The Development of the Freedom of Religion in Tanzania

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INTRODUCTION

To date there is no universally accepted definition of what constitutes religion. A Fairly widely accepted aspect of most definitions is that religious belief implies a belief in the supernatural expressed in the form of both animate and abstract forces. A religion also implies, according to Spiro\(^1\) an institution which is an attribute of social groups, comprising a component part of their cultural heritage’. Besides being an attribute of social groups, religion is seen as one of the several culturally constituted belief systems.\(^2\)

Tanzania being the main reference here has been estimated to consist of roughly 32% Muslim, 65% Christian, and 3% of indigenous religious groups.\(^3\) However the CIA World Factsbook states that 40% of the population is Christian with Muslims being 35% and indigenous belief 25%.\(^4\) The national census has not asked for religious affiliation since 1967, thus all figures on religious statistics for Tanzania are at best educated guesswork and differ widely.\(^5\)


\(^2\) Ranger T. O & Kimambo I.(1976 ), ‘The Historical Study of African Religion’, African Studies center, University of California Press, California p. 29: where he clearly stressed that “religion is only one aspect of culture as a whole and one can only hope to understand a particular belief system if one fully understands all the other aspects of the socio-cultural life of the society being studied. Nevertheless religion for many societies is one of the most basic aspects of culture which may affect all other facets of social life.”


\(^5\) Time Almanac2009 (powered by Encyclopedia Britannica) Time Almanac 2008, page 537
Freedom of religion is simply a principle that supports the freedom of an individual or community, in public or private, to manifest religion or belief in teaching, practice, worship, and observance; the concept is generally recognized also to include the freedom to change religion or not to follow any religion.\(^6\) The freedom to leave or discontinue membership in a religion or religious group, in religious terms called “apostasy” is also a fundamental part of religious freedom, covered by international conventions.\(^7\) However the case is different in a country with a state religion, freedom of religion is generally considered to mean that the government permits religious practices of other sects beside the state religion, and does not persecute believers in other faiths.\(^8\)

Under the Tanzanian Constitution of 1977\(^9\) freedom of religion is codified under article 19, which recognizes religion as the right to freedom of conscience, faith and choice of belief.\(^10\) It further provides that religion is construed to include religious denominations and cognate expressions.\(^11\)

Under Tanzanian case law freedom of religion was described in the case of Hamisi Rajabu Dibagula Vs Republic\(^12\) of where in its proceedings the Court of Appeal clearly stated that:

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6 Article 18 of the Universal Declaration of Human Rights of 1948

7 Ibid


9 As amended in 2008

10 Article 19 (1) of the 1977 Constitution of Tanzania as amended in 2008

11 Ibid Article 19(2)

“The freedom of religion enshrined in article 19 of the constitution includes the right to choose and profess, practice and propagate religion. Since profession, practice or propagation of religious faith, belief or worship is also a form or manifestation of a person’s expression.”

HISTORICAL DEVELOPMENT OF FREEDOM OF RELIGION IN TANZANIA

The history of freedom of religion in Tanzania can be traced extensively through different phases which include: The Era before Colonialism, The Colonialism Era, The Post Independence Era, The Post 1984 Era, and The 1994 Era

THE ERA BEFORE COLONIALISM

African Traditional Religions and freedom of religion

Almost from the start of civilization, more that 10,000 years ago, religion has been a great part of human history including Africa. Before the influx of colonialism the freedoms of religion in Africa was essentially based on the nature and way of life of that particular community. “Iwa nicsin” meaning “character is religion” is an ancient proverb of the Yoruba people in Nigeria, West Africa which expresses a fundamental truth about the character of the African people. When they are in need they turn to superhuman powers for help. They addressed their prayers to a God, either directly or indirectly, through lesser gods or spiritual go-betweens.

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14 Ibid p. 8
Beginning in the prehistoric times the people of Africa gathered in groups related by family ties and similar needs. These communities developed their own individual languages, cultures, practices and most importantly religions. It is estimated that more than 6,000 different peoples in Africa including Tanzanian Communities lived by the spiritual influence of their ancestral ways of life, thus religious freedom existed depending mostly on to the surrounding beliefs and circumstances.\(^{15}\)

Olupina J. and Nyang S.\(^{16}\) simply regard African traditional religion, as part of the religious heritage of human kind. Born out of experience and deep reflection of our African forebears, it provides answers to the stirring of the human spirit and elaborates on the profundity of the experiences of the divine-human encounter based on the resources of Africa’s own cultural heritage and insight. It also provides answers to the ultimate questions posed by men and women in Africa, gives meaning and significance to human life, explains the origin and destiny of human beings, how everything in the world came into being and the relationship that should exist between them. In short, it is Africa’s own way of coming to terms with reality.

**Influx of Foreign Religion and freedom of religion**

In the development of time waves of exploration and modernization inferred great impact on the traditional African Way of life most importantly religion, and thus affecting religious freedom.

\(^{15}\) Ibid p.10

In 1499 Vasco Da Gama a Portuguese Augustinian missionary arrived in Zanzibar, this is regarded as the first event that introduced Christianity most specifically Catholic Avengelism.\textsuperscript{17} The mission later ended in 1698 due to the Oman Arab conquest. The second and successful Evangelism in the 19\textsuperscript{th} century pioneered by three religious congregations, the Holy Ghost Fathers, the White Fathers and the Benedictine Monks. The Holy Ghost Fathers were the first to arrive in Zanzibar in 1863 and crossed to Tanzania mainland, Bagamoyo in 1868 where they opened freed slaves villages. In these villages they received and taught slaves freed by the British marines from the Arab slaves traders. With the help of catechists trained in these villages, the missionaries evangelized northwards till the slopes of Mount Kilimanjaro. The ex-slaves were the first catechists. The White Fathers arrived in 1878 in two groups one on the shores of Lake Tanganyika and the other on the shores of Lake Victoria. The mission evangelized all the west of Tanzania together with the neighboring countries such as Rwanda, Burundi, Uganda and east Zaire. The Benedictine missionary Monks landed in Dar Es Salaam in 1887. From there they evangelized southwards to Ruvuma River on the border with Mozambique, their two centers of Ndanda and Peramiho became the centers of development and modern civilization in the south of Tanzania.\textsuperscript{18}

The earliest concrete evidence of Moslem presence in East Africa is the foundation of a mosque in Shanga on Pate Island where gold, silver and copper coins dated AD 830 were found during an excavation in the 1980's. The oldest intact building in East Africa is a functioning mosque at Kizimkazi in southern Zanzibar dated AD 1007. It appears that Islam was widespread in the


\textsuperscript{18} Ibid
Indian Ocean area by the 14th century. When Ibn Battuta from Maghreb visited the East African littoral in 1332 he reported that he felt at home because of Islam in the area. The coastal population was largely Moslem, and Arabic was the language of literature and trade. The whole of the Indian Ocean seemed to be a "Moslem sea". Moslems controlled the trade and established coastal settlements in South East Asia, India and East Africa.\textsuperscript{19}

Islam was spread mainly through trade activities along the East African coast, but remained an urban littoral phenomenon for a long time. When the violent Portuguese intrusions in the coastal areas occurred in the 16th century, Islam was already well established there and almost all the ruling families had ties of kinship with Arabia, Persia, India and even South East Asia owing to their maritime contacts and political connections with the northern and eastern parts of the Indian Ocean. In the end of the 17th and beginning of the 18th centuries the coastal Moslems managed to oust the Portuguese with the help of Omani Arabs. These Arabs gradually increased their political influence until the end of the 19th century when European conquerors arrived at the coast of East Africa.\textsuperscript{20}

Thus by the influx of both Islamic religion and Christianity to a great extent religious freedom highly increased that is to say many communities could exercise their choice of religion to a variety of religious beliefs, although some of the choices where highly influenced by either force or domination.


\textsuperscript{20} Ibid
THE COLONIALISM ERA

As the scramble for African territory among the European powers intensified in the 1880s, Carl Peters and other members of the Society for German Colonization signed treaties with Africans (1884–85) in the hinterland of the Tanzanian coast. By an agreement with Great Britain in 1886, Germany established a vague sphere of influence over mainland Tanzania, except for a narrow strip of land along the coast that remained under the suzerainty of the sultan of Zanzibar, who leased it to the Germans. The German East Africa Company (founded 1887) governed the territory, called German East Africa. The company's aggressive conduct resulted in a major resistance movement along the coast by Arabs, Swahili (whose main leaders were Abushiri and Bwana Heri), and other Africans that was only defeated with the help of the German government.\(^{21}\)

Because the company had proved to be an ineffective ruler, the German government in 1891 took over the country (which by then included the coast) and declared it a protectorate. However, it was not until 1898, with the death of the Hehe ruler, Mkwalla, who strongly opposed European rule, that the Germans succeeded in controlling the country. During the period 1905 to 1907 the Maji Maji revolt against German rule engulfed most of South East Tanzania; about 75,000 Africans lost their lives as a result of German military campaigns and

lack of food. In addition, many new Christian missions, which included rudimentary schools for the Africans, were established.²²

During World War I, British troops occupied (1916) most of German East Africa. In the postwar period the League of Nations made Tanganyika a British mandate, the British, especially during the administration (1925–31) of Governor Sir Donald Cameron, attempted to rule “indirectly” through existing African leaders. However, unlike Nigeria, where the policy of indirect rule was first developed Tanganyika had few indigenous large-scale political units. Therefore, African leaders had to be established in newly defined constituencies. The effect of British policy, as a result, was to alter considerably the patterns of African life in Tanganyika. After a slow start, the British developed the territory's economy largely along the lines established by the Germans. Increasing numbers of Africans worked for a wage on plantations, especially after 1945, when economic growth began to accelerate. Also after 1945 Africans gradually gained more seats on the territory's legislative council (which had been established in 1926).²³

During the British rule The Tanganyika Order in Council of 1920 was enacted pursuant to the authority granted by the Foreign Jurisdiction Act of England.²⁴ This essentially acted as the constitution for the Tanganyika colony; in essence it left a room for religious freedom by

²² Ibid P. 137; under the Germans, several new crops (including sisal, cotton, and plantation-grown rubber) were introduced; the production and sale of other commodities (notably coffee, copra, sesame, and peanuts) was encouraged, and railroads were built to Kigoma on Lake Tanganyika and to Moshi.


specifying as to the application of received laws of traditional rules as long as they are not repugnant to justice.\textsuperscript{25}

\textbf{THE AFTER INDEPENDENCE ERA}

Tanzania did not have a Bill of rights in its constitution to guarantee the exercise of religious freedom since independence.\textsuperscript{26} The English Dominion Act, 1961 that is frequently wrongly cited as the Independence Constitution of Tanganyika did not contain a bill of rights either.\textsuperscript{27} Similarly the Republic constitution that is the proper Independence Constitution of the Republic of Tanganyika did not contain a bill of rights.\textsuperscript{28} Mwalimu Nyerere\textsuperscript{29} the first president of the by then Tanganyika is said to have feared that an independent judiciary composed of white judges could have posed a great danger to nationalist zeal for rapid development.

Mwalimu Nyerere’s refusal to have the Bill of rights in the Tanzanian constitution both after independence and during the making of the Republic constitution in 1962 has been subject to

\textsuperscript{25} Ibid


\textsuperscript{27} This was to abrogate the United Nations Trusteeship Agreement between the UNO and United Kingdom to give Britain constitutional powers to grant Independence to Tanganyika. This Act made Tanganyika a de jure colonial possession of Britain. It gave Tanganyika limited independence within the Commonwealth, while vesting her sovereignty upon the British Crown; Maina \textit{supra note} 26

\textsuperscript{28} Proposal of the Tanganyika Government for a Republic, Government for a Republic, Government paper No. 1 of 1962

\textsuperscript{29} The first Prime minister of the by then Tanganyika in 1961, later in 1962 the first president of Tanganyika which became Tanzania after the 1964 union with Zanzibar, he later resigned presidency in 1985, once named the “World Hero of Social Justice” by the President of the UN General Assembly
strong criticism.\textsuperscript{30} The main tenor of this criticism is that Mwalimu Nyerere’s reasons were not sufficient grounds for denying Tanganyika a bill of rights so as to effect their freedoms such as the freedom of religious belief.

Critics could not absolve Mwalimu Nyerere for ruling his country with similar authoritarianism as the British had done. The new state had inherited authoritarian laws that Nyerere made no efforts to change. Like in many newly independent African countries, the Tanganyika nationalists anchored their governance upon illiberal and authoritarian foundations.\textsuperscript{31}

The big mass of authoritarian laws left behind by the colonial administration gave the new nationalists government little difficulty in applying without the risk of earning bad names and publicity.

It is those that sought to have these authoritarian laws changed who earned criticism and bad names like being dubbed ‘terrorist’ or ‘communists’. In essence after independence religious freedom was by essence not guaranteed by any provision of the constitution.


THE POST 1984 ERA

It was not until 1984 when the Bill of rights was introduced into the constitution of the United Republic of Tanzania 1977, by way of a constitutional amendment clearly modeled on the African Charter on Human and Peoples Rights. 32

The Tanzanian Bill of Rights was closely tailored to resemble the Universal Declaration of Human Rights while incorporating the ‘duties’ analogy from the African Charter of Human and Peoples’ Rights. Major groups of rights in the Bill which advocated in one way or the other for the freedom of religion include the right to equality of human beings (article 12 and 13), the right to life (Article 14 to 17), and The right to freedom of expression (Article 18 to 21).

One important characteristic of the Tanzanian Bill of Rights is the use of claw back clauses that take away the substance of the guaranteed right by constitution itself or by a law made by parliament in that behalf. These claw back clauses constitute a significant departure from the substance of the rights guaranteed by the UDHR. Essentially claw back clauses seek to erode, water down or restrict the substance of the rights guaranteed. 33

Courts have shown spirited caution in making sure that claw back clauses that take away, or seek to erode the substance of the rights guaranteed including the rights to freedom of religion are not allowed to prevail. In Pumbun V Attorney General (1993) 34 the Tanzanian Court of Appeal held that a claw back clause in the Tanzanian Constitution must strictly be construed:

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32 Fifth Constitutional Amendment Act, 1984(Act No. 5 of 1984)

33 A good example being article 30 of the 1977 Constitution of the United Republic of Tanzania

34 Kisanga, J.A. [1993] 21 LRC 317 at 323
“otherwise the guaranteed right under the constitution may be rendered meaningless by the use of such derogative or claw back clauses of the very constitution”.

However it was not until 1987 when the Bill of Rights became enforceable in Tanzania. Despite being enforceable evidently there were no enforcement mechanism put in place thus the freedoms guaranteed in the Bill such as the freedom of religion had no means for its enforcement within the Tanzanian system.

THE POST 1994 ERA

In 1994 the government enacted the Basic Rights and Duties Enforcement Act which is an act to provide for the enforcement of the constitutional basic rights guaranteed under the 1977 Tanzanian Constitution. The Bill of rights provided in both the Tanzanian and the Zanzibar constitutions became therefore enforceable through constitutional petition in the high court of the United Republic of Tanzania and the High Court of Zanzibar respectively.

Article 26(2) of the Tanzanian constitution gives every person the right in accordance with the procedures laid down by law, to take action to ensure the protection of the constitution and the laws of the land, thus including the protection of the freedom to religion stipulated under article 18 of the constitution. This article vests a locus standi in constitutional litigation in Tanzania.

36 Chapter 3 Act. No. 33 of 1994
38 Ibid p.76
The matter for enforcement of basic rights must first be mentioned before a single judge who shall determine the issue whether the petition is frivolous or not. Only then shall the matter be placed before a panel of three judges who shall hear and determine the matter.\textsuperscript{39}

It thus evident that by putting in place an enforcement mechanism of the basic rights and duties which also includes the freedom of religion stipulated under article 19 of the Tanzanian Constitution, this marked a substantial protection of the freedom of religion within the United Republic of Tanzania.

CRITIQUE TO THE TANZANIA FREEDOM OF RELIGION

Despite the presence of the enforcement mechanism as stipulated under the Basic Rights and Duties Enforcement Act, and the inclusion of article 19 within the Tanzanian Constitution, freedom of religion is essentially not fully protected or guaranteed due to the following reasons:

The long and arduous procedure has made human rights litigation in Tanzania a nightmare. This must have been done intentionally to frustrate or make it difficult for individuals to access the courts and to defend their basic rights. For instance it is clear that the provision laying down the condition of initiation of court action by way of a petition accompanied by originating summons is duplex. Both the petition and originating summons are instruments for moving the court to act upon a matter brought before it. Since they are modes of instituting civil action, only one of them could be used, but definitely not both.\textsuperscript{40}

\textsuperscript{39} Ibid section 5

\textsuperscript{40} Supreme court Practice, Vol. 1(1993) [Sweet & Maxwell] Oder 5 rule 1 at p.28
The procedure of placing the petition before one judge for preliminary hearing and only then commit it to hearing on merits by a panel of three judges is similarly a delay tactic. Tanzania has very few High court judges. It is therefore difficult to appoint a panel of three judges. In law there is nothing wrong if a human right matter is originally heard by one judge. Taking into account the chronic problems of delay in the hearing and determination of cases in Tanzania, This provision is quite unrealistic.41

CONCLUSION
It is by essence evident that the development of the freedom of religion in Tanzania has in time developed to a more promising stage than it was before, however another essential element required within the Tanzanian system to ensure maximum protection of the freedom of religion is the adoption of the both the two ingredients of the freedom of religion as stipulated under international instruments. The Universal declaration on Human Rights and its proceeding instruments provide for freedom of religion as including the freedom of thought, conscience and choice of religion on one hand and the freedom to manifest a religion, or belief in teaching, practice, worship and observance.42 The same was also observed in the case of Leyla Sahin V Turkey (2004)43 where the two elements were described as essential to freedom of religion. Thus similarly the Tanzanian constitution should explicitly provide for the freedom of religion as including freedom to conscience, faith, choice and practice in matters of religion.

41 Mvungi Supra note 33 p. 12
42 In its Article 18