

## BERICHTE • REPORTS • RAPPORTS

## What can the Tanzania Judicial System learn from Germany?

*Issa Maige\**

### 1. Introduction

In November 2019, the author together with Justice *Thadeo Mwenempazi* represented the judiciary of Tanzania in an exchange programme for judges and lawyers held in Germany.<sup>1</sup> The programme involved visiting of various courts and law enforcement agencies. In the process, the author participated in various discussions with judges, public prosecutors, advocates and jurists on legal system in Germany. The legal systems in these two countries are significantly different. While Tanzania follows the adversarial system, Germany follows the inquisitorial system. Nevertheless, it is a fact that neither of the systems can claim to be better than the other. There is, however, a lot which each of the systems can learn from another. This report, therefore, is an observation of the lessons that Tanzania can learn from the German judicial system. It is contended that a combination of adversarial and inquisitorial systems in some areas of the law may be relevant in addressing some of the apparent weaknesses in the system of administration of justice in Tanzania. In so doing, this paper discusses, basing on the observations from the exchange programme in Germany and some documentary review, the legal systems and judicatures in the two countries and pinpoints what Tanzania can learn from Germany. For obvious reason, the report shall confine itself to Tanzania Mainland and the German State of Baden-Württemberg.

### 2. The judicatures and legal systems in Tanzania and in Germany compared

#### *2.1. The constitutional systems, structure of the unions and the judicatures*

The Constitution of the United Republic of Tanzania incorporates the principles of rule of law, separation of power and independence of the judiciary.<sup>2</sup> The three principles are sup-

\* The author is Judge of the High Court of Tanzania, Arusha District Registry.

1 For details of the exchange programme see the reports in *Recht in Afrika – Law in Afrika – Droit en Afrique* 17 (2014), pp. 113-116, and pp. 228-236, 18 (2015), pp. 139-142, 19 (2016), pp. 94-101, and 22 (2019), pp. 120-126.

2 Articles 4, 30 and 107A of the Constitution of the United Republic of Tanzania, 1977.

plemented by the broader principle of constitutionalism which requires that legitimization of the exercise of power by each of the three state pillars be traced from the Constitution.<sup>3</sup>

Tanzania is a union of two states: Tanzania Mainland and Tanzania Zanzibar. Although the judicature in Tanzania is not a union matter as such, the separate court systems in the two parts of the union meet at the Court of Appeal of Tanzania (CAT) which is a union matter.<sup>4</sup> Like in Tanzania, the judicature in Germany with the exception of the Federal Constitutional Court (FCC), the Federal Court of Justice (FCJ), and the four specialised federal supreme courts is not a union matter. The courts in each of the 16 states in Germany enjoy jurisdiction within their parameters.

## 2.2. *The lower judicature in Tanzania*

The lower judicature in Tanzania is divided between ordinary and specialised jurisdictions. In ordinary jurisdiction, there are three court levels established under the Magistrates Courts Act, 1984, Cap. 11, R.E, 2002 (MCA) namely; primary courts, district courts and courts of resident magistrates.

Primary courts enjoy jurisdiction within the districts of their establishments. They have unlimited original jurisdictions in matters arising from customary and Islamic laws.<sup>5</sup> In non customary civil matters, their jurisdictions are limited to disputes whose value of the subject matter is not more than 30 million Tanzanian Shillings (TZS) for movables and TZS 50 million for immovable.<sup>6</sup> They also enjoy criminal jurisdictions in some petty crimes specified in the Fourth Schedule to the MCA.<sup>7</sup> The composition of a primary court is a primary court magistrate or a resident magistrate in primary court sitting with two assessors. Appeals from decisions of the said courts lie to the district courts.

District and resident courts have concurrent original jurisdictions. The former is established at district level and the latter at regional level unless the Chief Justice decides otherwise. The pecuniary limit of their jurisdiction in civil matters is TZS 300 million for movables and TZS 500 million for immovable save for commercial disputes.<sup>8</sup> They can entertain all criminal matters except those which the High Court enjoys original jurisdiction. Appeals from decisions of these courts lie to the High Court of the United Republic of Tanzania (HC).

Aside from ordinary courts, there are some other specialised tribunals. These include the Ward Tribunal (WT) and the District Land and Housing Tribunal (DLHT) established

3 Ibid., article 64(5).

4 Ibid., article 107A.

5 Section 18 (1) (A) of the MCA.

6 Ibid., section 18 (1) (ii) and (iii).

7 Ibid., section 19(1) (b).

8 Ibid., section 40 read together with section 41(1) thereof.

under the Land Act to deal with land disputes.<sup>9</sup> While a WT is an informal tribunal administered by lay persons,<sup>10</sup> the DLHT is manned by a learned chairperson assisted by at least two assessors.<sup>11</sup> The chairperson is not bound by the opinion of assessors but in case of departure, he is obliged to assign reasons **therefor**.<sup>12</sup> While the WT entertains petty land matters within the ward of its establishment, the DLHT deals with land matters whose value of the subject matter is not more than TZS 300 million within the district or region of its establishment, as the case may be.<sup>13</sup> Appeals from the decisions of the WT lies to the DLHT while from the latter lies to the HC.

The tribunal vested with original jurisdiction to resolve employment and industrial disputes is the Commission for Mediation and Arbitration.<sup>14</sup> It is established under the Labour Institutions Act and its decisions can be faulted to the Labour Division of the HC or any registry of the HC by way of revision<sup>15</sup>. The tax jurisdiction is exercised by the Tanzania Revenue Appeal Board and the Tax Revenue Appeal Tribunal (TRAT).<sup>16</sup> Whereas the former determines disputes pertaining to tax assessment, the latter determines appeals from the former.<sup>17</sup> Appeals from TRAT lies to the CAT.

### 2.3. *The lower judiciary in Germany*

Unlike Tanzania, the German system does not discriminate between judges and magistrates. All courts in Germany are manned by judges.<sup>18</sup> There are one ordinary jurisdiction and four specialised jurisdictions in Germany.<sup>19</sup> In ordinary jurisdiction, there are three court levels: local courts, regional courts and higher regional courts. They all enjoy civil and criminal jurisdictions. In ordinary civil cases, a local court may determine disputes whose value of subject matter is not more than 5,000 Euros. Nonetheless, the original jurisdiction in matrimonial cases is not limited. In criminal matters, the jurisdiction of the local courts is limited to petty and medium level crimes.<sup>20</sup> While appeals against the decisions of the local courts

9 Section 15 of the Ward Tribunals Act, Cap. 206, R.E. 2002 read together with section 167 (1) of the Land Act, Cap. 113, R.E. 2002.

10 Ibid., section 4 of the Ward Tribunals Act.

11 Section 23 of the Land Disputes Courts Act, Cap. 216, R.E. 2002.

12 Ibid., section 24.

13 Ibid., sections 15 and 33 (2) of the Land Disputes Courts Act as amended.

14 Section 14 of the Labour Institutions Act, Cap. Act No. 7 of 2004.

15 Section 16 (1) of the Tax Revenue Appeal Act, Cap. 408, R.E. 2002.

16 Ibid., section 16(3).

17 Ibid., section 16(4).

18 A speech by the President of the Higher Regional Court of Stuttgart, Justice Mrs Cornelia Horz, on 11<sup>th</sup> November 2019 at the court in Stuttgart.

19 The Federal Court of Justice, at 12 and 15 (a book published by the Federal Court of Justice, Karlsruhe, 2014).

20 Ibid.

in ordinary civil cases go to the regional courts, appeals from the decisions of the same in matrimonial cases go to the higher regional courts and on further appeal to the FCJ. Appeals from criminal matters go to the regional courts. The regional court enjoys original jurisdiction in civil matters where the subject is above 5,000 Euros. Appeals therefrom go directly to the FCJ. It also enjoys original jurisdiction in serious crimes and appeals therefrom lie to the FCJ. Apart from appellate jurisdictions pointed out above, the higher regional court enjoys original criminal jurisdiction in crimes against the state and appeals therefrom lie to the FCJ.<sup>21</sup>

### 3. The higher judicature in Tanzania: Is it similar to Germany?

In Tanzania, the higher judicature starts with the HC and its specialised divisions. The HC has unlimited jurisdiction in all matters except where it is provided otherwise by the Constitution or any other written law.<sup>22</sup> According to article 109(1) of the Constitution, the HC consists of the Principal Judge and not less than 30 judges. Currently, it has more than 70 judges. One qualifies to be a judge of the HC, according to article 109(7) of the Constitution, if he or she is in possession of a first law degree recognized in Tanzania and has for a consecutive period of not less than ten years been either a magistrate or a public servant or an advocate. Judges of both the HC and CAT have securities of tenure subject to the Constitution. They can be removed in office for the reason of misbehaviour in a special procedure set out in the Constitution which involves constitution of a special commission consisting of not less of its half members being judges in any common law country.<sup>23</sup> In some cases, the HC can constitute itself as a Constitutional Court. That is when it is entertaining matters arising from basic right and duties enforcement. In here, the HC would be manned by three judges.<sup>24</sup>

Apart from deciding appeals from subordinate courts, the HC whether by itself or through its specialised divisions, can entertain appeals from some specialised tribunals. There are four specialised divisions of the HC: the Commercial Division of the HC,<sup>25</sup> the Land Division of the HC,<sup>26</sup> the Labour Division of the High Court<sup>27</sup> and the Economic and Corruption Division of the HC.<sup>28</sup> While the Commercial Division and the Corruption and

21 Ibid., pages 15 to 16.

22 Article 108(2) of the Constitution and section 2(1) of the Judicature and Application of Laws Act.

23 Ibid., article 110A(3) read together with article 120A(2) thereof.

24 Ibid., article 30(3) read together with section 10(1) of the Basic Rights and Duties Enforcement Act, Cap. 3, R.E. 2002.

25 It was established as the division of the High Court specialising in commercial disputes through amendment of the High Court Registries Rules.

26 Section 167 of the Land Act.

27 Section 50 of the Labour Institutions Act.

28 This Court was established under the High Court Registries Rules to deal with grand corruptions.

Economic Crimes Division enjoy original jurisdiction only, the other divisions act both as courts of first instances and of second instances.

The CAT established under article 117(1) of the Constitution, is the court of the last instance. It hears appeals and revisions from the decisions of the HC and its divisions. A three panels of the Justices of the CAT constitutes the quorum.<sup>29</sup>

#### 4. Comparison of the higher judiciatures in the two countries

While in Tanzania the CAT is the court of the last instance, in Germany it may be difficult to say that there is one court of the last instance. This is partly because of specialisation and existence of the FCC which is both a court and a constitutional organ.

The FCJ acts as the court of last instance in so far as ordinary civil and criminal cases may be concerned.<sup>30</sup> In specialised areas, there are specialised supreme courts which act as courts of last instances in each of the jurisdictions.<sup>31</sup> Leave requirement in the appeal to the FCJ is only in respect to civil appeals.<sup>32</sup> The right to appeal in criminal cases is automatic.<sup>33</sup>

While appeals to the FCJ and specialised federal supreme courts are limited to points of law only,<sup>34</sup> first and second appeals to the CAT are not restricted as such. In the second appeal, the prospective appellant has to demonstrate existence of some pertinent or novel issues in the intended appeal calling for the attention of the CAT. It is only on the third appeal that the appellant has to obtain certificate from the HC on points of law.<sup>35</sup> A decision refusing to grant leave in Germany is appealable<sup>36</sup> whereas in Tanzania is not. Nevertheless, in Tanzania, the aggrieved party may attempt a second bite to the CAT.<sup>37</sup>

It is worth of note that the superiorities of the FCJ and specialised federal supreme courts in Germany do extend to constitutional matters. This is an exclusive jurisdiction of the FCC.<sup>38</sup> The FCC can declare a parliamentary enactment unconstitutional.<sup>39</sup> Besides, it can determine constitutional disputes between constitutional organs in as much as between the Federal Republic and any of the states.<sup>40</sup> In Tanzania, such jurisdiction is not within the

29 Ibid., article 122(1).

30 Conversation with the President of the Federal Court of Justice, Justice Mrs Bettina Limperg, on 14<sup>th</sup> November 2019 at the court in Karlsruhe.

31 Article 95 of the Basic Right for the Federal Republic of Germany.

32 Op. cit., The Germany Federal Court of Justice, pages 14 and 15.

33 Ibid., 15 and 16.

34 Ibid., page 15.

35 Section 5 of the Appellate Jurisdiction Act, Cap. 141, R.E. 2002.

36 Op. cit., The Federal Court of Justice, page 15.

37 Rule 47 of the Court of Appeal Rules, 2009.

38 Article 93 of the Basic Law read together with section 1 of the Federal Constitutional Court Act, as last amended by Act No. 8 of 2017.

39 Ibid., section 8a of the Federal Constitutional Court Act.

40 Ibid., article 6.

domain of ordinary courts. It is vested in the Special Constitutional Court established under the Constitution.<sup>41</sup> Though the FCC may review decisions of the FCJ and other specialised supreme federal courts to determine compliance with the German Constitution (Basic Law), it cannot decide whether the same correctly applied the Basic Law.<sup>42</sup> It does, therefore, not act as the court of last instance to the said courts.

### 5. The legal systems in the two countries: A search for alternative solutions

The law in Tanzania consists of the Constitution, written laws and unwritten laws in the forms of customary law, Islamic law and case law.<sup>43</sup> For historical reason, English law with its substances of common law, doctrine of equity and statutes of general applications in force in England on the reception date in 1921, form part of Tanzanian law subject to some restrictions.<sup>44</sup> Conversely, the German laws are codified and placed in hierarchy. In accordance with the Basic Law, European Community Law is the highest norm to be followed by the Basic Law and statutory laws<sup>45</sup>.

Like in any other common law countries, dispute settlement procedure in Tanzania is woven in the adversarial system as opposed to the inquisitorial system practiced in Germany. While in the inquisitorial system a judge plays a very active roles in both pre-trial and trial proceedings, the role of a judge in the adversarial system is somehow dormant.<sup>46</sup> He or she assumes the role of an impartial referee leaving the active participation to the adversarial parties and their lawyers. In order to effectively regulate the contest therefore, formality and procedural technicalities in adversarial system is *sine qua non*.

Admittedly, this has been one of the major sources for delay and sometimes miscarriage of justice. Trials take long partly because of unnecessary preliminary objections which have to be resolved before proceeding to a further stage of trial and may sometime lead to an appeal to higher courts and stay of proceedings pending appeals.<sup>47</sup> It is submitted that rigid formalisation and proceduralisation of the legal proceedings inevitably puts the control of the proceedings in the hands of the adversarial parties and their lawyers. Obviously therefore, the control of the procedure falls in the hands of those who can afford to hire experienced and skilled lawyers at the detriment of those who cannot.

41 Article 125 and 126 of the Constitution of United Republic of Tanzania, 1977

42 Op. cit., conversation with the President of the Germany Federal Court of Justice.

43 The Judicature and Application of Laws Act, Cap. 358, R.E. 2002.

44 Ibid., section 2(3) thereof.

45 Article 25 of the Basic Law.

46 The Law Commission of New Zealand, “Adversarial and Inquisitorial System: A Brief Overview of the Key Features”, Law Commission, 12<sup>th</sup> August, 2013.

47 Colman Ngalo, “Rules of the Court of Appeal of Tanzania”, Paper Presented at a Seminar in the Commemoration of the 25<sup>th</sup> Anniversary of the Court of Appeal, Dar es Salaam (15<sup>th</sup> to 17<sup>th</sup> September, 2004).

During our visit in Germany, we had an opportunity to observe two matrimonial trials at the Local Court of Stuttgart and one criminal trial at the Local Court of Esslingen. While the two matrimonial cases were determined within 50 minutes and the judgments delivered,<sup>48</sup> the criminal trial which involved five witnesses was disposed of within two hours and an oral judgment pronounced.<sup>49</sup> The written judgement, we were told, would be issued within three weeks from the date thereof.<sup>50</sup> The quick disposal of these proceedings were partly because of the active roles of the trial judges in both pre-trial and trial stages and less entertainment of formality and procedural technicalities. The active involvement of the judge in investigating into the case and examining witnesses and evidence in the course of the trial, we observed, enable judges in inquisitorial system to not only control the proceedings but abuse of the court process as well.<sup>51</sup> The system also minimizes the possibility of trials being prolonged by unnecessary objections as to admissibility of evidence and striking out of proceedings for such technical grounds as wrong citation of enabling provisions of law and an affidavit being argumentative.

In Tanzania, some apparently frivolous and vexatious cases are tried up to finality partly because of lack of powers on the part of the trial judge to discontinue the same without trial. Provided that the factual narrations in pleadings reflect a cause of action, the trial judge or magistrate has no avenue to consider if there *prima facie* evidence to support the claim.<sup>52</sup>

More or less similar undesirable effects are obvious in criminal trials by the HC. The procedure as it stands now is such that a criminal trial by the HC is preceded by committal proceedings by a subordinate court.<sup>53</sup> This procedure appears to incorporate some elements of inquisitorial system in as much as it entails pre-trial collection of substances of the evidence to be relied upon and submitting them to the HC. That notwithstanding, the trial judge cannot decide before trial whether the substances of evidence are sufficient to establish a *prima facie* case. Neither can he or she, without the consent of the prosecution attorney, order for amendment of charge to, for instance, reduce the offence of murder to manslaughter.<sup>54</sup> That is so regardless of the fact that the trial judge may be certain that the substances of the evidence does not *prima facie* establish the offence of murder.

48 Observation of a matrimonial trial at the Local Court of Stuttgart on 13<sup>th</sup> November 2019.

49 Observation of a criminal trial at the Local Court of Esslingen on 12<sup>th</sup> November 2019.

50 Our conversation with the Deputy Director of the Local Court of Esslingen, Justice Mrs Anne Harschar.

51 A brief speech of the President of the Higher Regional Court of Stuttgart on 11<sup>th</sup> November 2019.

52 Under the adversarial system, a judge being an impartial referee, is not expected to make a pre-trial comment on the substance of the case.

53 Section 244 of the Criminal Procedure Act, Cap. 20, R.E. 2002.

54 My experience in criminal trials.

## 6. Conclusions and recommendations: What can we learn from Germany?

The inquisitorial system as applied in Germany gives the trial judge a high degree of control of the proceedings and thereby minimising unnecessary prolongation of the proceedings. In our common law adversarial system, cases are protracted by cumbersome procedural technicalities and unnecessary preliminary objections as to admissibility of evidence. No wonder a criminal case which was disposed of within four hours in Germany would have taken more than a year in Tanzania and perhaps it would have been knocked down on technicalities.

In matrimonial cases in Germany, parties are not expected to disclose detailed causes of the breakdown of the marriage. Once spouses are in separation for a period of one year, there is a presumption that a marriage has been irreparably broken down. A decree of divorce, therefore, will be issued without delving into details which may sometime be embarrassing to the parties and create bad impression of parents to the children. There is therefore a need to revisit our procedural laws with a view to combining elements of adversarial and inquisitorial systems in some cases. Cases which require speedy disposal such as matrimonial, economic and tax cases may be appropriately adjudicated upon in combined adversarial and inquisitorial procedure.

In Germany, judicial review to ensure compliance of the Basic Law is not limited to the executive and legislative functions as it is in our jurisdiction. The FCC enjoys jurisdiction to review court decisions, including those of the federal supreme courts to ensure compliance with the Basic Law.

In Tanzania, while article 107A of the Constitution requires dispensation of justice not be constrained by procedural technicalities to the extent of averring substantive justice, sometime this Constitutional direction is not adhered to or its scope of application is unpredictable. I would propose to have a chamber within the Court of Appeal to deal with reviews of decisions of the HC to ensure compliance with the Constitution. Besides, the jurisdiction of the High Court in Basic Rights and Duties Enforcement Act should extend to that aspect.