I reserved for consideration at this stage the questions of locus standi, cause of action and justiciability and I will proceed to do so before considering the matters set out above.

Arguing the question of locus standi, no doubt with a mind to the common law orthodox position, Mr. Mussa submitted that the petitioner had to show a sufficient interest in the outcome. He considered this to be implied in Art. 30 (3) of the Constitution. In his view the petitioner had to demonstrate a greater personal interest than that of the general public, and cited the Nigerian case of Thomas & Ors. v. Olufosoye (1986) LRC (const) 639 in support of his argument. In that case it was held by the Court of Appeal that under s. 6 (6) (b) of the 1979 Nigerian Constitution it was necessary for the appellants to establish a sufficient interest in maintaining the action and this should be

a personal interest over and above that of the general public. Ademola, J.C.A. said, at p. 650:

It is also the law as laid down in the (Adesanya) case that, to entitle a person to invoke judicial power, he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained or is in immediate danger of sustaining an injury to himself and which interest injury is over and above that of the general public.

Basing on this, Mr. Mussa went on to assert that the crucial factor in the petition was the petitioner himself and not the contents of the petition. Furthermore, he contended that Art. 26 (2) of the Constitution did not in itself confer locus standi and appeared to read the provision as if it were not independent in itself.

In response Mr. Mbezi argued that standing was certainly conferred on the petitioner by Art. 26 (2) and that personal interest (or injury) did not have to be disclosed in that context. He maintained that the alleged illegality of the laws was sufficient to justify the petition under that provision. Mr. Mbezi further stated that the petitioner acquired locus standi under Art. 30 (3) as well and referred to the dispersal of his meeting under the provisions of the Police Force Ordinance, the refusal to register his party under the provisions of the Political Parties Act an the banning of Michapo and Cheka newspapers (his alleged mouthpieces) as sufficiently demonstrating the petitioner's interest within the contemplation of Art. 30 (3). Mr. Mbezi further argued that in view of the provisions of Art. 64 (5) the Court could be moved into action by any petitioner.

I have given due consideration to the contending arguments and feel called upon to deal with the subject at some length. The status of a litigant in administrative law is a crucial factor and it has assumed an added dimension in constitutional law in the wake of written constitutions. In the English common law the litigant's locus standi was the handmaid of judicial review of administrative actions. Whenever a private individual challenged the decision of an administrative body the question always arose whether that individual had sufficient interest in the decision to justify the court's intervention. Hence, it is stated in Wade and Phillips, Constitutional Law (1965 : 672):

In administrative law it is necessary for a complainant to have a peculiar grievance which is not suffered in common with the rest of the public.

The turning point in England came with the procedural reforms in judicial review vide s. 31 of the Supreme Court Act, 1983, which was to lead in the course of the 1980s to the recognition of the existence of public law as a distinct sphere from private law. In other parts of the Commonwealth, notably India and Canada, a similar but imperceptible development came to manifest itself in the doctrine of public interest litigation. Traditionally, common law confines standing to litigate in protection of public rights to the Attorney General and this was reaffirmed by the House of Lords in Guriet v. Union of Post Office Workers (1978) AC 435, and the Attorney General's discretion in such cases may be exercised at the instance of an individual. But before even the enactment of the Supreme Court Act, a liberal view on standing was already taking shape and a generous

approach to the issue was already considered desirable. This is illustrated by these words of Lord Dipleck in IRC v. National Federation of Self-Employed and Small Businesses Ltd. (1981) 2 A11 E.R. 93, 107:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation or even a single spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the a [sic] court to vindicate the rule of law and get the unlawful conduct stopped.

Yet more contemporary developments indicate that in England judges are beginning to acknowledge the possible appearance of apparent "busy-bodies" where public interest litigation is concerned. The late Raymond Blackburn, a lawyer and former Member of Parliament, litigated several public interest questions in which he evidently had no greater interest than the other members of the public. In [missing character(s)] v. Metropolitan Police Commissioner, ex parte Blackburn, (1968) 2 QB 118, he challenged police policy in not enforcing the gaming or obscenity laws, and in Blackburn v. Attorney General, (1971) 2 A11 E.R. 1380, he challenged Government policy in joining the European Community.

The developments in Canada have been no less breathtaking and we there find more generous standing rules applied than elsewhere in the older Commonwealth. This has been largely facilitated by the existence of a written constitution and the incorporation of a charter of basic rights. The taxpayer is the central figure in the Canadian approach. In Thorson v. A.G. of Canada, ([illegible date]) [illegible number] 1 SCR 138, a taxpayer was allowed by a majority to challenge the constitutionality of the Official Languages Act. Laskin, J., of speaking for the majority, contemplated ". . . . . whether a question of constitutionality should be immunised from judicial review by denying standing to anyone to challenge the impugned statute." It was observed that standing in constitutional cases was a matter for the exercise of judicial discretion. In the case of Nova Scotia Board of Censors v. McNeil, (197[illegible digit]) [illegible digit] SRC 265, the Supreme Court again granted standing to a taxpayer to challenge the validity of a provincial Act regulating film and theatre shows. This position is also illustrated in Minister of Justice v. Dorowaki (1981) 2 SCR [illegible] where the majority granted standing to a taxpayer impugning federal legislation allowing abortion, and ruled:

. . . . . to establish status as a plaintiff in a suit seeking a declaration that the legislation is invalid, if there is a serious issue of invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other and that there is no other and effective manner in which the issue may be brought before the Court.

The Canadian Supreme Court has in fact extended the liberalising affect of these judgments beyond constitutional cases.

Finally, it is important to revisit the Nigerian position. What was said in Thomas was not merely an expression of the seeming inflexibility of s. 6 (6) (b) of the 1979 Nigerian

Constitution but it was also a product of the colonial heritage. Soon after the attainment of independence Nigerian courts found themselves having to determine when and under what circumstances will a litigant be accorded standing to challenge the constitutionality of a statute or to ask for a judicial review. In Olawayin v. A.G. of Northern Nigeria (1961) A11 N.L.R. 269, the plaintiff had challenged the constitutionality of a law which prohibited children from engaging in political activities. The trial court dismissed the claim on the ground that no right of the plaintiff was alleged to have been infringed and that it would be contrary to public principle to make the declaration asked for in vacuo. He appealed to the Federal Supreme Court which dismissed the appeal on the same ground of absence of sufficient interest. In a classic restatement of the orthodox common law approach, Unsworth, F.J. said, at p. 274:

> There was no suggestion that the appellant was in imminent danger of coming into conflict with the law or that there has been any real or direct interference with his normal business or other activities . . . the appellant [needed] to show that he had a sufficient interest to sustain a claim . . . to hold that there was an interest here would amount to saying that a private individual obtains an interest by the mere enactment of a law which may in future come in conflict.

Curiously, the Nigerian courts remained stuck in that position even when the 1979 Constitution suggested a way out with the clause —

> Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.

This is illustrated in the much criticised decision in Adesanya v. President of Nigeria & Anor. (1981) 1 A11 N.L.R.I. In that case the appellant brought action challenging the appointment by the President of the second respondent to the chairmanship of the Federal Electoral Commission. The latter was at the time the Chief Judge of Dendel State and was, therefore disqualified from being appointed a member of the Commission. When the matter came up for final disposal before the Supreme Court it was unanimously held that the appellant had no locus standi to bring the action on the ground that he had not demonstrated the appointment and subsequent confirmation by the Senate of the second respondent had in any way infringed his civil rights and obligations. Significantly, though, Fatayi-Williams, C.J.N. who delivered the leading judgment had these interesting remarks to make (at p. 20):

> I take significant cognisance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumourmongering is the pastime of the market places and the construction sites. To deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of [our? the?] Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised disenchantment with the judicial process.

There was unfavourable reaction from the public and the profession to the Adesanyadecision and the ambivalence of the Chief Justice in the above passage provided more ammunition. Henceforth many of the Nigerian courts preferred to use the broad and liberal part of the judgment of the Chief Justice. Therefore, in Chief Isagba v. Alege (1981) 2 NCLR 424, Omerun [?], J. accorded standing to a plaintiff by holding that any Nigerian taxpayer had sufficient interest in the observance of the provisions of the Constitution by any organ of the State or the agency. And in A.G. of Dendel State v. A.G. of Nigeria) ([illegible]) 3 NCLRI, 88, Obaseki, J.S.C., who was a party to the decision in Odesany, came around to say:

The constitution has opened the gates to the courts by its provisions and there can be no justifiable reasons for closing the gates against those who do not want to be governed by a law enacted NOT in accordance with the provisions of the constitution.

The shift in Nigeria was sealed in Adediran v. Interland Transport Ltd. (1991) 9 NWLR 155 where Karibi-Whyte, J.S.C. said:

. . . . the restriction imposed at common law on the right of action . . . is inconsistent with the provisions of s. 6 (6) (b) of the Constitution, 1979 and to that I think the high constitutional policy involved in s. 6 (6) (b) is the removal of the obstacles erected by the common law requirements against individuals bringing actions before the court against the government and its institutions . . .

It was necessary to treat the subject to this length in order to demonstrate that Mr. Mussa's appreciation of locus standi in the context of constitutional litigation no longer hold good. The notion of personal interest, personal injury or sufficient interest over and above the interest of the general public has more to do with private law as distinct from public law. In matters of public interest litigation this Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter. This position also accords with the decision in Benazir Bhutto v. Federation of Pakistan, PLD 1988 SC 46, where it was held by the Supreme Court that the traditional rule of locus standi can be dispensed with and procedure available in public interest litigation can be made use of if the petition is brought to the court by a person acting bona fide.

The relevance of public interest litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, this development promises more hope to our people than any other strategy currently in place. First of all, illiteracy is still rampant. We were recently told that Tanzania is second in Africa in wiping out illiteracy but that is statistical juggling which is not reflected on the ground. If we were that literate it would have been unnecessary for Hanang District Council to pass bye-laws for compulsory adult education which were recently published as Government Notice No. 191 of 1994. By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realised. Secondly, Tanzanians are massively poor. Our ranking in the world on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which

requires professional handling. By reason of limited resources the vast majority of our people cannot afford to engage lawyers even where they were aware of the infringement of their rights an the perversion of the Constitution. Other factors could be listed but perhaps the most painful of all is that over the years since independence Tanzanians have developed a culture of apathy and silence. This, in large measure, is a product of institutionalized mono-party politics which in its repressive dimension, like detention without trial, supped up initiative and guts. The people found contentment in being receivers without being seekers. Our leaders very well recognise this, and with the emergence of transparency in governance they have not hesitated to affirm it. When the National Assembly was debating Hon. J.S. Warioba's private motion on the desirability of a referendum before some features of the Constitution were tampered with, Hon. Sukwa Said Sukwa, after two interruptions by his colleagues, continued and said (Parliamentary Debates, 26.8.94):

Mheshimiwa Spika, nilisema kwamba tatizo la nchi yetu sio wananchi. Lazima tukubali hili kwa kweli, tatizo ni sisi viongozi. Kama sisi viongozi tutakubaliana, wananchi hawana matatizo. Mimi nina bakika Mheshimiwa Spika. Kama viongo [illegible] Tanzania wote, wa pande zote mbili wa Zanzibar na wa Tanzania Bara, tutakubali kusema kosho Serikali moja, basi itakuwa kesho, na wananchi watafanya maandamano kuunga mkono. Maana wananchi wetu hawana tatizo. Kwa nini tunawapolekea hili tatizo? Nasema tatizo ni sis viongozi.

Given all these and other circumstances, if there should spring up a public-spirited individual and seek the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant him standing. The present petitioner is such an individual.

These principles find expression in our Constitution. It is apparent from the scheme of Part III, Chapter One of the Constitution that every person in Tanzania is vested with a double capacity: the capacity as an individual and the capacity as a member of the community. In his former capacity he enjoys all the basic rights set out in Art. 12 to Art 25; in the latter capacity he is bounden to discharge duties towards the community as indicated in Art. 25 to Art. 28. This scheme reflects the modern trend in constitutionalism which recognises the pre-eminence of the community in the formulation of the constitution. It is recognised that rights are correlative with functions: we have them that we may make our contribution to the social end. Our Constitution goes further to emphasize the two capacities by equipping the individual with a double standing to sue. In the first place he is vested with standing by Art. 30 (3) which states:

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

This provision, in my view, caters for both personal and public interest litigation for at times the two may prove inseparable. A person who sues because he desires to be an independent parliamentary candidate where the system does not so allow necessarily shoulders the burden for the public. It is also important to note that under this provision action lies where a person's right "has been, is being or is likely to be contravened." These are plain and clear words which admit of no controversy. Standing is therefore available under the Constitution even where contravention of a basic right is reasonably apprehended. The case of Thomas, and in asmuch [sic] as it was decided in deference to the much criticised decision in Adesanya, has no relevance in the context of the Constitution. In the upshot it is not correct to say, as Mr. Mussa suggested, that the petitioner has no locus standi because he cannot show that his rights have already been infringed. In my view he is within the purview of Art. 30 (3) is there is in existence a law the operation of which is likely to contravene his basic rights.

Standing is additionally conferred by Art. 26 (2), and this states:

(2) Every person is entitled, subject to the procedure provided for by the law, to institute proceedings for the protection of the Constitution and legality.

Mr. Mussa suggested that this provision has to be read with Art. 30 (3) and cannot be used in lieu of the latter. With respect, I cannot agree. It is a cardinal rule of statutory and constitutional interpretation that every provision stands independent of the other and has a special [?] function to perform unless the contrary intention appears. There is nothing in Art. 26 (2) or elsewhere to link it to Art. 30 (3). The only linkage is to Art. 30 (4) and this is one of procedure rather than substance. Clause (4) empowers Parliament to make provision for the procedure relating to institution of proceedings under the article. It has not done so to date but that does not mean that the court is hamstrung. In D.P.P. v. Daudi Pete [?], Criminal Appeal No. 28 of 1990 (unreported), the Court of Appeal stated in that ". . . . until the Parliament legislates under sub- article (4) the enforcement of the Basic Rights, Freedoms and duties may be affected under the procedure and practice that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought." I hold Art. 26 (2) to be an independent and additional source of standing which can be invoked by a litigant depending on the nature of his claim. Under this provision, too, and having regard to the objective thereof — the protection of the Constitution and legality — a proceeding may be instituted to challenge either the validity of a law which appears to be inconsistent to the Constitution or the law of the land. Personal interest is not an ingredient in this provision; it is tailored for the cummunity and falls under the sub-title "Duties to the Society." It occurs to me, therefore, that Art. 26 (2) enacts into our Constitution the doctrine of public interest litigation. It is then not in logic or foreign precedent that we have to go for this doctrine; it is already with us in our own Constitution.

I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is bona fide and [evidently?] for the public good and where the Court can provide an effective remedy. This point is underscored in People Union of Democratic Rights v. Minister of Home Affairs, AIR 1985 Do hi 268, where it

was stated that "public interest litigation" meant nothing more than what it stated, namely, it is a litigation in the interest of the public. It is not the type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or a section of the society. It is emphasized in the case that the condition which must be fulfilled before public interest litigation is entertained by the court is that the court should be in a position to give effective and complete relief. If no effective or complete relief can be granted, the court should not entertain public interest litigation. I gave serious consideration to the matters raised in this petition and the prayers connected therewith and I was persuaded that in quite a number of areas the public interest overwhelmed what appeared to be a private factor. I therefore allowed arguments to proceed on the issues reviewed above. But in the light of those arguments and what is stated in this paragraph, it may be necessary to reconsider the position of one issue at the appropriate stage later. Meanwhile I will turn to dispose of the question of cause of action.

Cause of action is not a problem in this petition. Mr. Mussa seemed to suggest, but I respectfully disagree, that in order for cause of action to arise an event injurious to the rights of the petitioner must have taken place. In my view, where the issue is whether a law is unconstitutional the court looks at the law itself but not at how it works. The following passage from Chitaley [ao] , The Constitution of India (1970 : 686), citing Prahalad Je v. State, 1990 Orissa 157, is to the point:

> In order to determine whether a particular law is repugnant or inconsistent with the Fundamental Rights it is the provisions of the Act that must be looked at and not the manner in which the power under the provision is actually exercised. Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the provisions in the Act but on the nature of the provisions themselves.

I agree and do not wish to add anything more. In this petition the dispute is over the validity of various laws and this, in my view, constitutes the necessary cause of action. A situation could certainly arise where the cause of action would depend upon actual exercise of power. Such a situation is exemplified in this petition where the constitutionality of the appointment of Zanzibaris to non-union positions on the Mainland is questioned. In that context it is the appointments themselves that constitute the cause of action, but that has to do with the validity of the action rather than a law. There now remains the question of justiciability of the claims but since that has more to do with the first of the issues, I will not turn to consider them.

The first issue seeks to determine the immutability of basic rights enacted in the Constitution. This turns on the power of the Parliament to amend the provisions providing for these rights. Specifically, what is at issue are the amendments to Art. 20 and Art. 39 of the Constitution vide the Eighth Constitutional Amendment Act, 1992. In its original form Art. 20 read as follows:

> 20. (1) Subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble

freely and peaceably, to associate with other persons and, in particular, to form or belong to organisations or associations formed for the purposes of protecting or furthering his or any other interests.

(2) Subject to the relevant laws of the land, a person shall not be compelled to belong to any association.

In its amended form clause (1) remains unaffected, hence the rights and freedoms spelt out therein remain as before. Our interest in this petition centres on the freedom of association which, under the present multi-party system, includes the formation of political parties. Clause (2) was also unaffected by the amendment save that it now became clause (4). In between there are new clauses (2) and (3) which it is necessary to set out in full. (The translation from Kiswahili is partly my own and partly adapted).

(2) Without prejudice to subsection (1) no political party shall qualify for registration if by its constitution and policy —

(a) it aims to advocate or further the interests of —
(i) any religious belief of [sic] group;
(ii) any tribal, ethnic or racial group;
(iii) only a specific area within any part of the United Republic;

(b) it advocates the breaking up of the Union constituting the United Republic:

(c) it accepts or advocates the use of force or violence as a means of attaining its political objectives;

(d) it advocates or aims to carry on its political activities exclusively in one part of the United Republic; or

(e) it does not allow periodic and democratic elections of its leadership.

(3) Parliament may enact legislation prescribing conditions which will ensure compliance by political parties with the provisions of subsection (2) by relations to the people's freedom and right of association and assembly.

Pursuant to clause (3), Parliament enacted the Political Parties Act of [92] providing for the registration of political parties and other matters. Clause (2) above was lifted in its entirety and re-enacted as s. 9 (2) of the Act. In addition s. 8 of the Act provided for a two-stage registration — provisional and full registration. Provisional registration is done upon fulfilment of the conditions prescribed in s. 9; full registration is effected after fulfilment of the conditions in s. 10 which reads:

10 — No political party shall be qualified to be fully registered unless —

(a) it has been provisionally registered;

(b) it has obtained not less than two hundred members who are qualified to be registered as voters for the purpose of parliamentary elections from each of at least ten Regions of the United Republic out of which at least two Regions are in Tanzania, Zanzibar being one Region each from Zanzibar and [Pe_ts_] and

(c) it has submitted the names of the national leadership of the party and such leadership draws its members from both Tanzania-Zanzibar and Tanzania Mainland;

(d) it has submitted to the Registrar the location of its head offices within the United Republic and a postal address to which communications may be sent.

It is contended by the petitioner that ss. 8, 9 and 10 of the Political Parties Act are in the conditions on the formation of political parties and thereby inhibiting enjoyment of the freedom of in Art. 20(1). It is further contended that Art. 20(2) and [sections derive? are for the] therefore to Art. 20(2) and (3) ss. 8, 9, 10 and 13 of the Political Parties Act.

On the other hand, Art. 39 previously provided as follows:

39. No person shall be eligible for election to the office of President of the United Republic unless he —

(a) has attained the age of forty years; and

(b) is qualified for election as a Member of the National Assembly or of the (Zanzibar) House of Representatives.

As amended by the Eighth Constitutional Amendment Act, the [above] paragraphs are maintained but [numbered] (b) and (a) . There is added new paragraphs (a) and (d) which state (my translation);

(a) is a citizen of the United Republic by birth;

(d) is a member of and sponsored by a political party.

The requirement for membership of and sponsorship by a political party is extended to candicacy for the National Assembly in Art. 67 and Art. 77 as well as for local councils in s. 39 of the Local Authorities (Elections) Act. 1979 as amended by the Local Authorities (Elections) (Amendment) Act, 1992 (No. 7), s. 9. The petitioner contends that the requirement for membership of and sponsorship by a political party abridges the right to participate in national public affairs granted by Art. 21(1) which states: —

(1) Every citizen of the United Republic is entitled to take part in the

government of the country, either directly or through freely chosen representatives, in accordance with procedure provided by or under the law.

I am therefore called upon to strike out para (d) in Art. 39 and wherever else the requirement for membership of and sponsorship by a political party occurs.

As stated earlier the issue of immutability turns on Parliament's power to amend the Constitution. In assessing this power it on [sic] is appropriate to recall, in the first place, that fundamental rights are not gifts from the state. They inhere in a person by reason of his birth and are therefore prior to the State and the law. In our times one method of judging the character of a government is to look at the extent to which it recognises and protects human rights. The raison d'etre for any government is its ability to secure the welfare of the governed. Its claim to allegiance of the governed has be [sic?] in terms of what that allegiance is to serve. Allegiance has [to be] correlative with rights. Modern constitutions like our own have enacted fundamental rights in their provisions. This does not mean that the rights are thereby created; rather it is evidence of their recognition and the intention that they should be enforceable in a court of law. It can therefore be argued that the very decision to translate fundamental rights into a written code is by itself a restraint upon the powers of Parliament to act arbitrarily. As aptly observed by Chief Justice Nasim Hassan Shah in Muhammad Nawaz Sharif v. President of Pakistan, PLD 1993 SC 473, 557,

Fundamental Rights in essence are restraints on the arbitrary exercise of power by the State in relation to any activity than an individual can engage. Although constitutional guarantees are often couched in permissive terminology, in essence they impose limitations on the power of the State to restrict such activities. Moreover, Basic or Fundamental Rights of individuals which presently stand formally incorporated in the modern constitutional documents derive their lineage from and are traceable to the ancient Natural Law.

Our Constitution confers on Parliament very wide powers of amendment but these powers are by no means unlimited. These powers are to be found in Art. 93(1) and (2) and it is necessary to set out the relevant parts.

98 — (1) Parliament may enact legislation altering any provision of this Constitution . . . (emphasis added)

(2) For the purposes of construing the provisions of sub- section (1), references to alteration of any provision of this Constitution or of any law include references to the amendment or modification, of those provisions, suspension or repeal and replacement of the provisions or the re-enactment or modification in the application of those provisions.

These powers are evidently wide. It has to be accepted, in the first place, that Parliament has power to amend even those provisions providing for basic human rights. Secondly, that power is not confined to a small sphere. It extends to modification of those provisions, suspension or repeal and replacement of same, re-enactment or modification

in the application thereof. Drastic as some of these terms may sound, I still do not believe that they authorise abrogation from the Constitution of these rights. The provisions of Art. 98 should be read in the light of the clawback [?] clauses in Art. 30(2) and 31. The former reads as follows: —

(2) It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be be [sic] construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for —

(a) ensuring that the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;

(b) ensuring the interests of defence, public safety, public order, public morality, public health, rural and urban development planning, the development planning, the development and utilisation of mineral resources or the development or utilisation of any other property in such manner as to pr the public benefit;

(c) ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceeding;

(d) the protection of the reputation, rights and freedoms of others or the private lives of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or the safeguarding of the dignity, authority and independence of the courts;

(e) imposing restrictions, supervision and control over the establishment, management and operation of tion and private companies in the country; or

(f) enabling any other thing to be done which promotes, enhances or protects the national interest generally.

Art. 31, on the other hand, empowers Parliament, notwithstanding the provisions of Art. 30(2), to legislate for measures departing from the provisions of Art. 14 (Right to live) and Art. 15 (Right to personal freedom) during periods of emergency, or in ordinary times in relation to individuals who are believed to be conducting themselves in a manner that compromises national security. We may refer to Art. 97(1) which provides in part —

(1) subject to the other provisions of this Constitution, the legislative power of Parliament shall be exercised through the National Assembly . . .

Reading all these provisions together, it occurs to me that Parliament's power in relation to the amendment of the provisions under Part III of Chapter One of the Constitution can only be exercised within the limits of Art. 30(2) and Art. 31. Hence, even if it is a suspension, or a repeal and replacement it must be justifiable within the scope of the two provisions. I have therefore come to the conclusion, and Mr. Mussa concedes, that Parliament's power of amendment are not unlimited. It should be recognised, on the other

hand, that society can never be static. New times bring with them new needs and aspirations. Society's perception of basic human rights is therefore bound to change according to changed circumstances, and that makes it imperative for Parliament to have power to alter every provision of the Constitution. What remains immutable, therefore, is the ethic of human rights but not the letter by which they are expressed.

We turn to consider whether the amendments complained of were not within the constitutional limits, beginning with Art. 20 (2) and (3). The former does not abrogate or abridge beyond the purview of Art. (2) the right of association guaranteed under Art. 22 (3). It merely lays down the conditions a political party has to fulfil before registration and all these conditions are within the parameters of Act. [sic] 30(2). The conditions are clearly aimed at the promotion and enhancement of public safety, public order and national cohesion. There cannot be any such thing as absolute or uncontrolled liberty wholly freedom [sic] restraint, for that would lead to anarchy and disorder. Indeed, in a young country lke ours, nothing could be more suicidal than to licence prties based on tribe, race or religion. The problem with Art. (3) is even less apparent. It is an enabling provision giving Parliament power to enact a law for the registration of political parties and for ensuring compliance with Art. 20(2) by these parties. It does not expressly tell Parliament what to write in that law. I am satisfied and hold that Art. 20(2) and (3) were validly . . . . . There remains, however, the provisions of the Political Parties let which fall for comment under the second issue. Next is Art. 39 and allied articles and provisions relating to presidential, parliamentary and local council candidates. Once again, I am unfortunate in . . . . . say that these amendments were within the powers of Parliament. They do not abrogate but merely modify the application of Art. 21(1) by providing that participation in national public affairs shall be through political under Art. 98(2). I also think that the amendments are within the ambit of Art. 7(2) if public order be taken as having supplied the inspiration. These amendments were, therefore, validly made. It should be understood, however, that I am at this juncture talking of validity in strict legal terms; the amendments are otherwise not free from difficulties and there are dealt with under the fifth issue.

The Court's power to declare a law void is founded in Art. 64(5). Having held that the impugned constitutional amendments were validly made, I do not have to consider whether such amendments are "law" within the meaning of the article. I have read in this connection the interesting arguments in the cases of Golaknath v. State of Punjab (1967) 2 SCR 762 and Kesav anda v. State of Keral (1973) Supp. SCR1, but in view of the decision I have reached, I am unable to take advantage of them.

The second issue questions the constitutionality of ss. 8, 9, 10, and 15 of the Political Parties Act. Much effort had gone into this matter when I was obliged to admit that the trial of this issue should have been stayed. Last year the petitioner filed at the Dar es Salaam registry of this Court an application for orders of certiorari and mandamus. That was Miscellaneous Civil Cause No. 67 of 1993, the applicants being himself and the Democratic Party and the respondents being the Attorney General and the Registrar of Political Parties. The grounds for the application were that the Registrar was biased in refusing to register the Democratic Party and that the Political Parties Act (apparently the

whole of it) was unconstitutional and void. He was praying for orders to quash the Registrar's decision and to direct him to reconsider the Democratic Party's application according to law. The application was heard and subsequently dismissed by Maina, J. on 14 December 1993. Two days later the petitioner lodged a notice of appeal. There is now pending before the Court of Appeal a Civil Appeal No. 24 of 1994, in which the first ground of appeal states: —

The learned judge erred in law in failing to hold that section 8 and 10 of the Political Parties Act, 1992, Act No. 5 of 1992 are violative of article 13 (6)(a) of the Constitution of the United Republic of Tanzania and therefore null and void on the ground that they do not provide for fair hearing before the Second Respondent's to refuse full registration of a political party.

The memorandum concludes: —

It is proposed to ask the Court for the following orders:

(i) an order striking out sections 8, 10 and 16 of the Political Parties Act, 1992.

In the present petition I am confronted with the same prayer with slight variation, namely, to strike out ss. 8, 9, 10 and 15 of the same Act. In other words a suit in which the matter in issue is substantially in issue in another suit between the same parties is pending in another court in the country. It seems also that the Dar es Salaam suit was instituted earlier because the record of this petition shows that its trial was being put off to await the outcome of the former. In these proceedings we do not have a prescribed procedure but we have invariably invoked and been guided by the provisions of the Civil Procedure Code, 1966. Section 8 of the Code provides thus: —

8. No court shall proceed with the trial of any suit in which the matter in issue is also directly or substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanganyika having jurisdiction to grant the relief claimed.

This provision is in parimateria with s. 10 of the Indian Code of Civil Procedure, 1908. MULLA observes in relation to the latter that the object is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. It goes on to claim, citing a 1919 obscure authority, that the section enacts merely a rule of procedure and a decree passed in contravention of it is not a nullity and cannot be disregarded in execution proceedings. I think, however, that this might be true where the subsequent suit is decided without knowledge of the existence of the previous suit.

It is the pendency of the previously instituted suit that constitutes a bar to the trial of the subsequent suit. The word "suit" has been held to include "appeal": see Raj Spinning Mills v. A.G. King Ltd. (1954) A. Punj. 113. The "matter in issue" in the provision has also been construed as having reference to the entire subject matter in controversy

between the parties and not merely one or more of the several issues: see Hariram v. Hazi Mohamed (1954)Allahabad 141. The same position was stated by the Court of Appeal of Eastern Africa in Jadva Krson v. Harman Singh Bhogal (1953) 20 EACA 74 when they were considering s. 6 of Kenya Civil Procedure Ordinance which is again in parimateria with our s. 8. The case before me is, of course, a novelty. Like the eye of a butterfly, it is a composite of several petitions wrapped up into one. When considering the expression "matter in issue" one has to consider each issue independently for they have no relationship. There is not one subject matter in controversy between the parties but several. In these circumstances the second issue is severable as it could, indeed have been tried in a separate suit. In the circumstances of this case "matter in issue" must be taken to be matter in issue in each of the six issues framed and I am satisfied that the same matter is in issue in the appeal pending before the Court of Appeal.

In Jinnat Bibi v. Howeah Jute Mills Co. Ltd., AIR 1932 Cal. 751, it was held that the provisions of s. 10 of the Indian Code were mandatory and left no discretion to the courts in respect of the stay of suits when circumstances are such as to invoke the operation of that section. It was further held that one test of the application of the [sic] to a particular case ins whether on the final decision being reached in the previous suit such decision would operate as res judicatain the subsequent suit. Indian decisions are certainly not binding on this Court, but they deserve the greatest respect where they expound a provision which was previously our own and which remains in pari materia with our own.

The Indian Code of Civil Procedure was in application in Tanganyika until 1966 and s. 10 thereof is in pari materia with our s. 8. It is therefore not only in courtesy but also in common sense that I consider myself entitled to rely on these decisions. In so doing, I hold that the provisions of s. 8 of our Code are mandatory and provide no room for discretion in circumstances where it is invokable. It is invokable in the instant case. Moreover, there is no doubt that the final decision in the pending appeal would operate as res judicata in the instant petition. The question is not whether I am in a position to decide the matter ahead of the Court of Appeal; courts of law are not racecourses. The point is that I am bound to stop in my tracks and let the previous suit proceed to finality because the decision on the matter in issue would operate as res judicata on the same matter in the suit before me. I will therefore stay the [decision on] the second issue until the outcome of Civil Appeal No. 24 of 1994.

In the third issue the Court is invited to pronounce on the constitutionality of ss. 5 (2), 13, 25, 37-47 of the Newspapers Act, 1976 and para. 12 of G.N. No. 166 of 1977. I have two observations to make in this connection. First, it must be realised that the constitutionality of a provision or statute is not found in what could happen in its operation but in what it actually provides for. Where a provision is reasonable and valid the mere possibility of its being abused in actual operation will not make it invalid: Collector of Customs (Madras) v. N.S. Chetty, AIR 1962 SC 316. It seems to me, with respect, that much of what was said against the above provisions reflected generally on what could happen in their operation rather than on what they actually provided for. I was generally referred to the decision of the Court of Appeal in Kukutia ale Pumbum v.

Attorney General, Civil Appeal No. 32 of 1992 (unreported), but I think that case covers a different situation — the situation where a person was deprived of his right to sue unless he was permitted to do so by the defendant (the Government). The provisions complained of however, are administrative and implementational and their constitutionality can only be challenged if they were not within the power of the Legislature to enact them.

Secondly, and most importantly, have unfortunately come to doubt the petitioner's standing in this issue. As stated before, our Constitution confers a double capacity on every person — his personal and his community capacities. Now, in what capacity did the petitioner take up these provisions? It cannot be in his personal capacity because there is nothing in the provisions or any of them which is shown to have contravened, is contravening or is likely to contravene his right to receive or impart information. The contravention has to be read in the provisions themselves. It transpires that the petitioner's complaint is in fact founded on the banning of the "Michapo" and "Cheka" newspapers vide Government Notice No. 8 of 1993. That is improper. The use or misuse of the powers granted by s. 25, the relevant provision in that connection, has nothing to do with the validity of that provision as such. What would be relevant is whether Parliament had no power to grant those powers. As for the misfortunes of "Michapo" and "Cheka" the doors were open for the option of judicial review but it seems better options were found. Can we alternatively say that this issue falls under public interest litigation? I don't think so either. As seen before, public interest litigation is litigation in the interest of the public. In other words, the general public, or section thereof, must be seen to be aggrieved by the state of the law and to be desirous of redress. There could probably be provisions in the Newspaper Act one could consider oppressive, unreasonable and even unconstitutional, but that is beside the point; the point is that there is no evidence of public agitation against that law. And by "public" I do not mean merely newspaper editors but the Tanzanian public generally. Ironically, whatever ills this law may be identified with appear to be overshadowed by the unprecedented upsurge of private newspapers in recent years. As stated in Sanjeev Coke Manufacturing Co. v. Bhamet Coal Ltd., AIR 1983 SC 239, courts are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper issue between parties properly ranged on either side and a crossing of the swords. It is inexpedient for the Court to delve into problems which do not arise and express opinion thereon. In the premises I decline to pronounce on the third issue.

The fourth issue brings us to the provisions of the Police Force Ordinance and the Political Parties Act touching on assemblies and processions. Under s. 40 of the former a permit is necessary to organise an assembly or procession in a public place. The permit is grantable by the District Commissioner. Similarly, political parties require a permit from the District Commissioner to hold public meetings pursuant to the provisions of s. 11 (1) of the Political Parties Act. Section 41 of the Ordinance empowers a police officer above the rank of inspector or any magistrate to stop or prevent any assembly or procession of the holding or continuance of it "is imminently likely to cause a breach of the peace, or to

prejudice the public safety . . ." The police officer or magistrate may therefore give orders, including orders for the dispersal of the assembly or procession. Section 42 defines what constitutes an unlawful assembly or procession, namely an assembly or procession not authorised by a permit, where one is required, or one held in contravention of the conditions thereof or in disregard of orders by the police or magistrate. Section 43 is the penal provision for disobediences, etc. These provisions, i.e. ss. 41, 42 and 43, are imported into the Political Parties Act vide s. 11 (2) thereof. It was argued for the petitioner that these provisions are inconsistent with the freedom of peaceful assembly and public expression which is guaranteed under Art. 20(1). Mr. Mussa, on the other hand, thought they were all supervisory in character, intended to ensure peace and good order, to the end that the rights and freedoms may be better enjoyed.

A better approach to these provisions is to distinguish their functions. First of all, there is the requirement for a permit grantable by the District Commissioner and this falls under s. 40 of the Ordinance and (1) of the Act. Next there is control of the meetings and processions and this falls under s. 41, the exercise of that power being vested in the police and the magistracy. Finally, we have the criminal law provisions in ss. 42 and e . In considering the question of constitutionality these distinctions have to be kept in mind. : I draw these distinctions also because not all meetings or processions require a permit, yet all attract police and magisterial supervision. By virtue of G.N. No. 169 of 1958, religious processions as well as religious, [sic] social, educational, entertainment and sporting assemblies do not require a permit; by virtue of G.N. No. 98 of 1960 assemblies convened by rural local authorities within the areas of their jurisdiction do not require a permit; and by virtue [of] G.N. No. 237 of 1962 assemblies convened by Municipal or Town Councils within the areas of their jurisdiction do not require permits either; but all these events attract police and magisterial supervision. Let us now look at the character of the three divisions in relation to the Constitution.

Section 40(2) provides in part: of (2) Any person who is desirous of convening, collecting, forming, or organising any assembly or procession in any public place, shall first make application for a permit in that behalf to the District Commissioner . . . and if the District Commissioner is satisfied, having regard to all the circumstances, . . . that the assembly or procession is not likely to cause a breach of the peace . . . he shall, subject to the provisions of sub-section (3), issue a permit . . .

Section 11 (1) of the Political Parties Act is to the same effect although it does not expressly set out all that is in the above provision. These provisions may then be contrasted with the provisions of Art. 20(1) which states in part:—

(1) Subject to the laws of the land, every person is entitled to freedom of peaceful assembly, association and public expression, that is to say, the right to assemble freely and peaceably . . .

The Constitution is the basic or paramount law of the land and cannot be overriden by any other law. Where, as in the above provision, the enjoyment of a constitutional right is

"subject to the laws of the land." the necessary implication is that those laws must be lawful laws. A law which seeks to make the exercise of those rights subject to the permission of another person cannot be consistent with the express provisions of the Constitution for it makes the exercise illusory. In this class are s.40 of the Police Force Ordinance and s.11 (1) of the Political Parties Act. Both provisions hijack the right to peaceful assembly and procession guaranteed under the Constitution and place it under the personal disposition of the District Commissioner. It is a right which cannot be injoyed unless the District Commissioner permits. That is precisely the position that was encountered in ole Pumbun where the right to sue the Government could not be exercised with the permission of the Government. The Court of Appeal was prompted to say: -

. . . a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be saved by Article 30 (2) of the Constitution only if it satisfies two essential requirements: First such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decision, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality . . . If the law . . . does not meet both requirements, such law is not saved by Article 30 (2) of the Constitution, is null and void. Section 40 does not meet these requirements. It is in the absolute discretion of the District Commissioner to determine the circumstances conducive to the organisation of an assembly or procession; there is no adequate or any safeguards against arbitrary exercise of that discretion and there is no mechanism for challenging his decisions, except probably by way of judicial review which is tortuous and unbeneficial for the purpose of assemblies and processions. I have easily come to the conclusion that the requirement for a permit infringes the freedom of peaceful assembly and procession and is therefore unconstitutional. It is not irrelevant to add, either, that in the Tanzanian context this freedom is rendered the more illusory by the stark truth that the power to grant permits is vested in cadres of the ruling party.

Coming to s. 41, I am of the view that the provision does not operate to take away the right to hold assemblies or processions. It only empowers the police and the magistracy to step in for the preservation of peace and order. The provision is thus saved by Art. 31(2) (b), it being in furtherance of the State's normal functions of ensuring public safety and public order and is reasonably justifiable in a democratic society. As rightly remarked by Mr. Mussa the enjoyment of basic human rights presupposes the existence of law and order. A provision like . 41 is therefore a necessary concomitant to the realisation of these rights. Moreover, there is inherent in the provision a safeguard against arbitrary use. It comes into play when the holding or continuance of an assembly or procession "is imminently likely to cause a breach of the peace, or to prejudice the public safety or the maintenance of public order or to be used for any unlawful purpose," and therefore meets what is termed the "clear and present danger" test. In Muhammad Nawaz Sharif cited earlier, Saleem Akhtar, J. said, at pp. 832-833:—

Every restriction (on basic rights) must pass the test of reasonableness and overriding public interest. Restriction can be imposed and freedom . . . may be curtailed provided it

is justified by the "clear and present danger" test enunciated in Saia v. New York (1948) 334 US 558 that the substantive evil must be extremely serious and the degree of imminence extremely high.

Section 41, in my view, is conditioned on a clear and present danger where the substantive evil is extremely serious and the degree of imminence extremely high. A situation befitting the application of the provision can be found in the Guyanese case of C.R. Ramson v. Lloyed [sic] Barker and the Attorney General (1983) 9 CLB 1211. That case arose from the dispersal of a political meeting by the police. The plaintiff, an Attorney-at-Law, was standing near his motor car parked by the roadside discussing with a colleague the methods used by the police to disperse the crowd. A policeman came up, held the plaintiff by his arm and asked him what he was doing there, and was told "that is my business." Other policemen came up and surrounded the plaintiff, who was then jabbed several times in the ribs with a baton by another policeman who ordered him into the car. The plaintiff and his colleague then got into the car unwillingly and drove away. The plaintiff later brought action alleging, inter alia, an infringement of his right to freedom of assembly, expression and movement. It was held by the Court of Appeal that there was no infringement of the constitutional right to the freedom of assembly, expression or movement as the action of the police was not directed towards a hindrance or deprevation [sic] of these constitutional freedoms.

These factors apart, it is equally apparent that the petitioner admits the legitimate role of the police at assemblies and processions although, somehow, he does not realise that this role is specially authorised by s. 41. Para 19 (h) of the petition states in part:—

The court should also declare that a citizen has right to convene a peaceful assembly or public rally and the right to make a peaceful demonstration or procession without a permit from anybody except that he should just inform the police before doing so. (my emphasis).

I would not wish to believe that by this prayer it is intended that the police should attend assemblies and processions to applaud the actors and fold their arms in the face of an imminent break down in law and order. I am satisfied that s. 41 is a valid provision.

Finally, ss. 42 and 43. The former defines an unlawful assembly or procession and the latter punishes the same. Art. 30(2) (a) and (b) of the constitution empowers the Legislature to enact legislation for ensuring that the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms and for ensuring public safety and public order. This pwer [sic], in my vies [sic], includes the power to prescribe penalties for criminal breaches. In other words, the penalties are necessarily concomitant to the effective excercise [sic] of police and magisterial powers under the other provisions. I consider the provisions valid as well.

At this stage I will proceed to show the significance of the distinction I have been making. I have held that the requirement for a permit is unconstitutional but not the police- magisterial and penal role. The crucial question now is whether these aspects can

be severed. Severance is provided for under Art. 64(5) which states that "any other law inconsistent with the provisions of the Constitution . . . shall, to the extent of the inconsistency, be void." It is therefore established that where the valid portion is severable from the rest, that portion will be maintained provided it is sufficient to carry out the purpose of the Act. Delivering the judgment of the Privy Council in A.G. of Alberta v. A.G. of Canada (1946) AC 503 6, Viscount Simon said:

The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the Legislature would have enacted what survives without enacting the part that is ultra vires at all.

I am in no doubt whatsoever that the permit aspect can be expunged and expelled from the law without prejudicing the rest. This is illustrated by the fact that the supervisory aspects already operate independently where a permit is not required. It is evident, therefore, that the Legislature could have enacted the supervisory aspects without enacting the permit aspect. Having held, and I repeat, that the requirement for a permit is unconstitutional and void, I direct the provisions of s. 40 of the Police Force Ordinance and s. 11(1)(a) of the Political Parties Act, and all provisions relating thereto and connected therewith, shall henceforth be read as if all reference to a permit were removed. It follows that from this momment [sic] it shall be lawful for any person or body to convene, collect, form or organise and address an assembly or procession in any public place without first having to obtain a permit from the District Commissioner. Until the Legislature makes appropriate arrangements for this purpose, it shall be sufficient for a notice of such assembly or procession to be lodged with the police, being delivered a copy to the District Commissioner for his information.

In reaching this decision, I am certainly aware of the decision cited to me in C.Mtikila & Ors. V.R. Criminal Appeal NO. 90 of 1992 (Dodoma Registry - Unreported). In that case the present petitioner and others were charged before the District Court of Dodoma with three counts, the first of which alleged "refusing to desist from convening a meeting or assembly after being warned not to do so by police officers contrary to sections 41 and 42 of the Police Force Ordinance, Cap. 322." They were convicted and fined 500' each. They appealed to this Court and it was contended, inter alia, that s. 41 was unconstitutional. Mwalusanya. J. agreed and said: "I construe section 41 of the Police Force Ordinance to be void. From now onwards this section is deleted from the Statute Book." I am given to understand that an appeal has been lodged against that decision.

The fact that an appeal is pending naturally restrains me in my comments on that decision, yet I cannot avoid to show, albeit briefly, why I find that decision difficult to go by. The learned judge did not merely hold s. 41 to be unconstitutional; he went further and held the entire trial to be a nullity. He said between pp. 23 and 25 of his judgment:

In my judgment I find that the denial by the trial magistrate to have the appelants have access to the documents they required for their defence was a fundamental defect which

is not curable … The error is so fundamental that it has rendered the whole trial a nullity.

This is significant indeed. It is established practice that that [sic] where a matter can be disposed of without recourse to the Constitution, the Constitution should not be involved at all. The Court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so: Wahid Munwar Khan v. State AIR 1956 Hyd. 22. In that case a passage from Coday's Treatise on Constitutional Limitations was also cited in these terms:

In any case where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other clear ground the court may rest its judgment on that ground alone, if the other questions are immaterial having regard to the view taken by the court.

The Supreme Court of Zimbabwe expressed the same view in Minister of Home Affairs v. Bickle & Ors (1985) LRC (Const) 755 where Geoges, C.J. said (at p. 750):

Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal to factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.

And here at home the Court of Appeal had this to say in Attorney General v. W.K. Butambala, Criminal Appeal NO. 37 of 1991 (unreported):

We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really serious occasions.

The court continued:

… it is not desirable to reach a situation where we have "ambulance courts" which go round looking for situations where we can invalidate statutes.

It is evident that the appeal under reference could have been disposed of on the ground that the trial was a nullity without going into the constitutionality of s. 41. It is indeed curious that a trial which was adjudged a nullity could still provide the basis for striking down s. 41. On these grounds and others, I was unable to benefit from the decision of my learned brother.

The fifth issue takes us back to the amendments to the Constitution and elsewhere which make membership of and sponsorship by a political party mandatory for a person to contest presidential, parliamentary or local authority elections. I hold that the amendments was constitutionally valid but I reserved my position on their practical implication until this stage. It is essential for the purpose of the present exercise, and for

case of reference, to set out side by side the provisions of Art. 21 (1), Art. 20 (4) and Art. 39 (c), the last mentioned being representative of allied amendments elsewhere. Art. 21 (1) reads as follows:

(1) Every citizen of the United Republic is entitled to take part in the government of the country, either directly or throoooough freely chosen representativrd, in accordance with procedure provided by or under the law.

Art. 20 (4) states (my translation):

(4) Without prejudice to the relevant laws, no person shall be compelled to belong to any party or organisation, or for any political party to be refused registration by reason only of its ideology or philosophy.

And Art. 39(c) states (my translation):

39. No person shall be eligible for election to the office of President of the United Republic unless he -
(a) …; (b) …;
(c) is a member of and sponsored by a political party.

As generally understood the citizen's right to participate in the government of his country implies three consideration: the right to the franchise, meaning the right to elect his representatives: the right to represent, meaning the right to be elected to law making bodies; and the right to be chosen to a political office. These three rights are, in my vies, epitomised in the provisions of Art. 21(1), subject, of course, to the qualifications which expediency may dictate for the exercise of these rights, e.g. literacy and age. But while accepting the relevancy of such qualifications it has to be admitted in the first place that the concept of basic human rights has utilitarian aspect to it: to whom are these rights to be useful? Harold Laski (A Grammar of Politics, 1967: 92) responds thus:

There is only one possible answer. In any State the demands of each citizen for the fulfilment of his best self must be taken as of equal worth; and the utility of a right is therefore its value to all the members of the State. The rights, for instance, of freedom of speach does not mean for those in authority, or for members of some church or class. Freedom of speech is a right either equally applicable to all citizens without distinction or not applicable at all.

These remarks are no more applicable in political philosophy than they are in human rights jurisprudence. The matter is brought into focus if we substitute the right to participate in the government of one's country for the freedom of speech. The proposition would then be that the right to participate in the government of one's country is not reserved for those in authority, or for members of some special class or groups, but it is a right either equally applicable to all citizens without distinction or not applicable at all. This utilitarian factor is writ large in Art. 21 (1) for it speaks of "every citizen" being entitled to participate in the government of his country. It could easily have said "Every

member of a political party…," but it did not, and this could not have been without cause. It will be recalled, indeed, that the provision existed in its present terms ever since the one-party era. At that time all political activity had to be conducted under the auspices and control of the Chama Cha Mapinduzi, and it could have been argued that this left no room for independent candidates. It is certainly this notion which was at the base of Mr. Mussa's submission to the effect that the amendments did not take away the right for independent candidates for such right never existed before. The argument is no doubt attractive, but, at least with effect from July 1, 1992, Art. 21 (1) has to be read in a multi-party and non- party context. That is what I can gather from Art. 20 (4) - previously Art. 20 (2) - which was deliberately rephrased to accomodate [sic] both situations. It is illogical for a law to provide that no person shall be compelled to belong to a political party and in the same breath to provide that no person shall run for office except through a political party. If it were the intention of the Legislature to exclude non-party citizens from participating in the government of their country, it could easily have done so vide the same Eighth Constitutional Amendment Act by removing the generality in Art. 21 (1).

The position, as I see it, is now this: By virtue of Art. 21 (1) every citizen is entitled to participate in the government of the country, and by virtue of the provisions of Art. 20 (4) such citizen does not have to be a member of any polical party; yet by virtue of Art. 39(c) and others to that effect, no citizen can run for office unless he is a member of and sponsored by a political party. This is intriguing, I am aware that the exercise of the right under Art. 21(1) has to be "in accordance with procedure provided by or under the law," but I think that while participation through a political party is a procedure, the exercise of the right of participation through a political party only is not a procedure but an issue of substance. The message is: either you belong to a political party or you have no right to participate. There is additionally the dimension of free elections alluded to in Art. 21(). A citizen may participate in the government "either directly or through freely chosen representatives." It is contrary to every notion of free elections if non-party citizens are compelled to vote for party candidates. In the midst of this unusual dilemma I had to turn to the canons of statutory and constitutional interpretation.

When the framers of the Constitution declared the fundamental rights in Part III of Chapter One thereof, they did not do so in vain, it must have been with the intention that these rights should be exercisable. It is therefore established that the provisions of the Constitution should always be given a generous and purposive construction. In A.G. of Gambia v. Jobe(1985) LRC (Const) 556, 565, Lord Diplock said:

A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction.

This echoes what was said earlier in British Coal Corporation v. The King (1935) AC 500, 518, to the effect that in interpreting a constitutent [sic] or organic status the construction most beneficial to widest possible amplitude of its power must be adopted. And not much later, in James v. Commonwealth of Australia (1935) AC 578, 614 Lord

Wright, M.R. said:

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often be appreciated when considered, as the years go on, in relative to the vicissitudes of fast that from time to time emerge. It is not that the meaning of the word changes, but the changing circumstances illustrate and illuminate the full import of the meaning.

This approach is directed principally at resolving difficulties which may be inherent in a single provision. The strategy, according to these authorities, is to approach the provision generously and liberally particularly where it enacts a fundamental right. The case before me takes us a stage further. What happens when a provision of the constitution enacting a fundamental right appears to be in conflict with another provision in the Constitution? In that case the principle of harmonisation has to be called in aid. The principle holds that the entire Constitution has to be read as an integrated whole, and no one particular provision destryoying [sic] the other but each sustaining the other; see Muhammad Nawaz Sharif (above), p. 601. If the balancing act should succeed, the Court is enjoined to give effect to all the contending provisions. Otherwise, the court is enjoined to incline to the realisation of the fundamental rights and may for that purpose disregard even the clear words of a provision if their application would result in gross injustice. CHITALEY, p. 716, renders the position thus:

… it must be remembered that the operation of any fundamental right may be excluded by any other Article of the constitution or may be subject to an exception laid down in some other Article. In such cases it is the duty of the Court to construe the different Articles in the Constitution in such a way as to harmonise them and try to give effect to all the Articles as far as possible, one of the conflicting Articles will have to yield to the other.

These propositions are by no means novel but are well known in common law jurisdictions. They rest, above all, on the realisation that it is the fundamental rights which are fundamental and not the restrictions. In the case of Sture s.v. Crowninshield (1819) 4 Law Ed. 529, 550, Chief Justice Marshall of the Supreme Court of the United States said:

Although the spirit of an instrument, especially a Constitution, is to be respected not the less than its letter, yet the spirit is to be collected chiefly form its words. It would be dangerous in the extreme to infer from extrinsiz (sic) circumstances that a case for for which the words of n instrument expressly provide shall [its operation?]. Where words conflict with each other, where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural and common words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that

all mankind would, without hesitation, unite in rejecting the application.

In the instant petition, the following factors emerge. First, Art. 39(c) and allied amendments are restrictions on the exercise of a fundamental right and not fundamental in themselves. It is the fundamental rights, but not their restrictions, that this Court is enjoined to guard jealously. Secondly, the scheme of our Constitution contemplates the full excercise [sic] of the fundamental rights enacted therein save as they may be limited in terms of the provisions of Art. 30(2) and Art. 31(1). Although the amendments pass the test of validity by virtue of the very wide definition of "alteration" in Art. 98(2), it is only tenuously that they come within the ambit of Art. 30(2). Thirdly, the literal application of the amendments could lead to monstrous and nationally injurious results. It is believed that there are between three and four million people in this country who subscribe to some political party, leaving well over twenty millions a free decision in the government of their country is unjust, monstrous and potentially calamitous. Fourth, it must be said that any talk of "parties" at this juncture in the country's history cannot be serious. Apart from Chama cha Mapuaduzi whose presence is all pervasive, the rest exist more in name than in practice. The amendments are therefore capable of being abused to con i e the right of governing into the hands of members of a class and to render illusory the emergence of a truly democratic society. I do not wish to believe that that was the intention of the Legislature. Finally, Art. 21(1) can in fact operate alongside Art. 39 and allied amendments, without the latter's exclusionary properties, there being nothing strange in having party and independent candidates in any election.

For everything I have endeavoured to state and notwithstanding the exclusionary elements to that effect in Articles 39, 67 and 77 of the Constitution as well as s. 39 of the Local Authorities (Elections) Act, 1979, I declare and direct that it shall be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and local council elections. This will not apply to the council elections due in a few days.

We now come to the sixth and final issue. A declaration is sought to the effect that it unconstitutional for the President to appoint Zanzibaris to head non-union ministries and departments on the Mainland. This matter invites a bit of the union's history. When Tanganyika and Zanzibar united in 1964 the Constitution of the former was adopted as the interim Constitution of the United Republic, modified as to provide for a separate government for Zanzibar in matters other than those reserved to the union Government. At the same time the Government of Tanganyika was abolished. The union operated under interim constitutions until the promulgation of the 1977 Constitution.

Article 4(3) of the Constitution provides for the division of governmental functions on the basis of union and non-union matters. Authority in respect of all union matters as well as non- union matters in and for the Mainland is vested in the Union Government by Art. 34(1). Likewise all executive power of the United Republic with respect to union matters and with respect to non-union matters in and for the Mainland is vested in the President. He may exercise that power either directly or through delegation to other persons holding office in the services of the United Republic. The President is also empowered to

constitute and abolish offices and, pursuant to the provisions of Art. 36(2), he has power to appoint persons to offices in the public services of the United Republic subject to the other provisions of the Constitution. In the exercise of the functions of his office the President has unfettered discretion apart from complying with the provisions of the Constitution and the law. Article 55(1) additionally empowers the President to appoint Ministers who "shall be responsible for such offices as the President may from time to time . . . establish." He also has power to appoint Regional Commissioners for regions in the Mainland. Zanzibar retains its internal autonomy in respect of non-union matters falling on that side.

It was argued by Mr. Mbezi that the structure of the Constitution points to a dual role for the Union Government, i.e. as a Government responsible for Union Matters and as a Government responsible for non-Union Matters for and in the Mainland. He also submitted that the division of union from non-union matters could not have been done without a purpose. In his view non- union matters on the Mainland have to be run by Mainlanders, and the fact that they are constitutionally placed under the Union Government does not amount to their unionisation. He therefore thinks that the appointment of Zanzibaris to run these matters offends Art. 4(3). Mr. Mussa responded by pointing out that no provision in the Constitution compelled the President not to appoint Zanzibaris to such positions and that it would actually be discriminatory if he did not do so. In his view the exercise of the power of appointment was a matter of policy but not one founded on the Constitution.

The issue of Zanzibaris in "Mainland" ministries is presently a matter of considerable interest, and seems to derive more drive from the polarised political situation which culminated in the ill-fated parliamentary notion for a government of Tanganyika. But sentiments apart, one would certainly wish to know the juridicial [sic] position of non-union matters in and for the Mainland. The dualism factor asserted by Mr. Mbezi was recognised and articulated by the Court of Appeal in Haji v. Nungu & Aner. (1907) LRC (Const) 224 where Chief Justice Nyalali further stated (at p. 231) that in the basic structure of the Constitution there are "matters which concern exclusively that area which before the Union constituted what was then known as Tanganyika…" He went on to say that "These matters under the scheme of the Constitution fall under the exclusive domain of the Government of the United Republic. The Revolutionary Government of Zanzibar has no jurisdiction over these matters." Of course that case was concerned with a different matter - the jurisdiction of the High Court of the United Republic in election petitions - yet, even with that reference to the exclusive domain of the Government of the United Republic over Tanganyika matters, I cannot read a suggestion of the unionisation of those matters. There are various types of constitutions which are classified as federal and ours could carry that appellation in the absence of a standard or ideal type of a federal constitution. It is not uncommon for such constitutions to enumerate the areas reserved to the federated states, leaving the rest to the federal or central government. The Founders of our Union could easily have done that. They could have enumerated the spheres in which the Zanzibar Government would exercise power and leave the rest to the Union Government. In that case the philosophy of changu, changu; chako, chetu (mine is mine; yours is ours) would have made considerable sense, for everything in and for the

Mainland would have then been a union matter. But that was carefully avoided. Instead the Constitution enumerates union matters only and expressly declares the rest to be non-union; and this is so, according to Art. 4(3), "For the purpose of the more efficient discharge of public affairs… and for the effective division of functions in relation to those affairs…" I think, with respect, there is reason to insist on the significance of the division. It is occurs to me, that the fact of the non-union matters in the Mainland could have the effect of blurring that division.

That said, however, it is difficult to draw the inference of unconstitutionality, which the Court was called upon to draw, in relation to those appointments. The provisions to which I have referred, notably Art. 36(2) and Art. 55(1), do not limit the President in his choice of officers or Ministers or in their disposition. The furthest we can go is to fall back to the words "subject to the other provisions of this Constitution" in Art. 36 (2) and this would lead to the division of union and non-union matter in Art. 4(3). It can then be suggested that to keep the division effective there is an implied invitation to keep Tanganyika matters Tanganyikan. A breach of the Constitution, however, is such a grave and serious affair that it cannot be arrived t by mere inferences, however attractive, and I apprehend that this would require proof beyond reasonable doubt. I have therefore not found myself in a position to make the declaration sought and I desist from doing so.