1.0.INTRODUCTION.

Courts in Tanzania like in any other country fall under the ambit of judicially. Judicially is one of the three organs of state. The other two are executive and legislature. The role of courts is to interpreate the different laws passed by the legislature whereby the executive is left to execute those laws.

Through interpreting the court has got a great role of making sure they interprete according to the principles embodied in the named legislation and the constitution of the country. It is here when rule of law can be maintained or not.

2.0.RULE OF LAW.

The term rule of law mainly referrers to the way government is running its functions. It needs all government activities be done according to the law of the land. In simple words the term means the state of affairs in a country where the law rules.

The history of Rule of law traces back during the era of King James I in United State of America. Sir Edward Coke the chief justice in that era contemplated that the king should be under the God and the law where by law will be supreme to any executive activities[1].

This doctrine was taken by A.V.Dicey who developed it in his book published in 1885[2], in it he developed different principles which embodies the rule of law. These principles are supremacy of law, equality before the law and predominance of legal spirit. Hereinafter is how A.V.Dicey elaborated one after another.

[1] C.K.THAKKER(TAKWANI);LECTURES ON ADMINISTRATIVE LAW,4TH EDITION;EASTERN BOOK COMPANY.2008.
[2] The Law and the Constitution.

2.1.Supremacy of law.

This principle means that in any action or activities in the society law is the superior than anything. All in the society are ruled by law and no any discretion is allowed to supersede the law.

In his book he tried to explain that wherever there is discretion there is a room for arbitrariness which is contrary to republic government, rather it will be a monarch where the liberty of people will be at stake. Under this principle it is emphasized that a man can be charged or punished only by due process of law and for breach of law established in the ordinary legal manner before the ordinary courts of the land.

It is under this principle where the government is supposed to be subject to the law and not law subject to government. In other words the government should execute its activities in accordance with the law and not as the ruler's willness.

2.2.Equality before the Law.

This is the second principle of rule of law, which advocates that all people should be equal before the law. There should not be separate law for special people or special courts or tribunal. That means from top to lower officials all are subject to the same law and they are tried the same where acts in contrary to the laws of the land. In Tanzania this is a fundamental right entrenched under the Constitution of United Republic of Tanzania[3].According to Dicey the only organ to determining rights of individual is courts and nothing else. He criticized the method adopted by the France of having two separate organs of dealing with individual's rights, the normal courts for matters not of administration and droit administratif for administration matters. He said exemption of civil servants from the jurisdiction of the ordinary courts of law and providing them with special tribunals was the negation of equality.

2.3.Predominance of legal spirit.

[3] Article 13.

Predominance of legal spirit is another principle which in the words of Dicey is that ability to respect what has been given in the Constitution. It is for the judge to respect all things given in the constitution regardless the same is written or unwritten as in Britain. The spirit here is that judges should have a sense that their work is to preserve the rights and all principles under the constitution.

3.0.MODERN MEANING OF RULE OF LAW.

However there is another view that the term rule of law does not have a clear mening, it depends on the nation and legal tradition. According to Prof. Vijay Ghormade[4] the term has three meaning as follows.

3.1.Rule according to law.

That the government should rule as what the law provides, where no individual can be punished under criminal acts or pay damages except through following the prescribed legal procedures. When the government acts or imposes liability without adhering to the law requires, is said that it goes contrary to the rule of law. In short it needs the Government to adhere the legal procedures in its functions.

3.2.Rule under law.

This requires the government to recognize that all ruled as the law provides. This is the same as Dicey propounded that all are equal before the law. No one is above the law regardless of his/her rank.

3.3.Rule according to Higher Law.

The government according to this is required to rule not only by following what the constitution or other laws provide but through abiding to higher law. Higher law is those rights which unwritten like principles of equality, autonomy, dignity and respect. These are said to be more

[4] LLM(CA) class notice on Rule of law Mzumbe University 2011/2012.

than the written ones which are creatures of the government. If the government will execute its functions by observing what the law provides and bearing in mind these higher law the rule of law will be accomplished.

4.0.HOW COURTS PROMOTE RULE OF LAW IN TANZANIA.

The principles of Rule of law as noted above needs an organ which makes sure are preserved, promoted and maintained. The only organ which has this mandate is Court under judicially. Courts can promote the rule of law in different ways, few among them are as follows.

4.1.ENSURING FAIRNESS AND JUSTICE

Fairness and justice are two things which courts in determining different matters before it should make sure are adhered. Fairness attracts all elements of the principle of Natural justice, that is right to be heard (audi alteram partem) and no one should be a judge in his own case (nemo judex in sua causa).

4.1.1. Right to be heard.

Right to be heard or hear the other side means that both sides in the dispute should be heard before passing any order. This is the essence that fairness requires that no judgement to be passed until all the facts of the case are well known by the court and the parties. In his quotes Joseph Jourbert[5] once stated fairness requires that we don't make judgement until we know all the facts.

This means that judgments should not be passed until all the parties in the matter have given opportunity to participate in their case. Where each part will have a chance to say something and getting clarifications from the other part concerning the matter in dispute. The aim is to secure justice and prevent miscarriage of justice. In Tanzania there are many cases which have

[5] www.academicintergrity.org/fundamental (6th April,2012)

explained this right intensively, where many decisions which went against were dismissed or allowed.

Kissanga J (as he then was) in **Mahona v. University of Dar es Salaam**[6] dismissing the decision of the Minister of labour of reversing the decision of the Labour Conciliation Board which reinstated the plaintiff to the university after being terminated. On appeal to the minister by the defendant the plaintiff was not supplied by the memorandum of appeal. The judge held that there was a breach of the rule of natural justice as the grounds of appeal by the defendant were not made known to the plaintiff by the minister and the same minister proceeded to determine the appeal without hearing the applicant. The judge on underlying the importance of the rules of natural justice declared the decision of the minister as null and void.

This principle of right to be heard goes together with the need to **proper notice** of allegation. The mostly affected party before any action is taken notice should be given to show cause against the proposed action to be taken, where he will be able to produce his explanation over allegations.

It is a well settled practice that notice should be given to a party who his rights are likely to be infringed in the given matter before taking any step ahead in deciding the matter. Failure to do that will render the party unaware of the proceedings hence all the decision will be null and void.

Another important thing which form the principle of right to be heard if **Reasons of the decision**. The authority giving decision over the rights of any person involved in the dispute must make sure it provide reasons as to why such decision has been reached.

The essence of giving reasons is to allow the victim of the decision to know which grounds has been used to reach a particular decision.

[6] (1981)TLR 55.

If it happens that there is no reasons advanced towards the decision primafacie there will be an assumption that there was no god reason for such decision. Lord Upjohn in the case **Pardifield and others v. Minister of Agriculture, Fisheries and Food and Others**[7]**.**

"…if he does not give any reason for his decision a court may be at liberty to come to the conlusion that he had no good reason for reaching that conclusion."

The then Mwalusanya J in **James f. Gwagiro v. Attoney General**[8]explained it fully when required the president to provide reasons for termination of a public servant for public interest.

4.1.2. Right against bias.

This is another principle of natural justice, where it advocates that no man shall be a judge in his own cause, justice should not only be done, but manifestly and undoubtedly be seen to be done and judges should be above suspicion. In that case anything which tends or may be taken as to influence a person to decide otherwise than what the evidence and law provides.

Bias can be classified into different ways some of them are that of **pecuniary**, where a decision maker has pecuniary interest on matter before him or her. It is well settled that a person will be disqualified to handle the matter despite slight interest he has in the matter. (A) pecuniary interest however slight, will disqualify, even though it is not proved that the decision is in any way affected[9]. Coke, C.J. disallowing the decision of the College of Physicians against the doctor of Cambridge University who practiced in London without the license of the College. The College mandated by the statute which provided that half of the fine will be for the king and half for the College. The Judge held that as the college had a financial interest in its own judgement and was a judge in its own cause[10].

[7] (1968)A.C.997 P.1061.
[8]Chris Maina Peter;Human Rights in Tanzania, Selected materias;RudigerKopper Verlag.Koln; 1997.p.473 High Court of Tanzania at Dodoma, Civil Case No. 23 of 1973 (unreported)
[9] C.K.THAKKER(TAKWANI);LECTURES ON ADMINISTRATIVE LAW,4TH EDITION;EASTERN BOOK COMPANY.2008 p.179
[10] Ibid. p.179.

Personal bias is another type of bias. Different circumstances may rise to mean personal. Here a judge can be a relative, friend, business partner, professional revivary, enemity or grievances etc. Under this circumstance a judge is likely to be bias towards a one party in the matter. When it happens the court always allow the appeal on the ground of bias.

In **Jimmy David Ngonya v National Insurance Corporation Ltd**[11] The applicant was dismissed from employment as a branch manager of the respondent corporation. The Board of Directors dismissed him on the basis of an audit report whose contents were never shown to the applicant to enable him to contradict them. When the Board of Directors met to deliberate on the applicant's case, the General Manager, who had initiated the proceedings against the applicant and had commissioned the audit, was present but the applicant was absent. The applicant applied for certiorari and mandamus arguing that his dismissal was in contravention of the rules of natural justice. Bahati J.(as he then was) allowing the application he held that

> "Since the General Manager, who was in the nature of a prosecutor, was present during the deliberations of the Board which dismissed the applicant, the proceedings of the Board were vitiated by bias".

4.2.RECOGNIZING CONSTITUTION SUPREMACY.

Constitutional supremacy is a doctrine where by the constitution is supreme and the government rule in accordance with the constitution and whereas the power of government is limited by the constitution in order to escape from tyrant government hence rule of law. It is through this doctrine where the courts have the power to declare the laws passed by the parliament as unconstitutional hence null and void.

Tanzania has supremacy of the constitution whereby Constitution is the law of the land, all laws are subordinate to it. In different matters filed in court for determination, it is a settled rule that the court in interpreting the law they should interprete in accordance with the principles laid

[11] 1994 TLR 28 (HC)

down in the constitution. This was emphasizes in **Attorney General v. Lohay Akonaay and Joseph Lohay**[12] Nyalali C.J., Makame and Kisanga JJA.held that

> "The Constitution is supreme to every other law or institution and cannot be interpreted in a manner that subordinates it to any other law".

4.3.AVOIDING ARBITRARY EXECISE OF POWER.

In any country leaders are given powers or authorities to deal with different matters. Always these powers are given under specific legislation or Act. These leaders are required to use those powers as the law provides, any departure leads to arbitrary. In other words arbitrary use of power is improper use of authority by someone who has that authority because he or she holds a public office.

Where there is any arbitrary is the duty of the court to deal with it and direct the way those power was supposed to be exercised according to the law. The only thing the court is supposed to do is to show how the powers are required to be exercised. Arbitrary use of power can be of different types, some of them are as follows.

4.3.1. Non obedience of lawful order from a recognized organ of state.

This happens where somebody holding the office ignores to execute or implement any lawful order given by another organ of state like court. This is mainly done by executives where they find their interest are at stake by exercising their power contrary to requirements of law.

This started way back in 1832 in **Worcester v Georgia** where President Andrew Jackson commented negatively on enforcing the order by Supreme Court that the Georgia law dealing with the Cherokee Indians is unconstitutional and ordered the Georgia Superior court to reverse

[12] Civil Appeal No. 31 of 1994,CA(unreported)

its decision of convicting and sentencing to four years with hard labour two missionaries entered Cherokee territory without government license. The president commented that;

"Well John Marshall has made his decision, now let him enforce it"

From this comment is definitely no one will dare to start the procedures of reviewing those laws declared unconstitutional because has already shown his position.

The same position happened in Tanzania in the case of **Lesinoi Ndeinai and others v Regional Prison Officer and onother**. Two applicants who were release by the court on the ground that their arrest and dentetion was illegal. The Police and Prison officials disobeyed the order and they continued holding them without any formal charges just by mere order of the Officer Commanding District[13].

4.3.2. Exceeding the limit of their powers.

The person holding a public office and act in some matter beyond his or her power as stipulated in the law is called exceeding the power. This happens by overriding or not respecting the function of other organs of state like court and legislature. In most cases where such kind of behavior happens the court try their level best to ban though it depends from one judge and another.

In **Republic v Idd Mtengule**[14] the Area Commissioner acting in his capacity and as Party Secretary of Mpwapwa in Dodoma wrote a letter to the Primary Court magistrate to explain why he has released an accused person who has charged with selling buns(maandazi). The area commissioner banned the sale or consumption of edibles in response against the spread of cholera.

In reply the magistrate informed that what the area commissioner was doing is to interfere with the independence of judiciary. He continued that not every accused are supposed to be convicted and all accused are presumed innocent until proven contrary.

[13] Chris Maina Peter;Human Rights in Tanzania, Selected materias;RudigerKopper Verlag.Koln; 1997.p.490

[14] Ibid .P. 499.

On reviewing the case Judge in charge of the zone positively commented on the boldness of the magistrate;

> "..judiciary is supposed to be an independent institution for it is entrusted by the constitution to decide the rights, liabilities, guilty or innocence of people freely without pressures of all kind and from any corner, but it should not succumb to intimidation of any kind for otherwise individuals will go unprotected and lose confidence with judicial system".

The court also use judicial review to check whether decision made by administrative bodies are don in accordance with the law, where courts find they decided in contrary with the law decisions are declared ultra vires. The aim is to make sure all decisions are made as what the law need hence rule of law.

This was done in **Festo Barege and 794 others vs Dar es Salaam City Council**[15] the application for certiorari to quash the decision of the Dar es salaam City Council of dumping waste, prohibition to stop the City council from continuing that nuisance and Mandamus to compel the respondent to discharge its function properly by establishing and using site. It was stated by the court that;

> *"the City Council's action was ultra vires the Local Government (Urban Authorities) Act, 1982, the action was contrary to the city's master plan, not a statutory duty of respondent to create nuisance but to stop it and avoid to endanger the resident's health and article 14 of the Constitution of United Republic of Tanzania which guarantees the right to life and its protection by the society was breached".*

4.4.GUARANTOR OF PUBLIC AND INDIVIDUAL RIGHTS.

Tanzania and most of African countries have a Bill of Rights provisions in their Constitutions where by national courts are mandated to protect those human rights. Under these courts prays a great role than any other organ. Through this protection they become guarantors of public and individual's rights. Dicey A.V. under this aspect explains the role of the courts of law that are the

[15] Misc.Civil cause No.90 of 1991, HC of Tz at DSM (unreported)

guarantors of liberty. Moreover the rights will be secured more adequately if they are enforced in the court of law. Here means that it is through courts of law the rights are protected, no any other organ of state which will guarantee these rights except courts of law by enforcing them or compel to be observed.

In doing these, courts have only one duty to see whether there is any breach of human rights in the matter before them. Where there is breach courts are required to redress them and direct or declare constitutional effect of the breach. This has been done in different cases in Tanzania like **Lesinoi Ndeinai and others v Regional Prison Officer and another and Festo Barege and 794 others vs Dar es Salaam City Council (supra)**

4.5.HOLDING VIOLATORS OF LAW ACCOUNTABLE.

Rule of law requires as I have mentioned above among other things is equality before the law. That all people are equal before the law in the sense that any person who violates the law should be punished accordingly.

All people who become convicted they should face punishment of the violation they made without regarding their position. This goes hand in hand with the idea that also those who are not found to violate the law should be left free with no conditions attached to them.

Under these aspects courts should avoid engaging on technicalities which at the end of the day allows the violators to escape from the punishment provided under the law. Justice should prevail by awarding proper punishment to any person who goes against the needs of law.

Tanzanian courts have tried their level best to observe this by holding every violators of the law accountable accordingly as I have shown some cases above.

5.0.CONCLUSION.

In Tanzania rule of law as a doctrine has got a long history starting during the Party supremacy where the Party was supreme than anything in the nation. This can be seen through different acts of Area Commissioners in different areas as in **Republic v Idd Mtengule (supra). A**nother

evidence is where the party dictated the legislature what to do and not to do through threats. This happened in 1968 when the party wanted to increase the number of seats in the parliament, some members opposed on the ground of expense. The parliamentary Secretary warned them by saying,

> "Mr. Speaker, I want to make it clear that it is the party which is supreme and all the MPs are expected to work under the leadership and guidance of the party...and the party has the right to Displine you and dictate your tasks….it is beyond any doubt that this parliament belongs to TANU"[16].

During this time Rule of law was a mere sentence which did not have any substance on it. The government officials did what they wanted under the cover of Party supremacy. It was this time where detention and deportation were prevalent.

However things were not static, changes slowly started when Bill of Rights was enacted in 1984 during the 5th Constitution amendment and started its operations. Here is where bold judges started to show the government how it should govern according to law. Many deportation and detention cases were nullified on the ground of unconstitunality of the laws.

The most respected decision which the Court stated clearly how the Government should govern on the ambit of rule of law **is Chumchuwa s/o Marwa v. officer incharge of Musoma Prison and Another**[17]. Hon. Mr. Justice James L. Mwalusanya held;

> "I believe that rule of law means more than acting in accordance with the law. The rule of law must also mean fearless of the government…should extent to the examination of the ideal and that the law does not give the government too much power. The Rule of law is opposed to the rule of arbitrary power. The Rule of law requires that the government should be subject to the law rather than the law subject to the government. If the law is wide enough to justify a dictatorship then there is no rule of law. Therefore if by the rule of law all it means is that the government will operate in accordance with "the law" then

[16] Chris Maina Peter;Human Rights in Tanzania, Selected materias;RudigerKopper Verlag.Koln; 1997.p.7.
[17] High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988 (unreported)

the doctrine of rule of law becomes a betrayal of the individual if the laws themselves are not fair but are oppressive and degrading."

It is from this decision I can say most of rulers knew how to work according to law and what is most important is that though ruling according to law those law should be fair and not oppressive.

It is my observation that Tanzania Government ruled according to law however most of laws were unfair and oppressive as mentioned above. It is through stiff antagonist/ battle of court and judiciary in general against the Government towards observation of rule of law, where the government decided to have a commission to check all law and indicate which laws are against rule of law. The Commisssion was under chairmanship of Judge Nyalali, the commission was b randed Nyalali Commission. Under this commission laws which appeared to be unjust were listed down for amendments or repeal. As time went on the government repealed most of laws mentioned in the report leaving very few which are not used mostly.

Therefore through all above it is my observation that Court have played a great role in promoting the Rule of law. It has done this through decision of different cases and commissions made by government under the chairmanship of judicial officers.

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