Private candidacy in Election: CHRISTOPHER MTIKILA v. THE ATTORNEY GENERAL OF TANZANIA, 2005

IN THE HIGH COURT OF TANZANIA (DAR ES SALAAM MAIN REGISTRY) AT DAR ES SALAAM MISC. CIVIL CAUSE NO. 10 of 2005

(MANENTO J.K, MASSATI J, MIHAYO J.)

CHRISTOPHER MTIKILA (PETITIONER)

V.

THE ATTORNEY GENERAL (RESPONDENT)

JUDGMENT

Date of Hearing - 6/2/2006

Date of Ruling - 5/5/2006

MASSATI, J:

The Petitioner, REV. CHRISTOPHER MTIKILA, is a very determined man. In 1993 he filed a petition in the High Court at Dodoma, to seek among other reliefs, a declaration that the citizens of this country have a right to contest for the posts of president, Member of Parliament and local government councillor without being forced to join any political party. The High Court decided in his favour on this aspect. The government filed an appeal against that finding, but later withdrew the appeal and sent a bill in parliament to legislate in anticipation against that decision of the court. As we shall shortly see below that law is the subject matter of the present proceedings.

It could have been assumed that the petitioner had a motive for doing so in 1993, because by then he was still fighting to register his political party, the Democratic Party, as illustrated by his earlier petition.

Having secured the registration of his party, the petitioner who describes himself as the chairman of the Democratic Party has come again to this Court for the following orders:

(a) A declaration that the Constitutional amendment to Articles 39 and 67 of the Constitution of the United Republic of Tanzania as introduced by amendments contained in Act No. 34 of 1994 is unconstitutional.

(b) A declaration that the petitioner has a constitutional right under Article 2 (1) of the Constitution of the United Republic of Tanzania to contest for the post of the president of the United Republic of Tanzania and/or the seat of a member of parliament of the United Republic of Tanzania as a private candidate.

(c) Costs of this petition be borne by the Respondent.

(d) Any other remedy and/or relief the honourable Court will deem equitable to grant.

The gravamen of the Petitioner's complaints are couched in paragraphs 7, 8 and 9 of his petition which is to say: first, that the said constitutional amendments are violative of the Basic Human Rights as proclaimed in Article 21 (1) of the Constitution, two, that the said constitutional amendments are

violative of Article 9 (a) and (f) of the Constitution, three, that the said amendments are violative of Article 20 (4) of the Constitution, and fourthly, the said constitutional amendments are a violation of International Covenants on Human Rights to which the United Republic is a party. According to the petition the effect of all these amendments is that an ordinary Tanzanian is forced to join a political party in order to participate in government affairs in order to be elected to any of the posts of president or Member of Parliament.

The Respondent Attorney General resists the petition. The kernel of his objection is contained in paragraph 4 of his Answer to the Amended petition. It is to this effect:

"...the enactment of Act No. 34 of 1994 which was coupled with Constitutional amendments of the said Article is valid, legally done in a general way, for a specific public good and not in violation of any basic human rights. Further to that the Respondent states that the said constitutional amendments were not discriminatory at all as the law is applicable to all people and all candidates who wish to contest in elections. "

In short, the bone of contention between the parties in this petition is whether the amendment to the Constitution introduced by Act No. 34 of 1994 is constitutional.

Although the Court did not formulate the issues to be tried the petitioner has framed and both parties have fully argued on the following issues:

(i) Whether the sections, namely Articles 39 (1) (c) and 39 (2) and Article 67 (b) and 67 (2) (e) are unconstitutional.

(ii) Whether the said sections meet the proportionality test?

(iii) Whether the said amendment introduced by Act No. 34 of 1994 contravenes the International Instruments signed ratified and deposited by the Government of the United Republic of Tanzania?

We believe that no injustice will be done if we decide the petition on the basis of those issues even if we did not frame them at the beginning of the hearing of this petition, which was effectively in the form of written submissions. Counsels were also accorded opportunity to elaborate on their written submissions orally.

Mr. Rweyongeza and Mr. Mpoki learned Counsel appeared for the petitioner. Mr. Mwaimu and Ms Ndunguru appeared for the Respondent.

It was the petitioner's submission that the amendments to Article 39 and 67 introduced by Act 34 of 1994 restricting the right to contest in elections for president and member of parliament to political party candidates only are violative of the Basic Rights contained in Article 21 (1) of the Constitution, which gives a citizen, the right of association, and also violative Article 20 (4) of the Constitution which prohibits the enactment of laws forcing people to join any society or corporation. Mr. Rweyongeza and Mr. Mpoki, submitted that the said provisions are a limitation for citizens who desire to contest for those political posts. They submit that such provision is discriminatory because it tends to discriminate citizens who are members of political parties against those who are not members in contesting for political posts. The learned Counsel quoted several principles laid down by Lugakingira J (as he then was) in REV. MTIKILA v. ATTORNEY GENERAL [1995] TLR. 31.

The learned Counsel further submitted that since REV. MTIKILA VS ATTORNEY GENERAL (Supra) upheld the fundamental rights contained in the Constitution, the legislation of Act 34 of 1994 was void, on the score of repugnancy. They cited from SYLVIA SNOWSIS' book JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (Universal Law Publishing Co Pot Ltd, 2nd Reprint 1996, wherein the cases of LESSEE vs. DORRANCE and KAMPER vs. HEWKINS were referred to.

Submitting on the second issue which is whether the said provisions meet the proportionality test, Mr. Rweyongeza and Mr. Mpoki, submitted, first, that it was incumbent upon the Respondents to prove that the challenged legislation is within the purview of the exception. For that principle the learned Counsel relied on two Indian cases namely SAPHIR AHMED v. STATE OF UTRAH PRADESH [1954] AIR SC 729 and DEANA VS UNION [1984] I SCRI.

Coming closer at home, the learned Counsel cited the Tanzania Court of Appeal decision in KUKUTIA OLE PUMBUN & ANOTHER VS ATTORNEY GENERAL AND ANOTHER [1993] TLR. 159, where it was held that for legislation to pass the proportionality test, it must be shown that it is not arbitrary, and that the limitation is reasonably necessary to achieve a legitimate objective. They concluded on this issue that the impugned law does not meet the proportionality test.

Lastly, Mr. Rweyongeza and Mr. Mpoki, submitted that the Act violated the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights. The said International Conventions must be taken into account in interpreting the Bills of Rights and Duties. For that statement, the learned Counsel relied on the Court of Appeal decision in DPP v. DAUDI PETE [1993] TLR. 22.

In concluding their submission on the third issue, the learned Counsel for the petitioner said that in all its activities, the Constitution enjoins, the Government to adhere to the directives, principles of state policy, and this includes, in their duty to make laws. The learned Counsel therefore penned off by praying that the petition be allowed with costs.

Mr. Mwaimu, the learned Principal State Attorney and Ms. Ndunguru, learned State Attorney submitted on the first issue that the amendments to the Constitution were done within the powers of the legislature and that did not breach any provision of the constitution. For this, the learned state Counsel sought to rely on Article 98 (1) & 2 of the Constitution. They stated further that this position was also supported by Lugakingira J (as he then was) in REV. MTIKILA v. ATTORNEY GENERAL (Supra).

On the issue whether the amendments violated Article 21 (1) of the Constitution, the learned Counsel submitted that the amendments were done for a specific public good. They state in their submission:

"The prohibition to individual contestants in general and local government elections is one way to achieve representative democracy. The constitution primarily aims at establishing and safeguarding a representative democracy which is the policy our country follows, it is a policy, which intends to safeguard peace, order security and tranquility. "

And further down, the learned State Attorneys submit:

"The principle requiring an individual who is vying for leadership to contest through a political party is intended to ensure that whoever is made a candidate is well known to the people he wants to lead".

These, the learned Counsel informed the Court, are the reasons why the Parliament decided to prohibit private candidacy.

It was submitted for the Respondent that the question whether the restriction is reasonable must be decided on a case to case basis, citing decisions by the constitutional Court of South Africa (SOUTH AFRICA v. MAKWANYANE [1995] (3) S.A. 391 and another of S. v. BHULWANA [1996] (1) S.A. 388 (cc). They submitted that those views are persuasive to our Courts. On the basis of those decisions Mr. Mwaimu, and Ms. Ndunguru submitted that the amendment was not only good for representative democracy but also for balancing the interests of the public at large.

Responding to the question of discrimination, the learned state attorneys submitted that the amendment was meant for all those who aspire for leadership for the principle of equality does not require everyone to be treated the same, but simply that people in the same position should be

treated the same. Citing another South Africa case of PRESIDENT OF REPUBLIC OF SOUTH AFRICA VS HUGO [1997] 4 SA 1 CC cited in a book BILL OF RIGHTS sometimes it is possible to justify discrimination as an exception if the purpose is to meet the ends of affirmative action. This is called the principle of "fair discrimination ".

The learned state attorneys submitted further that Articles 21 (1), 39 (1) (2), 67 (1) (b) 2, and Article 20 (4) if read together, it will be noted that Article 21 (1) does not create any procedure. They submitted that the procedures for enfranchisement are found in the Elections Act and its Regulations. Therefore, it was not correct that there is no procedure for enfranchisement. They went on to submit that the fear that the provision could lead to abuse and confine the right to govern to a few and to render illusory the emergence of a truly democratic society, was unfounded and could not justify the declaration that the provision was unconstitutional. They submitted that on the contrary private candidates are uncertain and unreliable and could easily abuse powers as they would not originate from the people.

The learned Counsel then went on to distinguish the cases cited by the petitioner on the question of the proportionality test as all the cases cited dealt with the provisions in the statutes, whereas the present case deals with the Constitution itself which is a result of the will of the people.

On the last issue, the learned state attorneys submitted that while it is not disputed that Tanzania was a signatory to the Universal Declaration of Human Rights and ratified the African Charter for Human and Peoples Rights, these instruments have their limitations. They cited the example of Article 29 (2) of the Universal Declaration of Human Rights, which provides to the effect that the exercise of those rights shall be subject to such limitations as may be imposed by law for the purpose of securing and recognition of the rights and freedoms of others. On that premise, the learned Counsel submitted that since the Constitution advocates representative democracy, the amendments were necessary in order to maintain the requirements of morality, public order and general welfare of the people. And so the amendments were within the letter and spirit of the international instruments for Human Rights. At the end of the day the learned state attorneys prayed that the petition be dismissed with costs.

In their rejoinder, Mr. Rweyongeza and Mr. Mpoki, learned Counsel have submitted that although the Parliament is given wide powers to amend constitutional provisions those powers are subject to the limits imposed by Article 30 (2) and 31 of the Constitution. For that proposition they relied on the reasoning of Lugakingira J (as he then was) in REV. MTIKILA VS ATTORNEY GENERAL (Supra). Relying on the cases of PETER NG'OMANGO VS KIWANGA AND ANOTHER [1993) TLR. 77, DPP VS DAUDI PETE [1993] TLR 22, and MBUSHUU VS REPUBLIC [1995] TLR impugned do not meet the proportionality test. They submitted that private candidacy was not inconsistent with representative democracy. Therefore private candidacy would not erode the principle of representative democracy. They submitted further that there were no adequate safeguards and control against abuse by those in authority in the exclusive political party system, and so it does not fall within one limb of the proportionally test. Referring to the South African case of MAKWANYANE (Supra), cited by the Respondent's Counsel, Mr. Rweyongeza and Mr. Mpoki, submitted that persuasive as that decision, is, it is also authority for the need to widen the horizon of the principle of proportionality test, so that, it was desirable that the effect of a provision should not negate the content of the right in question, and that, the learned Counsel went on, was the essence of the decision in REV. MTIKILA v. ATTORNEY GENERAL (Supra), in that the decision was made in order, not to negate the essential content of the right of an independent candidate. So, if anything, the South African case is a persuasive authority for widening the scope of the proportionality test.

On the question whether or not there was any procedure set by statute, the learned Counsel reminded the Court that the issue was settled by Lugakingira J (as he then was) in MTIKILA v. ATTORNEY GENERAL (Supra) in that by using the harmonization principle where the balancing act does not succeed courts should incline towards the realization of the fundamental rights even at the cost of disregarding the clear words of a provision if their application would result in gross injustice.

On the authority and influence of international covenants, the learned Counsel for the petitioner reiterated their conviction on the weight to be attached to such instruments as illustrated in the DAUDI PETE case (Supra). The learned Counsel concluded their submission by praying that the petition be allowed.

It is now our turn to examine and analyse the rival arguments of the legal Counsel. But before we embark on this we think it is opportune for us to recapitulate the principles which will guide us in this task. These are those that govern the interpretation of the constitution and resolution of constitutional disputes.

These principles have mostly been developed by case law, and they are numerous, but in the present case we intend to adopt only those which we consider to be relevant in the circumstances of the case.

In Civil Appeal No. 64 of 2001 JULIUS ISHENGOMA FRANCIS NDYANABO v. THE ATTORNEY GENERAL (Unreported) the Court of Appeal of Tanzania (Samatta C.J.) at pp. 17-18 laid down five principles.

(a) The Constitution of the United Republic is a living instrument, having a soul and consciousness of its own. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purpose for which its makers framed it.

(b) The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions, but grows and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must therefore be strictly construed. So Courts have a duty to interpret the Constitution so as to further fundamental Objectives and Directives of State policy.

(c) Until the contrary is proved legislation is presumed to be constitutional. If possible legislation should receive such a construction as will make it operative and not in operative.

(d) Since there is a presumption of constitutionality of legislation save where there is a clawback or exclusion clause relied upon as a basis for constitutionality the onus is upon those who challenge the constitutionality of the legislation, they have to rebut that presumption.

(e) Where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them to justify the restriction.

Although not expressly included in the fifth principle it was the Court's view also, adopting its own decision in KUKUTIA OLE PUMBUN AND ANOTHER VS ATTORNEY GENERAL AND ANOTHER [1993] TLR. 159; as a rejoinder to that principle that:

"Whoever relies on a clawback or exclusion clause has to prove that the restrictions are not arbitrary, unreasonable and disproportionate to any claim of state interest."

The other principles of constitutional interpretation include: -

(f) Courts are not concerned with the legislative wisdom of Parliament. They are concerned only with its legislative competence.

(g) While parliament cannot directly override a decision of a Court of law declaring a statute unconstitutional and pronounce it to have been valid, it can make a fresh law, free from unconstitutionality.

(h) Courts do accept that civilization owes quite as much to those who limit freedom as to those who expand it.

(i) A Constitution must not be construed in isolation, but in its context which includes the history and background to the adoption of the Constitution itself. It must also be construed in a way which secures for individuals the full measure of its provisions. "

Beginning with the immediately forgoing principle of constitutional interpretation let us briefly attempt to give a historical glimpse to the provisions relating to representative democracy in the genesis of the history of post independent Tanzania.

The constitutional history of Tanzania begins with the Tanganyika (Constitution) Order In Council, 1961 published as Government Notice No. 415 of 1/12/61. The Second Schedule thereof was THE CONSTITUTION OF TANGANYIKA. Section 20 of that Constitution declared universal adult suffrage to every citizen of Tanganyika who had attained the age of 21 years, unless disqualified by an Act of Parliament. Sections 18 and 19 of the Constitution governed the qualifications and disqualifications for elections at the National Assembly. Section 18 provided:

"18 Subject to the provisions of Section 19 of this Constitution, any person who:

(a) is a citizen of Tanganyika.

(b) has attained the age of twenty one years, and

(c) is able to speak, and unless incapacitated by blindness or other physical cause to read the English language with a degree of proficiency sufficient to enable him to take an active part in the proceedings of the National Assembly.

"shall be qualified for election as a member of the National Assembly, and no other person shall be so qualified".

The next Constitution was C.A. Act No. 1 of 1962. (The Republican Constitution of Tanganyika) Section 24 of the Republican Constitution retained the same qualification for being elected to the National Assembly. But Section 4 (3) also listed down the qualifications for election of President. It reads"

"4 (3) Any citizen of Tanganyika who:

(d) is qualified to be registered as a voter for the purposes of elections to the National Assembly,

(e) has attained the age of thirty years and,

(f)in the case of elections held on a dissolution of Parliament, is nominated by not less than one thousand persons registered as voters for the purposes of elections to the National Assembly shall be qualified for elections as President.

It may be noted in passing here that in these constitutions there was no political party membership qualifications, although there were several active political parties.

Next, was the Interim Constitution which followed the union of Tanganyika and Zanzibar. Notably, Article 3(1) declared Tanzania as a one political party state

"3 (3) All political activity in Tanzania other than that of the organs of State of the United Republic shall be conducted by or under the auspices of the party. "

Article 4 (4) forbade:

'No Act of Parliament shall provide for the disqualification of any citizen of Tanganyika from registration as a voter for the purposes of elections by the people or for the disqualification of any such registered voter from voting at such elections except on the grounds of his allegiance to another state, infirmity of mind, criminality, absence or failure to produce evidence of age, citizenship or registration. "

So while political activity was confined to be conducted under the party all the citizenry had the universal franchise to vote. But this Constitution did not expressly provide for the qualifications of a presidential candidate, like Section 4 (3) of the 1962 Republican Constitution. Instead, the 1965 Constitution left it to the Electoral Conference to nominate a presidential candidate. This was the Electoral Conference of TANU as defined in Part E of the party's Constitution which was annexed as a schedule to the 1965 Interim Constitution.

Unlike the 1961 and 1962 Constitutions, Article 27 of the 1965 Interim Constitution introduced for the first time, party membership qualification for candidates of constituency members. It provided:

"27 (1) Any citizen of Tanzania who has attained the age of twenty one years and is a member of the Party shall, unless he is disqualified under the following provisions of this section or an Act of Parliament to which this section refers be qualified for election as a constituency member, and no other person shall be so qualified."

So, party membership, as a qualification for an elective post, was introduced in the country with the advent of a one party state. It is an undeniable historical fact.

We must hasten to add that although there were other political parties up to 1965 the previous constitutions did not provide for party membership qualification. In 1977 Tanzania enacted its first permanent constitution, with CHAMA CHA MAPINDUZI, entrenched as the only political party in the country. Article 4 (2) retained the universal suffrage as in the previous constitutions. No express qualifications were spelt down for a presidential candidate but his political membership is strongly implicit because the candidate has to be nominated by the party's General Meeting. But for candidates of Constituency Assembly, Article 26 of the 1977 Constitution provides:

"26 (1) Ili mtu aweze kuchaguliwa kuwa Mbunge wa kuwakilisha wilaya ya uchaguzi ni, lazima awe na sifa zifuatazo:-

(a)

(b) awe mwanachama wa chama anayetimiza masharti ya uwanachama kama yalivyoelezwa katika katiba ya chama na pia awe na sifa za kiongozi zifuatazo:- etc... "

This constitution was amended in 1985 to introduce the Bill of Rights. Article 3 (3) entrenched the one party state:

"3 (3) Chama Cha Mapinduzi, kwa kifupi CCM ndicho chama cha siasa pekee katika Jamhuri ya Muungano."

Universal franchise was retained in Article 5 Article 10 provides:

"10 (1) Shughuli zote za kisiasa nchini na zinazohusu Jamhuri ya Muungano zitaendeshwa ama na chama chenyewe au chini ya uongozi, usimamizi wa chama."

This edition of the Constitution introduced Articles 20 and 21, which we find relevant in the present petition. Article 20 (1) provides:

"20 (1) Kila mtu anastahili kuwa huru, bila ya kuathiri sheria za nchi kukutana na watu wengine kwa hiari yoke na kwa amani, kuchanganyika na kushirikiana na watu wengine, kutoa mawazo hadharani, na hasa zaidi kuanzisha au kujiunga na vyama au mashirika yaliyoanzishwa kwa madhumuni ya kuhifadhi au kuendeleza imani au maslahi yoke au maslahi mengineyo.

(2) Bila ya kuathiri sheria za nchi zinazohusika ni marufuku kwa mtu yeyote kulazimishwa kujiunga na chama chochote.

Article 21 (1) provides:

"21 (1) Kila raia wa Jamhuri wa Muungano anayo hakiya kushiriki katika shughuli za utawala wa nchi, ama moja kwa moja, au kwa kupitia wawakilishi waliochaguliwa na wananchi kwa hiari yao kwa kuzingatia utaratibu uliowekwa na sheria au kwa mujibu wa sheria.

(2) Kila raia anayo haki na uhuru wa kushiriki kikamilifu katika kufikia uamuzi juu ya mambo yanayomhusu yeye, maisha yoke au yanayolihusu taifa."

Let us now go to the provisions governing the qualifications for presidential and constituency members' qualifications the subject matter of the present dispute.

With the 1985 amendments Article 39 of the Constitution read:

39. Mtu hatastahili kuchaguliwa kushiriki kiti cha Rais wa Jamhuri ya Muungano isipokuwa tu kama:

(a) ametimiza umri wa miaka arobaini na

(b)anazo sifa za kumwezesha kuchaguliwa au kuteuliwa kuwa Mbunge au Mjumbe wa Baraza la Wawakilishi.

The qualifications for a member of parliament are spelt out in Article 67 (1) of the Constitution: 67(1)

Bila ya kuathiri masharti yaliyomo katika ibara hii, mtu yeyote atakuwa na sifa za kustahili kuchaguliwa au kuteuliwa kuwa Mbunge endapo:

And "*Chama*" is defined in Article 151 to mean:

...Chama Cha Mapinduzi kilichotajwa katika ibaraya 3 (3) na ya (10) ya Katiba hii "

The dominance of Chama Cha Mapinduzi was abolished by an amendment to Article 10, introduced by Act No. 4 of 1992, with the advent of multiparty politics in Tanzania while Articles 20 and 21 remained intact.

Section 13 of Act No. 4 of 1992 amended Article 39 but retained paragraph (c) of the qualifications for a presidential candidate.

"(c) ni mwanachama na mgombea aliyependekezwa na chama cha siasa. "

What the law did here is to transfer that qualification, which was initially only by implication, to an express one. On the other hand Article 67 (1) (b) remained the same except that for one to be elected as a parliamentarian he must now be:

"mwanachama na ni mgombea aliyependekezwa na chama cha siasa."

The 8tn Amendment (Act 4 of 1992) also amended Article 77 (3) of the Constitution by providing that"

"(3) Wagombea uchaguzi katika jimbo la uchaguzi watatakiwa watimize yafuatayo:

(a) wawe wamependekezwa mmoja mmoja, na chama cha siasa kinachoshiriki uchaguzi katika jimbo hilo."

Before that, Article 77 (1) (2) required a nominated parliamentary candidate to be approved by the party's National Executive Committee, a position since the promulgation of the 1965 Interim Constitution (Article (28)) (b) and the 1977 Constitution (Article 27 (2) (b).

It is those provisions which this petitioner challenged in his Misc. Civil Cause No. 5 of 1993. After due considerations and visiting numerous authorities, the learned Justice Lugakingira in that case (reported as) REV. CHRISTOPHER MTIKILA VS ATTORNEY GENERAL (Supra) at p. 68 concluded:

"For everything I have endeavored to state and notwithstanding the exclusionary elements to that effect in articles 39, 67 and 77 of the Constitution as well as s. 39 of the Local Authorities (Elections) Act 1979,1 declare and direct that it shall be lawful for independent candidates along with candidates sponsored by political parties, to contest, presidential, parliamentary and local Council elections. This will not apply to the Council elections due in a few days. "

Aggrieved by this declaration, the Respondent filed an appeal to the Court of Appeal while the Petitioner also cross appealed against certain decisions made adverse to him. This was Civil Appeal No. 3 of 1995. It cannot also be disputed that while the appeal was pending the Respondent processed a bill and proceeded to enact a law which had the effect of rendering the ruling of the High Court ineffective and/or a nullity.

On that ground the Respondent applied to withdraw the appeal. The Court of Appeal of course had to grant the application for withdrawal but speaking through KISANGA Ag. C.J. the Court of Appeal lamented at p. 3 of the typed judgment:

"... We are constrained to have to point out some aspects in the handling of this matter by the appellant which cause great concern. While the ruling was being awaited, the Government on 16/10/94 presented a Bill in Parliament seeking to amend the Constitution so as to deny the existence of that right, thus pre-emptying the Court Ruling should it go against the Government. This is where things started going wrong. The Government was now adopting parallel causes of action towards the same end by asking Parliament to deal with the matter simultaneously with the High Court. That was totally wrong for reasons which will be apparent presently.

Thus the government consciously and deliberately drew the judiciary into a direct clash with Parliament by asking the two organs to deal with the same matter simultaneously. Such a state of affairs was both regrettable and most undesirable. It was wholly incompatible with the smooth administration of justice in the country and every effort ought to be made to discourage it."

The Court then went on to observe in conclusion:

"In the instant case had the amendment been initiated and passed after the Court process had come to a finality that in law would have been alright procedurally, the soundness of the amendment itself, of course, being entirely a different matter. Then the clash would have been avoided. Indeed that would be in keeping with good governance which today constitutes one of the attributes of a democratic society. "

The amendments referred to in the judgment of the Court of Appeal are those made by Act No. 34 of 1994 which as observed, was passed by the Parliament on 16/10/94 while the Ruling of Lugakingira J (as he then was) was handed down on 24/10/94, as it was still pending when the Parliament enacted the law. As a matter of procedure, we must, at once condemn this act of the Respondent as being contrary to the dictates of good governance, and for which we can do no more than quote the above cited passage from the judgment of the Court of Appeal. We shall leave it at that and now go to the substance of the petition which is before us.

Act No. 34 of 1994, amended Articles 21, 39, and 67 of the Constitution by cross referring Article 21 to article 5, 39 and 67. Article 5 entrenches the universal franchise subject to the other provisions of the Constitution and other laws that may be enacted. To appreciate the impact of the amendments both the former and the new relevant Articles must be quoted in full.

Before the amendment, Article 21(1) provided:

"27 (1) Kila raia wa Jamhuri ya Muungano anayo haki ya kushiriki katika shughuli za utawala wa nchi, ama moja kwa moja au kwa kupitia wawakilishi waliochaguliwa na wananchi kwa hiari yao, kwa kuzingatia utaratibu uliowekwa na sheria au kwa mujibu wa sheria.

The new Article 21 (1) now reads (2005 edition):

"21. (1) Bila ya kuathiri masharti ya Ibara ya 39 ya 47 na ya 67 ya Katiba hii na ya sheria za nchi kuhusiana na masharti ya kuchagua na kuchaguliwa, au kuteua na kuteuliwa kushiriki katika shughuli za utawala wa nchi kila raia wa Jamhuri ya Muungano anayo haki ya kushiriki katika shughuli za utawala wa nchi, ama moja kwa moja au kwa kupitia wawakilishi waliochaguliwa na wananchi kwa hiari yao, kwa kuzingatia utaratibu uliowekwa na sheria au kwa mujibu wa sheria "

The underlined words were introduced by the amendment through the 11 Amendment. Article 39 (1) which refers to the qualifications of a presidential candidate and those of Article 67 (1), of the Constitution as amended articulate the necessity of being a member of a political party as a qualification for presidential and parliamentary candidates.

The petitioner contends that these provisions violate Article 9 (a) and (f), of the Constitution. On the other hand the Respondent contends that the amendments were valid, legally done, for a specific public good and not in violation of any basic human rights. It is from these rival contentions that the first issue was framed to wit:

"Whether Article 39 (1) (c), 39 (2), 67 (b) and 67 (2) (e) are unconstitutional?

It may of course sound odd to the ordinary mind to imagine that the provisions of a constitution may be challenged for being unconstitutional. The petition was filed under s. 4 of the Basic Rights and Duties Enforcement Act (Cap 3) which enables persons aggrieved by the violations of their basic rights under sections 12 to 29 of the Constitution to seek redress from this Court. According to the amended petition, the petitioner seeks redress under, among others, Articles 13 (2), 20 (4) and 21 (1) and partly under Article 9 (a) and (f). Since s. 4 of the Basic Rights and Duties Enforcement Act does not cover Article 9 we too, shall not consider the petitioner's complaint under that Article, as it is outside the scope of our mandate. Here we shall only confine ourselves to examining the alleged violation of Articles 13(2) and 21 of the Constitution.

The jurisdiction of this Court to adjudicate on violations of such article is further derived from Article 30 (3) of the Constitution, which reads:

"30 (3) Mtu yeyote anayedai kuwa sharti lolote katika sehemu hii ya sura hii au katika sheria yeyote inayohusu haki yake au wajibu kwake imevunjwa, linavunjwa au inaelekea litavunjwa na mtu yeyote

popote katika Jamhuri ya Muungano, anaweza kufungua shauri katika Mahakama Kuu."

The official English version of that Article is:

30 (3) Any person alleging that any provision in this part of this chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic may institute proceedings for redress in the High Court.

Our Constitution consists of 10 chapters, and some chapters have several parts. Chapter One has three parts. Part Three of chapter One has 32 Articles. So Article 30 (3) of the Constitution is only applicable to the enforcement of Part III of Chapter One of the Constitution. So this Court may indeed declare some provisions of the Constitution, unconstitutional.

But before we proceed, we feel impelled to touch on one thing which none of the parties has raised. And this relates to the procedure of instituting petitions under the Basic Rights and Duties Enforcement Act (Cap 3). Section 5 of that Act stipulates:

"5. An application to the High Court in pursuance of section 4 shall be made by petition to be filed in the appropriate registry of the High Court by originating summons. "

In the present case the petition was filed without an originating summons. This appears to offend the mandatory section 5 of the Act. Ordinarily, this would have the effect of the petition being struck out as incompetent. But this is a matter that touches on fundamental rights under the Constitution. In THE JUDGE I/C HIGH COURT ARUSHA, and ATTORNEY GENERAL VS N.I.N. MUNUO NG'UNI Civil Appeal No. 45 of 1998 (Unreported) the Court of Appeal of Tanzania, adopted with approval the following passage paraphrased by the trial Court:

"...that a Court should take liberal approach to rules of practice, and procedure where basic rights and freedoms are involved so as to give to the complainant a full measure of his rights. The rationale is that since the rights guaranteed by the Constitution are effectively enforced, and that to decline to examine the merits of a petition on the basis of a procedural technicality would be an abrogation of that duty. "

In that case, the Court was also sitting on appeal from a decision of the High Court sitting under the Basic Rights and Duties Enforcement Act, just as we are. There of course, the issue was on how to plead specific damages which was a matter of procedure. Here, the question is want of originating summons which, we think, is also a matter of procedural technicality. On the basis of the above authority, we do not think the lack of an originating summons should abrogate us from doing that duty.

Mr. Rweyongeza and Mr. Mpoki learned Counsel for the petitioner, have submitted that, while Article 21 (1) of the Constitution guarantees the right of any person to elect or be elected or nominated to take part in matters pertaining to the government of the country, that right is violated by Act 34 of 1994 amending Articles 21 (1), 39 and 67 which require that such person can only so participate if he is nominated by a political party for the posts of the president and/or member of parliament. They submitted that the said amendments are further violative of Article 20 (4) which prohibits persons from being compelled to join any association or organization. The learned Counsel proceed to argue that by this provision, it means that only members of registered political parties may be permitted to be elected president or members of parliament. These, they conclude is unconstitutional.

Mr. Mwaimu, learned Principal State Attorney submitted, that the said amendments were legally promulgated by the Parliament in terms of Article 98 (1) of the Constitution. Then reverting to Article 21(1) the learned State Attorney first submitted on the reasons for the prohibition of private candidacy. He said it was one way of achieving representative democracy, and intended to safeguard peace, order, security and tranquility. To support his argument on the proportionality test, the learned Principal State Attorney quoted several decisions from South Africa, to which we shall revert soon

below.

In reply, Mr. Rweyongeza and Mr. Mpoki, learned Counsel submitted that although parliament has powers to amend Constitutional provisions, those powers are not limitless, hence the proportionality test. Here, the learned Counsel cited several decisions of this Court and the Court of Appeal. They argued that representative democracy was not inconsistent with that of private candidacy. They disagreed with the Respondent's contentions that political parties enabled the candidates to formulate and propagate their philosophies, because that mechanism had no adequate safeguards and effective controls against abuse by those in authority.

Although the learned State Attorney addressed the Court generally on the constitutionality of the impugned Articles, in this ruling we intend to examine and decide on each of the issues as agreed by the parties.

The Respondent contends that the amendments were constitutional because they were duly enacted by the Parliament who have such powers under Article 98 (1) of the Constitution. We think that is not the issue here. We accept the proposition that although the Parliament has powers to enact legislation, such powers are not limitless. As Professor Issa Shivji in his article "Constitutional Limits of Parliamentary Powers" published in special edition of THE TANZANIA LAWYER October, 2003 put it on p. 39:

"...the power to amend the Constitution is also limited. While it is true that parliament acting in Constituent capacity ...can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution ".

The issue therefore is whether the amendments to Articles 21 (1) and Articles 39 and 67 of the Constitution is Constitutional. We have tried to trace above the history of representative democracy. We have shown that soon after independence the two Constitutions 1961, and 1962 had no restriction on the qualifications for elective posts of the president and Members of Parliament. We noted also that this restriction to party members to be nominated for the said elective posts first appeared in the 1965 Interim Constitution and carried over in the 1977 constitution, when the party was under one party system. But until the enactment of the Bill of Rights in the 1984 Constitutional Amendments, there were no provisions similar to Articles 20 and 21, hence the legitimacy of Articles 39 and 67 which remained restrictive to party membership. We have seen above what the two provisions provide. To us the combined effect of Articles 20 and 21 is to expand the arena of representative democracy. To appreciate it one must compare Article 20 (2) as it appeared immediately after the insertion of the Bill of Rights and reflected in the 1985 version of the Constitution and Article 20 (4) as it appears in the 2005 edition of the Constitution which reads:

"20 (4) Itakuwa ni marufuku kwa mtu yeyote kulazimishwa kujiunga na chama chochote au shirika lolote au kwa chama chochote cha siasa kukakataliwa kusajiliwa kwa sababu tu ya itikadi au falsafa ya chama hicho."

It appears to us therefore that, while Articles 20 and 21 of the Constitution are intended to expand the arena of democracy and the right to participate in the government of the state, Articles 39 (1) (c) and 67 (1) (b) of the Constitution as amended seem to erode and restrict the right to contest for the elective posts to members of political parties only. We think that those provisions cannot be reconciled.

In our considered view the right to join or not to join political parties is as fundamental as the right to religious belief which cannot be made a basis for contesting for an elective political post. And so we proceed to hold that the provisions of Articles 21 (1), 39 (1) (c) and 67 (1) (b) are violative of Articles 20 and 21 of the Constitution. But the contraventions alone are not sufficient to declare the Articles, unconstitutional. This then takes us to the second issue which is whether the impugned Articles meet

the proportionality test?

To bring the provisions within the proportionality test it must be shown that the Articles are saved by Articles 30 and 31 of the Constitution, but Article 30 (1) is in our view, more pertinent. It provides:

30 (1) Haki na uhuru wa binadamu ambavyo misingi yake imeorodheshwa katika katiba hii havitatumiwa na mtu mmoja kwa maana ambayo itasababisha kuingiliwa kati au kukatizwa kwa haki na uhuru wa watu wengine au maslahi ya umma."

As we have seen above, once the petitioner has shown that his fundamental rights have been violated the burden shifts to the Respondent to prove that the impugned provision is in the public interest. As the Court of Appeal has put it in KUKUTA OLE PUMBUN (Supra).

" A law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will be declared un constitutional unless it satisfies two requirements:

(a)that it is not arbitrary, and

(b) that the limitation imposed by law is no more than is reasonably necessary to achieve the legitimate objection."

The requirement to subject the impugned legislation to this test is not disputed by the parties. It is also not in dispute that the burden now is on the Respondent to justify the legislation.

Elaborating on this aspect, the learned Counsel for the petitioner submitted that to pass the proportionality test it must be shown that the legislation was directed towards a legitimate societal and community interest, and that the restriction was necessary to achieve the said goal. They submitted that the impugned Articles as amended do not pass the proportionality test.

Mr. Mwaimu, learned Principal State Attorney paraphrased his argument by a long discourse on the reasons why Parliament had to pass such legislation. To quote him:

"...the amendments were done for a specific public good...The prohibition to individual contestants in general and local governments elections is one way to achieve representative democracy ...it is a policy which intends to safeguard peace order security and tranquility... "

The learned Principal State Attorney also anchors his arguments on Article 3 (1) of the Constitution, and ends up by emphasizing the importance of a potential leader to be weighed through a political party. This is where Mr. Mwaimu, brought in the South African cases of SOUTH AFRICA VS MAKWANYANE [1995] (3) S.A. 391 (cc) and S VS. BHULWANA [1996] (1) SA 388 (cc).

Undaunted, Mr. Rweyongeza and Mr. Mpoki, learned Counsel for the petitioner, submitted in rebuttal that the proportionality test was not met. They rallied the support of the decision of this Court in PETER NG'OMANGO VS KIWANGA & ANOTHER [1993] TLR, 77 and the Court of Appeal decisions in DPP VS DAUDI PETE [1993] TLR 22, and MBUSHUU VS REPUBLIC [1995] TLR. 97. They even went on to quote the same South African cases of MAKWANYANE (Supra) and BHULWANA (Supra), to support their arguments by stating that while widening the horizon of the principle of proportionality test, such limitations would only be justified if it is -

(i) reasonable,

(ii) justifiable in an open and democratic society based on freedom and equality and (iii) shall not negate the essential content of the right in question.

They thus submitted that the decision of Lugakingira J (as he then was) was in line not to negate the essential content of the right for a person to contest as a private candidate or through his chosen party.

We are not of course, entitled to question the wisdom of the parliament for enacting the Constitutional amendments in question but if we were to assume that the Respondent was attempting to discharge his burden of proof, we are not satisfied that in this case, the Respondent has succeeded. The arguments may be attractive to the ear, but they are not supported by any empirical evidence. There is no evidence at all to suggest that the existence of the right of private candidate is inimical to the spirit of representative democracy. In fact as we have shown above there was no such restriction immediately after the country became a Republic. There is no suggestion that the lack of the party affiliated qualification had brought any havoc to the society by then.

We have also had the advantage of reading the South African cases cited by Mr. Mwaimu. In S. v. BHULWANE [1996] 1 South African Law Report, the Respondent was found in possession of 856 9 gms of cannabis. He was convicted on the statutory provision raising a presumption of guilt under s. 21 (1) (a) of The Drugs and Drugs Trafficking Act. The provision's constitutionality was challenged on the ground of infringing the fundamental right of presumption of innocence. Then, s. 33 (1) of the Constitution of South Africa was considered and the Constitutional Court through O'REGAN J, held at p. 395 of the Report:

"...In sum therefore, the Court places the purposes, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad in to fundamental right, the more persuasive the grounds of justification must be."

S. v. MAKWANYANE AND ANOTHER (Supra) was another criminal case in which s. 277 (1) (a) (c) of the Criminal Procedure Act 51 of 1977 sanctioning capital punishment was challenged as being unconstitutional. CHASKASON P. of the Constitutional Court made the following observation on p. 403 GH that:

" ...I need say no more in this judgment than that s. 11 (2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution itself and in particular, the provisions of Chapter 3 of which it is part. It must also be construed in a way which secures for individuals the full measure of its provisions. "

We have also had the advantage of perusing the decision in SAGHIR AHMED AND ANOTHER V STAFF OF V.P. AIR 1954 SC 728. The Appellant there had challenged the constitutionality of legislation restricting the right to use a highway. We agree with Mr. Mwaimu that the facts there were different; as there what was being challenged was a statute and not the provisions of the constitution itself. However, that decision is also authority that:

"There is undoubtedly a presumption in favour of the Constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under Article 19 (1) (g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it with the purview of the exception laid down in clause 6 of the Article."

And that -

"The question whether the restriction imposed by a particular legislation on the exercise of fundamental rights under Article 15 (1) (g) are reasonable or not would depend on the nature of the trade and the conditions prevalent in it. "

We think that these statements of Constitutional interpretation are of universal application whether the impugned legislation is an Article of the Constitution itself or another statute.

In DEENA @, DEEN DAYAL ETC VS UNION OF INDIA AND OTHERS [1984] 1 SCR, 1, the sentence of death was being challenged for being unconstitutional. There the Supreme Court of India held among others:

"In cases arising under Article 21 of the Constitution, if it appears that a person is being deprived of his life or has been deprived of his liberty, the burden rests on the state to establish the constitutional validity of the impugned law. "

This principle is equally applicable in a case where as in this case a person alleges that his fundamental right to participate in the running of the government of his country is being restricted by another provision of the Constitution.

What we gather from the persuasive authorities cited by the learned Counsel can be put in a nutshell as follows:

(i)Where a person alleges an infringement of his fundamental right the burden shifts to the state to justify the impugned law.

(ii)Whether or not the infringement or restriction imposed is reasonable or not would depend on the nature of the restriction/infringement.

(iii) In determining whether the impugned law/provision is reasonable or not the Constitution must be construed in the light of its history and background, so as to ensure that the individual realizes the full measure of his fundamental rights; so that the essential contents of the rights are not negated.

We have attempted above to show that historically, Articles 20 and 21 of the Constitution were introduced to broaden the arena of representative democracy and participation in public affairs. In the scheme of the Constitution, this is one of the basic rights of the citizens of Tanzania. We have also seen that party qualification to contest for elective posts was unknown before the 1965 Interim Constitution and the entrenchment of the one party state. So it emerged and continued to dominate all the subsequent Constitutions as a legacy of one party policy. So, it cannot be gainsaid that during the one party state, the right to participate in being voted to power was restricted to party members. With the insertion of the Bill of Rights in 1985 and later multiparty system in 1992, party membership qualification was hardly or of little relevance, except as a legacy of the one party structure because not only party monopoly was abolished by Article 3 of the Constitution but also it was expressly forbidden under Article 20 (4) to force any person to join any association or party. It is in the light of these developments that we take the firm position that Articles 20 (4) and 21 (1) entrench fundamental rights, and Articles 39 (1) (c) and 67 (1) (b) must be construed so as to achieve the full measure of those fundamental rights. On a full and deep consideration, we are of the settled view that Article 39 (1) (c) and 67 (1) (b) make a substantial inroad into those rights guaranteed under Articles 20 (4) and 21 (1) of the Constitution. We are also satisfied that the Respondent has failed to discharge his burden to justify the said restriction, because, first, it is historical, secondly they have not produced any evidence to substantiate their fears on private candidates. It is true that Article 3 introduces a multiparty political system but we do not think that this is inconsistent with private candidacy. Private candidacy could well exist alongside multiparty system as was indeed the case before the 1965 Interim Constitution.

We have also carefully weighed the balance of the scale of the purposes, effect and importance of the impugned Articles, against the nature and effect of the infringement caused by the said Articles, and we are satisfied that the infringement is a substantial and unjustified inroad into the fundamental rights and we think such trends must be nipped in the bud, if our constitution has to remain a

respectable fountain of basic rights. As Mwalimu Julius K. Nyerere, put it in his book OUR LEADERSHIP AND THE DESTINY OF TANZANIA, HARARE AFRICAN PUBLISHING GROUP 1995, p. 9, quoted by Prof. Issa Shivji in his article CONSTITUTIONAL LIMITS ON PARLIAMENTARY POWERS (Supra).

"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?

We have prefaced our ruling by stating that one of the principles of Constitutional interpretation, is that the Constitution must be construed as a living organism. With whatever little knowledge we might have, we know as a basic principle of nature that living organisms do grow in size with time, but, unless it is dead, it does not grow smaller. By analogy our Constitutional provisions on representative democracy, having emerged from the cocoon of a one party system should be interpreted so as expand the arena of representative democracy and not shrink back to that era as demonstrated in the attempt by Act 34 of 1994. This is even more so now in view of the fragile opposition political parties existing along with the ruling CCM party as demonstrated in the just ended general elections.

So in conclusion on the above two issues, we wish to make it very plain that in our view Act 34 of 1994 which amended Article 21 (1) so as to cross refer it to Articles 5, 39, and 67 which introduced into the Constitution, restrictions on participation of public affairs and the running of the government to party members only was an infringement on the fundamental right and that the restriction was unnecessary and unreasonable, and so did not meet the test of proportionality. We thus proceed to declare that the said amendments to Articles 21 (1) 39 (1) (c) and 67 (10 (b) are unconstitutional.

We shall dispose of the third issue briefly, although we do not really consider it necessary to do so in view of our findings on the first two issues. The issue is whether the impugned Articles also contravene the International Covenants to which Tanzania is a party?

Mr. Rweyongeza and Mpoki learned Counsel, have submitted that these Articles contravene the Universal Declaration of Human Rights, and the African Charter on Human & Peoples Rights. They cited Articles 20 (1) and (2) and 21 (1) of the Declaration and Articles 10 (2) (1) and 29 of the African Charter on Human Rights to illustrate their arguments, and DPP VS DAUDI PETE (Supra) to show the effect of these conventions in the interpretation of our Constitution.

On the other hand, Mr. Mwaimu the learned Principal State Attorney does not seriously contest the existence and effect of the International Covenants but said these should be construed within their own limitations. He cited Article 29 (2) of the Universal Declaration of Human Rights to illustrate his point. He submitted that in the light of those limitations the impugned Articles of the Constitution were made in order to maintain morality, public order and general welfare of the people. So, the learned state counsel submitted, this Court should find that even as against these international conventions, those amendments were just and reasonable. He therefore prayed that the petition be dismissed with costs.

As the Court of Appeal of Tanzania observed in DAUDI PETE, we have no doubt that international conventions must be taken into account in interpreting, not only our constitution but also other laws, because Tanzania does not exist in isolation. It is part of a comity of nations. In fact, the whole of the Bill of Rights was adopted from those promulgated in the Universal Declaration of Human Rights. To come nearer to the case at hand, Articles 20 and 21 (as originally drafted before the Amendments) of the Constitution are replica of Articles 20 (1) and (2) and 21 of the Declaration. The Covenant of Civil and Political Rights which followed the declaration and ratified by Tanzania in June 1976 provides in its Article 25 thus:

"Every citizen shall have the right and the opportunity without any of the distinctions in article 2 and without unreasonable restriction: -

(a)To take part in the conduct of public affairs directly or through freely chosen representatives

(b)To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot guaranteeing the free expression of the will of the electorates?

Article 2 of the convention, enshrines the right of an individual without any distinction of any kind such as political or other opinion.

Article 29 (2) of the Universal Declaration of Human Rights, relied upon by Mr. Mwaimu has the same effect as Article 30 (1) of the Constitution of the United Republic of Tanzania. As seen above, case law has subjected any justification for restricting fundamental rights under that Article 30 (1) to the proportionality test. We have, we hope, amply demonstrated above that the amendments introduced by Act 34 of 1994 into Articles 21 (1) 37 (1) (c) and 69 (1) (b) of the Constitution substantial inroad into a fundamental right of the citizens to participate in the affairs of their government. We are of the unshakeable view that political party membership as a qualification to being nominated for an elective post is too unnecessary restriction, for the purposes of achieving and maintaining morality, public order and general welfare of the people.

There are, certainly alternative and better ways of achieving that goal. And so, in our opinion, the impugned provisions are not saved even under Article 29 (2) of the Universal Declaration of Human Rights. In the event, we agree with the learned Counsel for the petitioner, that amendments to Articles 21 (1) 39 (1) (c) and 67 (1) (b) of the constitution also contravene the International Conventions. So we answer the third issue also in the affirmative.

For all the above reasons we now come to the inevitable conclusion that this petition must succeed. We are of the settled view that the amendments to Articles 21 (1) Article 39 (1) (c) and Article 67 (1) (b) introduced by Act No. 34 of 1994 or popularly known as the 11 Amendment are unnecessary and unreasonable restrictions to the fundamental right of the citizens of Tanzania to run for the relevant elective posts either as party members or as private candidates. We thus proceed to declare the alleged amendments unconstitutional and contrary to the International Covenants to which Tanzania is a party.

In REV. MTIKILA VS ATTORNEY GENERAL [1995] TLR 31, at p. 68 this Court through Lugakingira J. (as he then) declared and directed that:

"...it shall be lawful for independent candidates along with candidates sponsored by political parties to contest, presidential, parliament and local council elections."

We shall also declare in the present case that in principle it shall be lawful for private candidates to contest for the posts of President and Member of Parliament along with candidates nominated by political parties. However unlike the learned late judge we will not just leave it at that. Exercising our powers under any other relief as prayed in the petition and cognizant of the fact that a vacuum might give birth to chaos and political pandemonium we shall proceed to order that the Respondent in the true spirit of the original Article 21 (1) and guided by the Fundamental Objectives and Principles of State Policy contained in Part 11 of the Constitution between now and the next general elections, put in place, a legislative mechanism that will regulate the activities of private candidates. So as to let the will of the people prevail as to whether or not such candidates are suitable. As this is a public interest litigation the parties shall bear their own costs.