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Mini-Dissertation (MND802)

The implementation by Tanzania of orders of the African Court on Human and Peoples' Rights requiring constitutional and legislative reform

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Dedication

To all the progeny of Mzee Tito Magoti Snr., with love.

Acknowledgements

Asante sana to the Almighty God for allowing me to write this paper.

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My family, friends in the 2024 HRDA legion and all my comrades, I value your camaraderie.

Abstract

The African Court on Human and Peoples' Rights (Court) has, in 25 decisions, ordered Tanzania to take legislative (and constitutional) measures to align several laws with the Charter. The decisions are thematically divided into those dealing with criminal justice (15 with the abolition of the death penalty, two with the right to bail, two with the right to legal representation, two with abolition of corporal punishment, one with access to judicial remedies) and one with election management. Two more decisions deal with the right to participate in government.

This study finds that Tanzania has partially implemented orders in two instances: the orders in one case related to legal representation, through the enactment of the Legal Aid Act (of 2017); and in the case concerning electoral management, by setting qualifications and positions for civil servants who would be appointed as election directors. This is a total of two orders out of 25 being partially implemented. The hindrances to implementing Court orders include Tanzania's failure to establish effective democracy and governance institutions, such as the parliament and the judiciary, which would guard rights and promote government accountability. There are also factors relating to the Court, such as inadequacies in enforcing its decisions and not having an appellate chamber. This study recommends that Tanzania promulgate a new constitution with a comprehensive Bill of Rights to effectively guard rights, promote the independence of the judiciary and the checks and balance role of the parliament as well as the accountability of the Government. It is also recommended that Tanzania establish a domestic oversight mechanism to monitor the implementation of Court orders, bolster the role of the Commission for Human Rights and Good Governance in monitoring the implementation of treaty obligations and protection of human rights and ensure effective citizen participation in government.

Acronyms

AU – African Union

CAT – Court of Appeal of Tanzania

CPA – Criminal Procedure Act

ICCPR – International Covenant on Civil and Political Rights

INECA – Independent National Electoral Commission Act

LHRC – Legal and Human Rights Centre

NEA – National Election Act

THRDC – Tanzania Human Rights Defenders Coalition

TLS – Tanganyika Law Society

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Chapter 1: Introduction

1.1 Brief background

The African Court on Human and Peoples' Rights (Court) was established to enhance the protection of human rights and the delivery of effective remedies in cases of human rights violations.[1] The Court has issued several decisions and orders against the United Republic of Tanzania.[2] However, this study focuses only on decisions in which the Court ordered Tanzania to adopt legislative and constitutional reforms to bring its laws in conformity with international human rights standards.

Through 25 decisions rendered as of July 2024, the Court has ordered Tanzania to take constitutional and legislative reforms.[3] For clarity, in this study, Court orders are referred to as legislative or constitutional reform orders, as the case may be. Two of the 25 Court orders, of which one is a consolidated matter, direct constitutional reform measures relating to political participation. The remaining 23 orders pertain to legislative reforms. Thematically these orders deal with criminal justice or access to justice (15 with the abolition of the death penalty, two with the right to bail, two with the right to legal representation, two with abolition of corporal punishment, one with access to judicial remedies) and one with election management. Below is a brief discussion of the cases.

[1] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights of 2020, art 2.

[2] From the Registrar of the Court in a lecture to master of laws (Human Rights and Democratisation in Africa) students at the University of Pretoria, as of March 2024, 156 cases (46%) filed before the Court are against Tanzania. 12 out of 17 reparation judgments (70.6%) are against Tanzania. Also, 18 out of 25 judgments on merit (72%) are against Tanzania. Moreover, 71 out of 95 merits and reparation judgments (74.7%) are against Tanzania, and 24 of the 80% provisional measure orders (30%) are against Tanzania.

[3] https://www.african-court.org/cpmt/decisions (accessed 17 July 2024).

1.2 Description of decisions against Tanzania ordering legislative and constitutional reforms

1.2.1 Constitutional measures

The Court in its first-ever case ordered Tanzania to amend its Constitution. In *Reverend Christopher R. Mtikila v The United Republic of Tanzania,*[4] consolidated with the matter of the *Tanganyika Law Society and Legal and Human Rights Centre v The United Republic Tanzania,*[5] Tanzania was ordered to amend articles 39, 67 and 77 of its 1977 Constitution (Constitution) which prohibits independent candidates from running for elections. The Court found that the restriction of independent candidates violated the right against discrimination, the right to freedom of association, and the right to freely participate in government as guaranteed under articles 2, 10 and 13(1) of the African Charter on Human and Peoples' Rights (Charter), respectively.[6] Tanzania was ordered to amend its Constitution within a reasonable time.[7]

The Court in *Jebra Kambole v The United Republic of Tanzania*[8] found the prohibition under article 47(1) of the Constitution against challenging results of presidential election in courts of law unjustified, unnecessary and unreasonable in a democratic society,[9] for violating the right against discrimination (article 2 of the Charter) and the right to be heard (article 7(1)(a) of the Charter). Tanzania was ordered to amend its Constitution to remove the prohibition.

[4] (merits) (2013) 1 AfCLR 34.

[5] (merits) (2013) 1 AfCLR 34.

[6] *Mtikila* (n 4) para 126(1) (2).

[7] *Mtikila* (n 4) para 126(3).

[8] (judgment) (2020) 4 AfCLR 460.

[9] *Kambole* (n 8) para 106.

1.2.2 Legislative measures

In the case of *Ally Rajabu and Others v United Republic of Tanzania*,[10] the Court found that section 197 of the Tanzania Penal Code, which provides for mandatory death penalty for the offence of murder without allowing courts to consider the peculiar circumstances of the case or mitigation, violates the right to life guaranteed under article 4 of the Charter.[11] Equally, the Court found that death by hanging is inhumane and degrading treatment prohibited under article 5 of the Charter.[12] Tanzania was ordered to amend section 197 of its Penal Code to align it with articles 4 and 5 of the Charter.[13]

After the Rajabu decision, the Court issued 14 more decisions ordering the amendment of section 197 of Tanzania's Penal Code.[14] However, Tanzania retains the impugned section.

[10] (merits and reparations) (2019) 3 AfCLR 539.

[11] *Rajabu* (n 10) para 114.

[12] *Rajabu* (n 10) para 118-119.

[13] *Rajabu* (n 10) para 171(xv).

[14] *Nzigiyimana Zabron v United Republic of Tanzania* (judgment) (2024) AfCHPR 12; *Dominick Damian v The United Republic of Tanzania* (merits and reparation) (2024) AfCHPR 8; *Crospery Gabriel and Ernest Mutakyawa v United Republic of Tanzania* (merits and reparations) (2024) AfCHPR 4; *Romwad William v United Republic of Tanzania* (Merits and reparations) (2024) AfCHPR 4; *Deogratias Nicholaus Jeshi v United Republic of Tanzania* (merits and reparations) (2024) AfCHPR 2; *Ibrahim Yusuf Calist Bong and 2 Others v United Republic of Tanzania* (merits and reparations) (2023) AfCHPR 46; *Kachukura Nshekanabo Kakobeka v United Republic of Tanzania* (merits and reparations) (2019) AfCHPR 14; *Makungu Misalaba v United Republic of Tanzania* (merits and reparations) (2023) AfCHPR 40; *John Lazaro v United Republic of Tanzania* (merits and reparations) (2023) AfCHPR 35; *Chrizant John v United Republic of Tanzania* (merits and reparations) (2023) AfCHPR 44; *Ghati Mwita v United Republic of Tanzania* (judgment) (2023) AfCHPR 9; *Marthine Christian Msuguri v United Republic of Tanzania* (merits and reparations) (2022) AfCHPR 36; *Gozbert Henrico v United Republic of Tanzania* (merits and reparations) (2022) AfCHPR and *Amini Juma v United Republic of Tanzania* (merits and reparations) (2023) AfCHPR 10.

In the case of *Bob Chacha Wangwe and Legal and Human Rights Centre v United Republic of Tanzania*,[15] the Court found sections 6(1), 7(2), and 7(3) of the Tanzania National Election Act (NEA) violative of the right to participate in government, contrary to article 13(1) of the Charter. Section 6(1) does not prescribe qualifications of persons to be appointed as election directors. Also, sections 7(2) and 7(3) of the NEA violate the Charter for not prescribing positions of public servants who qualify as returning officers and their qualifications.[16] Tanzania was ordered to amend the impugned provisions within two years.

In *Anudo Ochieng Anudo v United Republic of Tanzania*,[17] Tanzania was ordered to amend its citizenship legislation to provide room for judicial remedies in the event one's citizenship is outright revoked by the Minister.[18]

In two more cases, Tanzania was ordered to remove corporal punishment from its laws.[19] The Court held that implementing corporal punishment on an offender below the age of 18 as an alternative to a capital sentence violates article 5 of the Charter which prohibits torture, degrading and inhumane treatment.[20]

[15] (merits) (2023) AfCHPR 14

[16] *Wangwe* (n 15) para 112.

[17] (merits and reparations) (2021) AfCHPR 2.

[18] Tanzania Citizenship Act of 1985, s 23, http://citizenshiprightsafrica.org/wp-content/uploads/2016/08/Tanzania-Citizenship-Act-1995.pdf (accessed 30 August 2024).

[19] *Yassin Rashid Maige v United Republic of Tanzania* (merits and reparations) (2023) AfCHPR 28.

[20] *Kabalabala Kadumbagula and Daud Magunga v The United Republic of Tanzania* (merits and reparations) [2024] AfCHPR 11.

Tanzania has also been ordered to ensure mandatory legal aid to persons accused of serious offences attracting heavy sentences.[21] The 2017 Legal Aid Act was enacted as a reaction to the order of the Court in the case of *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*.[22] Yet, it is not aligned with the right to defence guaranteed under article 7(1)(c) of the Charter. The order is to be implemented by November 2025.[23]

In two other cases relating to the right to bail,[24] the Court found that section 148(5) of the Criminal Procedure Act violates the right to non-discrimination (article 2 of the Charter) for prohibiting bail on a sweeping generalisation for certain offences. It also violates article 7(1) of the Charter for non-involvement of courts in granting or denying bail, violates the right to be heard and the presumption of innocence contrary to article 7(1)(b) of the Charter. Tanzania was ordered to amend the impugned provision.

As of July 2024, the Court issued 25 decisions against Tanzania, ordering constitutional and legislative reforms. It is unclear whether the orders have been fully implemented. This study thus investigates the extent of implementation, hindrances and opportunities for Tanzania to implement Court orders.

[21] *Hassan Bundala Swaga v United Republic of Tanzania* (merits and reparations) [2023] AfCHPR 38.

[22] African Court on Human and Peoples' Rights 'Activity Report of the African Court on Human and People's Rights' (2018) p 19 https://www.african-court.org/wpafc/wp-content/uploads/2020/05/Activity-report-January-December-2018.pdf (accessed 28 August 2024). See also *Nganyi* (merits) (2016) AfCLR 308.

[23] *Swaga* (n 21).

[24] *Legal and Human Rights Centre and Tanzania Human Rights Defenders Coalition v The United Republic of Tanzania* Appl 039/2020 (merits and reparations) [2023] AfCHPR 16 and *John Mwita v The United Republic of Tanzania* Appl 007/2016 (merits and reparations) (2023) AfCHPR 9.

1.3 Statement of problem

The Court has issued 25 decisions ordering Tanzania to take legislative and constitutional reform measures. However, the orders have received limited implementation. This study seeks to find out the extent to which the orders have been effectively implemented. It will also delve into factors hindering the implementation of Court orders. In the end, the study will explore opportunities for Tanzania to best implement orders of the Court.

1.4 Research questions

This study seeks to respond to two research questions:

i) To what extent has Tanzania implemented the orders of the African Court requiring legislative or constitutional reforms?

ii) What factors hinder and would galvanise the implementation of these orders?

1.5 Literature review

There is limited literature specifically relating to Tanzania's implementation of orders of the Court in general, and orders requiring Tanzania to take legislative measures in particular. While the decisions and orders of the Court bind the parties,[25] there is limited implementation. Scholars associate the limited implementation of orders of the Court with the lack of an effective enforcement mechanism.[26] The Court is faced with challenges to its operations, including pushback and retaliation from some member states, and has seen several countries

[25] Court Protocol (n 1) arts 28(2) and 34.

[26] AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* p 28 https://www.ahrlj.up.ac.za/images/ahrlj/2016/AHRLJ%201_2016.pdf (accessed 9 October 2024).

withdrawing access for individuals and civil societies.[27] Adjolohoun looks into the wider inward and outward factors impacting disengagement from the Court, some of which are purely political, such as states' unwillingness to be held to account.[28] Pulling out of the Court is thus a means to evade accountability in the name of sovereignty.

Makunya suggests that the Court has been dynamic while states are increasingly inventing means of running from their obligations under international human rights law.[29] It is why, for instance, Tanzania joined states that recently withdrew the declaration that allowed individuals and NGOs to have direct access to the Court.

1.6 Methodology

This is a critical study which seeks to assess the extent to which Tanzania has effectively implemented legislative orders of the Court. The study assesses the implementation of 25 orders of the Court against Tanzania, with the view to finding the extent to which such orders have been acted upon.

The study investigates factors contributing positively or negatively to implementation by analysing literature and scholarly writings on the implementation of the decisions of the Court.

[27] HS Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* p 5 https://scielo.org.za/pdf/ahrlj/v20n1/02.pdf (accessed 10 October 2024).

[28] Adjolohoun (n 27).

[29] TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* p 1231.

The website of the Court will be useful for obtaining decisions. Moreover, Tanzania's legal information website owned by the judiciary of Tanzania will help to assess the progress in individual laws that the Court directed amendments. Also, to better understand the context, the study will monitor progress from political commitments or pledges by the executive on the directed reforms.

1.7 Theoretical approach

This theoretical approach adopted in this study centres around the effectiveness of international human rights law, which is, in this context, dependent on the interactive role played by the domestic legal and socio-political environment as well as international human rights law. Scholars have argued for and against bottom-up and top-down perspectives to weighing the effectiveness of human rights law, noting that the top-down perspectives underscore that international law and institutions significantly influence domestic approaches to human rights and reforms, shaping institutional cultures of organs like the executive and the judiciary.[30] On the other hand, the bottom-up approach looks at the role of grassroots mobilisation and its effect on shaping domestic respect for human rights, and social progress.[31]

Ignatieff suggests that bottom-up approaches have proved to be an effective way of spearheading solidarity, somewhat ridiculing the elite conceptualisation of rights.[32] De Burca advances a theory of the effectiveness of international human rights law, which is interactive, a mix of social justice movements, civil society advocacy groups and international norms.[33] De

[30] M Nowak 'The need for a world court of human rights' (2007) 7 *Human Rights Law Review* p 251.
[31] S Hopgood *The endtimes of human rights* (2013) cited by Nowak (n 31) p 10
[32] J Klabbers & M Ignatieff 'The ordinary virtues, moral order in a divided world (2018) 29 *European Journal of International Law* p 668-669.
[33] G de Burca *The effectiveness of human rights* (2021) p 10 https://doi.org/10.1093/oso/9780198299578.003.0002 (accessed 19 October 2024).

Burca emphasises the need for domestic human rights movements to not dismiss the role of international human rights law and institutions in bringing about real changes driven by interactive and iterative dynamics.[34] As such, this study too observes that Tanzania's obligation to implement orders of the Court is dependent on several factors, including the role of the legislature to hold the government to account, the judiciary to protect and create a domestic culture of respect for human rights, and a society that effectively participates in government.

So, this study is premised on the importance of domestic state actors in ensuring that Tanzania implements Court orders. There are, however, notable limitations to the reliance on state actors, which calls for concerted efforts and support of other non-state actors like the media, independent state institutions like the Commission for Human Rights and Good Governance and civil society groups.

1.7 Overview of mini-dissertation structure

The introductory chapter offers the study background description of decisions the Court ordering Tanzania to take legislative and constitutional reform measures, problem statement, research questions and methodologies. Chapter 2 traces the implementation of the 25 Court orders, considering both legal and extra-legal developments. The aim is to ascertain if measures ordered by the Court have been taken or if there is a process towards that objective. Chapter 3 delves into factors hindering the effective implementation of Court orders. It considers internal (domestic) and external factors. Chapter 4 discusses the opportunities for Tanzania to effectively implement orders of the Court. Chapter 5 concludes the study and recommends several actions in light of the findings.

[34] Burca (n 33) p 12

Chapter 2: Implementation of Court decisions directing legislative and constitutional reforms

2.1 Introduction

This Chapter traces the extent to which the 25 Court orders relating to legislative and constitutional reforms against Tanzania have been implemented. As observed by Hawkins and Jacoby in their study on partial compliance, it is essential to note that compliance, just like implementation, may be broken down into several degrees: partial compliance, non-compliance and full compliance,[35] which may also be further subdivided. Despite being common in many jurisdictions and preferred by states, Hawkin and Jacoby add that partial compliance is a relatively stable endpoint, likely to inspire convergence of domestic standards to the direction of international law.[36] Similarly, out of the 25, only two orders relating to election management and legal aid provision have been partially implemented by Tanzania.

Since Tanzania withdrew individuals' and NGOs' direct access to the Court,[37] its effects and relatability to implementing the Court's orders are equally explored. Specific legal and extra-legal developments in reaction to the Court's orders are identified and analysed.

2.2 Tanzania's withdrawal of individual and NGOs' access to Court

Tanzania withdrew a declaration deposited to allow individuals and non-government organisations (NGOs) to directly access the Court in 2019.[38] As a result, individuals and NGOs have no direct access to the Court for cases filed against Tanzania. However, the Court has

[35] D Hawkins & W Jacoby 'Partial compliance: a comparison of the European and Inter-American Courts of Human Rights' (2010) 6 *Journal of International Law and Relations* p 36.
[36] Hawkin & Jacoby (n 35).
[37] Withdrawal notice was communicated to the Office of the Secretary General of the African Union Commission on 21 November 2019 https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 7 August 2024).
[38] Court Protocol (n 1) art 34(6).

established a position that a member State's withdrawal of the article 34(6) declaration does not affect cases already decided, pending at the Court at the time of withdrawal and cases submitted within the one-year notice period.[39]

Tanzania's Solicitor General has noted that the withdrawal of the declaration does not affect pending cases and existing Court orders.[40] Thus, Tanzania is required to implement Court orders, including those issued after the withdrawal took effect. While the withdrawal of the declaration remains Tanzania's prerogative, it is a shame for a host country to sabotage regional judicial mechanisms,[41] amidst the growing appetite for redress from the Court by its citizens. Data from the Court indicates that Tanzania has the majority of cases (46%) filed before the Court as of April 2024.[42] It could be argued that limiting NGOs and individuals' access to the Court denies access to justice to potential litigants.[43]

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[39] *Ingabire Victoire Umuhoza v Rwanda* (merits) (2017) AfCLR 2 para 67-68. See also, *Andrew Ambrose Cheusi v United Republic of Tanzania* (2020) ACtHPR 4 para 38.

[40] A Luke 'Tanzania in the spotlight for 'withdrawal' from Arusha-based human rights court' *The EastAfrican* (Nairobi) 6 November 2021 https://www.theeastafrican.co.ke/tea/news/east-africa/tanzania-withdrawal-from-arusha-based-human-rights-court-3609834 (accessed 7 August 2024).

[41] L Francis 'Legal Scholars Frustrated by Tanzania's 'Sabotage' of Judicial Mechanisms: 'It's a Shame' *The Chanzo* (Dar es Salaam) 17 April 2024 https://thechanzo.com/2024/04/17/legal-scholars-frustrated-by-tanzanias-sabotage-of-judicial-mechanisms-its-a-shame/ (accessed 12 August 2024).

[42] Registrar of the Court (n 3). See also N de Silva 'Individual and NGO access to the African Court on Human and Peoples' Rights: The latest blow from Tanzania' *Blog of the Europen Journal of International Law* (16 December 2019) https://www.ejiltalk.org/individual-and-ngo-access-to-the-african-court-on-human-and-peoples-rights-the-latest-blow-from-tanzania/ (accessed 29 August 2024) and Amnesty International 'Tanzania: Withdrawal of individuals rights to African Court will deepen repression' 2 December 2019 https://www.amnesty.org/en/latest/press-release/2019/12/tanzania-withdrawal-of-individual-rights-to-african-court-will-deepen-repression/ (accessed 12 August 2024).

[43] https://www.chr.up.ac.za/news-archive/2019/1916-press-statement-centre-for-human-rights-expresses-concern-about-tanzania-s-withdrawal-of-access-to-the-african-court-by-individuals-and-ngos (accessed 12 August 2024).

Tanzania's withdrawal notice states that 'the declaration was implemented contrary to the reservations submitted by Tanzania when it was made'.[44] The declaration had two reservations. One is that the Court should only determine cases once all domestic legal remedies have been exhausted and the second is that the Constitution should be adhered to.[45] Tanzania's declaration withdrawal was widely criticised. For instance, the legality of the reservations was questioned, which Ajdolohoun thinks is illicit because it touches on the material jurisdiction of the Court as it empties the object and purposes of the declaration.[46]

Nevertheless, the role of the Court in spearheading legal development on the continent, including in Tanzania, cannot be underestimated.[47] The Court has delivered significant decisions against Tanzania which calls the country to adopt international human rights standards relating to criminal justice, elections management and governance, as discussed in this study.

[44] The United Republic of Tanzania 'Notice of withdrawal of the declaration made under article 34(6) of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights' (2019) https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 26 August 2024)

[45] The United Republic of Tanzania 'Declaration' *Ministry of Foreign Affair* (Dar es Salaam) 9 March 2010 https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Declaration_Tanzania.pdf (accessed 26 August 2024).

[46] Adjolohoun (n 27) p 9 & 32 https://orcid.org/0000-0002-9251-6068 (accessed 30 September 2024).

[47] SH Adjolohoun & P Nantulya 'Why the African Court on Human and Peoples' Rights matters' (2024) *African Centre for Strategic Studies*, https://africacenter.org/spotlight/african-court-on-human-and-peoples-rights/#:~:text=The%20African%20Court's%20mission%20is,of%20the%20legitimate%20aspirations%20of (accessed 12 August 2024). See also, Activity Report of the African Court (n 22) (2023) para 85 https://www.african-court.org/wpafc/wp-content/uploads/2024/04/EX-CL-1492-XLIV-Report-AfCHPR-_-EN.pdf (accessed 26 August 2024).

2.3 Implementation of Court orders against Tanzania

The 25 orders considered in this study relate to political participation and criminal justice. The discussion below traces their implementation.

2.3.1 Orders relating to political participation

The Court has ordered Tanzania to amend its Constitution to allow independent candidates to run for elections and the outcomes of presidential elections to be petitioned in courts. Another order relates to the appointment and qualifications of the election management officials, as we see below.

a) Amendment of articles 39, 67 and 77 of Tanzania's 1977 Constitution

In the consolidated matter of *Mtikila*[48] and *TLS,*[49] Tanzania was ordered to amend articles 39, 67, and 77 of its 1977 Constitution[50] to allow independent candidates to run in general and local government elections.[51] Mtikila's application was triggered by the 1992 Eighth Constitutional Amendment Act that required all candidates to be members and be sponsored by a political party.[52] The amendment affected section 39 of the Local Government Authorities (Elections) Act of 1977. Mtikila challenged the amendment in the High Court, contending they are null and void.[53] The amendment was declared unconstitutional.[54]

Mtikila's victory was short-lived. Before the decision was pronounced, the Attorney General tabled a Bill in the Parliament which had the effect of nullifying the rights of independent

[48] Appl 011/2011.

[49] Appl 009/2011.

[50] Introduced by the Eighth Constitutional Amendment Act of 1992.

[51] *Mtikila* (n 4) para 126(3).

[52] *Mtikila* (n 4) para 67.

[53] *Rev Christopher Mtikila v The Attorney General* 1993 (5) HCT.

[54] *Mtikila* (n 53).

candidates to run for elections.[55] Article 21(1) of the Constitution and the 1993 decision of the High Court, all allowing independent candidates, were amended and nullified as the Bill was passed into law.

Mtikila further approached the High Court petitioning articles 39, 67, and 77 of the Eleventh Constitutional Amendment Act of 1994 which prohibited independent candidates.[56] The High Court granted Mtikila's petition, noting that the amendments violated the rights of independent candidates.[57] The Attorney General challenged *Mtikila's* High Court decision in the Court of Appeal of Tanzania (CAT).[58] The CAT overturned the High Court decision, noting that the matter is political and should be resolved through the parliament.[59]

Mtikila resorted to the Court, joining the TLS and Human Rights Centre (LHRC), to challenge the ban on independent candidates.[60] Their applications were consolidated.[61] The Court allowed the application on account that the ban on independent candidates violated the applicant's rights, including equality before and equal protection of the law, the right to freely associate, and the right to participate in government guaranteed under articles 2, 3, 10 and 13(1) of the Charter.[62] Tanzania was ordered to amend articles 39, 67 and 77 of its 1997

[55] Eleventh Constitutional Amendment Act 34 of 1994.

[56] *Christopher Mtikila v The Attorney General* 2005 (10) HCT.

[57] *Mtikila* (n 56).

[58] *The Honourable Attorney General v Reverend Christopher Mtikila* 2009 (45) CAT.

[59] *Mtikila* (n 58).

[60] *TLS* (n 5 & 49).

[61] *TLS* (n 5 & 49).

[62] *Mtikila* (n 4) paras 126(1) & (2).

Constitution to allow independent candidates to run for elections within a reasonable time.[63] Tanzania was also ordered to amend section 39 of the Local Authorities (Elections) Act 1979.[64]

Progress

Since *Mtikila's* decision was handed, Tanzania has conducted two local government and general elections, maintaining the ban on independent candidates. Tanzania is headed to another election circle in November 2024 and October 2025.[65] However, there is no evidence to signal that independent candidates will be allowed.

While the Court did not specify the time within which to amend the Constitution to allow independent candidates, it is unconvincing that the 'reasonable time'[66] anticipated has not lapsed. Equally, the recent amendments to electoral laws, the Independent National Elections

[63] *Mtikila* (n 4) para 126(3).

[64] *Mtikila* (n 4) para 126(3).

[65] https://www.ndi.org/2025-tanzania-general-election (accessed 26 August 2024).

[66] *Mtikila* (n 4).

Committee Act,[67] the Political Parties Act[68] and the Presidential, Parliamentarians and Ward Councillors Elections Act[69] did not address the ban on independent candidates.[70]

Understandably, the reforms ordered by the Court require constitutional review. Tanzania has indicated that it could repeal the ban through its constitutional review process.[71] The three progress reports submitted to the Court in 2015, 2016 and 2017 indicate that the implementation of the order was dependent on the outcome of the referendum on the proposed Constitution which had a provision to allow independent candidates.[72] However, the 2012-14 constitutional review process did not succeed[73] as the sittings of the National

[67] 2 of 2024 https://www.parliament.go.tz/polis/uploads/bills/acts/1712044368-ACT%20NO.%202%20OF%202024%20SHERIA%20YA%20TUME%20YA%20TAIFA%20YA%20UCHAGUZI%20YA%20MWAKA%20202.doc%20chapa%20dom%20(1).pdf (accessed 26 August 2024).

[68] 3 of 2024 https://www.parliament.go.tz/polis/uploads/bills/acts/1712043990-ACT%20NO.%203%20OF%202024%20THE%20POLITICAL%20PARTIES%20AFFAIRS%20LAWS%20(AMENDMENT)%20ACT%202024.docx%20chapa%20dom.pdf (accessed 26 August 2024).

[69] 1 of 204 https://www.parliament.go.tz/polis/uploads/bills/acts/1712042493-ACT%20NO.%201%20OF%202024%20SHERIA%20YA%20UCHAGUZI%20WA%20RAIS,%20WABUNGE%20NA%20MADIWANI%20YA%20MWAKA%202024.doc%20chapa%20dom.pdf (accessed 26 August 2024).

[70] A Kwayu 'Tanzania's election laws make it hard to build political opposition – what needs to change' *The Conversation* July 2024, https://theconversation.com/tanzanias-election-laws-make-it-hard-to-build-political-opposition-what-needs-to-change-233995, (accessed 8 August 2024).

[71] Activity Report of the Court 2018 (n 22). See also Proposed Constitution, of 2014, arts 82(2)(b), 85(1)(f), 86(2), 97(2)(3), 138(g) & 210, https://constitutionnet.org/sites/default/files/rasimu_ya_katiba_inayopendekezwa_na_bunge_maalum_1.pdf (Accessed 12 August 2024).

[72] Activity Report of the Court (n 22).

[73] E Kabendera 'Tanzania: as a constitutional reform stall, Jakaya Kikwete risks losing his legacy' *African Arguments* 2 October 2024 https://africanarguments.org/2014/10/tanzania-as-constitutional-reform-stalls-jakaya-kikwete-risks-losing-his-legacy-by-erick-kabendera/ (accessed 29 August 2024).

Assembly were boycotted.[74] It is uncertain whether the referendum will occur or a new process will be conducted.

Tanzania's reluctance to amend its Constitution to allow independent candidates to run for elections has necessitated the TLS and LHRC to file an application before the Court to enforce the *Mtikila* decision.[75] The duo seeks an order to compel Tanzania to implement the *Mtikila* decision. They prayed for provisional measures to stay the 2020 Tanzania general election to prevent further violations of the right to participate in government. However, the order was not granted. The Court did not see the necessity, urgency or interests that could be prejudiced.[76] The main case is pending before the Court.[77]

b) Amendment of article 41(7) of the Tanzania's 1977 Constitution

In the case of *Jebra Kambole v The United Republic of Tanzania*,[78] the Court ordered Tanzania to amend article 47(1) of its Constitution to allow the outcomes of presidential elections to be challenged in courts.[79] Article 47(1) of the Constitution does not allow courts to inquire into the outcomes of the presidential election once announced by the Electoral Commission.[80]

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[74] S Maoulidi 'The ukawa boycott and Tanzania's constitutional impasse' *Constitutionnet* 29 August 2014, https://constitutionnet.org/news/ukawa-boycott-and-tanzanias-constitutional-impasse (accessed 12 August 2024).

[75] *Legal and Human Rights Centre & Tanganyika Law Society v United Republic of Tanzania* Appl 036/2020, https://www.african-court.org/cpmt/details-case/0362020 (accessed 29 August 2024).

[76] *LHRC* (n 75) (provisional measures) (2020) 4 AfCLR p 27-29 https://www.african-court.org/cpmt/storage/app/uploads/public/5fb/cc6/7ac/5fbcc67ac4630276346380.pdf (accessed 29 August 2024).

[77] *LHRC* (n 75).

[78] *Kambole* (n 8).

[79] *Kambole* (n 8) para 118.

[80] *Kambole* (n 8) para 4.

Kambole asserted that the prohibition violated his right to equal protection before the law and the right to be heard as provided under article 3(2) and 7(1) of the Charter.[81]

The Court found that article 47(1) of the Constitution violates the right to freedom from discrimination (article 2 of the Charter).[82] Also, the right to be heard and access remedies before courts under article 7(1)[83] as well as article 1 of the Charter were violated.[84] Tanzania was ordered to amend its Constitution within a reasonable time to remedy the violations.[85]

Progress

Four years after the order was issued, Tanzania maintains the ban on presidential election results to be petitioned in courts. It is imperative to note that the Proposed Constitution has a provision allowing presidential election results to be petitioned before the High Court.[86] However, as noted earlier, the constitution-making process was taken off the agenda even before a referendum could be held.[87]

It is fair to say, as seen with the previous order, that once a new Constitution is promulgated, the order under this section could be implemented. The challenge is that the Government of Tanzania through the Justice Minister suspended the constitutional review process for a

[81] *Kambole* (n 8) para 4.

[82] *Kambole* (n 8) para 3.

[83] *Kambole* (n 8) para 104.

[84] *Kambole* (n 8) para 108.

[85] *Kambole* (n 8) para 118.

[86] Proposed Constitution (n 64) art 87 https://constitutionnet.org/sites/default/files/rasimu_ya_katiba_inayopendekezwa_na_bunge_maalum_1.pdf (accessed 12 August 2024). See also, minority Proposed Constitution of 2014 art 81, https://www.policyforum-tz.org/sites/default/files/RASIMU%20YA%20KATIBA%20TOLEO%20LA%20PILI.pdf (Accessed 12 August 2024).

[87] Kabendera (n 73).

reason that citizens need civic education first.[88] The Minister's direction was premised on the recommendation of a presidential task force which proposed that a new constitution should be written after the 2025 general election.[89] However, the statement by the Minister is a bit confusing because Tanzania already undertook a constitution-making process in 2012/14.[90] it was not a requirement that people are given civic education before a constitution is written. It remains to be seen if, after three years of civic education, a new Constitution will be promulgated, removing the prohibition to challenge presidential election results in courts.

c) Amendment of sections 6(1), 7(2) and 7(3) of the then National Election Act

The Court ordered Tanzania to amend sections 6(1), 7(2), and 7(3) of its NEA to prescribe qualifications of persons to be appointed election directors and prescribe positions of public servants who qualify as returning officers.[91] The order seeks to ensure the credibility and integrity of the election management body. Tanzania is expected to implement the order of the Court within a reasonable time and without undue delays.[92]

Progress

It is pertinent to note that the NEA, which was litigated in the *Wangwe* case before the Court, was repealed by the enactment of the Independent National Election Commission Act

[88] Oxford Analytica 'Tanzanians may have to wait for a new constitution' (2023) https://www.emerald.com/insight/content/doi/10.1108/OXAN-ES281595/full/html (accessed 12 August 2024).

[89] B Karahan 'Taskforce says new constitution to take time to draft' *The Citizen* (Dar es Salaam) 22 October 2024, https://www.thecitizen.co.tz/tanzania/news/national/taskforce-says-new-constitution-to-take-time-to-draft-3993498 (accessed 13 August 2024).

[90] M Juliana & U Wanitzek 'Constitutional reform in Tanzania: Developing process and preliminary results' (2015) 48 *Verfassung Und Recht in Übersee* p 330 & 131, http://www.jstor.org/stable/26160033 (accessed 12 August 2024).

[91] *Wangwe* (n 15) para 138.

[92] *Wangwe* (n 15) para 138.

(INECA).[93] The INECA captures the order of the Court relating to prescribing the manner of appointment and qualifications of election directors. Section 17 of the INECA provides that (1) the election directors shall be appointed by the President based on the recommendations of the Independent National Electoral Commission; and (2) further provides for the qualifications of persons to be appointed as election directors, including being a citizen of the United Republic of Tanzania by birth, a person of integrity, holding a bachelor's degree from a recognised University, as well as being a senior civil servant.[94] As such, the INECA only addresses one aspect of the order of the Court, that is section 7(3) of the then NEA. Section 6(1) and 7(2) remains unamended.

The qualification under section 17 of the INECA applies to members of the Independent National Election Commission (INEC) under section 7(1) and (2). Chairperson, Vice-Chairperson and members of the INECA shall be appointed by the President upon qualifying an interview by the vetting committee.[95] The INEC prescribes the manner of appointment and qualifications of election directors.[96] However, INEC does not prescribe qualifications for civil

[93] Independent National Electoral Commission Act 2 of 2024, https://www.parliament.go.tz/polis/uploads/bills/acts/1712044368-ACT%20NO.%202%20OF%202024%20SHERIA%20YA%20TUME%20YA%20TAIFA%20YA%20UCHAGUZI%20YA%20MWAKA%20202.doc%20chapa%20dom%20(1).pdf (accessed 8 August 2024).

[94] The INECA s 17 (1) & (2) Swahili version reads that 'Kutakuwa na Mkurugenzi wa Uchaguzi atakayeteuliwa na Rais baada ya kupendekezwa na Tume.
(2) Mkurugenzi wa Uchaguzi atakuwa na sifa zifuatazo:
(a) awe ni raia wa kuzaliwa wa Jamhuri ya Muungano kwa mujibu wa Sheria ya Uraia Tanzania;
(b) awe ni mtu mwaminifu na mwadilifu;
(c) awe na shahada ya chuo cha elimu ya juu kinachotambuliwa kwa mujibu wa sheria; na
(d) awe afisa mwandamizi katika utumishi wa umma.'

[95] INECA (n 93) secs 5(2), (3) & (4).

[96] INECA (n 93) s 17.

servants who serve as returning officers, leaving room for the electoral commission to go back to the usual practices.[97]

Tanzania heads into the poll this year for local government in November 2024 and the general election in October 2025. Each election stands as a test of the Court's order in the sense that the district executive officers (regularly deployed) who are ruling party cadres are expected to be returning officers, a backtrack to the Court's order in *Wangwe*.[98]

2.3.2 Orders pertaining to criminal justice reforms

The orders in this subsection constitute doing away with the mandatory death penalty and its mode of execution, guaranteeing the right to bail, legal aid provision for offenses attracting heavy sentences, and access to judicial remedies for immigration cases. None of the orders under this section have been implemented.

a) Amendment of section 197 of the Penal Code

The Court has in 15 decisions ordered Tanzania to amend section 197 of its Penal Code to remove the mandatory death penalty and its mode of execution, death by hanging.[99] In the leading 'death penalty' decision of the Court against Tanzania,[100] the Court agreed with the applicants that the death penalty as provided for under section 197 of the Penal Code for the offence of murder omits the judicial discretions of the Judges to consider circumstances of the case or the accused and impose another sentence.[101] The mandatory nature of the death penalty practice in Tanzania under section 197 makes it an arbitrary deprivation of life contrary

[97] The electoral body usually fields District Executive Directors who are arguably ruling party cadres as returning officers in general elections.

[98] *Wangwe* (n 15) para 10.

[99] *Rajabu* (n 10). See also n 14.

[100] *Rajabu* (n 10).

[101] *Rajabu* (n 10) para 114.

to section 4 of the Charter.[102] Also, the Court found that death by hanging as provided under section 197 of the Penal Code is cruel, degrading and inhumane treatment contrary to article 5 of the Charter.[103] The leading *Rajabu* orders were to be implemented by November 2020.[104]

After the *Rajabu* decision, as of July 2024, the Court delivered 14 other decisions ordering Tanzania to amend section 197 of its Penal Code.[105] The orders in the 14 decisions require that the law be amended to remove the mandatory death penalty as well as its mode of execution, death by hanging.

Progress

Despite a flurry of orders of the Court directing Tanzania to amend section 197 of its Penal Code to remove the imposition of a mandatory death penalty and its mode of execution, Tanzania maintains it.[106] It is pertinent to underscore that the death penalty is also applicable in Tanzania for offense of treason[107] and several other misconducts of military members, though the latter is discretionary.[108] Thus, Tanzania is not only required to amend section 197 of its Penal Code but comprehensively outlaw the mandatory death penalty and its mode of

[102] *Rajabu* (n 10) para 114.

[103] *Rajabu* (n 10) para 120.

[104] *Rajabu* (n 10) para 171(xv).

[105] (n 14).

[106] Penal Code of 1981, see 2022 revised version https://tanzlii.org/akn/tz/act/ord/1930/11/eng@2019-11-30 (accessed 30 August 2024).

[107] Penal Code (n 106) secs 39 & 40.

[108] Tanzania National Defence Act 24 of 1996 1st sch https://tanzanialaws.com/statutes/principal-legislation/222-national-defence-act (accessed 30 August 2024).

execution. However, Tanzania has, since 2016, indicated that it cannot comply with the Court order.[109]

Although the faulted section 197 providing for the mandatory death penalty is not amended, no one has been executed since 1994.[110] Human rights practitioners consider Tanzania a *de facto* death penalty abolitionist.[111] Since the execution of death row inmates is dependent on the signing of a certificate by the President of Tanzania, the late President John Magufuli, said publicly that he would never sign execution certificates.[112] Moreover, a significant number of inmates on death row gain a presidential pardon.[113] Death-row inmates are, in the alternative, elevated to a life sentence.[114]

[109] Activity Report of the Court (n 42) 2019 p 22 https://www.african-court.org/wpafc/wp-content/uploads/2020/07/EN-EX-CL-1204-AFCHPR-ACTIVITY-REPORT-JANUARY-DECEMBER-2019.pdf (accessed 28 August 2024).

[110] The Law Reform Commission of Tanzania 'Draft discussion paper on the review of capital punishment, corporal punishment and long term sentences in Tanzania' (2008) para 2.12.

[111]A Novak 'Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania'* (2021) 5 *African Human Rights Yearbook* p 405 https://www.ahry.up.ac.za/images/ahry/volume5/Part%203%20Novak%202021.pdf (accessed 25 July 2024).

[112] T Gerzso 'Tanzania: President Magufuli declares his position against the death penalty' *World Coalition Against Death Penalty* 20 September 2017 https://worldcoalition.org/2017/09/20/tanzania-president-magufuli-declares-his-position-against-the-death-penalty/ (accessed 12 august 2024).

[113] 'Magufuli grants presidential amnesty to 61 death row inmates' *The Citizen* 09 December 2017 https://www.thecitizen.co.tz/tanzania/news/national/magufuli-grants-presidential-amnesty-to-61-death-row-inmates--2616208 (accessed 30 August 2024).

[114] N Abdallah 'Rais Samia awasamehe wagungwa 1,082' *Mwananchi* (Dar es Salaam) 27 April 2024 https://www.mwananchi.co.tz/mw/habari/kitaifa/rais-samia-awasamehe-wafungwa-1-082-4605158 (accessed 30 August 2024).

As contentious as it is in Tanzania, the death penalty has been recurring in conversations around criminal justice reforms.[115] The Law Reform Commission (LRC), under the directions of the Attorney General,[116] adopted a draft position paper on the review of capital punishment, long-term sentences, and corporal punishments in Tanzania.[117] The LRC concluded that the death penalty is still needed.[118] However, the LRC did not address the design of the death penalty, which is mandatory for several offenses, as well as its mode of execution.

A report presented in July 2023 by the Presidential Commission chaired by former Tanzania Chief Justice Othman Mohamed Chande (Chande Commission) to oversee criminal justice reforms recommended major reforms to guide institutional and legislative reframing, including the question of the death penalty.[119] The Chande Commission recommended that the death penalty be discretionary and that the circumstances of the case and the accused be considered.[120]

The Chande Commission recommended further that if the death certificate is not signed within three years (as the requirement for executing death-row inmates), the inmate should be elevated to a life sentence.[121] If the Chande Commission's recommendations are acted

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[115] The Law Reform Commission of Tanzania 'Annual Report 2006/7' p 1 https://www.lrct.go.tz/uploads/documents/sw-1601398916-Annual%20Report%20Final%20%202006-2007.pdf (accessed 25 July 2024).

[116] The Law Reform Commission of Tanzania (n 115).

[117] The Law Reform Commission of Tanzania (n 115) p 14.

[118] The Law Reform Commission of Tanzania (n 115) p 14.

[119] E Takwa 'Call to act as President Samia receives criminal justice report' *Daily News* 15 June 2024, https://dailynews.co.tz/call-to-act-as-president-samia-receives-criminal-justice-report/ (accessed 8 August 2024).

[120] Takwa (n 119).

[121] United Republic of Tanzania 'Summary of the report of the Presidential commission on criminal justice reforms' (2023) p 29.

upon, there will be minimal reforms in the death penalty application, removing its mandatory nature as ordered by the Court. However, its execution mode might remain the same because it was not part of the recommendations.

b) Amendment of section 148(5) of the CPA of 1985

In the case of the *Legal and Human Rights Centre and Tanzania Human Rights Defenders Coalition v The United Republic of Tanzania*, the Court ordered Tanzania to amend section 148(5) of its CPA of 1985.[122] The Court found that section 148(5)(a) of the CPA had been domestically settled and went on determining section 148(b) and (e). The Court found that section 148(5)(b) and (e) is discriminatory and violative of article 2 of the Charter for outright barring bail for accused persons who have served more than three years sentence and those who have been charged with offences relating to properties whose value exceeds TZS 10,000,000.[123] The Court found that the impugned section treats some accused persons less favourable than other persons charged with offenses falling outside the ambit of section 148(5).[124]

Furthermore, the Court found that the prohibition of Courts from considering bail applications under section 148(5)(a) and (c) of the CPA is violative of the right to the presumption of innocence guaranteed under article 7(1)(b) of the Charter.[125] Consequently, the impugned section violated the right to be heard in a way that courts could consider the circumstances of

[122] *LHRC* (n 24).

[123] *LHRC* (n 24) para 173.

[124] *LHRC* (n 24) para 109.

[125] *LHRC* (n 24) para 130.

the case as presented by the accused which might move the judge/magistrate to grant them bail as guaranteed under article 7(1) of the Charter.[126]

For finding the violations of articles 2, 7(1) and 7(1)(b), article 1 of the Charter which requires State parties to ensure the enjoyment of rights and equal protection under the law was too violated.[127] Tanzania is required to amend section 148(5) of the CPA within two years, lapsing June 2025, to remedy the violations found.[128]

After the *LHRC* decision, the Court decided on a similar question of bail restriction under section 148(5) of the CPA in the case of *John Mwita v The United Republic of Tanzania*.[129] Like in the *LHRC* decision, the Court found violations of the right to liberty contrary to article 6 of the Charter, as well as the right to free legal assistance guaranteed under article 7(1) of the Charter.[130] Tanzania was ordered to amend section 148(5) of the CPA within three years to align it with the provisions of the Charter.[131]

Progress

Tanzania maintains the anti-bail law with its 1985 design despite constant appeals from various actors to amend the anti-bail law.[132] Attempts to litigate the impugned provision in

[126] *LHRC* (n 24) para 156.

[127] *LHRC* (n 24) para 163.

[128] *LHRC* (n 24) para 178 & 187(ix).

[129] *Mwita* (n 24).

[130] *Mwita* (n 24) para 118 & 98.

[131] *Mwita* (n 24) para 144.

[132] Latest (2022) amendments to the CPA maintain the 1985 design of the anti-bail provision, https://tanzlii.org/akn/tz/act/1985/9/eng@2019-11-30 (accessed 12 August 2024).

Tanzania proved futile, although the High Court's ruling,[133] which was varied by the Court of Appeal,[134] was in line with the Court's ruling that followed two years later.[135]

Despite Tanzania's reluctance to implement Court orders under this spectrum, there are extra-legal developments which suggest that, with time, some fundamental reforms will take place. For instance, the Chande Commission recommended that unbailable offenses should be maintained as per the design section 148(5) because such a section only includes serious crimes.[136] It is also recommended that the Economic Organised Crimes Control Act be amended to allow the court to look into the circumstances of the case and allow or deny bail for economic organised crimes,[137] as compared to other capital crimes.

Other recommended measures include adoption of the Bail Act to put bail issues under one law.[138] Also, unbailable offenses be heard within a reasonable time, short of which the court should be allowed to grant bail depending on the circumstances of the case,[139] and broadly that courts be allowed to hear bail applications for all offenses.[140] There are prospects that the right to bail and its parameters as recommended by the Chande Commission will be

[133] Dickson Paulo Sanga v The Attorney General [2020] TZHC 653, (https://tanzlii.org/akn/tz/judgment/tzhc/2020/653/eng@2020-05-20 (accessed 8 August 2024).

[134] Attorney General v Dickson Paulo Sanga [2020] TZCA 371, https://tanzlii.org/akn/tz/judgment/tzca/2020/371/eng@2020-08-05 (accessed 8 August 2024).

[135] Similar reasoning recurred in the *LHRC* (n 24).

[136] *LHRC* (n 24) p 16.

[137] *LHRC* (n 24) p 17.

[138] *LHRC* (n 24).

[139] *LHRC* (n 24).

[140] *LHRC* (n 24).

adopted if the government maintains current goodwill since the Commission was not dissolved.[141]

c) Amendment of the Legal Aid Act of 2017 to ensure legal aid for capital offenses

The enactment of the 2017 Legal Aid Act in Tanzania is an outcome of the Court order in the case of *Wilfred Onyango Nganyi and 9 Others v United Republic of Tanzania*[142] as indicated in the 2018 implementation report.[143] Nganyi and his colleagues alleged that their case trial was prolonged and unduly delayed from 2006 to 2013, as well as not being provided with legal aid at the hearing, contrary to article 7 of the Charter.[144]

The Court found that there was a violation of the right to be tried within a reasonable time guaranteed under article 7(1)(d) of the Charter because the two-year pendency of proceedings on the ground of investigation was not justified.[145] The Court found further that although the applicants were entitled to legal representation, the failure of the trial magistrate and the trial judge to facilitate them with legal aid after their attorney's withdrawal of instructions and go ahead to convict them with a 30-year jail term,[146] was violative of Tanzania's obligations under the Charter.[147] Thus, Tanzania was ordered to ensure that the

[141] G Lamtey 'Judge Othman's Commission on criminal justice reforms presents its report to President Samia' *The Citizen* (Dar es Salaam) 15 July 2024 https://www.thecitizen.co.tz/tanzania/news/national/judge-othman-s-commission-on-criminal-justice-reforms-presents-its-report-to-president-samia-4304654 (accessed 8 August 2024).

[142] *Nganyi* (n 22).

[143] Tanzania drafted the Legal Aid Bill of 2016 which became a law in 2017. See more Activity Report of the Court (n 22) (2018) p 19 https://www.african-court.org/wpafc/wp-content/uploads/2020/05/Activity-report-January-December-2018.pdf (accessed 28 August 2024).

[144] *Nganyi* (n 22) para 113 & 114.

[145] *Nganyi* (n 22) para 155.

[146] *Nganyi* (n 22) para 183.

[147] *Nganyi* (n 22) para 184.

Applicants are provided with legal representation in the proceedings before them in domestic courts.[148]

Following the *Nganyi* decision as noted earlier, Tanzania enacted the Legal Aid Act of 2017[149] and its Regulations.[150] The Legal Aid Act was tested again in the case of *Hassan Bundala Swaga v United Republic of Tanzania,* where the Court ordered Tanzania to ensure that it has a provision ensuring mandatory legal aid for persons accused of serious offenses attracting heavy sentences.[151] The Applicant alleged that his right to a fair trial, encompassing the right to be heard and the right to free legal assistance, was violated during his trial because he did not have legal representation.[152]

Since the 2017 Legal Aid Act only provides for free legal aid to accused persons on the clearance of a judicial officer, the Court found such a practice to be inadequate, contrary to its earlier decisions in the cases of *Thomas v Tanzania* and *Mohamed Abubakari v United Republic of Tanzania*.[153] In the two above cases, the Court held that the right to defence encompasses the right to free legal assistance for indigent persons if charged with a serious offense attracting a heavy sentence.[154]

[148] *Nganyi* (n 22) 193(ix).

[149] Act No 1 of 2017 https://tanzlii.org/akn/tz/act/2017/1/eng@2019-11-30 (accessed 28 August 2024).

[150] Government Notice No 44 of 2018, https://legalaid.sheria.go.tz/uploads/1621838646-1548837841979_GN%20(1).44%20Legal%20Aid%20Regulation,%202018-1 (accessed 28 August 2024).

[151] *Swaga* (n 21).

[152] *Swaga* (n 21) para 5.

[153] *Swaga* (n 21) para 83.

[154] *Swaga* (n 21) para 83.

The Court found that because the applicant was charged with a serious crime, rape, warranting life imprisonment, he ought to be provided with free legal assistance, in the interest of justice, without him having to request it.[155] It is such omission that led to the Court's finding of the violation of article 7(1)(c) of the Charter interpreted together with article 14(3) of the ICCPR, that free legal assistance is part of the right to defense.[156] Tanzania was ordered to ensure that its Legal Aid Act is fully aligned with the Charter.[157]

Tanzania is supposed to amend its Legal Aid Act and fully align it with the Charter by November 2025.[158] It is essential to underscore that Tanzania has a flurry of capital crimes attracting heavy sentences.[159] However, only persons accused of murder, manslaughter and treason are provided with mandatory legal aid with the office of the High Court Registrar arranging *pro bono* services for them.[160]

Progress

Since 2023, when the order to have mandatory free legal aid for persons accused of crimes attracting heavy sentences was delivered in the case of *Swaga*, Tanzania's Legal Aid Act of 2017 has not been amended to ensure persons accused of capital crimes are provided with

[155] *Swaga* (n 21) para 85.

[156] *Swaga* (n 21) para 86.

[157] *Swaga* (n 21) para 87.

[158] *Swaga* (n 21).

[159] CPA s 148 (5) (a) https://tanzlii.org/akn/tz/act/1985/9/eng@2019-11-30 (accessed 30 August 2024).

[160] C Ngaiza, A Omari & K Gaston 'Towards coordinated legal aid services in Tanzania' (2019) 1 *Tanzania Legal Aid Journal* p 102 https://www.tls.or.tz/wp-content/uploads/2019/10/LEGAL-AID-JOURNAL-2019.pdf (accessed 8 August 2024).

free legal assistance without having them apply for it.[161] There is a willingness for Tanzania to review its Legal Aid Act of 2017 as indicated in reports submitted to the Court.

d) Abolition of corporal punishment

In the cases of *Yassin Rashid Maige v United Republic of Tanzania*[162] and *Kabalabala Kadumbagula and Daud Magunga v United Republic of Tanzania,*[163] the Court ordered Tanzania to amend its various laws providing for corporal punishment. The applicant was convicted of armed robbery and sentenced to a thirty-year jail term and twelve strokes of the cane (corporal punishment).[164] The applicant alleged, among others, that the punishment was blatantly excessive and was inhumane and degrading treatment, also that he was not provided with free legal assistance.[165] The Court found that Tanzania violated article 7(1) of the Charter for not providing the applicant with free legal assistance as well as freedom from torture.[166]

The Court faulted Tanzania for having laws that provide for corporal punishment.[167] The laws pointed out by the Court include the Penal Code Cap 16 (revised 2022), the CPA of 1985, and the Corporal Punishment Act. The rationale is that corporal punishment (implemented as an alternative to a capital sentence for minor offenders) is qualified as degrading and inhumane treatment contrary to article 5 of the Charter.[168]

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[161] No provision providing for free legal aid for all capital offences attracting heavy sentences https://tanzlii.org/akn/tz/act/2017/1/eng@2019-11-30 (accessed 28 August 2024).

[162] *Maige* (n 19).

[163] *Kadumbagula* (n 20).

[164] *Maige* (n 19) para 5.

[165] *Maige* (n 19) para 11.

[166] *Maige* (n 19) para 100 & 143.

[167] *Maige* (n 19) para 178 (xvi).

[168] *Maige* (n 19) para 178 (xvi).

Other laws not mentioned by the Court but providing for corporal punishment are the National Education Act[169] and the National Education (Corporal Punishment) Regulations of 1979. Also, the Law of the Child (Retention Homes) Rules of 2012 and the Law of the Child (Approved Schools) Rules 2011 provide for corporal punishment as a means of correction.[170]

Progress

Tanzania retains corporal punishment as both a punitive measure[171] and as an alternative to capital sentences for children.[172] Recent criminal justice reform recommendations by the *Chande Commission* did not touch on corporal punishment at all.

e) Amendment of the Tanzania Citizenship Act to ensure access to judicial remedies on revocation of citizenship

In the matter of *Anudo Ochieng Anudo v United Republic of Tanzania*,[173] the Court ordered Tanzania to amend its citizenship law to ensure that individuals enjoy judicial remedies whenever there is a challenge to their citizenship.[174] The applicant was expelled from both Tanzania and Kenya after being declared an illegal migrant and an irregular situation, respectively.[175] Anudo did not have remedies before the courts because the Tanzania

[169] 1978 s 60.

[170] http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/URTanzania.pdf (accessed 8 August 2024).

[171] In schools as sanctioned by the head of school and for offenders sanctioned by courts.

[172] *Maige* (n 19) para 178 (xvi).

[173] *Anudo* (n 17).

[174] *Anudo* (n 17) para 94-95.

[175] *Anudo* (n 17) para 4-12.

Citizenship Act makes the Minister's decisions on granting or withdrawing one's citizenship final and conclusive.[176]

The Court found that the applicant was deprived of his Tanzanian citizenship arbitrarily, contrary to article 15(2) of the UDHR.[177] Also, the manner of expelling the applicant from Tanzania was found to be violative of article 13 of the ICCPR, since he earlier was a national.[178]

The Court found the Tanzania Citizenship Act to be lacking essential elements that could have allowed citizenship to have recourse, for instance, exercise judicial review in terms of article 7(1)(b) and (c) of the ICCPR, once their nationality is questioned by an authority.[179] Such a practice violated the applicant's right to be heard. The Court observed further that Tanzania is obligated to ensure that its laws fully explain remedies in case one's citizenship is questioned.[180]

Progress

The Tanzania Citizenship Act[181] is not amended as ordered by the Court up to date. The Tanzania Citizenship Act still have a provision (section 23) that makes the Minister's decision to grant or withdraw one's Tanzanian citizenship final and conclusive, given without explaining reasons and not subject to appeal or review. Although the Court did not specify the time

[176] Citizenship Act (n 18).

[177] *Anudo* (n 17) para 88.

[178] *Anudo* (n 17) para 106.

[179] *Anudo* (n 17) para 115

[180] *Anudo* (n 17) para 116.

[181] Citizenship Act (n 18)

within which to amend the law, six years of not implementing the order seems unjustifiably long.

2.4 Overall status of implementation of orders of the Court

This chapter observes that Tanzania has partially implemented Court orders, but 2 out of 25 in the context of this study. Only an order that directed the enactment of the Legal Aid Act and election management has been partly implemented. There is a general acceptance, however, that measures requiring constitutional reforms are contingent on the adoption of a new Constitution. The argument is justified by the fact that the 2014 proposed Constitution addresses the orders of the Court in the *Mtikila* and *Kambole* cases, as seen throughout this study.

From the recommendations of the Chande Commission, it can be learned that there might be reforms relating to bail administration, touching on the role of courts in granting or denying bail, considering the circumstances of the accused, limiting the time within which an accused can be detained under anti-bail law pending hearing, and narrowing down the list of predicate offences leading to money laundering.

The questions under this chapter have been answered, such that, Tanzania has implemented and undertakes to implement some of the Court orders. However, the rate is slow whereas out of 25 orders, only 2 orders have been partially implemented. Such extent could be characterised as a limited magnitude of implementation of Court orders. In the next chapter, this study explores factors hindering the implementation of Court orders.

Chapter 3: Factors hindering the implementation of Court orders

3.1 Introduction

This Chapter explores factors hindering the effective implementation of the decisions of the Court. It is considering both internal (domestic) and external factors. The assumption is that, although Tanzania might implement some orders of the Court, there are systemic legal and governance challenges that ought to be addressed to make the implementation effective.

3.2 Internal factors

Tanzania's limited implementation of Court orders is associated with several hindrances, internal and external, which are considered below.

3.2.1 Prevalence of records of not respecting domestic court orders

Tanzania's (public interest) litigation climate adds a lot to the country's willingness to implement orders of international human rights courts. Public interest litigation is pointed out because it often leads to an order to enact, amend or repeal certain legislation or practice,[182] as is the case for litigation before international human rights courts. The Government of Tanzania has tended not to implement domestic court orders on several occasions.[183] Two instances in which the Government was ordered by the court to amend certain laws, but did not, are considered below.

[182] S Namwase 'Securing legal reforms to the use of force in the context of police militarization in Uganda: The role of public interest litigation and structural interdict' (2021) 21 *African Human Rights Law Journal* p 216, https://www.saflii.org/za/journals/AHRLJ/2021/49.pdf (accessed 2 September 2024).

[183] CM Peter & MKB Wambali 'Independence of the judiciary in Tanzania: A critique' (1988) 1 *Law and Politics in Africa, Asia and Latin America* p 81, https://www.jstor.org/stable/pdf/43109730.pdf?refreqid=fastly-default%3A9f08d072d163b55710aca1c6db4a8bce&ab_segments=&origin=&initiator=&acceptTC=1 (accessed 2 September 2024).

In 2018, section 148(4) of the CPA of 1985 was declared unconstitutional.[184] The provision empowers the Director of Public Prosecution (DPP) to object to an accused person's right to bail for bailable offences, without giving reasons or the accused being heard.[185] The Government was ordered to amend the provision within a year because it offended several articles of the Constitution.[186] However, six years later, the offensive provision of the CPA is not amended.[187] It is being applied as ever.[188]

In 2019, the Government was ordered to amend sections 13 and 17 of the Law of Marriage Act of 1971 (LMA),[189] which allowed girls aged 15 to 18 years to get married upon parental consent or at the age of 14 by the respective parents securing a court order authorising such a marriage.[190] The Government was required to implement the order by amending the two provisions that offend the Constitution and the rights of the child within one year from

[184] *Attorney General v Jeremia Mtobesya* [2018] TZCA 347, Attorney General vs Jeremia Mtobesya (Civil Appeal 65 of 2016) [2018] TZCA 347 (2 February 2018) - TanzLII (accessed 15 August 2024).

[185] CPA s 148(4).

[186] *Mtobesya* (n 184).

[187] https://tanzlii.org/akn/tz/act/1985/9/eng@2019-11-30 (accessed 23 September 2024).

[188] 'The Chanzo morning briefing: Tanzania news' *The Chanzo* (Dar Es Salaam) 6 September 2024, https://thechanzo.com/2024/09/06/the-chanzo-morning-briefing-tanzania-news-september-06-2024/ (accessed 23 September 2024).

[189] http://parliament.go.tz/polis/uploads/bills/acts/1461835089-ActNo-5-1971.pdf (accessed 2 September 2024).

[190] *Attorney General v Rebeca Z. Gyumi* [2019] TZCA 348, Attorney General vs Rebeca Z. Gyumi (Civil Appeal 204 of 2017) [2019] TZCA 348 (23 October 2019) - TanzLII (accessed 15 August 2024).

2019.[191] However, five years later, sections 13 and 17 of the LMA have not been amended.[192] Child marriage is still being practised despite a court order outlawing it.[193]

In attempts to enforce an order outlawing child marriage, the Government was afforded six more months within which to amend the two provisions of the LMA, lapsing in June 2023.[194] More than a year later, sections 13 and 17 of the LMA have not been amended, a clear indicator that the Government has once again thrown a legitimate court order in the bin. Regarding the DPP's absolute prerogative to enter a certificate to object bail for bailable offences, the application was struck out on technicalities.[195]

The non-implementation of the two orders of the court, despite attempts to enforce the one relating to child marriage, shows the other side of Tanzania's human rights litigation climate. Scholars associate the Government of Tanzania's reluctance to respect court orders with the lack of clear checks and balances because the executive is seemingly stronger than other organs of the State.[196] It is why the Judiciary often go quiet when the Government does not

[191] *Gyumi* (n 185) p 51.

[192] See here the LMA as amended in 2019, https://tanzlii.org/akn/tz/act/1971/5/eng@2019-11-30 (accessed 17 September 2024).

[193] End Child Marriage Now 'Tanzania ECM country profile' (2023) https://www.aucecma.org/tanzania-ecm-country-profile/ (accessed 23 September 2024).

[194] *Mary Barnaba Mushi v Attorney General* [2023] TZHC 18309, Mary Barnaba Mushi vs Attorney General (Misc. Cause No. 14 of 2022) [2023] TZHC 18309 (14 June 2023) - TanzLII (accessed 15 August 2024).

[195] *Jeremia Mtobesya v The Attorney General & Another* [2024] TZHC 1784, Jeremiah Mtobesya vs The Attorney General of the United Republic of Tanzania & Another (Misc. Civil Cause No. 14 of 2023) [2024] TZHC 1784 (24 April 2024) - TanzLII (accessed 15 August 2024).

[196] VB Makulilo 'Oversight functions of the national assembly and good governance in Tanzania: A missing link?' (2023) *The African Review* (published online ahead of print 2023). https://doi.org/10.1163/1821889x-20230001 (accessed 17 September 2024). See also Peter & Wambali (n 183).

implement their orders.[197] If orders of domestic courts are sometimes not implemented, what effects would that practice have on implementing orders of regional or international human rights courts? This study arrives at an inference that the domestic records of not respecting court orders have a net effect of influencing similar considerations when the country is ordered by international human rights courts to undertake certain legislative reforms.

3.2.2 Government encroachment in judicial decision-making processes

The discussion under this subsection captures one of the famous dramas in Tanzania's public interest litigation. Two cases in which, one, the Government amended the law while a matter relating to it was being contested in court, and two, the Government found a way to bring back into the statute book a provision that was struck out, in the same style earlier found to be offensive of the Constitution.

In 1994, the judiciary of Tanzania faced contempt from the Attorney General before issuing the landmark independent candidate decision.[198] The Attorney General submitted a motion to the Parliament to amend the Constitution to prohibit independent candidates from running in elections,[199] a week before the High Court was set to pronounce its decision on the same matter.[200] Although the High Court allowed independent candidates to run in elections,[201] the

[197] J Oloka-Onyango 'Human rights and public interest litigation in East Africa: A bird's eye view' (2020) 47 *The George Washington International Law Review* p 971, referring to S Gloppen *The Accountability function of the courts in Tanzania and Zambia* in S Gloppen, R Gargarella & E Skaar (eds) *Democratisation and the judiciary: the accountability function of courts in new democracies* (2004) 115 p 118 https://ssrn.com/abstract=2606120 (accessed 15 August 2024).

[198] *Rev. Christopher Mtikila v Attorney General* [1994] TZHC 12 https://tanzlii.org/akn/tz/judgment/tzhc/1994/12/eng@1994-10-24 (accessed 17 September 2024).

[199] Via Eleventh Constitutional Amendment Act 34 of 1994.

[200] *Mtikila* (n 4) para 69-70.

[201] *Mtikila* (n 4) para 69-70.

Attorney General had already started a constitutional amendment process to counter Mtikila's win. The amendment to the Constitution ultimately imposed a ban on independent candidates from running in elections.[202]

Mtikila challenged the Constitutional amendment that rendered his independent candidate's victory technically nullified and re-secured the victory in 2006.[203] The High Court noted that the constitutional amendment violated the Constitution as well as the applicants' right to participate in government.[204] Disgruntled, the Attorney General appealed before the Court of Appeal of Tanzania (CAT).[205] In its decision, the CAT noted that the independent candidate matter was purely political and should be left for Parliament to deliberate on it.[206] It is why Mtikila resorted to seeking further redress before the African Court.[207]

The circumstances surrounding the domestic litigation of independent candidates in Tanzania show how difficult it could be to secure and enforce an order of the court which might be unfavourable to the government. Moreover, the confidence of the Government to amend the law while the very law was before the Court for determination is a clear indication of the contempt by the executive for the court. The subsequent CAT restraint to decide on a matter on which lower courts had twice judiciously determined to allow independent candidates to

[202] Eleventh Constitutional Amendment (n 50).

[203] *Christopher Mtikila v The Attorney General* [2006] TZHC 5 https://tanzlii.org/akn/tz/judgment/tzhc/2006/5/eng@2006-05-05 (accessed 17 September 2024).

[204] *Mtikila* (n 198)

[205] *Attorney General v Reverend Christopher Mtikila* [2010] TZCA 3 https://tanzlii.org/akn/tz/judgment/tzca/2010/3/eng@2010-05-07 (accessed 17 September 2024).

[206] *Mtikila* (n 200).

[207] Consolidated Appl 009/2012 & 011/2011.

run for elections indicates how the country's apex court has failed to adopt progressive decisions.[208]

Tanzania's founding father, Mwalimu Julius Kambarage Nyerere, was not pleased with the Attorney General's move to amend the Constitution to hijack Mtikila's independent candidate victory. Mwalimu Nyerere was of the view that massaging the Constitution for political convenience would render the Bill of Rights meaningless.[209]

Another incident was seen earlier when the Bill of Rights was being tested in courts of law in the 1990s.[210] The High Court pronounced the entire section 148(5) of the CPA of 1985 to be unconstitutional for arbitrarily limiting liberty.[211] The CAT overturned the decision, but only ordered amendment of paragraph (e) of section 148(5), noting that it was broadly framed without adequate safeguards against abuse.[212] The case is, for the purpose of herein analysis, coined as the *Right-to-bail* case.

The impugned provision of the then Criminal Procedure Code restricted bail for persons accused of 'serious assault causing grievous bodily harm or threat of violence to another

[208] As we shall see under section 3.2.1.3 of this Chapter,

[209] Shivji I 'Tanzania abolishes public interest litigation (A comment on the Amendment of Basic Rights and Duties (Enforcement) Act (Cap. 3 of the revised laws of Tanzania)' (2019) 46 *Eastern Africa Law Review* p 178 referring to JK Nyerere *Our leadership and the destiny of Tanzania* (1995) p 9 https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://journals.udsm.ac.tz/index.php/ealr/article/view/5157/4406&ved=2ahUKEwig6o-4hPSHAxUwBNsEHaeOPMIQFnoECBoQAQ&usg=AOvVaw2F3UMLAZptABuctb1U0O1I (accessed 14 August 20204).

[210] Tanzania introduced the Bill of Rights section into its Constitution in 1984 but gained enforcement in 1988.

[211] *Daudi Pete v The Director of Public Prosecutions* [1988] HTC.

[212] *Director of Public Prosecutions v Daudi Pete* [1991] TZCA 1 https://tanzlii.org/akn/tz/judgment/tzca/1991/1/eng@1991-05-16 (accessed 16 August 2024).

person or having or possessing a firearm or an explosive.'[213] While the CAT exercised what scholars called 'judicial restraint'[214] for not ruling on the untenability of the whole of section 148(5) because of the net effects of its application,[215] there was an element of boldness because it struck out paragraph (e) from the statute book.[216] Earlier, the High Court had, despite finding the impugned section offensive of the Constitution, allowed the Government to amend it within a certain period.

The impugned provision that was struck out of the statute book was reintroduced into the CPA seven years later. A law was passed in a design and effect that was earlier found to be offending the Constitution.[217] That is, paragraph (a) of subsection (5) of section 148 of the CPA was deleted and replaced by adding three more other offenses, robbery (renaming the struck-out paragraph (e)), murder, defilement and treason, in subparagraph (i) of paragraph (a).[218]

The *Independent candidate* and the *Right-to-bail* litigation are proof that the Government can disobey court orders or use the Parliament to maintain restrictive laws. In such a situation, a question comes up: Would the government be willing to take up orders of an international Court in an atmosphere where domestic litigation over a similar matter was deliberately rendered fruitless? The response leads to an assumption that such dynamics affect the implementation of Court orders.

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[213] CPA s 148 (5) (e).

[214] J Quigley 'The Tanzania Constitution and the right to a bail hearing' (1992) 4 *African Journal of International and Comparative Law* p 174.

[215] As also submitted by Professor Mgongo Fimbo in his *amic* brief in *Pete* (n 212) p 7.

[216] *Pete* (n 211).

[217] Tanzania Written Laws (Miscellaneous Amendments) Act 12 of 1998 http://parliament.go.tz/polis/uploads/bills/acts/1457520379-ActNo-12-1998.pdf (accessed 16 August 2024).

[218] Tanzania Written Laws (n 217)

3.2.3 Judicial inadequacies in protecting fundamental rights

The two courts of records in Tanzania, the High Court and the CAT, have differed in their interpretation of rights. Shivji argues that the judiciary was generally instrumental in developing human rights jurisprudence from 1987 to 2015.[219] The High Court has been fairly rated to have satisfactorily delivered progressive decisions compared to the apex court, the CAT.[220] The culture of judicial restraint has been there, but it did not deter courts from delivering some progressive decisions.[221] However, the climate of bold judges and decisions diminished from 2015 up to date, as justices, especially those sitting in the CAT, took a more conservative approach to human rights cases.[222] A liberal and purposeful interpretation of human rights has been forsaken since then.

There is also a trend of contestation in approaches to human rights interpretation between the High Court and the CAT. Scholars have argued that individual High Court judges have taken a more liberal approach to fundamental human rights as compared to justices of the CAT.[223] There are instances where High Court Judges have awarded remedies to litigants without tying their interpretations to the Bill of Rights, which seemingly lacks the rhythm of a progressive constitutional framework.[224] On the other hand, the CAT is criticised for not being liberal, thereby overturning some of the progressive High Court decisions.[225] Some of the celebrated

[219] Shivji (n 209) p 178.

[220] Onyango (n 197) p 20.

[221] Onyango (n 197) p 20.

[222] Shivji (n 209).

[223] Onyango (n 197).

[224] Onyango (n 197).

[225] Onyango (n 197) p 20.

decisions of the High Court often have a short lifespan before they are overturned by the CAT.[226]

For instance, while the High Court outlawed the death penalty in 1994,[227] the CAT reversed that decision.[228] Consequently, the 1994 CAT reversal became influential in the recent attempts to litigate the death penalty, both before the High Court and the CAT.[229] Maina and Bisimba think that by overturning the High Court decision, the CAT lost an opportunity to rewrite Tanzania's jurisprudence on the death penalty by abolishing it.[230]

Other landmark decisions of the High Court that the CAT overturned include the 1994 *Independent candidate* decision, noting the question is political,[231] but ignoring the very essence of having the judiciary as the custodian of justice, as well as the *Right-to-bail* decision.[232] The 1988 High Court *Right-to-bail* decision was reasoned similarly to the *LHRC's* Court decision that ordered Tanzania to amend section 148(5) of the CPA.[233] Inconsistencies in interpretation and approach to fundamental rights between the High Court and the CAT deny the country an opportunity to make progressive legal and political developments. It is

[226] AK Barume *Land rights of indigenous people in Africa, with special focus on Central, Eastern and Southern Africa* (2010) p 152 https://www.iwgia.org/images/publications/0002_Land_Rights_of_Indigenous_Peoples_In_Africa.pdf (accessed 23 September 2024).

[227] *Republic v Mbushuu Alias Dominic Mnyaroje & Kalai Sangula* [1994] TZHC 7 https://tanzlii.org/akn/tz/judgment/tzhc/1994/7/eng@1994-06-22 (accessed 17 September).

[228] *Mbushuu alias Dominic Mnyaroje and Another v Republic* [1995] TLR 97

[229] *Jebra Kambole v The Attorney General* [2022] TZCA 377 https://tanzlii.org/akn/tz/judgment/tzca/2022/377/eng@2022-06-15 (accessed 17 September 2024).

[230] CM Peter & HK Bisimba (ed) *Law and Justice in Tanzania: Quarter of a century of the Court of Appeal* (2007)

[231] *Mtikila* (n 200).

[232] *Pete* (n 211).

[233] *LHRC* (n 24).

that systemic outlook of rights that, this study argues, could be slowing down Tanzania's appreciation of its obligation to safeguard rights by amending the laws as ordered by the Court.

3.2.4 Obscurement of public interest litigation

The government of Tanzania has numerously attempted to undermine, limit or abolish (as classified by scholars) public interest suits in Tanzania. Earlier in 1994, a law, the Basic Rights and Duties (Enforcement) Act (BRADEA), was enacted requiring a three-judge bench to hear and determine human rights cases.[234] Scholars were of the view that a three-bench judge requirement was maliciously imposed to slow down the litigation pace because it is not easy for judges to convene regularly in that number.[235] It was further said to be a counter-reaction against a flurry of orders unfavourable to the government and a lack of good faith.[236]

Equally, the strict requirement of *locus standi* (a personal interest in the matter being submitted before the court) slowly became pertinent for human rights cases to be considered on merits. The BRADEA was amended in 2020 to mandate that litigants swear an affidavit of admissibility showing how they are personally affected by a certain law or an administrative action for their cases to be considered.[237] Scholars characterise the amendment as the last

[234] Basic Rights and Duties Enforcement (Practice and Procedure) Rules of 1994 s 15 https://tanzlii.org/akn/tz/act/gn/2014/304/eng@2014-08-29 (accessed 17 September 2024).

[235] JE Ruhangisa 'Public interest litigation in the delivery of justice and democracy in Tanzania: Worrying trends' (2021) 7 *Tuma Law Review* p 32 https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/tuma7&id=41&men_tab=srchresults (accessed 20 August 2024).

[236] Ruhangisa (n 235) p 41.

[237] Written Laws (Miscellaneous Amendments) Act 3 of 2020 ss 6 & 7 https://tanzlii.org/akn/tz/act/2020/6/eng@2020-06-17 (accessed 14 August 2024).

nail in the coffin,[238] an abolition[239] of, and actual attacks against public interest litigation by the Government.[240] Requiring an applicant to show how they are personally affected by a law they are petitioning[241] is a clear manifestation of Tanzania's intention to limit public participation in protecting the Constitution.

Shivji argues that the amendment to the BRADEA is inconsistent with article 30(3) of the Constitution which entitles every person a room for judicial remedies when their rights are or are likely to be violated.[242] While protecting the Constitution and laws of Tanzania is everyone's constitutional duty,[243] the 2020 amendment to the BRADEA speaks to the contrary for personifying the duty.[244]

The requirement of an affidavit of admissibility could be necessary in cases of individual violations of human rights attributed to article 30(3) of the Constitution, but not a sweeping generalisation of circumstances of the general public nature anticipated by article 26(2) of the Constitution.[245] The amendment, through a backdoor, subjects article 26(2) to article 30(3) of the Constitution and overrules the *Mtikila* (independent candidate) decision in which the court distinguished the two articles, noting they are not linked.[246] Moreover, the 'abolition' of public interest litigation ran together with Tanzania's withdrawal of article 36(4) declaration

[238] Peter & Wambali (n 183) 76.

[239] Shivji (n 209).

[240] Ruhangisa (n 235).

[241] BRADEA (n 234) s 4(2).

[242] Shivji (n 209) p 170.

[243] Constitution art 26(2).

[244] Shivji (n 209) p 171.

[245] As above, referring to the reasoning of Justice Kamugumya Simon Kahwa Lugakingira in *Mtikila v Attorney General* (1995) TLR 31 HC).

[246] Shivji (n 209) p 175.

which allowed individuals and NGOs access to the Court. With the two restrictive measures running together, one can easily see a total boycott against human rights courts.

Abolishing, limiting or undermining public interests in Tanzania as interchangeably used by scholars has led to a decline in the number of human rights cases filed in courts.[247] For instance, the High Court of Tanzania's main registry has had a stagnant number of 18 public interest cases since 2022, a trend that worried the former Tanzania Chief Justice.[248]

Justice Chande was quoted saying that the legislators have also expressed anger at the Government for not adhering to orders of the Court.[249] In consternation, Justice Chande said, 'what kind of government is this?' as a display of frustration at the contempt of the court by the government.[250] Legal scholars consider boycotting court orders as a deliberate move for the country to sabotage regional courts, the East African Court of Justice (EACJ) and the Court, which are both hosted in Arusha.[251] The allegations stand unbeaten because, apart from the decisions of the Court, there is a slow pace for Tanzania to implement orders of the EACJ too.[252]

What effects does the domestic human rights litigation climate have on implementing orders from international human rights courts? This question bag answers. The obvious response

[247] Francis (n 41).

[248] Francis (n 41).

[249] Francis (n 41).

[250] Francis (n 41).

[251] Francis (n 41).

[252] J Biegon 'State implementation and compliance with the human rights decisions of the East African Court of Justice' (2021) *De Jure Law Journal* p 422 https://orcid.org/0000-0003-4905-6470 (accessed 23 September 2024).

would be that it slows down Tanzania's appreciation of its international human rights obligation, which has trickled down to the non-implementation of Court orders.

3.2.5 Lack of culture of democracy and respect for human rights

Studies have shown that a system that guarantees functional multiparty electoral politics, independence of the judiciary, respect for the rule of law, protection and guarantee of fundamental rights and liberties, and active civil society is likely to guarantee that orders of the Court are implemented.[253] It has been argued further that when institutions are weaker, with the most prominent being the parliament, anti-corruption, and electoral bodies, it paves the way for political actors to defy orders of courts with impunity.[254]

Tanzania has systemic governance issues that undermine the possibilities of embracing certain democratic and human rights reforms. One is not having a constitution which has a comprehensive bill of rights. Wambali has argued that, despite having a bill of rights and reflecting some principles of democracy such as multi-party politics, the government

[253] F Viljoen & L Louw 'State compliance with recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *The American Journal of International Law* p 25 https://www.jstor.org/stable/pdf/4149821.pdf?refreqid=fastly-default%3A4e1627cd780b183ff3aac4ac3cccb231&ab_segments=&origin=&initiator=&acceptTC=1 (accessed 20 September 2024).

[254] VO Ayeni 'Implementation of the decisions and judgments of African regional human rights tribunals: reflections on the barriers to state compliance and the lessons learnt' (2022) 30 *African Journal of International and Comparative Law* 563 https://www.euppublishing.com/doi/pdf/10.3366/ajicl.2022.0425 (accessed 19 September 2024). See also K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* p 391.

[executive] exercises extreme control over the enjoyment of political rights by curtailing the establishment of independent institutions to support popular democracy.[255]

For instance, the President of the United Republic of Tanzania appoints the Chief Justice and all Judges,[256] making the judiciary subservient to the executive.[257] Judges can singlehandedly be appointed to other offices by the President.[258] A critical example is the former Director of Public Prosecution, who was appointed a Judge, then an Attorney General and recently reappointed into the judiciary as a Justice of Appeal.[259] This trend means that judicial personnel are serving and can be reshuffled at the pleasure of their appointing authority, the President.

On the other hand, the parliament has long been captured by the state-party relationship.[260] Some dynamics include Parliament dissolution by the President[261] if members do not pass a

[255] MKB Wambali 'Democracy and human rights in Tanzania mainland: the Bill of rights in the context of constitutional developments and the history of institutions of governance' PhD thesis, University of Warwick, 1997 https://wrap.warwick.ac.uk/id/eprint/4207/1/WRAP_THESIS_Wambali_1997.pdf (accessed 11 September 2024).

[256] Peter & Wambali (n 183).

[257] Peter & Wambali (n 183) p 77.

[258] Peter & Wambali (n 183) p 77 showcases that several Judges have been appointed to other government services. For instance, Justice Julie Manning was appointed Justice Minister in 1975; Justice Yona Mwakasendo was appointed Chief Corporation Counsel of the Tanzania Legal Corporation in 1976; Justice Patel was appointed Counsellor at the Tanzania High Commission in India in 1978.

[259] 'Samia reappoints two former ministers in latest mini-reshuffle' *The Citizen* (Dar es Salaam) 15 August 2024 https://www.thecitizen.co.tz/tanzania/news/national/samia-reappoints-two-former-ministers-in-latest-mini-reshuffle-4725928 (accessed 12 September 2024).

[260] M Collord 'Tanzania's 2020 election: Return of the one-party state' (2021) *Études de l'Ifri* p 37. https://www.ifri.org/sites/default/files/atoms/files/collord_tanzania_2020_election_2021.pdf (accessed 12 September 2024).

[261] Constitution art 97.

budget or Bill, having required them to do so.[262] Since 2020, the Parliament has been constituted by over 93% 'elected' ruling party cadres,[263] turning it into an extended party caucus, after a completely rigged 2020 general election.[264] It is not expected for a parliament with an overwhelming majority of the ruling party to exercise oversight over the Government they are loyal to,[265] other than rubberstamping legislative and policy measures put forward for fear of not being re-elected or losing their sits.[266]

The cumulative effect of the lack of a culture of democracy is that only one arm of the state, the Executive, becomes stronger and influential to others. As a result, the Government runs its affairs with limited parliamentary [and judicial] oversight.[267] It is fair to draw a link between the lack of a culture of democracy, which gives the Government autonomy in decision-making, some of which undermines its commitment to respecting and implementing orders of the Court. The capacity, nature and independence of institutions, most of which are implicated in human rights violations, are critical for state compliance with their obligations to heed to orders of the Court.[268]

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[262] V Wang 'The accountability function of parliament in new democracies: Tanzania perspective' (2005) 2 *Development Studies and Human Rights* p 6, https://open.cmi.no/cmi-xmlui/bitstream/handle/11250/2435984/Working%20paper%20WP%202005-2.pdf?sequence=2 (accessed 12 September 2024).

[263] D Paget 'Tanzania: The authoritarian landslide' (2021) 32 *Journal of Democracy* p 61, https://doi.org/10.1353/jod.2021.0019 (accessed 12 September 2024).

[264] Paget (n 263) pp 62, 64-65.

[265] Collord (n 300) p 36.

[266] Wang (n 262).

[267] M Collord 'Wealth, power and institutional change in Tanzania's parliament' (2022) 121 *African Affairs* p 20 & 26, https://doi.org/10.1093/afraf/adac008 (accessed 12 September 2024).

[268] Ayeni (n 254) p 578.

3.2.6 Influence of religious standing and opinions

Religious opinions play a significant role in Tanzania's political governance.[269] They have influenced a stance on many societal issues, such as the age of marriage (which was outlawed by the CAT),[270] being 15 years, which is associated with Muslim beliefs.[271] There is a rebuttable consensus that the order to control the death penalty practice as directed by the Court might not be easily implemented, as the death penalty is arguably ideologically justified by the main religious establishments in Tanzania, Christians and Muslims.[272] The biases emanating from a clash between religious beliefs and international human rights standards somehow overwhelm Tanzania's willingness to amend the law relating to the death penalty to align it with the order of the Court. It is from such a clash that the death penalty is still legal in Tanzania, in a design that the Court found to be offending the Charter. However, as seen in section 2.3.2 of Chapter 2 of this study, there is a hope that the mandatory death penalty might be reviewed.

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[269] Judicature and Application of Laws Act 358 of 2019 s 11, https://media.tanzlii.org/media/legislation/861/source_file/b345e9ea516618d5/1920-7.pdf (accessed 20 August 2024).

[270] *Gyumi* (n 190).

[271] A Karam 'Faith-Inspired Initiatives to Tackle the Social Determinants of Child Marriage' (2015) 13 *The Review of Faith & International Affairs* p 62, https://doi.org/10.1080/15570274.2015.1075754.
See also African Union 'Campaign to end child marriage: a review of research, reports and toolkits from Africa' (2015) p 21, https://au.int/sites/default/files/documents/31018-doc-5465_ccmc_africa_report.pdf & BK Kheri 'Child marriage and its effects to women development in Zanzibar' Master's thesis submitted, KDI School of Public Policy and Management, 2011) https://archives.kdischool.ac.kr/bitstream/11125/30284/1/Child%20marriage%20and%20its%20effects%20to%20women%20development%20in%20Zanzibar.pdf (all accessed 20 August 2024).

[272] L Shaidi 'The death penalty in Tanzania: Law and practice' (undated) *British Institute of International Comparative Law* p 1, https://www.biicl.org/files/2213_shaidi_death_penalty_tanzania.pdf (accessed 20 August 2024).

3.2.7 Effects of Tanzania's withdrawal of article 34(6) Declaration

Scholars have attributed the lack of States' trust in the Court to the withdrawal from its jurisdiction by disallowing individuals and NGOs to access it. The lack of trust in the Court could also affect the state's willingness to implement its orders.[273] States like Tanzania, which has records of not respecting orders of its domestic courts,[274] would feel overwhelmed with the flurry of orders from 'foreign' courts despite being obligated to respect them. As a result, they may boycott the Court, as evidenced by Tanzania's withdrawal in 2019.

Moreover, there is a reality that states are not so happy with the domestic impacts of the Court's decisions. Much as Tanzania embraces the notion of sovereignty, and since the impacts of the Court orders would render some domestic practices annulled or rewritten, feelings of a compromise to state autonomy can be summoned. Such influence is what some states like Tanzania would want to avoid.[275] The costs and benefits of accepting 'foreign' decisions, put that way for clarity, seem relatively burdensome for some States, which is why they end up shielding themselves by boycotting the legitimacy of the Court.[276] Misgivings against the Court, in all senses, affect the extent contesting States like Tanzania can legitimately embrace its orders.

[273] Adjolohoun (n 27).

[274] Adjolohoun (n 27).

[275] TG Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* p 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135130 (accessed 25 September 2024).

[276] Daly & Wiebusch (n 275).

3.2.8 Legitimacy conflict between municipal and international laws

A clash between domestic and international legal systems or standards has come to the cost of the latter being considered secondary or complementary to the former.[277] Being a dualist state,[278] Tanzania's legal system considers the Constitution as a *grundnorm*, a law above all other laws.[279] Studies have found that domestic legal systems are deemed to contextually address issues within a given state compared to an outward outlook built on international standards.[280] It is why scholars have argued that the utility of international law can only be relevant in three dimensions: the lack of domestic governance capacity, inadequate political will, and inability to address certain issues that might necessitate invoking international law.[281]

Building on inadequacies or inability of Tanzania's legal system to address certain key issues per international human standards as ordered by the Court, such as the application of the death penalty, election management, and participation of independent candidates in elections, it could have been more beneficial if orders of the Courts were acted upon. However, there does not seem to be political will for the country to welcome the inclusion of international standards into domestic legal order.

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[277] A Slaughter & W Burke-White 'The future of international law is domestic' (2006) 47 *Harvard International Law Journal* 328, https://heinonline.org/HOL/Contents?handle=hein.journals/hilj47&id=1&size=2&index=&collection=journals (accessed 20 August 2024).

[278] Public International Law and Policy Group 'Domestic Incorporation of international law: Comparative State practice' (2011) pp 11-14, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1057&context=war_crimes_memos (accessed 17 September 2024).

[279] http://hrlibrary.umn.edu/research/TanzaniaB.html (accessed 17 September 2024)

[280] Slaughter & Burke-White (n 277) p 330.

[281] Slaughter & Burke-White (n 277) p 333.

3.3 External factors

3.3.1 The lack of an appellate Chamber in the Court

Scholars attribute Tanzania's withdrawal of the declaration that gave individuals and NGOs access to Court[282] as an ultimate response to the costs of adhering to its jurisdiction and orders.[283] But what are the challenges? One is the lack of appellate mechanisms within the Court and restrictive reviews, which triggers disgruntlement amongst member states.[284] It might not be surprising for Tanzania to slow down the implementation of a flurry of orders against them if an argument of the hierarchy of the Court's decision-making is brought into the picture.

3.3.2 Influence of dissenting or separate opinions by the Court

Dissenting opinions are part of judicial decisions making. Thus, they are permissibly appropriate as per the Rules of the Court.[285] But what messages do they send to disgruntled parties, considering the Court has no appellate mechanisms? This study assumes that, though permissible, dissenting opinions give States, such as Tanzania, a ground to lean on if they do not want to implement a certain order.

Dissenting opinions show the extent to which the author has fulfilled a judicial duty, although he could not convince his/her colleagues.[286] When judges cannot agree on something, it is a sign that they are dealing with problems on which society itself cannot agree, thus the need

[282] Amnesty International (n 42).

[283] Adjolohoun (n 27) p 4.

[284] Adjolohoun (n 27) p 4.

[285] Rules of Court of 2020 r 70 http://www.african-court.org/wpafc/wp-content/uploads/2020/10/4-RULES-OF-THE-COURT-25-September-2020.pdf (accessed 17 September 2024).

[286] RB Stephens 'The function of concurring and dissenting opinions in courts of last resort' (1952) 5 *Florida Law Review* p 396, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=3609&context=flr (accessed 18 September 2024).

to cure uncertainties.[287] Consequently, the goal is to attain stability in the law and ensure legal principles conform with the evolving social and economic order of the society.[288] A dissent serves as an appeal to the intellect of tomorrow, although it changes no results in the main case.[289] Referring to The Canons of Judicial Ethics, Justice Simmons denotes that, 'except in case of conscientious difference of opinion on fundamental principles, dissenting opinions should be discouraged in courts of last resort.'[290]

Scholars have argued that unanimous decisions have more power than those containing dissenting or separate opinions.[291] It is believed that dissents dilute the authoritative nature of the decision.[292] An empirical study on compliance with the decisions of the Inter-American Court of Human Rights and the European Court of Human Rights reveals that decisions bearing dissents are less likely to be complied with as compared to those unanimously written.[293] While the American and European context might not necessarily reflect realities on the African

[287] JW Carter 'Dissenting opinions' (1953) 4 *Hastings Law Journal* p 122, https://repository.uchastings.edu/hastings_law_journal/vol4/iss2/5 (accessed 18 September 2024).

[288] Carter (n 282) p 119.

[289] R Simmons 'The use and abuse of dissenting opinions' (1956) 16 *Louisiana Law Review* p 498 https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2369&context=lalrev (accessed 18 September 2024).

[290] Simmons (n 289) p 499.

[291] D Naurin & O Stiansen 'The dilemma of dissents: Split judicial decisions and compliance with judgments from the international human rights judiciary' (2020) 53 *Comparative Political Studies* https://journals.sagepub.com/doi/pdf/10.1177/0010414019879944?casa_token=BF9xYm6xMRYAAAAA:iKtgT5W_FSNfCYV3opP10ahdG-1fWDXV283waLHh2Qyl8NwDkZwfq3CUFAS5vVifkV7JlVL3f9HBX70 (accessed 18 September 2024).

[292] Naurin & Stiansen (n 291).

[293] Naurin & Stiansen (n 291) p 960.

continent, it is somewhat convincing to associate the effects of dissenting opinions as adding to the State's, Tanzania in this case, reluctance to implement Court orders.

For instance, in the 25 decisions considered by this study, there have been dissenting/separate opinions. In the 15 death penalty decisions considered by this study, two justices wrote separate opinions.[294] Tanzania had earlier indicated that it would not implement the order of the Court relating to the death penalty practice,[295] although the recent extra-legal developments seen in section 2.2.2 of Chapter 2 suggest that they might reconsider the mandatory death penalty.[296]

3.3.3 Lack of mechanisms to enforce decisions of the Court

The lack of a mechanism to enforce the Court's decision[297] has chilling effects on the state's responsiveness to orders. The Charter is silent on the implementation of decisions of the Court, wherefore, the African Union Assembly does not concern itself with human rights non-compliance by member states.[298] It is why Viljoen observes that there is a weak political oversight over the implementation of the decisions of the Court.[299] Adjolohoun and Nantulya

[294] In the *Rajabu* case, Justices Tchikaya and Bensaoula delivered separate opinions.

[295] Activity Report of the African Court (n 22) (2018) p 16 https://www.african-court.org/wpafc/wp-content/uploads/2024/04/EX-CL-1492-XLIV-Report-AfCHPR-_-EN.pdf (accessed 26 August 2024).

[296] Summary of the report of the Presidential Commission on criminal justice reforms (n 116) p 17.

[297] Daly & Wiebusch (n 275) p 298.

[298] Daly & Wiebusch (n 275) p 305.

[299] F Viljoen 'Impact in the African and Inter-American Human Rights systems: A perspective on the possibilities and challenges of cross-regional comparison' in P Engstrom (ed) *The Inter-American Human Rights System* (2018) p 304 https://doi.org/10.1007/978-3-319-89459-1_12 (accessed 16 September 2024).

associate the absence of mechanisms to enforce decisions and the inability to compel states to do so is an easy route for states to dishonour decisions.[300]

Moreover, the international protection of human rights can only be subsidiary to the national one: it is national political processes that guarantee enforcement.[301] For Tanzania's case, is there a mechanism to enforce the decisions of the Court? The process of implementing decisions of the Court is centred on the executive's will. While the authority of the decisions of the international judicial organs depends in part on the social legitimacy they achieve and on the existence of a community of stakeholders that accompanies and disseminates their standards,[302] there is no proof, other than reporting to the Court and the Commission's follow-ups, that signal stakeholders' coordinated efforts to have decisions implemented. These dynamics leave it for the State to choose when and how to implement decisions of the Court, with absolute privilege, contempt and impunity.

3.3.4 Lack of institutional shield

In its operation, a young institution like the Court, as suggested by Adjolohoun, needed to be shielded by a quasi-judicial body like the Commission.[303] The Commission would, in some instances, filter cases and help reduce litigation load and potential attacks against the Court. Thus, the design of the Court remains defeative of its sustainability. As a result, boycotts and

[300] Adjolohoun & Nantulya (n 47).

[301] K Nyman-Metcalf & I Papageorgiou 'Why Should We Obey You? Enhancing Implementation of Rulings by Regional Courts' (2017) 1 *African Human Rights Yearbook* p 187. https://heinonline.org/HOL/Page?handle=hein.journals/ahry2017&id=185&collection=journals&index= (accessed 2 September 2024).

[302] Nyman-Metcalf & Papageorgiou (n 301) p 189.

[303] Ajdolohoun (n 27) p 21.

wars against the legitimacy of the Court, continue to undermine its appreciation amongst member states, thereby affecting the speed of implementation of its decisions.

3.3.5 Ambiguity of Court orders

The formulation of a precise and targeted remedy improves compliance.[304] Studies reveal that articulative remedies are fully implemented and complied with, as compared to those vaguely crafted.[305] Thus, the vagueness of orders might have triggered Tanzania's reluctance to implement it. The Court has for example directed Tanzania to amend its Penal Code to remove the mode of execution of the death penalty, death by hanging.[306] However, the Court did not precisely direct what mode of execution qualifies as humane and undegrading.

3.3.6 Timing of issuing decisions

Adjolohoun has linked a load of cases against Tanzania to the Court's lack of fully considering the timing and institutional context for the issuance of certain decisions.[307] However, Adjolohoun does not show the circumstances to be considered and why they matter, although he advances the view that the death penalty decision was issued, disregarding the social-cultural context.[308] It is also fair in terms of timing to think that certain reforms could not have been possible or would affect country plans and stability. The *Kambole* decision directing constitutional amendment to allow results of the presidential elections to be challenged in courts was issued three months before the general election.[309] However, Tanzania has had a two-year ample time within which to amend the law. The Constitution did not need to be

[304] Viljoen & Louw (n 253) p 16.

[305] Viljoen & Louw (n 253) p 16.

[306] *Rajabu* (n 10) and 13 other *death penalty* cases discussed in section 2.3.2 (d) of Chapter 2 of this study.

[307] Ajolohoun (n 27) p 22.

[308] Ajolohoun (n 27) p 22.

[309] Ajolohoun (n 27) p 24

amended before the election. This argument would only come into play if, say, Tanzania had indicated that there is a shortage of resources to undertake reforms within the time allocated by the Court, a defense that cannot be proportionately justified either.

3.4 Conclusion

Tanzania is faced with significant hindrances to the implementation of orders of the Court. The lack of effective democratic institutions has seen Tanzania having records of not implementing domestic court orders which makes the judiciary, for instance, ineffective in guarding rights. Attempts to obscure public interest litigation and the withdrawal of article 34(6) have added to domestic hostility against orders of human rights courts. The influence of religious opinions has undermined consideration of orders deemed to conflict with such standings.

Pertaining to the Court and the Commission, it has been seen that the lack of an effective enforcement mechanism of the orders makes it easy for Tanzania to escape its obligations under the Charter. The lack of an appellate mechanism within the Court or an institution to shield it has fuelled disgruntlement among states. These and many more factors contribute to Tanzania's slow pace in implementing the decisions of the Court.

Chapter 4: Opportunities for Tanzania to ensure orders of the Court are implemented

4.1 Introduction

This chapter considers the opportunities that could enable Tanzania to implement the decisions of the Court. The study recommends measures specific to Tanzania, such as adopting a new constitutional order with a comprehensive bill of rights and strengthening democracy and governance institutions. There are also measures specific for the Court to consider.

4.2 Opportunities for Tanzania

4.2.1 Promulgation of a new Constitution

Tanzania has indicated that the implementation of two constitutional reform measures ordered by the Court is contingent on the adoption of a new Constitution.[310] The measures are to allow independent candidates to run for elections,[311] and allow the results of the presidential elections to be challenged in courts of law.[312] It is also clear that the 2014 constitutional reform process was unsuccessful, as it did not end up in a referendum.[313] However, the 2014 Proposed Constitution of the United Republic of Tanzania did provide for provisions to address the two measures as ordered by the Court.[314] It is therefore imperative that Tanzania finalise the constitutional review process.

[310] Activity Report of the African Court (n 22).

[311] *Mtikila* (n 4).

[312] *Kambole* (n 8) 460.

[313] Maoulidi (n 69).

[314] Proposed Constitution (n 71).

This study recommends further that Tanzania's new Constitution should effectively safeguard rights. It should address systemic hindrances to the effective implementation of Court orders. Here are some of the major issues to be considered.

4.2.2 Promulgating a comprehensive Bill of Rights in the Constitution

Commenting on the Constitutional amendment that prohibited independent candidates from running for elections, Tanzania's founding President Mwalimu Julius Nyerere was quoted as saying:

> This is very dangerous. Where can we stop? If one section of the Bill of Rights can be amended, what is to stop the whole Bill of Rights being made meaningless by qualifications of, and amendments to, all its provisions? I am saying that the basic rights of the citizens of this country must be regarded as sacrosanct... The right to vote and the right to stand for elective office are the rights of a citizen. So is the right to join a political party. But using the right to join a political party cannot be a condition for exercising either of the other.[315]

Mwl Nyerere's interjection suggested that the constitutionally guaranteed rights do not have adequate safeguards against abuse. Wambali notes that the danger brought by the amendment of the Constitution to nullify Mtikila's 1994 independent candidate win exposed how flimsy the Bill of Rights is.[316] The prevalence of clawback clauses, especially for civil rights like the right to freedom movement (art 17), the right to freedom of expression (art 18), the right to freedom of religion (art 19), the right to freedom of association (art 20) and the right

[315] Shivji (n 209).

[316] Wambali (n 255) p 212.

to participate in public affairs (art 21), leaves room for those rights to be enjoyed but with limitations.[317]

For instance, the Constitution provides for the right to life (art 14), but it must be enjoyed in accordance with the laws. Subjecting the right to life to other laws means that it can be taken away at any time by an operation of another law. It is such justification that is used to curtail lives by the application of the death penalty. The right to life in Tanzania is, according to the decisions of the Court against Tanzania, arbitrarily curtailed by an operation of the death penalty law.[318] The lack of an explicit statement of rights without clawbacks in the Bill of Rights renders some rights inadequately provided and protected. The Constitution should be rewritten to make it difficult for rights to be easily tampered with, save to a permissibly necessary extent. Aligning the provisions of the Bill of Rights with the provisions of the Charter, which provides for certain rights without a claw-back clause, is essentially important. For instance, the right to life in the Charter is crafted without clauses permitting its derogation.[319] This does not anyhow negate the fact that some rights in the Charter have clawback clauses, but Tanzania could accord maximum safeguards to provisions of rights in its prospective constitution.

The Constitution should also explicitly contain a comprehensive set of rights and their classification, such as the right to legal representation, the right to bail and the right to legal remedies when there are violations. The classification might be, for instance, based on the

[317] Wambali (n 255) p 173-174.

[318] *Rajabu* (n 10).

[319] Article 4 provides that 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' The definition under the Charter has no clawback clauses as compared to the one in the Constitution of Tanzania.

international human rights standards where you have civil and political rights, economic, social, and cultural rights as well as group rights. An elaborate Bill of Rights in the Constitution will help protect and safeguard rights, as well as promote a culture of domestic respect for human rights and inspire a similar approach towards international legal obligation that Tanzania has committed to observe.

Equally, the barriers to public interest litigation should be addressed. The 2020 amendment to the Basic Rights and Duties Enforcement Act, which required a show of interest in a matter or how one is personally affected by legislation as a precondition for petitioning laws and practices and the requirement of a three-judge bench for human rights cases, should be lifted.

4.2.3 Strengthening the independence of the judiciary

As the maxim goes, Courts should guard rights without fear, favour or prejudice.[320] As seen in this study, the independent candidate domestic litigation drama is one of the instances in which the Court of Appeal of Tanzania could have protected the right to participate in government but threw the ball to the parliament, to the advantage of the executive. The number of progressive decisions of the High Court that the Court of Appeal has overturned calls for a new dawn in the judiciary of Tanzania as seen under section 3.2.3 of Chapter 3 of this study. Nevertheless, the prevalence of domestic court orders that have not been implemented[321] shows an institutional deficit, which makes the functionality of the Judiciary

[320] PN Langa 'The protection of human rights by the judiciary and other structures in South Africa' (1999) 2 *SMU Law Review* p 1533 https://scholar.smu.edu/cgi/viewcontent.cgi?article=1739&context=smulr (accessed 11 October 2024).

[321] See section 3.2.1.1 of Chapter 3 of this study.

somewhat imperfect. A new constitution should ensure that the judiciary operates effectively and independently, to inspire respect for the orders of international courts too.

4.2.4 Strengthen parliamentary independence

The functional independence and efficacy of the law-making arm of the State is paramount. The Parliament should operate outside the Executive's influence as discussed briefly in section 3.2.1.5 of Chapter 3. The powers of the President to dissolve the Parliament[322] should be controlled as they somewhat threaten its independence,[323] although it has never occurred that the President has utilized such a mandate. It has been continuously argued that the separation of powers between the legislative arm of the State and the executive is blurred, undermining checks and balances.[324] Some of the fundamentals to consider for the parliamentary design include doing away with the President dissolving the Parliament, the President should not directly appoint members of parliament to be Ministers and the same should not dub as MPs. The parliament should vet and approve top appointments made by the President, such as the Chief Justice, Justices of Appeal and High Court, and the Attorney General. The Parliament should vet the decisions of the executive at large, especially those relating to international treaty obligations. The oversight function of the parliament must be strengthened[325] with the view to constantly checking the government and promoting accountability.

[322] Constitution art 90(2)(b), (c) & (d).

[323] AJ Liviga 'Tanzania: A bumpy road to consolidated democracy' (2009) 25 *Eastern Africa Social Science Research Review* p 29 https://doi.org/10.1353/eas.0.0005 (accessed 1 October 2024).

[324] Liviga (n 323) 35.

[325] Liviga (n 323) 36.

4.2.5 Implement recommendations of the Presidential Commission on criminal justice

Tanzania has been forming 'commissions' or 'task forces' to investigate and advise the government on legislative reforms. That is notwithstanding the existence of the Tanzania Law Reform Commission, which has the primary mandate to advise the government on that discourse. The recent Presidential Commission (Chande Commission) on criminal justice reforms, for instance, came up with practical recommendations which address several orders of the Court. The Chande Commission recommended doing away with the mandatory death penalty and that courts be involved in the bail admission process.[326] The recommendations of the Chande Commission must be acted upon with quickness. Recommendations of the previous commissions, such as the Nyalali Commission which flagged 40 laws to be outlawed for being repressive,[327] should be acted upon too. It is inconceivable to think about the net effects of the 40 repressive laws on democratic governance and the enjoyment of fundamental rights of individuals. Addressing challenges identified by experts and commissions helps the country to align its laws with its international legal obligations and standards.

4.2.6 Strengthen citizen participation in government

The Constitution, article 21, provides for the right of every citizen to participate in government and public affairs. However, the right to take part in government is unattainable if citizens are not aware of their rights to the extent it could inform their decision-making and scrutiny against political leaders. As Wambali suggests, it can only be possible for the country to attain

[326] Presidential Commission on criminal justice (n 13).

[327] See more here https://tanzlii.org/akn/tz/doc/law-reform-report/1994-04-01/final-report-on-the-designated-legislation-in-the-nyalali-commission-report/eng@1994-04-01 (accessed 2 September 2024).

respect for human rights if the masses are emancipated through legal literacy programmes.[328] Similarly, the former Tanzania Chief Justice has argued that citizens and their representatives are the ultimate forces best placed to force the executive to respect and implement the court orders, including those of international courts.[329] But it can only be possible if citizens are educated about the work of the Court and its relevance in the governance systems.[330] It is, therefore, recommended that civil society organisations and the government ensure that citizens are empowered with the view to ensuring they know their rights and how to assert them.

4.2.7 Bolster the role of the Commission for Human Rights and Good Governance

The Charter obliges States to establish and guarantee the independence of national institutions with the competence to promote and protect rights provided therein.[331] It is in conjunction with the requirements of the Charter that NHRIs, accredited with affiliate status by the African Commission[332] or otherwise, shall assist it in protecting and promoting human

[328] Wambali (n 255).

[329] Francis (n 41).

[330] JM Isanga 'The Constitutive Act of the African Union, African courts and the protection of human rights: New dispensation?' (2013) 11 *Santa Clara Journal of International Law* p 302.

[331] Charter, art 26.

[332] Resolution on the Granting of Affiliate Status to National Human Rights Institutions and specialized human rights institutions in Africa of 2017 res 370, para 2 https://achpr.au.int/index.php/en/adopted-resolutions/370-granting-affiliate-status-national-human-rights-institutions-achprres370lx (accessed 28 September 2024).

rights at the national level.[333] In doing so, the NHRIs are expected to monitor the implementation of the decisions of treaty bodies,[334] such as the Court.[335]

While the effectiveness of the competence granted to NHRIs depends on their autonomy,[336] much remains to be desired from Tanzania's Commission for Human Rights and Good Governance (CHRAGG). In its reports, the CHRAGG has not indicated if it has worked towards ensuring the government implements orders of the Court. Yet there is no proof that the CHRAGG has done anything to pressure or persuade the Government to implement decisions of the Court. The CHRAGG should, for instance, establish an international treaty obligation monitoring unit within its departments to regularly conduct follow-ups with the government, with the view to ensuring that the orders of the Court are implemented. CHRAGG can also liaise with the Law Reforms Commission of Tanzania for pioneering preparation of Bills to amend (or legislate) certain legislations or align them with orders of the Court.

[333] Resolution on the Granting of Affiliate Status to National Human Rights Institutions (n 330).

[334] The Network of African National Human Rights Institutions *The Role of NHRIs in monitoring implementation of recommendations of the African Commission on Human and Peoples' Rights and judgments of the African Court on Human and Peoples' Rights'* (2016) para 9-13 https://www.nanhri.org/the-role-of-nhris-in-monitoring-implementation-of-recommendations-of-the-african-commission-on-human-and-peoples-rights-and-judgments-of-the-african-court-on-human-and-peoples-rights/ (accessed 11 October 2024).

[335] Pretoria Deceleration on Economic, Social and Cultural Rights in Africa of 2004.

[336] LM Mute 'Protecting the mandate and autonomy of the African Commission on Human and Peoples' Rights: leveraging the roles of national human rights institutions' (2021) *Coalition for the independence of the African Commission* p 10 NHRIs-ACHPR_EN.pdf (achprindependence.org) (accessed 28 September 2024).

4.2.8 Reconsider the 2019 withdrawal of article 34(6) Declaration

Although it is not likely for Tanzania to quickly reverse its decision as the President indicates[337] that until reasons for withdrawal are addressed,[338] amid constant calls by stakeholders,[339] including the President of Court,[340] Tanzania should reconsider the 2019 withdrawal of article 34(6) Declaration which blocked direct access to the Court for individuals and NGOs. As seen in this study, the withdrawal is perceived as a lack of confidence in the Court, with the net effect of affecting the reception of its orders. Reconsidering the withdrawal will also inspire cooperation and collaboration with the Court.

4.2.9 Establish domestic mechanism to monitor the implementation of decisions of the Court

The Coalition for an Effective African Court on Human and Peoples' Rights has highlighted that Tanzania has no procedures for enforcing decisions of the Court.[341] The African Union's Executive Council adopted a resolution for member States of the African Union to appoint national focal points to work with the Court in assisting with the implementation of the

[337] African Court on Human and Peoples' Rights 'The President of the African Court paid a courtesy call on H.E the President of the United Republic of Tanzania' (Dar es Salaam) 28 May 2021 https://www.african-court.org/wpafc/the-president-of-the-african-court-paid-a-courtesy-call-on-h-e-the-president-of-the-united-republic-of-tanzania/ (accessed 7 October 2024).

[338] 'Tanzania will rejoin African Court: Samia' *The Guardian* (Dar es Salaam) 25 November 2022. https://legacy.ippmedia.com/en/news/tanzania-will-rejoin-african-court-samia (accessed 7 October 2024).

[339] F Kell, A Masabo & T Feltes 'Reviving Tanzania's regional leadership and global engagement: priorities for an effective foreign policy reset' (2024) *Royal Institute of International Affairs* 38 https://doi.org/10.55317/9781784136048 (accessed 7 October 2024).

[340] African Court on Human and Peoples' Rights (n 337).

[341] Coalition for an Effective African Court on Human and Peoples' Rights 'Booklet on the implementation of decisions of the African Court on Human and Peoples' Rights' (2021) p 30 https://www.africancourtcoalition.org/wp-content/uploads/2021/08/ACC-Implementation-Booklet_ENGFR_2021.pdf (accessed 30 September 2024).

decisions.[342] Tanzania is one of the 21 countries that have appointed such focal points.[343] Despite having focal points, the process of implementing decisions of the Court is incumbent on the executive's will, under the auspices of the office of the Attorney General, a principal legal advisor to the Government of Tanzania.[344] It is imperative that Tanzania establishes an independent body that follows up, monitors, and engages the government in ensuring that orders of the Court are implemented. Tanzania could also set up a parliamentary oversight mechanism or committee with special competence to ensure international human rights accountability is attained.

4.3 Conclusion

Chapter 4 identifies several measures for Tanzania to consider with the view to ensuring effective implementation of Court orders. It is key for Tanzania to promulgate a new Constitution with a comprehensive Bill of Rights which tackles systemic hindrances to the enjoyment of rights, a text that strengthens the independence of democracy and governance institutions. It is generally recommended that Tanzania build a culture of democracy, bolster the role of the Commission for Human Rights and Good Governance should be bolstered and citizens' participation in government.

[342] Resolution on the Appointment of a Focal Point on Judicial Independence in Africa of 2023

[343] Executive Council 'Decision on the 2023 activity report of the African Court on Human and Peoples' Rights' (2024) https://africanlii.org/akn/aa-au/doc/decision/2024-02-15/1245/eng@2024-02-15/source (accessed 11 October 2024).

[344] Office of the Attorney General (Discharge of Duties) Act of 2019 s 8 https://tanzlii.org/akn/tz/act/2005/4/eng@2019-11-30 (accessed 12 October 2024).

Chapter 5: Conclusion and recommendations

5.1 Conclusion

This study investigated the extent to which Tanzania has implemented decisions of the Court ordering legislative and constitutional reforms. The study finds that the Court has ordered Tanzania to take legislative and constitutional reform measures, to align legislation and her Constitution with the Charter, in 25 decisions.[345] Out of 25 decisions, three are on political participation and the remaining are on criminal justice and natural justice (the right to be heard and obtain remedy before courts). Two decisions ordered amendment of the Constitution, to allow independent candidates to run for elections and results of presidential elections to be challenged in courts, respectively.[346] Fifteen decisions ordered Tanzania to do away with the mandatory death penalty and its inhumane mode of execution, death by hanging.[347] Two decisions ordered amendment of the CPA to allow courts to consider bail applications for all offenses.[348] The remaining two decisions pertain to reforming the election management system[349] and the right to legal remedies when citizenship is outrightly revoked by the Minister,[350] respectively.

This study observes further that out of 25 orders, only two have been partially implemented. The 2017 Legal Aid Act is a reaction to the Court order in the case of *Nganyi*, although it faces inadequacies for not making it mandatory for persons accused of capital crimes that attract heavy sentences to be provided with free legal representations as ordered in the case of *Swaga*. Another order pertains to election management where Tanzania has adopted a new

[345] Court website (n 3).
[346] See section 1.2.1 of Chapter 1 of this study.
[347] *Rajabu* (n 10) & (n 14).
[348] *LHRC* (n 24).
[349] *Wangwe* (n 15).
[350] *Nganyi* (n 22) & *Swaga* (n 21).

law setting criteria and qualifications for civil servants who might be appointed as election directors as ordered by the Court in the case of *Wangwe*. However, this measure is incomplete because it does not address a similar concern for returning officers as ordered by the Court.

The study further identifies factors hindering the implementation of Court orders. The lack of effective democracy and governance institutions such as the legislative body, the prevalence of domestic court orders that have not been implemented, and inadequacies in judicial protection of rights contribute to a slow pace in implementing orders of the Court. Attempts to obscure public interest litigation and the withdrawal of article 34(6) have added to domestic hostility against orders of the Court. There is also an overwhelming influence of religious opinions against the calls for measures to control the practice of the death penalty.

This study finds that for international human rights law to be effectively implemented in Tanzania, a lot of domestic factors come into play, especially the role of organs of the state like the judiciary, an active civil society and an effective judiciary that guards rights. It is why. Tanzania needs a new constitution that supports the functionality of institutions as will be seen in the recommendations section below.

Moreover, the lack of an appellate mechanism within the Court has fuelled disgruntlement amongst member States, including Tanzania, thus undermining the appreciation of orders of the Court. Failure of the AU Executive Council to effectively enforce orders of the Court is another impediment.

5.2 Recommendations

This section provides recommendations to be considered to address the hindrances to the implementation of the orders of the Court. The recommendations are subdivided into those directed to Tanzania, the Court, the Commission, and the African Union.

5.2.1 Recommendations for Tanzania

This study recommends that Tanzania promulgate a new Constitution with a comprehensive Bill of Rights that, among others, provides adequate safeguards for rights against abuse. The Constitution should anticipate and manage the application of claw-back clauses against fundamental rights and liberties. Tanzania should also ensure that the separation of powers is practically reflected in the new Constitution to enable checks and balances. Tanzania should implement the recommendations and opinions of experts, civil society groups and Commissions, such as the Chande Commission, which has provided pertinent observations about doing away with the mandatory death penalty and allowing courts to hear bail applications for all offenses.

Tanzania should bolster the role of the Commission for Human Rights and Good Governance (CHRAGG). CHRAGG should regularly monitor the governments' obligations under the Charter, including the implementation of decisions of the Court. Apart from having a focal person responsible for the implementation of decisions of the Court, Tanzania may also strengthen its domestic mechanism on that aspect. For instance, Tanzania may establish an oversight mechanism within the parliament to oversee the implementation of decisions of the Court and hold the government to account.

Tanzania should ensure that human rights education is provided to her citizens for them to effectively participate in government and promote accountability. The African Union needs to redesign the Court with an appellate mandate, strengthen the mechanism to enforce decisions of the Court and for the Court to manage the use of dissenting opinions, especially in politically and socially sensitive matters.

5.2.2 Recommendations for external actors

5.2.2.1 Introduction of an appellate mechanism in the Court hierarchy

The Court was established as a single entity with a unitary institutional hierarchy.[351] The lack of an appellate mechanism within the Court is a design challenge. Scholars have indicated that the lack of an appellate or review mechanism within the Court has fuelled anger amongst some contracting State parties.[352] It has thus led to the withdrawal of article 34(6) Declaration to disengage with the Court.[353] The introduction of an appellate chamber of the Court, just like the case is for the EACJ,[354] would allow parties to exhaust their dissatisfaction and disgruntlement, especially for cases touching critical issues relating to political governance and, broadly, unfavourable decisions.[355] The motive behind the establishment of the EACJ's appellate chamber is the dissatisfaction of the Kenyan Government after an unfavourable decision, in which they thought an appellate chamber would have helped filter the dissatisfaction.[356] Although the appellate chamber of the EACJ might have absorbed some grievances, member states, including Tanzania, do not adequately implement its decisions. It is, therefore, one thing to have an appellate chamber, as it might occur for the Court. Still,

[351] Adjolohoun 'Jurisdictional fiction? A dialect scrutiny of the appellate competence of the African Court on Human and Peoples' Rights' (2019) 6 *Journal of Comparative Law in Africa* p 10 https://repository.up.ac.za/bitstream/handle/2263/79002/Adjolohoun_Jurisdictional_2019.pdf?sequence=1&isAllowed=y (accessed 7 October 2024).

[352] See for instance in the cases of *Alex Thomas v United Republic of Tanzania* (Merits) (2015) 1 AfCLR 465 para 130 and *Armand Guehi v United Republic of Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 paras 31-34.

[353] Adjolohoun (n 27) https://orcid.org/0000-0002-9251-6068 (accessed 30 September 2024).

[354] Treaty for the Establishment of the East African Community of 1999 art 23(2) & (3).

[355] Adjolohoun (n 351) p 19.

[356] JT Gathii 'Variation in the use of subregional integration courts between business and human rights actors: The case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* p 38 https://www.jstor.org/stable/43920644 (accessed 7 October 2024).

there might be other factors to take into consideration to ensure that human rights obligations stemming from orders of the Court are met by states. It is equally essential, as Adjoholoun recommends, to look at the essence of the right of appeal as applied in domestic proceedings, but more so, filtering disgruntlement in cases of controversial socio-political nature,[357] address errors in decisions[358] premised on limited appreciation of laws and facts in the Court's reasoning. In a two-tiered adjudication process, states like Tanzania might welcome and implement orders of the Court.

A practical comparative advantage can be borrowed from the practice of the European Court of Human Rights (ECHR), which has a Grand Chamber.[359] Upon referral or request, the Grand Chamber reviews decisions rendered by the first instance division of the same ECHR.[360] However, it has to be understood that, despite having a Grand Chamber and being regarded as the world's most effective human rights court,[361] the ECHR has experienced backlashes and resistance from even the progressive jurisdictions or, rather, states that have been complying with its decisions, such as the United Kingdom.[362] States like Turkiye, Romania, Ukraine, Hungary, Azerbaijan and the Russian Federation have not substantially implemented the

[357] Adjolohoun (n 27).

[358] A Possi ''It is better that ten guilty persons escape than that one innocent suffer': the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* P 330 https://www.ahry.up.ac.za/images/ahry/volume1/Possi.pdf (accessed 12 October 2024).

[359] Protocol 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the Control Machinery Established Thereby of 1994, arts 27-31.

[360] Protocol No 11 (n 352) arts 42-44.

[361] LR Helfer 'Redesigning the European Court of Human Rights: Embeddedness as a deep structural principle of the European human rights regime' (2008) 19 *European Journal of International Law* p 126 https://doi.org/10.1093/ejil/chn004 (accessed 7 October 2024).

[362] C Hillebrecht *Domestic Politics and International Human Rights Tribunals: The problem of compliance* (2014) p 114–125 https://assets.cambridge.org/97811070/40229/frontmatter/9781107040229_frontmatter.pdf (accessed 7 October 2024).

decisions of the ECHR.[363] Thus, having an appellate chamber is one thing, but there might exist other reasons hindering the implementation of decisions which have to be addressed, altogether. Pertinent to underscore that the Inter-American Human Rights Court has only one chamber with seven judges,[364] but its decisions are equally received with contestation from some member states like Brazil.[365]

5.2.2.2 Strengthening the promotion and protective missions of the Commission

The Commission engages States in its missions to promote respect for human rights on the Content. To do so, the Commission receives briefings from States on the legislative and policy measures considered or are about to be taken, to ensure that they adhere to their obligations under the Charter.[366] Viljoen has advised that promotion missions should go hand in hand with protective activities, which the Commission has not significantly been doing.[367] It is also recommended that promotion missions be strengthened to ensure that they bear the expected fruits. In doing so, the Commission will ensure the Court's decisions are implemented as well.

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[363] Council of Europe *Implementation of judgments of the European Court of Human Rights* (2023) https://rm.coe.int/implementation-of-the-judgments-of-the-european-court-of-human-rights-/1680aaaa60 (accessed 7 October 2024).

[364] Statute of the Inter-American Court of Human Rights of 1979 art 4 https://www.oas.org/en/iachr/mandate/Basics/statutecourt.asp (accessed 7 October 2024).

[365] VO Mazzuoli 'Effectiveness of Inter-American human rights system in Brazilian law' (2011) 11 *African Human Rights Law Journal* p 213 https://scielo.org.za/pdf/ahrlj/v11n1/10.pdf (accessed 7 October 2024).

[366] Rules of Procedure of the Commission of 2020 r 75-76.

[367] F Viljoen 'From a cat into a lion? An overview of the progress of the African human rights system at the African Commission's 25 year mark' (2013) 17 *Law Democracy & Democracy* 313-14 http://dx.doi.org/10.4314/ldd.v17i1. (accessed 29 September 2024).

5.2.2.3 Control the influence of dissenting opinions by the Court

Justices of the Court may wish to manage the use of dissenting opinions, especially in politically and socially sensitive questions brought before it, unless where compellingly necessary and appropriate. The President of the Court may, for instance, issue an internal circular that guides the issuance of dissenting or separate opinions in certain cases when there is a deliberate object of building a firm jurisprudence based on the Charter. Earlier in the years, in some jurisdictions, it was the Chief Justice who urged judges to restrain from over-doing dissenting or separate opinions.[368] Though not easily attainable, unanimous decisions might help counter the possibility of states somewhat borrowing confidence from the minority opinions, noting that even judges disagree or there are other perspectives which are, or with enough number of Judges leaning towards that thinking, might be judicially acceptable.

5.2.2.4 Strengthening the AU mechanism for enforcing decisions of the Court

As Mutua notes, the Charter has institutional inadequacies that have rendered inefficiencies in enforcing the decisions of the Court.[369] The African Union's Executive Council should strengthen the enforcement mechanism of the decisions of the Court. This will inspire member States' respect for Court orders and their legitimacy. It is imperative that the culture of respect for, and commitment to, human rights be cultivated across the continent.[370]

[368] Carter (n 287) 122.

[369] Makau Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* p 343 https://doi.org/10.1353/hrq.1999.0027 (accessed 1 October 2024).

[370] Isanga (n 330) p 300.

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