LIMITATION CLAUSES AT THE AFRICAN REGIONAL HUMAN RIGHTS SYSTEM AND TANZANIA: REFLECTION OF JUDICIAL DECISIONS

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Abstract

Enjoyment of fundamental human rights as guaranteed by the African Charter or Constitution of Tanzania is subject to limitations which are set out by the ordinary law made by parliament. However, case law has demonstrated that no provision of the limitation clause in the African Charter or Constitution may be interpreted as permitting a State to suppress enjoyment or exercise of the rights and freedoms to a greater extent than reasonably required. Which tests or criteria should guide the court or other authorities depends on the instrument in question. Both the African Charter and the Constitution of Tanzania do not have clearer guiding criteria.

Courts have attempted, nevertheless, to come up with criteria or tests by borrowing from international, other regional and domestic human rights systems. This article reviews case law from the African Court and Tanzania and finally proposes the adoption of the three-tier test in resolving tension when at issue

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before the Court is whether or not a legislation or conduct is saved by Article 30(2) of the Constitution which allows limitation of human rights. The benefit of adopting this approach would enable domestic courts to be consistent when deciding human rights petitions.

Key Words: Limitation Clauses, Claw-back clauses, proportionality principle, necessary in a democratic society.

1. INTRODUCTION

In the parameters of human rights law, two sides always come into conflict. The first side was stated by Louis Henkin, that human rights enjoy a *prima facie*, presumptive inviolability, and will often 'trump' other public goods.[2] The other side posits that there are reasonable limits even to fundamental rights. Only a handful of rights such as the right life or not be tortured are considered to be absolute.[3] Laws that interfere with traditional rights and freedoms are sometimes considered necessary. Freedom of movement, for example, does not give a person unlimited access to another person's private property and so do murderers must generally lose their liberty to protect the lives and liberties of others. Equally important, individual rights and freedoms will sometimes clash with a broader public interest such as public health or safety, or national security. When this happens, these rights may be limited. The challenge has

[2] See Henkin, L., *The Age of Rights*, New York: Columbia University Press, 1990 at p. 4.

[3] Walker, J., "Hate Speech and Freedom of Expression," Library of Parliament, Legal and Social Affairs Division, Legal Boundaries in Canada 3 (29th June, 2018), available at https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E, archived athttps://perma.cc/WW6J-6CWT (accessed 20th October, 2019).

always been on how to balance the broader public interests for common good *vis-à-vis* the enjoyment of fundamental rights.

This article is a continuation of a discussion which started in an article titled "Judicial Interpretation of Limitation Clauses at the International and Regional Human Rights Systems: Lessons for Domestic Courts." It traces the jurisprudence of the African human rights tribunals and examines the judicial decisions of the Tanzanian courts. The lesson learnt from other courts and tribunals will help shape the courts in Tanzania when balancing between protection of human rights and limitation clause found under Article 30(1) and (2) of the *Constitution of the United Republic of Tanzania*, 1977 (as amended).

2. LIMITATION CLAUSES UNDER THE AFRICAN CHARTER

The African Charter on Human and Peoples' Rights, 1981 (The Charter) embodies three kinds of limitations or restrictions to rights. These are the right-specific limitation clause, a general limitation clause, and the right-specific claw back clauses.[4] Three provisions in the Charter bare right-specific limitations. These are Article 11 - freedom of assembly; Article 12 (2) - freedom of movement and residence; and Article 14 - right to property. For instance, Article 11 says:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to *necessary restrictions provided for by law* in particular those enacted *in the interest of* national security, the

[4]See Odhiambo, B.P., "The Limitation of Rights Under the Kenyan Constitution," Masters in Law Dissertation, Faculty of Law, University of Pretoria, September, 2015, at p. 34.

> safety, health, ethics and rights and freedom of others. (Emphasis added.)

It is called a right-specific limitation clause because the words bearing limitation are found in the same Article. A provision that is deemed to embed a general limitation clause is Article 27(2) of the Charter which provides thus, "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." This provision cut across all provisions in the African Charter, in the sense that enjoyment of all rights in the Charter is subject to paying attention to the rights of others, collective security, morality and common interest.

While the African Court on Human and Peoples' Rights in the case of *Mtikila*[5] did not address its opinion as to whether there are three types of limitations clauses, understandably so since that was not one of the arguments before it, the Court remarked that Article 27(2) is a general limitation clause to the Charter. The Court held the view that the limitations to the rights and freedoms in the African Charter are only those set out in Article 27(2) and that such limitations must take the form of 'law of general application.'[6]

As said above, the African Charter imposes another limitation to the rights in the form of claw-back clauses. The phrase 'claw-back' clause is often used to refer to those provisions in the bill of rights that seek to minimize or limit some of the rights by way of subjecting those rights to ordinary law.[7] They usually run thus, "except for

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[5] *In the Consolidated Matter between Tanganyika Law Society, the Legal and Human Rights Centre, Reverend Christopher Mtikila v. The United Republic of Tanzania*, Applications No. 09/2011 and No. 011/2011.

[6] Ibid., paragraph 107.1.

[7] Mapuva, L., "Negating the Promotion of Human Rights Through 'Claw-Back Clauses' in the African Charter on Human and Peoples' Rights", International

reasons and conditions previously laid down by law,"[8] "subject to law and order,"[9] "within the law,"[10] "provided that he abides by the law,"[11] "subject only to necessary restrictions provided for by law,"[12] "in accordance with the provisions of the law,"[13]etc. For instance, Article 9(2) of the Charter provides that everyone has the right to express and disseminate his opinions within the law. This style of formulating human rights provisions with some form of claw-back clauses has often been criticized on the ground that it compromises the realization of the rights in question by permitting the State to breach its obligation of protecting human rights.[14] It is a style established in the African Charter and Tanzania borrowed it when the Bill of Rights was included in the Constitution of Tanzania in 1984.

3. INTERPRETATION BY THE AFRICAN COMMISSION AND THE COURT ON HUMAN AND PEOPLES' RIGHTS

The African Court is younger than its counterparts, the European and Inter-American Courts of Human Rights. Thus, its jurisprudence is still developing. The Court was established under the *Protocol to the African Charter on Human and Peoples' Rights*

Affairs & Global Strategy, available at ttps://iiste.org/Journals/index.php/IAGS/article/viewFile/34503/35504 (accessed 11 February 2019).

[8] Article 6 of the Charter.

[9] Article 8 of the Charter.

[10] Article 9 (2) of the Charter.

[11] Article 10 (1) of the Charter.

[12] Article 11 of the Charter.

[13] Article 13 of the Charter.

[14] Higgins, R., "Derogation under Human Rights Treaties," Volume 48 *British Yearbook of International Law,* 1978, p. 281. See also Mbunda, L.X, "Limitation Clauses and the Bill of Rights in Tanzania." Volume 2 No. 4 *Lesotho Law Journal*, 1988) p. 153.

*on the Establishment of an African Court on Human and Peoples' Right*s (the Protocol),[15] which was adopted by Member States of the then Organisation of African Unity (OAU) in June 1998. The Protocol came into force on 25th January, 2004. The main duty of the Court is to ensure protection of human rights in the Africa region. It complements the protective mandate of the African Commission on Human and Peoples' Rights which was established under the *African Charter on Human and Peoples' Rights*, 1981 (ACHPR). The Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the ACHPR, the Protocol and any other relevant human rights instrument ratified by the States concerned.[16]

The ACHPR does not have adequate guidance on how to interpret the limitation clauses unlike other regional and international human rights instruments. Under the International Covenant on Civil and Political Rights, 1966; the European Convention on Human Rights, 1950; and the American Convention on Human Rights, 1969 a common feature underlying the limitation clauses, whether it is a general limitation clause or a right-specific limitation clause, is that not every single limitation of a human right will be considered as lawful. Three conditions (also known as three-part test) must be shown for a right to be limited or restricted. First, a restriction must be 'prescribed' or 'determined' by law. Second, the said restriction must be for a certain purpose or interest. The purposes include, securing the rights and freedoms of others, protection of national security, or public safety, public order, public health or public moral,

[15] Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.
[16] Ibid., Article 3.

or promoting the general welfare. Third, the restriction must be 'necessary in a democratic society.'

The relevant provisions under the African Charter which limit the exercise of rights and freedoms (Articles 11, 12 and 27(2) of the Charter) make reference to the following elements only:

(i) "necessary restrictions" provided for by the law (Articles. 11 and 12 (2)); and

(ii) for the protection of national security, safety, law and order, public health, public morality, ethics, rights of others, collective security and common interests (Arts. 11, 12(2) and 27(2)).

While in the Charter there is reference to "necessary restrictions," there is no identical phrase, "necessary in a democratic society" as found under the International Covenant on Civil and Political Rights, 1966; European Convention on Human Rights, 1950; and Inter-American Convention on Human Rights, 1969. Besides, some provisions have "claw-back clauses." This poses challenges to the African human rights tribunals when interpreting limitation clauses under the Charter.

However, despite this challenge, the African Commission was not bogged down. It developed its own body of jurisprudence before the African Court was established and held the view that the rights and freedoms in the Charter can only be limited by invoking international human rights standards. In the case of *Media Rights Agenda and Others v. Nigeria*[17] the Commission said that it is empowered by the provisions of Articles 60 and 61 of the Charter to draw inspiration from international human rights law and take into consideration as subsidiary measures other general or special international

[17] Application No 224/98; (2000) AHRLR 200 (ACHPR 1998).

conventions, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.[18] After having said this, the Commission went on to state that for the State Party to rely on the limitation clause it is not enough to plead the existence of a law, it has to go further to show that such a law falls within the permissible restrictions under the Charter and is, therefore, in conformity with its Charter obligation.[19]

In another case,[20] the Commission adopted the principle of proportionality holding that "where it is necessary to restrict rights, the restriction should be as minimal as possible and not undermine fundamental rights guaranteed under international law…. Any restrictions on rights should be the exception."[21] In furthering its opinion with regard to claw-back clauses, the Commission in the *Legal Resources Foundation v. Zambia,*[22] stated that claw back clauses in the Charter should not be used by a State Party to the Charter to avoid its human rights responsibilities."[23] The Commission opined that the purpose of the expression "in accordance with the provision of law" is solely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.

The jurisprudence of the African Court can be illustrated in its first case decided on merit in 2013. This is the case of *Mtikila*[24] that challenged the Tanzanian law prohibiting independent candidacy in

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[18] Ibid., paragraph 51.
[19] Id., paragraph 75.
[20] *Amnesty International and Others v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).
[21] Ibid., paragraph 80.
[22] Application No. 211/98.
[23] Ibid., paragraph 70.
[24] *In the Consolidated Matter between Tanganyika Law Society, the Legal and Human Rights Centre, Reverend Christopher Mtikila v. The United Republic of Tanzania*, Applications No. 09/2011 and No. 011/2011.

political elections. Paragraphs 106-109 of the Court's judgement set very well the legal basis for the decision on merit. In developing its jurisprudence, the Court had no qualms in making reference to the decisions of other regional and international human rights bodies, including the UN Human Rights Committee,[25] the African Commission on Human and Peoples' Rights,[26] the European Court of Human Rights, 1950,[27] and the Inter-American Court of Human Rights, 1969.[28]

The Court decided this case by following this pattern, although in a quite haphazard manner, that is to say, not by showing chronologically the three-part test as the European Court and Inter-American Court have been doing. However, implicitly, from this case, the Court adopted wholesome the jurisprudence of its sisters tribunals. In deciding the controversy whether the law restricting independent candidacy in Tanzania is justifiable, the Court held that, once the complainant has established that there is a *prima facie* violation of a right, the respondent State may argue that the right in question has been legitimately restricted by law, by providing evidence that the restriction serves one of the purposes set out in Article 27(2) of the Charter;[29] which are "the right of others, collective security, morality and common interest."

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[25] See paragraph 105.4.
[26] See paragraphs 106.1 and 109.
[27] See paragraphs 106.2, 106.3, and 106.4; Citing the case of *Handyside v. UK*, Application No 5493/72, Judgement of 7th December, 1976; *Gillow v. UK*, Application No. 9063/80, Judgement of 24th November, 1986; *Olson v. Sweden*, Application No. 10465/83, Judgement of 24th March, 1988; *Sporrong & Lonner & Others v. Sweden*, Application No. 7151/75, Judgement of 23rd September, 1982.
[28] See paragraphs 106.5 and 107.3; Citing the case of *Baena Ricardo & Others v. Panama*, Judgement of 2nd February, 2001 and *Castaneda Gutman v. Mexico*, IACHR Series C no 184, IHRL 3057.
[29] *Mtikila* Case, paragraphs 106.1.

After citing many authorities from the African Commission and European Court, the African Court cautioned that, any restriction on rights can be authorized only if the legal basis is a legislative act and if the law's content conforms to the ACHPR.[30] It was also the view of the African Court that the limitation imposed by the Respondent State ought to be in consonance with the international standards to which the Respondent is expected to adhere.[31] The Court cited the decisions of the African Commission in the *Media Rights Agenda and Others v. Nigeria*[32] and *Anver Prince v. South Africa*[33] and continued to cite with approval the view of the African Commission saying that, after assessing whether the restriction is effected through a "*law of general application,"* the next issue to examine is the proportionality test. The Court said:

> The jurisprudence regarding the restrictions on the exercise of rights has developed the principle that, the restriction must be necessary in a democratic society; they must be reasonably proportionate to the legitimate aim pursued… Such a legitimate interest must be proportionate with and absolutely necessary for the advantages which are to be obtained. [34]

The Court stated that this is the same approach with the European Court, which requires a determination of whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the final analysis the Court held: "the restriction on the exercise of the right through the prohibition on

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[30] Ibid., paragraph 106.5.
[31] Id., paragraph 108.
[32] Application No 224/98; (2000) AHRLR 200 (ACHPR 1998).
[33] Application No. 255/2002.
[34] *Mtikila* Case, paragraph 106.1.

independent candidacy is not proportionate to the alleged aim of fostering national unity and solidarity"[35] as was argued by the Respondent State.

The other case worth review is the case of the *African Commission on Human and Peoples' Right v. Republic of Kenya.*[36] In that case, the Court was asked to determine whether the eviction of the Ogiek people from the Mau Forest was contrary to Article 14 (the right to property) under the African Charter and whether differential treatment of the Ogiek people constituted discrimination within the meaning of Article 2 of the Charter. It was alleged on behalf of the victims that the Ogiek are an indigenous minority ethnic group in Kenya comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest complex, a land mass of about 400,000 hectares straddling about seven administrative districts.

According to the Applicant, in October 2009, through the Kenya Forestry Service, the Kenyan Government issued a thirty (30) days eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they move out of the forest on the grounds that the forest constituted a reserved water catchment zone, and that, in any event, it was part and parcel of government land under Section 4 of the Government's *Land Act*. The Applicant contended the failure of the Respondent State to recognise the Ogiek as an indigenous community denies them the right to communal ownership of land as provided in Article 14 of the Charter. Furthermore, according to the Applicant, the differential treatment of the Ogieks and other similar indigenous and minority groups within Kenya, in relation to the lack of respect for their property rights, religious and cultural rights, and right to life, natural resources and development under the relevant

[35] Id., paragraph 107.2.
[36] Application No 006/2012, Judgement of May 2017.

law, constituted unlawful discrimination and is a violation of Article 2 of the Charter. The Government contended that this decision was informed by the State's attempt to conserve the forest which is a water catchment area. In deciding the case the Court cited Articles 14 and 2 respectively which provide thus:

> 14 The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.
>
> 2 Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The Court held that Article 14 envisages the possibility where a right to property, including land, may be restricted; "provided that such restriction is in the public interest and is also necessary and proportional."[37] In the instant case, the Respondent State argument was that "public interest justification for evicting the Ogiek from the Mau Forest" had been the preservation of the natural ecosystem.[38] The Court reasoned:

> [The State] has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in

[37] Ibid., paragraph 129.
[38] Id., paragraph 130.

> the area. Different reports prepared by or in collaboration with the Respondent on the situation of the Mau Forest also reveal the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions… In the circumstances, the Court is of the view that the continued denial of access to and eviction from Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.[39]

In conclusion, therefore, it can be argued that, while the African Court has not adequately developed its body of jurisprudence, since a majority of cases filed before it have ended at the admissibility stage for want of jurisdiction and other admissibility criteria, the trend, as illustrated above, shows that the Court tends to travel on the same wave length of jurisprudence adopted and developed by other human rights tribunals.

Before we embark on an analysis of Tanzania case law, it is pertinent to observe, albeit briefly, a comparative jurisprudence from two jurisdictions, namely, Canada and South Africa which will shade more light on how other domestic courts have approached situations where conflict arises.

4. CASE LAW FROM CANADA AND SOUTH AFRICA

The non-absolute nature of human rights and the need to balance conflicting interests has not pre-occupied only international and regional courts. The Constitutional Court of South Africa, for

[39] Ibid.

example, in *De Renk v. DPP*,[40] acknowledged the importance of harmonious co-existence in society and noted the need for a balancing process should individual rights be in conflict.

For the last twenty years or so, constitutional courts have applied the principle of "proportionality" or "reasonableness" as a procedure that aims at striking the appropriate balance. In the common law system, "proportionality" is usually referred to as the "principle of reasonableness."[41] The Canadian case of *R. v. Oakes,*[42] is the landmark decision in Canada on the issue whether the limitation clause allows reasonable restrictions on rights and freedoms. The *Canadian Charter of Rights and Freedoms* which forms the first part of the *Constitution Act, 1982* upon which the decision was based guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[43] The Court identified two main functions of Section 1 of the Canadian Charter. First, it guarantees the rights which follow it, and second, it "states the criteria against which justifications for limitations on those rights must be measured."[44] The Court then said that the "onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold limitation."[45] The Court had to decide the circumstances under which a limitation can be said to be

[40] (Witwatersrand Local Division) 2002, 12 BCLR 1285 (CC) para 89.
[41] Cianciardo, J., "The Principle of Proportionality: The Challenges of Human Rights," Volume 3 No. 1 *Journal of Civil Law Studies,* 2010, p. 177 at p. 179.
[42] [1986] 1 S.C.R. 103; (1986) 26 DLR at 225.
[43] Section 1 of the Canadian Charter on the Rights and Freedoms states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[44] Paragraph 63 of the Court's decision in *R. v. Oakes* (*supra*).
[45] Ibid., paragraph 66.

"reasonable" and "demonstrably justified" in a free and democratic society. It held, as follows:

> Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom... The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking Section 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test… There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. Third, there must be a proportionality between the effects of the limiting measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance… The more severe the

> deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[46]

In South Africa, both the interim Constitution, 1993[47] and the final *South African Constitution* of 1996 opted to adopt a general limitation clause. The first sub-section of the Interim Constitution reads as follows:

> 33(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation:–
>
> (a) shall be permissible only to the extent that it is - (i) reasonable; and (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall not negate the essential content of the right in question, and further provided that any limitation to:
>
> (aa) a right entrenched in Section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
>
> (bb) a right entrenched in Section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary.

Citation of the above provision is important for the purpose of this discussion because, one of the decisions of the Constitutional Court

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[46] Id., paragraphs 69-71.
[47] Constitution of the Republic of South Africa 200 of 1993.

made under the above provision formed the foundation for future development as far as limitation clause under the 1996 South Africa Constitution is concerned. In the case of *S. v. Makwanyane*,[48] the Court's President, Chaskalson, P., made the following statement:

> The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality… The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality," means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. *In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through*

[48] 1995 3 SA 391 (CC).

> *other means less damaging to the right in question*…[49] (Emphasis added).

The wording of the general limitation clause under Section 33(1) of the Interim Constitution was changed in the general limitation clause in Section 36(1) of the 1996 Constitution largely to reflect the decision in *Makwanyane*.[50] The Constitutional Court has continued to apply the limitations jurisprudence developed under the Interim Constitution.[51] In the case of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*,[52] the Constitutional Court adopted the principles enunciated in the *Makwanyane* case while interpreting Section 36(1) of the 1996 Constitution which provides thus:

> The rights in the Bill of Rights may be limited only in terms of law of general application[53] to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;

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[49] Ibid., paragraph 104 of the Judgement.
[50] For an in-depth discussion on this see Rautenbalch, I.M., "Proportionality and the Limitation Clause of the South African Bill of Rights", Volume 17 No 6 *Potchefstroom Electronic Law Journal*, 2014, p. 2249.
[51] Iles, K., "A Fresh Look at Limitation: Unpacking Section 36," Volume 23 *South African Journal on Human Rights*, 2007, p. 68.
[52] (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).
[53] The reference to "law of general application" gives effect to the formal aspects of the rule of law or legality, namely that all limitation must be authorized by legal rules.

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

In the above cited case, the Court held that although Section 36(1) of the 1996 Constitution differs in various respects from Section 33 of the Interim Constitution, its application still involves a process, described in *Makwanyane* as the weighing up of competing values, and ultimately an assessment based on proportionality requirement which calls for the balancing of different interests.[54] In approving its earlier decision in *Makwanyane*, Ackermann, J., wrote:

> In *Makwanyane* the relevant considerations in the balancing process were stated to include ". . . the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question." The relevant considerations in the balancing process are now expressly stated in Section 36(1) of the 1996 Constitution to include those itemised in paragraphs (a) to (e) thereof. In my view this does not in any material respect alter the approach expounded in *Makwanyane*, save that paragraph (e) requires that account be taken in each limitation evaluation of "less restrictive means to achieve

[54] Ibid., paragraph 33 of the Judgement.

> the purpose [of the limitation]." Although Section 36(1) does not expressly mention the importance of the right, this is a factor which must of necessity be taken into account in any proportionality evaluation.[55]

From the foregoing decisions, it is illustrated that the limitation of rights in terms of the South African Constitution is that those who limit the rights must comply with the requirements set out in the Constitution itself, namely, (i) the limitation must be only in terms of law of general application (means an Act of Parliament); (ii) to the extent that the limitation is reasonable and justified in an open and democratic society based on the human dignity, equality and freedom. However, in investigating the second condition of the general test that refers to the reasonableness and justifiability of a limitation of the right, the third requirement comes into play, namely (iii) the factors in Section 36(1)(a) to (e) must be taken into account, including the purpose of the limitation. This mirrors the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights and other human rights bodies.

5. CASE LAW FROM TANZANIA

The Bill of Rights in the *Constitution of the United Republic of Tanzania*, 1977 was enshrined in 1984.[56] Consistent with the *African Charter on Human and Peoples' Rights, 1981* the Tanzania Constitution recognises and guarantees not only basic human rights but also basic human duties. Equally, it carries three types of

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[55] Id., paragraph 34.

[56] The Bill of Rights was introduced through the Fifth Amendment of the Constitution of 1984 (Act No. 15 of 1984).For detail analysis of the history of Bill of Rights in Tanzania see Peter, Chris Maina, "Five Years of Bill of Rights in Tanzania: Drawing a Balance-Sheet" Volume 18 No. 2 *Eastern Africa Law Review*, December 1991, p. 147.

limitation clauses, a general limitation clause under Article 30; right-specific limitation clauses under Articles 15(2), 17(2), 19(2), and 21(1); and claw-back clauses under Articles 14, and 24 (1). Before 2005, the Constitution had so many claw-back clauses than these ones but the same have since been reduced.[57] For the purpose of discussion that follows below, it is instructive to cite, in so far as relevant, the general limitation clause and at least one provision having a right-specific limitation clause in the Tanzania Constitution. Article 30, clauses (1) and (2) provide thus:

> (1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.
>
> (2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act *in accordance with such* law *for the purposes* of:
>
> (a) ensuring that the rights and freedom of other people or of the interests of the public are not prejudiced;
>
> (b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and

[57]These Claw-back clauses were reduced in 2005 through the Fourteenth Amendment of the Constitution (Sheria ya Mabadiliko ya Kumi na Nne katika Katiba ya Jamhuri ya Muungano ya Mwaka 1977 (Act No. 1 of 2005)).

utilization of minerals or the increase and development of property or any other interests;

(c) ensuring the execution of a judgement or order of a court;

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

(e) imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country; or

(f) enabling any other thing to be done which promotes, or preserves the national interest in general. (*Underline is added to emphasize phrases which have been applicable in the regional and international human rights instruments*).

By and large, the above quoted provision indiscriminately throws various grounds allowing the Government to limit the rights enshrined in the Constitution. This author does know of any country where such wider provision clauses were borrowed from. Mbunda is quoted as saying that these provision "fall short of international acceptable standards."[58]

[58]Mbunda, L.X., "Taking Stock of Media Laws in Tanzania: Do They Promote Media Freedom or are They Repressive?" Volumes 31-34 *Eastern Africa Law Review,* December 2004, at p. 177. Mbunda is also quoted in the case of *Daudi Pete v. The United Republic*, High Court of Tanzania in Mwanza, Miscellaneous

An example of a provision which contains a right-specific limitation is Article 19 (freedom of religion). Clauses (1) and (2) state as follows:

> (1) Every person has the right to the freedom to have conscience, or faith, and choice in matters of religion, including the freedom to change his religion or faith.
>
> (2) Protection of rights referred to in this Article shall be *in accordance with the provisions prescribed by the laws which are of importance to a democratic society for security and peace in the society, integrity of the society and the national coercion* (Emphasis supplied).

One may argue that clause (2) above is not a limitation clause because it is not crafted in a negative way. It is differently formulated from an equivalent provisions in other human rights instruments, say for example, Article 18(3) of the ICCPR which states that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". However, a close look at the provision seems to suggest that it was intended to be a limitation to the enjoyment of rights guaranteed under clause (1). If properly drafted, it was supposed to start with a word 'Limitation' instead of the word 'Protection'. This is evident if the following questions are asked, 'is it possible for an Act of Parliament to enact provisions to indicate the manner in which a person can enjoy his rights to conscience, faith and choice of religion?', and, how can the

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Criminal Cause No. 80 of 1989 (Unreported) where Mwalusanya, J, remarked that "Mbunda put his finger at the right button in his paper 'Limitation Clauses in the Bill of Rights',...when he states that whether the limitation clauses in the Bill of Rights will foster or restrict liberty, will depend upon the attitude of the judiciary."

exercise of the rights guaranteed in clause (1) be for "importance to a democratic society for security and peace in the society"? A possible parameter regarding what an Act of Parliament may do is that of prescribing how religious institutions may be registered and the boundaries within which they are required to operate. This is usually the function of the law; to provide regulatory mechanisms through which rights and freedoms may be enjoyed because rights have already been guaranteed under the Constitution. Thus, indeed, clause (2) is a limitation clause.

The Courts in Tanzania have played their judicial role to interpret these limitations in various cases. Due to limited space, reference will be made to a very small body of case law. The few cases referred to herein, to borrow Prof. Peter's words, "have been selected purely on their academic value."[59] There are many other cases decided in the manner shown below which one could cite. These few are simply examples worth considering. The first case to travel along the avenue of international human rights standards in Tanzania was decided by the High Court. This is the case of *Chumchua Marwa v. Officer Incharge of Musoma Prison and Another*[60] decided by Mwalusanya, J. (as he then was). The applicant was a son of a deportee who had been deported from Mara Region to Lindi Region by the order of the President on allegation that his continued residence in Mara region was dangerous to peace and good order. At issue in this case was whether the *Deportation Ordinance*, 1921[61] was unconstitutional for

[59] Peter, Chris Maina, *Human Rights in Tanzania: Selected Cases and Materials*, Koln: Rudiger Koppe Verlag, 1997 at p. xi.
[60] High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988. *In the Matter of an Application for a Writ of Habeas Corpus in respect of Marwa Wambura Magori and in the Matter of the United Republic of Tanzania* (Unreported).
[61] No. 18 of 1921. Now Deportation Act, Cap 380 of the [R.E 2002].

offending the Bill of Rights contained in the Constitution. The Court examined whether the Act in question and the order of President could be saved under Article 30 (1) and (2) on the ground of national security. The Court was quick to opine that:

> [O]ur nation's constitutional ideals have been enshrined in the Bill of Rights and it will be a living charter unless it is interpreted in a meaningful way... The implementation and application of the Bill of Rights should not be blunted or thwarted by technical or legalistic interpretation… If those rights are to survive and be available on a day to day basis, we must resist the temptation to opt in favour of a restrictive approach.

The Court remarked that a superficial reading of the limitations and restrictions on the Bill of Rights would lead one to conclude that the Bill of Rights has been rendered an empty shell. The learned judge borrowed some words from the Court of Appeal and reasoned that the liberty of the individual is so precious and fundamental that the Courts are duty bound to see that it is not taken away except under express provisions of the law of the land.[62] He cited a number of cases from other jurisdictions to buttress his decision. He also cited the UN *Siracusa Principles* (1984)[63] which provides guidance on interpretation of limitation clauses including the three-part test of "legality," "justification" of limitation and "necessity" and concluded that "those are sensible principles, which I recommend should be adopted in Tanzania by our courts in interpreting the Constitution,

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[62] Stated so by the Court of Appeal in a case which was decided before the incorporation of the Bill of Rights into the Constitution, in *Attorney General v. Lesinoi Ndenai & Joseph Selayo Laizer and Two Others* [1980] TLR 214 at 239.

[63] Siracusa Principles are principles of interpretation of the limitation and derogation provisions of the ICCPR developed in Siracusa, Sicily, in April and May 1984 by a group of 31 distinguished experts in International Law.

if the Bill of Rights is not to exist in theory only." However, the learned judge did not go far to apply those principles enunciated in the *Siracusa principles* to determine the case; instead he used jurisprudence from various commonwealth countries.

The other case is that of the High Court in *Daudi Pete v. The United Republic*[64] where the issue was whether the provisions of Section 148(5) (e) of the *Criminal Procedure Act*, 1985[65] which denies bail to a person charged with robbery with violence contrary to Section 286 of the *Penal Code*, 1945[66] was unconstitutional. The Court cited with approval the case from the Court of Appeal of Trinidad and Tobago in which the following guidance was given: When an Act of Parliament restricts the rights or freedoms of a person; all that the person is required to do is to show that his right has been restricted. After having shown this, the burden shifts to the respondent to show that such restrictions are reasonable. If the latter fails to discharge this burden then the court may pronounce against the validity of the impugned Act.[67]

The learned judge went ahead and remarked, "I adopt the same reasoning as above propounded," and reasoned that, since Article 15 of the Constitution provides for the right to liberty, such that no one may be deprived of his freedom "except in accordance with the law", then "Section 148 of the CPA that derogates from the right to liberty" is *ex-facie ultra-vires* Article 15 of the Constitution, unless the Government is able to show that the provision is saved by Article 30 of the Constitution "by showing that the statute in question is in public interest and justifiable on national security grounds."

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[64] High Court of Tanzania in Mwanza, Miscellaneous Criminal Cause No 80 of 1989 (Unreported).
[65] Act No. 9 of 1985. Now Cap 20 of the [R.E 2002].
[66] Cap 16 of the [R.E 2002].
[67] *Attorney General v. Morgan* [1985] LRC (Const.) 770, at 797.

This has to be proved "on a balance of probabilities." The Court went on to opine that legislation which limits the fundamental rights on the ground listed in Article 30 "must pass what has been called the proportionality test." After having said this, the learned judge adopted and paraphrased the words of Chief Justice Spreight from the Cook Islands in the case *of Clarke v. Karika*[68] and held the view that the appropriate tests for the court to apply when it is alleged that a legislation infringes the constitutional rights is to consider whether the object of legislation is constitutionally legitimate and whether the means used to limit the said right bears a reasonable relationship to the object. After analysis of the circumstances, the Court concluded that the means adopted are not reasonable and demonstrably justified in a free and democratic society and declared Section 148 (5) (e) of the CPA unconstitutional and ordered the release of the applicants on bail.

The DPP not being happy with this decision appealed to the Court of Appeal.[69] The Court of Appeal (Nyalali, CJ, Makame, JA and Ramadhani, JA) upheld the High Court decision that Section 148(5)(e) of the CPA was unconstitutional but on a different ground. The Court faulted the learned trial Judge especially in his reasoning that every statute which derogates from the right to personal liberty "is *ex-facie ultra vires* the provisions of Article 15" unless the Government is able to show that the provision is saved by Article 30 of the Constitution. The appellate Court reasoned that since Article 15 itself contains a limitation clause under sub-article (2), a person whose right has been deprived or who has been denied of the right to personal liberty that denial must be done so only under the conditions stipulated under paras (a) and (b). And, in the present case, it is para (a) which is relevant. For purposes of clarity,

[68] [1985] LRC (Const.) at 732.
[69] See *Director of Public Prosecutions v. Daudi Pete* (1993) TLR 22.

Article 15 of the Constitution (as translated from Kiswahili to English by the Court) read as follows:

> 15 (1) Man's freedom is inviolable and every person is entitled to his personal freedom.
>
> (2) for the purpose of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:
>
> (a) in certain circumstances, and subject to a procedure, prescribed by law; or
>
> (b) in the execution of the sentence or order of a court in respect of which he has been convicted.

According to the Court of Appeal, paragraph (a) sanctions the deprivation or denial of liberty under "certain circumstances, subject to a procedure prescribed by law." The Court stated that the circumstance under which bail can be denied was easy to find because it was provided under Section 148(5), namely, when an accused person is charged with robbery with violence then a police officer in charge of a police station or a court before whom the accused person is brought shall not admit that person to bail. However, the problem was in finding the requisite prescribed procedure for denying bail to the accused person. The Court was of the view that the procedure envisaged under paragraph (a) is intended to safeguard the person whose right to liberty has been deprived. Having examined the whole of Section 148 and the CPA in general, the Court failed to find any such prescribed procedure for denial of bail in terms of para. (a) of Article 15(2) of the Constitution; it, therefore, concluded that Section 148(5)(e) of the CPA was violative of Article 15(2) of the Constitution. That was not

the end of the matter. For, the Court of Appeal further opined that "to the extent that Section 148(5)(e) violates the Constitution, it would be null and void ... unless it is saved by the general derogation clauses, that is, Article 30 ..., which permits certain derogations from the basic rights of the individual."[70] The reasoning of the Court was quite well in order when applied in the context of "necessity" and "proportionality" elements even though the Court of Appeal did not use those terms. It held:

> We accept the proposition that any legislation which falls within the parameters of Article 30 is constitutionally valid, notwithstanding that it may be violative of basic rights of the individual. But, and this is the crucial but, such legislation must fit squarely within the provisions of the Article. Any statute which is so broad as to fall partly within and partly outside the parameters of the Article would not be validated.[71]

The Court was of the opinion that Section 148(5) (e) would be validated if it could be construed as being wholly for purpose of defence, public safety, or public order in terms of Article 30(2). And the provisions of the CPA would be saved if the denial of bail aimed only at accused persons who are likely to be a danger or threat to the interests of defence, public safety or public order. The Court concluded that a close look of Section 148(5)(e) shows that the provisions were so broadly drafted such that they are capable of being used to deprive liberty even to persons who are not dangerous.[72]

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[70] Ibid., p. 41.
[71] Id., p. 43 of the Judgement penned down by the former Chief Justice, Hon. Francis Nyalali.
[72] Ibid.

When tracing the jurisprudence of the Court in Tanzania as far as limitation clauses are concerned, one finds that it is actually in the case of *Kukutia Ole Pumbun and Another v. Attorney General and Another*[73] where the Court of Appeal (Kisanga, JA, Mnzavas, JA and Mfalila, JA) developed the principles of interpretation to a level of being as close as possible to the jurisprudence of regional and international human rights tribunals. In this case, the appellants sought to sue the Government. They applied for the Minister's consent to sue the Government as required by Section 6 of the *Government Proceedings Act, 1967* but got no reply. They, then, called upon the High Court to rule on the constitutionality of that provision of the law on the ground that Section 6 violated the unimpeded access to the Court to have one's grievances heard and determined. They argued that Article 13(6)(a) of the Constitution, specifically, says that, for purposes of ensuring equality before the law, every person shall be entitled to a fair hearing. Referring to Article 30(2)(b) of the Constitution which permits limitation to human rights in certain circumstances, the learned Counsel for the applicants was of the view that Section 6 is not saved because it is too general in its application. On the part of the Government, the argument was that Section 6 was justified on grounds of public interests and that it was necessary under Article 30(2) of the Constitution because it enabled the Government to regulate and control the suits which are brought against it. It was further argued that, if Section 6 were to be removed, that would open flood gates of frivolous and vexatious litigation which would embarrass the Government and take up much of its time that could be better spent on matters connected with the development and welfare of the members of the society generally.

[73] [1993] TLR 159.

In determining the matter the Court made reference to *DPP v. Daudi Pete*[74] and said that it had occasion to deal with a similar matter in that case. The Court said that when it comes to matters of restrictions of fundamental rights the Court has to "strike a balance between the interests of the individual and those of the society of which the individual is a component."[75] After having said this, the Court admittedly adopted very useful principles under the two tests mentioned below in determining an issue like this. It held:

> [T]he Court in *Pete's* case laid down that a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; **first,** *such a law must be lawful in the sense that it is not arbitrary*. It should make adequate safeguards against arbitrary decisions, 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*. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by Article 30(2) of the Constitution, it is null and void. And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms with these requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or

[74] (1993) TLR 22.
[75] Ibid., p. 166.

> claw-back clauses of that very same Constitution.[76] (Emphasis supplied).

From the above quoted passage it can easily be argued that while the Court feels that the tests to be applicable are two, they are actually three. 'Legitimate object' and 'reasonably necessary' ought to be separate tests, in the sense that, when a human right Court in Tanzania is called upon to establish the constitutionality of an Act of Parliament the following criteria must be looked at: First, whether the law in question is lawful. A law is said to be lawful when it is not arbitrary, and it offers adequate safeguard against arbitrariness. It should provide effective control against abuse. Second, the limitation imposed by such law must be for the purpose of achieving a legitimate object. Third, even if there is a legitimate object, the limitation imposed by such law must be reasonably necessary ("principle of necessity"). It is during the establishment of "necessity" requirement that the principle of proportionality comes in. To use the words of the Court, "if the law is drafted too widely" so as to limit everyone's rights including even those of persons who were not intended, then, such law is not 'proportional' and thus not 'necessary.'

In the instant case, the Court of Appeal applied these tests and held that Section 6 of the *Government Proceedings Act,* 1967 is arbitrary because it does not provide for any procedure for the exercise of the Minister's power to refuse to give consent to sue the Government. It does not provide any time limit within which the Minister is to give his decision. The Section makes no provisions for any safeguards against abuse of the powers conferred by it. There are no checks or controls whatsoever to the exercise of that power, and the decision depends on the Minister's whims. And, to

[76] Id., pp.166-67.

make it worse, the Court said, there is no provision for appeal against the refusal by the Minister to give consent and concluded that such law is certainly capable of being used wrongly to the detriment of the individual. The Court had no problem with the argument of the Government that the provision of Ministerial consent to sue was for "public interests." The issue, however, was whether it was necessary. The Court observed that, "the pertinent question to ask is whether there was really a compelling need for such limitation. In other words, in what way is the limitation justified in public interest so as to bring it within the purview of Article 30(2) of the Constitution?"[77] The Government claimed that the requirement of consent was necessary in order to give the Government the opportunity during which to study the proposed claims and, where warranted, to consider settlement out of Court. This would spare the Government of the embarrassment of appearing in Court and save its valuable time to serve the wider public. The Court rejected this argument. It held the view that the Government can achieve all this within the normal procedures of bringing civil suits. Ordinarily, before a person decides to sue the Government, there must be some prior communication between the person intending to sue the Government and the Government in which the former will have indicated sufficiently the nature and grounds of his claim. Thus, if the Government so wishes, it can assess the claim and, where warranted, consider settlement out of Court during such pre-suit communication.

In the final analysis, the Court held that "the requirement of consent to sue is really not necessary for the purpose of affording the Government time to assess the claim and consider settlement out of Court." And, above all, "such restriction militates against the

[77] Ibid.

principles of good governance which call for accountability and openness or transparency on the part of Governments."[78]

The other interesting decision in these regards is the case of *Mbushuu alias Dominic Mnyaroje and Another v. Republic*[79] by the Court of Appeal (Makame, JA, Ramadhani, JA and Lubuva, JA). In that case, the High Court of Tanzania convicted the appellants of the offence of murder as charged. After some submissions as to the constitutionality of the death sentence, the learned Trial Judge declared that death sentence is unconstitutional and committed each of the accused persons to life imprisonment. The appellants appealed against conviction and the government cross-appealed against the sentence of life imprisonment and the decision that the death penalty was unconstitutional. During the trial the appellants argued and the Trial Court accepted that, first, the death penalty is contrary to Article 13(6)(e) of the Tanzania Constitution as its execution offends the right to dignity; second, it is a cruel, inhuman and degrading punishment contrary to Article 13(6)(e); third and last, that the death penalty violates the right to life as provided by Article 14 of the Constitution. One of the grounds of appeal by the Government was that "the learned Trial Judge erred in not finding that the death penalty is saved by Article 30(2) of the Constitution." It contended that the death penalty passes the proportionality test because it is in the public interest (as the legitimate object of the law is to protect the society from killings) and that the imposition of a punishment of murder is not arbitrary since the penalty is imposed after due process of law.

After having examined how the execution of the death penalty takes place, the Court Appeal agreed with the learned Trial Judge that

[78] Id., p. 169.
[79] [1995] TLR 97.

death penalty is inherently inhuman, cruel and degrading punishment and that it offends Article 13(6)(d) and (e). But the crucial issue before the Court was whether the punishment of death could be saved under Article 30(2) of the Constitution. The Court made reference to the two cases previously decided, *Daudi Pete v. AG* (*supra*) and *Kukutia Ole Pumbun v. AG*. (*supra*) and adopted the principles enunciated in these cases stating that: any legislation that derogates/limits the basic rights of an individual on the ground of public interest "must first be lawful, that is, it should not be arbitrary" and second, "on the proportionality test, that is, the limitation imposed should not be more than reasonably necessary."[80]

As to the first requirement, the Court was in agreement with the arguments by the government that for a person to be convicted of murder he must have undergone a full trial by the High Court sitting with assessors and with the assistance of a prosecuting State Attorney and a defence counsel. Then, there is an automatic appeal to the Court of Appeal. In this sense a punishment which is arrived at after a due process of law could not be said to be arbitrary. The Court made a review of international instruments to see how the right to life is provided under these instruments before deciding this issue. As a result of its survey, the Court remarked that "the international instruments declare the inherent and universal right to life, demand that right be protected by law and prohibit the arbitrary deprivation of that right. That means the right can be denied by due process of law."[81]

With regard to the second requirement the Court posed an issue, "whether or not the death penalty is reasonably necessary to

[80] Ibid., p. 113.
[81] Id., p. 109.

protect the right to life." In other words, the Court asked, "is the death penalty necessary to deter from killing others?" The Court agreed with the opinion of the learned Trial Judge who said that in deciding cases court decisions of other countries provide valuable information and guidance in interpreting the basic rights in our Constitution. And admitted that "that is what we have done following *Furham v. Georgia*[82] in finding that death penalty is inhuman, cruel and degrading punishment."[83] However, the Court was quick to point out that as to what is reasonably necessary in our jurisdiction "we have to be extra careful with judicial decisions of other jurisdictions." The Court continued to reason that there is no conclusive proof one way or the other regarding that the death penalty is not the most effective punishment. "For this we say it is society which decides." In the end, the Court concluded, that the penalty of death under Section 197 of the Penal Code although it offends Article 13(6)(a) and (e) of the Constitution it is not arbitrary, hence a lawful law, and it is reasonably necessary and thus saved by Article 30(2) of the Constitution."[84] With due respect, in this issue, the Court failed to apply the principle of proportionality. The Court was supposed to decide whether the mandatory death penalty was "reasonably necessary" to protect the right to life when balanced against other measures, including the penalty of life imprisonment.

6. CONCLUSION

This article can be concluded by making a few remarks and recommendations. The African Charter on Human Rights and Peoples' Rights, 1981 does not provide an adequate guidance on

[82] (1972) 408 US 238.
[83] Ibid., p. 116.
[84] Ibid., p. 117.

how to balance between rights and other legitimate interests, yet the tribunals that interpret it (the African Commission and the Court) have adopted the jurisprudence from international and other regional human rights tribunals to fill in the gaps. In their views, the rights and freedom in the Charter can only be limited by invoking international human rights standards. And, these standards are borrowed from tribunals applying similar instruments, like the European and Inter-American human rights Courts.

Similarly, the Constitution of Tanzania does not provide guidance to the courts on how limitation clauses in the Bill of Rights should be interpreted. Many democratic constitutions like the South African Constitution, 1996 and even the Kenyan Constitution, 2010[85] do provide that "the rights in the Bill of Rights may be limited in accordance with the law" or "in terms of law of general application" to the extent that "the limitation is reasonable and justifiable in an open and democratic society." This is what is reflected in the international instruments as well as European and American Conventions on Human Rights. But the same is missing in the Tanzania Constitution. Both the general limitation clause under Article 30(2) and other rights-specific provisions are not formulated precisely to show that the intention was to import into the Tanzanian Constitution some criteria in which a right can be limited without breaching the human rights standards. Credit should be given to the courts because they have attempted to borrow a leaf from other jurisdictions by way of adopting some principles and applying them to the Tanzania situation notwithstanding the wording of the provisions of the Constitution.

This article makes a case for the wholesale adoption of the jurisprudence connected with the interpretation of human rights

[85] See Article 24 of the Republic of Kenya Constitution, 2010.

instruments as ably demonstrated by case law based on the African Charter. By a purposive interpretation of Article 30(2), Articles 15(2), and 19 (2) of the Tanzania Constitution where the words "in accordance with such law," "for the purposes of" "to a democratic society" are found, these should be taken as criteria or tests to be applicable in case there is a conflict between enjoyment of rights, on the one hand, and other legitimate grounds for limiting rights, on the other. Unfortunately, the first test that has been used by the courts in Tanzania, namely, that "the law that limits right must be lawful and not arbitrary" applies only when there is a law at issue before the Court. What test should be applicable if at issue before the Court is a conduct, such as where some petitioners are, challenging the Government for denying them the freedom to hold an assembly?

It is, therefore, proposed that in order to determine whether an Act of Parliament or conduct that violates or restricts the basic human rights or freedom is justifiable, three basic requirements should be applied. All of the three conditions should be met simultaneously in order for the limitations to be legitimate pursuant to the Constitution. Firstly, if it is an 'Act', the first test should be whether the law in question is lawful; not arbitrary and not abusive. If it is a 'conduct', the test is whether the restriction was previously established by law and whether such law is lawful. Secondly, the second test applies to both an Act of Parliament and a conduct, and that should be whether the law or conduct in question is required by a compelling governmental interest such as to ensure protection of the rights or reputation of others or to protect national security, public order, or public health or morals etc. Thirdly and lastly, the third test should be whether the law or conduct in question is necessary in a democratic society. This third test should be a controlling test where the principle of proportionality is invoked. Thus, to be compatible

with the Constitution, the restriction brought by an Act or conduct must be justified by reference to a compelling government interest which, because of its importance, clearly outweighs the social need for the full enjoyment of the right. If some measures of restrictions are to be taken, those measures must be strictly proportionate, so that the sacrifice inherent in the restriction of the right is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.

The above recommendation is even fortified by statements made in the case law from the Court Appeal. For example, in the *DPP v. Daudi Pete,* the former Chief Justice of Tanzania, Hon. Francis Nyalali, who penned down the judgement of the Court, invoked the African Charter and said that:

> Tanzania signed the Charter on 31st May, 1982 and ratified it on 18th February, 1984. Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, *account must be taken of that Charter in interpreting our Bill of Rights and Duties*.[86] (Emphasis added.)

This is not the first time Chief Justice Nyalali made this statement. In the case of *AG v. Lesinoi s/o Ndenai,*[87] he recommended for adoption of jurisprudence from other jurisdictions. He stated thus "when basic human rights are at stake or the question of interpretation of a constitutional provision arises it is always very helpful to consider what solutions to the problems other courts in other countries have found, since basically human beings are the

[86] *DPP v. Daudi Pete* (1993) TLR 22 at p. 34.
[87] (1980) TLR 214.

same though they may live under different conditions."[88] In further support to this recommendation, the High Court of Tanzania quoted what Chief Justice of Zimbabwe, Gubbay, CJ pointed out in 1990 when he was quoted as saying:

> A judicial decision has greater legitimacy and will command more respect if it accords with international norms that have been accepted by many countries, than if it is based upon the parochial experience or foibles of a particular judge or court."[89]

So, it seems correct on principle to insist that the application of the above suggested tests and principles is a matter which ought to be taken into consideration by our courts when interpreting the Tanzania Bill of Rights.

[88] Ibid., p. 222.
[89] In the Volume 16 No 3 Commonwealth Law Bulletin, 1990 quoted by Mwalusanya J (as he then was) in the case of *Republic v. Mbushuu alias Dominic Mnyaroje and Kalai Sungula* [1994] TLR 146 (HC) at p. 151.