The Annual State of Constitutionalism in East Africa 2009

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Abbreviations

AEC	African Economic Community
AG	Attorney General
APRODH	Association For Protection of Human Rights and Prisoners in Burundi (Association Burundaise pour la Protection des Droits Humains et des personnes Détenues
ASC	Annual State of Constitutionalism
ASP	Afro Shirazi Party
AU	African Union
BBC	British Broadcasting Corporation
BCDI	Bank of Commerce, Development and Industry
BINUB	United Nations Integrated Office ion Burundi (Bureau Intégré des nations Unies au Burundi)
BOT	Bank of Tanzania
CASSOA	Civil Aviation Safety and the Security Oversight Agency
CBO	Community Based Organisation
CBS	Central Broadcasting Service
CCM	Chama cha Mapinduzi
CDF	Constituency Development Fund
CECAFA	Central and Eastern African Football Associations
CET	Common External Tariff
CHADEMA	Chama Cha Demokrasia na Maendeleo
CHOGM	Commonwealth Heads of Government Meeting#
CHRAGG	Commission of Human rights and Good Governance
CHRI	Commonwealth Human Rights Initiative
CM	Common Market
CNDD-FDD	Conseil National Pour La Défense dela Demo cratie-front Pour la Défence de la démocrative
CNTB	National Commission for Land and Other Possessions (Commission Nationale de Tarre et Autres Biens)

COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organisation
CU	Customs Union
CUF	Civic United Front
DC	District Commissioner
DP	Democratic Party
DRC	Democratic Republic of the Congo
EABC	East African Business Council
EAC	East African Community
EACB	East African Currency Board
EACJ	East African Court of Justice
EAHC	East African High Commission
EAHRC	East African health Research Commission
EAKC	East African Kiswahili Commission
EALA	East African Legislative Assembly
EASTECO	East African Science and Technology Commission
EATU	East African Trade Union Council
EDPRS	Economic Development Poverty Reduction Strategy
EEZ	Exclusive Economic Zone
EPA	External Partnership Agreements
ESCR	Economic, Social and Cultural Right
EU	European Union
EUCTHR	European Court of Human Rights
FARG	Genocide's Survivors' Fund
FES	Fredrich Ebert Stiftung
FIFA	Federation of International Football Associations
FNL	Forces Natinales de Cibération
FOTSC	Forum for the Strengthening of Civil Society
FRODEBU	The Front for Democracy in Burundi (Front Pour la Démocrative au Burundi)
FTA	Free Trade Area
GNLG	National Commission for Fight Against Genocide
GNU	Government of National Unity
Hon.	Honourable

HRBA	Human rights Based Approaches
HRW	Human rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ID	Identification
IDP	Internally Displaced Persons
IMO	International Maritime Organisation
IRPD	Institute of Research for Peace and Development
ITEKA	Burundian Association in the Defence of Human Rights
JRLO	Justice, Reconciliation, Law and Order Sector
JWTZ	Jeshi la Wananchi wa Tanzania na Zanzibar
LGBTI	Lesbian Gay Bisexual Transgender and Intersex
LHRC	Legal and Human Rights Centre
MHC	Media High Council
MP	Member of Parliament
MSD	Mouvement pour la Solidarité et la Démocratie
NEC	National Electoral Commission
NGO	Non Governmental Organisation
NRM	National Resistance Movement
NTB	Non Tariff barriers
OAG	Governmental Action Observatory (Observatoire de L'Action Gouvernementale)
ODI	Overseas Development Institute
OHADA	Organisation for the Harmonisation of Business Laws in Africa
OLUCOME	The Anti-Corruption and Economic Malpractice Observatory (l'Observatoire de lutte contre La Corruption et les Maluversations économiques)
ONUB	The United Nations Operation in Burundi
ORINFOR	Office Rwanda's d'Information
PALIPEHUTU-FNL	Party for the Liberation of the Hutu People – National Forces of Liberation
PS	Principal Secretary
PTA	Preferential Trade Area

RC	Regional Commissioner
REDET	Research and Education for Democracy in Tanzania
RPF	Rwandan Patriotic Front
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SMZ	Serikali ya Mapinduzi
SOSPA	Sexual Offences Special Provisions Act
SUMATRA	Surface and Marine Transport Regulatory Authority
TANU	Tanganyika African National Union
TBC	Tanzania Broadcasting Corporation
TFF	Tanzania Football Federation
TRA	Tanzania Revenue Authority
TRC	Truth and Reconciliation Commission
UAE	United Arab Emirates
UDSM	University of Dar es Salam
UK	United Kingdom
UN	United Nations
UNDPKO	Department For Peacekeeping Operations United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UPRONA	the Union for National Progress (Union pour le Progress National)
URT	United Republic of Tanzania
UWT	Umoja wa Wanawake Tanzania
VAT	Value Added Tax
VOA	Voice of America
WTO	World Trade Organisation
ZAFELA	Zanzibar Female Lawyers Association
ZEC	Zanzibar Electoral Commission
ZFA	Zanzibar Football Association
ZLSC	Zanzibar Legal Services Centre
ZRB	Zanzibar Revenue Board

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Annual State of Constitutionalism 2009

*Rose Nakayi**

Introduction

The publication of this series on the annual state of constitutionalism (ASC) is timely, since it is now ten years after the revival of the East African Community (EAC). This has given the authors of the papers in this volume an opportunity to take stock of the achievements and huddles towards regional integration and the state of constitutionalism at both the national and regional level, and how the national issues of constitutionalism feed into or shape the regional matters and vice- versa.

The papers further discuss the diverse governance trends in East Africa as they unveiled in 2009 through the lens of constitutionalism. Corruption and other aspects, such as the genocide ideology law that has been criticised as draconian in Rwanda, the unresolved Buganda Question and its implications on the stability of Uganda, are all brought to the fore. They further reveal that although the East African countries have made strides in the right direction to make human rights a reality in the lives of their people, there are still so many glaring loopholes in the area and more efforts are required to improve the situation. Economic, social and cultural rights (ESCRs) are still relegated to second position as revealed in the Tanzania paper. Also, 2009 was bleak in regard to human rights for some minority groups.

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For example, two papers in this series, Burundi, and Tanzania, expose the infringement of the rights of albinos as a minority group. The question that arises in this situation is how far can superstition or traditionalism go unchecked, especially if at crossroads with notions of human rights? Are human rights activists by their nature well equipped to deal with such situations? Albinos were mainly targeted under the superstitious illusion that some of their body parts can be used to make potions for acquisition of wealth. The loss of lives of albinos at the hands of unscrupulous people should not be looked at as a simple matter involving murderous people in search for wealth. Its deeper analysis would reveal structural deficiencies that lead to mass poverty of many, and also loopholes in government accountability. In the absence of concrete steps to alleviate these masses from poverty, or disappointed with the states' lethargic approaches to the same, desperate superstitious options are taken at the detriment of humans like albinos. The other thorny issue in 2009 was the independence of the judiciary. The East African countries believe in the notion of separation of powers, although the executive branches prefer to have a hand to control what the judiciary does, especially if it is a threat to the power of the executive. The situation reveals that the vocabulary of checks and balances is less used than that of control of one arm of government over another, especially if the matter is related to political imperatives of the executive.

Despite the commonalities in some of the papers as seen above, each paper brings out some distinctive information on the state of constitutionalism in the studied countries as seen below:

Looking at the state of constitutionalism in 2009 in the broader context of East Africa, Romuald Haule has devoted a rigour of analysis to the concept of constitutionalism, where it stands in national jurisdictions of partner states and the EAC, and the potential role of the EAC in promoting constitutionalism in the region. The author analyses the challenges and opportunities presented in

constitutional and political developments in the member states. It takes the analysis to the regional level and shows the factors that may inhibit constitutionalism in the region, or actually offer great opportunities for its enhancement.

Haule sets the ground for his scrutiny of the key issues by reminding the reader that constitutionalism should be construed in a broader rather than a narrow sense, beyond a constitution as a living document. To him, it should be considered as "…it relates to a concept that is greater than just the sum of state organs, institutions and law and envisages the determination of how a government should use its powers and how the same should be accountable to its citizens." The constitution of any state can be a good indicator of constitutionalism in any given country, but not the only document that should be referred to ascertain respect for the concept of constitutionalism. Looking beyond the black letter rules in the laws and constitution to the practices of government can be a good indicator of how a country respects the concept of constitutionalism.

To precisely get a clear picture of where the EAC stands today, it is imperative to see where it has come from. Its current position and status is a product of a number of factors in the past (positive and negative). To put the reader in context, Haule's paper highlights the historical development in the EAC and contemporary developments as they relate to constitutionalism and regional integration. Key among these developments was the initial attempt at regional integration, on the basis of the 1967 Treaty of the EAC, which collapsed in 1977 due to a number of political and economic reasons, including, ideological differences of member states, unequal share distribution of the regional cake, and the Uganda question, for instance, Idi Amin's unconstitutional coup d'etat. Each of the current partner states faced a number of constitutional and other challenges between 1977 and the early 1990s when the ground

was prepared for the revival of the EAC. These challenges on top of those presented by globalisation were an impetus for the initial partner states (Uganda, Kenya and Tanzania) to consider regional integration in order to cope in the circumstances.

In contemporary terms, the coming into force of the EAC Treaty on 7 July, 2000, the signing of the East African Customs Union in November, 2009 and the Common Market Protocol that was ratified in 2010 are not only events, but the beginning of a slow, but steady process towards regional integration at many levels. According to The EAC Treaty (signed in November, 1999), the customs union would be followed by the common market, then a monetary union and subsequently, a political federation. The objectives of the EAC are broader and cover almost all spheres of life. On the other hand, the main objective of the customs union is the formation of a single trading territory in which partner countries freely trade without paying duty. With the advantages that accrue from this, countries like Rwanda and Burundi joined the EAC. Big is usually perceived to be better, but in this, it presents a number of challenges. Haule's paper points to the difference in history and language among the challenges. Uganda, Kenya and Tanzania have a historical connection to Britain and are Angolophone, whereas Rwanda and Burundi are Francophone, with historical links to Belgium and France. Also important is the fact that Uganda, Kenya and Tanzania have once been in the community together. This could put them at an advantage whereby they use some lessons learnt from their pre-1977 dealings, or at a disadvantage, if they absolved one another of the pre-1977 mistakes but did not forget, leading to mistrust, suspicion or disagreement in running the affairs of the revived community. Either way, the new entrants, Burundi and Rwanda, would be affected.

The foregoing among others makes Haule's proceeding point valid. He argues that learning from the reasons for the collapse of the initial EAC, or actually addressing them is important to cement

trust among the partner states and consolidate the integration. It is important that the structures of the EAC enhance access to information by the citizens of the partner states, and their participation in the affairs of the community. The mechanisms through which this can be achieved should be clearly stated and indicated in the EAC structures in order to actualise consultation and participation that is already recognised as a right. In the case of *the East African Law Society and 4 others v. the Attorney General of Kenya and 3 others (Ref. No. 3 of 2007) [2008],* the applicants *inter alia* pleaded that the rushed Treaty amendment was irregular since various interest groups in the East African region had not been involved in the process. The court concurred, saying that "failure to carry out consultation outside the Summit, Council and the Secretariat was inconsistent with the principle of the Treaty and, therefore, constituted an infringement of the Treaty as seen in Article 30.

That aside, Haule's paper highlights the role that civil society organizations (CSOs), community based organisations (CBOs) and the private sector can play, each individually as a bridge between the EAC structures and the citizenry. Their participation in the affairs of the EAC has not yet reached a significant mark. Since they normally operate at the grassroots, CBOs have an edge in mobilisation and dissemination of information. Their role in building peoples' confidence in the whole integration process right from inception should not have been undermined. This greatly affects the peoples' ability to make the states accountable both at the national and regional level.

Through the process of integration, partner states give up some of their sovereignty in favour of the EAC. This comes with a level of responsibility to the EAC to work toward a number of things, including ensuring respect for human worth and dignity. Human rights, constitutionalism and the rule-of-law are, therefore, a part of the vocabulary of the EAC. Specifically in the area of judicial review,

rule-of-law and human rights, the question that still loams is whether the East African Court of Justice (EACJ) has jurisdiction to deal with human rights cases. This issue is more contentious than before. The Zero draft Protocol dealing with the extension of jurisdiction is still consulted about, but the case law seems to be going ahead of it. Haule looks at the case of *James Katabazi and 21 others v. Secretary General of the East African Community and Attorney General of the Republic of Uganda (*REF. No. 1 of 2007) [2007] EACJ 3 (1 Nov. 2007) where the court found that it did not have jurisdiction to deal with human rights issues in respect of Article 27 of the Treaty. However, that would not be a bar for it to engage in its jurisdiction of interpretation under Article 27 (1) of the EAC Treaty, for reason that human rights issues might come into play. After all, it is clear that human rights can be read in some objectives of the community (under Article 5 (1) EAC Treaty), for example, to develop policies and programmes for among others legal and judicial affairs, the good of all member states and their citizens; 5 (1) (d) which talks of the rule-of-law and the promotion and the protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Member states have an obligation to ensure that they do not interfere in the court's exercise of jurisdiction, especially where it is deemed appropriate according to law.

Besides that, there is dissatisfaction on how the EAC has, to a great extent, remained silent or passive in some events that have taken place in partner states despite their great impact on the rule-of-law, human rights, and interstate relations. Clear examples of such events include the post-election violence in Kenya and the conflict between Uganda and Kenya over Migingo Island. It is a reasonable expectation that the EAC ought to have intervened in such matters within the community.

Regional integration should come with benefits like strengthening the rule-of-law and human rights both at the national and regional level. There are a number of challenges in achieving this, but Haule makes recommendations through which the efforts of the Community can be fruitful. These include increasing people-participation in the affairs of the EAC.

Looking at Burundi, the state of constitutionalism in 2009 as explored by Frédéric Ntimarubusa sets the ground by looking at the historical developments in the politics and constitution making process in Burundi. Like in many other African countries coming out of the colonial rule by the hegemony of the time, this period in Burundi is characterised by unconstitutional takeover of power, suffocation of the opposition, mistrust among political parties and disregard for the rights of the people. The ethnic dimension of the atrocities committed against the population in Burundi adds nuance to this period greatly characterised by annihilation of the concept of constitutionalism and respect for the rule-of-law. No doubt that ethnicity has in contemporary times been used as a tool of exclusion on the one hand, and entitlement in the politics and economic sphere in Burundi.

That aside, Ntimarubusa's paper shows a ray of hope for Burundi when a transitional government was established in 2001, with the support and facilitation of the international community. The role played by South Africa's Nelson Mandela and Tanzania's former president Mwalimu Julius Nyerere in the negotiations leading up to the Arusha Agreement of 28 August, 2000, cannot be overlooked, and so is that by the African Union troops. The fact, however, remains that the international community is not always there to ensure that calm is sustained and the agreements of the parties are respected all through. In this case, after Arusha, it remained the responsibility of the Burundian government to ensure constitutional order within its jurisdiction.

The picture has not been all rosy as Ntimarubusa reveals. The judiciary in Burundi cannot pride itself in independence due to interference from the executive. The institution in charge of ensuring proper administration of justice (*Conseil Supérieur de la Magistrature)* is not as independent as it ought to be. It is under the control of the executive, for example, chaired by the president and its members are chosen by the government. In addition, Burundi does not have a good record of democracy and human rights. With the re-introduction of multiparty politics, tension and insecurity heightened in the period prior to the elections expected in 2010, leading to human rights violations, in contravention of the constitution and other laws of the land. Just like in Tanzania, some individuals attacked the albino population in Burundi. The albinos, therefore, needed protection from the State. This is only one among the many diverse challenges in Burundi, the most daunting being the establishment of an accountable government that would help the country out of its politically unstable past.

Power sharing has been at the height of a number of peace agreements signed to bring about peace in Burundi at a number of occasions. For example, the 2000 Arusha Peace and Reconciliation Agreement for Burundi, the 2003 agreement between the Transitional Government of Burundi and the *Conseil National pour la Défense de la Démocratie-front pour la Défence de la démocratie*) CNDD-FDD, and the 2006 agreement between the government of Burundi and the *Parti pour la libération du peuple hutu -Forces nationales de libération* (Palipehutu-FNL). Ntimarubusa's paper looks at the link between the various power-sharing agreements, signed by the government and dissidents on the one hand, and democracy and violence on the other. Despite the fact that the 2005 Burundi constitution incorporates power-sharing provisions, more work is needed to make it a reality. Even with these provisions, not much change has been recorded. For example, there seems to be no break

from the pre-power sharing patterns of politics of exclusion in favour of the Tutsi to the exclusion of the Hutu. This contradicts the ideas behind the power-sharing agreements which include addressing the grievances of the historically and ethnically excluded Hutus, attaining democracy, reducing the likelihood of violence, etc.

Heeding to the constitution and some of these agreements has been such a daunting task and has indirectly had tremendous consequences for democracy, the rule-of-law and enjoyment of rights for the people of Burundi. The volatile political situation in Burundi had a likelihood to breed violence and worsen the human rights situation in Burundi, especially toward, during and after the 2010 elections.

For the Rwanda state of constitutionalism in 2009, Clement Nkeza illuminates that the country has continued to struggle and shrug off the experiences of 1994 genocide in order to move forward. Its admission as the 54th member of the Commonwealth in 2009 is cause for celebration, although it has evoked mixed feelings among some sections of the public both local and international. Indeed, Nkeza provides answers to various questions on whether joining the Commonwealth helps the country improve its human rights record that has recently come under the spotlight, especially the lack of tolerance for political dissent and the media. Was joining the Commonwealth a protest move to cut off ties with France? This is among the queries addressed in the paper. The other question that remains unanswered is whether the timing of this action reveals anything in terms of political strategies of the Rwanda government at the time.

Nkeza looks at genocide as one of those evils having a great bearing on human dignity, which is a pillar of human rights. Genocide ought to be prevented in order to create a conducive environment for human rights to prevail. Legislatively, 2009 saw the implementation of Rwanda's law on ideology of genocide to prevent and punish the

crime of genocide ideology as a measure against going back into the painful past. The author examines this law and its implications to civil liberties, especially the freedom of speech and expression, in essence questioning whether the measures that have been adopted to avert genocide violate human rights as alleged by different actors. Part of the paper details the various mechanisms the Rwanda government is undertaking to assist genocide survivors through the Genocide's Survivors' Fund (FARG), including the criticisms that are levelled on the mismanagement of the fund.

The Lesbian Gay Bisexual Transgender and Intersex (LGBTI) Practice debate that raised eyebrows in Uganda spilled over to Rwanda. Just like in the Uganda paper, Nkeza's paper details the counter-statements from pro-gay rights and anti-gay 'rights' movements each justifying its position. This debate in Rwanda like it was for Uganda, attracted international attention. It is believed that the treatment of the Gay community as a part of the minority entity is central, according to some commentators, to measuring the progress of Rwanda as it seeks to correct human wrongs and assert human rights of those most vulnerable.

Looking at constitutionalism in Tanzania in 2009, Julius Lugaziya avoids analysing matters of constitutionalism in Tanzania mainland in a vacuum. Instead, he goes back to relevant aspects of the history of the country that have a bearing (direct or indirect) on contemporary matters of constitutional importance. He looks at the various constitutions right from the independent constitution, the republican constitution of 1962, the interim and most interestingly the one party constitution of 1965. He brings to light a united spirit in the Union on the part of the dominant political party in Zanzibar- the Afro-Shirazi Party (ASP) and Tanganyika African National Union (TANU) in Tanganyika (now Tanzania Mainland) to suffocate the opposition using the constitution of 1965. In this year, Tanzania moved from a multiparty system to a single party

system. This favoritism of a single party – Chama Cha Mapinduzi (CCM) has slipped through the years to shape contemporary issues of politics, governance and the rule-of-law in Tanzania.

It is unfortunate that this seemingly uniform intention of the parties boomeranged for ASP, the Zanzibar party. The TANU constitution unlike that of ASP was appended to the constitution, parliament became subordinated to the party, and Union matters increased. Technically, Zanzibar sovereign powers were reduced as more issues came within the ambit of the Union.

The reemergence of ASP is seen in the process leading up to the 1977 Constitution of the United Republic of Tanzania; CCM was formed from a merger of ASP and TANU. Strangely, the Union Parliament comprising only CCM members was converted into a Constituency Assembly pursuant to government Notice No.39 of March 25, 1977. Of course, having members of parliament (MPs) of the same party meeting as the Constitutional Commission meant that the whole process would be politicised and in the interest of CCM, resulting in a constitution that did not show any commitment to human rights or contain provisions on the same. Multiparty politics was sidelined. Yearning for a new order, chief justice Francis Nyalali's Commission found that 20 percent of the people wanted a multiparty dispensation as opposed to the 80 percent against it. However, the change in the constitution to reflect the desires of the 20 percent were not in line with those of government that believed that change in sovereignty is a prerequisite for change in constitutional order. Lugaziya avers that this is an erroneous and escapist assertion of government to run away from the need to change the constitution.

The study on Tanzania brings to light instances where executive power is used to undermine the work of judicial and quasi judicial bodies, to the detriment of the people. The case of *Nyamuma,* complaint No. HBUB/S/1/1032/2003/MARA is a clear example of the government's disrespect for the rule-of-law, and institutions that

are put in place to enforce it. The complaints in this case included the right to property, and the right against forcible evictions. The case was initially before the Tanzania Commission of Human Rights and Good Governance (CHRAGG) and went as far as the Court of Appeal. The Court of Appeal ruled that the Commission, under Section 28(3)[1] had a right to go to court to have its decision (although not to the status of a decree) enforced. For that reason, in the wisdom of the Court of Appeal, the complainants had a right to resettlement back to their land or compensation, a decision that the government rejected in defiance of the rule-of- law. What is positive out of this case is that it is now clear that the decisions of the CHRAGG can be enforced.

Strangely, some decisions of the government are directly intended to defeat rulings of court. This is evident in the amendment of the constitution, where by a new provision requiring one to be sponsored by a political party and providing against change of political party after going to parliament was made. This was in the case of *Rev. Christopher Mtikila v. Attorney General*[2], in which the court held that barring an independent candidate from vying for office was in breach of the constitution. The amended provision of the constitution did not challenge the status quo, since it serves similar purpose; discourage independent candidates from playing politics and most importantly violates the constitution. For the later reason, the High Court, ruled in favour of Rev. Mtikila when he challenged the new amendment to the constitution. Despite the importance of this decision in terms of constitutionalism, the government's appeal

[1] "If within the prescribed time after the report is made no action is taken which seems to the Commission to be adequate and appropriate, the Commission may, after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made, either bring an action and seek such remedy as may be appropriate for enforcement of the recommendations of the Commission."

[2] Miscellaneous civil case No. 10/2005.

against it has not been heard yet. Most probably someone is buying time, such that there is no decision on this core issue by the next elections. To date, the courts in Tanzania have not been expedient in disposing of important cases involving constitutional matters. A number of very important cases like *Rugemeeleza Nshala and Mtetezi Ltd v. Attorney General*[3] are pending, yet the issues they involve put a number of peoples' rights at stake. There is, therefore, no guarantee of genuine justice when it is so delayed to an extent that it becomes illusory once dispensed.

In many countries, the constitution is the supreme law. Before the Kisanga Committee,[4] the republic of Tanzania's Constitution contained a number of clauses with claw-back effects, subjecting it to other laws. The other laws in the country as earlier mentioned are made by a parliament with majority CCM parliamentarians that normally uphold political imperatives over national issues/interests. The government's decision to endorse a recommendation by the Kisanga Committee to trash the claw-backs is one of the celebrated achievements of the time. However, this removal has not been translated into enjoyment of most of the basic rights as guaranteed in the constitution of Tanzania. Contributing to this is the gap between the law and the practice, and the reluctance of the government to lose control over the enjoyment of rights that would have an impact on the political arena of the country, such as releasing independent candidates from bondage into the political space.

Further, this paper shows how basic constitutional principles have been sidelined in the United Republic of Tanzania. Among these is the independence of the judiciary, earlier pointed out. The judiciary in Tanzania is supposed to be the icon of law and order and, therefore, ought to be independent. Unfortunately, the exercise of executive powers by the executive many times affects the independence of the

[3] Misc. Civil Cause No.35 of 2009.

[4] A Committee established to collect and analyze peoples' views on the Constitution.

judiciary. Although checks on the judiciary by the executive would in specific circumstances be appropriate, they have been misconceived in the case of Tanzania. For example, the creation of judicial boards under the Judicial Service Act[5] has the potential to be misused to the detriment of the independence of the magistrates, thereby negatively impacting on their output and the people they serve.

Further, the conditions under which parliament operates impede the constitutional guarantee of its supremacy. First of all, parliamentarians in the CCM are definitely prisoners of the party since they cannot change parties while in parliament. This situation is made more precarious by attempts to monitor and curtail free thought and opinion of parliamentarians, while in parliament. In this way, national interests are sacrificed for those of CCM. Events pre and post Richmond Report by a parliamentary select committee as discussed by Lugaziya clearly show this.

Media freedom was not respected in 2009. The News Paper Act makes the offences of "sedition", and "incitement to violence". As a result of fear media houses censor their output so much to the extent of denying the public the information they might need to know various issues of national importance. Although these provisions and the prescribed punishments were said to be unconstitutional by the Nyali Commission, they still remain on the statute books and affect media houses. For example, on allegations of 13 October, 2008, the government banned the *Muanahalisi Newspaper* for three months up to 12 January, 2009 for allegedly producing seditious stories about the president.

Lugaziya's paper adds nuance to some of the union issues underscored in the Zanzibar report. Although there has always been bickering between the CCM and other opposition parties like the Civic United Front (CUF), they spoke in unison on how to apply the proceeds from the oil that was expected to be extracted from the oil wells in Zanzibar. Their argument was that Zanzibar should be the

[5] Chapter 237.

sole beneficiary of the oil, despite the fact that matters of mineral oil had been stealthily added to the list of Union matters. Other issues of Zanzibar's sovereignty come into play, especially after a decision to the effect that it was not a State to be a victim of treason as was held in *Serikali ya Mapinduzi Zanzibar(SMZ) v. Machano Khamis and 17 others, Criminal Sessions Case No.7/99.* These haggles over who manages what between the Zanzibar government and that of the mainland definitely threaten the Union.

Among the other discounting facts on Tanzania's level of respect for human rights was its failure to fully investigate and bring to book those that were responsible for the unwarranted killing of albinos and the return of Burundi refugees en masse, contrary to international human rights and refugee laws and conventions.

Other issues in the year touch and concern the independence of the National Electoral Commission (NEC). The fact that the commission is appointed by the president, is answerable to him, and totally depends on the executive for its funding, points to its allegiance to the president who also serves as the chairman CCM-the ruling party. The likelihood of having the opposition sidelined in elections is high, in pursuance of having members of CCM take up political office.

In a nutshell, among the pertinent matters of constitutional importance in 2009, is the question of enforcement of decisions of the human rights and governance body, the independence of the judiciary, protection of the rights of minorities like albinos, and the unending or unresolved Union matters between Zanzibar and the mainland. It is difficult to tell if there was advancement in the constitutional jurisprudence of the country in 2009 since most, if not all the significant constitutional cases are not decided yet.

Prof. Olum Yasin's paper on the annual state of constitutionalism in Uganda in 2009 brings to light the events that happened in Uganda, with a bearing on constitutionalism.

Olum highlights the various progressive trends and hiccups on the road to strengthening constitutionalism in Uganda. Legislatively, the author analyses the meaning and the implications of the anti-homosexuality Bill that proposes the death penalty for all persons engaged in the act of homosexuality. The other bill threatening civil liberties was the Interception of Communication Bill 2009, which sought to legalise government security agencies' to tap phones among other modes of communication allegedly for security purposes. The author also revisits the Buganda Question, a kingdom of the Baganda that has been at loggerheads with the central government over its demands among which is the federal system of governance. Indeed, Olum aptly argues that this hostility between the government and Buganda Kingdom culminated in the September, 2009 riots that left 27 people dead. The aftermath saw the clamp-down on media houses, one of which was the closure of Central Broadcasting Service (CBS) radio. This was a gross violation of human rights such as freedom of expression and communication, resulting in denial of access to information and knowledge due to the closure of the radio.

The author also interrogates the new trend of '*districtisation*' which involves pronouncement and creation of new districts by the president without following the necessary legal procedures. Olum argues that this has grave implications on constitutionalism considering the fact that these districts are 'granted' to ethnicities and not necessarily a block or region hence the likelihood of increased ethnic tensions.

Beyond that, the author decries the ever shrinking public space. For example, the enactment of various stringent measures and laws by the government to control the work of the CSOs in the country. In the same vein, in relation to the 2011 general elections, the paper illuminates the growing agitation for electoral reforms and the disbanding of the electoral commission on grounds of incompetence and fear that it would not deliver free and fair elections. The evil of

corruption again raises its ugly head. The author details the various 'deals' and scandals executed in the name of the Commonwealth Heads of government Meeting (CHOGM) meeting which involved squandering billions of State funds with impunity.

In assessing the state of constitutionalism in Zanzibar in 2009, Salma Maoulidi looks at the various controversial constitutional debates in Zanzibar in the period under review. A number of critical constitutional issues arise from the somewhat unclear relationship between Zanzibar and mainland Tanzania, within the United Republic of Tanzania. Some of the contentious issues include the representation of Zanzibar in the politics of the United Republic, human rights, the rule-of-law among others. Among the pressing issues that Maoulidi looks at are the prerequisites for registration as a voter contained in the Elections Act No. 11 of 1984 as amended by Act No. 5 of 2005. The requirement that one should hold a valid national identity card and the residency requirement of three consecutive years in a constituency contravenes the Zanzibar constitution. A number of people that would be eligible to vote are left out since, they in some instances cannot satisfy the above mentioned requirements, or are intentionally left out for political reasons.

Her paper goes ahead to bring to the reader some of the unresolved issues in the Union of Zanzibar and mainland Tanzania. One particularly interesting issue with connotations of citizenship, identity and constitutionalism is the exclusion of Zanzibaris from national sporting events, and it's invisibility in regional bodies like the EAC. In terms of sports, despite the Union, Zanzibaris have not been part of the teams representing Tanzania in sporting events. At the same time, Zanzibar as it stands without the mainland is not recognised as a sovereign State that can stand on its own. This leaves the question whether the Union is in all matters or just a few; and what implications this can have on some of the rights of the people in Zanzibar. The automatic result has in some instances brought about tensions between the mainland and Zanzibar at the level of sports,

threatening the relationship of both parties in the Union, and adds to the mounting pile of Union disgruntlements. Also important to mention is Zanzibar's silent position in the regional bodies that the United Republic is a member to. Since there are quite a number of unresolved issues within the Union, it is believed that joining regional bodies like the EAC definitely serves to further complicate issues or introduces more issues that have to be dealt with within the Union.

Maoulidi further details out the gamut of issues in Zanzibar in 2009, some of which have their roots in the political history of the country. The dominance of CCM , whose voice tends to suffocate all others in the opposition, the unresolved Union questions and all the attempts made to resolve the situation. The *Muafaka* I- III is of relevance here. The failure of CCM to heed to the deliberations and agreements during the *Muafakas* is a regrettable setback in the politics of Zanzibar in relation to mainland Tanzania. This leaves the question on how the issues between the two would best be resolved. Despite all that, it is expected that the accord signed between the president of Zanzibar and the CUF secretary general Seif Shariff Hamad will go a long way in solving the political impasse in Zanzibar.

Maoulidi's paper further takes us to the contention surrounding the legality of the government of National Unity (GNU), the legal regime in Zanzibar and implications for constitutionalism. She shows that there is still a diversity of views on the legality of the government and its ability to instill respect for constitutionalism and human rights in various areas including the electoral process in Zanzibar. Indeed another stumbling block to recording a good record in 2009 are the outdated laws that contradict the constitution, and a renege on the concepts of separation of powers and good governance by the structures of government and those in office, and also the absence of proper checks and balances.

However, the paper on Kenya is not included because it was not available at the time of publication.

2

The State of Constitutionalism in East Africa: The Role of the East African Community in 2009 One People, One Destiny After 10 Years

*Ronald Haule**

Introduction

On 30 November, 1999, the Treaty for the Establishment of the East African Community (EAC)[6] was signed in Arusha, Tanzania by presidents Daniel Toroitich Arap Moi of Kenya, Benjamin William Mkapa of Tanzania and Yoweri Kaguta Museveni of Uganda. Subsequently, the EAC entered into force on 7 July, 2000. In the ten years since its revival[7] the EAC has enlarged after Rwanda and Burundi also acceded to the Treaty in June 2007. In 2009, as the EAC celebrated a decade of its renewed existence and of its achievements towards regional integration, questions were asked as to whether during the ten years of its existence, the EAC had promoted constitutional stability in the region and guarded against abuse of power.

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6 Treaty for the Establishment of the East African Community, as amended on 14 December, 2006 and 20 August, 2007, hereinafter referred to as the "Treaty."

7 For more information on the previous attempt at regional integration see p 2.

This paper explores the constitutional nature of the EAC, and its actual and potential role in promoting constitutionalism in the region. In so doing, it analyses the constitutional and political developments in the member states and examines the constraints and the opportunities for the EAC to enhance constitutionalism and to promote the idea of one people and one destiny.

The paper comprises five parts: the nature of constitutionalism and how it has been manifested in African states; analysis of the historical development of the EAC; the current constitutionalism development in East Africa; remarks on the relationship between community law and constitutionalism; and the rule-of-law and judicial review in the EAC. The paper concludes with a few remarks and an enumeration of the challenges the EAC is facing with regard to its goal of becoming *One People, One Destiny.*

The Nature of Constitutionalism

The notion of constitutionalism evokes many arguments and responses in those confronted with it. Most of these are the constitutional academicians and lawyers, who have from time to time, faced difficulty in defining its exact meaning. Constitutionalism can be narrowed down to just a concern with the instrumentalities of governance, such as the constitution, other legal documents devised to support it, and the structures and institutions within such a framework.[8] The concept can also be broadened to encompass "the aggregation of legislation, doctrine, conventions and non-state laws which significantly affect the structure, powers, administration and accountability of all important organs of the state and affect relations between the state and the citizen."[9] Whichever way it is examined, constitutionalism cannot be equated with the constitution as some

[8] Oloka-Onyango (ed) *Constitutionalism in Africa: Meeting Opportunities, Facing Challenges*, Oxford University Press, Oxford 2001, p 2

[9] S. Adelman. *Constitutionalism, Pluralism and Democracy in Africa*, in 42 *J. Legal Pluralism and Unofficial L.* 73, 1998, p 76.

may believe. Instead, it relates to a concept that is greater than just the sum of state organs, institutions and law, and envisages the determination of how a government should use its powers and how it should be accountable to its citizens.

At the centre of the concept of constitutionalism lies the constitution. The notion of a constitution is another that is not always straight forward for purposes of definition. There is, however, a greater consensus on what a constitution is. It is considered the highest law of the land, the mother law based on the general will of the people. While based on the general will of the people, constitutions are documents that are enduring, but not eternal; they must be capable of modification and change to suit the society and values they are meant to represent.[10]

Since the independence of many African states from their colonial masters in the 1960s,[11] the history of constitutionalism and constitutions in Africa has been characterised by instability and

[10] "As the former chief justice of South Africa, Justice Ismail Mohammed, once observed, a constitution is not simply a statute, which mechanically defines the structures of government and the relations between the government and the governed, but it is: '[A] mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values binding its peoples and disciplining its government". J. Hatchard et al, *Comparative Constitutionalism and Good Governance in the Commonwealth, An Eastern and Southern African Perspective*, Cambridge University Press, Cambridge 2004, p 12.

[11] In 1960, the UN General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples. Known as the Declaration on Decolonisation, it stated that all people have a right to self-determination and proclaimed that colonialism should be brought to a speedy and unconditional end. Consequently, African colonialism was slowly dismantled during the 1960s and 1970s: Senegal in 1960 from France, Tanganyika in 1961 and Zanzibar in 1963 from Britain (in 1964 both these countries formed a united republic to become the modern day Tanzania), Uganda in 1962 from Britain, Kenya in 1963 from Britain, Burundi and Rwanda in 1962 from Belgium, Equitorial Guinea in 1968 from Spain and Mozambique in 1975 from Portugal. For more information see http://www.un.org/Depts/dpi/decolonisation/trust2.htm#4 (accessed 13 October, 2010).

insecurity. This has resulted from the effortlessness and nonchalance with which many African leaders selfishly and self-interestedly amend their constitutions to suit their own political agenda.[12] This type of symbolic constitutionalism, which entailed abuse of the few constitutional constraints in place, led to economic, social and political crises in many states from which the African continent is still trying to recover decades later.[13]

Despite the likelihood of a renege on constitutions and the concept of constitutionalism, it is clear that the essence of a constitution is to prevent both tyranny and anarchy, while the philosophy behind constitutionalism is to promote respect for the rule-of-law and democracy. Thus, the very nature of constitutionalism ensures a healthy and noble respect for human worth and dignity, and promotes a number of core elements that uphold:

> "(i) the recognition and protection of fundamental rights and freedoms;
>
> (ii) the separation of powers;
>
> (iii) an independent judiciary;
>
> (iv) the review of the constitutionality of laws; and,
>
> (v) the control of the amendment of the constitution."[14]

Therefore, with the advent of the third wave of democratisation[15] in Africa during the 1990s, such principles and values were at the heart

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[12] In many cases, the rights and duties of political parties are not clearly defined in the constitution in a manner that ensures open fair and just electoral processes. C.M. Fombad, *Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa* in 55 *American Journal of Comparative Law* 2, 2007, p 36.

[13] C.M. Fombad, *Limits on the Power to amend Constitutions*: *Recent Trends in Africa and their Potential Impact on Constitutionalism*, in 6 *University of Botswana Law Journal* 27, 2007, p 28.

[14] Fombad, supra, note 7, p 6-8.

[15] Most writers consider the third wave to have begun in the 1970s, but it only reached Africa in the late 1980s and early 1990s. For more information, see S. Huntingdon, *The Third Wave: Democratisation in the Late Twentieth* Century,

of new constitution-making and a new dawn of constitutionalism finally arrived on the continent. It remains to be seen whether such constitutions remain the living documents they are purported to be, representing the sovereign will of the people and holding in check the exercise of governmental power. Constitutionalism is not a luxury for those with privileged access to the African political system, but is a basic necessity for the rich and poor alike. All citizens should be free to pursue their daily duties and responsibilities free from threat, corruption, harassment and arbitrary interference from the state and public officials.[16]

Constitutionalism and the Historical Development of the EAC

With such a democratic and constitutional wind blowing through the corridors of power on the African continent during the 1990's, most states adopted new constitutions or amended existing documents.[17] A number of these amended or new state constitutions had provisions that checked abuse of public power and resources, preserved and protected individual liberties and ensured the rule-of-law. This strengthening of good governance in African states produced a plethora of positive effects. For example, various states desired to merge into regional or sub-regional co-operation agreements such as the Organisation for the Harmonisation of Business Laws in Africa

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1991, at 15-16; L. Diamond, Is the third wave over? 7 *J. Democracy* 20, (1996), at 20-21; L. Diamond *et al* (eds), *Consolidating the Third Wave of Democracies*, 1997, J. Ihonvbere and T. Turner, *Africa's Second Revolution in the 1990s*, *Sec Dialogue,* (1993), at 349-52; Fombad, *ibid*, p 2.

[16] H.K. Prempeh, Marbury in Africa: *Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, in 80 *Tulane Law Review*, 2005-2006, p 1287.

[17] For example, both Ghana and Angola adopted a new constitution in 1992, Malawi and Ethiopia in 1994, Chad in 1996 and Nigeria in 1999, while Algeria and Cameroon significantly amended their constitutions in 1996.

(OHADA)18; the African Economic Community (AEC)19; and the EAC.

Although the presidents of Kenya, Tanzania and Uganda, signed the Treaty for the EAC on 30 November, 1999, this was not exactly the beginning of a new organisation. Collaboration in the region had begun at the beginning of the 20th century when the British formed a customs union from Kenya and Uganda; Tanganyika joined later in 1922.[20]

The British saw the potential to further their interests in East Africa in 1946 by uniting the Tanganyika and the Zanzibar Protectorate, the Uganda Protectorate and the Colony of Kenya in the East African High Commission (EAHC). This aimed at regulating trade, transportation and communication between the three within a common market structure and to facilitate British exploitation of the region.[21] Yet the country to benefit most from

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[18] OHADA is the French acronym for "Organisation pour l'Harmonisation du Droit des Affaires en Afrique" translated in English as the "Organisation for the Harmonisation of Business Law in Africa" and is an organisation created on 17 October, 1993 in Port Louis (Mauritius). The OHADA Treaty is today made up of 16 African states. For more information see http://ohada.com/index.php?newlang=english, (accessed 2 November, 2009).

[19] The aim of AEC is to promote economic, social and cultural development as well as African economic integration in order to increase self-sufficiency and endogenous development and to create a framework for development, mobilisation of human resources and material. The AEC Treaty (more popularly known as the Abuja Treaty) came into force after the requisite numbers of ratification in May, 1994. For further information see http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf, (accessed 2 November, 2009)

[20] P. De Lombaerde (ed.), *Multilateralism, Regionalism and Bilateralism in Trade and Investment, 2006 World Report on Regional Integration*, Springer, Dordrecht 2007, p 134.

[21] S. Fitzke, *The Treaty for East African Co-operation*: *Can East Africa Successfully Revive One of Africa's Most Infamous Groupings?*, in 8 *Minn. J. Global Trade*, 1999, p 132.

EAHC was Kenya with most industries based near Nairobi. Unfortunately for the other countries in the EAHC, Kenya became the most developed by the British in the industrial sector as well as in the related areas of service and trade.

The newly independent Kenya, Tanzania and Uganda of the 1960s, were still united by a common market structure and their economies were still linked and interdependent. Their new leaders, presidents Jomo Kenyatta, Julius Nyerere and Milton Obote, saw the benefits of maintaining such economic ties, while at the same time recognised the high price they would have to pay, if they were to separate. United, they could boost their trade links with the rest of the world or compete with each other and would lose, if they remained sole players.

As a result, Uganda, Kenya and Tanzania signed the Treaty for East African Co-operation in 1967 (Treaty of 1967) to enhance regional integration.[22] The Treaty was quite unique because in addition to promoting economic interests; it also aimed at integrating the politics and the common services of the member countries.[23] The attempt to integrate was easier than perhaps for other states because the three countries shared a similar legal system. They had been British colonies and, therefore, had common laws as the basis for their legal system, albeit with small differences. In addition, the member states used English and Kiswahili as common languages. Integration is always daunting, but it was certainly not as fraught with difficulties as perhaps those arising from other regional agreements.[24]

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[22] Treaty for East African Co-operation, 6 June, 1967, 6 I.L.M. at 932; the Treaty was signed on 6 June, 1967 and entered into force on 1 December, 1967.

[23] Fitzke, *supra* note 12, pp 132-133.

[24] Other regional agreements such as OHADA and the AEC, have to overcome the barriers of differing languages, legal systems as well as large memberships which the EAC with its three members did not have to overcome. For example, OHADA has four official languages and sixteen member states as well as a number of different legal systems.

However, despite initial optimism regarding the Treaty of 1967, there were several difficulties and problems to be overcome for it to be successful. For example, member states were interested in protecting their own varying regional interests. Both Uganda and Tanzania wanted to improve their overall position within the region and improve the balance and share of trade in their favour. Uganda (land-locked) also wanted to improve its ties with Kenya in order to access Kenya's ports, if it were to export trade overseas. However, Kenya's predominance continued within the region in view of the fact that it had better infrastructure and trade connections as well as an established business community. Thus, between 1969 and 1978, Tanzania and Uganda controlled only 23.4% of the exports between the three countries, while the lion's share of 76.6% was controlled by Kenya.[25]

Apart from economic and trade disparities among the member states, there were also ideological differences. For example, while Tanzania and Uganda were actively pursuing socialism, Kenya promoted an open liberal economy which welcomed foreign investment.26 As a result, foreign investors yet again preferred Kenya to the poorer Tanzania and Uganda, creating a deeper economic divide between Kenya on the one hand, and Uganda and Tanzania on the other. Therefore, while there were a number of successful meetings between the three nations from 1968 to 1971,[27] these ceased due to competition and inequalities between the member

[25] Fitzke, *supra* note 21, at 138.

[26] In 1967, Tanzania adopted the Arusha Declaration which promoted a policy of self-reliance and eschewed foreign investment: Similarly, Uganda adopted the Common Man's Charter.

[27] The Treaty of 1967 established the authority made up of the respective Heads of State. The Authority was assisted by a committee whose primary function was to serve as an advisory body with respect to the day-to-day management and decision-making in the community. K. Kamanga, *Some Constitutional Dimensions of East African Cooperation*, www.kituochakatiba.co.ug/Constm%20 2001%20%20Khoti%20EAC.pdf, p. 9.

states.[28] The Idi Amin coup d'état in Uganda forced Tanzania to boycott sitting at the same meeting table with Uganda. So, for the remainder of the 1970s, the EAC existed in name only. It ultimately collapsed acrimoniously in 1977.[29]

Consequently, the collapse of the old EAC can be attributed to three main reasons:

- the unbalanced distribution of costs and benefits between member states;
- ideological differences between member states; and,
- clashes between the Heads of State after the 1971 military coup d'état in Uganda.

Despite the collapse, all was not lost. There was too much of a common natural heritage for Kenya, Tanzania and Uganda, to work together. For example, as has already been seen, they shared similar historical experiences and had many other things in common such as languages, traditions and customs. Moreover, they all stood to gain by seeking regional integration, for example, co-operation would reinforce each country's strengths, while jointly addressing their weaknesses. Nonetheless, any new co-operation between the three states had to address the issues that had led to the demise of the previous agreement, making comprehensive negotiations necessary. Even so, presidents Moi, Mwinyi and Museveni signed in 1993 the initial protocols to revive the EAC. The three countries signed the Agreement for the Establishment of the Permanent Tripartite Commission for East African co-operation.[30] Given its success, the then agreement was upgraded to a formal Treaty in 1999 in Arusha, Tanzania establishing

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[28] While there was a desire to establish a regional integration process, concurrently each country was also following its own agenda at a political, economical and institutional level. The resulting tensions between such opposing schedules ultimately meant that community law and municipal law were not reconciled. ibid, p. 11.

[29] Fitzke, *supra,* 12, p. 140.

[30] ibid, pp. 141-142.

the EAC. The Treaty-making process, which involved extensive negotiations among the member states and wide public participation, was considered a success on many levels. The Treaty came into force on 7 July, 2000 following the conclusion of the process of ratification and deposit of the instruments of ratification with the United Nations (UN) secretary general; thus a renewed EAC came into being united this time by a new found common platform of a liberal conception of the state and a market-driven economy. In contrast with the Treaty of 1967, good governance issues were higher up on the agenda in the new Treaty, with special emphasis on democratisation, broader participation and human rights observance. [31]

Since then, Rwanda and Burundi acceded to the EAC Treaty in 2007, enlarging the EAC to five members. The new membership has enriched the EAC and brought new challenges, such as integrating different legal systems, since Rwanda and Burundi have a civil law legal system different from the common law legal system of the original members. A new language (French) also comes into play, although both states are also Swahili speakers. In addition, Rwanda is unique among African states because it is driven towards building a developmental state. That is, "there is a drive to construct a state dedicated to producing development results partly because this is seen as the best way of guaranteeing the Tutsi group against a return to ethnic violence".[32] This also needs to be factored into the integration process.

Current Constitutionalism Development in East Africa

Although some pessimists believed that the EAC would have once again disintegrated and imploded, we cannot confirm that it has been a total success during its 10-year existence. Progress has proceeded

[31] Art. 6, Treaty for the Establishment of the East African Community.

[32] D. Booth *et al*, *East African Integration: How can it contribute to East African Development?,* Overseas Development Institute, ODI Briefing Paper, London February, 2007, (www.odi.org.uk), p. 7.

at a slow and steady pace. For example, the three Heads of State in September 2004 appointed a committee to consider the possibility of fast-tracking the integration process. The committee recommended overlapping and parallel processes of integration in successive phases.[33] The initial phase would address the institutional framework and financial inputs necessary to move to the second transitional phase, which would consolidate economic integration in the region with the implementation of the customs union, the common market and the monetary union. Success in these first two phases would be seen as the necessary basis for the foundation of a political federation. The committee set a launch date for the political federation on 1 January, 2010, although subsequent summit meetings scheduled this for 2012 and even 2015.[34]

The Customs Union in East Africa

At the time of writing, there was an almost concluded process of establishing a free trade area and customs union. The 2005 Customs Union Protocol, signed by the Heads of State on 2 March, 2004, came into full effect in January, 2010 and aims at the harmonisation of revenue systems, customs and investment laws. The liberalisation of intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the partner states; the promotion of efficiency in production within the community; the enhancement of domestic, cross border and foreign investment in the community; and the promotion of economic development and diversification in industrialisation in the community, are Its main objectives [35]

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[33] East African Community, Communiqué of the 5th Extraordinary Summit of EAC Heads of State, *Theme: EAC Enlargement for Peace, Security, Stability and Development of the East African Region*, Kampala, Uganda, 18 June, 2007, pp. 6-7.

[34] ibid.

[35] Art. 3, Protocol establishing the East African Customs Union.

The fully-fledged customs union, which began on 1 January, 2010,[36] signals the end of the much needed five-year implementation period that was designed to recognise the asymmetry in economic development of the partner states.[37] Kenya, being the strongest economy of the region, entered the customs union under a graduated tariff band that was 25% in the first year, falling to zero at the end of the five years. Meanwhile products from the other countries entered the region duty-free.

This grace period for the weaker economies intended to give them a chance to become more competitive within the region and allay their fears of being flooded with more competitive products from Kenya, which would smother locally produced products, and harm local industries. Rwanda and Burundi joined the customs union in July, 2009 and so it is too soon to comment on the benefits they have accrued. However, the strategy appears to have worked for the other partner states with exports from Tanzania to the EAC having increased by 119%, from Uganda by 125% and Kenya by 25% since 2005.[38] Consequently, Tanzania, which is often seen as dragging its feet within the EAC, is now fully supportive of the customs union, while it is Uganda's private sector which launched a last minute attempt to extend the transitional period for another five years. It appears that Uganda's private sector does not feel ready for the fully-fledged customs union and has even appealed to President Museveni for help, but the appeal has fallen on 'deaf ears'.[39] The customs union is an essential first step towards regional integration. Therefore, any extension of the transitional period would set back

[36] EAC UPDATE ISSUE NO 31, 11 December, 2009, e-News-11-12-09.pdf, p. 5.

[37] Art. 11, Protocol establishing the East African Customs Union.

[38] J. Barigaba, "Regional trade hits $2.7m, just 5 years into customs union", The East African, 9 November 2009, http://www.theeastafrican.co.ke/news/-/2558/683138/-9x4p3oz/-/index.html (accessed 28 January, 2010).

[39] C. Riungu, "Who's afraid of Blue Band? Uganda bid to delay customs union flops", *The East African*, 9 November, 2009, http://www.theeastafrican.co.ke/news/-/2558/683110/-/9x4p5oz/-/indx.html (accessed 28 January, 2010)

by five years the other stages that would lead to political federation. The customs union is a necessary forerunner to the common market and according to Juma Mwapachu, then EAC secretary general, once it is achieved, the other strands of the integration process would follow automatically.[40]

However, many challenges have to be addressed within the region, if the customs union is to achieve its objectives and be a strong foundation for the proceeding stages of the integration process. The private sector in East Africa, through the East African Business Council (EABC), committed to a fully-fledged customs union and regional integration, has delineated its main concerns with regards to customs union instruments and called for urgent measures to address challenges within the areas of the EAC Common External Tariff (CET),[41] issues of competitiveness,[42] EAC Rules of Origin, [43] the elimination of Non Tariff Barriers (NTBs),[44] and the EAC standard, quality, assurance metrology and testing.[45] The EABC

[40] ibid.

[41] Private Sector participation in the review of the CET and pre-budget consultations of the Ministers of Finance should be institutionalised according to the EABC. See K. Kiilu, *Private Sector priorities ahead [sic] a fully-fledged customs union*, at http://eabc.info/node/408, (accessed 28 January 2010).

[42] There are issues of competitiveness which go beyond the business community, such as "energy, infrastructure, telecommunications, transport and the cost of and access to finance" which will reduce business costs, improve reliability and facilitate trade for the benefit of, not just the private sector, but the whole region. Only the partner states can address these issues and the EABC recommends their urgent consideration of the matter. ibid.

[43] The question remains regarding the removal of the usage of the Rules of Origin in a fully operational customs union when partner states are members of other regional arrangements and the border situation is still undefined. ibid.

[44] The EABC has noted that the mechanism for the identification, monitoring and elimination of NTBs has been sufficiently developed and agreed upon, but to date, very little is being done to eliminate NTBs such as "police road blocks, weighbridges, mutual recognition of standard marks/export certification, business registration and licensing and immigration procedures" . ibid.

[45] There is a lot of bureaucracy and duplication in this area which could be solved

stresses the need for the progress made so far to be built upon, while advocating for a clear schedule that will pave the way for moving customs from a national to a regional level and thus centralising customs management.

Another concern is the overlapping membership in preferential arrangements among the five-member community. Currently all EAC members, except Tanzania, are members of the Common Market for Eastern and Southern Africa (COMESA),[46] while Tanzania is the only EAC member country which is also a South African Development Community (SADC) [47] member. EAC rules also allow members to sign bilateral trade agreements with the notification of the other partner states, which together with the overlapping membership, may lead to difficulties in the management of the customs union and limit its functioning with regards to an immediate and pro-active implementation of projects.[48] Of course

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by harmonising all EAC standards as well as honouring the mark of quality bestowed by one partner state bureau of standards throughout the region. ibid.

[46] The history of COMESA began in December, 1994 when it was formed to replace the former Preferential Trade Area (PTA) which had existed from the earlier days of 1981. COMESA (as defined by its Treaty) was established 'as an organisation of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people and as such, it has wide-ranging objectives which necessarily include, in its priorities, the promotion of peace and security in the region. For more information see http://about.comesa.int/lang-en/overview/comesa-Treaty/1-general, (accessed 28 January, 2010).

[47] The SADC has been in existence since 1980, when it was formed as a loose alliance of nine majority-ruled States in Southern Africa known as the Southern African Development Coordination Conference (SADCC) with the main aim of coordinating development projects in order to lessen economic dependence on the then apartheid South Africa. SADC was established under Article 2 of the SADC Treaty by SADC member states to spearhead economic integration of southern Africa. For more information see http://www.sadc.int/, (accessed 28 January, 2010).

[48] The World Trade Organisation (WTO) has also commented on this fact:

it is known that a COMESA-EAC-SADC tripartite taskforce has been working on a proposal for the establishment of a giant Free Trade Area (FTA) which has now been submitted to the various member states for comments; even so, the EAC partner states must decide where their loyalties lie and resolve this issue of overlapping membership since this has led to the Customs Management Act, 2004 being amended four times by the East African Legislative Assembly (EALA).[49]

Despite some impediments to the new system as mentioned above and other such challenges, such as bureaucratic inefficiency and inadequate infrastructure, the EAC is well on its way to achieving a free trade area and customs area that will benefit the entire region.

Co-operation in Public Goods and Services

The EAC member states expect co-operation in the delivery of public goods and services to their citizens. These range from health research, communication, education, aviation and so forth. Although some steps have been taken in this regard with the signing of some tripartite documents such as the Protocol on the Establishment of the East African Science and Technology Commission (EASTECO); the Protocol on the Establishment of the East African Civil Aviation Safety and the Security Oversight Agency (CASSOA); the Protocol on the Establishment of the East African Kiswahili Commission (EAKC); and the Protocol on the Establishment of the East African Health Research Commission (EAHRC) in 2007, progress is still slow. Many of these protocols are yet to be ratified by member states and cannot come into force. The subsequent drafting of bills,

"This overlapping membership poses certain difficulties for EAC members, mainly because of differences in, *inter alia*, origin criteria, and intra-regional trade liberalisation scenarios under the various agreements", World Trade Organisation, *Trade Policy Review, Report by the Secretariat, EAC,* 20 September, 2006, WT/TPR/S/171, 1.

[49] REF: EALA/PQ/OA/012/2009

pertaining to the protocols to be tabled in the EALA and referred to the EAC Sectoral Council for Legal and Judicial Affairs, for legal input, were also due in 2007. However due to the delay in the ratification of the protocols, there is now a delay in achieving the legislation.[50] Given the slow progress in this regard, it appears that EAC member states do not appreciate how regional co-operation can improve the lives of their citizens, while at the same time cut costs through sharing services. Simultaneously, it indicates that despite all the talk regarding the fast-tracking of the integration process, there is no real desire to achieve the aim of one people and one destiny.

The Common Market Mechanism in East Africa

The process, initiated in 2006 of negotiating a common market, reached its conclusion with the signing of the common market Protocol by the Heads of State at the end of November, 2009. The road has been long with many disagreements and differences of opinion along the way, so much so that initially it was thought that the common market Protocol would have been signed at the summit in April, 2009[51] but deadlock on four main issues at the 9th round of negotiations at the beginning of April, 2009 led to the postponement of the signing to November, 2009. National identification documents,[52] access to and use of land,[53] permanent

[50] EAC Secretariat, *16th Meeting of the Council of Ministers, Report of the Meeting*, Arusha, Tanzania, 13 September, 2008, ref. EAC/CM 16/2008, pp. 28-31.

[51] *Press Release – Last Round of Negotiations of EAC Common Market Protocol, Minister Challenges Experts on Protocol*, at common market 9th Round.pdf, p. 2.

[52] "The United Republic of Tanzania's position is that the national identification document may, among other standard travel documents, facilitate the free movement of the holders, thereof, for partner states that would have accepted its use. Kenya, Rwanda, Burundi and Uganda's position is that the national identification document *shall*, among other standard travel documents; facilitate the free movement of the holders, thereof, for partner states that would have accepted its use prior to coming into force of the Protocol." (emphasis added), *Press Release – Multi-Sectoral Council of Ministers considers the draft EAC Common Market Protocol*, at Press – Draft CM Protocol.pdf, p. 3.

[53] "Rwanda, Kenya, Burundi, and Uganda's position is to have the sub-article in

residence permits,[54] and issues relating to the articles concerning regulations, directives and decisions and annexes,[55] with Tanzania mainly having a difference of opinion with the other partner states, were the main issues of contention.

Since no consensus on these items could be achieved at the negotiations or at the following EAC sectoral meetings, the issues were finally decided at the 10th Ordinary Summit of EAC Heads of state in April, 2009. Concessions were generally made on all the issues: national policies and laws would not be overridden by the draft Protocol on the common market; national identity cards would not be an acceptable form of travel unless partner States were ready to use them on a bilateral basis; and the granting of

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place which states: by enabling a national of one partner state to access and use land and premises situated in the territory of another partner state for purposes of establishment in accordance with the national laws of the partner states. Tanzania's position is that land is not a Common Market Protocol issue and hence this sub-article should be deleted altogether", *idem*.

[54] "Permanent Residence; Article 18: All partner states agreed to bracket the Article which states: [Permanent Residence]

1) Any citizen of the partner state who will have resided in the territory of another partner state for a period exceeding 5 years as resident shall be entitled for permanent residence status upon undergoing necessary administration procedure in a competent authority

2) The dependant and spouse of the person entitled to such status provided in sub-Article 1 shall also be entitled to the same status accorded to the principal.

3) Notwithstanding the conditions provided in sub Article 1 and 2 of this article, the Council may from time to time provide for any other circumstances in which the citizen of a partner state can be entitled with this status without necessarily meeting the said conditions]", idem.

[55] "Regulations, Directives and Decisions; and Conclusion of Annexes: Article 87, 88. Whether it is the partner states or the Council to conclude regulations or directives and annexes that are necessary to give full effect to the provisions of the Protocol, Tanzania maintains it is the partner states and not the Council. Rwanda, Kenya, Burundi, and Uganda's position is that this is the preserve of the Council of Ministers", *idem.*

rights to land and establishment should not be automatic, but lay the basis for eligibility.[56] Consequently, the Heads of State added a new item to be included in the Draft Protocol: it should ensure the full protection of cross-border investments of East Africans.[57] Since then, the Common Market Protocol was signed by the Heads of State and was then awaiting ratification.

While a fully enforced customs union is a noteworthy achievement, it has mostly involved the business community in the region and has not really trickled down to the ordinary citizen. The common market is intended to benefit all the citizens of East Africa with its promise of free movement of persons, labour, services, goods and rights of establishment and residence in the region.[58] Yet, as appears to be a common occurrence in the EAC, things are not so simple. Subject to the ratification of the protocol in June, 2010, all these benefits have not automatically come into force.

The free movement of persons is subject to two types of requirements. First, according to the EAC Common Market (Free Movement of Persons) Regulations, Annex I, a citizen of one partner state visiting another partner state must present to the immigration officer a valid travel document or ID card, where these are accepted, and declare the required information for exit or entry. At this point, an entitled citizen under the regulations will receive a free renewable six-month pass.[59] While it is clear that the pass is free and renewable, it is a departure from the current practice under which East African citizens can travel simply with a valid document between partner

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[56] EAC Secretariat, *Communiqué of the 10th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, April 2009, at Communique -10th Ordinary Summit.pdf, p. 1-2.

[57] ibid, p. 2.

[58] Art. 2 (4), Protocol on the Establishment of the East African Community Common Market.

[59] Reg. 5 (2), EAC Secretariat, *The East African Community Common Market (Free Movement of Persons) Regulations*, *Annex I*, at Annex on the Free Movement of Persons.pdf.

states without need of a pass. It is not clear why such a requirement that calls for extra administration has been introduced and neither is its purpose obvious.

Second, the free movement of persons is subject to Article 7(5) of the common market Protocol, "limitations imposed by the host partner state on grounds of public policy, public security or public health." This is a vague provision; only "public security" is explained under the "interpretation" in Article 1 as "the function of governments which ensures the protection of citizens and other nationals, organisations and institutions against threats to their well-being and to the prosperity of their communities." The other terms remain undefined. With no definition, abuse of this provision is possible with regard to the citizens' right to freedom of movement.

The free movement of labour has always been a contentious issue wherever it has been proposed.[60] There is always fear that there will not be sufficient jobs for everyone and that "others" will be preferred to "us". This being the case, it appears that a number of hurdles have been placed in the customs union Protocol with regard to this right. First, workers will need a work permit for employment that is longer than 90 days and a special pass for employment under 90 days, subject to the usual forms, fees and procedures.[61] This does

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[60] This was an issue in the European Union (EU) when the Schengen agreement, not originally part of the EU framework, became a part of EU law through the Treaty of Amsterdam in 1997, and enforced from 1 May, 1999. Fears expressed by member states include illegal immigration, drugs trafficking and terrorism and has led some EU member states such as the United Kingdom (UK) and Ireland, to remain outside the Schengen area. For more information see http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm, (accessed 28 January, 2010).

[61] Reg. 6, EAC Secretariat, *The East African Community Common Market (Free Movement of Workers) Regulations*, *Annex II*, at Annex on the Free Movement of Workers.pdf.

not appear to be any different from the standard procedure for any worker from outside East Africa working in the region. How can this then be called free movement of labour?

Second, the provision regarding the free movement of workers is again subject to "limitations imposed by the host partner state on grounds of public policy, public security or public health"[62]. Lastly, restrictions in the movement of workers and professionals will continue and be subject to a time-frame. Tanzania has the most limits in this category and does not have to allow the movement of doctors, land surveyors and science teachers from the partner states until 2015.[63]

Under the Common Market Protocol, it is not sufficient to obtain a work permit, but a residence permit must also be applied for; another complicated procedure to be followed.[64] All in all, the assurance of free movement within the EAC does not really hold up to its promise. Nothing much has changed. Maybe the EAC should take a lesson from the book of the EU, where the four freedoms of the free movement of people, goods, services and capital, are enshrined in the founding treaties. For example, freedom of movement of people means that every EU citizen is entitled to travel freely around the member states and to settle anywhere within the EU, without the need for passes, visas, work permits or resident permits.[65] These measures are designed, among other things, to encourage EU citizens to exercise their right to move and reside freely within member states, to cut back administrative formalities to the bare essentials, to provide a better definition of the status of family members, to limit

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[62] Art. 10 (11), Protocol on the Establishment of the East African Community Common Market.

[63] See, *supra,* note 95, pp. 11-41.

[64] Reg. 6, EAC Secretariat, *The East African Community Common Market (Right of Residence) Regulations*, *Annex IV*, at Annex on the Right of Residence.pdf.

[65] The right to free movement, http://ec.europa.eu/justice_home/fsj/freetravel/fsj_freetravel_intro_en.htm, (accessed 28 January, 2010).

the scope for refusing entry or terminating the right of residence and to introduce a new right of permanent residence. Is this not also the purpose of the Common Market Protocol in the EAC? After all, Article 4, 2(a) states that one of the specific objectives of the common market is to "accelerate economic growth and development of the partner states through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital." Yet it appears to have become more complex than before.

Notwithstanding any shortcomings in the Common Market Protocol, its signing marked another significant step in the regional integration process and has made the EAC a regional bloc to be reckoned with. The ratification of the Common Market Protocol gave birth to an EAC single market of 126 million consumers with no internal borders that will attract more trade, investment and tourism than the five partner states operating independently. In fact, in this era of regionalism and globalisation, Mwapachu has emphasised that "no country can be on its own".[66] So, while it was estimated that initially there would be a short-term loss of revenue for all the partner states , the benefits will be many.

Towards EAC Political Federation?

As alluded to earlier, the eventual goal of the EAC is a political union under a federal constitution. The provisional date for the achievement of the foregoing ranges from 2012 to 2015.[67] Other substantive components in the achievement of a federal union include progress in infrastructure, science and technology, constitutional and financial issues.

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[66] C. Riungu, "At last, Common Market becomes reality", The East African, 23 November, 2009, http://www.theeastafrican.co.ke/news/-/2558/801948/-/pywr4iz/-/index.html, (accessed 28 January, 2010).

[67] A federal union is planned after the achievement of a regional monetary union.

The final objective of achieving a political federation is an opportunity as well as a challenge for the EAC. So far, progress towards integration has continued at a slow, but steady pace, too slow for some members at times, but without stagnation. It should be noted that to achieve the goal of a political union, a comprehensive engagement with the reasons and issues that led to the failure of the previous EAC agreement must be part of the agenda. While the process leading to the new Treaty of 1999 attempted to be far-reaching and all-inclusive, leading to a stronger will to succeed in achieving regional integration, there are still difficulties that need to be addressed legitimately and fairly by all parties, for stability and prosperity to be achieved.

The national consultations on fast-tracking the political federation showed a number of areas of political[68] and economic[69]

[68] "The disparities in the national constitutions and practices of democracy, good governance, anti-corruption, human rights, constitutionalism and the . […] Lack of uniformity in doctrine, discipline and accountability among agencies dealing with peace, security and defence in the partner states. […] *Loss of sovereignty*: People are concerned about the loss of national identity and independent national decision making. They would like to see the structures of the proposed federal *vis-a-vis* national governments. […] Lack of a mechanism for participation of national political parties in the federal arrangement. […] Unclear institutional arrangements for the proposed federation to address political power-sharing at different levels and among the different partner states. […] There is no mention of how the federal constitution will be developed, popularised, voted upon and how it will relate to the national constitutions. […] Differences in education systems, curricula and academic/professional qualifications and social welfare schemes among the partner states. […] Implications on the existing social insurance system and the need for an EA Health Insurance scheme. […] Uncertainty of how the benefits of integration will trickle down to the grassroots. There was a general concern that awareness about the EAC integration, its benefits and opportunities is very low and may result in lack of ownership of integration processes. […] Loss of cultural and traditional values, including language", EAC Secretariat, *19th Meeting of the Council of Ministers, Report of the Meeting*, Arusha Tanzania, 13-18 November, 2009, ref. EAC/CM 19/2009, pp. 62-63.

[69] "Financial sustainability of the proposed Political Federation with the implied

concerns of East Africans. Thus, with both the customs union and the common market now in place, the time is ripe for the EAC to take the opportunity to reassure its citizens by ensuring that East Africans are informed about of their rights and the opportunities accorded to them under regional integration. EAC citizens need to see the benefits of greater union currently by seeing an efficient customs union and common market working for the benefit of the region; public officials need to be educated on the new laws and regulations so that the benefits can be realised; road and energy projects need to be invested to facilitate trade and improve reliability in the region. The EAC should also address the current shortcomings of both protocols so that by seeing the benefits of what has been achieved so far, East Africans can begin to envisage how a political federation would be of benefit to them.[70]

To achieve a lasting political federation, the real challenge is the allocation of tasks and responsibilities: What is best achieved at the envisaged federal level and what should be left for the realisation

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increase in taxation to run one additional tier of government. […] Weak economies will be dominated by the stronger economies in the region in the absence of a mechanism to address imbalances and ensure equitable distribution of benefits. […] There is a concern that the differences in the levels of economic development, entrepreneurial skills and competitiveness in the manufacturing and service industries will disadvantage some partner states. […] People were concerned about the differences in the land tenure systems obtaining in the partner states and how they will be addressed. […] The customs union is faced with a number of operational problems that need to be addressed. […] The need to establish mechanisms for sustainable utilisation and conservation of the environment", *ibid,* pp. 63.

[70] The EAC Heads of State reaffirmed the need to strengthen the pillars of political federation upon recommendation of the Council of Ministers "by locking in the gains achieved from the other stages of integration as a precursor to attaining sustainable political federation and through development of appropriate regional policies that lay a firm foundation", EAC Secretariat, *Communiqué of the 11th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, November, 2009, at Communique-11th Ordinary Summit[1].pdf, p. 3.

at a national level?[71] On this point, the EAC has not shirked its responsibility to its citizens. Upon recommendation of the Council of Ministers, the Heads of State have directed the Council to "constitute a team of experts to undertake detailed studies on the concerns raised and challenges identified on political federation with a view to proposing ways of addressing them."[72] Yet more needs to be done, if Article 123 of the Treaty is to be fully addressed as well as citizens' concerns allayed.

Whatever the answers of the team of experts, the EAC still faces a number of tests to prove its authenticity; regional integration is not just a customs union or a common market, but a commitment to constitutional stability in the region and to the promotion of its core principles, such as human rights and good governance. Thus, political federation is not an event to be achieved by a certain date, but a process to be built from scratch. East Africans should have been sensitised and educated on this process and made the part of journey from the very beginning. Only now are the EAC Heads of State addressing this challenge by directing the Council to "develop a comprehensive sensitisation programme for continuous and in-depth sensitisation"[73] of citizens about the EAC integration. Here, the Council must be serious; there must be a comprehensive and realistic attempt to ensure all citizens in East Africa, especially those in the villages and remotest areas, are informed and empowered in regard to the East African identity and solidarity. It is a challenge for the EAC, but also a great opportunity to ensure that everyone is walking together towards political federation.

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[71] This was a major concern for East African Citizens during the National Consultations, see *supra*, note 68.

[72] See *supra*, note 70.

[73] ibid.

EAC Community Law and Constitutionalism

The EAC is an example of regional integration. The more regional integration takes place, the more constitutionalism should be emphasised in the region. In this respect, it is necessary to examine what regional integration means and how it is achieved.

Regional integration processes have important implications for the trade and development processes of developing countries. Besides that, they are a process and a means by which a given group of countries (like those in the EAC) can develop and ensure constitutional stability. There are basically two ways to approach regional integration. The late president of Ghana, Kwame Nkrumah, advocated the use of political institutions as a means for integrating the other necessary areas of interest. On the other hand, the functionalist approach promotes integration through taking small steps to construct a network of functional relations in trade, investment, infrastructure, culture, etc. To arrive at a political federation is the ultimate aim of this kind of building-block approach to regional integration. That is, a political superstructure that is built up consistently from a strong base.[74] Both these types of approaches can be identified in the East African methodology, but it is the building-block approach which is dominant.

Whichever method or mixture of methods is employed, it is essential that the process produces stability and prosperity for the states and the citizens themselves. There is always an expectation that any regional arrangement will bring about gain. Usually, this is thought to be in terms of economic and trade development. Yet, with a political federation as the definitive goal, other loftier principles and ideals, such as good governance, the rule-of-law and human rights, must also be among the gains and benefits for all citizens.

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[74] T.N. Kibua and A. Tostensen, *Fast-tracking East African Integration: Assessing the Feasibility of a Political Federation by 2010*, http://www.ipar.or.ke/Documents/WP/WP_05.pdf, (accessed 15 November, 2009), p. v.

The other side to regional integration is that the state must surrender some of its sovereignty to the regional agreement. The EAC law is considered supreme over the constitutions and the laws of the member states.[75] This has not, and will not be a smooth process in the community. For example, commitments are not honoured and progress is slow. Often the complaint from the Council of Ministers is that they are awaiting the return of protocols from the member states.[76] Again, this indicates the real spirit of the member states: they are not ready to move towards regional integration in a speedy manner. Consequently, maybe it is time to drop the idea of fast-tracking the integration process. Real and lasting integration is a constant process over a given time and in agreed stages. It has been over fifty years since the EU signed its initial agreements, but it has not yet achieved the political federation it envisages. Can the EAC accomplish the same within 10 years? Maybe a more realistic approach is needed in East Africa which takes into account particular difficulties each member state has in taking part in the integration process and focus on achieving a lasting regional commitment that involves all members of society, and not just the political leaders.

The likely loss of sovereignty on the part of the member states calls for some sort of incentive to keep them in the community. This can only be accomplished, if the EAC ensures constitutional stability and guards against the abuse of political power in the region. This can be achieved in a variety of ways:

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[75] Even the Treaty itself is not crystal clear on this point, but Art. 33(2) implies this is the case: "Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter."

[76] EAC Secretariat, *19th Meeting of the Council of Ministers, Report of the Meeting*, Arusha Tanzania, 13-18 November, 2009, ref. EAC/CM 19/2009. This point is made repeatedly throughout the report.

Ceding of some Sovereignty to EAC

Through ceding some sovereignty to the EAC, where the state parties can be represented. In this way, it is most likely that any decision made will be agreeable to the state parties. At the moment, this remains a challenge for the region since the decision-making process in the EAC is by consensus of the partner states through the structural meetings of the officials, permanent secretaries, ministers and Heads of State. Although ceding is admirable, its drawback is that decisions cannot be made, if a partner state is absent or missing.[77] Another facet to this issue is that often contentious issues are left to be resolved by the Summit of the Heads of State as, for example, was the case with the difficulties regarding the draft Common Market Protocol: the ultimate solution to the problem in this case was to allow national laws to apply.[78]

Decision by consensus is commendable, but it constrains performance. After Kenya held a general election in 2007, marred by post-election violence, there was a period of inactivity and no meetings were held in the EAC because Kenya could not attend.[79] This begged the question: What would happen in 2010 when Burundi, Rwanda and Tanzania held elections? Would the EAC grind to a halt? Partner states must realise that they need to cede

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[77] For example, when Kenya and Tanzania were not present for the Meeting of Experts on the 14-15 September, 2009, Tanzania argued that the meeting was not properly constituted and, therefore, that the report of the experts should not be presented to the Meeting of the Council. See EAC Secretariat, *19th Meeting of the Council of Ministers, Report of the Meeting*, Arusha Tanzania, 13-18 November, 2009, ref. EAC/CM 19/2009, pp. 60-61.

[78] See EAC Secretariat, *Communiqué of the 10th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, April 2009, at Communiqué -10th Ordinary Summit. pdf*, p. 3.*

[79] F. Olouch and J. Barigaba, "To make EAC strong, give the Secretariat teeth", The East African, 2 November, 2009, http://www.theeastafrican.co.ke/news/-/2558/679956/-/qxlvqlz/-/index.html (accessed 28 January 2010).

authority to EAC organs like the secretariat if the community is to make a significant move towards political federation.

The EALA passed a resolution in May, 2009, at its 6th Meeting of the 2nd Session, urging the Summit to delegate its powers to the Council "to restructure and allocate responsibilities to individual members of the Council on such terms and conditions as the Council will deem fit."[80] Although this would be a step in the right direction, many ministers in the Council are serving ministers in ministries in their respective countries. Most probably they would not be in a position to take on extra duties with the effectiveness they require. The Summit has since delegated some of its powers regarding the approval of the reviews of the EAC, CET and EAC Rules of Origin, to the Council of Ministers subject to conditions and qualifications,[81] nevertheless, it should not stop there, it can further empower other EAC organs and institutions.

While the reluctance of the partner states is understandable, deeper integration and ceding of sovereign power to EAC organs and institutions is necessary, if the EAC is not to remain just a bureaucracy, executing the instructions of the Summit and Council; currently, most issues are resolved by their decisions.[82]

Harmonisation of National Laws

This is articulated by Article 126 of the Treaty and is still in progress. The Sectoral Council on Legal and Judicial Affairs has commissioned

[80] EAC Secretariat, *19th Meeting of the Council of Ministers, Report of the Meeting*, Arusha Tanzania, 13-18 November, 2009, ref. EAC/CM 19/2009, p. 26.

[81] EAC Secretariat, *Communiqué of the 11th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, November 2009, at Communique-11th Ordinary Summit[1].pdf, pp. 2-3.

[82] See EAC Secretariat, *19th Meeting of the Council of Ministers, Report of the Meeting*, Arusha Tanzania, 13-18 November, 2009, ref. EAC/CM 19/2009; EAC Secretariat, *Communiqué of the 10th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, April 2009, at Communiqué -10th Ordinary Summit.pdf; EAC Secretariat, *Communiqué of the 11th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, November, 2009, at Communique-11th Ordinary Summit [1].pdf.

a study on the harmonisation of EAC partner states' national laws in the EAC context which will take into account the different legal systems pertaining the partner states , especially Rwanda and Burundi, which have a different legal system from the rest of the members. As mentioned previously, this is a challenge for the community, but at the same time a point of growth since it can only enrich the community patrimony.

A Good Design of the Federation

A design that ensures member representation, clear distribution of power and proper checks and balances would go a long way towards eliminating the insecurity that arises as a result of fear of loss of sovereignty. A federation is a compound polity; the allocated tasks and responsibilities throughout the union will ensure its success. The EAC organs and institutions must work together yet at the same time check and balance each other to ensure that constitutionalism and the rule-of-law are respected norms. In this respect, the roles of the EALA and the EACJ Justice are essential to the future of the EAC. It will be their responsibility to promote and protect the fundamental principles of the community and work towards the achievement of EAC objectives.

Currently, they have yet to setup to the mark. For example, at the moment, the members of the EALA are appointed by their national parliaments, and not by East Africans. How is this a democratic process and how does this make them accountable to the people of East Africa? While there is no doubt that the EALA is currently representing East African citizens, the election process of the members needs to be clearer and more transparent so that each citizen can be sure he or she is being represented.

Even so, the EALA has to some extent taken its responsibility to the people of East Africa seriously.[83] Their function is legislative and of

[83] There are reports that MPs have refrained from turning up for meetings to the extent that a quorum cannot be formed. See J. Okungu, "East African

oversight. In this regard, the EALA in 2009 enacted a number of laws, debated and approved the EAC budget, yet its efforts to legislate were hampered by the long waiting period for bills to return from the sectoral committees. At the time of writing, some bills had been pending for over two years.[84] If it is to fulfil its legislative function relating to the operationalisation of the Treaty, these delays must be avoided and new ways of giving the EALA greater responsibility in its mission found. Another source of delay occurs while waiting for assent of the bills as required by Article 62 of the Treaty.[85] Again, the Summit of the Heads of State must assent to the bill enacted by the EALA. All in all, it may take a number of years before any legislation is enacted.

During this 2nd Assembly (2007-2012), the EALA has also been active in its function of oversight through putting forward questions for oral answers that are important to the life of the community[86] to the chairperson of the EAC Council of Ministers[87]; it has tabled a number of resolutions pertinent to matters of the EAC;[88] and has

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Legislators should get more serious", 2 April, 2009, http://allafrica.com/stories/200904030057.html, (accessed 28 January, 2010).

[84] For example, the EAC Elections Bill 2008, the Tourism and Wildlife Management Bill 2008, Lake Victoria Basin Commission Bill 2007 and the Civil Aviation Safety and Security and Oversight Bill 2007.

[85] Art. 62 of the Treaty states that: "1. The enactment of legislation of the community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to shall be styled an Act of the community. 2. When a bill has been duly passed by the Assembly, the Speaker of the Assembly shall submit the bill to the Heads of State for assent. 3. Every bill that is submitted to the Heads of State under paragraph 2 of this article shall contain the following words of enactment: Enacted by the East African Community and assented to by the President of the Republic of Kenya, the President of the Republic of Uganda and the President of the United Republic of Tanzania."

[86] Rule 17 of the Rules of Procedure of the East African Legislative Assembly.

[87] See http://www.eala.org/plenary-session/quetsions-a-answers/june-2007-to-february-2009-, (accessed 28 January, 2010)

[88] See http://www.eala.org/plenary-session/resolutions, (accessed 28 January, 2010).

appointed a number of relevant committees[89] so that it may review, scrutinise, investigate and inquire into the activities of the organs and institutions of the EAC.[90]

There appears to be some tension simmering below the surface in regard to the relationship between the organs and institutions of the EAC and even between the partner states .[91] While it is important that checks and balances exist and differences of opinion are healthy for growth, it is not fruitful that accusations and blame-laying become the order of the day. It is the task of those devising the federation to ensure that its organs and institutions have the responsibility of ensuring high constitutional standards and collaboration through the community, otherwise its very purpose will lose all meaning.

Popular Participation

The citizens of East Africa should be in position to participate in all the affairs of the EAC. This should be in any manner, such as through a political party, trade union, NGOs, CSOs, etc. The EAC of 1967

[89] Rule 77 of the Rules of Procedure of the East African Legislative Assembly.

[90] In fact under this remit, the EALA setup a select committee in 2009 to investigate the circumstances under which the 4th Meeting of the 2nd Session of the Legislative Assembly was suspended by the EAC Secretariat, an event which caused considerable tension between the two organs of the community. For more information see EAC Secretariat, *19h Meeting of the Council of Ministers, Report of the Meeting*, Arusha Tanzania, 13-18 November, 2009, ref. EAC/CM 19/2009, 25; G. Muramira, "EALA quizzes Mwapachu over suspension of session", 19 February 2009, http://allafrica.com/stories/200902190031.html, (accessed 28 January, 2010).

[91] For example see G. Muramira, "EALA quizzes Mwapachu over suspension of session", 19 February, 2009, http://allafrica.com/stories/200902190031.html, (accessed 28 January, 2010); C. Butunyi, "EALA in tussle with ministers over management of Lake", 12 October, 2009, http://allafrica.com/stories/200910120085.html (accessed 28 January, 2010); "Another day, another crisis", 7 March 2009, http://allafrica.com/stories/200903100251.html, (accessed 28 January, 2010); V. Myyanyika and B. Kagashe, "EALA Speaker names obstacle to Federation", 5 August, 2009, http:// allafrica.com/stories/200908050554.html, (accessed 28 January, 2010).

to 1977 lacked participation by the private sector and civil society. This is considered one of the reasons for its downfall. Therefore, full ownership and participation by the people is essential for regional integration to be successful and sustainable.

Article 7(1) of the Treaty states that "[t]he principles that shall govern the practical achievement of the objectives of the community shall include: (a) people-centred and market-driven co-operation;" yet the Treaty does not specify the procedure for this participation. Only Article 30 of the Treaty hints at this kind of involvement when it allows for any person resident in the EAC to

> "refer for determination by the court, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the community on the grounds that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

The above implies that the people's participation is essential to the life of the EAC and it is their right and responsibility to protect the Treaty when it is threatened. Yet these will remain just words until a process or course of action has been specified that protects the citizens' right to be involved not just in the protection of the Treaty, but in all areas of consultation and co-operation activities.

This was made all the more real in the recent case of *the East African Law Society and 4 others v. the Attorney General of Kenya and 3 others (Ref. No. 3 of 2007) [2008]* when the applicants pleaded that:

> "e) The Summit, Council of Ministers, Office of the secretary general and the 3 partner states ' Attorney Generals excluded all the other organs of the community, the partner states governments and more importantly, the people and registered interest groups of East Africa in the irregular and rushed Treaty amendment process."[92]

[92] The *East African Law Society and 4 others* v. the *Attorney General of Kenya and 3 others* (Ref. No. 3 of 2007) [2008], p. 6.

The court noted that at times extensive consultation had been carried out yet in the above case no consultations had been allowed. Consequently, court found that "failure to carry out consultation outside the Summit, Council and the Secretariat, was inconsistent with a principle of the Treaty and, therefore, constituted an infringement of the Treaty within the meaning of Article 30."[93] It is clear that popular participation cannot be on an ad hoc basis, but must be true to an established practice and to the operational principles of the community as stated in Article 7.

The same can be said for the role of the civil society in the EAC. Presently, the Treaty allows for stakeholder participation such as the private sector, different interest and community groups, as well as CSOs, NGOs and CBOs at all levels, especially through consultative forums. The same groups can also seek observer status, but so far only those groups that transcend national boundaries have actually been able to do so, such as the East Africa Trade Union Council (EATU), Kituo cha Katiba and the *EA Business Council*[94] as well as the *East Africa Law Society* and the *East African Magistrates and Judges Association*.

While the Treaty under Article 127(4) directs the secretary general to provide a CSO forum, this is yet to happen formally. Only recently did the Council direct the Secretariat to "formalise the forum provided for under Article 127(4) of the Treaty with a proposal on rules of procedure to guide the participation of the private sector, civil society and other interest groups."[95] For this to happen only now, as the EAC prepares to celebrate a decade of existence, is a shame and a betrayal of the spirit of the Treaty, which in its preamble,

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[93] ibid, p. 31.

[94] A.B. Chikwanha, *Civil Society Organisations' Hurdles in the East African Community,* Institute for Security Studies, 29 October 2007, http://www.iss.co.za/index.php?link_id=4057&slink_id=5095&link_type=12&slink_12&tmpl_id=3, (accessed 10 November 2009)

[95] (EAC/CM 19/Directive 27)

acknowledges the fact that lack of a meaningful participation by the private sector and the civil society in the previous EAC was a factor in its downfall.[96] The EAC appears not to have learnt from its weaknesses the first time round and that there must be a more meaningful involvement of the civil society in the processes leading to regional integration, if the EAC is to succeed.

The civil society has a great role to play in the East African integration process since they conduct research, workshops, seminars and training, as part of their activities and, therefore, are able to inform the people of what is going on and how it affects them. Their ability to empower people and give them a voice should not be overlooked or considered inconsequential.

As previously mentioned, the recent Ordinary Summit of the EAC Heads of State on 20 November, 2009 directed the Council of Ministers to augment and promote the "East African identity and solidarity among citizens of East Africa about the EAC integration"[97] as well as provide an agenda to encourage mutual trust and confidence building, as the way to proceed towards the political federation. Why should such a directive be necessary? If people and civil society participation had always been an indispensable and necessary part of the integration process from the very beginning, an East African identity would have been composed and integrated by now in every citizen's mind through an active and constructive ownership of the whole process. Has not the EAC reaped the fruits of its own labour? If such a directive is necessary, then it has not done enough to ensure full ownership and participation by the people and the civil society. The EAC must do more to ensure this identity, solidarity, trust and confidence by the people so that they

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[96] Preamble, Treaty for the Establishment of the East African Community.

[97] EAC Secretariat, *Communiqué of the 11th Ordinary Summit of EAC Heads of State,* Arusha, Tanzania, November, 2009, at Communique-11th Ordinary Summit[1].pdf, p. 3.

feel they are part of the new political and social reality that is being created, that is, as one people with one destiny.

Mediation of Disputes between and among Member States

The EAC should be in position to arbitrate in any disputes that might arise from time to time. A recent example of a failure to do so is the Migingo Island dispute between Uganda and Kenya.[98] The situation simmered between the two states with both resorting to the deployment of armed forces and calling for the intervention of the UN.

Article 29 of the EAC Treaty provides that;

> "1. Where the secretary general considers that a partner state has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the secretary general shall submit his or her findings to the partner state concerned for that partner state to submit its observations on the findings.
>
> 2. If the partner state concerned does not submit its observations to the secretary general within four months, or if the observations submitted are unsatisfactory, the secretary general shall refer the matter to the Council which shall decide whether the matter should be referred by the secretary general to the Court immediately or be resolved by the Council.

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[98] The Migingo Island dispute, regarding a tiny islet of Lake Victoria, which has been described variously as ' a rock', 'one hectare of land floating on Lake Victoria' and a 'hostile rock without vegetation', broke out in 2008 between Kenya and Uganda. While both lay claim to the tiny island, the central issue in the dispute is the fish in the waters surrounding the island which are a valuable commodity for both sides. The nile perch is an important export for both countries yet overfishing and climate change have led to decreasing numbers in Lake Victoria. "Both countries claim that Migingo is part of their territory, Uganda based on colonial maps and Kenya on the basis of the same colonial maps and further claim that the island is inhabited by members of a Kenyan community, the Luo." http://www.pambazuka.org/en/category/features/56719, (accessed 22 November, 2009).

> 3. Where a matter has been referred to the Council under the provisions of paragraph 2 of this article and the Council fails to resolve the matter, the Council shall direct the secretary general to refer the matter to the Court."

Therefore, given that the dispute between Uganda and Kenya has the potential to jeopardise the peace, security, and stability in the concerned states, the secretary general should have made a representation to both sides. It would also be within the secretary general's powers to invite the two states to a meeting on the issue before the conflict escalates. If the above solutions were not plausible or were ineffective, the issue should have been referred to the Council or, in the case of the Council being unable to resolve the matter, to the EACJ. The EAC should never have remained silent on the issue. It has a duty to the people who are involved in the dispute through no fault of their own and a duty to take care of such inter-state conflicts.

Since the EAC Treaty and communitarian law assumes supremacy over national constitutions and laws, it must take the lead in ensuring constitutionalism and the rule-of-law. It should also ensure that human rights are at the forefront of its political agenda in the regional integration process. Constitutionalism does not fall by the wayside just because some levels of national sovereignty are surrendered to the community, instead the community must ensure that the basic principles mentioned previously, which ultimately have, as their central theme, respect for human worth and dignity, are upheld and promoted. Yet presently, the EAC appears to be shirking its responsibilities and putting the integration process at stake when it does not address the pressing issues of the community, such as the Migingo Island crisis and the violent crisis following the 2007 general elections in Kenya. The EAC cannot be afraid to intervene; it must face the challenges and mediate in the lives of its member states when necessary. The EAC is accountable to the citizens of the

partner states for its actions and the citizens expect and wish to see its decisiveness when their lives and livelihoods are at stake or else support for the community will wane and disappear.

Rule of Law and Judicial Review in the EAC

According to Dicey, constitutionalism is closely linked to the rule-of-law.[99] While the rule-of-law is slightly narrower in its scope, many of the core elements of constitutionalism already mentioned are necessary for the rule-of-law to exist. While respect for the rule-of-law may not ensure constitutionalism, it safeguards the existence of constitutionalism. Judicial review is the means by which the courts control the exercise of governmental power. Thus, the judicial review of administrative action, that is, of government departments, local authorities, tribunals, state agencies and agencies exercising powers, which are governmental in nature, ensures that the executive acts within the powers granted to them by parliament.

Regional courts of law have a great role to play in matters of constitutionalism and the rule-of-law. Constitutional justice is concerned with the adoption of constitutional norms, institutions and processes that are designed to limit and control political power. When political power violates the rights of the citizens of East Africa, they should have recourse to national courts and ultimately the EACJ.

During the period 2007-2008, the EACJ underwent a period of change: from an ad-hoc court to a fully established court of first instance with appellate divisions.

The court has jurisdiction to hear and determine disputes:

- On the interpretation and application of the Treaty;
- Between the community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations;

[99] Fombad, *supra*, note 12, p. 8.

- Between the partner states regarding the Treaty, if the dispute is submitted to it under a special agreement;
- Arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the court to which the community or any of its institutions is a party; and,
- Arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the court.[100]

The court also states that it may extend its jurisdiction to human rights at a suitable date to be determined by the Council as per Article 27 of the Treaty. At this juncture, it is necessary to say that the Council has been dragging its feet over such an extension. The fundamental principles of the community include: "good governance, including adherence to the principles of democracy, the rule-of-law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."[101] Yet the rules of procedure for the court published in 2008[102] contain no extension, while the Zero Draft Protocol to operationalise the extended jurisdiction of the court to include human rights is still under consultation. According to lady Justice S. B. Bossa, the reasons for this delay are based on bureaucratic inertia, ignorance of the law and legal illiteracy, the political landscape and the expansion of the EAC.[103] This was her opinion in 2006 and while the consultations have now finally concluded, the development of the Protocol to

[100] http://www.eacj.org/jurisdiction.php (accessed 10 November, 2009).

[101] Art. 6, Treaty for the Establishment of the East African Community.

[102] The East African Court of Justice Rules of Procedure 2008 are the revised rules of procedure to conform to the Treaty amendments restructuring the court.

[103] S.P. Bossa, *A Critique of the East African Court of Justice as a Human Rights Court*, a paper presented at a conference organised by Kituo cha Katiba on Human Rights Institutions in Eastern Africa on 26 October, 2006, Arusha, Tanzania, pp. 7-9.

operationalise the extended jurisdiction of the EACJ is still in progress.[104] While it is admirable that extensive consultations of all stakeholder groups are being made, the questions remain: Why has it taken over six years to hold consultations on the Zero Draft Protocol yet, as already mentioned previously, there was no need to consult stakeholders on the changes made to the Treaty that also affected the EACJ? Is it not best to be consistent, both with regards to changes affecting the Court, and stakeholder consultation?

On the other hand, the jurisprudence of the court has already come close to surpassing the Zero Draft Protocol. In the case of *James Katabazi and 21 others* v. *Secretary General of the East African Community* and *the AG of the Republic of Uganda*, Mr Oluka, representing the attorney general of the Republic of Uganda (the 2nd Respondent), submitted that under Article 27 (1), the court did not have jurisdiction to deal with matters of human rights until jurisdiction is vested under Article 27(2). He, therefore, asked the court to dismiss the reference with costs causing the court to have to deal with the issue of whether it has a human rights jurisdiction. On this point, the court found that it did not have jurisdiction to deal with human rights issues per se according to Article 27 of the Treaty, but on further reflection reasoned in the following manner:

"The objectives of the community are set out in Article 5 (1) as follows:

1. The objectives of the community *shall be to develop policies and programmes aimed at widening and deepening co-operation among the partner states in* political, economic, social and cultural fields, research and technology, defence, security and *legal and judicial affairs,* for their mutual benefit. (Emphasis supplied)

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[104] The Council of Ministers, *Presentation of the Report of the Council of Ministers for the period July 2008-March, 2009 to the 10th Summit of Heads of State by the Hon. Monique Mukaruliza, Chairperson of the Council of Ministers of the East African Community*, p. 354-Presentation-report-of-the-council-of-minsters-april-2009.pdf, p. 10.

Sub-Articles (2) and (3) give details of pursuing and ensuring that the attainment of the objectives as enshrined in sub-Article (1) and of particular concern here, is the 'legal and judicial affairs' objective. Article 6 sets out the fundamental principles of the community which governs the achievement of the objectives of the community, of course as provided in Article 5 (1). Of particular interest here, is paragraph (d) which talks of the rule-of-law and the promotion and the protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

Article 7 spells out the operational principles of the community which govern the practical achievement of the objectives of the community in sub-Article (1) and seals that with the undertaking by the partner states in no uncertain terms of sub-Article (2):

The partner states undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule-of-law, social justice and the maintenance of universally accepted standards of human rights**.** (Emphasis supplied)

Finally, under Article 8 (1) (c), the partner states undertake, among other things to:

> "abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty."

While the court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under Article 27 (1) merely because the reference includes allegation of human rights violation."[105]

Further still the court found that to oversee the rule of law, which is its role, "embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human

[105] East African Court of Justice, Arusha, Tanzania: *Katabazi and 21 others v Secretary General of the East African Community and another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November, 2007), pp. 15-16.

rights or the rule- of-law".[106] The court was eventually in favour of the applicants and granted them costs against the 2nd respondent.

It is worth noting that the court is an international court and as such, its jurisdiction is not aimed at affecting the jurisdiction of national courts on matters of human rights. The court must promote and uphold the fundamental principles of the community and, therefore, must pursue a commitment to good governance which includes adherence to the principles of recognition, promotion and protection of human rights as per Article 6 of the Treaty. The primary responsibility of the state is to protect human rights and observe its international obligations. So, any extension of the court's jurisdiction to include human rights would mean that any person seeking to invoke it would first have to show the exhaustion of local remedies.[107] This is what occurred in the above cited case and the Court could not eschew its responsibilities with regards to human rights just because it is not yet specifically catered for.

While there is already an African Court of Human and People's Rights, this does not diminish the role of the EACJ in dealing with a cross-section of issues, including human rights. The regional integration process is fraught with challenges and difficulties, and if it is to be successful, there must be a strong judicial arm to make authoritative and assertive statements on the issues that affect the member states and their peoples. It would not make sense to refer such cases to another regional court. Only in this way can the EACJ command the respect and confidence of the people of East Africa and help them believe in constitutional justice and the regional integration process.

Yet, it is known that the human rights record for the region is far from perfect and maybe it is for this reason that the Heads of State have so far failed to formally extend the court's jurisdiction to human

[106] ibid, p. 20.

[107] T.O. Ojienda, "Alice's Adventures in Wonderland": Preliminary Reflections on the Jurisdiction of the East African Court of Justice, 2 *E. African J. Hum. Rts. and Democracy* 94, 2004, p. 98.

rights, but the court's own jurisprudence has surpassed this necessity. The court has not shirked its responsibilities although the numbers of cases adjudicated so far are too few to give a determinate evaluation of its record. However, the court does not appear to be afraid of stepping on a few political toes or checking the abuse of public power and resources. This is the essence of the rule-of-law, judicial review and constitutionalism, and is a credit to the judiciary of the court.

Challenges and Conclusion

The EAC has come a long way since its renewed existence in 1999. In ten years, the EAC expects to achieve its objective of a political federation by 2012. The progress has been slow and steady, and this is a sign of building a strong foundation on which to construct regional integration.

To achieve this goal, there is demand that the member states transfer some level of sovereign power to the community and its institutions. Thus, the challenge is to design and implement an appropriate and strategic pacing and sequencing of national and regional co-operation, so that the process is democratic and constitutional, that is, the values and principles of the peoples are transferred to the new political superstructure. Only in this way will regional integration reflect the sovereign will of the people at the heart of the national constitutions. Regional integration does not spell the end of constitutionalism, the rule-of-law or human rights, it reinforces them. However, the EAC must actively pursue them and enshrine them in its everyday practices, in its organs and institutions, and should not be afraid of confronting the status quo.

In this respect, there are a number of challenges that the EAC faces:

Popular Participation

Any regional integration process must be owned by the people it represents, if it is to be successful and sustainable. Currently, there

is much confusion and distrust in the region regarding the whole process and what it means for the citizens of the member states. The EAC should actively take on the challenge of improving the access of the people to the whole process of integration even to the point of allowing a referendum in which the people should express their opinion of the future of the federation. A negative response from the referendum would not mean an end of the EAC, but would be a call for more work to be done to build a solid base for the construction of the federation.

The EAC should also face the challenge of the civil society and the special role they have as a bridge between the community and the people. The language of the people is often not the language of the documents of the EAC and so greater effort should be made to reach the people through a medium they can relate to. Rather than try to limit their access to the integration process, the EAC should harness the tremendous intellectual and organisational capacities that the civil society have to present to the people the fundamental principles and benefits of the community. The EAC should not fear sharing with the civil society because they can only gain in the process.

Human Rights

The EAC should face the challenge of being the protector of human rights at a regional level. Presently, this role is not clear and the human rights record for the region reflects that. Human rights are at the forefront of any political agenda that has human dignity at its centre. The EAC should empower and support the EACJ in its protection and promotion of human rights. It should mediate in disputes between member states, especially those that threaten the lives of its citizens, such as the current Migingo Island situation. It should also be in position to intervene in situations, where a national crisis affects constitutional stability, such as the 2007-2008 Kenyan general election crisis.

The International Criminal Court (ICC), through its prosecutor, Luis Moreno Ocampo, is currently investigating the 2007 Kenyan post-election violence that saw hundreds killed as probable crimes against humanity. Yet the EAC did not intervene in the situation despite the East Africa Observer Mission report calling "upon the Summit to review the state of peace, security and good governance in Kenya as mandated by Article 11(3) of the EAC Treaty"[108] and urged "the Summit to take an active role and be at the forefront of the process towards a just and lasting solution to the crisis".[109] Eventually, it was Kofi Annan, the former UN chief, who brokered a peace deal with the parties involved, and while the EAC undertook what it called a "quiet diplomacy", it is not known exactly what they achieved through such negotiations.

Democratic Deficits

Each member state in the EAC needs to resolve its own pressing internal issues before it can become part of the process to create a superstructure such as a political federation. There are a number of democratic deficits in the community that put constitutionalism at risk including good governance, the rule-of-law and human rights.

While all the member states have a multi-party system of governance, the reality is that a *de facto* one-party system continues to monopolise the region in the form of dominant parties[110].

[108] The East African Community Observer Mission Report Kenya General Elections December, 2007, 11.1, http://www.parliament.go.tz/bunge/docs/ealanews.pdf, (accessed 10 November, 2009).

[109] ibid, p. 11.2.

[110] "There is still one-party dominance even where the ruling party has a relatively small majority over the opposition, yet the ruling parties have managed to keep the opposition weak and fragmented." According to the definition given, four of the five countries of the EAC have dominant parties with Tanzania having had the same party, CCM, in power since 1964. Rwanda (RPF), Burundi (CNDD) and Uganda ("Movement"), and have all had the same parties and leaders in power since the end of their internal strife/wars with constant accusations of

The EAC must work towards helping member states establish a free, fair, participatory and competitive political process which in turn, will lead to free and fair elections. Democracy is an essential principal of the community and an indispensable prerequisite for constitutionalism.

It should also be noted that many East African countries are in the process of strengthening constitutionalism. For instance, Kenya is still in the process of recovering from the post-election violence which affected the whole of the EAC in a number of ways.[111] Currently, it is the disagreement over the constitution which is causing apprehension and disquiet: no one wants a repeat of the 2007 post-election violence. Furthermore, in Tanzania, the tensions in Zanzibar are a blight on the political landscape. General elections were scheduled for 2010 and while these tensions continued, there was always fear that violence might once again erupt as it did in early 2001 following the elections of December 2000. For the moment Burundi and Rwanda are still in the process of recovering from their instabilities of the 1990s. While they have made great progress, they are still viewed as the most vulnerable member states in the community.

Transparency and Accountability

The EAC has a great responsibility to the citizens of East Africa to be both transparent and accountable in all its activities. It can do this in a number of ways as previously mentioned: by strengthening the democratic processes with the EAC itself; by, for example, putting in place a mechanism through which the people of the region can vote

bullying tactics towards the opposition parties. Kenya is the only country where the political landscape has changed in the last 10-15 years, but was marred by post-election violence after its last elections. See Fombad, *supra*, note 12, p. 36.

[111] Kenya's ports and transport system is at the heart of the import/export system for the region and the crisis led to a shortage in fuel and commodities that affected all the member states.

for the members of the EALA; by giving the private sector and the civil society a greater voice in the formal processes of integration; and lastly, by giving greater access to information regarding the regional integration process to all citizens of East Africa.

While the sensitisation programme envisaged by the Summit of the Heads of State is essential, so is the transparency in the information released to the public. Meetings are continuously taking place between officials, secretaries, ministers and Heads of State yet communiqués and reports of these meetings are hard to find, especially on the EAC website. Even if some are there, others are not or only recent information is available on the website. Today's society is becoming more technical and linked to the World Wide Web. The EAC must catch up in this respect and ensure that all its activities are transparent and available for its citizens to access.

In this respect, the press has been fulfilling this role for the EAC. There was a great interest by the press from all the five partner states in all the activities of the EAC throughout 2009 and the number of articles, information pieces, comments and editorials are many. Yet, should a citizen want to check or read more about any news article, it is an uphill task to find the EAC document at its source. Transparency and accountability constitute also freedom of information. In this respect, the EAC must continue in its efforts to reach all citizens in whichever way it can.

The EAC must be built on a strong foundation. Therefore, the a forementioned concerns must be addressed in order to ensure a durable regional and political integration that will be of benefit to all the peoples of the community. The greatest challenge the EAC faces is the political will to effect changes and to ensure that the people are kept at the forefront of this regional integration process so that after 10 years it still aims to achieve the ideal of one people and one destiny for East Africa. It is easy to get caught in national interests and national suspicions and distrust of the other member

States with regard to economic and trade gains. However, the purpose of the EAC is "to develop policies and programmes aimed at widening and deepening co-operation between the partner states ..."[112] For this end, the political will must put bureaucratic inertia and political difficulties behind it and bring to the forefront the will of the people. To paraphrase the famous saying of Abraham Lincoln, if the promotion of constitutionalism and its principles of good governance, the rule-of-law and human rights is really desirable, the EAC must ensure that the community is "of the people, by the people and for the people."[113]

[112] Art. 5, Treaty for the Establishment of the East African Community.

[113] A. Lincoln, *The Gettysburg Address*, speech delivered on 19 November, 1863, at the dedication of the Soldiers' National Cemetery in Gettysburg.

3

The State of Constitutionalism in Burundi, 2009

*Frédéric Ntimarubusa**

Introduction

This paper examines the state of constitutionalism in Burundi. A constitution is a fundamental text that establishes the basic principles of constitutionalism. It provides for the different organs of government, for example, the executive, the legislature and the judiciary. In this paper, the discussion will focus on the major constitutional and human rights issues in 2009. Before we delve into further detail, it is worth noting that the current constitution of Burundi hinges on the Arusha Peace and Reconciliation Agreement. The first part of this paper focuses on the political system, according to the Arusha agreement, and its implementation. The second part analyses the state of constitutionalism with a link to human rights and constitutionality throughout 2009 and highlights the opportunities and challenges. The last part draws a conclusion and makes recommendations.

The Arusha Peace and Reconciliation Agreement and its Implementation

The Arusha agreement resulted from the sub-regional initiative to find sustainable solutions to the Burundi political crisis which started in 1993. This was after the assassination of President Melchior Ndadaye and his political supporters, which was followed by mass killings.

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The agreement was concluded on 28 August, 2000 in Arusha, Tanzania. Among others, the agreement contains a protocol on democracy and good governance and also defines constitutional principles of governance and fundamental rights.

After a new constitution was adopted in 1998, the government and the armed rebels engaged in negotiations under the facilitation of the Mwalimu Julius Nyerere and later on by Nelson Mandela of South Africa. The agreement was signed without the involvement of CNDD-FDD (*Conseil National pour la Défense de la Démocratie*) movement led by Pierre Nkurunziza that time and the then important rebel group (with 20,000 soldiers) and *Parti pour la libération du peuple hutu -Forces nationales de libération* (PALIPEHUTU-FNL-Party for the Liberation of the Hutu People- National Forces of Liberation).

The Constitutional Act of Transition of 6 June, 1998 was abrogated by the Transitional Constitution of 28 October, 2001.[114] This transitional constitution was based on the Arusha Agreement and was adopted to cover a transitional period of 36 months (Art.2) and following which, a post-transition constitution would be promulgated (Art.265).

The Implementation of the Arusha Agreement: The Constitution of 18 March, 2005

The 2005 constitution was framed with the Arusha Peace agreement and reconciliation in mind. The intent was to put in place a body of laws that could govern post-conflict political systems and sustain stability in the country. Thus, the constitution contained provisions on power-sharing; reflecting clauses in the Arusha talks whose aim was to solve ethnic-based political crises. Negotiators argued that politics of exclusion is what spurred conflict in Burundi. Therefore,

[114] *Loi no. 1/017 du 28 october, 2001 portant promulgation de la Constitution de Transition de la République du Burundi, B.O.B., No 10/2001, 1 Octobre, 2001, 1269.*

the Arusha peace talks attempted to restore the aspect of inclusion by setting quotas to represent each faction. Consequently, there are now quotas from the three ethnic groups: the Hutu, the Tutsi and the Twa, in the executive, the legislature, the police and in the army.

The Executive

According to the Arusha agreement, executive power is vested in the president, two vice-presidents and members of the government.

The President of the Republic

The president (head of state) represents national unity. He or she is responsible for ensuring the observance and respect of the constitution and to ensure by his arbitration the continuity of the state and the regular functioning of its institutions. The president is the guarantor of national independence, the integrity of the territory and the respect of treaties and international agreements.

In political matters, the president is only responsible to the parliament. Under Article 116 of the constitution, for serious error, serious abuse of power or corruption, the president can be declared deposed of his functions by a resolution taken by 2/3 of the members of the national assembly and the Senate, when voting together. In criminal matters, the President is responsible for acts fulfilled or done as a president only in cases of high treason. In that case, particular guarantees are granted to him or her, such as: he or she can only be accused by the congress made up of the national Assembly and the senate; the investigation can only be driven by a team of at least three magistrates of the General Prosecution of the republic, chaired by the General Prosecutor of the Republic and the matter can only be referred to the High Court of justice comprising the Supreme Court and the constitutional court.

In administrative matters, the administrative acts of the president, except those taken under discretionary competence, can, in respect of Article 119, be referred to and heard before an administrative jurisdiction.

With regard to the designation of the president, the constitution provides that the first president of the post-independence transition period is elected, not by direct universal adult suffrage, but by a 2/3 majority of members of the congress comprising the National Assembly and the Senate.

The Vice-Presidents

The 2005 constitution brings back the system of vice-presidency. The vice-presidency replaced the position of the prime minister. The vice-presidents assist the president. In this respect, the first vice-president co-ordinates the administrative and political domain, while the second vice-president co-ordinates the economic and social domain. In addition, on a determined agenda, the president can delegate the vice-presidents to chair Cabinet meetings. The vice-presidents must also ensure that presidential decrees within their mandate are enforced.

Misunderstandings among members of political parties have caused instability to the vice-presidency. The first presidency has changed two times, while the second vice-presidency has changed three times following quarrels and misunderstandings.

The Government

According to Article 129 of the constitution, the government was opened up to all ethnic groups. It comprises 60% Hutu [115] (ministers and vice-ministers) and 40% (Tutsi ministers and vice-ministers). Moreover, a minimum of 30% have to be women. The members come from different political parties having gathered more than 1/20 of the votes casted.

When the president terminates a minister, the latter is replaced after consultation with his or her political party. Article 130 stipulates that the minister in charge of national defence cannot be of the same ethnic group as the minister in charge of the Police. All members of

[115] There are three ethnic groups: Hutu, Tutsi and Twa. The last is a minority and majority of them are illiterate.

the government take ministerial orders or ordinances and implement presidential decrees and the *Arrêtés* (orders) of the vice- presidents of the republic.

The president represents the executive branch (Unlike the old constitution, the 2005 constitution did not make provision for the position of prime minister) and is elected through universal adult suffrage. He is assisted by the vice-presidents and ministers in the execution of his duties.

The state of constitutionalism in 2009 was crucial, as it was at the eve of the second post-conflict polls. The first regime was characterised by political turmoil and institutional deadlock, but there was remarkable improvement. Rivalries among members of the ruling party were settled and misunderstanding between opposition parties and the ruling party mitigated, although complaints prevailed over the dismissal of some deputies who had rebelled against the ruling party. The improvement in the political climate also saw the establishment of the Independent National Electoral Commission.

The Legislature

Article 147 of the 2005 constitution confirms the bicameralism of the legislature, which consists of the national assembly and the senate. It adds that no one can belong at the same time to both organs. Article 152 establishes an incompatibility regime of a parliamentary mandate with any other public function.

The constitution stipulates a number of matters on which legislation can be passed only by the legislator. These include fundamental rights and duties; the status of persons and goods; the political administrative and judicial organisation of the country (including the electoral system, the determination of crimes and criminal sentences, amnesty legislation, etc); protection of the environment and natural resources; financial and patrimonial matters; nationalisation and privatisation of companies; education

and scientific research; the social and economic policy objectives of the state and the legislation related to labour and social security.

The 2005 constitution provides in Article 163 subjects for which both chambers of parliament have to meet in congress such as to:

- receive a message of the president;
- accuse the president in a case of high treason;
- re-examine the project of the law of finances in determined conditions, such as in case the national assembly has not yet voted for the budget by 31 December;
- elect the post-transition president;
- value after 6 months the applying of the government policy; and,
- receive the solemn of the Independent National Electoral Commission.

It is also important to mention that the mandate of the deputies and the senators has a national character and any imperative mandate is voided.

The National Assembly

The national assembly, according to Article 164, is made up of at least 100 deputies comprising 60% Hutu and 40% Tutsi, including a minimum of 30% women elected in direct universal adult suffrage for a mandate of five years and of three deputies of the Twa ethnic group co-opted in accordance with the electoral code of 20 April, 2005. In case the results of voting do not reflect the percentages mentioned, other members of parliament are appointed following the mechanism laid out in the electoral code.

Elections of deputies take place according to the polls of blocked lists in the proportional representation. A list can be provided by a political party or individuals as independents. These lists have a multi-ethnic character and take into account the equilibrium between the men and women. For any three candidates inscribed to a list, only two can belong to the same ethnic group and at least a quarter (¼) of

them must be women. Candidates are considered elected when their parties or lists (for independent candidates) total to a number equal to at least 2% of all recorded votes on a national scale.

Finally, the constitution grants a right to opposition parties present at the national assembly to participate in all parliamentary commissions. The constitution also provides that a political party having members in the government cannot be involved in the opposition.

The Senate

The senate is made up of:

- two delegates of every province elected by an electoral team composed of the members of the communal councils of the considered province;
- three persons chosen within the Twa ethnic group; and,
- former Heads of State.

It is also mandatory that a minimum of 30% of the representatives are women and the electoral law provides modalities through which women will be represented, if necessary based on the system of co-option.

The senate has the following mandate :

- approve amendments to the constitution and laws, including laws governing the electoral process;
- be responsible for reviewing the Ombudsman's report on matters of public administration;
- approve the texts of laws regarding demarcation, attribution and powers of territorial entities;
- lead investigations in the public administration and, if need be, make recommendations to ensure that no region or ethnic group is excluded from the benefit of public services;
- control the application of the constitutional dispositions demanding ethnic and gender representativeness and balance in all state structures and institutions;

- advise the president of the republic and the president of the National assembly on any question such as in legislative matters;
- formulate positions or offer amendments regarding the legislation adopted by the national assembly;
- work out and deposit proposals of laws for examination by the national assembly; and,
- approve appointments only in the following positions :
  a) the chiefs of defence and security bodies;
  b) the governors of province;
  c) the ambassadors;
  d) Ombudsman;
  e) the members of the High Council of Justice;
  f) the members of the Supreme Court;
  g) the members of the Constitutional Court;
  h) the Attorney General of the Republic;
  i) the president of the Court of Appeal and the president of the Administrative Court;
  j) the Attorney General ;
  k) the presidents of the High Tribunals, the Commerce Tribunals and the Labour Tribunals;
  l) the Attorneys;
  m) the members of the Independent National Electoral Commission.

The Judiciary

Cases are settled by the judiciary in all the territories of Burundi. Also, judicial power is structured in a way that reflects the whole population in its composition and the recruitment procedures take into consideration the need to promote regional, ethnic and gender equality.[116]

[116] Article 208.

The *Conseil Supérieur de la Magistrature* (The Council of the Judiciary) is the institution in charge of looking after the good administration of justice and guaranteeing the independence of the judges when exercising their functions. It is the highest disciplinary authority of the magisterial jurisdiction. The Council also assists the president and the government in policy planning and formulation in justice matters, in the monitoring of the situation of the country in the judicial domain and that of human rights, and in planning the strategies to address impunity. The Council produces a report on the state of justice once a year which it addresses to the government, to the national assembly and to the senate.

However, the composition of this Council is problematic since it is chaired by the president assisted by the justice minister, meaning that it is under the control of the executive. Furthermore, of the 15 members of the Council, only seven are magistrates elected by fellow magistrates and eight are appointed by the president.

The above defined political system, inaugurated in August, 2005, has been unstable. The cabinet has been shuffled six times over a five-year period.

The Bureau of Democracy, Human Rights Practices, and Labour in the 2009 country report reported:

> The government's human rights record remained poor. Security forces continued to commit numerous serious human rights abuses, including killings and beatings of civilians and detainees with widespread impunity. Human rights problems also included vigilante abuse and personal score-settling; rape of women and girls; harsh life-threatening prison and detention centre conditions; prolonged pre-trial detention and arbitrary arrest and detention; lack of judicial independence and efficiency, and judicial corruption; detention and imprisonment of political prisoners and political detainees; and restrictions on freedom of speech, assembly, and association, especially for political parties. Domestic and sexual violence and discrimination against women remained problems.

From the above wrongdoings and deviations from the law, it is obvious that criminality has prevailed, despite the introduction of a legitimate government deriving its mandate from the constitution.

Nonetheless, Burundi observed tranquillity and improved political stability in 2009. This situation resulted, on one hand, from the conclusion and the signing of the peace agreement between the Government and PALIPEHUTU-FNL; and the dialogue between the ruling party and its main opponents, notably *Front pour la Démocratie au Burundi* (FRODEBU- the Front for Democracy in Burundi) and *Union pour le Progrès national* (UPRONA- the Union for National Progress), on the other hand.

The mentioned dialogue has helped to solve the institutional deadlock which had resulted from rivalries and divisions among the ruling party members. Thus, the last cabinet reshuffle in 2009 was successful as it calmed down opposition parties.

Constitutional Court and the Constitutionality of Laws

The laws referred to here are the legislative acts enacted by the legislature, either the national assembly (under the 1992 and 1998 constitutions) or the parliament, comprising the national Assembly and the senate (under the 2001 and 2005 constitutions). The constitution lists a number of matters on which legislation can be passed only by the legislature (national assembly and senate). These include fundamental rights and duties; the status of persons and goods; the political administrative and judicial organisation of the country (including the electoral system, the determination of cases and criminal sentences, amnesty legislation, etc); protection of the environment and natural resources; financial and patrimonial matters; nationalisation and privatisation of companies; education and scientific research; the social and economic policy objectives of the state and the legislation related to labour and social security.

As far as the procedural act initiating judicial review is concerned,[117] laws can be referred to the constitutional court by several applicants:[118] The President of the Republic, the president of the national assembly, the president of the senate, quarter of the members of the national assembly, a quarter of the members of the senate or the ombudsman. They can do so before or after the promulgation of the law.

Furthermore, any individual or person (*personne morale*) as well as the office of the public prosecutor, can refer a law to the court. They can do so only after the promulgation of the law - either directly or through an interlocutory petition, for example, when challenging the constitutionality of the law during a judicial proceeding pending before another court to which they are a party. In order to have the right to bring a matter before the court, individuals and legal persons must have an interest.

Secondly, in the case of organic laws,[119]the control of their constitutionality prior to their promulgation is obligatory. This also applies to the Standing Orders of the national assembly and the 2001 and 2005 constitutions and the Standing Orders of the senate. Organic laws are referred to the court by the president, Standing Orders by the president of the national assembly or the president of the senate.

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[117] Art.151, para. 1,of the constitution of 13 March, 1992; art. 144, para. 1, of the constitutional Act of Transition of 6 June, 1998; art. 185, para. 1, of the Transitional Constitution of 28 October, 2001 and art. 230, para. 1, of the constitution of 18 March, 2005.

[118] For obvious reason, the constitution of 13 March, 1992 did not include the president of the senate or quarter of the members of the senate, nor the ombudsman as possible applicants, but, contrary to other constitutions, did include the prime minister.

[119] The Technical Constitutional Commission defined an organic law as: "*Une loi organique est une loi dont l'élaboration est expréssement demandée par la Constitution*".

Thirdly, the constitutional court can rule on the constitutionality of certain types of decrees ("*actes réglementaires*"). Although the president, too, jointly with the minister concerned, can issue decrees. Under the current constitution,[120] as interpreted and clarified by the constitutional court,[121] a distinction must be made between decrees enacted on the basis of the president's autonomous regulatory power ("*le pouvoir d'établir des règles de droit autonomes, dans toutes les autres matières que celles reservées par la Constitution au Parlement et qu'on appelle domaine de la loi*) and decrees enacted to implement laws *("le pouvoir de prendre des mesures d'exécution des lois"*).

Contrary to the latter type, autonomous decrees («*des actes réglementaires pris dans les matières autres que celles relevant du domaine de la loi*») can be referred to the constitutional court. As far as the procedural act initiating the judicial procedure is concerned, an important development has taken place. Under the 1992, 1998 and 2001 constitutions,[122] the same above mentioned categories of applicants, who would refer a law to the constitutional court, were also empowered to refer an autonomous decree to the court. In practice, this has major implications for the ability of the constitutional court to review the constitutionality of presidential decrees.

The constitutional court determines the constitutionality of laws and interprets the constitution.

The Constitutional Court is made up of seven members appointed by the president, but can only make a decision if five of them are present.

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[120] Art.107 of the constitution of 18 March, 2005 foresees : "*Le Président de la République exerce le pouvoir règlementaire et assure l'exécution des lois*" .

[121] An identical clause contained in the constitution of March 1992 has been interpreted. For more details: constitutional Court, RCCB 7, 7 December, 1992.

[122] Art. 151, para. 1, of the constitution of 13 March, 1992; *A*rt.144, para. 1, of the Constitutional Act of Transition of 6 June, 1998; Art.185, para. 1, of the Transitional Constitution of 28 October, 2001.

Although this is not an exhaustive list, below are the highlights of some of the functions of the constitutional court:

- Rule on the constitutionality of laws and regulatory acts taken on matters not relating to law.
- Ensure respect of the constitution in force, including the Fundamental Human Right Charter by state organs and other institutions.
- Interpreate the constitution following a request by the President, the president of the national assembly, the president of the cenate or a quarter of the members of the parliament or the Senate.
- Rule on regularity of presidential and legislative elections on referendums and announce the results.
- Receive the oath of the president, deputy presidents and members of the cabinet.
- The vacancy of the president of the republic's post.

In 2009, new cases of corruption were reported and have continued to lead to alleged impunity since the decisions of the Court were not enforced.

On the contrary, some of the civil society activists have been assassinated allegedly on grounds of denouncing and publicly criticising high ranking officers in the government, army or the police suspected to have been involved in corruptive activities and embezzlement. For instance, Ernest Manirumva, the vice-president of *l'Observatoire de lutte contre la corruption et les malversations économiques* (OLUCOME- The Anti-corruption and Economic Malpractice Observatory), was assassinated in April, 2009 because he was working on corruption cases involving some elites such as the media. Unfortunately, justice has not yet held Manirumva's suspected killers accountable.

Challenges and Opportunities

Challenges

"There is no development without democracy and there is no democracy without development," declared former French President François Mitterrand on 20 June, 1990 during the Franco-African summit of La Baule in France.

Burundi took the train of this wave of democratisation in 1992 by adopting the multi-party system.[123] It is with the Arusha Peace and the Reconciliation Agreement of 28 August, 2000 that the multi-party system will be reasserted as the political system in Burundi. With that agreement, some rebel movements became political parties and the first post-conflict elections were held in 2005 and the second in 2010.

As election period was approaching,[124] the security situation prevailing called for comment. For instance, Human Rights Watch (HRW) reported that since the end of 2008, CNDD-FDD youth groups had been mobilised in a quasi-military manner and their illegal behaviour was "encouraged or tolerated by government and party officials."[125]

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[123] For the first time in the political history of Burundi, the multi-party system was introduced by the Constitution of 13 March, 1992. Its Art.53: '' *Le multipartisme est reconnu en République du Burundi*". Also, the current Constitution foresees the multi-party system on its art. 75.

[124] *Les élections de 2010 sont fixées selon le calendrier suivant:*
Le 21 mai 2010 : Elections des conseils communaux;

Le 28 juin 2010 : Elections présidentielles;

Le 23 juillet 2010 : Elections des députés;

Le 28 juillet 2010 : Elections des sénateurs;

Le 7 septembre, 2010 : Elections des conseils de collines/quartiers.

[125] Human Rights Watch (2009), *Pursuit of Power: Political Violence and Repression in Burundi*. p. 64.

Respect for Independence of the Judiciary in Burundi

Regarding this aspect, we are going to raise on one hand, statutory obstacles ethnic and gender balance criteria, the non-recognition of the immovability principle and the domination of the executive branch representatives in the composition of the *Conseil Supérieur de la Magistrature*, and on the other hand, functional obstacles. Finally, we highlight the issue of the independence of magistrates vis-à-vis the social environment.

The Non-recognition of the Principle of Immovability (judicial immunity)

The principle of immovability states that a magistrate cannot face any individual measure (revocation, suspension) by the government without the prior implementation of common disciplinary procedures. The constitution, however, does not provide for this principle.

Under all post-colonial regimes, except the monarchy, magistrates faced excessive transfers. These, coupled with the fear of disciplinary sanction, affected their ability to freely perform their duties.

The Domination of the Executive Branch Representatives in the Composition of the Conseil Supérieur de la Magistrature

The best manner of ensuring the independence of the judges (judiciary) is setting up an independent institution aimed at mediating between the magistrates and the government on their important career decisions. Articles 210 and 220 of the constitution institute the *Conseil Supérieur de la Magistratur,* the role of which is purely advisory. As mentioned before, it is predominantly composed of members chosen by the government and is chaired by the president, who is assisted by the justice minister.

Functional Obstacles

According to Article 1 of law No. 1/001 of 29 February, 2000, which reforms the status of magistrates, qualified magistrates are appointed

by the president following a proposal by the justice minister. The appointment of high grade magistrates is passed by the senate; the *Conseil Supérieur de la Magistrature* intervenes only to give technical advice. Thus, the Burundian magistrate is in a state of psychological dependency from the beginning of his or her career.

Also, Article 11 of the same law empowers the justice minister and the president to promote a magistrate. This practice affects the independence of the judiciary since magistrates are forced (influenced) to obey the orders of the executive branch in order to acquire its good favours.

Tribunals and courts entirely depend on the justice ministry from which they acquire the material and financial means necessary for their functioning. The magistrates would wish the judicial branch to acquire financial independence to manage their budget allocation.

Corruption: A Vicious Circle

It is difficult for a magistrate to observe ethical rules given the precariousness of their working conditions. This situation puts the magistrates in a state of permanent dependence and paves way for corruption and all its related ills. It will be necessary to provide magistrates with better working conditions and remuneration in order to prevent them from being vulnerable to bribes and favours.

Corruption is a threat to development. The government has put in place a policy and tools to fight corruption, but more has to be done to make the policy effective.

Relationship between Power-Sharing and Democracy

This part elaborates on power-sharing mechanisms and practices which represent a far-reaching attempt to resolve conflict and promote democracy through institutional building.

Advocates of power-sharing, look at it as the ability to resolve conflict by fostering inclusion. Since the conflict in Burundi was linked to the exclusion of the Hutu from military, economic and

political power structures, ethnically-based power-sharing could contribute to redressing these Hutu grievances. Even if one adopts a view of conflict that is based more on elite opportunism rather than popular grievances, power-sharing in Burundi could be interpreted as a way of constructively catering for elite opportunism.

Proponents of this view likewise suggest that power-sharing provisions can help make democracy more attainable and sustainable. Co-operation and dialogue can be fostered through the socialisation of former belligerents who grow accustomed to working together in the power-sharing institutions and resolving their differences through institutionalised state channels. Ultimately, this builds a strong and more inclusive democracy.

In 2009, a relative stability in institutions was observed after much bargaining and political unrest in the first years of the post conflict regime. Thus, the government organised electoral campaigns despite anxiety about the success of the campaign.

Relationship Between Power-sharing and Violence

Critics, on the flipside, argue that power-sharing can in fact be an incentive for further violence. Since power-sharing positions are often given on the basis of an individual or group's capacity for violence, this can send a powerful message to others that violence will be rewarded. Furthermore, it is argued that power-sharing hinders democracy by institutionalising ethnic identity,[126] separating elites from the population and making governance and decision-making unworkable.

Where does Burundi Fit into this Debate?

Since the Arusha negotiations were profoundly elite-driven, many of the political parties represented in these negotiations had no

[126] See Nimubona, Julien, Analyse critique de l'accord d'arusha pour la paix et la réconciliation au Burundi, *Observatoire de l'Action Gouvernementale* Governmental Action Observatory (OAG), March, 2002.

connection with the population.[127] So, participants had a material incentive to continue negotiating due to per diems and other benefits.

Furthermore, power-sharing negotiations may have inadvertently contributed to violence. As stated above, the Burundian civil war continued throughout the Arusha negotiations with prominent factions of the CNDD-FDD and the PALIPEHUTU-FNL continuing to fight. The negotiations themselves triggered further splits within the movements. When individuals did not get the office they sought through the political negotiations, they could and did threaten to continue to pursue their interests through violent means.

Finally, despite the limitations, the elitist nature of the Arusha negotiations and the pursuit of violence after the Arusha power-sharing deal, elections were held in 2005, bringing to power a president who promised free healthcare and free primary education to the rural population, and to bring on board all the remaining factions, including the PALIPEHUTU-FNL that joined the peace process.

Ethnicity has been recognised as the only way to let all rebels lay down their weapons despite the fact that national citizenship is suffocated due to the ethnic power-sharing.[128] However, Burundi is safer than it were a decade ago.

Does this Represent an Ultimate Victory for Power-sharing?

The ceasefire agreements and the democratic elections in Burundi do not represent a fundamental break from the patterns of politics in the past. The remaining fighters and leaders decided to lay down

[127] This was demonstrated by the series of elections held in 2005, where only CNDD-FDD, FRODEBU and UPRONA parties got the popular vote required, at least 5%, were entitled to ministerial positions. However, 17 political parties were in the Arusha peace process.

[128] Niyungeko, Gérard, *Quelles solutions institutionnelles pour le Burundi au sortir de la crise?* Conférence à l'Université Libre de Bruxelles, 17 February, 2004.

their weapons for various reasons, which are unconnected to what might have been required for sustainable peace in the country. For instance, the dynamics of conflict in the Democratic Republic of the Congo (DRC) and the ability of the Burundian armed groups to establish rear bases and attract funding. Also, by the early 2000s, the Burundian population was tired of war and it was increasingly difficult for the CNDD-FDD to mobilise militants within the country. Likewise, by 2009, it was difficult for the PALIPEHUTU-FNL to use previous ethnic arguments to mobilise supporters.[129]

Burundi's power-sharing institutions and practices are not the central determinants for future violence or non-violence. Most importantly, governance in Burundi remains highly militarised. While there are new faces in Burundian political and security structures, the nature of the Burundian state remains the same, including the very central position of violence within it. Some features of the Burundian peace process and its aftermath point to the continued centrality of violence in the Burundian state context.

First, developments in Burundi have shown that ethnicity and even ethnic exclusion, were not the causes of violence in Burundi, even though both exclusion and violence often expressed themselves ethnically. During the Arusha process, the high degree of factionalism demonstrated that ethnic groups were not cohesive and that other considerations (such as personal and regional ties and economic interests) also formed the basis for and against inclusion.

Second, post transitional politics in Burundi indicates that violence remains central to state governance. Third, poverty had increased and violence had continued.[130] The CNDD-FDD has

[129] Instead, the PALIPEHUTU-FNL mobilised new recruits using the promise of demobilisation packages.

[130] See Jan van Eck, *Absence of Peace Dividends Undermines Legitimacy of Whole Transition: War Continues and Poverty Grow*, in *Unity for Policy Studies*, University of Pretoria, April/ May, 2002. See also Mariam Bibi Jooma, *We cannot Eat the Constitution*: *Transformation and the Socioeconomic reconstruction of Burundi*, in ISS Paper 106, May, 2005. Stephen Jackson points out that a considerable

ruled in an authoritarian manner and used force unlawfully. For instance, the Human Rights Watch reported that since the end of 2008, "CNDD-FDD youth groups have been mobilised in quasi-military ways". Just within a year after taking office, several prominent opposition politicians were arrested on what was largely viewed as trumped up accusations of coup-plotting, among these, the former president, Domitien Ndayizeye, and his Vice-President, Alphonse Marie Kadege.

Can we Say Violence is Ethnically Expressed Today?

Indeed, conflict today is most often expressed between different traditionally Hutu groupings, for instance, between FRODEBU and the CNDD-FDD, between different CNDD-FDD factions, and between the CNDD-FDD and the FNL. Yet the continued centrality of violence, even when the 'ethnic question' was deemed to have been settled, shows that violence is a product of a particular kind of state and cannot be reduced to the status of ethnicity within the state.

Land Conflicts

Given the small size of Burundi, finding shelter and enough land to farm remains a challenge. With the return of half-a-million refugees and the majority of the country's 375,000 internally displaced persons (IDPs), the war-ravaged country of approximately eight million people has had to reintegrate about 10% of its population. Refugee return has taken place mostly in rural areas, especially at border provinces,[131] amid widespread poverty, lack of basic infrastructure and scarcity of land. In the main key return

number of Tutsi voted for the CNDD-FDD, this shows how disillusioned they had become with the Arusha parties. See Stephen Jackson, The United Nations Operation in Burundi (ONUB)- Political and Strategic Lessons Learned, in Independent External Study for United Nations Department for Peacekeeping Operations (UN DPKO), July, 2006.

[131] The provinces of Makamba, Rutana and Bururi.

communes, the population has increased by an estimated 50% since 2002.[132]

While some refugees had been away since 1972, others had never seen their homeland, having been born in exile or left as children. Many, however, have come back to find their houses destroyed or occupied by other people.

A double solution has been proposed. A short-term solution saw the local administration officials being instructed to allocate to returnees 50m x 50m spaces to build a house regardless of the availability of one's land. However, this is not always the case since those who stayed on the land sometimes refuse to vacate. Finding land to resettle the returnees is a big concern for the government. Accordingly, a long-term solution has been proposed. The land management ministry has to identify the land and put it at the disposal of the national solidarity ministry. A survey conducted by the National Land Commission in December, 2008 to identify available land or land belonging to the state in the hands of individuals, found that just 4,500 people, mostly returnees, had been resettled. In situations, where they have somewhere to go, returnees are being offered building materials. The government, in an attempt to cater for landless returnees, IDPs and other vulnerable people, has also embarked on building villages in some provinces, each housing 250 families. The government of Burundi, through the Commission Nationale de Terre et Autres Biens (CNTB- National Commission for Land and Other Possessions),[133] the United Nations High Commissioner for Refugees (UNHCR) and other agencies and/or NGOs, have responded to the rise in land disputes by increasing

[132] As per Alexandre Galley, manager of the return programme of refugees. This programme is conducted in partnership between the United Nations High Commissioner for Refugees (UNHCR) and the German Technical Co-operation (GTZ).

[133] CNTB was setup in 2006 to assist returnees and other landless people recover their land or other lost properties. As at Mid-July, 2009, it had registered 18,300 land disputes and solved 2,950.

support for land conflict mediation, resulting in solutions, such as land-sharing.

Human Rights and the National Independent Human Rights Commission

Human Rights Situation

Although a credible electoral body to supervise the elections was established, the human rights situation in Burundi remains of concern. The possibility of the country being plunged again into a cycle of violence cannot be ruled out, if the necessary conditions for holding free and fair elections are not met. In this part, we underscore the deteriorating political situation.

Youth groups from the ruling party and the FNL have disagreements. In Kinama, a marginalised urban commune located in the north of Bujumbura, the youth affiliated to FNL were injured by their counterparts from the ruling party. At the beginning of 2009, as per the report released[134] in January and February, 2009, HRW research indicated that FNL members killed one of their own activists, Abraham Ngendakumana, abducted and tortured another, Jean Baptiste Nsabimana, after the two openly disagreed on decisions the party had made in the peace process.

According to a HRW report,[135] 23 killings[136] as well as a dozen non-fatal shootings and grenade attacks carried out between January, 2008 and April, 2009 in the context of local-level apparent score-settling between FNL members and those affiliated to CNDD-FDD, involving some police, administrative officials, and national

[134] Human Rights Watch, Burundi: end political violence, repression. Attacks by Ruling Party and Former Rebels Threaten 2010 Elections, 3 June, 2009.

[135] Human Rights Watch, Pursuit of Power: Political Violence and Repression in Burundi, May, 2009, p. 64.

[136] Examples are given by the murders of Ernest Manirmva, of two heads of quarters in Kamenge urban commune, among which, the murder of Frédéric Misigaro, an important person in the intelligence services.

intelligence service agents, happened. It also documents more than 120 arrests since mid-2008, apparently on the basis of political affiliation, by Police and administrative officials.

Since December, 2008, unidentified attackers have burnt down more than 50 meeting places of the ruling party in at least 10 provinces. Partly, in response to these events, members of the party's youth league, *Imbonerakure,* armed with sticks and clubs, and chanting slogans, including death threats intended to intimidate their political opponents, began marching through the streets before dawn in certain communes. According to a press release by HRW.[137] "on 27 November, 2009, the interior minister ordered the police to return 103 asylum-seekers to Rwanda, in violation of international law".

The same press release added that "the 103 deported asylum-seekers were among several hundred Rwandans, who fled to Burundi's northern provinces of Kirundo and Ngozi, mostly between July and September. In October, HRW interviewed several Rwandan asylum-seekers in Kirundo province, some of whom appeared to have credible fears of persecution in Rwanda, including the risk of being unlawfully tried twice for the same crime by Rwanda's community-based *gacaca* courts and the fear of being "disappeared".[sic]" Some reported that fellow villagers had been taken at night from their homes in Rwanda's Southern province by unknown persons or by local defence forces"[138].

Burundi is a state party to the 1951 Refugee Convention which prohibits states from expelling or returning refugees to places where their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion. Also Article 19 and 20 of the Burundian refugee

[137] Human Rights Watch, Burundi stop deporting Rwandan asylum-seekers. Forced Return after Rwandan pressure violates national and international refugee law, 2 December, 2009.

[138] ibid.

law [139] prohibits expelling or returning refugees against their will. Imperative to note also is the case of albinos which has been such an awful threat of human rights. Since August 2008, this group of citizens has been a target of violent attacks that resulted in the murder of six of them. Their killings are based on superstitious beliefs. Following this, albinos from across the country were housed in a temporary shelter in order to protect them. Until the end of 2009, the albinos had not returned to their communities of origin. Some perpetrators have been identified, arrested and judged. On 29 May, 2009, eleven people, accused of killing albinos and allegedly selling their limbs to witch doctors, underwent trial in Ruyigi province.

National Independent Human Rights Commission

Activities to setup this commission were launched by President Pierre Nkurunziza on 20 December, 2006 on the occasion of the 58th anniversary of the Universal Declaration for Human Rights. More than three years after, the commission has not yet been established. On the occasion of the Universal Periodic Review of Burundi in December, 2008, the government of Burundi made a commitment to establish an independent national human rights commission in compliance with the Paris Principles.[140]

According to Akich Okola,[141] the Independent Expert of the UN Human Rights Council on the situation of human rights in Burundi, at the end of his 11th visit to the country from 20 to 30 January, 2009, he recommended that Burundi needs an independent national Human Rights Commission. National human rights institutions play

[139] Loi n°1/32 du 13 Novembre 2008 sur l'Asile et la Protection des réfugiés au Burundi.

[140] The Paris Principles are a set of international standards that national human rights institutions must comply with in order to be legitimate, independent, credible and effective, to meet the goal of promoting and protecting human rights. Those principles have been endorsed by the UN General Assembly.

[141] Mr. Akich Okola was appointed Independent Expert of the UN Human Rights Council on the situation of human rights in Burundi in 2004.

a key role in protecting and promoting human rights at the national level. They can also act as an interface between the state and the civil society. "However, it is essential that they are independent in order to be credible and effective," he added.

The legislative process for implementing that commission has been finalised, and what remains is the appointment of its members.

Opportunities

Peace Recovery

Following several protocols and agreements, a global ceasefire agreement[142] was signed in November, 2003 between the transitional government of Burundi and the main wing of the CNDD-FDD (Nkurunziza's faction). In March, 2005, a new constitution, based largely on the Arusha agreement, was adopted following a referendum. A series of elections were held, culminating in the election of the former rebel leader of the CNDD-FDD, Pierre Nkurunziza, as president in August, 2005.[143]

In September, 2006, a ceasefire agreement was reached between the government and the main wing of the PALIPEHUTU-FNL (Rwasa faction), but ceasefire violations continued to occur. In December, 2008, the PALIPEHUTU-FNL agreed to change its name to FNL, thus removing its ethnic identification. This paved way for its recognition as a political party.

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[142] The Global Ceasefire Agreement of 2003 embraces the Ceasefire Agreement of 2 December, 2002, the Joint Declaration of Agreement of 27 January, 2003 on the cessation of hostilities, the Pretoria Protocol of 8 October, 2003, the Pretoria Protocol of 2 November, 2003, and the Pretoria Protocol of 2 November, 2003.

[143] The CNDD-FDD won 58.23% of the popular vote in the legislative elections. In the communal elections, the CNDD-FDD won 62.6% of the votes. For a discussion of the electoral process and results, see Filip Reyntjens, *Briefing: Burundi: A peaceful transition after a decade of civil war?*, in African Affairs, Vol. 105, no. 418, 2006.

In April 2009, following a meeting of the Political Directorate of the Facilitation in South Africa, it was agreed that 3,500 ex-FNL combatants would be integrated in the army and 5,000 others would be demobilised.[144]

FNL was, therefore, recognised as a political party in time to contest in the 2010 elections.

In the summer of 2010, Burundi was scheduled to have its second presidential and legislative elections since the Arusha peace process started. The first series of elections held in 2005 were widely hailed as an important milestone in Burundi's long trajectory towards peace. The 2005 elections marked the end of Burundi's carefully negotiated transitional process. Therefore, there was hope that the 2010 elections would mark the consolidation of peace in the country, especially since the last remaining rebel movement, agreed to lay down their weapons and register as a political party in April 2009. Burundi appears to represent a successful negotiated transition to peace.

However, Burundi's protracted peace process has not been smooth. At every key juncture, there have been set-backs and threats, renewed violence, and pessimistic predictions.

The Transitional Justice Mechanism for Resolving Past

The Arusha agreement on peace and reconciliation in Burundi called for the establishment of a Truth and Reconciliation Commission (TRC) as well as an international judicial commission of inquiry. In May, 2004, the UN sent a high-level mission to Burundi to assess the advisability and feasibility of establishing these commissions.

In December, 2004, parliament passed a law establishing a TRC. Subsequently, the UN mission's final report known locally

[144] For details of the negotiations and agreement with the FNL, see International Crisis Group, *Burundi: réussir l'intégration des FNL*, in Africa Briefing 63, 30 July, 2009.

as the "Kalomoh report", was issued in March, 2005. Calling for a reconsideration of the Arusha agreement formula, it proposed the establishment of twin transitional-justice mechanisms comprising a truth commission and a special chamber to try those bearing the greatest responsibility for acts of genocide, war crimes, or crimes against humanity.

In 2006, major UN-initiated developments took place in Burundi at the request of the government. For example, the United Nations Opperation in Burundi (UN ONUB) started downsizing and the process was completed on 31 December, 2006. Subsequently, Security Council Resolution 1719 called for the creation of a UN Integrated Office in Burundi Bureau Integre des Nations Unies au Burundi (BINUB) to assist the government on peace consolidation,[145] democratic governance, disarmament, demobilisation, reintegration and reform of the security sector, promotion and protection of human rights, and measures to end impunity, as well as donor and UN agency co-ordination.

A six-member tripartite steering committee comprising government, UN and civil society representatives was to prepare for and run the consultation process. The consultations aimed at seeking the views of the population on the truth and reconciliation commission and the special tribunal that should be established. For this objective to be attained, the government had to take measures to ensure an environment conducive for national consultations on transitional justice so that victims and witnesses could participate without fear. The consultations ended in December, 2009.

The tripartite steering committee realised a big success regarding national consultations.

On the contrary, Raymond Kamenyero, the executive secretary of the Forum for the Strengthening of Civil Society (FORSC),

[145] The newly created UN Peace building Commission placed Burundi under its purview and pledged financial assistance managed by the Peace building Fund and aimed financing projects to consolidate peace such as 'Cadre de dialogue'

expressed concern over the modalities of the transitional justice mechanism setup. He said that consultations on those modalities were not transparent. He added that in any case, the result could not be different from what international instruments provide.[146] The spokesman of *Mouvement pour la Solidarité et la Démocratie* (MSD -Democracy and Solidarity Movement) party, Nyamoya François, also noted that the national consultations were not necessary, as the transitional justice mechanisms were provided for in the Arusha Peace and Reconciliation Agreement.

A Responsible Civil Society

Civil society is one of the 'hottest' concepts in social sciences that touch on political life. Since so many countries have established more democratic regimes in recent years, there has been renewed interest in popular engagement in political life and everything else that relates to the way political cultures or basic values and beliefs affect the way a state is governed. More recently, there has also been growing interest in how strengthening the civil society can contribute to conflict resolution.

All observers agree that civil society refers to voluntary participation by average citizens and thus does not include behaviour imposed or even coerced by the state. Civil society includes not just the individuals who participate, but the institutions they participate in, sometimes called civil society organisations (CSOs). Helping to develop the civil society is one of the areas in which individuals must have a critical input.

Thus,the civil society is strong to the degree that CSOs are large and powerful. As far as Burundi is concerned, local organisations, especially those which focus on human rights, such as League ITEKA, *Promotion des Droits Humains et la Protection des Détenu*s (APRODH - Protection of Prisoners and Human Rights Promotion

[146] Press conference, *Les perspectives de la justice transitionnelle sur le Burundi*, Novotel, 21 January, 2010.

Association) and those which focus on economic governance, such as OLUCOME or governance in general, such as *Observatoire de l'Action Gouvernementale* (OAG- Governmental Action Observatory), often play a key role.

Talking of the role played by CSOs, Domitien Ndayizeye and Alphonse Marie Kadege, respectively former president and former deputy-president of Burundi, were accused of organising a coup d'état. The trial was referred to the courts and it discovered that it was a fictive coup d'état.[147] Reference can also be made to the assassination of Ernest Manirumva,[148] for which, human rights organisations, such as APRODH and FORSC[149] are putting pressure to the third commission[150] so that its members can accelerate the investigations to let the truth be known.

A concern on freedom of association must be emphasised. Article 22 of the International Covenant on Civil and Political Rights (ICCPR), to which Burundi is a party, states that everyone has the right to freedom of association. A similar provision is contained in Article 32 of the 2005 constitution

On 10 November, 2009, HRW reported that the home affairs minister had threatened to 'punish' FORSC because of their campaign calling for justice for Manirumva who was assassinated on 9 April, 2009. They called upon the president to address the issue and to also react after the murder of Salvator Nsabiriho[151] in Kayanza

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[147] This occurred in 2006. Domitien Ndayizeye and Alphonse Marie Kadege are respectively members of FRODEBU and UPRONA parties in opposition.

[148] Ernest Manirumva, a highly respected economist, was vice-president of the Burundian civil society group OLUCOME. Since January, 2009, Manirumva had also been vice-president of an official body that regulates public procurement.

[149] FORSC: *Forum pour le Renforcement de la Société Civile*|.

[150] The first and the second commissions investigating the assassination of Ernest Manirumva did not report the findings of their investigations. So, a third one has been settled and seemed to initiate serious investigations.

[151] A man who was summoned by the Governor of Kayanza province on 13 October, 2009 regarding a property dispute.

province. During the same period, HRW reported that Pacifique Nininahazwe and Pierre-Claver Mbonimpa, the general delegate of FORSC and the chairman of APRODH respectively, had received death threats from individuals linked to the National Intelligence Service. The two activists were told that intelligence agents wanted to kill them because of the information they were believed to possess about Manirumva's murder.[152]

On 23 November, 2009, a decision was taken by the home affairs minister to outlaw the registration of FORSC, arguing that there was a technical error in the group's registration application.[153] Because of lack of motivation[154] and pressure from journalists, René Gabriel Simbananiye, the chief executive officer in the ministry of home affairs, said the decision was intended to suspend FORSC, but not to ban it.

Even if the registration of associations is done under the ministry of home affairs, only their members-individuals or corporate bodies, can ban the association. Otherwise, an interested person can refer the case to other jurisdictions.

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[152] Human Rights Watch, Reverse ban on civil society group. Threats and Restrictions Represent Attempt to Silence Critics, Press Release, 25 November, 2009.

[153] According to the ordinance, the decision is based on the fact that some of its members are registered by the ministry of public works, Labour, and Social Security (such as trade unions), and the ninistry of Justice (such as the Bar Association), rather than the ninistry of Interior, which governs registration of most nongovernmental organisations. However, these groups were members of the forum when the Interior ministry approved its statute and membership list in 2006.

[154] The only permissible restrictions are those that are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. None of these restrictions has been used as a justification for banning FORSC.

The East African Community: From Co-operation to Community

The EAC is the regional inter-governmental organisation of the republics of Kenya, Uganda, Rwanda, Burundi and Tanzania, with its headquarters in Arusha, Tanzania.

The Treaty for the Establishment of the East African Community was signed on 30 November, 1999 and entered into force on 7 July, 2000 following its ratification by the original three partner states of Kenya, Uganda and Tanzania. Rwanda and Burundi acceded to the EAC Treaty on 18 June, 2007 and became full members of the community with effect from 1 July, 2007.

If Rwanda and Burundi had not maintained peace and stability, the EAC would have automatically turned down their application to join the community.

The inclusion of Rwanda and Burundi was endorsed at the Heads of State Summit of the EAC chaired by Mwai Kibaki, the Kenyan president. Originally, the EAC bloc consisted of Uganda, Kenya and Tanzania, but the new development increased the EAC population to over 120 million people.

The regional integration process is at a high pitch at the moment. The EAC is currently moving towards a political and economic union. The encouraging progress of the East African Customs Union, the expansion of the community with the admission of Rwanda and Burundi, the ongoing negotiations of the East African Common Market as well as the consultations on fast tracking the political federation. all underscore the determination of the East African leadership and citizens to construct a powerful and sustainable East African economic and political bloc.

Conclusion

The main characteristics of the constitutional and political history of Burundi are massacres, assassinations, and a series of coup d'états, as a way of capturing power. Although hope of good governance, in all of its aspects was tested by the 2005 elections, Burundian institutions

still need to be strengthened with the target of building democracy and the rule-of-law and the respect for human rights.

The situation in Burundi is stabilising and a progressive step has been the promulgation of the constitution (a fundamental text) of 18 March 2005 following a referendum held on 28 February 2005.

The executive arm is of government represented by the president (there is no position of prime Minister) elected by the parliament[155] and endowed with the fullness of power with the assistance of the Vice-presidents and ministers. The parliament is bicameral-the national assembly and the senate, but the primacy is granted to the national assembly in legislative matters and outstanding power is granted to the senate in making appointments to high positions of the state.

The most outstanding criticism is, given the executive branch's control over the legislative branch, a situation to which the constitutional court has contributed,[156]the only real and promising counter-power rests with the civil society, and a power-sharing arrangement between ethnic communities.

Paradoxically, rather than leading to an end to violence, ethnic power-sharing in Burundi has underlined the fact that conflict was not rooted in ethnicity in the first place, although violence was expressed ethnically.

As argued, conflict in Burundi can best be understood as a logical response to, and a component of bad leadership and governance, which are themselves a product of a particular kind of state. Post-independence governance in Burundi has consisted of exclusionary and neo-patrimonial governance by successive military leaders.

Besides, poverty constitutes a danger in every society. In a bid to sustain peace and tranquillity, the government should consider poverty as one of the core issues to be addressed. The government

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[155] In the second aftermath conflict elections, the President will be elected by universal suffrage. This must been the case in the 2010 elections.

[156] *Cour Constitutionnelle*, RCCB 213, Arret, 5 June, 2008.

should setup a sound and viable economic policy, and ensure equitable redistribution of wealth, and a fair management of available resources. There also seems to be a vicious cycle of corruption in the country. The government should, as a result, ensure that the anti-corruption organs bring about an efficient management of the country's resources. To achieve this, the government should make regular follow up on the performance of the different institutions that have been put in place to fight corruption. Some of the anti-corruption institutions include; the ministry of good governance, the Anti-Corruption Brigade, the Anti-Corruption Court, as well as civil society.

The government needs to strengthen the synergy of all its strategies in order to ensure success in the fight against corruption. The joint action between the government and the Anti-Corruption Brigade will enhance the fight against impunity and will enforce the policy on fighting corruption.

We cannot run the study herein without emphasising the history of the constitutional court and its key role. The constitutional court was established in 1992 following the application of the constitution of 13 March, 1992. Before the constitution of 16 October, 1962, constitutional matters were dealt with by the Supreme Court and under the constitutions of 11 July, 1974 and 20 November, 1981, a constitutional chamber was created within the respective Supreme Court.

As far as the current constitutional court is concerned, while legal persons and individuals can still challenge the constitutionality of laws before it, this is no longer the case for decrees. This renders the government virtually immune from human rights scrutiny by the constitutional court when exercising its regulatory powers through presidential decrees and ministerial orders that violate human rights norms. Laws and decrees can be referred to the court by the executive (the president) and the legislature (the president of the national assembly or the senate or a quarter of the members of the

national assembly or the senate). So, this limitation, introduced in the 2005 constitution, has a very restrictive impact on the role of the constitutional court as a human rights court. Therefore, a new procedural constraint limits the possible revival of government's human rights profile.

All the political key players have turned their attention to the 2010 elections because political intolerance, non respect for civil freedoms and for human rights, are a barrier to free, transparent and fair elections.

So, all involved actors, national and international, have to work together to face this challenge. The government has to organise transparent and democratic elections; the political parties have prepare their members for all alternatives (win or defeat); conceive and run programmes which take into account the daily concerns of the population; the National Council of Communication has to ensure equitable access to public mass media and to apply impartiality in the regulation of mass media; the Independent National Electoral Commission should always avoid any political manipulation aimed at distorting electoral processes; civil society should contribute to the electoral education of the population with a view to countering possible electoral fraud and in monitoring the electoral process. Religious groups should avoid any political manipulation that aims at transforming places of worship into venues of political meetings. Burundi's partners should continue supporting the country with financial, material and technical support, during this critical and crucial period. Finally, Burundian citizens should reject any solicitation and/or appeal to violence in any political competition.

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The State of Constitutionalism in Rwanda, 2009

*Clement Nkeza**

Introduction

The concept of constitutionalism is abstract and, therefore, difficult to grasp. In fact, Rosenfeld posits that 'there appears to be no accepted definition of constitutionalism.'[157] Scholars agree, however, that the gist of the concept of constitutionalism lies with conviction of a limited and restrained government.[158] The idea of a limited government is embedded in the principle of the rule-of-law and respect for human rights. These two tenets rest on Levinson and Tulis' two pillars of constitutionalism, namely a 'theory of justice and processes.'[159]

It is noteworthy that the above mentioned tenets of constitutionalism are quite fairly stated in most modern constitutions. It should, however, be noted that having a written constitution in a legislative format is not an end in itself. According to Levinson and Tulis, 'a constitution's principal role is, not to articulate the polity's aspirations, or to empower the main political institutions to enact

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[157] R., Michel, Modern Constitutionalism as Interplay between Identity and Diversity, available at http://www.questia.com/PM.qst?a=o&docId=89585098, accessed on 06.10.2010.

[158] ibid. See also Levinson, S. and Tulis, J. K., Eds., 2009. *From words to worlds: Exploring Constitutional Functionality.* The Johns Hopkins University Press: Baltimore, p. 20.

[159] ibid.

public policy in the name of the sovereign, or even to design the regime's political institutions in a self-conscious way.'[160] Although they acknowledge the importance of having a written constitution, they argue that the chief purpose of having such a document is to bar the impulse of the sovereign within the institutions of the government.[161]

Against this backdrop, one can say that the concept of constitutionalism goes beyond the wording of a given constitution as it encompasses the reality of how the limitations set by the constitution actually constrain the government.

This paper intends to critically appraise events that have a constitutional import in Rwanda. The main aim is to highlight important constitutional achievements and areas of improvement during 2009, and then suggest recommendations where possible.

In matters, where the constitutional relationship is obvious, the author analyses the matter to establish whether the written constitution and the practice go hand in hand. Where the subject matter does not seem to be in connection with the constitution, the author links the matter with the spirit of constitutionalism.

Some of the events were merely indicated without analysis as they were not fully developed so as to bear much on constitutionalism at the time covered by the study.

This paper is divided into four sections apart from the introduction and the conclusion. The first section deals with compulsory prosecution prescribed by the Criminal Procedure Act of 2004. Article 121(a) of the Act, which authorised the judge to summon and adjudicate a criminal matter in the absence of the prosecutor, was invalidated[162] on the ground that it infringed the principle of fair trial. The remaining paragraph of the above article, which allows the judge to compel the prosecutor to bring before he/her a suspect who is not cited in a

[160] ibid. p. 150.
[161] ibid.
[162] Ex parte *Alfred Mutebwa*, *RS/Inconst/Pén.0001/07/CS* of January 11, 2008.

pending case, continues to fuel the debate on the constitutionality of such a provision. The author discusses the impact of this provision on the independence of the judiciary.

In the second section, the author addresses the constitutional import of the message of hope which cross-cuts the theme of memory for genocide in Rwanda. Special focus is placed on how this message can bear fruits for the survivors' human rights.

The state of media during 2009 is discussed in the third section. Here the author analyses policy improvements regarding media regulation. Besides, official conduct vis-a-vis the media, as well as the conduct of the media as regards the consumer, are brought into play under this section.

Under the fourth section, the author gives a brief review of outstanding events some of which happened almost at the end of the period of the study, while others were still debated at that time. Those topics include the progress of parliament, decriminalisation of LGBTIs sexual practices, Rwanda's accession to the Commonwealth, the law on the ideology of genocide and the issue around the Genocide Survivors' Fund (FARG).

Compulsory Prosecution and Judicial Independence

The Republic of Rwanda is committed to 'build[ing] a State governed by the rule of law, based on respect for fundamental human rights…'[163] Rwanda has an independent judiciary that is the sole custodian of human rights.[164]

In this section, the phrase judicial independence is used to mean impartiality of judges, although for academic purposes, the concept of impartiality may have a distinct meaning.[165] We will analyse to

[163] The Constitution of the Republic of Rwanda (the preamble of the constitution, 6º, in *O.G.* Special N° of 04 June 2003 as amended to date.

[164] H.J. Reske, 1997. Pondering Judicial Independence, in *ABA Journal,* February 1997, p. 92. See also J.J. Shestack, 1998. The Risks to Judicial Independence, in *ABA Journal*, June 1998, p. 8.

[165] See *Valente* v. *R.*14. This is leading a Canadian case on judicial independence

that effect, the case of Alfred Mutebwa [166] and its impact on the level of public appropriation of judicial decisions.

Pursuant to the order of the Intermediate Court of Nyarugenge compelling the prosecutor to prosecute Mutebwa and other eight members of the Board of Directors of the Bank of Commerce, Development and Industry (BCDI), Mutebwa challenged the constitutionality of Article 121 of the Criminal Procedure Act.[167] It must be recalled that Mutebwa and other managers were summoned to appear before the judge during the hearing of the case of Alfred Kalisa on six charges of mismanaging the defunct BCDI.

Mutebwa articulated his appeal on three grounds[168]:

> The article in question undermines the constitutional provisions which give the prosecution exclusive jurisdiction to prosecute by allowing the court to investigate, prosecute and eventually judge;
>
> Article 121 violates the principle of presumption of innocence enshrined in Article 19 of our constitution, as the accused person would not stand as an innocent person before a court which prosecuted him before judgment. This, argued Mutebwa, would also undermine the principle of fair trial.
>
> Article 121 implies that prosecution could defy the order of the court, which is in contradiction with Article 140 of the constitution which provides that '*judicial decisions are binding on all parties concerned, be they public authorities or individuals.*

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which discussed the nature of judicial independence and impartiality and the distinction between the two terms. See also W., Kelly, ibid.

[166] *Ex parte Alfred Mutebwa , RS/Inconst/Pén.0001/07/CS* of January 11, 2008.

[167] Law N° 13/2004 of 17/05/2004 reads as follows: "In the course of proceeding, the court may order the prosecutor to prosecute and bring before the court those persons it considers as co-authors and accomplices of the accused as long as it has sufficient evidence to prove that they committed the offence. Where the court finds out that the prosecution is not willing to prosecute such persons, it may summon them to appear before the court and be tried".

[168] *Mutebwa Alfred*, at para [4].

When the Supreme Court asked the defense counsel about alternative ways in case of manifest lack of will to prosecute on the part of the prosecution, he simply stated there must be two different organs, one in charge of prosecution and the other responsible for hearing.[169]

On the other hand, the submission of the state attorney was that the court's order to prosecute does not interfere with the smooth operation of the prosecution as far as the law does not state that judges should prosecute. For the state attorney, the law is merely silent on that issue and should be complemented for more clarity.[170]

The learned judges rightly established that according to Rwandan law,[171] investigation and prosecution must exclusively be carried out by the National Public Prosecution Authority (NPPA).[172]

Equally, the court relying on foreign jurisprudence,[173] observed that "respect for the basic separation of powers lodged in the executive, legislative and judicial branches of government compels [the] court not to interfere with the prosecutor's authority". The court brought the matter to its logical conclusion by quoting another United States (US) precedent,[174]

> In exercising whatever discretion it has [relating to the investigation and Prosecution], the court removes itself from its proper function and becomes enmeshed in the prosecution's fact gathering process and defendant's trial tactics. Such does not appear to me to comport with the court's proper role.

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[169] ibid at para [17].

[170] ibid., at para [18].

[171] See Article 160 and 161 of the constitution and Article 2 of the Criminal Procedure.

[172] Mutebwa, at para [20].

[173] *People v. Robles* 72 NY 2nd 689 [1979]. South African Precedence in *South African Association of Personal Injury Lawyers v. Heath* 2000 (1) BCLR 77 (CC) para 46.

[174] *United States v. Crouch*, 478 F. Supp. 867 (E.D. Cal. 1979).

Finally, the court noted that such interference is likely to undermine the independence of the judiciary, which requires courts not only to be independent, but more so to be perceived to be independent[175].

In its ruling, the court virtually found flawless the first paragraph of Article 121 of the Criminal Procedure Act, allowing the court to enjoin the prosecutor to prosecute and bring before the court those persons it considers as co-authors and accomplices of the accused as long as it has sufficient evidence to prove that they committed the offence. The court highlighted that the only problem with this provision lies with the inappropriate use of the phrase 'sufficient evidence to prove that they committed the offence' which, for the court should be harmonised with the French version (*indices sérieux de culpabilité*), meaning 'reasonable grounds to suspect wrong doing'.[176]

However, the court found the second paragraph inconsistent with the independence and impartiality of the judiciary. It was held that the paragraph jeopardises the principle of fair trial because it vested the court with power to summon those the prosecution does not will to prosecute so that they can be tried. Having noted that the law did not tell who should prosecute such people, the court deduced that it was implied that the court would prosecute as the prosecution had shown its unwillingness to do so.[177]

To remedy the matter, the court applied the Cotzee trite test,[178] consisting in severing the good from the bad in such a way that the main objective of the statute will remain intact.[179]

> The court did not apply its mind to analyse Mutebwa's third ground thus underscoring the gap created by the statute implying

[175] See *Mutebwa* at para 27.
[176] ibid. at para 29. Translation was supplied by the court.
[177] *Mutebwa*, para 32.
[178] *Coetzee v The Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 16.
[179] *Mutebwa* at para 34.

> the possible defiance of the prosecution to court's decision in contradiction with Article 140 of the constitution[180] on the ground that the overall concern of the applicant was to show interference of the judiciary with the prosecution's role.[181] Thereafter, the court decided to sever only the second paragraph of the provision in question.[182]

With all due respect to the court, its judgment is flawed with a three-fold error regarding the mandate of the prosecution to prosecute, the scope of the independence of the judiciary and the main objective of the statute.

The court held that it was improper for the judge to use his/her discretion to encroach on the prosecution's competence. It is worth mentioning, however, that by silencing the applicant's concern about possible defiance of prosecution to court's decision, the court left out the opportunity to expound on the prosecution's independence, newly introduced in Rwandan law by Article 162 of the 2003 constitution.[183]

The Organic Law N° 22/2004 of 13 August, 2004 on the statute of public prosecutors and personnel of the public prosecution service as amended, states that 'each prosecutor shall be independent in his or her prosecution functions. He or she shall independently

[180] Article 140 of the constitution states that 'Judicial decisions are binding on all parties concerned, be they public authorities or individuals. They shall not be challenged except through ways and procedures determined by law.'

[181] *Mutebwa* at para. 35-36.

[182] ibid. para. 39-40.

[183] The Constitution of the Republic of Rwanda provides for the independence of prosecutors (Articles 161 and 162) without elaborating on the scope of such independence. The subsequent laws on the prosecution authority do, however, give some details on the independence of prosecutors and the relationship between the prosecution and the court. See Organic Law N° 22/2004 of 13/08/2004 on the statute of public prosecutors and personnel of the public prosecution service as amended to date and Organic Law N° 03/2004 determining the Organisation, Powers and Functioning of the Prosecution service as amended to date especially in its Articles 53-54.

examine matters before him or her and take decisions without any external pressure.[184] It is interesting to note that Article 54 of the Organic Law N° 03/2004 determining the organisation, powers and functioning of the prosecution service[185] equates by implication the judge's instructions or injunctions in the exercise of their duties as one of the aforementioned external pressures.

Now, the question is; as these two organic laws governing the prosecution service clash with the law on criminal procedure on this issue, which one should prevail?

In Rwanda, organic laws prevail over ordinary laws.[186] Indeed, this holds true, not only on a procedural standpoint, but also on a substantive viewpoint. It is difficult to understand how a judge could possibly compel a prosecutor to prosecute and yet still continue to present himself as an unbiased arbiter of the disputes that come before him.[187] This undermines not only the independence of the prosecutor, but equally adversely affects the impartiality and neutrality of the judge. As Mayron T. Steel puts it, it is required of 'judges to act impartially and equally to strive to be perceived as impartial'. [188]

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[184] Art.19 of the Organic Law n° 22/2004 of 13/08/2004 on the statute of public prosecutors and personnel of the public prosecution service, in OG N° 17 of 1/09/2004 as amended to date.

[185] Organic Law n° 03/2004 determining the Organisation, Powers and Functioning of the Prosecution service.

[186] Hierarchically, organic laws weigh more than ordinary laws in Rwandan law. In this case, the Criminal Code which is an ordinary law, the judge should have considered the provisions of organic laws governing the prosecution service. It should be noticed, however, that neither of the two articles related to the independence of prosecutors was discussed before the court.

[187] Byron M. Sheldrick (2006), 'Judicial Independence and Anti-terrorism Legislation in Canada: Blurring the Investigative and Judicial Functions: Re: an application under s. 83.28 of the Criminal Code', in The International Journal of Evidence & Proof, pp. 75-80.

[188] T. S., Myron 2009. 'Judicial independence', in *Widener Law Journal*, Vol. 18, pp. 299-307.

The problem posed by the remaining paragraph of Article 121 of the Criminal Procedure Act is well disclosed in Vincent Gatwabuyege case.[189] On 23 July, 2009 Gatwabuyege and ten other people[190] appeared before the primary court of Kacyiru on charges committed in relation to awarding work assignments and addendum contracts for the construction of the eastern headquarters in 2007. After unfolding the identity of the accused persons, the court realised Mutsindashyaka and three other people,[191] who were interrogated by the prosecution as suspects in the same case, were not brought to court. Thereafter, court asked the prosecutor whether or not they were accused. The prosecutor was noncommittal at that time, but wrote a letter two days before the next hearing notifying the court of the prosecution's decision not to bring Mutsidashyaka and the three others before court.

The accused and their counsels opposed the position of the prosecutor, arguing that it was a violation of the principle of equality before the law of all as enshrined in Article 16 of the constitution. Counsel highlighted that the prosecution may not hide behind its prerogative to decide on the opportunity to prosecute in violation of the equality principle, which is guaranteed by the Rwanda constitution.

The court then issued an interim order instructing the prosecution to bring Mutsindashyaka and the others whom the prosecutor was reluctant to charge. Relying on the Leadership Code of Conduct

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[189] This case concerns the order made by the primary court, for instance, in the course of the hearing of the case of the *National Public Prosecution Authority v Vincent Gatwabuyege*, case No RP0117/09/TB/KCY.

[190] A part from Gatwabuyege, there was Alexis Mugarura, Charles Kasaana, Eliab Munyemana, Augustin Hategeka, Jean Habyarimana, Honoré Munyanshongore, Yvone Nyiramasengesho, Is'hak Habimana and John Wilson Sekaziga.

[191] These offences took place when Theoneste Mutsindashyaka was the governor of the Eastern Province. Other people include. Marie Claire Mukasine, Alexis Karani and Jean Marie Vianney Makombe.

Act,[192] which prohibits a leader from, among other behaviours, mismanagement of anything in his/her control and personalising the organ he/she leads, the court found that these four people could be criminary liable. The judge, therefore, decided to coerce the prosecution to bring those people before court in accordance with Article 121 of the Criminal Procedure Act.[193]

A week later in the next hearing, court proceedings resumed and the court asked the prosecutor whether he was abiding by its order. The prosecutor stated he was not indicting Mukasine, Karani and Makombe on the basis that, the elements of crime were not fulfilled. Regarding Théoneste, Mutsindashyaka, prosecution argued that there were although enough evidence, there was no indication as to whether he should be taken to the primary court of Kacyiru. The proceedings were adjourned and the court decision was to be communicated one week later. On 3 September, 2010 the court reaffirmed its earlier order, instructing the prosecution to bring before it those people it was reluctant to charge.

The prosecutor finally gave in and presented the indictment for Théoneste Mutsindashyaka, but discharged the three whom the court had enjoined the prosecutor to bring before it, for lack of intention to do wrong. The judge insisted that all of them should be brought before the court which holds the exclusive prerogative to acquit or convict. Eventually, they were brought before court, and among those who were forcibly brought before court, only Mutsindashyaka was convicted.[194]

The above facts reflect the unfinished work of the Supreme Court in the Mutebwa's case. To the Supreme Court, the first paragraph of

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[192] Article 9, 12° and 13° of Organic Law N° 61/2008 of 10/09/2008 on the Leadership Code of Conduct in *O. G.* n° 24 of 15/12/2008.

[193] This is the very Act which was challenged in the Supreme Court for its inconsistency with the constitution.

[194] Mutsindashyaka was sentenced to one-year imprisonment and a fine of 500 000 Rwanda Francs.

Article 121 of the Criminal Procedure Act would not impair judicial independence, if read down to mean that compulsory prosecution should be based on reasonable grounds to suspect wrong doing.[195] This ruling is unsatisfactory in that the learned judges did not ponder upon the onus to convince the judge of the reasonableness of grounds to suspect wrong doing.

If it has to be by the judge's personal opinion, then it would be very difficult for him the to appear as an impartial arbiter bearing in mind that a judge is not allowed to substitute his/her for the prosecutor as the Supreme Court rightly decided. It would be particularly difficult for him/her to otherwise find facts in a case, where the prosecutor is not ready or willing to prosecute.

In circumstances, where the prosecutor is compelled by the court to bring before it a suspect whose case is not before court, it would be perceived that such a case would be handled on the basis of the judge's opinion, and not on facts. This is clearly a breach of the United Nations General Assembly vide Resolution 40/32 of 29 November, 1985 which stipulates that 'the judiciary shall decide matters before them impartially, on the basis of the facts and in accordance with the law, without any restrictions'.[196]

Consequently, such a judicial decision that is inconsistent with the above resolution will necessarily appear to be biased.[197] This was

[195] See the *Mutebwa* at para. 29.

[196] These principles were adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan, Italy from 26 August-6 September, 1985 and endorsed by the UN General Assembly vide Resolutions 40/32 of 29 November, 1985 and 40/146 of 13 December, 1985. See Chris Maina Peter, The Magic Wand in Making Constitutions Endure in Africa: Anything (Lessons) to Learn from East Africa?, in African and Asian Studies 6 (2007) 511-535.

[197] Under the objective test applied by the European Court of Human Rights (EuCtHR), it must be determined whether, quite apart from the judges' personal conduct, there are ascertainable facts which may raise doubts as to their impartiality. In this respect, even appearances may be of a certain importance. *Kleyn* and *others* v. *The Netherlands*, Applications nos 39343/98, 39651/98,

sketched in the Gatwabuyege case where Mutsindashyaka challenged in vain the impartiality of the judge.[198]

The Bangalore principles of judicial conduct[199] make it clear that it is inappropriate for a judge to make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. This applies, too, to the proceedings which are before the judge, and to those likely to come before him.

The instruction by court to prosecute thus impairs invidiously the impartiality of the initiative of the judge to declare that he is satisfied with the existence of reasonable grounds on a party's wrong doing, as this tantamounts to prejudgement of matters to be brought before court. Instead of the judge compelling the prosecutor to bring him suspects, the Bangalore principles would require the judge to disqualify him/her when inter alias he/she has actual bias or prejudice concerning a party or has *p*ersonal knowledge of disputed evidentiary facts concerning the proceedings. [200]

Whether Article 121 of the Criminal Procedure Act serves the main objective of the law is quite arguable, too.

The main objective of the law as held in Mutebwa's case was to make sure that all parties are evenly treated without the prosecutor's unjustified favour. This objective is useful, and particularly so when one considers the tremendous role impunity played in the 1994 genocide against Tutsis.[201] There is, however, little doubt, if any, as to whether compulsory prosecution could serve such an objective. On the contrary, it is likely to by all means serve the very opposite

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43147/98, 46664/99, 6 May, 2003.

[198] The *State v. Gatwabuyege* at para 10. According to the counsel, court had already decided the case before it was heard which was dismissed by the same court.

[199] E/CN.4/2003/65, Annex, p. 21.

[200] ibid.

[201] N.U.R.C., 2000. Report of the Kigali Summit on National Unity and Reconciliation of 18-20-octobre. This report singled out the culture of impunity among its then major challenges.

goal. In fact, with compulsory prosecution, the prosecutor might withhold necessary evidence in court, thus leaving the judge with no option, but to acquit criminals who would subsequently go untroubled.

Having outlawed the judge's initiative to bring before him for trial those he suspects to have done wrong, court should have considered that the judge's hands are tied as far as the investigation of the case to come before him is concerned. In addition, it should be noted that without proper prosecution, criminal justice would be emptied of its substance, hence undermining the concept of fair trial in its entirety. The author agrees with C. Fijnaut and M.S. Groenhuijsen, that a situation, such as 'this implies, with a certain predictability that the introduction of a duty to prosecute will lead to a kind of 'displacement effect'.[202]

Against this backdrop, there is legitimate fear that compulsory prosecution will thwart the normal course of justice. Indeed, all procedural guarantees observed that cases, such as this would lead to the acquittal of the real culprit, while the prosecutor would prove him guilty, if the prosecution was not precipitated.

It is the author's contention that the matter of stopping the prosecutor from discrimination in handling people rests on a two-pronged answer. In the first place, the independence of the prosecution as enshrined in the law needs to be enhanced. This requires more than rhetorical provisions of the prosecutor's ethics.[203] More so, this rhetoric should be coupled with penal sanctions in case

[202] C. Fijnaut and M.S. Groenhuijsen 2004. A European Public Prosecution Service: Comments on the Green Paper, in *The European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10/4, 321–336. These authors' argument was applied to the case under scrutiny, although on a different discussion, they are similar in as much as in both cases the prosecution duty is being forced on unwilling agents.

[203] The independence of prosecutors is well established in the law governing their statute both corporately and individually. Their accountability for abuse of authority, while carrying out their duties, however, leaves a lot to be desired.

of deliberate breach thereof. Secondly, in order to squarely deal with the lack of will to prosecute, the *locus standi* should be expanded so as to enable individuals and corporate bodies[204] to stand before the court on grounds other than personal interest. By so doing, the untroubled offender could face justice notwithstanding the lack of will by the prosecutor to charge him or her.

The Message of Hope: Ingraining the Survivor's Human Dignity

> The possibility of a different future, a future that would not simply be a repetition of the past, is dependent on a never-ending labour of remembrance (Durrant).

The theme of the 15th Commemoration of the genocide against the Tutsi was, 'Let us commemorate the genocide against Tutsi by fighting its trivialisation and negation and by building our Nation.' This was the message of hope which dominated all speeches, sign posts and the media throughout the 15th Commemoration in 2009.

Now that we are talking about the message of hope in the context of commemoration or collective memory,[205] we must admit that the concept of collective memory is one of the most difficult to fathom. In fact, scholars do not agree on whether memory belongs to the realm of the individual mind or whether people can recall events they have never experienced before. Halbwachs is not only of the

[204] One example is that of granting the office of ombudsman powers to investigate economic crimes. See Ministerial Order N° 67 of 05/5/2009 in *O.G.* n° 39 of 28/9/2009. This order gives the staff of the office of the ombudsman powers to investigate inter alia corruption and other related crimes. It is not clear, however, if they could prosecute. Note that the ministerial order grants them the status of judicial police, which itself, is under the NPPA, however, they are independent as provided in Article 3 of this ministerial order.

[205] The word 'commemoration' is defined by the Webster dictionary as the act of calling to remembrance, by some solemnity; the act of honouring the memory of some person or event, by solemn celebration. This implies necessarily a get together to that effect.

view that people can remember events of which they have never been part of, he also argues that it is impossible for individuals to remember in any coherent and persistent fashion outside of their group contexts.[206] In the same vein, Aharony contends that 'collective memory is actually a "borrowed memory," relying entirely upon the memory of others. Often a person recalls events that she has not experienced herself.'[207]

On the turn, Bell is strongly against the idea of collective memory. He is of the view that "we need to separate out the concepts of memory and myth rather than subsuming them under the monolithic notion of collective memory."[208] His main argument for disentangling these concepts is based on his conviction that memory is not transferable to those who did not experience the facts that are called to remembrance.[209] In lieu of collective memory, he thus coins a new concept of mythscape, which is readily confinable in time and space. Bell also contemplates mythscape as a relatively free space 'wherein the struggle for control of peoples' memories and the formation of nationalist myths is debated, contested and subverted incessantly.'[210]

It is, however, noteworthy that although Bell and Halbwachs do not agree on the transferability of memory, they agree on scales of remembrance. According to Olick,[211] Halbwachs distinguishes autobiographical memory (one experienced by the narrator), the

[206] See J. K., Olick, Collective memory in, *International Encyclopedia of the Social Sciences*, 2nd Edition, p. 7, citing Halbwachs M (1992), *On Collective Memory*. Trans. and ed. Lewis A. Coser. Chicago: University of Chicago Press, p. 38.

[207] M., Aharony, 2004. The Construction of Israeli Collective Memory of the Holocaust in the Formative Years of Israel, Conference on History matters: Spaces of violence, spaces of memory, conference paper at the New School University.

[208] D., S., A. Bell (2002), Mythscapes: Memory, Mythology, and National Identity, Centre of International Studies University of Cambridge, p. 66.

[209] ibid. p. 73.

[210] ibid. p. 66.

[211] J., K., Olick, op cit. p.7.

historical memory (acquired through historical accounts), *c*ollective memory (active past that forms our identity) and history (facts without any organic relation).

For the sake of brevity, we shall leave aside the public-private relatedness of memory and focus on the relationship between the past and the present and how our recalling of events of the past bears on who we are and what we plan to become. Halbwachs perceives a contrast between "history" and "collective memory" in such a way that history is dead and collective memory is living. [212]

Because the kind of memory we keep shapes our identity[213] and heals[214] victims of violence, the question of how we remember becomes very vital, a matter of life or death.

Addressing the issue of memories of violence, Waintrater[215] contends that persecution marginalises survivors by transforming them into ostracised beings. The reason she gives for that feeling of abandonment is the denial of the social contract which consequently makes them lose the legitimate faith in the world that is not indifferent to their destruction, a world where their existence matters.

In front of the world's treason, the survivor has two choices to make. He can either choose to be a passive survivor, in despair over the historical facts, or be an active survivor courageous enough to deal with the challenges. Put otherwise, one can ask himself whether he will apply his memory to matters-of-fact or matters-of-concern.[216]

[212] ibid.

[213] E., Pellegrino (2007), *Culture and Bioethics: Where Ethics and Morals Meet*, Georgetown University Press, Washington, DC.

[214] L., Simich *et al.,* (2006), Post-Disaster Mental Distress Relief: Health Promotion and Knowledge Exchange in *Partnership with a Refugee Diaspora Community*, No 1, vol. 25, p. 45.

[215] R., Waintrater (2009), *Entre mémoire et oubli: le dilemme du survivant témoin* in *Rwanda. Récit du génocide, traversée de la mémoire,* éd. *Espace de liberté, La pensée et les hommes*, p. 100.

[216] A., Galloway, Collective Remembering and the Importance of Forgetting: A Critical Design Challenge, available at http://www.purselipsquarejaw.org/papers/galloway_chi2006.pdf.

Fourteen years down the line, the temptation in Rwanda's commemoration of the genocide against Tutsi was to focus much on matters-of-fact. Commemorations focused much on scenes of heinous killings and tortures. At the same time, those who survived the very atrocities would corroborate the objective facts with their subjective experiences. From 10:00pm onwards, shows of hideous images of genocide atrocity were aired on the national television. That would spur survivors' recall of horrible scenes of genocide as if it were taking place around the corner.

The fact is that the horror of genocide is indescribable,[217] unimaginable and incomprehensible.[218] In brief, it leaves all narrators short of words to term it.[219] The problem of the horror of genocide, however, does not affect only our ability to find the exact words to describe it, but it affects also the survivor's whole life. Karegeye argues that a look behind petrifies the victim's body, freezes their words and seals the communion between the dead and the living.[220]

Faced with such unprecedented challenges, Rwandans try every new way to come to terms with the consequences of the genocide. The intent of this article is to look into these trial exercises, focussing on their significance on the dignity of the survivors.

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[217] W., O'Neill, *Souvenir du mal et Réconciliation Sociale, in Rwanda. Récit du Génocide*, Traversée de la Mémoire, éd. Espace de liberté, La pensée et les hommes, p. 44.

[218] M., Ilboudo (2009), *Comprendre l'incompréhensible in Rwanda. Récit du Génocide, Traversée de la Mémoire,* éd. Espace de liberté, La pensée et les hommes, p. 235.

[219] C., Sagarra, Obstacles et enjeux d'une Ecriture Témoignant in *Rwanda. Récit du Génocide, Traversée de la mémoire,* éd. Espace de liberté, La pensée et les hommes, p.135. Sagarra describes the situation of narrator such as genocide as one of a semantic impasse, where the expression is approximate, inadequate, as all witnesses are confronted with an impossibility to name what they came across.

[220] J.P., Karegeye, Envoilée d'un oiseau mythique ou les possibles d'une mémoire fertile, in *Rwanda. Récit du génocide, traversée de la mémoire,* éd. Espace de liberté, La pensée et les hommes, p. 9.

Human dignity is the foundation of all human rights. No wonder the International Bill of Rights and other international human rights Sinstruments put human dignity at the epicentre. To begin with, the Universal Declaration on human rights (UDHR) starts with a powerful statement: "All human beings are born free and equal in dignity and rights."[221] The International Covenant on Civil and Political Rights (ICCPR) stipulates that even when deprived of liberty, one should be treated with respect for the inherent dignity of the human person.[222]

Dignity may be understood as a feeling of being fully human. As such, dignity is all we fight for and yearn to have all our lifetime. And when it disappears, life is no longer worth it. Lack of dignity was negatively described in a workshop on Human Rights-Based Approaches (HRBA) reflection in these terms:

> "When you experience the lack of dignity, you experience it this way: You are nobody; you are illiterate. You don't matter; you are insignificant. You get hungry. Nobody, if that person is really a human being, wants to be used power upon."[223]

Although genocide witnesses and narrators cannot help, but confess their impossibility to find exact words to describe it,[224] they agreed to say that at times some survivors experience nightmares which make them feel like swaying between the dead and the living. The image at the front page of the website of IBUKA-Belgium eloquently bears witness to that.[225]

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[221] UDHR, Article 1a. More explicitly the preamble of the UDHR reads : "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"

[222] ICCPR, Article 10, 1^0.

[223] Cambodian workshop on Human Rights Based Approaches reflection, available at http://www.actionaid.org/micrositeAssets/cambodia/assets/hrba workshop 2006.pdf

[224] See supra notes 211-214.

[225] That image depicts a very dismal person with a gloomy background. The skeletal

The government's approach for the last 14 years was not different. Out of compassion, the entire nation would manifest the very same attitude described above at every single commemoration cycle.[226] Previous official commemorations were dominated by speeches and images aimed at bringing to the surface the horror of genocide. But again, it must be stressed that it is crucial to expose the horror of genocide as we strive to help victims of genocide out of their plight. As Robinson urges, Rwandans must be "'true' to the past in…both making political sense of how the wrongs came to be perpetuated, as well as the moral judgment that these acts were wrong."[227]

There is need for caution, however, if support to survivors has to be human rights-based, the support should not end up destroying their dignity. Indeed, human rights-centred approches impact human dignity at three levels: laws, resources and relationships.[228]

Under this section, the author appraises the message of hope and how it intends to impact on survivors' relationships.[229]

The drastic change of Rwanda's image, conceded the executive secretary to the National Commission for the Fight Against Genocide

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body and hands on the mouth suggest a state of mind filled with dismay. In other words, it does not clearly come out from that image whether it is a living human being or a mummified corpse. Neither does the facial expression show that life is worthy the cost.

[226] Interview with the executive adviser of the executive secretary to the National Commission for Fight against Genocide on 9 December 2009.

[227] T., Robinson, A Collective Reckoning with the Past in Dialogue (2005) 3:1, pp. 178-206.

[228] Cambodian workshop. See supra note 223.

[229] The author does not ignore that a new law was passed, the Law N° 69/2008 of 30/12/2008 relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1 October 1990 and 31 December 1994, and determining its organisation, powers and functioning, in O.G. n° Special of 15/04/2009. Nor do I forget the one dollar campaign and other public actions towards easing of the survivors' burden. They were very important indeed, but I perceive them as an extension of what was existent so far irrespective of some degree of novelty thereof.

(CNLG), was based on national identity and the message of hope.[230] The secretary, however, did not elaborate these causes. The official speeches in comparison with interviews held with relevant people explain major changes derived from the message of hope. Below is an extract of President Kagame's address:[231]

> In this process of commemoration, we always remember a number of things, all linked to the genocide that took place here in Rwanda in which people were killed because of who they were born as. It is linked to our history and what characterised that history. Most importantly, we remember the people who perished in that genocide.
>
> When the truth is revealed, we have to decide what to do with it, considering all the repercussions. What matters is that one knows the truth. So, there is the need to remember, based on what really happened. This history that we remember is a history in which people lost lives. This realisation should urge us to realise that life must continue, that we need to extricate ourselves from the bondage of what befell us.
>
> Another thing that we must remember, besides our history, is how people have survived genocide and its aftermath, and are moving forward. Even as we recall the past, we must look and move forward. When we remember, we should not be distracted from our other duty, which is to shape our future. We should see in our history the roots of our future. All this should be part and parcel of our commemoration.

In this speech, there is a combination of the necessity of voicing our outcry against genocide and the need to move forward for a better future.

It flows from the president's speech that while our remembrance might be different in terms of whatever contigencies we experienced, all we remember is linked to genocide, which has become part and

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[230] The message of the executive secretary of the National Commission for the Fight against Genocide to the diplomatic corps accredited in Kigali. See National Commission for the Fight against Genocide, 15th Commemoration of genocide against Tutsi, p. 23.

[231] See the 15th Commemoration of genocide against Tutsi report, p.76.

parcel of Rwanda's history.[232] This is a reminder that as Rwandans are united by their shared history, none of them should no more be looked down upon for who they are born as.[233]

The second point in the president's speech is the realisation of the object of our memory; the loss of human lives, which should urge us to realise that life must go on. It is a realisation of the fact that at one point in time, the force of evil intended to wipe out one constituent of the people. It is also a realisation that it was by the big hearts of its sons and daughters that Rwanda managed to secure some survivors. The above statement is a reminder to the survivors of what their survival is to them; a living testimony of their resilience.[234] It is hence a call for them to realise that human dignity is not given by anybody, but is something one continuously works out. It is something you build as you become free from want and free from your fears.[235]

For emphasis, realisation in this speech should mean an endeavour to dissociate one's identity with whatever befell him. It is this way that the message of hope can make sense. It should be dignity-centred. This can only be achieved through preventing people from "being patronised or getting used to being given without having to do anything about it."[236] That would, therefore, make them "reach the

[232] ibid.

[233] Reference made to people who were killed for who they were born as, implicitly points to the international instruments referred to earlier on at notes 221 and 222.

[234] For President Paul Kagame, others can only give a helping hand, but everyone is responsible for shaping their own future. This is what he said in his speech on the 15th anniversary of genocide against Tutsi: 'No one else other than ourselves owns that future, no one can decide it for us. But we welcome all those, including the friends I mentioned earlier, to give a hand in helping us to shape that future.' See the report of 15th commemoration of genocide on p. 78.

[235] UN Resolution No. A/RES/60/225 on Assistance to Survivors of the 1994 Genocide in Rwanda, Particularly Orphans, Widows and Victims of Sexual Violence.

[236] Cambodian Workshop on Human Rights-Based Approaches Reflection. supra note 223.

degree of autonomy that is imperative for making the right choices in order to reclaim their dignity and live in hope."[237]

Therefore the 15th commemoration of Genocide should be considered a big progress towards the attainment of the survivors' human rights. Challenges are, however, yet to be dealt with. Among those, one may mention the deep misery in which survivors are still plunged. Such misery seems to be the reason why survivors' associations prefer to depict the survivor's image in a very dismal picture.[238]

The government lacks enough resources to squarely cover all survivors' needs, and that is why the recent shift from needs-based approach to human rights-based approach is commendable.

According to the CNLG,[239] the government encourages survivors to participate in government programmes aimed at resolving national problems, instead of confining them in isolation. This is in agreement with psychological techniques for survivors' care given by Jorge Rodríguez Sánchez, including the following:

Treat them as active survivors, and not as passive victims, do not necessarily treat the victims as patients, allow survivors to reflect on what has happened and how to face the future rather than give advice. Provide as much information as possible, and listen to doubts and

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[237] A. Karamaga, Africa Towards Hope and Dignity (2009), available at http://www.oikoumene.org/fileadmin/files/wcc-main/documents/p5/ete/Hope and Dignity for Africa-Andre Karamaga.pdf.

[238] With reference to the picture talked about (see FN 225), the IBUKA – Rwanda executive secretary said the situation of many rural genocide survivors is no brighter than the above-mentioned image. Many live in deprivation, in fear for their lives as they continue to be a target for *genocidaires'* attacks, and others are living with the dire consequences of physical assaults they faced during genocide. An interview held at IBUKA headquarters on 9 December 2009.

[239] Interview with the executive adviser of the executive secretary to the CNLG.

problems to help find solutions, and encourage survivors to return to their daily routines as soon as possible.[240]

Although, the above techniques are not a panacea to the survivors' problems, they were obviously less focused on in the last one-and-half decade. Now is the time to deal with consequences of genocide and wait for the outcome.[241]

Much as collective memory refers to active past, one that forms our identity, such a living memory should not act as an ongoing psychological torture to those who hold it. The above description was the author's attempt to make sense of how the message of hope may help the survivors perpetrate genocide memories in a dignified way. Although the author does not pretend that the message of hope could have immediate impact on genocide survivors, he believes in the reasonableness of the new approach which consists in reckoning the survivors' potentials. If this message well permeated the whole Rwandan society, there would be no passive victims of genocide. All would instead be active survivors of genocide ready to take on challenges. This is what it takes, according to psychologists,[242] for one to lead a dignified life after experiencing disastrous conditions.

The State of the Media

The media plays an indispensable role in implanting and maintaining the legal culture in any society. The media educates the population and entrenches accountability. Conversely, the media can be used to produce the very opposite effect.

The genesis of the printed press in Rwanda dates back in 1933[243] with *Kinyamateka,* a catholic church-owned newspaper

[240] J.R. Sánchez, Management of Dead Bodies in Disaster Situations, Pan American Health Organisation, 2004 Disaster Manuals and Guidelines Series, Nº 5, available at http://www.paho.org/English/dd/ped/DeadBodiesBook.pdf .

[241] Interview with the Executsive secretary of IBUKA-Rwanda. Interview held at IBUKA headquarter on 9 September 2010.

[242] J.R. Sánchez, supra note 240.

[243] X, Rwanda, http://www.Article19.org/speaking-out/rwanda.

followed by *Imvaho* owned by the state in 1960,[244] both published in Kinyarwanda. Radio Rwanda came into being three decades after the first printed press.[245] It was not until 1988 that the first independent private press emerged in Rwanda with the creation of *Kangura*. Until then, both the public and the church's press were only used to convey opinions officials of the state.[246]

It was, however, not before long that *Kangura*, another newspaper backed by the the government, was started to counteract *Kangura.*[247] This confusion was shortlived as the rise of Rwandese Patriotic Front (RPF) rebellion opened wide the door for several political parties, leading to a proliferation of independent newspapers in 1991 all of which were either sponsored by political parties or followed certain political ideologies.[248] As a result, media outlets that were not allies of the government faced all kinds of pressure in an attempt to shut them up. In a period of one year, at least half of those newspapers were shut down due to financial and judicial pressures.[249]

The liberalisation of the media industry in Rwanda has replaced the recent monopoly of public media by a multiplicity of private media outlets and radio stations. As a result of the 2002 Press Act, the number of press companies and community radios (which are branches of Radio Rwanda) is at its highest peak in the Rwandan history.[250] In spite of the considerable increase in media initiatives

[244] M. Alexis et I. Mpambara, IMS Assessment mission: The Rwanda Media Experience from the Genocide (2003), in International Media Support, March 2003.

[245] ibid., p.11.

[246] ibid., p.12. It is noted here that the church's press turned to a hate media which resulted in the 1959 bloody revolution.

[247] ibid. Although it is not clear whether the choice of the name of *Kangura* aimed at confusing the ill-advised reader who would mistake it for its rival. What is known is that it embattled all themes *Kangura* discussed.

[248] ibid.

[249] ibid. It is believed that only 30 out of 60 newspapers survived a year after their creation in 1991.

[250] These include 47 private print media and 14 private radio stations notably:

in Rwanda, critics blame the media for being descriptive and disconnected from the day-to-day chores and concerns of the population.[251]

What may be startling, however, is that the general population is not embarrassed by this shallowness of the media and low involvement in their business. This can be partly explained by the low rate of literacy and the gloomy legacy of the hate-media in Rwanda's recent past.[252] It should be noted that the rise in the number of media organisations in Rwanda is linked to political pluralism, contributing to the suspicion of media organisations.[253] Therefore, the question is whether the media disconnected from public affairs can last long. Obviously, they cannot. With the loss of confidence in media houses, media death would ensue. The bigger question

Voice of Hope, Voice of Africa, Radio 10; Radio Flash; Radio Contact FM; Sana Radio, City Radio; Radio Umucyo; Radio Salus Popoli; Radio Maria; Radio Izuba, Amazing Grace Radio station; Rubavu Community Radio Station and Musanze Community Radio Station.

[251] Taking the example of the *Office Rwandais d'Information* (ORINFOR), which is the National Bureau of Information, the *Sunday Times* finds its website dull, with no critical archives, such as information updates, state policy, newly passed laws, excerpts of speeches, news on investments, interest rates, the national economy and researches on Rwanda… The *Sunday Times* puts the blame on a history of ill-recruitment, one based on some high up leader's caprices at the expense of personal performance and skills. See Emma Kabanda, A monologue on ORINFOR, *The Sunday Times*, 27 December, 2009, p. 9.

[252] The hate-media was a sharp tool of the killing machine during the 1994 genocide in Rwanda with three journalists, namely Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze found guilty of inciting people to commit genocide. See *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor* (Case ICTR-99-52-A).

[253] Indeed, a fair number of people were against political pluralism in 2003 when they were consulted on ideas to be included in the Constitution. The same can apply to the media as media and political parties had the same consideration concerning public debate. The same conclusion can also be drawn from the economy of Article 2 of N° 30/2009 of 16/9/2009 determining the mission, organisation and functioning of the Media High Council (MHC) which entrusts MHC with the mission to protect the public for whom the media are intended.

is, however, what is being done to prevent perpetuation of this dim situation of the media? The answer is to be found in the legal framework protecting the media and in the conduct of the leadership of the country towards the media.

Media protection is entrenched in the constitution. Freedom of thought, opinion, conscience, religion, worship and public manifestation is enshrined in the constitution as requisites of freedom of the press,[254] but freedom of the press is also explicitly guaranteed.[255] These rights which are recognised by the constitution are elaborated in the law on the media.

The law provides for freedom of the media and that of a journalist to express his or her opinions, including the right to gather, receive, give and broadcast information or opinions by means of the media.[256] Equally, Article 19 of the same law guarantees journalists, in broader terms, free access to all sources of information and the right to enquire and publish on all events of public life, except some documents from the executive and the judiciary which may be confidential.[257] Confidentiality of information at the disposal of a journalist is guaranteed by Article 20 of the new law in quite a similar manner as the previous law with a claw-back-clause. It allows court to enjoin the concerned journalist to disclose the source of information whenever it is considered necessary to carry out criminal investigations or proceedings.

Furthermore, in both the old[258] and the new law, censorship of information is prohibited and remanding a journalist in custody

[254] See Article 33 of the constitution.

[255] See Article 34 which guarantees freedom of the press and freedom of information.

[256] See Article 16 of Law N° 22/2009 on Media of 12/08/2009 in OG N°33 of 17/08/2009.

[257] Article 14 and 15 of the law on the media restrict the access and publication of such information, while Article 79 provides for penalties for any violation of Article 14 and 15.

[258] See Article 11 of the Law N°18/2002 of 11/05/2002 on the press. See also

before his or her trial is forbidden, except for cases where national security or public order is at stake.[259] The 2009 law on the media marks its improvement on this point. For example, journalists can only be held responsible for incitement to commit crimes, if such incitement is followed by commission of an offence or by any attempt to commit an offence.[260]

Despite some setbacks of the new law,[261] it introduces significant improvements. For example, it does not provide for punishment for breach of privacy as was the case in the old laws.[262]

Article 17 of the Law N°22/2009 of 12/08/2009 on the Media, in *OG* N°33 of 17/08/2009.

[259] Compare Article 85 of both the new law and the old one.

[260] See Article 82 of the Law N°22/2009 of 12/08/2009 on the Media, in OG N°33 of 17/08/2009.

[261] The Media High Council is now competent to suspend a publication whereas before amendment, the High Council of Press had only the power to trigger suspension through judicial procedures under the 2002 law on the Press. Article 74 of the 2002 law on the press stated that the High Council of the press gives an opinion about the suspension of the media outlet, a radio or television. Article 77 and 94 of the repealed law referred explicitly to judicial suspension. Now Article 75 and 83 and 84 of the current law gives full competence to MHC to suspend newspapers and periodicals. The court intervenes only when it comes to suspend a media organ according to Article 94. In addition, the new law expressly prohibits journalists from making judgement instead of keeping at least the wording of the old law which enjoined them to separate their own opinion from analysis and information so as to avoid any possible confusion. Also the new law under Article 76 allows MHC to permanently suspend a media enterprise which has not been published for a number days. This could severely affect independent press outlets who suspend their activities as a result of the executive pressure as it has been the case in the past. See R., Turyahebwa (2010), The State of constitutionalism in Rwanda 2008 in Kamanga K. (ed.), *Constitutionalism in East Africa; Progress, Challenges and Prospects in 2008*, Kampala, Fountain Publishers pp.54-98.

[262] See Article 80 of the 2009 law on the media which provides for a fine in case of interference with individual or family privacy as compared to Article 82 of the 2002 law on the press whereby the contravener could face up to a one-year imprisonment sentence.

Another area of progress is the abolition in the new law of criminal liability of vendors, distributors or on print workers for press offence.[263]

Concerning the conduct of leaders, there is a consistent openness from the head of state to meet the press and address issues of national and regional concern.

At the department level, an innovative practice known as 'town-talks'[264] not only links the executive with the media, but involves the participation of the population at large. This has increased the level of accountability by those who hold public offices. Accountability in turn bears much on the efficacy of the government. Town-talks are held in form of live press conferences aired simultaneously at the national Television and two or three radio stations. Institutions account on their relevant responsibilities and participants are given the opportunity to ask any questions regarding the performance of the institution. A limited number of participants intervene from the conference hall, but a larger number use a toll free line to ask questions or contribute to the show. It could be better, however, if this practice was legally binding to all institutions.

Despite all these success stories, some attacks and threats against international press and independent print media outlets speckled 2009. The British Broadcasting Corporation (BBC) Kirundi and Kinyarwanda airwaves were suspended for three months. The then

[263] Compare Article 85 of the new law and Article 87 of the old law. It must be highlighted that the publication cannot be held responsible for verbatim talk of their interlocutors. According to Article 83 of the new law, a media professional would be charged with complicity and thence incur the same criminal penalties, if through media, they incited people to commit such crimes or if their publication endangers public law and order or public decency.

[264] These are live television talks whereby the general population expresses their views on departmental achievements, developments and challenge those in charge to respond to queries raised. The word department here is used in a broad sense. It may refer to a government ministry, the local government or a specialised government unit such as the police, Rwanda Revenue Authority, etc…

information minister said the suspension was caused by what he called 'improper conduct to undermine' the achievements of unity and reconciliation. The weekly talk-show, known as *Imvo n'imvano (*the root cause)[265] accused of 'giving airtime to genocide deniers, is what was targeted.'[266] A month later, the Voice of America (VOA) was threatened with the same punitive measures. Critics found in this a suppression of the freedom of speech.[267]

According to *Umuseso,* an independent national newspaper the suspension followed the interview BBC held with former prime minister Faustin Twagiramungu, where he opposed what he called the attempt by the government to have the entire Hutu population apologise for the genocide, arguing that not all Hutu killed Tutsi or participated in the genocide.[268]

Umuseso also documented its expulsion from Serena Hotel on the World Press Freedom Day together with two other media outlets, including *Rushyashya* and *Umuvugizi* on the grounds of being critical of the government.[269] The same magazine gave Mushikiwabo's version (then information minister), who said the expulsion was a lesson dispensed to them on professionalism.

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[265] Translation is mine.

[266] Nkurunziza Kimironko, "We are indeed tired of BBC," in *New Times* No 1789, 29 April, 2009, p. 7.

[267] Gagnon, G., 2009. Rwanda: Restore BBC to the Air. Available at http://www.hrw.org/fr/news/2009/04/27/rwanda-restore-bbc-air, accessed on 11October 2010.

[268] Habuhazi Innocent, Mushikiwabo aravugururа cyangwa aravuyanga?, Umuseso No 355 of 18-21 May 2009, p. 12. See also Gagnon, G., 2009. Rwanda: Restore BBC to the Air. http://www.hrw.org/fr/news/2009/04/27/rwanda-restore-bbc-air .

[269] See Gonzaga Muganwa, The Enigma of Press Freedom in Rwanda, available at http://tizianoproject.org/features/the_enigma_of_press_frededom_i/. Those who were banned include notably Umuseso, Rushyashya and Umuvugizi. See also Hassan Shire Sheikh, East and Horn of Africa Human Rights Defenders Network, available at http://www.defenddefenders.org/documents/Intervention on Freedom of Expression ACHPR 45th session Banjul.pdf .

To a great extent, it is true that the lack of professionalism by journalists is echoed manifold. It is, however, arguable how expulsion could lead to practicing professionalism. There is need to increase the number of graduate journalists as figures show only about 20% journalist graduates. However, concrete measures towards this goal remain wanting. The plight of the press is nevertheless more complex than that. It is a social, cultural and economic problem. Rama wittily describes the problem in those various dimensions as follows.[270]

- Mass-illiteracy and a lack of culture of reading which leads many Rwandans to rely more on radio for information. This implies a community dependence on street radios as far more effective mediums of communication;
- Lack of investment/funding linked with weak private sector giving, thus the government more control over the media through advertisements;
- Lack of openness as there is little social dialogue on matters of policy and most importantly, the lack of a culture of disagreeing without hatred or disregarding one another.

It is conspicuously necessary to address the above three setbacks for a free flow of reliable information. Indeed, these habits impede much freedom of press and affect directly everyone's right to information which determines the free will of the entire nation. The government, together with the private sector, are undertaking some major steps which will hopefully change the above mentioned trend. Regarding the government, it has entrusted MHC to initiate a bill of law on the right to information which MHC has accomplished.[271] On the other hand, the Institute of Research for Peace and Development

[270] See http://www.facebook.com/topic.php?uid=54689469083&topic=7460. Last accessed on 27 December. 2009.

[271] The draft Bill was brought to the public for the first time on 9 May, 2009 following the decision by the government to establish the access to information law during its February 2009 retreat. Failure to conform to Article 11 is punishable up to six-month imprisonment under Article 27 of the draft Bill.

(IRPD) has initiated a campaign for the culture of public debate in high schools.

The draft Bill on the right to information intends to curb the refusal by public and private officials to disclose or provide information.[272] The same draft Bill purports to protect those who disclose information.[273] This may enhance public confidence in the media since as of now journalists complain about officials who provide information refusing to be quoted, reducing the quality of information to rumour or speculation.[274]

Business Law Reform, Governance, Human Rights and Morals

In this section, the author briefly discusses the achievements and areas of improvements of the Rwandan parliament in 2009 regarding business law reform, decriminalisation of the ideology of genocide, challenges of the Survivor's Aid Fund, Rwanda's accession to the Commonwealth and the draft Bill on LGBTI and homosexuality.

Parliament Achievements in 2009

The year 2009 was remarkable in terms of legal reforms in the business sector. Rwanda was crowned the world's top reformer in doing business.[275] For the first time, an African country was ranked the world's first reformer since *'Doing Business'* started tracking reforms. The recognition given considering the legal reforms in the

[272] Article 11 of the draft Bill provides that application for request for information should be processed within seveni working days

[273] Article 28 and 29 of the draft Bill.

[274] Media High Council. 2009. Concept Paper of a right to information bill. unpublished, p.4.

[275] See http://www.doingbusiness.org/Features/Reformers2010.aspx. Last accessed on 20 January, 2010.

following fields: commercial law,[276] property registry,[277] labour law,[278] intellectual property law[279] and the law of securities.[280]

Although these laws 'concern the economy' as Edmund Kagire put it,[281] they involve much more than the economy. It is worth noting that the above cited law reforms have a far reaching effect on people's lives as the Justice, Reconciliation, Law and Order Sector (JRLO) recognises it.[282] In the same vein, the Economic Development Poverty Reduction Strategy (EDPRS) highlights the a vital role such reforms expected to play in 'improving economic freedoms, the regulatory and licensing environment for doing business, and promoting principles of modern corporate governance.'[283]

One should see in those reforms a means through which people achieve the full enjoyment of their property rights which would otherwise remain out of their reach. An eloquent example is business and land registration which would take as long a time as

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[276] See the Law N°07/2009 of 27/04/2009 relating to companies, in *O.G* N°17bis of 27/04/2009; see also Law N°12/2009 of 26/05/2009 relating to commercial recovery and settling of issues arising from insolvency, in *O.G.* n° special of 26/05/2009.

[277] Instructions of the Registrar General N° 01/2009/ORG of 24/06/2009 relating to modalities of registration and management of the register of security interests in movable property, in *O.G* n° 33 bis of 17/8/2009.

[278] Law N° 13/2009 of 27/05/2009 regulating labour in Rwanda, in O.G. n° special of 27/05/2009.

[279] Law N° 31/2009 of 26/10/2009 on protection of intellectual property, in *OG* N° 50 bis 0f 14/12/2009.

[280] Law N° 10/2009 of 14/05/2009 relating to mortgages; Law N°32/2009 of 18/11/2009. governing negotiable instruments, in *OG* n° 52 bis of 28/12/2009.

[281] Edmund Karugahe, Parliament Highlights 2009 Achievements, available at http://www.allafrica.com/Rwanda

[282] The Republic of Rwanda Justice, Reconciliation, Law & Order Sector Strategy and Budgeting Framework January 2009 – June 2012, p. 52.

[283] The Republic of Rwanda, Economic Development & Poverty Reduction Strategy 2008 – 2012, p. 88.

the administration pleased.[284] There was no binding deadline for the registration authorities. Consequently, this would result in a couple of years waiting for the registration process. Today, registration of business may take twenty four hours only. Furthermore, the administration is legally bound to supply reasons for refusal in case registration is delayed or not granted.[285]

Besides, those business law reforms may give rise to individual self-confidence as the government keeps on creating more possibilities and more a conducive environment for investment.

Having said this, the government should watch over the frequency of reforms to avoid the collapse of the above-said people's self-motivation to do business. Indeed, the law needs to be predictable in a bid to ensure stability in policy and hence increase the individual motivation to venture. This is proven wanting as half of the business-related laws passed early 2009 have had some amendments.[286]

Apart from the recurring modifications of the law, the on-going legal reform may be fraught with the charge that it is too much business-oriented at the expense of the protection of other individual fundamental rights. This is illustrated by the new law regulating

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[284] Among other reasons land and business registration was unnecessarily delayed was the involvement of so many unsalaried and unprofessional local authority. Today, all services are provided by one agency.

[285] See Article 15 of the M.O N°01/09/MINICOM of 08/05/2009 determining small private limited company, in O.G. N° Special of 08/05/2009, which clarifies that if the administration does not respond within 5 working days, the application will be deemed approved. The same article enjoins the registrar general or his representative who rejects the application to notify him/her in writing within 5 days and give justification.

[286] For example the laws relating to companies as well as the law governing mortgages were amended within a period of one year following their entering in force. See Law N° 14/2010 of 07/05/2010 modifying and complementing Law n°07/2009 of 27/04/2009 relating to companies in Official Gazette n° special of 14/05/2010. See also Law N°13/2010 of 07/05/2010 modifying and complementing Law n°10/2009 of 14/05/2009 on mortgages in Official Gazette n° special of 14/05/2010.

labour in Rwanda. Amongst other things, this law puts extreme burden on working women. Article 64 of the law regulating labour in Rwanda, for example, reduces the maternity leave to four weeks in case of still-born or infant's death.[287] In addition, Article 66 compels women without maternity insurance coverage to resume work after half the time of the legally recognised duration of maternity leave, or else lose 80% of the monthly salary. This is clearly inconsistent with the international labour standards. It should be highlighted that neither the public nor private insurance companies organise maternity insurance so far.

Two explanations are singled out for the above setbacks: First, the scarcity of experts to support parliamentarians and second, shortage in expertise in legislative drafting skills. The speaker of the senate[288] pointed out that there is a shortage of experts in parliament. For example, an entire commission is advised by one person. The shortage of experts is also coupled with limited consultation of the public at large and targeted groups during the drafting process.[289] The necessity of more legislative drafting skills is self-evident given the aforementioned occasional modifications of the law.

LGBTIs' Practice Decriminalised

In its endeavour to modernise and adapt its three-decade-old penal code to contemporary issues, Rwanda is about to pass into law the new penal code Bill. This rather gender-sensitive Bill was opposed by the Civil Society Coalition for the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex rights. They found the law

[287] It is said that when the infant dies at the age of one month or less, the maternity leave may not exceed four weeks. One wonders whether this time is enough for the recovery of a woman.

[288] This was unveiled by the Speaker of the senate during his address to the media in March 2010.

[289] It could be much better if the government put more efforts in consulting the targeted groups in any draft bills rather than relying on consultants' views whether national or international.

discriminatory and quite impairing to a number of fundamental human rights.[290]

According to the Coalition for the Protection of LGBTI rights, Article 217 of the draft Bill[291] infringes on the right to privacy and family; the right to freedom of speech, assembly and association; the right to security and health; the right to be free from torture, cruel; inhuman and degrading treatment or punishment; and the right to freedom from arbitrary deprival of liberty.

Apart from the alleged Curtailment of fundamental rights, the Coalition anticipates a host of unpredictable offensive consequences of Article 217. Such effects include the denial of access to condoms and diaphragms.[292] The Coalition's position paper sent to parliament suggests that, if passed into law, Article 217 would restrict promotional programmes of the National Strategy on HIV and AIDS which target LGBTIs as a vulnerable and high risk group.[293]

In addition, parliament has abandoned the initial wording of Article 217 which stipulated that:

> Any person who practices, encourages or sensitises people of the same sex, to sexual relation or any sexual practice, shall be liable for a term of imprisonment ranging from five (5) years to ten (10) years and a fine ranging from Two Hundred thousand Rwanda Francs (200,000 RFw) to one million (1,000,000 RFw).

Currently, the draft Bill only outlaws all forms of invitations to same-sex practices. As light as the modification may appear in the wording of the article, it denotes a remarkable shift of paradigm in

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[290] Civil Society Coalition for the Protection of LGBTI rights position paper p. 13.

[291] Article 217 of the draft Bill read has been slightly modified so far. Initially, this article repressed sexual relation between people of the same sex. To date, it does only hold liable those who encourage or sensitise others to do such practices.

[292] A diaphragm is a circular rubber contraceptive device that a woman places inside her vagina.

[293] Civil Society Coalition for the Protection of LGBTI rights position paper, p. 11.

Rwanda's official stance. Indeed, dropping the penalty for sexual relation practices is implicitly paramount to adhering to the thesis of LGBTI as a natural phenomenon. This position is actually one step away from the recognition of LGBTIs rights altogether.

Rwanda's Accession to the Commonwealth

Rwanda was admitted as the 54th member of the Commonwealth in 2009. It is the second member without previous constitutional ties with Great Britain.[294] Rwanda's membership has raised political debates among analysts. To some, Rwanda's membership in the Commonwealth meant a departure from the historically controversial ties with the French. On the other hand, some analysts think Rwanda's membership will weaken human rights records within the Commonwealth.

Regarding the shift in diplomatic relations, the government strongly refutes any correlation between Rwanda joining the commonwealth and its diplomatic relation with France, arguing that they are two independent incidents.

Concerning the second opinion, the Commonwealth Human Rights Initiative (CHRI) was of the view that Rwanda's membership could constitute a setback to the shared values of the Commonwealth. Although the discussion of the report by the CHRI falls beyond the scope of this chapter, it is worth noting that some of the arguments in that report are anachronistic.[295]

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[294] CHRI (2009), Rwanda's Application for Membership for the Commonwealth: Report and Recommendations of the Commonwealth Human Rights Initiatives, p. 9.

[295] Without any need of verifying the accuracy of the report about the civil society, it is unfair to judge Rwanda's policy in 2009 on the basis of its 1997 records. Suffice it to say that there is a world of difference between what Rwanda was in 1997 (a country in devastation of genocide, torn up by the war against former genocidal forces striving to finish up their project) and what it actually is twelve years later. See p. 49 of the report.

Furthermore, it is arguable whether applicant states should satisfy the Commonwealth with their full compliance with high human rights standards, as suggests CHRI suggests,[296] or if the Commonwealth should be contended with minimum commitment to human rights standards as Diana notes.[297]

Countries should indeed be encouraged to join such communities whose essence is to uphold human rights standards and ideals.

By joining the Commonwealth, young democracies, such as Rwanda may, among other things, learn from elder members' best practices and thus, speed up their growth in terms of human rights and democracy. The question, however, is: How fairly do current members of the commonwealth share in the shared values? In fact, the CHRI report on Rwanda's application depicts a lack of focus on human rights issues among member states of the Commonwealth.[298]

Since Rwanda is committed to forge ways to attain a better future for a more dignified people, the population holds a legitimate expectation to benefit a host of things from the Commonwealth. Education is at the forefront of the expectations. In as far as Rwanda believes in the core role of the youth in transforming the countries national history, education is indeed an instrumental tool to that effect. This could not be overstressed by President Kagame in his speech at the Royal Commonwealth Society. 'First of all, quality education is paramount. In Rwanda, we recognise that the political freedom we fought for can be undermined, if young people find themselves trapped in the ignorance caused by illiteracy.'[299]

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[296] CHRI (2009), supra note 294, at p.17.

[297] According to Diana 'Universal human rights do not impose one cultural standard, rather one legal standard of minimum protection necessary for human dignity.' See Diana Ayton-Shenker, The Challenge of Human Rights and Cultural Diversity, at http://www.un/rights/dpi1627e.hml

[298] The CHRI seems skeptical as to whether Commonwealth member states do share its underlying core values. See CHRI supra note 294, p. 2.

[299] Speech by His Excellency Paul Kagame, President of the Republic of Rwanda

Another key element is free movement of people and goods. One of the big challenges Rwanda faces is its geographical position. Rwanda's small size and the fact that it is landlocked were considered by previous governments as a divine condemnation to poverty.[300] Today, there is a paradigm shift, people believe in possibilities regardless of geographical challenges. Expanding the horizons through regional integration is an open gate towards almost endless opportunities in terms of innovation, creativity and technology.[301]

Benefits of regional integration are so many. For example, Rwanda's membership to the EAC has opened the door *inter alia* to free movement of workers, which entails among other things, access to job opportunities[302] and equal treatment in employment.[303] This can help a country hire more skilled people on a cheap contract and nationals may also benefit from the free movement of workers by seizing job opportunities and better employment conditions.

Law on Ideology of Genocide

The law was passed in 2008 to prevent and punish the crime of genocide ideology.[304] However, the law has since been criticised by international human rights organisations, arguing that it[305] impairs

at the Royal Commonwealth Society, London, Commonwealth Club, March 9th 2010.

[300] This was inferred by former president Juvenal Habyarimana's slogan that 'to others God bestowed gold and petroleum, but to Rwanda it was given peace.' Now, Rwandans have learnt that chronic poverty is incompatible with lasting peace. That is even paved in Rwandan culture as conveyed in this saying: *Abasangira ubusa bitana ibisambo* (Those who share a little call each other names".

[301] ibid. p. 2.

[302] EAC, Common Market (Free Movement of Workers) Regulations, regulation 12. Partner states are required to collect and disseminate information about job opportunities.

[303] ibid. Regulation 13.

[304] Article 1 of the Law N°18/2008 of 23/07/2008 relating to the punishment of the crime of genocide ideology, in O.G. N° 19 0f 1/10/2008.

[305] CHRI, report on Rwanda's application for membership to the Commonwealth, p. 20.

the right to freedom of expression. They also opine that the law could have been devised to politically silence the opposition.

The author analyses the law on the ideology of genocide taking due consideration of the above concerns. However, the question is whether such a law is necessary. Such a law is justified because fighting the ideology of genocide and all its manifestations is one of the first fundamental principles of the constitution under Article 9.

In addition, the justification of the law is premised on the state's responsibility "to address the complex circumstances that permit ordinary people to turn against each other in a mass killing spree, and to identify mechanisms for acting on early warning signals to emerging discrimination and discriminatory practices of the state and its functionaries, as well as the people themselves."[306] There is skepticism by regional and global organisations regarding the possibility of curbing genocide from reoccurring.[307] This is another reason why state actions against genocide ideology are so crucial. Stanton argues that early warnings are not enough to stop genocide from happening and advises that people who can act on those warnings must be reached. What is alluded to here as people who can act on warnings, are the policy makers.[308] Stanton concludes his argument by assuming that genocide can and will be prevented, if constituencies do not excuse policy makers' demagogueries, such as 'we didn't know, it is too late or we couldn't act.'[309]

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[306] Obote O. 2007, Understanding and fighting genocide ideology, The 13th Commemoration of Rwanda Genocide at African Union Headquarters, Addis Ababa-Ethiopia, p.

[307] Stanton, G., Factors Facilitating or Impeding Genocide, available at http://www.google.rw/#hl=en&source=hp&biw=1280&bih=656&q=Factors+Facilitating+or+Impeding+Genocide&aq=f&aqi=&aql=&oq=&gs_rfai=&fp=2f6f0b32e9f7c9be , acceded on 13/10/2010.

[308] ibid.

[309] ibid.

Dr. Obote Odora identifies the ideology of genocide as one among many perceived or real causes of genocide.[310] When the ideology of genocide looms large, the leadership of the country has to act in good time or otherwise face justice for committing acts of genocide or for omission. Odora cautions, however, that the ideology which begins with the process of identification and stigmatisation of the other,[311] can switch to us and vice-versa with the change of political situation or other circumstances.[312]

The reverse of the other can easily lead to some kind of retaliation. The possibility of retaliation should not, however, bring analysts to turn a blind eye to the deadly role of disseminating the ideology of genocide in the implementation of genocide. That seems though to be the case for CHRI,[313] despite a consistent international jurisprudence in that regard.[314] The Genocide Ideology Act is labelled as too vague

[310] Odora, O., 2007. Understanding and Fighting Genocide Ideology, presentation at the 13th Commemoration of Genocide at African Union Head Quarters, Addis Ababa Ethiopia. p. 3.

[311] ibid. p. 4.

[312] ibid. p. 5.

[313] CHRI, report on Rwanda's application for membership to the Commonwealth. p. 20. For CHRI, the primary causes of genocide were mainly economic. Those economic conditions include according to CHRI, high population density, too much dependence on subsistence farming, worsened by the scarcity of land and population growth. Other economic factors mentioned are the economic crisis in the 1980s and sharp fall of the price of coffee. In the end, the report concludes, 'the worsening economic conditions no doubt created a fertile ground for the Hutu state-sponsored hate propaganda and the *reaction* of the Tutsi (emphasis supplied).' This last statement sounds unfortunately as if the Tutsis were responsible for their fate.

[314] See the *Prosecutor* v *Ferdinand Nahimana,* Jean *Bosco Baragwiza and Ngeze* Hassan; Case N° ICTR-99-52-T. This case clearly demonstrated a strong causation link between the hatred propaganda and the commission of genocide. The chamber articulated the conviction in these words:

A specific causal connection between the RTLM broadcasts and the killing of these individuals -- either by publicly naming them or by manipulating their movements and directing that they, as a group, be killed -- has been established. Further, the

and broad to provide a clear understanding of its proviso. It is also described as one imposing one view about Rwanda to everybody.[315] Under this subsection, the author investigates judicial decisions against the content of the law in a bid to find out whether the law is consistent with individual rights recognised by the constitution. Since at this stage there is only one decided case[316] about the genocide ideology regarding the opposition, it is difficult to objectively verify the contention about the law being designed in order to suppress the opposition.

Regarding the content of the law, Article 2 and 3 constitute the backbone for the understanding of the law and its effects on individual rights. On the one hand, Article 2 defines the ideology of genocide as follows:

> an aggregate of thoughts characterised by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.[317]

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same judgment refutes the fallacy of the argument of the presidential plane's crash in the following terms: *if the downing of the plane was the trigger, then RTLM, Kangura and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded.* And the conclusion of the matter was respectively to Barayagwiza, *You were fully aware of the power of words, and you used the radio – the medium of communication with the widest public reach – to disseminate hatred and violence… without a firearm, machete or any physical weapon, you caused the deaths of thousands of innocent civilians.* To Ngeze Hassan, *you poisoned the minds of your readers, and by words and deeds caused the death of thousands of innocent civilians.* See also The Prosecutor v. *Simon* Bikindi, Case No. ICTR-01-72-T.

[315] CHRI, supra note 117 at p. 31; *Human Rights Watch, Supra note* 130 p. 39.

[316] See the *State* v *Mushayidi Déogratias.* Case N° RP 0040/10/HC/KIG of 17/09/2010. In this case the accused answered eight charges, including the crime of ideology of genocide of which he was acquitted.

[317] Law N°18/2008 of 23/07/2008 Relating to the punishment of the Crime of Genocide Ideology in *OG* N°20 of 15/10/2008.

On the other hand, Article 3 provides for characteristics of the crime of genocide ideology.[318] The crime of genocide ideology, according to this article, is characterised in any behaviour manifested by facts aimed at dehumanising a person or a group of persons with the same characteristics in the following manner:

- Threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred;
- Marginalising, laughing at one's misfortune, defaming, mocking, boasting, despising, degrading and creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred;
- Killing, planning to kill or attempting to kill someone for purposes of furthering genocide ideology.

What appears from the definition of this crime is that the law does not distinguish the distortion of facts about genocide from mere disagreements between two members of the society. This could, therefore, lead to suppression of freedom of expression by criminalising man's gut feelings, such as laughing, mocking or defaming. These terms describe better emotions rather than reason.

In addition, the law does not take into account the status of the accused, especially his or her ability to influence other people to buy his or her theory regarding genocide.[319] Consequently, the law provides that children could be condemned for committing the crime of genocide ideology.

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[318] ibid.

[319] The law considers greater penalties to those who have the ability to induce others to join their camp. See Articles 6 and 8 which raise the minimum penalty by five years and ten years respectively for leaders whether public, private or religious and those who disseminate it through any kind of media.

Scholars link the ideology "a myth, or an articulated social goal which enjoins or justifies the destruction of the victims".[320] It is also understood as 'a comprehensive vision, or a set of ideas proposed by the dominant class of a society to all members of this society. The main purpose behind an ideology [being] to offer change in society through a normative thought process.'[321] Affolter envisions ideology as a political tool used to protect and defend a particular contemporary thought to be instrumental in the development of a brave new world free of offensive human material[322].

Two main elements may be drawn from the above scholarly definition of ideology. First, the term ideology refers to a set of normative ideas and secondly, those ideas aim at changing the socio-political landscape of society. When applied to genocide, the ideology purports to justify the elimination of the victim (the vulnerable other).

Should the ideology of genocide have been understood from this point of view, the law could not have provided for criminal liability of children under the age of 12. In effect, children of this tranche of age could hardly hold normative ideas about anything. Equally, judges could not have held responsible for committing the crime of genocide ideology those, who out of anger, spontaneously uttered insults to their relatives with whom they were previously in disputes over family or property issues.[323]

Since the crime of genocide ideology, just like any other legal provision, gets its effect through application by courts, the author

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[320] Totten S and Bartrop P. R., 2008. Dictionary of Genocide. Greenwood Press, Westport, Connecticut and London, p. 203.

[321] Odora O., supra note 306, p. 4.

[322] Affolter, F. W., 2005. The Specter of Ideological Genocide: The Baha á'ís of Iran War Crimes, Genocide, & Crimes against Humanity Volume 1, no. 1 (Jan, 2005): 75-114, p. 78.

[323] *State* v. *Christine Mukambarushimana*, Case N° RP 0096/09/TGI/MHG. The case will be discussed in details below.

briefly comments on one case from the Intermediate Court, and another from the High Court so as to identify the whole contours of issues around the law on genocide ideology.

The Case of Christine Mukambarushimana

The prosecution authority accused Mukambarushimana, a Hutu woman married to Gwiza Ngiriye (a genocide survivor), of perpetuating the genocide ideology on account that she told Claudine Murebwayire (the wife of her husband's uncle) that she would kill her because she survived the machetes of those who cut her during the genocide. The prosecutor alleged that the defendant made a full confession which she denied, saying she was forced to.

Mukambarushimana defended her case, saying that her in-laws were treating her like an *Interahamwe* (Hutu extremists militia who carried out the genocide) in order to persuade her husband to divorce her.[324] She argued that those who accused her of planning to kill Murebwayire were just playing games aimed at getting her out of her family. Asked why she refused her opponent's witnesses, the defendant replied that it was because they were all from her opponent's family.[325] What transpires from the background of facts is that disputants were competing for a plot of land.[326]

After analysing a fair number of testimonies, the court discarded almost all witnesses due to their discordant testimonies.[327] Only one testimony was considered. That is, after the the complainant had insulted the defendant that she is an *interahamwe,* the defendant responded that those who cut the complainant did not do their job properly. To the question whether the witness heard any word relating to genocide, she answered she never heard one.[328]

[324] *State* v. *Christine Mukambarushimana*, Case N° RP 0096/09/TGI/MHG, at para. 6.
[325] ibid.
[326] ibid. at para. 11.
[327] ibid. at para. 19.
[328] ibid. para. 21.

The court convicted the defendant of the crime of genocide ideology despite the deposition of the witness that no word related to genocide was uttered when the disputants were insulting each other. Court construed the defendant's speech as a threat related to what happened to the complainant during genocide. She was, therefore, sentenced to serve six months in jail.[329]

What is astounding about this case is that the judge did not explicitly refer to the law on genocide ideology throughout her ruling.[330] It can, however, be assumed that her decision was based on Article 3, 1° because of the words used by the court which were quoted from the foresaid provision. More surprisingly, the court did not even explain how it was satisfied on the criminal intention of the accused to commit the crime of genocide ideology. Suffice to mention that the unfortunate defendant had many reasons why she could not be harbouring this ideology. One might wonder why in the first place she chose to marry a survivor, and yet have evil intention to wipe them away. This holds especially true because her husband had nothing against her according to the case. Further more, how could she dare threaten the entire large family whereas she was the sole Hutu within that family? Lastly, does saying that those who cut the complainant did not perform the act properly necessarily mean that she wished all survivors or even all Tutsi to have been utterly destroyed?[331] Given that the court did not provide any answer to the above questions, the query of crimination intention will remain, and subsequently the sentence will be perceived unjustified.

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[329] The defendant benefited from the complainant's act of provocation. She would otherwise have served between 10 years and 25 years in prison according to Article 4 of the law on genocide ideology.

[330] This is emblematic to similar cases decided at intermediary courts.

[331] The words could also mean that she wished the complainant could have died, which is not rare in Rwandan culture. People are used to insulting each other "*Uragapfa"* meaning you better should have died. The facts in these case should be looked from the angle of the crime of divisionism provided for in Law N° 47/2001 of 18/12/2001 on prevention, suppression and punishment of the crime of discrimination and sectarianism.

The Case of Déogratias Mushayidi

Mushayidi is a genocide survivor and a vehement critic of the ruling party. He was charged on seven grounds, including of genocide ideology.[332] On the latter ground, prosecution alleged that he wrote about the crash of the presidential jet by the RPF (according to him) as a trigger for the genocide, thus alluding to the RPF as the cause of the genocide. Prosecution found in this a denial of the truth that genocide was well planned ahead of time. That he acknowledges the genocide perpetrated against Tutsi, but considers also other crimes committed against Hutu. Also Prosecution alleged that he preached double genocide, one against Tutsi and the other against Hutu. Lastly, prosecution also alleged that he wrote accusing that the RPF of killing some survivors in order to constantly keep under pressure those who committed genocide.

Mushayidi admitted that for the sake of national reconciliation, although he acknowledges the genocide against Tutsi, he could not hush up the fact that Hutu were also victims of other crimes.[333] He insisted that this should not be distorted to make him sound as if he propounded double genocide. He categorically refuted denying genocide since he is also a victim of genocide. He also argued that his opinion on the involvement of the RPF in the crash could not constitute a crime, especially because, he was not the only one holding that view.

The court, unlike in the case of Christine Mukambarushimana relied on Article 2 of the law[334] and dismissed all the allegations against the defendant on this charge. The court's understanding

[332] The *State* v. *Déogratias Mushayidi*, Case N° RP 0040/10/HC/KIG 0f September 17, 2010.

[333] Mushayidi, at para. 45.

[334] The content of this article reads, 'The genocide ideology is an aggregate of thoughts characterised by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.'

of the core element of the law highlighted the phrase '*aiming at exterminating or inciting others to exterminate people*'. The court thus dismissed the prosecution's allegations on the basis of its failure to satisfy the court that Mushayidi's writings aimed or incited others to exterminate people. It was also held that in the sense of Article 3 of the law, Mushayidi's opinion on RPF's responsibility in the crash or his perception on the presidential jet crash as a trigger for genocide could not be construed as 'creating confusion aiming at negating the genocide which occurred'.[335] Moreover, the court also found that the prosecution was not able to demonstrate from the provision of the law how Mushayidi's writing about the killings of survivors by the ruling party constituted the crime of genocide ideology. The court observed rather that such an account could constitute the offence of disseminating rumours aiming to sap people's faith in the current government.

The above decision sets down a good precedent for subsequent judgments. It flows from the reasoning of the judges, that the yardstick for judges when dealing with cases of genocide ideology, should be to first of all apply their minds to the relevance of facts to Article 2 of the law. Due emphasis should be put on whether or not the facts before the case aimed at exterminating or inciting others to exterminate people on any grounds. Otherwise any conviction based on another benchmark than set out in this judgment would unwarrantedly impair freedom of speech and expression.

In fact, limited freedom of speech, according to the constitution, by public order, good morals and rights of others.[336] It is also implied in the same provision that it can be limited by the law. These are common terms used under various jurisdictions and international instruments. It should be remembered, however, that constitutional

[335] Article 3, 2° of the law on genocide ideology.
[336] Article 34 of the Constitution.

states may not impose penalties for hate speech, except for intentional incitement to discrimination, hostility or violence.[337]

In conclusion, it is worth mentioning that the government is considering revisiting the law under scrutiny. One can, however, commend the ruling of the High Court in the above discussed case. For the time being, other courts should consider applying the same reasoning in similar cases. It is also advisable that the state, in its endeavor to amend the current law, clarify the concept of aggregate of ideas so as to avoid penalising people for their ideas (opinion) instead of punishing them for the genocide ideology.

The State's Duty to Assist Genocide Survivors and the Fund for Genocide's Survivors (FARG)

The survivor's right to public support is entrenched in the constitution, especially in Article 14[338] and guaranteed by the subsequent law creating the national fund for assistance to victims of genocide.[339] As a result, vulnerable genocide survivors have benefited from public and private support to enable them cope with the daily challenges of life.

Financial support is estimated to total up to US $15,000,000, which is approximately 8,895,000,000.00 RWF with the government contributing a biggest share of about US $11,000,000 which is approximately 6,523,000,000.00 RWF each year.[340] In 2009, the

[337] Commonwealth Secretariat, 2002. Freedom of speech: Best practices. p.13.

[338] Article 14 of the Constitution declares, 'The State shall, within the limits of its capacity, take special measures for the welfare of the survivors of genocide who were rendered destitute by the genocide committed in Rwanda from October 1, 1990 to 31 December, 1994, the disabled, the indigent and the elderly as well as other vulnerable groups (emphasis is mine).'

[339] Law Nº 02/1998 of 22/01/1998 creating the national fund for assistance to victims of genocide and massacres perpetrated in Rwanda from 1 October 1990 to 31 December 1994.

[340] International Justice Tribune (2006), Battle to control genocide survivors Fund in Rwanda, 26 July 2006 available at http://www.rnw.nl/international-justice/article/battle-control-survivors-fund-rwanda.

law on the genocide survivors' fund was amended, bringing in major changes. On the one hand, the share of the survivors fund (FARG) in the government budget was increased from 5% to 6%.[341] The good news for FARG is that the government's budget increases over the years, thus making FARG's share much more significant. On the other hand, the law opens doors to victims of crimes against humanity other than victims of the Tutsi genocide.

This view emerges from the title of the law which states; Law relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1October, 1990 and 31 December, 1994. Most importantly, this law incorporates in clearer terms moderate Hutus who were victims of the extremist regime. This view is supported by Article 27 of this law that excludes any person who participated in genocide and other crimes against humanity from receiving FARG support and assistance.[342] By excluding those who committed genocide, the law by implication includes moderate Hutus as Tutsis cannot be charged with committing genocide against Tutsis.

Notwithstanding the aforesaid improvement, there are still concerns and criticisms concerning the mismanagement FARG. For example, substandard work has been done at constructions sites of genocide survivors' villages and genocide memorials as well as misappropriation of survivors' funds. Some of the houses were destroyed barely one year after handing them over to the owners.

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[341] See Article 22 of the Law N° 69/2008 of 30/12/2008 relating to the establishment of the Fund for the support and assistance to the survivors of the Tutsi genocide and other crimes against humanity committed between 1 October, 1990 and 31 December, 1994, and determining its organisation, powers and functioning.

[342] ibid.

Most of the memorials are either incomplete, or in bad shape and yet there are not so many to be held responsible.[343]

Besides, the law infringes on survivors' fundamental rights. To begin with, the FARG was given the exclusive right to undertake civil action[344] in cases involving first category convicts. This is obviously depriving survivors of their right to defend their case before the court.[345]

Article 21 recognises a small participation of survivors by giving them an option to assist the Fund in such civil litigation, but denies them any entitlement to compensation. In fact, the compensation to be paid by first category genocidaires[346] has to be transferred to the Fund. According to this Article, what was supposed to be the right compensation to genocide survivors is diverted to support the Fund's activities. This does not align with the survivors right to fair trial and more so because the wronged ones might not qualify to be direct beneficiaries of the Fund.[347] Furthermore, there is no legal provision for a compensation. This has undermined the survivors'

[343] Recently, the management of IBUKA (the main survivors' association) were indicted for alleged misappropriation of Rwfr 400, 000, 000 which is roughly equivalent to USD 683, 760.

[344] Article 20 of the 2009 law.

[345] This is rather incompatible with the right to defense guaranteed by Article 18 and 19 of the constitution which can never be done away with even in case of state of siege according to Article 137 of the constitution.

[346] According the Rwandan law first category genocidaires are any accused person who planned or organised genocide, or was a public official at all levels or religious minister or those who incited others to commit genocide, supervised it and ringleaders. It can be also those who committed the offence of rape or sexual torture, together with his or her accomplices. See Article 51 of the Organic Law n° 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of *gacaca* courts charged with prosecuting and trying the perpetrators of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994, in *OG,* Special N° of 19/06/2004.

[347] It should be noted that the direct beneficiaries are the neediest of the survivors.

right to equitable justice in as much as only victims of minor violations, such as acts of vandalism may expect merely a symbolic compensation.[348] This is why IRDP rightly calls for the establishment of a compensation fund.[349]

To sum up the section, it must be noted that the end 2009 was marked with intense meaningful constitutional activities. This section has highlighted the possibilities offered by business law reform to spur Rwandans' enthusiasm to venture and how it could strengthen civil society by allowing foreign capital in. Again, Rwanda's membership to the Commonwealth is an opportunity for Rwanda to learn from best practices of other members in terms of good governance, human rights and democracy. Rwanda's constitutional social duty towards genocide survivors in 2009 was marked by raising the quota in the national budget and holding accountable those who mismanaged the survivors' Fund. Individual right to compensation, however, remains unattended to. Lastly, Rwanda in 2009 dropped the criminalisation of lesbians, gays, bisexuals and transgender sexual relationships.

General Conclusion

The review of constitutionalism, which is an interface between the content of the constitution and the constitutional practice of a particular economy, is very useful in determining how fairly the government of the day respects the will of its people regarding governance. With hindsight, one can say that previous constitutions did not impact that much on the constitutionalism of the state. For instance, despite clear constitutional provisions proscribing discrimination under the first, second and third republics,

[348] Even victims of crimes against property do not necessarily get right compensation as in most cases those responsible for those offences are too poor to squarely account for their acts.

[349] IRDP (2006), Rwandan Tutsi Genocide: Causes, Implementation and Memory, available at http://www.irdp.rw/docs/genocideEn.pdf.

discriminatory practices happened to be the strategic interest of the leadership. There is no gainsaying, however, that Rwanda has achieved a lot in building constitutionalism since the 1994 genocide.

A quick look at events that occurred in 2009 only substantiates the preceding statement. Courts of law have full-fledged power to invalidate the acts of parliament and the executive. It is, however, desirable that judicial power applies greater caution when wielding powers so as to preserve its neutrality.

Regarding the message of hope and its consequence on the post-genocide collective memory, the wisdom of the government lies in a paradigm shift from the needs-based to a human right-based approach. The latter does not undermine the role of the state in the struggle for the dignity of survivors. It does not encourage a provider state, but a protector one by creating more opportunities and empowering the least talented to seize existing opportunities. It is from this angle that the state undertook business law reform which made it easy to start business in Rwanda and enhanced the accountability of agencies in charge of the business registry.

Against this background, creating wealth should not be an end in itself, but a means to an end. It is gratifying that the amendment to the law on the survivors' Fund increased the amount allotted to the Fund, but for the survivor's dignity, an additional fair compensation for damages incurred in the course of genocide should be considered. In addition, those who mismanage the survivors' fund should be brought to justice.

During 2009, Rwanda passed the test on issues of governance, human rights and morals. As a result, the country was admitted as the second member of the Commonwealth without colonial ties with the UK. On the other hand, the legislature had dropped the project of criminalising sexual practices among LGBTIs. There is a need, however, to consolidate the liberalisation of the media by

legally binding information holders to disclose and provide it under the protection of the law.

In order to ensure that genocide never happens again, a law on genocide ideology was put in place. It is noteworthy that at the time of editing this paper, the state had already initiated an amendment to this law. This paper strongly recommends that while the amendment to the law is still in process, courts should consider the Mushayidi precedent which comprehensively set the benchmark for elements of this crime.

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2. *National Prosecution Authority v. Vincent Gatwabuyege*, case No RP0117/09/TB/KCY.
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1. *Prosecutor* v. *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Case ICTR-99-52-A).
2. The *Prosecutor* v. *Simon Bikindi*, Case No. ICTR-01-72-T.

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1. *People* v. *Robles* 72 NY 2nd 689 [1979].
2. *South African Association of Personal Injury Lawyers v. Heath 2000* (1) BCLR 77 (CC).
3. *United States* v. *Crouch*, 478 F. Supp. 867 (E.D. Cal. 1979)
4. Coetzee v *The government of the Republic of South Africa* 1995 (4) SA 631 (CC).
5. *Kleyn and others* v. *The Netherlands*, Applications nos 39343/98, 39651/98, 43147/98, 46664/99, 6 May 2003.

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1. Aharony M., (2004), *The Construction of Israeli Collective Memory of the Holocaust in Formative Years of Israel*, Conference on History natters: Spaces of violence, spaces of memory, at the New School University.
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5

Constitutional Developments in Tanzania Mainland (2009) an Account of Semi Finished Business and Pending Matters

*Julius M. Lugaziya**

Introduction

A lot of events, significant in terms of constitutionalism in Tanzania, happened in 2009. For example, courts made decisions that have impacted human rights, and a few more cases have been filed seeking various measures against the abuse of individual rights or the breach of the constitution.

For purposes of this paper, a constitution is a formal document having the force of law by which a society organises a government for itself, defining and limiting organs *inter-se* and with the citizens.[350] A constitution gives power and legitimacy and it enshrines acceptability and respectability.[351]

Constitutionalism, on the other hand, means the system of governance according to the constitution by limiting the excesses of government such as abuse of power and denial of rights. It guarantees

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[350] Shivji, I.G [ed] (2004). *Constitution and Legal Systems of Tanzania*; Mkuki and Nyota Publications, Dar es Salaam.

[351] ibid. at p.46ff.

government accountability, periodic elections and limits the power of government organs through the system of checks and balances; it addresses the problem of establishing a government with sufficient power to realise the aspirations of the society, yet so structured and controlled that oppression will be prevented.[352]

When a constitution is passed to legitimise government actions and validate its exercise of power and to remove limitations, the result is a constitution without constitutionalism. It will be argued therefore, that having a constitution, does not, of its own, guarantee constitutionalism. In this paper, events that took place in Tanzania, impacting constitutionalism, form the background to its development.

On 25 October, 2009, country-wide elections were held for local government leaders. In my opinion, this exercise was successfully completed. However, there are some constitutional petitions still pending in court, which will have a telling effect once they are determined. There were also the general elections set for October, 2010.

This paper seeks to explore the constitutional developments in Mainland Tanzania in 2009 and assess their impact on constitutionalism. The author shall study the constitution of Tanzania, and from it, examine the concept of constitutionalism, for he believes, a discourse on the subject under study, is really a study about constitutionalism. The paper is comprises three sections.

The first section looks at the evolution of the constitution in Tanzania. The second section details the various events that impacted on constitutionalism in 2009, and section three contains conclusions and recommendations.

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[352] Mtaki, C and Okema, M: (1994) *Constitutional Reform and Democratic Governance in Tanzania,* Freriedrich Neumann Stiftung, pp.145-154.

Creation of the Tanzania Constitution

To date, Tanzania has had five constitutions. Each of these constitutions has had its own features with regard to the necessities of time, as the author shall explain.

The Independence Constitution

Characteristic to all emerging African governments from colonial rule, the Independence constitution was a Westminster model passed by the parliament in England.[353] Tanganyika became a sovereign government under the Queen of England through her representative, the Governor. It got a sovereign parliament, a prime minister and was a multi-party democracy. The constitution, however, did not have consideration for the aspirations of the people of Tanganyika. It had to keep unperturbed, the colonial interests expressed in the form of large plantation owners, manufacturers and branches of multi-national companies. So, although Britain had agreed to relax its grip on Tanganyika, the purpose of the constitution was to make arrangements for a peaceful hand over of political power without jeopardising its interests.

The Republican Constitution, 1962

The Tanganyika African Union Party (TANU) controlled parliament, and through its president, it felt the independence that had been obtained did not go far enough. It wanted to exercise control over the economy and the means of production. It was, therefore, felt desirable to have a constitutional structure that would give meaning to Tanganyika's political independence. Tanganyika wanted to become a republic with an executive president. The government then prepared a government White Paper titled "Proposals of Tanganyika government for a Republic". Parliament hurriedly discussed the proposals, resulting in an Act constituting itself into a Constituent

[353] Vide the Tanganyika (Constitution) Order in Council, 1961

Assembly for purposes of making a constitution. This process begot the 1962 Republican Constitution[354].

The Interim Constitution of the United Republic, 1964

Quite a number of issues of constitutional significance arose in the union between Zanzibar and Tanzania, meriting an investigation into the origins of this relationship and the constitutional developments there under.

Zanzibar overthrew the government of the Sultan in January, 1964. This was at the height of the "cold war" which pitted the countries in the western hemisphere (the capitalists) against those in the eastern hemisphere (communists). The war was characterised by efforts to win spheres of influence. There are various accounts as to what influenced the talks between the president of Tanganyika and Zanzibar to form a union.

Nonetheless, the talks were held, leading to what is known as the "Articles of the Union" on 22 April, 1964, and the Union was formally born on 26 April, 1964. Articles of the Union are international agreements which would only get the force of law after they were ratified. The Tanganyika parliament and the Zanzibar Revolutionary Council ratified the articles.[355] While the ratification was notified in the official Tanganyika gazette,[356] there is still controversy as to whether, in Zanzibar, this process was ever made public.

These ratifications gave birth to the United Republic, bearing the name Tanzania, which is a combination of the names of the former two sovereign governments, Tanganyika and Zanzibar.

The ratifications through these two laws constituted what is known as the "Acts of the Union", and through them, the president of the United Republic of Tanzania issued a decree modifying the

[354] Shivji, I.G, et al, supra. p.

[355] Vide the Union of Tanganyika and Zanzibar Act, No.22/1964 for Tanganyika and The Union of Zanzibar and Tanganyika Law for Zanzibar.

[356] Vide government Notice No. 243/1964

Constitution of the Republic of Tanganyika to make provision for the Union.[357] Curiously, this constitution, which was a result of the modification of the Tanganyika constitution, does not show what was modified in the Zanzibar Constitution. It has been explained that this was necessary at the time, hence the title "interim" constitution.[358]

The interim Constitution of the United Republic of Tanzania was made by the president through issuance of a Decree, the power conferred upon him by the articles of the Union. It was a one-man constitution which did not invite participation from either part of the Union.

The One Party Constitution, 1965

Although at the time of independence, both Tanganyika and Zanzibar had multi-party politics, the said opposition parties gradually became weak or the politics of the time weakened them so much. Consequently, they ceased to have any meaningful effect on national politics. The ruling parties, TANU for Tanganyika, and Afro Shirazi Party (ASP) for Zanzibar, used this as an opportunity to entrench themselves further and worked towards the abolition of opposition parties.

From Ghana, as a means of holding a firm grip on power, many African countries got attracted to a one-party rule to consolidate the gains of independence and power.[359]

To give legal effect to this intent, the Union parliament passed another constitution.[360] So as to give effect to the place of the ruling

[357] The Interim Constitution Decree, Government Notice No. 246/1964.

[358] Generally see: Shivji, I.G[ed] op. cit, note 1.

[359] Most African countries embraced single-party rule eg. Guinea, Togo, Malawi, Congo, etc. Also see: Dowden, R (2009). *Africa: Altered States, Ordinary Miracles*, Portobello Books, London.p75.

[360] The Interim Constitution of Tanzania. Its Article 3(2) made TANU the sole political party for Tanzania Mainland and ASP as the sole political party for Tanzania Zanzibar.

party, the TANU constitution was made an annexation to the Union Constitution, thus in law, becoming part of it. In addition, for inexplicable reasons, the ASP constitution was not appended to the Union Constitution, which had four main features. First, it appeared to entrench TANU more than the ASP. Secondly, it made parliament subordinate to the party and its organs, and thirdly, it increased the number of Union matters, thus slicing matters Zanzibar could determine on its own, reducing its sovereign powers. More importantly though, it gave more powers to the president. It gave him powers to nominate MPs and his other appointees, the regional commissioners (RCs), became MPs by virtue of their offices. The fact that they were ex-officio did not reduce their capacity in parliament, with the full right of debating and voting on any matter. By 1970, out of 220 MPs, only 100 were directly elected[361]

The fact that many of them were presidential appointees and yet the president was also the chairman of TANU, left Zanzibaris feeling cheated. To address some of the resultant dissatisfactions, the idea to merge TANU and ASP and make Tanzania a truly one-party state was conceived.

The Constitution of the United Republic of Tanzania, 1977

The current constitution, the Union Constitution, was passed in 1977 in a process that was a one-party affair. It was passed after only three hours of deliberations. Circumstances prior to its passing, in my view, are very important in order to appreciate the arguments for or against the writing of a new constitution, which the government, through the ruling party, has contumaciously refused to do.

On 5 February, 1977, TANU and ASP merged into one party, Chama cha Mapinduzi (CCM). After about one month, on the 16 March, 1997, the president appointed a constitutional commission

[361] See Shivji, I.G [ed]. Op. cit. note 351 p.53-4.

vide the authority given to him by the articles of the Union.[362] The appointed commissioners were the ones who had drafted the CCM Constitution shortly before under the chairmanship of Sheikh Thabit Kombo, a staunch revolutionary, but whose knowledge of constitutional matters was doubtful. Nevertheless, he had able members under him, including the former speaker of parliament, Pius Msekwa.

On the same day, the president converted the Union Parliament, comprising CCM members only, into a Constituent Assembly.[363] Ordinarily, the constitutional commissioners and the Constituent Assembly would not begin their work until their appointments are made official by placing an announcement of their appointment in the official gazette. However, it would appear the constitutional Committee, a de facto party committee, had started work on the proposals even though the appointment of its members had not been published in the official gazette. While the appointments were published on 25 March, 1977, the committee presented its proposals for deliberation by the party National Executive Committee (NEC) of CCM the following day.

On the other hand, members of the Constituent Assembly were the same MPs of the ruling party, and when the proposals were presented to them for deliberations, they were forewarned that their authority to deliberate had to be guided by the party's interests. Presenting the proposals, the then prime minister, Edward Moringe Sokoine, (rip) said, *inter alia;*

> "……But Mr. Speaker, in exercising our authority, we ought to be conscious of our limitations. The proposals we are about to debate are the outcome of party directives…..Therefore, the Constituent Assembly has full powers to reject or amend these government proposals if it feels that they are contrary to, or in conflict with,

[362] Vide Government Notice No.38 of 25 March, 1977.
[363] Vide Government Notice No.39 of 25 March, 1977.

> the party directive. On the other hand, if these proposals correctly implement the party wishes, I beg the Assembly to accept them without a moment's hesitation..." [Underscoring supplied][364])

And the members of the constituent Assembly did not hesitate. The new constitution, intended to be a permanent one, was hardly deliberated upon and was passed after three hours, most of that time, not debating the proposals as such, but congratulating the committee for its work and the chairman of the party whose wisdom had led to the idea of a new constitution.[365] The majority of the public was never made party to this important exercise for the life of any nation. To put it differently, the current constitution was not a people-driven exercise.

Up to this time, political expedience took precedence over social-economic and civil rights. It had not been felt that it was politically right to bring in the Bill of Rights. Because of this background to its making, there have been calls for the writing of a new constitution, notably after the re-introduction of multi-party politics.

In response to the clamour for a new political climate, the then president, Ally Hassan Mwinyi, appointed a commission chaired by the then chief justice, Francis Nyalali, to collect views on a single or multi-party system in Tanzania. After the commission visited most parts of the country, the commission recommended the writing of a new constitution and the introduction of multi-party politics in spite of the fact that only 20% of the people interviewed recommended a multi-party system. Initially, both these proposals were rejected. The government found that there was no need for multi-partyism because the report showed that 80% of the interviewees appeared satisfied with the status quo.[366] It seems people were opposed to multi-party politics because they were used to "Nyerere's party",

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[364] *Majadiliano ya Bunge (Hansard), Mkutano wa Sita*, 25 April, 1977. p.11.

[365] ibid.

[366] Report of the Presidential Commission on a Single or Multi-party Political System in Tanzania, Government Printer, Dar es Salaam, 1991.

on one hand, but, on the other, because the virtues of multi-party politics were not articulated in the government paper.

As regards the writing of the new constitution, the government said constitutional changes were only necessary in case of a change of sovereignty and that the current constitution has provisions on how it could be changed, that is, through parliament.[367] Effectively, the only changes that should be made must have the blessing and approval of the government.

Nyerere, who was retired, but still wielded a lot of influence, once again castigated the government for ignoring the views of the 20%. He probably had in mind the wind of political change that was blowing throughout the world, heralding a new political order. The events that followed were that the wishes of the 20% of the interviewees were accommodated and the constitution was amended for the eighth time, re-introducing multi-partyism in Tanzania.[368]

The proposal for writing a new constitution is still lying in the shelves. However, the argument that a new constitution is only necessary, where there is a change of sovereignty, is false. The history of constitution making in Tanzania betrays this argument. The fourth constitution, to wit, the Single Party Constitution of 1965, was passed when the country moved from a multi-party system to a single party. In my view, there was no change of sovereignty whatsoever, and, therefore, *in consimmilli cassu*, I do not see how the situation in 1965 differed from the present situation.

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[367] Article 98 provides for the change of the constitution, wherein it is stipulated that such change must have a 2/3 backing by parliament. It is the ruling party only that can garner such majority, and therefore, whatever can change, must get a *fiat* from the ruling party.

[368] The Eighth Constitutional Amendment re-introduced multi-parties vide Act No.4/1992. I have used the word "interviewees" deliberately. In some areas where the population would be literate and, therefore, could give informed opinions, interviews were by invitations, which excluded well informed persons, and it is the position of this paper that the interviewees were not a true reflection of what the Tanzania population wanted at the time.

We can only say that the adamance to make a new constitution lies in the fact that the present constitution is sufficiently supportive and protective of the status quo, negatively impacting constitutionalism, as will be discussed in the following sections.

Constitutional Developments in Tanzania in 2009

Legal Events

From the beginning of 2009, the High Court and the Court of Appeal were beehives of activities, with direct impact on constitutionalism. The year opened with a judgment of the Court of Appeal on the enforceability of the findings of the Tanzania Commission for Human Rights and Good Governance (CHRAGG). It held that the Commission, although in law, is mandated to give recommendations which are not judgments, nonetheless, those recommendations are justifiable and may be enforced as if they were decrees.

The Right to own Property: The Nyamuma Case[369]

In the above mentioned case in 1993, a parcel of land situated in Serengeti district in Mara region was designated by Government to be Nyamuma village. However, the following year, a large chunk of it was taken up to form the Ikorogo Game Reserve. The remaining part became known as Nyamuma "Iliyobaki", meaning Nyamuma "that remained". While the local populace was still licking the wounds of the government action in 1994, on 8 October, 2001, the government came out again, and by use of a public address system, announced that Nyamuma Iliyobaki was to be vacated immediately, or to be exact, by or before 12 October, 2001, that is, four days away. There were no promises of any compensation whatsoever.

Acting like a bull in a china shop, on 12 October, 2001, government officials led by the district commissioner, Thomas ole

[369] Complaint No. HBUB/S/1/1032/2003/MARA.

Sabaya, and the district police commander, Alexander Lyimo, acting in their official capacities went to the area and forced those still remaining to flee as they put their houses on fire, killed a number of their livestock and burnt their food stocks.

The villagers presented their grievances to the Mara regional authorities, but their complaints fell on tough soil. Subsequently, they enlisted the services of the Legal and Human Rights Centre (LHRC) which led them to the CHRAGG. The respondents were the said Thomas Sabaya and Alexander Lyimo. The attorney general (AG) was joined as a necessary party. The complainant alleged a number of violations of human rights which were in violation of their constitutional right to own property, the right to live in a conducive environment and better life, the right to liberty and security, the right against forcible evictions, all enforceable under chapter three of the 1977 constitution,. They alleged to have lost property worth Tanzania shillings 890, 523,950.

The Act setting up the commission empowers it to receive complaints and conduct investigations on any matters brought before it alleging violation of human rights.[370]

Section 15 of the Act provides that:

The Commission shall have power to investigate any human rights abuses or maladministration;

a. on its own initiative
b. on receipt of a complaint or allegation under this Act, by
- an aggrieved person acting on such person's personal interest;
- an association acting on the interests of its members; or
- a person acting in the interest of a group or class of persons.

It must be mentioned, however, that the president of the Union government and that of Zanzibar are exempt from the provisions of the Act.

[370] The Commission is a creature of both the Constitution of the United Republic of Tanzania; vide Article 130 and the Commission for Human Rights and Good Governance (CHRAGG) Act, Cap. 391 R.E 2002

During the "hearing" of the complaint, the commission had occasion to hear 120 witnesses for the complainants and 20 for the respondents. At its conclusion, it was of the view that the complainants had satisfactorily established all their claims and on 13 December, 2004, it recommended the following:

a. That the complainants be resettled at their village land.
b. The government should take penal and disciplinary measures against all the officials involved in the criminal acts.
c. The government pay compensation to the complainants to the tune of Tanzania shillings (Tshs.) 890,523,950.

After such findings, the law requires the Commission to communicate its recommendations to a relevant authority, in this particular case, the AG.[371]

After receiving the recommendations and going through them, on 18 May, 2005, the then AG, Andrew Chenge, wrote to the commission informing it, bluntly, that the government would not comply with any of its recommendations because it did not see what had been violated. He argued that there were no houses burnt, no crops had been burnt, neither were any crops destroyed and that there was no brutal force used. He further pointed out that 14 out of the 135 complainants were actually Kenyans and that the list of complainants contained fictitious names. In other words, the government ignored or rubbished the findings of the commission. It is submitted that the matters raised by the government were mere after-thoughts as they were matters that could have been raised and settled during the hearing by the commission, and these words after the hearing were an unfortunate bravado and uncalled for arrogance.

In the circumstances, the Commission and the LHRC lodged, an application in the High Court Land Division to have its

[371] Section 28(2), Commission for Human Rights and Good Governance, Cap.391, RE 2002.

recommendations enforced. The application was made in terms of S.28 (3) of the Act setting up the Commission, which provides as follows:

> "If within the prescribed time after the report is made no action is taken which seems to the Commission to be adequate and appropriate, the Commission may, after considering the comments, if any, made by or on behalf of the department, authority or person against whom the complaint was made, either bring an action and seek such remedy as may be appropriate for enforcement of the recommendations of the Commission."[Emphasis added]

The application was followed by a number of preliminary objections by the AG touching on the propriety as well as the competence of the application. Four of the five objections *in limine* were dismissed.[372] However, the last one, on the competence of the High Court to entertain the application, was upheld. The judge, Rugazia, [373] agreed with the objection that since the commission only gives recommendations, they are not judicial decisions to be enforced by a court of law.

He said, *inter alia;*

> "It has to be said for the benefit of the applicants that as submitted by the respondents, recommendations by the Commission are not judicial decisions to be enforced by a Court of law……All in all, it has to be said that this Court as prayed by the respondents, has no jurisdiction to do what the applicant is praying for, and having said that, the preliminary objection is upheld. Consequently, the application is dismissed."

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[372] The five preliminary objections were as follows: a) The applicants did not have *locus standi* to file the suit. b) The Commission did not have any judicial or quasi-judicial powers, and, therefore, its role was to make recommendations that could not be enforced in court. c) The application was abusive of the court processes as the same matter between the parties was pending in the High Court main registry, d) The matter was *res judicata* and d) The High Court Land Division lacked jurisdiction to entertain the matter.

[373] The Hon. Judge is no relation of the author.

Curiously enough, the learned judge made reference to the provisions that empower the Commission to go to Court, to wit, Sections 6(e) and 15(3). He said;

> "If you look at some sections of the Act, that is, section 6(e) and 15(3), it is provided that the Commission may go to court, a requirement which would have been unnecessary if it had judicial powers."

This conclusion was manifestly faulty. It was influenced by the submissions in support of the objection that by "going to court", that would entail a fresh trial. But, if the above provisions are correctly interpreted, and read with the clear provisions of section 28(3), it is manifestly clear what the Commission should go for in court after its recommendations are ignored. Under the above cited section 28(3), the commission is enjoined to go to court to seek enforcement of its orders. And this is what the Court of Appeal held, in reversing the decision of the High Court. And there can be no rational argument about the jurisdiction of the High Court on land matters.

The recommendation sought to be enforced was to resettle the villagers back to their land.[374]

Very unfortunately, in spite of that progressive decision in the jurisprudence of human rights, the government has stood its ground and none of the recommendations has been effected. The officials who were implicated have not suffered any penalty. The villagers have neither been resettled nor have they been compensated. This, to a government that professes to observe the rule-of-law, is a shame, to put it very mildly.[375]

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[374] The Land Division of the High Court has exclusive jurisdiction on both original and appellate jurisdiction on all matters relating to land under Section 167 of the Land Act, No.4/1999 and Section 62 of the Village Land Act, No.5/1999.

[375] The setting up of the commission itself was explained as an exemplification of the government's commitment to the rule-of-law. Recently the minister for justice, on behalf of the president, said the president has no power to take anybody to court under the rule-of-law. There are persons who are cited in the embezzlement of public funds in the infamous External Partnership Agreements

But, this is not by accident. The law setting up the commission for good governance suffers from a number of shortcomings. The fact that it is not a judicial body, or even a quasi-judicial one, renders it toothless. To the villagers of Nyamuma, the decision in their favour, and the reliefs given there under, remained elusive. This is partly because the commission is not independent enough as it is directly answerable to the president. Under that Act, the president can stop any on-going investigations by the commission in his entire discretion.

The author is of the firm view that unless the law setting up the commission is looked into with a view to giving it more strength, its intended good work will remain a wasteful academic exercise without giving any tangible results. Disregard by the government of its recommendations in the Nyamuma case is a case in point. Worse still, it would allow the culture of impunity, on the part of the government and officers, to grow out of proportion. To address this problem, it is suggested that the appointment of the commissioners should be made more transparent. For example, the commission could be selected by a board after interviewing the candidates, and then the selected commissioners should be endorsed by the peoples' representatives in parliament. This would in a way help to ease the problem because basically, the problem is not what the commission was setup to deal with, but the lack of independence of the commissioners which is discernible in the manner they are appointed.

The Loliondo Saga

Reminiscent of the events in the Nyamuma land saga, was the eviction, by use of force, of the residents of eight Maasai villages

(EPA) scandal who have not been brought to book because they are said to be the friends of the president, and there is a general feeling that their non arraignment has got something to do with their proximity to the president.

by the government assisted by the agents of a hunting company, Otterlo Business Corporation Limited. The evictions were made so as to give room to the company, belonging to an Arab royal family based in Abu Dhabi in the United Arab Emirates (UAE). Ally Hassan Mwinyi granted the company a 10-year extending concession to hunt for animals in the Loliondo Game Controlled Area. Although the agreement was opposed due to environmental concerns, which led to the cancellation of the first agreement, the same was re-established. The extensions have continued to be renewed. At the instigation of the government, some six villages entered a contract with the company in which they were to benefit economically.[376]

In May, 2009, the government sent to all the villagers in the eight villages a letter informing them that they were required to leave and take their cattle out of the Otterlo Business Corporation controlled areas. However, the villagers had contracts with Otterlo Business Corporation, and not the government.

The government, in cohort with the Otterlo Business Corporation, wanted to remove the villagers by force. By July, 2009, permanent homesteads and food stores were completely burnt, rendering 1,753 people homeless, four goats were burnt, a young woman was raped, and an unspecified number of cattle were mauled by lions. Those that remained were pushed into extreme drought areas without water or grass. Four children got lost. Three were found, but the other is still missing. Twelve men were beaten by the Police and three of them were seriously injured.[377] Many people are said to suffer from psychological trauma as a result of these events.[378] These were gross human rights abuses since the government had not been privy to the agreements between the villagers and the company.

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[376] A letter by Navaya Ole Ndaskoi to the then President, Benjamin Mkapa, cited at http://www.ntz.info/docs//w03733, accessed on December, 2009.

[377] ibid.

[378] A Report by Feminist Activists (FemaAct), entitled "Loliondo is Burning" read to the press on 12th September, 2009 found on www.http://pambazuka.org/en/category/advocacy/58422 accessed on 1st December, 2009.

Otterlo Business Corporation now operates in the area and the government explained that the actions were necessary to "protect" the environment.[379] However, as far as environmental degradation is concerned, available evidence shows that it is Otterlo Business Corporation, and not the poor Maasai pastoralists, which is the culprit. The company, owned by Brigadier General Mohamed Ally Al-Nahyan, has constructed an airstrip in the middle of the controlled area, allowing in private planes which go back loaded with wildlife. The airstrip causes noise pollution, and is built in the middle of the controlled area, thereby blocking a migration route for animals. It has also built permanent structures, some near the water sources. These activities betray the claim that the company was intent on protecting the environment. The forcible eviction of the Maasai, after all, was not to protect the environment as was claimed.

The matter eventually landed in parliament. Saning'o ole Telele, the MP for Ngorongoro where Loliondo is situated, raised the matter in parliament and sought explanation from the government about the allegations of human rights abuses in Loliondo. In her reply, the minister for tourism and natural resources, Shamsa Mwangunga, explained that she did setup a committee from her ministry to look into the matter and according to her, there were no gross violations of whatever kind, no one was raped and that indeed, like the victims in Nyamuma, some of the pastoralists were actually Kenyans. Mwangunga's response was quite surprising considering that even assuming that the alleged victims were Kenyans, Tanzania has acceded to and ratified several international human rights instruments which oblige it to protect all persons within its jurisdiction.

After this explanation, another MP, Christopher ole Sendeka of Simanjiro, disputed the explanations, saying the minister had told lies in Parliament and called for the setting up of a parliamentary committee to investigate the matter. Subsequently, a 25-member

[379] Tanzania has ratified the CCPR, the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights.

committee, led by Job Ndugai, the Kongwa MP and chairman of the parliamentary committee on land and natural resources, was setup, and it was to present its report in Parliament in February, 2010.[380]

The Right to Freedom of Association: Rev. Christopher Mtikila v. Attorney General[381]

Famously known as the "Independent Candidates Case", it was yet another matter by the cleric-turned-politician, Rev. Mtikila. He asked the court to order compliance with the constitution by allowing independent candidates to vie for political office.

Previously in 1993, he had lodged a case challenging provisions of the law that had outlawed independent candidates, arguing that they infringed the constitutional right of association and to participate in public affairs.[382] This move did not go down well with the government which was determined to frustrate the move. First, there were objections against the presiding Judge, James Mwalusanya. His views on defending human rights were a constant pain to the government.[383] After studying the objections, he withdrew from the conduct of the case. He was replaced by Lugakingira, J (as he then was). After hearing the arguments for and against the petition, he concurred with the petitioner that outlawing private candidates was in violation of the constitution.

Since it had appeared from the onset that the government would not accept the outcome from court, government pushed for and got an amendment of the constitution so as to circumvent the High Court judgement. This approach against progressive judgements is

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[380] http://www.transerve.co.tz/2009/11/09, accessed on 3 December, 2009.

[381] In Miscellaneous Civil Case No.10/2005.

[382] *Rev. C.Mtikila v. The Attorney General* (1995)TLR 31.

[383] It is said that the petition was either drafted by the judge himself or he fine-tuned it because he was in favour of private candidates. He was also outspoken against the death penalty and the infringement of individual liberties.

not confined to Tanzania. The actions of this nature are common in Zimbabwe, where Makoni[384] has lamented;

> Progressive judgements of our Courts that seem to be at variance with the wishes of the Executive, are followed with constitutional amendments influenced by the Executive (with the sole aim) to dilute the judicial activism of our Courts"

Article 21, which was the subject of attack in the petition, was amended by inserting therein sub-Article (1), which now required a candidate to be sponsored by a political party. In effect, a person who did not want to belong to a political party lost the enjoyment of participating in national politics.

A further amendment was that it would be illegal to "cross-over" to another party once a candidate was elected to parliament on a party ticket.[385] The amendment to circumvent the court decision irked Nyerere who told off the government that it did not have the power to take measures that were intended to defeat a decision of the court.[386]

In 2005, Mtikila went back to court with another petition, this time, challenging the amendment discussed above. He sought orders to declare the said amendment unconstitutional, and therefore, void

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[384] Makoni, A. *Rule of Law and Constitutional Practices*, (Harare, 2007) in a paper presented at a Symposium organised by Zimbabwe Lawyers for Human Rights and SADC Lawyers Association on Constitution Making and Constitutionalism.

[385] In recent days, there has been bickering among the members of the ruling CCM party in and outside parliament. The bickering has become so nasty to the extent that some called their party colleagues "lunatics". Meanwhile in another party, *Chama Cha Demokrasia na Maendeleo* (CHADEMA), there are also some problems, pitting the deputy secretary general, Zitto Kabwe, and his colleagues in the leadership of the party. It is commonly believed that this uncomfortable co-existence is possible, thanks to the law prohibiting crossing over.

[386] In a May Day address to the Workers at Sokoine Stadium, Mbeya, on 1 May, 1995.

and of no consequence.[387] The full bench of the High Court upheld the petition. S. A. Massati, J (as he then was) on behalf of the panel, stated, *inter alia*, that in interpreting our constitution, and in fact, all laws, international conventions must be taken into account. He said the whole of the Bill of Rights was adopted from those rights that are promulgated in the UDHR.[388]

For yet another time, the government was chagrined by the decision. This time it did not ignore the decision. Rather, it lodged an appeal to the Court of Appeal, challenging the decision. Defending the decision to lodge the appeal, the minister for justice, Mathias Chikawe, told the members of the press that indeed, the government was appealing to "protect" the constitution. He explained;

> "…..Government is not opposed to sole candidates as such. We have only gone to Court to protect the constitution. The government was challenging the legality of the High Court ruling that would force constitutional changes….if the High Court is allowed to force amendments in parts of the constitution, who will stop it from calling for the repeal of the whole constitution?"[389] [Emphasis added]

Compare this reasoning, with the aim of the petition, which was itself seeking to stop the constitution being violated! This statement goes to confirm the saying that a politician leads a double-life. When he

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[387] In Miscellaneous Civil Case No.10/2005.

[388] The UDHR is part of our law, having been incorporated into the constitution vide Article 9(e).

[389] Mathias Chikawe:" The government is not opposed to private candidates", The Citizen

[389] It is shameful that matters involving members of the leading football clubs in the Country, Yanga and Simba, hardly take a month in our Courts. A case would be filed on Friday afternoon, say, to get an injunction to stop an election scheduled for the following day. On the following Monday, the opposite side would bring in their defence, with an objection to the propriety of the case. Written or oral submissions would be heard that same week. And a ruling settling the matter would follow within days.

has to defend the government he serves, he will abandon all pretence of professionalism. Chikawe is a lawyer of no mean repute.

The decision of the High Court came out in February, 2009. To date, there is no mention of the wherewithal of the appeal. It is not clear why a constitutional matter of this import should lie in the registry unattended for all this time.[390] It must be borne in mind that the next general elections, in political-speak, were just around the corner.

Compulsory Party Membership. A Prerequisite for Contesting

The requirement that those who want to contest for political office must, without election, belong to some political party, is clearly in violation of Article 20 on the freedom of association, since a claw-back to it was removed vide the 14th constitutional amendment.[391]

Prior to the amendment, the enjoyment of several rights under Chapter Three of the constitution was subjected to so many other laws, and actually, the CCM–controlled parliament was at liberty to pass legislation that circumvented these rights.[392]

These provisions had kept legal scholars wagging their scholarly pens. Luoga, F wondered as to why the constitution had so subjected itself to other laws. He wrote;

> "There is nothing in the constitution relating to its status or confirming that it takes precedence over other laws"

And commenting on the omnibus claw-back, he said:

> "The general claw-back does not give any criteria for its application. The executive can, for any flimsy reason, which it

[390] Act No.1/2005.

[391] Article 30(2) provided that the Bill of Rights enshrined under Chapter Three did not invalidate any existing law, nor did it prohibit the enactment, by parliament, for purposes of ensuring public safety…or anything which promotes or preserves the national interest in general.

> will label "interest of the nation", cause to be passed legislation to nullify or otherwise restrict the exercise of the rights."[393]

Such comments and others apparently got the attention of the government, and in July, 1998, the then President, Benjamin Matuwani William Mkapa, appointed a special committee to collect, co-ordinate and analyse the people's views on the constitution. The Kisanga Committee, as it was known after its chairman, Justice Robert Kisanga, recommended the removal of the claw-back clauses. The recommendation was taken by the government so as to "*get rid of the idea of subjecting the constitution to the laws of the land…by removing from there the phrase "without prejudice to the provisions of other laws..."* [394] [Emphasis supplied]

These removals were hailed as a "brave and innovative" step as far as the whole human right discourse is concerned."[395]

That said, as the author has shown, the failure by the government to withstand the consequence of such "bravery", makes him hesitate to shower upon it similar emotions.

The remaining recourse is, of course, the Court of Appeal, where the appeal by the government is pending. The need for an urgent decision is rooted in the need for the private candidates, if allowed, to have ample time to organise themselves. Any delay will work to the advantage of the ruling CCM, and the minister's arguments are far from sincere because it is publicly acknowledged that a decision to allow private candidates is likely to affect the ruling party most. Some of its members are stuck to it for lack of a better alternative

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[393] Luoga, F.D.A.M, *"The Tanzania Bill of Rights"* in Peter C.M (ed). (1998) *Fundamental Rights and Freedoms in Tanzania*, p.4.

[394] Bill Supplement No. 12 of 12th November, 2004, Government Printer, Dar es Salaam, p.19.

[395] Wambali, M.K.B., *"Reflections on the Main Features of the Bill of Rights following some amendments to the constitution"* in The Tanzanian Lawyer, Vol.2/2008, pp. 3-31.

and that the law is only used for political expediency rather than for the health of constitutional jurisprudence.

Even when the registrar of political parties aired his view on the matter, and advised government to consider enacting a law on private candidates, the justice minister was swift to say the views were far-fetched and they amounted to a phantasm. No private candidates were contemplated by the government. The registrar gave his views which fall within his mandate.[396]

That position by the government makes it the more imperative that the Court of Appeal should come and make a decision, thereby settling the political dust.

The apparent relaxation of the claw-back clauses on some parts of the constitution should not blind us to the fact that the enjoyment of the fundamental rights which the removals professed to address, is still difficult to come by. The action seeking the enforcement of fundamental rights is brought under the Basic Rights and Duties Enforcement Act.[397]

The main fetter to the enjoyment of the provisions of this Act is that a petition filed under it seeking to enforce a basic right or freedom is heard by a full bench of the High Court, a panel of three judges. In spite of the increase in the appointment of judges, for most parts of the country, it is still difficult to garner three judges at the same time. In consequence, like the availability of all other good things in the country, petitions seeking constitutional remedies have mainly been filed in Dar-es-Salaam, constructively making it difficult for the rest of the Tanzanians to enjoy the fruits of this seemingly progressive piece of legislation.

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[396] The Registrar of political parties is appointed under the Political Parties Act, Cap. No. 258 R.E 2002, whose role, among others, is to act as a bridge of communication between government and political parties, and advise it on all matters to do with multi-party system and the growth of democracy.

[397] Cap.3 R.E 2002.

It must, however, be pointed out that on a positive note, the Court of Appeal has effectively removed the common law stringent requirement of "*locus standi",* thus opening the door for any citizen to come to court so as to stop, as it were, the violation of a constitutional right.[398] The old common law rule was that an individual could not go to court to enforce a community right unless he could show that he was particularly, more than any of those members of the community, injured by the tort complained of.

The AG, like any other litigant, has a right of appeal against a decision in which he has been aggrieved. It could be argued that the matter under discussion, in so long as it is on appeal, is *sub judice* and, therefore, outside the purview of public discussion, academic or otherwise. The author, therefore, may be prompted to adopt the "wait and see" attitude. It is not clear what the Court of Appeal might decide, but from the rumblings, it can safely be said that a decision rejecting the appeal by government may unleash on to the political turf, a juridical monster that may cause a complete about-turn.

Matters Pending in Court

As pointed out earlier, there are matters now lying in courts, which ought to have been decided by now.

Zephrine Nyalugenda Galeeba and James Kabakama v. Attorney General[399]

Two advocates based in Dar es Salaam instituted the above petition challenging the provisions of the Advocates Act which make it mandatory for every registered advocate to be a member of the Tanganyika Law Society (TLS). They challenge the provision on the ground that it infringes the constitutional right of association.

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[398] See: *L&HRC and Others v. A.G,* Misc. Civil Cause No.77/2005. Also see *Rev. C. Mtikila v. A.G* (1995) TLR 31*, and J.I.F Ndyanabo v. A.G* Civil Appeal No.64/2001 (unreported).

[399] Misc. Civil Cause No. 67/2008.

The TLS applied to, and was joined as an interested party. The final submissions in this matter were filed in October, 2008 and judgement was to be given on notice. No notice has ever come and a decision is still pending.

Meanwhile, the panel of judges that heard the petition is no longer serving in the High Court. Justice Thomas Mihayo, a former president of the TLS, has since retired, and the other two justice, William Mandia and Madam Catherine Oriyo, have since been elevated to the Court of Appeal. The matter still awaits the reconstitution of a new panel.

Rugemeeleza Nshala and Mtetezi Ltd v. Attorney General.[400]

Another Dar es Salaam-based advocate-cum-environmental rights activist, Rugemeleza Nshala, and a firm, Mtetezi Ltd, have recently instituted a constitutional petition challenging the Mining Act.[401] The Act gives power to the minister responsible for mineral matters to sign Mineral Development Agreements (MDAs) on behalf of the government. They have argued in the petition that those powers violate Articles 63(3) (a)-(e) of the Constitution. By virtue of that Act, all agreements and treaties to which Tanzania is a party, must be brought to parliament for scrutiny, and they contend that none of the MDAs has ever been brought before parliament for deliberation, modification, ratification or rejection".

They argue further that the allocations and concessions made vide the said MDAs are responsible for the forceful displacement of millions of agriculturalists, peasants, pastoralists and artisanal miners from their lands, totally disregarding their proprietary and land rights enshrined in the constitution.

During Mkapa's government, MPs raised concern over the secretiveness of the "investment" agreements. The government insisted that under the international investment laws, the agreements

[400] Misc. Civil Cause No.35 of 2009.

[401]

were to be privy only to the government and the investors. When some parliamentarians proved to be intransigent, CCM MPs were summoned in a CCM parliamentary caucus and reports had it that they were reprimanded for being "disrespectful" of the intentions of the government of their party. Subsequent to the reprimand, CCM parliamentarians, who made the majority in Parliament, toed the party line and the legitimate calls to have the agreements reviewed by Parliament got smothered.

However, later events tend to show that the parliamentarians had a point. The terrible effects of the skewed agreements came to the climax when the prime minister, Edward Ngoyai Lowassa, and two senior cabinet ministers, were forced to resign on 7 February, 2008. Subsequent to the said resignations, President Jakaya Kikwete had to dissolve the entire Cabinet and appointed a new one.

The brief background to the saga was that Richmond Development Company, said to have been registered in the US, was awarded a tender to generate electricity in dubious circumstances. It failed to deliver and instead, passed on the tender to M/s Dowans. The award of the original tender was said to have been ordered by the prime minister, whose orders usurped the powers of the board, which ought to have evaluated the tender and made the awards. Although the company failed to generate any electricity, it was being paid 152m Tanzania shillings of the taxpayers' money in what were called capacity charges.

A subsequent parliamentary probe committee implicated the then prime minister with two other ministers in the scam, leading to their resignation. Since their resignation, the political landscape in the country has never been the same. Those who resigned allege that they were made scapegoats, while the public debate is that the resignations are not enough. Everybody who was involved should have been brought to book.[402]

[402] The ruling party is conspicuously divided on the matter. It is said the next elections will be fought basing on who supported which camp.

The petition challenging these types of concessions which have plunged the country into a near constitutional crisis could be an eye-opener when it is heard and determined. A week after the petition challenging the constitutionality of the Mining Act was filed, a political party, National Convention for Construction and Reform-(NCCR-Mageuzi), lodged another constitutional petition demanding an independent electoral commission within the context of Articles 3(1), 21(1) and (2) and 74(1) of the Constitution before the 2010 general elections.

This petition shall be discussed later when dealing with the electoral laws.

However, with regard to the pending constitutional petitions, which appear as if they have been abandoned, I propose, in earnest, that a law be put in place which will require that such petitions be disposed of within a given short period.

The Local Government Elections

The constitution provides for universal adult suffrage. Elections are carried out under two different systems and are governed by two different authorities. The general elections for electing the president and MPs are carried out under the National Elections Act[403] and for district and urban councillors are governed by the Local Government Elections Act of 1979,[404] the Local Government (Urban Authorities) Act of 1982[405] and the Local Government (District Authorities) Act of 1982.[406]

The general elections are conducted under the supervision of the National Electoral Commission (NEC), while the local government elections for the election of village chairpersons, members of the village councils and chairpersons of the Hamlets (*vitongoji*) at the

[403] Cap.343 R.E 2002, The NEC is created by Article 74 of the constitution.
[404] Cap. 292 R.E. 2002.
[405] Cap.288 R.E 2002.
[406] Cap.287 R.E 2002.

district level, are co-ordinated by the prime minister's office (PMO) (Regional Administration and Local Government).

Under the law, the district executive directors (DEDs) are the principal election managers and their assistants serve as assistant returning officers. NEC does not take part in the conduct of the local government elections. This leaves ground open to manipulation by the minister, a partisan participant loyal to the government, made up of the party from which the minister comes. This arrangement poses a real likelihood of bias on the managers of the elections. The district executive directors are supposedly "independent" and do appoint returning officers from among a pool of civil servants, who, likewise, are deemed not to be political. The situation on the ground, however, gives a different picture. The civil servants are loyal, or are expected to be loyal, to the ruling CCM and do hold their positions as party agents in implementing its manifesto.

Examples to support this claim are legion. A district executive director of Karatu, an opposition party stronghold, was transferred in the very last week of the elections in a transfer which the government explained as normal. The opposition party, Party for Democracy and Development, Tanzania (*Tovuti ya Chama Cha Demokrasia na Maendeleo*-CHADEMA), which runs the local authority there, alleged with some credibility that the transfer was *mala fide*, associating it with local politics. He is said to have been reported for not "co-operating" with the ruling party stalwarts in the district. The allegation that the transfer could have some political trappings could be justified on the ground that this extraordinary transfer was not punctuated by any emergency in the district on the one hand, and on the other, his replacement could not have had ample time to effectively supervise the elections as he ought. That notwithstanding, though, CHADEMA retained the constituency.

That was not the only problem with the elections. In 2009, a regulation requiring all the contestants to be sponsored by their

parties, but at the grassroots (village) was introduced.[407] The contestants, mainly from the opposition, who had been sponsored by their parties, but not at the village level, were disqualified. Experience showed that this requirement was to work to the advantage of the ruling party.

The Political Parties Act does not allow village-based political parties. If a party wants to field a candidate, in my considered view, the party should have been allowed to field a candidate it wanted to support. This is because in some places, some parties are not well established at the village level. What is more, in some other places it was risky to identify oneself with the opposition parties. An opposition candidate on the United Democratic Party (UDP) opposition party for Mahenge town was quoted to have complained in Kiswahili:

> "Ukiwa Chama cha Upinzani serikali iliyopo madarakani pamoja na wanachama wa CCM na jamii inakuchukulia kama mhalifu asiyetakiwa katika jamii"

Translated, this statement means: "when you are in the opposition, the government of the day and CCM members and the society generally tend to perceive you as an unwanted criminal."[408]

This definitely, is not reflective of the situation all over the country. Nonetheless, it shows the difficulty encountered by some opposition parties that are not well established at all village levels in the country.

The justification for this requirement was that the villagers know the candidate well. That is as it may be. However, because of the obvious disadvantage to some of the contending parties, this should be looked into. As it is a multi-party democracy, one

[407] Regulation 11(1) (f) of the Local Government (Election of Village, Hamlet, Street Leaders) Regulations, 2009. And Paragraphs 14, 15, and 16 of the Circular/Guidelines on Election of Village, Hamlet and Street Leaders issued by the prime minister's office.

[408] The Legal and Human Rights' Centre: Report on the Local Government Elections, January, 2010 p 46-47.

of the contestants, CCM, should not prepare the playing field alone, considering that 17 parties took part in the local government elections.

Another introduction that had a negative impact on the entire exercise was a requirement that the voters should write the names of their preferred candidates and their parties' names in full. This requirement ignored the level of ignorance and illiteracy, particularly among the rural citizenry. It would be expecting too much, if it could be thought that a villager in some corner of the country could be able to write, correctly, the name such as National Convention for Construction and Reform, which is popular by its acronym NCCR-Mageuzi. In some rural areas, people wrote Sisiemu, Kyandema, Tielopii, which are not registered parties. Therefore, these votes were not counted![409]

According to this requirement, an acronym would not meet the requirement of the law.

But all this, according to the report LHRC prepared on the just concluded local government elections, was not by accident.

The cumbersome requirements gave room for the returning officers and election supervisors to "assist" the very many illiterates on "how" to vote. The above report documents polling stations where the returning officers, supervisors and some members of the people's militia who "assisted" voters by inserting the names of CCM candidates contrary to their instructions.[410]

A combination of all these led to a number of outcomes. There were so many disqualifications, mainly for the opposition candidates

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[409] See: Karugendo, P." Sisiemu, Kyandema Na Tielopii in *Raia Mwema Newspaper*, Issue No.111, Dec.9-15, 2009

[410] Although generally the assistance helped many, in some cases, the contrary was observed. In Sumbawanga municipality, Rukwa region and at Kizenga, Iramba district, there were many incidents of militias and returning officers "assisting" the voters wrongly, as per the Report of the Legal and Human Rights Centre. op.cit, pp.46-48.

that frustrated voters opted not to cast their votes on 25 October, 2009. As expected, this resulted in a massive victory for CCM amid a low voter turnout. According to the report the prime minister presented to parliament on 6 November, 2009, CCM won by a massive 93.86%, CUF and CHADEMA, the more organised political parties in the opposition, managed to get a combined total of 5.13%.

As earlier stated, there is nothing much to celebrate about these statistics given the low voter turnout on the elections day. Country-wide reports indicated an incriminating low voter turnout. Njombe district with a population of 126,586, only 28,170 registered. Of those, only 5,842 or 4.82% turned out to vote. In Dodoma, the supposed capital of the country, matters were even worse. About 52,272 people registered out of an eligible voting population of 441,450. Of those who registered, only 1,790 or about 3.4% showed up to vote. The picture elsewhere was not any better.

The majority of Tanzanians live in rural areas, and in my view, our leadership would not pass the test of respectability if the local government electoral laws remain as they are. An electoral process, which is easy for the voters to follow, which does not contain unnecessary hurdles, and which is all inclusive by all stakeholders, would go a long way towards strengthening constitutionalism.

The Independence of the Judiciary

Any country that professes the rule-of-law must have an independent judiciary. In Tanzania, the judiciary is vested with the power to adjudicate on all legal matters. In the exercise of its powers, the judiciary is supposed to be free from any form of interference either from the executive or any other organ of the state. Judges and magistrates are to exercise their independence subject only to the constitution and the laws of the land.[411]

[411] Constitution of the United Republic of Tanzania, Articles 107A and 107B.

Since the days of the single party, the judiciary has sailed through rough waters, where many of its decisions were questioned openly and at times ignored by the executive and its party operatives. The setting up of special courts, applying retrospective laws, left no room for the judiciary to act independently. These were made in furtherance of the policies of Ujamaa, a brand of African socialism propounded by Nyerere.[412]

A further onslaught on the independence of the judiciary can be seen in the setting up of watchdog bodies, known as the Judicial Boards. These are a creature of the Judicial Service Act.[413] These are headed by politicians and comprise members who are nominated by politicians at regional and district levels. The RC heads a regional judicial board and the district commissioner heads the district judicial board. These boards monitor the working of magistrates. They are enjoined to receive complaints from the members of the public about the performance of magistrates, inquire into these and may make recommendation to dismiss, remove, lower the rank, or recommend deduction of salary, etc, of the magistrates.[414] The appointment of such bodies indicates that the judiciary is not trusted and the role of these bodies has been largely to serve political purposes, not really checking the excesses of the judicial officers. In addition, judicial independence is also curtailed by its total dependence on the executive for remuneration and although there are some constitutional niceties about security of tenure, these do not extend to magistrates.

This explains why at times the judiciary appears to move cautiously, lest it treads on sensitive executive toes. The inexplicable delay in resolving constitutional matters alluded to herein before may be explained by this cautious approach. The judiciary seems

[412] The war on economic crimes and the setting up of a special court in 1983 is a case in point. There was no appeal against the decision of this court.

[413] Chapter 237.

[414] ibid. Section 19.

not to take advantage of the constitutional provisions to act independently.

Parliamentary Supremacy

The Tanzania parliament is established under Article 63 of the constitution and its powers and privileges are provided for in Article 100. The functions of parliament are to pass laws and to supervise the government.

Since the release of the Richmond report by a parliamentary select committee[415], it has come out that parliamentary supremacy is yet another nicety, which, in appropriate cases, the state and the ruling party may decide to dispense with. As a result of the report, as stated before, the then prime minister, Edward Ngoyai Lowassa, and two other ministers were forced to resign. It was a painful thing to do, leading the supporters of the resigned prime minister to chuckle with pain. It is said that they are planning a political come-back.

After the release of the report, parliament passed 23 resolutions demanding that some top officials should be sacked. These included the then AG, Johnson Mwanyika, the head of the Anti-corruption Bureau, Dr. Edward Hosea, and Arthur Mwakapugi, who was the permanent secretary in the minerals and energy ministry. It also called for the disciplining of the members of the government Negotiating Team (GNT) for failure to safeguard national interests. Government was given a time limit within which to comply.

The first report by the government was rejected to the embarrassment of the prime minister, who was forced to seek for extension. Two more extensions were later asked for and granted. While no action has been taken, the AG and Mwakapugi have since retired (probably with all their retirement benefits). A report of compliance has not yet been submitted.

To the surprise of the ruling party, there arose a group in parliament of CCM parliamentarians which joined hands with

[415] Op. cit. note.

those of the opposition to demand immediate action against those mentioned. As for politicians, it called for them to be relieved of their positions in the ruling party. The sleaze was called *"ufisadi"* and those seemingly spearheading the crusade are called *"Makamanda wa vita dhidi ya ufisadi"*

It soon became apparent that the unfolding events inside and outside parliament were not all well with the ruling party, which was weary of the opposition taking advantage of the situation.

In mid-August, CCM convened a meeting of its NEC to deliberate on the developments. The aim was to put a stop on the anti-party/government debates in parliament.

At the meeting, it turned out that it was the Speaker of the national assembly, Samuel Sitta, who was the target of the acrimonious attacks from NEC members. They accused him of allowing debates that were embarrassing to the party. Some members went as far as demanding his expulsion from the party. This would have meant that he would have lost his position as speaker.[416]

Attacking the speaker and MPs for what they said or did in parliament was clearly an infringement of the constitution. Under the constitution, MPs are guaranteed the freedom of opinion, debate, and it is provided that such freedom 'shall not be breached or questioned by any organ in the United Republic of Tanzania, in any court or elsewhere.[417] Reacting to the alleged infringement, the CCM secretary general, Yusuf Rajabu Makamba, said the party was right to "reprimand" its members who "misbehave" even if they are in parliament because parliament belonged to CCM. Probably, he meant that the majority of the MPs were from CCM.

The present electoral system and the prohibition on "crossing the floor", have denied parliament its mandated responsibility.

[416] A member of parliament must belong to a political party. Also see: Kubenea, S."Spika Chupuchupu kunyang'anywa kadi ya CCM" , *Mwanahalisi Newspaper*, August 19-26, August, 2004 p. 1.

[417] Article 100 of the Constitution, 1977.

Rather than serving the people, who in theory an MP is supposed to represent, the situation on the ground is that s/he owes allegiance to the party first.

This explains parliament's inability to oblige the government to implement its 23 directives on the Richmond saga. Whenever a matter of national importance comes up, if the ruling party has interest in stopping it, it would call its MPs for a party caucus to give them what the party line is, and remind them that if it were not for the party, they would never have been MPs. The matter, even if it had been debated with frothing mouths, simply melts away!

The Media

The Newspaper Act[418] continues to hang over the media like the proverbial Damocles' sword. Although there has been a proliferation of newspapers, radio and television stations, these have survived mainly on self-censorship, lest they offend the law. It is argued that although the proliferation of papers may be prima facie evidence of freedom of press that press in itself is not enough. One has to look at the environment in which those papers are operating.

Under the Act, the minister is empowered to prohibit publication of a newspaper in "public interest" or in the interest of "peace and good order".[419] These criteria are clearly subjective and are amenable to abuse.

However, the most scaring part of the Act is Part V which creates offences against the public. These are referred to as "seditious" and "incitement to violence". The law provides for both imprisonment and a fine. It also provides for confiscation of the printing machinery by the police and pending trial, it may be sold.[420]

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[418] Chapter 229.
[419] ibid. Section 25.
[420] ibid. See sections 32-37.

These provisions offend the constitutional presumption of innocence and it is a denial of the right to livelihood and the right to earn lawfully through work.[421]

The Nyalali Commission cited these provisions as unconstitutional and recommended that they should be expurgated.

The government has stood its ground, and the provisions have not been removed. They are used from time to time to shut down newspapers, to raid some publishing houses and to visit some outspoken editors with unspecified reprisals.[422]

On 13 October, 2008, the government banned the *Mwanahalisi Newspaper* for three months up to 12 January, 2009 for writing about the scheme against President Kikwete, in which two prominent politicians, Edward Lowassa and Rostam Aziz, an MP for Igunga in Tabora, were linked to a plot to unseat the president as a ruling party presidential candidate in 2010. The paper went on to include in the plot, the president's own son, Ridhiwan. The reason for the ban was that the report was seditious, intended to ruin the president's family relationship and the president's avowed friendship with those mentioned.

As it can be seen, how did this article threaten state security? It was apparently defamatory of the two gentlemen and the president's son. But, these had legal remedies by way of civil cases. What is interesting, those mentioned have never, even once, denounced the report.

It is also not clear why at all the times, the government shuns away from using the more lenient penal provisions of the Newspaper Act. The Act contains provisions for a fine not exceeding Tsh100,000 for conviction on a first offence and Tsh150, 000/ for a subsequent offence.[423]

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[421] The Constitution, Articles 22,23 and 24.

[422] Most papers have been routinely banned for writing about individuals who could have dealt with the newspapers in civil suits. These news items had nothing to do with state security or peace.

[423] Section 32.

On the other hand, media owners and other stakeholders have been discussing the Media Bill for the last three years now, as the government has failed to convince them that this would be a departure from the repressive Newspaper Act.

In these circumstances, it can be safely said that there are not enough guarantees for freedom of press, and the government holds the Newspaper Act as its ace in a game of cards.

The Zanzibar Question

A discussion on the constitutional developments in Tanzania Mainland will usually spill over into the developments in Zanzibar, since as the adage goes, "when Zanzibar sneezes, Tanzania Main land catches the cold" and vice versa. In 1999, the Court of Appeal declared that Zanzibar was not a sovereign state, and therefore, no offence of treason could be committed there.[424] The Zanzibaris, who possess all outward symbols of sovereignty; an anthem, an army (*vikosi vya Serikali ya Mapinduzi*), a flag and a president, were not amused. The chance to re-assert their sovereign power came with the revelation that there were huge oil and gas deposits in Zanzibar. This began with the debates in the Zanzibar House of Representatives about the discovery.

The debates were so heated up that the Zanzibaris in a rare show of unity, both CCM and members of the main opposition party, the CUF, agreed that the discoveries should benefit Zanzibar alone. However, the said oil has not been discovered yet.

They even said that oil and gas had been sneaked into the list of Union Matters without their knowledge. They likened their counterparts from the other side of the Union to colonialists, day-light robbers and or with similar undignified jejune. The Zanzibar energy and settlements minister, Mahmoud Yusuf Himid, told the

[424] *Serikali ya Mapinduzi Zanzibar(SMZ) v. Machano Khamis and 17 others*, Criminal Sessions Case No.7/99.

animated House that the Revolutionary Government of Zanzibar had removed oil and gas from the list of Union Matters. [425]

After repeated swear-words from Zanzibar, some MPs wondered why the government was quiet. An MP from Nzega, Lucas Lumambo Selelii, took upon the government to explain what its stand on the matter was. The explanation given by the prime minister, Mizengo Pinda, only added fire into the works. He warned that statements from Zanzibar could endanger the Union and that Zanzibaris should consider the consequences they would suffer, if the Union was to break up.

Hamad Rashid Mohamed, the leader of the opposition in the Union Parliament, himself a Zanzibari, retorted that Zanzibar would not suffer more than Tanzania Mainland would.[426]

In recent years, Zanzibaris have shown a sort of solidarity and assertiveness that the sceptics have kept wondering about.

On 5 November, 2009, the bitter political rivals, President Amani Abeid Karume from CCM and Seif Shariff Hamad of the opposition CUF, met in camera and like the magicians, came out of their closed door meeting to announce that they had buried the hatchet and that henceforth, CUF will for the first time recognise Karume's presidency and that processes were underway to form a government of national unity.

Sceptics are watching with interest. This agreement comes after two previous attempts at reconciling the two yielded no results. These were brokered by the international community.

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[425] Union matters are normally discussed and agreed upon by both sides, so it is difficult to imagine how these could be added or removed without the other side knowing.

[426] See Faraja Julee and Patty Magubira "Pinda Warns Zanzibar" in *The Daily News*, 23 July, 2009 p. 1. Also see Kagaruki, E "What is wrong with Articles of Union that comprise Tanzania*" The Sunday Citizen,* 24 January 2010

What is more interesting is that the details of this meeting and or agreement are only known to the two, at least publicly. It is not clear whether the decision had the blessing of the party organs from which the two come.

However, what is known is that CUF, as if in its new found faith, wants to have a spell under their "President". Somehow, it is in the front vying for the change of the Zanzibar constitution to allow Karume to stay in power so as to "finalise the work of forming a unity government". They have even tabled a motion in the House of Representatives towards that intent.

This enthusiasm has raised some concern, particularly on the Mainland, and in my view, rightly so. The Zanzibaris argue that matters pertaining to Zanzibar should be left to the Zanzibaris to solve. The Union Constitution does not have provision for a unity government and the electoral laws entail the "winner-take-all" *modus*. The party winning the election forms the government without incorporating any other party. Neither does the CCM constitution provide for such arrangements. Some CCM members in Zanzibar, who saw the exit of Karume as an opportunity for them to ascend to the presidency, are advancing this argument. Others are just sceptical and have warned the party to watch out.[427]

The Zanzibar question is a delicate issue, requiring a lot of wisdom to tackle it, otherwise there is obvious danger that the recent trends may lead up to the demise of the Union.

The Killing of Albinos

The spate of killings and maiming of people with albinism continued to cast a negative image on the country's human rights record in 2009. The killings started in 2007 when it was said that albino body parts contained metaphysical powers that would propel one to immediate wealth and political power. In the face of growing

[427] See: Shigongo, E "Beware, the cat is lying on its back" in *Uwazi Tabloid,* 20-27 January, 2010. at 6.

concern, locally and globally, the government tried several desperate ways to stem the killings without success. These included the cancellation of all licences issued to traditional healers, holding a national vote to name those involved or perpetrating the grisly rituals and sensitisation programmes.

While on a tour in the lake zone regions at the beginning of the year, prime minister Mizengo Pinda called upon the immediate killing of people found with albino body parts. He was later put to task by the members of the opposition in Parliament for advocating anarchy and violating the constitution which he swore to uphold. He later withdrew the statement amid tears before parliament.[428] Mob justice has no explicit place in a formal civilised society with due processes and democratic institutions. Nonetheless, in spite of the condemnation by opposition politicians, sections of the community, however, including religious leaders, seemed to support him. A Muslim Sheikh in Mwanza, Hamis Almasi, called upon the suspects to be shot in public!

In another move, on 23 January, 2009, the government announced the cancellation of all traditional healers' licences. Traditional healers are widely believed to be the catalysts behind the killings by asking their clients to bring them the parts which are ingredients in the potions traditional healers concoct to make people rich. Consulting and receiving medicine from traditional healers is widespread in the country due to a number of factors. Most people in rural areas thrive on the services of these healers, partly because of their deep-rooted beliefs grown over a period of time, but also because of the lack of drugs in public health facilities or due to poverty. The announcement to revoke the licences did not have any impact. At any rate, most of them ply their trade without licences.

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[428] In Tanzania, all persons are presumed innocent until proved guilty. Article 13(6) (b) of the constitution. Also see: Kulwa Karedia,"Pinda amwaga chozi Bungeni," *Tanzania Daima*, 30 January, 2009 p. 1.

In March, in yet another move, President Kikwete announced a countrywide exercise where a poll was to be held to name the albino killers. The exercise was carried out countrywide. The outcome of the exercise remains a secret of the government. On 4 May, 2009, the LHRC asked the government to release the findings of the vote. However, the government has kept silent. This is not without reason. The exercise was amenable to abuse, and if anybody was taken to court, that would have been a recipe for suits against the government for malicious prosecutions. The government, afraid of that, may have decided to keep silent over the findings.

In spite of all those efforts and attempts, the situation on the safety of albinos remains delicate. It is submitted that of all the options, educating people on the fallacy of using albino body parts to get wealth is the best option.

The Burundian Refugees

With a refugee population of about 36,000 people, Tanzania announced that it was closing the refugee camps in Kigoma and Ngara and that the refugees in the camps had to prepare to return to their respective countries of origin.

The international human rights watchdog, HRW, expressed scepticism as to the *modus* of carrying out the exercise and asked the government to prevent the forcible return.[429]

Although the Tanzania government assured the UNHCR of the safe return, the agency negotiated for extension because it believed there were no adequate arrangements to make the refugees exercise the options available to them under international law. These include the right to seek integration in the host country. At that time, the situation in Burundi was not yet stable. Therefore, the refugees were weary about security and the failure to get land to settle on.

Tanzania has been host to a number of refugees from both Rwanda and Burundi since the early 1970s. With the passage of

[429] See: http://www.hrw.org accessed on 8 January, 2010.

time, however, some of them have been associated with violent crimes within and outside their camps, thus causing panic. The wish that they returned could be understood within that context since Tanzania has got its own problems with the increased incidents of crime.

The Roman Catholic Manifesto

In July 2009, the Roman Catholic Church, through its association of professionals, issued what it called its "Election Manifesto Towards the General Elections of 2010".

This document was released with the full backing of the Council of Roman Catholic Bishops. It was critical of the current leadership and contains proposals for the kind of leaders that are suited to lead. It warns the people "not to repeat the mistakes" of 2005, where the leaders who were elected, have all, but abandoned their constituents. This was blamed on the lack of awareness on the part of the voters. The Catholic Church adopted the manifesto and went ahead to draw a year-long sensitisation programme on the document.

This was viewed as a document with a political agenda. The church was asked to get off politics, as that was outside its domain. A ruling party veteran, Kingunge Ngombale Mwiru, led the salvo against the church, arguing that the document posed the danger of "religionism" that would break the country. He asked the church to withdraw it and steer out of politics.[430]

The Muslims saw this as a mechanism that the Catholic Church had been using to "intimidate" the government and as a result of which, Catholics were favoured in the government as a way of appeasing them. The Catholic Church has a huge following and the ruling party, CCM, is said to have been scared that the manifesto would raise their awareness that could work against it in the elections.

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[430] Two MPs on a CCM ticket, Hon. Gertrude Lwakatare and Martha Mlata, are church ministers. It is not clear how these two separate their religious and political roles.

The Catholic Church ignored both concerns. It denied it aimed at any religious group, but it was meant for all Tanzanians.[431] The manifesto and the sensitisation programme still continue.

A look at the contents of the manifesto will demonstrate that the document is a very positive contribution to educating the prospective voters on what to have in mind before casting their votes. The lack of this awareness has been blamed for bringing forth elected leaders who do not measure up to the expectations of their electorates. The more the people are empowered in this area, the more likely that better leaders are elected. It is submitted that this education is urgently needed and the more people get involved, the better the political climate will become. On its part, the government would rather have an electorate that is not adequately equipped in terms of voter education. These can be easily manipulated and their choice of leaders, as seen earlier, more often is influenced in favour of the ruling party.

The Predictions of Sheikh Yahya Hussein

With the elections in 2010 and possibly the widening of the democratic playing field, a lot of things were bound to surface. As the author was finalising the preparations of this study on 23 December, 2009, a veteran astrologer, Sheikh Yahya Hussein, called a press conference where he made his predictions for 2010. Concerning the general elections, his "stars" showed that President Kikwete would win the elections and whoever opposed him, would die immediately.

A CCM member, John Magale Shibuda, an MP for Maswa, had already made his intentions known to pick up the forms and contest against the president. He blamed the astrologer for being "used to threaten" him and thus to infringe his constitutional right, which is also guaranteed in the CCM constitution. The reactions

[431] Bishop Methodius Kilaini and Rev. Fr. Anthony Makunde of the Roman Catholic Church in *Tanzania Daima*, 21 July, 2009 p. 1

were many, most dismissing the predictions as superstitious and of no effect. [432]

When the State House was non-committal,[433] events took a turn. The State House was blamed for appearing to support the predictions. One paper alleged that the prediction was part of the scheme to actually intimidate the section of the CCM members who were planning to oppose the incumbent.[434]

If the heat generated by this kind of action by a fortune-teller was anything to go by, we were poised for very interesting times and certain constitutional rights would be affected in some ways.

The 2010 General Elections

This sub-heading is not oblivious of the fact that the discourse is confined to 2009. However, some matters of importance relating to the 2010 elections made it imperative to have a cursory glance at the electoral laws, as we geared up to that event. Preparations for a general election take long, and indeed, it would be shown that preparations were in top gear in view of the pending elections.

Having concluded the local government elections in 2009, the country prepared for the general elections in 2010. This time, the elections were to be conducted under the National Elections Act and supervised by NEC, appointed by the president.

Whether the elections and the election procedures are free and fair depends on how they are administered. Under both the constitution and the Act setting up NEC, NEC is supposed to be independent and to conduct its affairs in a transparent and professional manner. It is not supposed to receive orders or directives from anybody or

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[432] Ray Naluyaga, "Predictions by Sheikh Yahya a hoax", *The Citizen*, 30 December 2009. p.1.

[433] The State House director of communications, Salva Rweyemamu when asked to comment, he said the Sheikh's views are his right and that they must be respected. For some reason, this was seen as if to support the prediction.

[434] *Mwanahalisi Newspaper*, Issue No169, 30 December, 2009- 5 January, 2010. p.2.

any government organ.[435] However, NEC is not as independent as it is said to be. NEC is directly answerable to the president, who is its appointing authority.[436]

NEC must seek the approval of the president before delineating any new electoral constituency. The opposition claims that where there was doubt that an incumbent MP from CCM may not make it back to parliament due to stiff opposition from another party member, NEC would split the constituency so as to retain both. Most new constituencies are said to have been created under these considerations, rather than on the need to have a more effective representation, as it is always said by NEC.

Under the current arrangement in Tanzania, courtesy to the ingeniousness of the late Mwalimu Nyerere, the president of the country has also been the chairman of the ruling CCM, which also takes part in the elections. It cannot be rationally argued that under these arrangements, the political playing field would be levelled. The opposition has sought, for a long time, to have this situation revisited, at least on the political platform. They have been arguing that under these arrangements, where the president appoints the NEC, the commission cannot be independent, and by extension, the elections cannot be free and fair. The protests have gone unheeded.

Eventually, the bickering having yielded no results, an opposition party, NCCR-Mageuzi on 17 December, 2009 went to court to lodge a constitutional petition to challenge the electoral laws and to seek a declaration that the government establishes an independent electoral commission so as to give meaning to the provisions of Articles 3(1), 21(1) and (2) and 74(1) and (7) of the constitution.[437]

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[435] Article 74(11).

[436] Article 75(2).

[437] Article 74(1) and (2) relates to the creation of the Electoral Commission and the appointment of its commissioners.

Article 3(1) declares Tanzania to be a democratic country pursuing multi-party democracy.

Article 21(1) provides for the right to participate in the electoral processes, to vote and to be voted into political office.

Article 21(2) provides for the right and freedom to an individual citizen to participate fully in decisions on matters affecting him personally or his life or the country generally.

According to the petition, NEC, which is answerable to the president and which completely depends on the executive for its funding, is not independent, as it does not enjoy the confidence of all stakeholders, notably the opposition parties.

The petitioners also challenged the Local Government Elections Act, which provides for the appointment of the returning officers by the director of elections, a public servant and who as such, is loyal to the ruling party, CCM. The petitioners further alleged that in the current situation in which the conduct and co-ordination of the local government elections has been placed under the jurisdiction of the minister responsible for local government and regional administration, it is "unconstitutional, unjust and very inconsistent with the spirit of Articles 3(1) and 21(1) and (2) of the constitution".

Evidence is abound that the provisions that were complained about have greatly assisted, and have been manipulated by the electoral machinery to turn in winners who have not always been the choice of the electorate. CCM has been able to win in both local and general elections largely due to these lapses in the electoral laws. It has in recent days won in the bye-elections in Kiteto (Manyara region), Mbeya Rural (Mbeya), Busanda (Mwanza) and Biharamulo (Kagera). According to media reports, these victories were made possible largely due to the way the elections are administered, although it must be said that the complaints apart, the opposition

camp suffers from its own internal management problems and lack of funds and organisational capacity, compared to CCM.

The petition by NCCR Mageuzi alluded to herein is yet another challenge that could lead to greater strides in the struggle for multi-party democracy. Therefore, the call for this petition to be determined at the earliest possible time, it is hoped, does not amount to contempt of court!

Conclusion

In this study, although there were no actual amendments of the constitution, there were quite some activities with impact on constitutionalism.

The enforceability of the recommendations of the CHRAGG was made certain. While the High Court had dismissed the recommendations as incapable of being enforced, the Court of Appeal set aside the judgement and made it clear that the High Court has jurisdiction to enforce the recommendations. However, there is still a manifest disregard of these recommendations by the executive, thus rendering its determinations ineffective. The author challenges the government to honour the recommendations of the commission. That way, the commission will not be seen as a public relations ploy of the government, a semblance of a commitment to human rights, but when in reality, the opposite is true. The author suggests further that the commission be made stronger and more independent.

There were elections and by-elections in 2009. The elections were characterised by a low voter turn up in some areas, to embarrassing levels. The victors really had nothing much to celebrate about. On the one hand, voter education needs to be stepped up. Yet on the other, I have attempted to show that the apparent apathy about the past elections was not so much about ignorance, as it was due to frustrations at the way the said elections were administered. There

were several names removed from the contest on flimsy grounds and many complaints by the opposition parties went unheard.[438]

A country that professes to observe the rule-of-law should make all effort to have an independent judiciary, a judiciary which is free to interpret the laws of the land without hind-thoughts. Although there are provisions in the constitution which offer these possibilities, they are not utilised. The judiciary should come out boldly and dispense justice without fear. The expeditious disposal of the constitutional matters pending in court would be such a move. The author urges the judiciary to determine these matters with dispatch. The petitions are not a pass-time affair. The country must get out of the constitutional limbo!

The media is another crucial component in a democracy, and as such, as much as possible, there must be an enabling environment for the media to operate without being under constant threat of legal repercussions. The author is of the view that freedom of the press is not synonymous with proliferation of newspapers, magazines, radio and television stations. The proliferation of newspapers that are expected to write what government wants to hear and read connotes false freedom. The government should, without haste, implement the recommendations of the Nyalali Commission by amending the Newspaper Act by removing the unconstitutional provisions therein. The media is not a reserve of the government. All stakeholders need to be involved in the laws that affect them. The Media Bill, about which the government has for four years been dilly-dallying, should now be tabled in parliament. I believe there are no magicians within government who would know what is best for the media without involving a public discussion.

[438] A candidate in the Mbeya Rural bye-elections was removed because he had his forms signed by an advocate instead of a magistrate. Contestants for councillorship were removed because they were sponsored by their parties at district and regional levels. The law requires them to be sponsored by their village party branches.

The electoral laws at the local government level should be looked into so as to remove the obvious circumstances inclining towards the ruling CCM. The playing field, in my view, needs to be more levelled. The introduction of new and cumbersome procedures at short notices before the elections is a deliberate scheme at goal-shifting in the electoral processes. This has denied the opposition parties ample time to make adequate preparations.

Unless there is a thorough education on the right to life of the albinos and about the fallacy of the alleged potency of their body parts, the problem of albino killings will stay on for long, particularly in a society, where now the wealthy are hallowed! The conviction of albino killers in Shinyanga is a positive move, but I insist that those arrested should be prosecuted according to the law. Calls for summary justice to the suspects do not only offend the constitution, but they also violate international human rights instruments to which Tanzania is a party.

The question of Zanzibar needs to be resolved since both sides of the Union seem to agree that the break-up will not benefit any of the two sides. Both presidents of the United Republic and that of Zanzibar upon taking office, swear to uphold the Union. This oath, in my view, is binding on them and they should spearhead the efforts to seek a permanent solution. Bickering and swear-words are a fetter to a healthy Union.

Witch doctors and other fortune tellers should be greatly discouraged. Tricks and devices like the predictions of Sheikh Yahya Hussein, which may result in infringing on people's constitutional rights, especially if they get intimidated and thereby refrain from taking a course of action they would have otherwise taken, must be vigorously reprimanded and be stopped at once. Being a Sheikh, and therefore an Islamic religious leader, Sheikh Yahya Hussein should be knowing or believing that the secrets about a person's life and or death are a preserve of God.

NEC is answerable to the president, who is also the chairman of one of the contending political parties. This has made it difficult for the commission to enjoy the confidence of all the parties. One of the parties, NCCR-Mageuzi, has since filed a petition seeking to upset this setup.

The government will not bring about these changes on its own. The opposition political parties should also consider working more than they have done, step up their organisational capacities and answer the question: "Why is it that we fail even when sometimes it appears that we are faring well?

May be a change of strategy is needed.

6

The Annual State of Constitutionalism in Uganda, 2009

*Yasin Olum**

Introduction

In 2009, there were several challenges in the state of constitutionalism in Uganda. Constitutionalism implies state-society relations, especially regarding the way individuals and groups exercise their liberty and rights, such as freedom of expression, association, equality and respect of the rule-of-law[439]. Constitutionalism can also be defined as "an arrangement by which power is organised within a state so that its exercise is accountable to a set of laws beyond the reproach of those who exercise these powers[440]. Furthermore, constitutionalism is about democracy and good governance through mechanisms like separation of powers and checks-and-balances in the way the three organs of government (Legislature, Judiciary and Executive) relate with one another. Ideally, therefore, government is expected to exercise power through established and written laws so

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[439] Asiimwe B. Godfrey and Muhozi Christopher (2005) "The State of Constitutional Development in Uganda for the Year 2005", Kampala, Kituo cha Katiba

[440] ibid.

that it does not unduly infringe on the rights of the citizens. It is this conceptual framework that will inform the way the state interfaced with society This will help in the analysis of constitutionalism in 2009.

The themes discussed have had both direct and indirect effect on constitutionalism in the country and these include: the relationship among the judiciary, executive and legislature; the media; the human rights situation; the civil society; the Electoral Commission (EC) and electoral reforms; corruption; national resource exploitation and allocation; and the central government-regional relations.

The Judiciary, Executive and the Legislature

The 1995 constitution of the Republic of Uganda (as amended)[441] provides for the existence of the judiciary, executive and legislature. Specifically, Article 77 (1) provides that "there shall be a parliament of Uganda". Its functions are spelt out as follows:

79 (1) "Subject to this constitution, parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda"; 79 (2) "Except as provided in this constitution, no person or body, other than parliament, shall have power to make provisions having the force of law in Uganda except under authority conferred by an Act of parliament"; and 79 (3) "Parliament shall protect this constitution and promote the democratic governance of Uganda".

The key legislation regarding the executive, which is relevant to this report, is Article 99 (1). It states: "The executive authority of Uganda is vested in the president and shall be exercised in accordance with this constitution and the laws of Uganda". The executive authority works through the Cabinet and other organs of the state. Lastly, with regard to the judiciary, Article 126 (1) states that "Judicial power is derived from the people and shall be exercised by the courts

[441] Republic of Uganda (2006) constitution of the Republic of Uganda 1995 (Kampala: Uganda Law Review Commission), February.

established under this constitution in the name of the people and in conformity with the law and values, norms and aspirations of the people". In 126 (2), it is provided that "In adjudicating cases, both of a civil and criminal nature, the courts shall, subject to the law, apply the following principles: (a) justice shall be done to all irrespective of their social or economic issues; (b) justice shall not be delayed; (c) adequate compensation shall be awarded to victims of wrongs; (d) reconciliation between parties shall be promoted; and (e) substantive justice shall be administered without undue regard to technicalities. It is on the basis of these key constitutional provisions that the three organs of government have been analysed, starting with the judiciary, followed by the executive and then the legislature.

Structurally, one of the principles that determine constitutionalism is the independence of the judiciary and the right of redress for injustices perpetuated on innocent citizens by overzealous state operatives. The independence of the judiciary is achieved through the fundamental principles of separation of powers, whereby the amount of power that any individual or group has, is checked so that it is not abused. In 2009, several events took place regarding the behaviour of the judiciary, the executive and the legislature. These events had and continue to have significant effect on the state of constitutionalism in the country.

In the judiciary, the court ruling on the death penalty stood out in 2009 as one of the key issues. In a judgment delivered by the Supreme Court on 21 January, 2009, in *Attorney General v. Susan Kigula and 417 Ors*,[442] a seven-member quorum of Judges ruled that the death penalty was legal. This ruling aimed at challenging the decision by the constitutional court which had upheld that the execution of the death sentence by hanging was cruel, inhuman, degrading and, thereby, unconstitutional. The ruling in favour of upholding the death sentence has been upheld in spite of protestations from the

[442] Supreme Court No.3 of 2006

legal fraternity and civil the society. It would have been prudent that all avenues of natural justice be explored and respected before any person is sentenced to death.

It should also be observed that the executive (i.e., the president) has 'closely monitored' how the judiciary has been doing its work. Where the ruling by the judiciary has gone against the government of Uganda (GoU), the all-powerful executive has on a number of occasions arm-twisted the judiciary by publicly attacking it, thus lowering the integrity and morale of its officers. The cases that can be cited regarding the acrimonious relationship between the executive and the judiciary include the storming of the High Court premises in Kampala on 16 November, 2005 by some armed people dressed in black T-shirts and army uniform trousers, later to be termed "black mambas" who re-arrested Dr. Kiiza Besigye and other Peoples Redemption Army (PRA) rebel suspects after they had been released on bail. Second, were the president's remarks on judges that give court orders for eviction of people from their land (whether rightly given or not). In other words, the relationship between the judiciary and the executive remained lukewarm in 2009 mainly because the independence of the judiciary was sometimes interfered with by the executive. This interference was contrary to Article 128(1) of the 1995 constitution which provides that "… the courts are supposed to be independent and not subject to the control or direction of any person or authority".

In spite of its progressive trends regarding the laws it has passed (although many bills are yet to be handled), the legislature was overshadowed by the executive. Because the National Resistance Movement (NRM) has the majority in parliament, their allegiance to the party has over-ridden their national interests. The executive sometimes influences parliament to pass certain legislations that are sometimes perceived to be archaic by some sections of society. Indeed, some of the laws (to be discussed soon) have been detrimental

to maintaining adequate balance between the executive and the legislature, thus interfering with the culture of constitutionalism. Yet historically, whenever there is a clash between the executive and the legislature, the first casualty is the latter. To avert the situation, where the executive dominates the legislature, all political forces in the country must get committed to the culture of constitutionalism.

In 2009, several bills were either tabled, or passed by parliament. Some of these produced serious constitutional repercussions. For example, the Land Bill has a direct resonance to constitutionalism. Other contentious bills that are yet to be passed or have been passed, and were of interest in 2009 include, the Regional Government Tier, the Bill to takeover Kampala City by the central government, and the Interception of Communication Bill (2007). The creation of new districts is the other contentious issue that engaged parliament in 2009.

Buganda Kingdom raised its disapproval of the Land Bill. In fact, during consultations on the Bill, Buganda Kingdom strongly opposed it. To Buganda Kingdom, the Land Bill should have been rejected because it sought to turn squatters into land owners. The fracas that ensued between the central government and Buganda Kingdom led to the arrest of three kingdom ministers on charges of decampaigning the Bill, thus undermining the authority of the government. They were freed weeks later after detention in separate secret places around the country. In addition, Buganda objected to hold talks with the government over the Land Bill, until its demand for a federal system of government was made part of the agenda, and the issue of the Bill giving land rights to squatters and taking it away from the rightful owners, and the return of the 9000 sq. miles of land taken away by the British colonialists, resulting from the 1900 Agreement, dealt with. Buganda made this stand after President Museveni had earlier, in a televised talk-show on Wavah Broadcasting Service (WBS) TV, asserted that he would not discuss

the Federal political system with Buganda. It has to be realised that the Land Bill is part of the wider struggle between Buganda and the central government over political power. The often neglected land question which, if not well handled, will have grave consequences for constitutionalism in Uganda. In addition, the opposition to the Land Bill came from politicians from the north (because of the communal nature of land ownership in north Uganda) and the business community because of its economic implications.

The Bill to take over Kampala city by the central government, tabled in June 2009 by the local government minister, mainly aimed at expanding Kampala beyond its current gazetted boundaries to include Entebbe, Wakiso and Mukono. The Bill also aims at making the position of mayor ceremonial; he or she will be elected by Kampala Capital City Authority from among the directly elected councillors by a simple majority. However, this Bill has now hit a constitutional snag. Strong criticisms have been levelled by the cabinet, the Democratic Party (DP), and Buganda Kingdom officials against the expansion of Kampala. The first criticism from the cabinet was on the constitutionality of the expansion of Kampala. Quoting Article 178 of the 1995 constitution, then prime minister, Professor Apollo Robin Nsibambi, said:

> The intended attempt to expand Kampala beyond the boundaries provided in the current gazetted notices is likely to cause us constitutional problems e.g. if one tries to include Entebbe or any part of Mpigi or Wakiso, the act would be an attempt to change the boundaries of the constitutional Buganda region whose boundaries were determined by Article 178(3).[443]

On his part, the then deputy attorney general, Fred Ruhindi, wrote to President Museveni on 2 July, 2009 seeking permission to amend

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[443] Mwanguhya Mpagi Charles and Ssenkabirwa Al-Mahdi "Cabinet Stuck Over Kampala Expansion: Nsibambi Writes to Local Government Minister Advising Review of takeover", in *Daily Monitor* 13th July 2009, pp. 1-2.

the Bill to exclude parts of Wakiso from the boundaries of Kampala Capital City:[444]

> It has occurred to me after wide consultations that the extension of the boundaries of Kampala Capital City to some parts of Wakiso district would require the amendment of the constitution … Under Article 178 of the constitution, the districts of Buganda listed in the First Schedule of the constitution, are deemed to have agreed to form the regional government of Buganda. Kampala Capital City was not deemed to be part of Buganda region. The extension of the boundaries of Kampala Capital City to any of the districts of Buganda region would therefore be unconstitutional.

The second criticism against the expansion of Kampala came from DP. Speaking on behalf of DP as its legal adviser and shadow cabinet attorney general, Erias Lukwago, said: "The entire process is unconstitutional and we advise them to withdraw the entire Bill because an amendment cannot in any way cure an illegality"[445]. DP, therefore, wanted a referendum to be held before the Bill was enacted into law. As DP planned to hold a rally against the Bill in Ndeeba, a suburb in Kampala city, the police fought running battles with DP supporters, fired teargas and arrested three DP officials (Sam Lubega, Church Ambrose Bukenya, and James Ssekidde).

The third came from Kabaka Ronald Mutebi. He instructed his officials at Mengo to devise strategies of fighting the proposed expansion of Kampala city boundaries.[446] He called for the empowerment of the Central Civic Education Committee (CCEC), which was setup by Buganda Kingdom, to sensitise people about the dangers the then Bill posed. The creation of the committee was a clear indicator of the seriousness with which the Kabaka resisted the Bill as it was. Hence, this Bill was likely to continue to raise serious

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[444] ibid., p. 4.

[445] ibid., p. 2.

[446] Mwanje Robert "Kabaka Meets Cabinet Ahead of Lukiiko", *Daily Monitor* 20 July, 2009, p. 3.

constitutional issues as the debate went on. In fact, if the Bill is not handled well by all parties involved, it may lead to constitutional and political crises in the country because Buganda would view it as an assault on its territoriality and authority. The Bill has been a catalyst of the already precarious relationship between Buganda Kingdom and the central government.

The creation of new districts is the other delicate issue parliament dealt with in 2009. This 'districtisation' or the creation of new and small districts from existing ones, has caused serious ethnic tensions between groups that had lived together in peace, harmony and have inter-married for decades. Article 5(2) of the 1995 constitution stipulates that subject to Article 178 of this constitution, Uganda shall consist of (c) "the districts of Uganda, as specified in the First Schedule to this Constitution, and other districts as may be established in accordance with this constitution or any other law". The original districts listed in the constitution are thirty-nine (39). These 39 'mother' districts enjoy constitutional entrenchment and protection. Since the coming into force of the 1995 constitution on 8 October, 1995, over 41 new districts have been created. The creation of new districts, which violates Article 178 of the 1995 constitution, has taken on an ethnic dimension, thereby creating ethnic hatred among communities that had co-existed peacefully under the original districts. The creation of new districts out of the original 39 is fundamentally changing the character of the country. Unless Article 5(2) is amended first, the continued altering of the original 39 districts is manifestly unconstitutional.

The argument advanced by some legislators from Buganda against the creation of new districts is that Buganda region is getting crumbs of the national cake by the number of its districts not being increased like is the case with other regions given that each district gets sh10b. Mengo, however, opposes the creation of new districts on the following grounds: they are unviable entities because they

create costly layers of bureaucracy and are used for political purposes by the incumbent NRM regime to weaken Buganda; and, when they are created, they become more vulnerable and dependant on the government, leading to political interference.

To resolve the bickering over the creation of new districts, President Museveni advised the leaders embroiled in the wrangles to look for a middle ground. Using the case of leaders from Ntoroko, who were conflicting over the proposed districts, the president said: "Ntoroko people, do not bring noise on this issue [headquarters]. Between Karugutu and Rwebisengo, look for a middle ground." President Museveni said this after the Ntoroko leaders had earlier submitted a petition to then speaker of parliament, Edward Ssekandi, to intervene in the misunderstandings between them and their counterparts in Rwebisengo. They said: "We the people of Ntoroko county hereby submit to you our appeal to address our outstanding problems which may result in disaster in our county". Other districts that have seen similar conflicts include: Ibanda and Kiruhura that fought over the location of the headquarters until the latter was granted a district status; people in Tororo who were fighting over the creation of Mukuju and Kisoko districts; the Balaalo in Teso were driven out in 2009 as the Bagisu tussled it out with the Bagwere who were also quarreling with the Banyole; and in West Nile, there was tension between the people of Terego and Maracha over the creation of Nyadri district. An appeal was lodged against the local government minister over the creation of Nyandri district. The Court of Appeal nullified the name of the district.

In Bunyoro, however, the president offered a different suggestion to resolve the conflict over political control of Masindi, Hoima and Kibaale districts. He suggested the idea of 'ring-fencing' of political offices in favour of the indigenous Banyoro against the immigrant groups, especially from Kigezi, known as the 'bafuruki'. This suggestion has generated a lot of controversy over the

constitutionality of the president's assertions, not only in Bunyoro where they have fuelled uncalled-for tension, but also in the country at large. Consequently, Uganda continues to be divided as some groups emphasise their ethnicity more rather than nationality, dividing the country further. So, the government strongly believes that the solution to such ethnic tensions is the passage of the current Regional Government Bill, which is before parliament. Buganda has strongly opposed this Bill arguing in favour of *federo (*or federalism). Some other areas such as Bunyoro-Kitara Kingdom, have opposed the Regional Tier Bill as well.

Another bill that generated controversy in 2009 is the Interception of Communication Bill (2007) originally introduced in 2007 to compliment the Anti-Terrorism Act (2003). This Bill does the following: gives powers to the security minister to listen in on an individual's telephone conversation; control an established communication monitoring centre (Clause 3 of the Bill); allow the government of Uganda to scrutinise the financial accounts of individuals in commercial banks; and intercept and monitor all postal mail, emails, letters and money transfers. Several stakeholders and critics have challenged its intent and legality. Parliamentarians, especially those in the opposition, argued, among other reasons, that the security minister, a member of the ruling NRM party, would have too much powers which he could easily abuse to suppress their political rights and instill fear among Ugandans. The parliametarians also pointed out that in other countries that have similar laws and have suffered terrorist attacks, the courts, and not the security minister, have been mandated to authorise wire-tapings and related forms of electronic surveillance. In fact, Articles 27(2), 29, 41, 20(2) of the 1995 constitution, which is the supreme law of the land, guarantee the right to privacy, freedom of expression, freedom of association, freedom of assembly, among other freedoms, that are inherent fundamental rights. Hence, if this Bill is passed

in the form the security minister introduced it then; it would take away the powers of the judiciary and place them in his hands. The consequence of the Bill in its form then, to individuals and groups, who are not in the 'good books' or not toeing the 'correct political line' of the NRM regime, could be disastrous.

The last Bill that has a human rights implication and which generated a lot of controversy both within and outside Uganda's borders is the Anti-Homosexuality Bill 2009 commonly known as the *Bahati* Bill. It was named after the mover of the private member's Bill, David Bahati, the MP for Ndorwa West. The Bill was introduced in parliament on 14 October, 2009. Whereas homosexuality is illegal in Uganda, the Bill is so stringent that committing a homosexuality offence causes the offender to be liable to life imprisonment and the death penalty for aggravated homosexuality (i.e., sex with a minor or disabled person, where the offender is HIV-positive, a parent or person with authority over the victim, or where drugs are used to overpower the victim). Other sanctions under the proposed Bill include: a prison sentence of up to seven years for the promotion of homosexuality; and imprisonment for up to three years for anybody failing to report the offence within 24 hours.

Those in support of the Bill, including religious leaders under their umbrella organisation, the Uganda Joint Christian Council (UJCC) oppose capital punishment, saying it should be done away with and have called homosexuality "… an evil and foreign practice because it is a virus of the crazy white people who want to smuggle it in the country with the support of local acolytes". Furthermore, they observe that "… homosexuality is against the laws of nature and various religious beliefs".[447] However, those for it argue from a human rights point of view, saying that an individual has the right to freely practice what he or she believes in. They argue that the right of two consenting adults should not be trampled upon by anyone or

[447] Kalinaki Daniel "Bahati's Bill Should be Returned to Sender", *Daily Monitor*, 19 November, 2009, p. 12.

the state which should not play the role of God. They reason that as long as one's actions do not infringe the rights of others, it is no one's business to mind what they do in the privacy of their bedrooms.

So far, the Bill has lost some heat with the intervention of the international community and more so Barack Obama, the US president. The intervention by Barack Obama saw President Museveni change his mind over the Bill which he had strongly backed in its initial stages. The online newspaper *DC Agenda* of December, 2009, notes that on 24 October, 2009, President Museveni assured the US State Department through the Assistant secretary of state for African Affairs, Johnnie Carson, that he would block the Bill which had rattled foreign governments and human rights activists. The Anti-Homosexuality Bill became so controversial that on 29 October, 2009, Bahati had to inform the internal affairs minister, Matia Kasaija, through the prime minister that he had been receiving calls over threats to his life.[448] These threats suggested that the Bill could be reviewed or even shelved.

The Media and the Right to Freedom of Expression

It has long been established that the media is central in establishing constitutional order in any country. The media plays the crucial role of broadcasting the voices of the people on the way the state is governing the polity. Indeed, the former US ambassador to Uganda, Steven Browning, once stated: "A democracy is only as strong as its press. A press that is restricted, constrained and intimidated, can only weaken the government".[449]

[448] Ndawula Stanley and Mulindwa Henry "Incredible: MP Bahati Anti-Sodomy War Takes Strange Twist: His Missing Brother Offered Shs.300m to Brand Him Gay", *Red Pepper*, 28 December, 2009, p. 3. And, Tugume John and Ladu Ismail "MP in Fear as Cousin Vanishes: My Life in Danger Over Gays Bill – Legislator", *Daily Monitor*, 25 December, 2009, pp. 1-2.

[449] Uganda Governance Trends Report (2009) Progress, Stagnation or Regression: Discerning Governance Trends in Uganda (2004-2008) (Kampala NGO Forum), February, 2009.

Although the media has continued to disseminate information of national importance to the citizenry, it has constantly faced the wrath of some state functionaries. The Uganda Broadcasting Council (UBC) and the Uganda police Force (UPF) have been ranked as major threats to the media and the right to freedom of expression (Human Rights Network for Journalists-Uganda 2009). For instance, two Buganda Kingdom-owned radio stations, namely; 88.8FM and 89. 2FM in 2009 were closed on allegations of violation of broadcasting laws. The Central Broadcasting Service (CBS) was switched off air on 10 September followed by Ssuubi FM Radio Two, also known as Akaboozi Ku Bbiri, and the Catholic Church-owned Radio Sapientia. On closing the stations, the government accused them of inciting violence. Although the other radio stations with similar accusations were re-opened, CBS remained closed. Government setup the following team to negotiate with Mengo over the re-opening of CBS; Aggrey Awori (information, communication and technology minister) was the head, and the attorney General, Geraldine Bitamazire (education minister), Kabakumba Matsiko (information minister), Rukia Chekamondo (privatisation minister), and Sulaiman Madada (minister for the elderly), as members. The government set certain conditions before the station could be reopened: Buganda to apologise to government for violating the broadcasting rules; and the court case CBS staff lodged against the government to be withdrawn.[450]

As the issue of CBS remained unresolved, the kingdom and some businessmen started two Luganda newspapers *Gwanga* and *Ddobozi*, the former belongs to the kingdom and the latter to four businessmen with Buganda leanings.

Another issue regarding the media and freedom of expression in 2009 is the fact that eighteen journalists were sacked under duress

[450] See "CBS must apologise", The Observer, 30 December, 2009.

from practicing their profession[451] and some opposition leaders were denied access to some local radio stations to reach out to the electorate. For example, in November 2009, Dr. Kiiza Besigye, forum for Democratic Change (FDC) president was blocked from appearing on Nenah FM in Karamoja, by the Resident District Commissioner (RDC).[452] Such events forced some opposition parties supporters to use violence to participate in the political process.

The repression of the media and the restrictive space for political participation will most likely result in the use of unorthodox means to reach out to the public which will, no doubt, be a recipe for constitutional disorder.

The situation degenerated further with the establishment of the media offences department within the UPF. This department is meant to strengthen the government's aggressive arm towards the media by entrenching the coercive and adherent organ (Media Offences Department) to various levels in the country so as to monitor and bring tramped-up charges against critical media houses, journalists and opposition politicians. In fact, since its inception and the time of writing, more than eight journalists had been victimised and harassed by the police.[453] Also, twenty other journalists had been arraigned before the courts of law and charged with cases ranging from sedition, defamation, treason to sectarianism.

As a deliberate attempt to tighten its grip on the media, the government embarked on enacting stringent laws such as: the Interception of Communications Bill, 2007, mentioned earlier,

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[451] Human Rights Network for Journalists-Uganda (2009) Press Freedom Index 2009 Kampala. Also accessed on http://www.hrnjuganda.org/freedom_Index.htm#Fired%20under%20Duress

[452] Gerald Bareebe and David Mafabi, "Govt official cancels Besigye's radio show", *Monitor*, 17 November, 2009. See also Moses Mugalu, "Karamoja: Museveni Sabotaging Besigye Campaigns, says FDC", *The Observer*, 19 November, 2009.

[453] Human Rights Network for Journalists-Uganda (2009) Press Freedom Index 2009 Kampala.

meant, among other reasons, to compel journalists or media houses to reveal their sources of information. The government also proposed the extension of the pre-detention trial period from 48 hours to 90 days. The consequence of this law is that 'anti-government' journalists will find themselves languishing in detention centres for three months before being arraigned before the courts of law. Indeed, in 2009, sedition and criminal defamation were commonly used to criminalise journalists who were going about their daily professional work. For instance, in 2009, there were 14 cases on sedition and criminal defamation, five on promoting sectarianism, two cases on forgery and uttering false documents, and one case was on treason. In all, over 35 journalists were harassed and intimidated while on their professional duties in 2009.

These are obviously big figures that bespeak of suppression of press freedom and the journalism. Consequently, all media incidents that occurred in 2009 have led to self-censorship amongst the media fraternity and the general public. The incidents have also adversely affected radio and television programming as well as the print media in terms of the content published. Indeed, the fact that the electronic media has decided to engage more in entertainment clearly demonstrates that information on current affairs is no longer viewed as a priority because of fear of state interference and persecution. Consequently, the power of the media to hold government officials accountable has been undermined, entrenching corruption and dictatorial tendencies.

Lastly, the infringement on the freedom of expression took effect when UBC deprived Ugandans of their right to freedom of expression when the *Bimeeza* (open air dibates) programmes were banned. The Bimeeza was a local initiative aimed at creating a forum for enhancing public participation in the governance process and holding leaders able. It was the people's parliament. All these tendencies of reducing public space affected the political and constitutional order in 2009

and continued to infringe on the right to freedom of expression which is an essential tenet to a democratic society. All these negative tendencies by state functionaries would have been better dealt with if the following were addressed:[454] passing the Prohibition and Prevention of Torture Bill. It would hold individual perpetrators to account for the atrocities or abuses they have committed; the state takes the necessary measures to halt and protect citizens (including journalists) who hold divergent views from its own against those who engage in intimidation and harassment; government establishes one National Media Commission which is primarily constituted by professionals other than state appointees; the state repealed the libel and defamation laws to ensure that offences against journalists incur only civil penalties; and, all legislations governing the media and the press in the country conform with the provisions of Article 19 of the UDHR which provides that any law which is incompatible with Article 9 and 29 should be consistent with the Declaration.

Human Rights Situation

Although the government refutes the accusations regarding its human rights record, human rights abuses have not ended in Uganda. The HRW report of 8 April, 2009 titled "Open Secret: Illegal Detention and torture by the Joint Anti-terrorism Task Force in Uganda" accuses the Joint Anti-Terrorism Task (JATT) force located in Kololo, Kampala, which comprises the military, the police and intelligence organisations and operates under the command of the Chieftaincy of Military Intelligence (CMI) of extended illegal detentions (106 cases), torture (25 torture cases whereby three died), and other forms of maltreatment. By law, any citizen who breaks the law should to be detained in gazetted places. In Uganda, illegal detention and torture centres are called 'safe houses'.

In light of the abuses, HRW reported to the government, parliament and the media, but unfortunately, the military and

[454] ibid.

civilian leaders, who have the authority to address this problem, failed to curtail the abuses or to investigate and prosecute those responsible. The report recommends that the government should stop the illegal detentions, compensate its victims, and investigate and prosecute those responsible. In addition, the report also called on the US of America (USA) and UK, which supply Uganda with military aid in form of training, collaborate with the military and the police on counter-terrorism, national security and justice issues, to ensure that their aid is conditioned on respect for human rights. They also urged the government to grant detainees access to their family members, legal representation and medical attention.

The heinous cycle of ritual killings or human sacrifices is the other grave human rights issue that engulfed much of 2009.[455] The police and human rights organisations are nowhere near tackling this inhuman pandemic. According to the Anti-Human Sacrifice and Trafficking Taskforce unit or department in the police, there were 29 suspected ritual murders in 2009, 15 of which involved killing children in violation of Article 6(1) of the UN Convention on the Rights of the Child which states that children have a right to life. Besides the human sacrifices, 2009 also witnessed political killings. One classic case of political killings was on 17 December, 2009, when the Court of Appeal declared then Mayuge district chairman, Bakali Ikoba Tigawalana, guilty of murdering Fred Musiitwa Nume, the campaign manager of his political rival.[456] By the time of writing this report, Tigawalana was still on the run.

In total, 123 people were reported missing in 2009 and 90 of these were children and 33 adults. It is alleged that parts of human

[455] Lirri Evelyn "Uganda Grapples with Human Sacrifice", *Sunday Monitor* 30 January, 2010, pp. 10-11. And Ziribagwa Margaret "Human Sacrifice on the Increase: Highest Cases in Kampala, Wakiso", *Saturday Vision* 30 January, 2010, pp. 1-2.

[456] Anne Mugisha "Court History: He Disappeared After Court Guilty", *Saturday Vision* 30 January, 2010, pp. 14-15.

bodies, especially blood, hair, head, breasts, tongues and genitals are mixed with herbs for purposes of wealth creation, especially in urban areas where people are constantly looking for riches. The African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN), Uganda chapter believes poverty has forced some parents to sell their children to earn money. In terms of occurence of the despicable human sacrifice cases, many have happened in the central and western regions, with Kampala registering the highest number of four ritual murders in 2009, three in Jinja, two in Mukono and Mityana districts, and one in Mpigi, Kamuli, Kaliro, Fort Portal, Ntungamo, Bushenyi, Pader, Kabale, Kiboga, Gulu, Masaka, Nakasongola, Oyam, Apac, Kitgum, Ibanda, Soroti and Mbale districts. To curtail human sacrifice, the executive director of the Foundation for Human Rights Initiative (FHRI), Livingstone Ssewanyana, asserts that the public and the police should be sensitised about the dangers of human sacrifice.[457]

In terms of the achievements of the executive and the judiciary in 2009, records show that the number is quite small for various offences in the whole country for a whole year, 54 of the 125 suspects arrested were taken to court for engaging in various offences ranging from murder, abduction, death, and practicing witchcraft. However, the justice system is slow to handle such cases because the court process is too long, witnesses lose interest in the case, and sometimes there is difficulty in tracing witnesses. Because some of the punishments are lenient, the chief justice, Benjamin Odoki, asked the courts to pass tougher sentences for those involved in child abuse offences, including child sacrifice and human trafficking. Therefore, the motion by parliament moved by the Busongora MP, Christopher Kibazanga, to urge government to enact a law regulating the activities of traditional healers and herbalists, should be taken seriously.

[457] ibid., p. 15.

On the other hand, Karamoja sub-region is one of the areas that faced serious human rights and security problems in 2009. On 15 October, 2009, Francis Adamson Kiyonga, the Pokot constituency MP in Nakapiripirit district, wrote an opinion letter in which he strongly argued that the eight-year old disarmament programme which began in 2001 had betrayed leaders at all levels (parliament, district, sub-county, and village) in Karamoja because of its slow pace, and unfocused approach.[458] Kiyonga notes that the majority of the Karimojong co-operated in the disarmament programme, leading to the recovery of 15,000 guns. He further notes that because the government had not fully utilised the goodwill of the Karimojong, insecurity continued, leading to loss of lives and cattle. Kiyonga argues that the Karimojong attribute the persistence of this situation to some local leaders and government officials who have failed to listen to local voices on how to protect the population. They have instead favoured an approach that pursues their own personal interests. He adds that suspicion has grown among the local people towards some government officials who seem to have deliberately slowed down the disarmament process because they seem to gain from the insecurity, hence the 'protection' of known criminals who continue raiding cattle and plundering people's private properties without due protection from the army. Kiyonga also observes that the Karimojong are skeptical of the successes of the disarmament programme due to lack of a specific timeframe and budget to accomplish it. Consequently, he observes that communities have lost confidence in the ability of some of their local leaders to bring an end to the insecurity and human rights abuses.

The 2009 Uganda Human Rights Commission (UHRC) report notes that UHRC received a number of complaints in 2009 alleging

[458] Kiyonga Francis "Disarmament: Government has Betrayed Karamojong Leaders", "Opinion", 15 October, 2009 – this was a letter which Hon. Francis Kiyonga wrote to the president of Uganda complaining about the difficulties of the disarmament exercise.

human rights violations by the Uganda Peoples Defence Forces UPDF in Karamoja "due to their use of excessive force during cordon and search operations that resulted in injury or death of unarmed civilians."[459]

Due to the above trends, the human rights and security situation in Karamoja is likely to worsen because the Pokot and other ethnic groups in Karamoja, are threatening to re-arm and protect themselves against hardcore criminals, who are either living within the communities, or in UPDF protected areas.

The Civil Society

In the civil society sector, Uganda now boasts of over 7,000 NGOs that have mushroomed in a period of barely ten years. Because of their different objectives, governance-oriented CSOs have had a love-hate relationship with the National Resistance Movement NRM government. For quite some time, including 2009, some CSOs have vehemently condemned government for failing to practice constitutionalism and governance in accordance with the principles of the rule of law. The govenment has also criticised CSOs, development partners and the public, for doing less in the area of good governance. In this particular survey, three significant issues were of interest to the civil society sector, namely: the NGO Act, the minimum wage and the oil discovered in Bunyoro.

With regard to the NGO sector, it has to be noted that the operations of NGOs are being curtailed by the current legal and regulatory framework. The NGO Act (2006), the NGO Regulations (2008) and the draft NGO policy, are inconsistent and tend to restrict the rights of citizens to freely participate in the country's development process.[460] CSOs observe that section 2 (1) of the NGO Registration Act, which provides for mandatory registration

[459] Uganda Human Rights Commission Annual Report, 2009, p.68

[460] Republic of Uganda (2009) NGO Act, Regulations and Policy 2009 (Kampala: Ministry of Internal Affairs).

contravenes section 29 (1) (e) of the 1995 constitution which guarantees freedom of association. Consequently, CSOs through their umbrella organisation, the NGO Forum, through Petition No. 5 of 2009, sought a constitutional court interpretation of the new NGO Act.

With regard to the minimum wage, the Platform for Labour Action (PLA), an NGO, petitioned the constitutional court over the minimum wage (Constitutional Petition No. 20 of 2007). The petitioners wanted Court to pass judgment and rule in favour of increasing the minimum wage from, sh6,000 passed by parliament, of to sh200,000. The significance of increasing the minimum wage is that countries whose employees are underpaid and cannot meet their basic needs, are an insecure group of people and, thus, can become a source of insecurity because they can be easily influenced to engage in illegal acts.

Electoral Commission and Electoral Reform

Electoral malpractices such as rigging, intimidation, violence, ballot stuffing, and bribery, continue to interfere with Uganda's democratisation process. In spite of internal weaknesses between and among the opposition parties, four opposition parties FDC, Uganda Peoples Congress (UPC), DP and The Justice Forum (JEEMA), formed the Inter-party Coalition (IPC) and together with CSOs, raised several issues that required reforms, including reconstituting the membership of the Electoral Commission (EC). In addition to their practical experiences the in actual monitoring of the electoral process, their outcry for electoral reforms arises from the Supreme Court's ruling of 6 April, 2006 (all seven judges agreed), based on Dr. Kiiza Besigye's petition of the 2006 presidential elections, that there were malpractices in the elections which needed to be addressed.[461]

[461] Olum Yasin (2006) "Election of Members of the East African Legislative Assembly: The Case of Uganda", The Uganda Living Law Journal, Vol. 4, No.

In a letter he wrote to the president dated 19 April, 2009, Jaberi Bidandi-Ssali, the president of the People's Progressive Party (PPP), raised, among other critical national issues, the need for electoral reforms.[462] In his reply to Bidandi in a letter dated 14 May, 2009, the president did not see the purpose of amending electoral laws since the only problem with elections in Uganda, according to him, was the lack of a computerised voters' register. On his part, the chairperson of the EC, Badru Kiggundu, stated:

> Electoral reforms vary from person to person and in different regions of the country. There is nothing major. We just need to streamline a few things otherwise this system is working and is better compared to what Uganda had in the 1980s.[463]

Although Kiggundu saw the need for electoral reforms, his tone suggested he did not take electoral reforms seriously. He was as dismissive as the president of Bidandi's letter. However, the head of the EU commission's delegation to Uganda, Vincent De Visscher, adding his voice to the need for electoral reforms, observed that the government should adopt and implement the 2006 recommendations of the EU presidential and parliamentary election observers. The recommendations aimed at increasing transparency in the voting process.[464] Key among the recommendations include: reinstating the two-term limit for President as earlier provided in the 1995 constitution; ending unreasonable and discriminatory requirements for candidacy; removal of guaranteed seats for the army, the youth, and workers; enhancing the procedure for making complaints; and, allowing Ugandans abroad to vote. Hence, debates over electoral reforms continued to generate controversy between the different parties because the lack of a level playing field for

2, December, p. 148.

[462] *Independent* (2009) "When Museveni of 2009 Meets Museveni of 1986", in Issue 067, 3-9 July, pp. 14-15.

[463] ibid., p. 15.

[464] Wafula Walter and Nakaweesi Dorothy "EU Backs Electoral Reforms", *Daily Monitor*, 7 July, 2009, pp. 1-2.

political competition was seen as certainly affecting the prospects for free and fair elections which would, no doubt, lead to political and constitutional instability during and after the 2011 elections.

To address the opposition's and EU's demands, the legal and parliamentary affairs committee, chaired by Stephen Tashobya, considered incorporating the electoral reforms in the amendment to the electoral laws namely: the presidential Bill 2009, the Parliamentary Elections Amendment Bill 2009, the Political Parties and Organisations Amendment Bill 2009, and the Electoral Commission Amendment Bill 2009. However, the opposition described the selective manner in which the committee was doing its work as "half-hearted" appeasement measures as opposed to ensuring that free and fair elections are held in the country. They argued that the proposed reforms by the government did not address the composition of the EC, the removal of army representatives from parliament and the reinstatement of the presidential term limits. While supporting the position of the government, the attorney general, contended that it was not necessary to overhaul all electoral laws, including changing the constitution. He argued that "if all stakeholders act in good faith, we shall have free and fair elections". Also, of major contention was the fact that while under the EC Amendment Bill 2009 the government favoured the secretary to the EC serving a renewable five-year term, the opposition demanded for a total overhaul of the commission and to have opposition nominees as part of its composition.

Corruption

The government has enacted many laws and institutions[465] to fight corruption. However, the scourge of corruption by some few highly

[465] Some of the laws include: the 1995 constitution, the Leadership Code Act 2002, the Inspectorate of Government Act 2002, the Anti-Corruption Act, *Qui Tam* Legislation, Whistleblowers Protection Act, the Local Governments Act 1997, Public Procurement and Disposal of Public Assets Act 2003, the

placed political leaders and public officials continues to weaken government institutions and to rob the country of resources meant for service delivery. Indeed, the progress report released by the African Peer Review Mechanism (APRM) noted that regardless of the many anti-corruption regulations put in place by the government, it was terribly losing the fight on corruption.[466] The report notes that Uganda has never scored more than three out of ten points, according to the Transparency International (TI) Corruption Perception Index rankings, making her one of the most corrupt nations in the world.

In fact, systemic corruption in the country continues to manifest itself in various forms, namely: electoral, patronage, bureaucratic, financial, and political. Corruption through patron-client relations is perhaps the most severest form of corruption today, whereby national resources and benefits, are delivered to individuals, groups and regions that are seen as supportive of the incumbent NRM regime and the president rather than on the basis of national priorities. This sectarian way of treating citizens within the same polity, using national resources, is a sure way of engendering constitutional chaos.

The most serious corruption cases in 2009 were in the Uganda Revenue Authority (URA), where fake number plates were said to be circulating alongside genuine ones; the high power leakages resulting

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Public Finance and Accountability Act 2003, the National Audit Act 2008, and the Access to Information Act 2005. The institutions established to combat corruption include: the Office of the Inspector General of Government, Directorate of Ethics and Integrity, the Inter-Agency Forum, the Judiciary, the Criminal Investigation Directorate, the Directorate of Public Prosecution, the Parliamentary Accounts Committee, and the District Accounts Committee. For a detailed discussion of the laws and institutions of corruption, see Olum Yasin (2008) "Public Accountability and Governance in Uganda", in Local Governance and Development Journal, Vol. 2, No. 2, Dec., pp. 78-96.

[466] Bareebe Gerald and Pachutho Andrew "Government has no Will to Fight Graft, Says Report", *Daily Monitor*, 29 January, 2009, p. 5.

from the corrupt tendencies of officials of the electricity distribution company in Uganda (Umeme); the Temangalo land saga in which the security minister, Amama Mbabazi, was implicated in selling his personal land to the National Social Security Fund (NSSF) (a workers' body) overvalued to a tune of sh11b; and lastly, what the newspapers have termed as the "CHOGM bonanza", which involved embezzling by various high placed ministers of billions of shillings from funds meant for the Commonwealth Heads of government Meeting held in Uganda in 2007. All these cases were mostly a result of breaking legally entrenched procurement procedures. The lenient manner in which the government is prosecuting those, who are highly placed politically and supporters of the regime is raising serious concern among a cross-section of the public. Added to this deficiency, is the lack of the necessary political clout, resources and independence at the disposal of investigative bodies such as the Inspector General of government (IGG), so as to deal severely with those involved. Therefore, it is still largely within the domain of political will, besides other strategies, to fight systemic corruption in the country.

Another related case regarding the fight against corruption during 2009, related to the former IGG, Justice Faith Mwondha (she was seen by many Ugandans as a crusader against corruption), tussling it out with MPs over her reappointment as IGG. On 31 March, 2009, she objected appearing before the parliamentary committee on appointments to be vetted for re-appointment as IGG. Mwondha argued that there was no need for her to reappear before the committee to be vetted again, and that to do so would be unconstitutional. Her refusal caused a lot of confusion and uproar among some MPs. First, the president gave her a letter of re-appointment without being vetted. When the appointment committee of parliament learnt of her re-appointment, they strongly opposed it on grounds that it was illegal. It was only when the

attorney general advised the president that Justice Mwandha had to appear before parliament for vetting, that he changed his position and directed her to appear before the committee.

It should be mentioned that prior to this impasse, Mwondha had clashed with some senior government officials and some MPs, who accused her of mismanaging the IGG's office, including accusing some senior politicians of being corrupt without substantiation. Parliament vowed to block the budget of the IGG's office until Mwondha clarified such statements. So, some MPs were ready to take her on during the vetting process to discipline her. Because of this and other related conflicts, Mwondha chose to petition the constitutional court for interpretation of her re-appointment, but the petition was dismissed. This case left an indelible mark on the fragile relationship between the institutions of government (i.e., IGG, parliament, the judiciary and the executive). It has to be noted that when institutions of government begin to fight one another in this manner, the constitutional government becomes the obvious and immediate victim. Secondly, the war against corruption will be compromised when strong individuals such as Mwondha, are denied the opportunity to fight it.

National Resource Exploitation and Allocation

The need to exploit the nation's natural resources in order to foster socio-economic development is indisputable. The most prominent of the national resources currently generating interest among most Ugandans and the civil society fraternity, is oil. Uganda's oil deposits in the Lake Albert region were discovered in February, 2006 with a total reserve estimated at two billion barrels. Since the oil discovery, however, conflict among people, who have for several decades been living in harmony in the oil region, is on the rise. Also, the issue of how the government handled the oil deals, in a non-transparent manner, has been raising national concern.

Consequently, under a case filed with the High Court on 22 December, 2009, Greenwatch, a Ugandan pressure group, sued the government to compel it to disclose details of the Production Sharing Agreements (PSAs) it signed with four exploration companies (*Reuters* 2010, p. 29) [467]. Greenwatch wanted the government to release copies of PSAs it signed with Britain's Heritage Oil and Tullow Oil, Dominion Oil and Neptune Petroleum. Greenwatch's central argument was based on the 1995 constitution which provides that every citizen is entitled to information within the possession of the state and that it can only be legally withheld where such a disclosure jeopardises national security or compromises individual privacy. Greenwatch rejected the government's refusal to disclose the PSAs on grounds that the disclosure would severely weaken its negotiating position in future licensing rounds. It argued that the grounds upon which the government had refused to disclose PSAs and, therefore, withheld public information were not backed by law. It has to be mentioned that a London-based platform had revealed that foreign oil companies would reap between 31-35% return on investments (RoI) based on the medium-term price oil outlook, leaving Uganda worse off in real cash terms.

In line with Greenwatch's interest and in the interest of the public, two journalists, Charles Mwanguhya and Angelo Izama, sued the government through Human Rights Network (HURINET), an NGO, for failing to disclose the PSAs[468]. However, the suit was dismissed by the chief magistrates' court. They, as a result, decided

[467] See also Hillary Nsambu, " NGO Sues government over oil deals", *The New Vision*, 4th January, 2010

[468] See *Charles Mwanguhya Mpagi and Izama Angelo v. Attorney General*, No. 751 of 2009, Chief Magistrates' Court of Nakawa, at Nakawa. In this case, the court observed that the applicants had a right to access the oil agreements, but that, on balance, the harm (to confidentiality interests) from disclosure outweighed any public benefits from disclosure (given that the applicants failed to establish or even allege any concrete public benefits), and accordingly dismissed the application.

to go to higher court to challenge the ruling. If not well handled by the government, the issue of oil exploitation and its utilisation, is bound to generate serious political and constitutional problems in the country. As seems to be the case today, suspicion is rife among a cross-section of Ugandans over the maximum secrecy with which the government is treating the oil resource. It is believed that the secrecy surrounding the oil exploitation is a ploy for a few highly placed individuals to benefit from at the expense of the rest of Ugandans.

Central Government-Regional Relations

This section explores the relationship between the central government and some regions of Uganda, especially regarding the restoration of kingdoms that has both direct and indirect implications on constitutionalism. These regions include Buganda, Ankole, and Busoga. Each of these regions will be discussed in turn. It should be mentioned that, although there are some problems with the way the other areas run their kingdoms, these problems are more internal than with the Central Government as is the case for Buganda.

The relationship between the central government and Buganda (i.e., Mengo), which president Museveni enjoyed from the time the National Resistance Army (NRA/NRM) captured state power on 26 January, 1986, further degenerated when the two parties clashed in September, 2009 after the police blocked Kabaka Ronald Muwenda Mutebi II from officiating at a youth function in Kayunga district, citing security reasons. This resulted from that demand by the Banyala, a minority ethnic group, that the Kabaka could not visit the district unless he got permission from their ruler, captain Baker Kimenze. Mengo objected to this demand, arguing that it did not recognise Kimenze as a traditional ruler in Buganda and that the Kabaka did not require any permission to visit any of his territory. This dispute caused a clash between the two parties to a point of fatality. Consequently 27 civilians lost their lives and a score of others

sustained serious injuries and were admitted in hospital. At the same time, several other individuals were arrested on grounds of inciting violence, including journalists and to date, most of those arrested have not been tried nor granted bail.

Talks between the president and the Kabaka, held at State House in Entebbe on 30 October, 2009, did not yield fruitful results. This aggravated an already bad situation, where Buganda saw the Land Bill and the Regional Tier Bill, as calculated attempts by the central Government to take over its land with the aim of weakening and denying it the *federo* or federalism it is demanding. On the *federo* question, the president categorically stated that a federal system of government for Uganda was resolved by the enactment of Article 178 of the 1995 constitution which provides for the creation of regional tier governments. Citing the 1962 Constitution, the president argued that granting Buganda a federal government status would create chaos and power conflicts between regional governments and the central government. He observed:

> The 1962 Constitution failed disastrously because that constitution tried to create two countries in one … it created a separate chief justice, separate police force … Within four years, it had failed. We have Article 178 of the constitution which we amended to provide for those who want a regional government.[469]

Adding on the president's assertion, Moses Byaruhanga, the special presidential adviser on political affairs, observed that the matter of having a federal system was discussed by the 1995 Constituent Assembly (CA) and was found to be unviable. To him, Buganda's position and that of the rest of Uganda over *federo* as reported in the Odoki Commission report was a result of views of only a few people and the CA which rejected it had representatives from all over the country. He rejected the argument put forward by Buganda of sharing power with the central government, for example, the

[469] ibid., p. 3.

central government would have powers to control national matters, such as defense, citizenship, foreign relations, telecommunications, electricity, inter-region highways and dams; and regional governments have powers over schools, health services, feeder roads, culture, land, local services, local governments, local development plans, and local economic policy. Byaruhanga also emphasised that Buganda's demands had been catered for under the regional tier system.

The president and Byaruhanga's statements were a slap in the face of Buganda's standing demands for *federo*, the 9,000 square miles of land given to it by the colonial government and property taken over by the government after the abolition of traditional kingdoms in 1966. With these two antagonistic positions, *federo* will continue to cause serious political and constitutional ramifications, if it is not handled urgently and amicably.

Similarly, the relationship between the central government and Ankole reached a climax when the forum of 13 cultural leaders, led by Omukama (King) of Bunyoro, Solomon Gafabusa Iguru, as chairman of the association of cultural leaders, asked the president to restore the Ankole Kingdom and recognise Prince John Barigye as the Omugabe (King) of Ankole (Mugerwa 2009, pp 1-2). The chairman of the Ankole Cultural Trust (incidentally, the trust is a brainchild of President Museveni), George William Katatumba, has also voiced the trust's concern over the restoration of the kingdom. The proponents of this position observed that Ankole Kingdom had existed for 600 years and was a wealthy cultural asset which should not be allowed to go to waste. In response, the president observed that he would only decide on the restoration of the kingdom after district councils in the region passed a resolution for its restoration as required under the 1995 constitution. Consequently, some of the councils then resolved that the Obugabe be restored. However, this annoyed the president, who was also informed that money had been used to influence the passage of the resolutions. Like the case

of Buganda Kingdom, the fact that Ankole monarchists have vowed not to give up the fight for the restoration of their kingdom implies that unless the matter is handled amicably between those for and those against it, chaos is likely to prevail.

The relationship between the central government and Busoga has not assumed the love-hate relationship that the Central Government is experiencing with Buganda. The centrality of Buganda in Uganda's politics since colonial times can explain the nature of the love-hate relationship between the two parties. In the case of Busoga in the Eastern Uganda, the controversy over who their new king should be, only emerged after the death of the Kyabazinga (King), Henry Wako Muloki, on 1 September, 2008. As was the case in Ankole, 13 cultural leaders put the issue of the Kyabazinga government for immediate consideration.[470] The crisis started when Prince Edward Columbus Muloki was chosen as the new Kyabazinga on 31 October, 2008 in spite of the court order blocking the elections. The chiefs argued that the court ruling was not binding on the cultural institution. Seven out of eleven hereditary chiefs agreed by consensus on Columbus's election. Three reasons explain his victory.[471] First, his late father, Muloki, was liked by most of the chiefs who constituted the electoral college of Busoga's Chiefs Royal *Council, headed by the Issabalangira* (chief prince), Daudi Kunhe Wakholi. Second, he was seen as favourite of the president. Third, he was considered to be experienced and exposed to the day-to-day running of the kingdom affairs. During the election, the other four contestants, either walked out, or did not turn up (Fred Kakaire of Bugweri chiefdom, Christopher Mutyaba of Bukono chiefdom and Patrick Izimba of Kiguulu chiefdom did not turn up). Specifically, Gabula Nadiope of Bugabula chiefdom, one of Muloki's Columbas's rivals, walked away, protesting the heavy deployment of the police

[470] ibid., p. 2.

[471] Bita George (2008) "Busoga's New Kyabazinga", *Saturday Vision*, 12 November, 2008, pp. 1 and 5.

and the army outside the Bugembe kingdom headquarters, where the elections took place.

When William Wilberforce Kadhumbula Nadiope Gabula IV was declared the Kyabazinga later after a second disputed election held on 5 October, 2009 at the 'White House' in Jinja, which was heavily guarded by the regular police, the Mobile Police Patrol, and UPDF soldiers, rival groups turned Jinja town into a battlefield on 5 October, 2009.[472] Columbas's supporters pelted Gabula's supporters with stones and vowed to stop the enthronement. The fracas was only stopped when the police and the army fired teargas canisters and live bullets to disperse the agitated supporters. The of Gabula's IV election has not brought sanity in the kingdom of Busoga following Muloki's death.

This confusion can be traced from history. Historically, while kings in Busoga ruled for only five years and passed on the baton to another royal, Muloki altered these ideals in Busoga's constitution of 2000 before he died. This reform meant that the election of a new kyabazinga by the Chiefs Royal Council would come when the king either died, or was mentally ill, or when he became physically incapacitated. This new provision, which led to the politicisation of the kyabazingaship, heralded the era of royals creating camps and being backed by politicians. Thus, different political groups have since emerged in Busoga to support one candidate against another for the kyabazingaship. Also, because some of the chiefs are not financially sound, they have been lured with financial assistance to stand against other potential candidates. Matters worsened when the central government said it would not recognise Prince Gabula and Columbas until one of them was agreed upon through dialogue.

This confusion is still raging in Busoga kingdom, leading to the death of Lt. Aggrey Mwondha, a UPDF soldier and the commandant

[472] Muyita Solomon "Chaos as Nadiope is Elected Kyabazinga: Rival Group Disrupts Enthronement", *Daily Monitor*, 6 October, 2009, pp. 1-2.

of the royal guards, who is alleged to have been hit by a trailer on the Jinja-Iganga highway at around 8.30pm. Mwondha, who was loyal to Columbas, successfully led an operation that blocked the coronation of Wilberforce Nadiope IV, who was elected the new kyabazinga on 6 November, 2009. His free engagement as a UPDF officer, in a partisan political-cultural tradition without bringing him to order, was questioned. It is this kind of partisan treatment that has raised some people's suspicion both within and outside Busoga, of the NRM government's hand in the current confusion and in politicising the kingdom's decisions. In spite of the government's mediation efforts to resolve the crisis under the chairmanship of Adolf Mwesigye, the local government minister, Busoga's acting Katiikiro (prime minister), Ronald Gideon Lubale, appointed in May, 2009 by the acting Kyabazinga to spearhead arrangements for a new Kyabazinga, Kaunhe, said:

> At the moment, we want someone to serve and lead the Basoga as Kyabazinga, and whether government recognises him or not, is immaterial. We will present him to the government for recognition at the installation stage … according to the Busoga constitution, the government only plays a role during installation of the Kyabazinga, when the head of state or other dignitaries are invited to grace the crowning ceremony.[473]

In Busoga, there is widespread belief that Gabula is supported by top Kamuli-based NRM and opposition politicians, while Colubus is supported by State House.[474] As a result of these political camps, the kyabazingaship remained politically unstable for much of 2009 with wide ranging implications on the state of constitutionalism in Uganda.

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[473] Muyita Solomon "Now Government Disowns New Kyabazinga and Mystery Deepens Over Death of Chief Busoga Guard", *Daily Monitor,* 7 October, 2009, pp. 1-2.

[474] ibid., p. 2.

Conclusion

The year 2009 saw a mixture of both the good and the bad regarding constitutionalism in Uganda. Generally, the positive aspects can be identified in the way the judiciary and parliament performed their duties. The judiciary continues to dispose of cases that are before it as expeditiously as possible, despite the challenges it faces. Parliament, on the other hand, has continued to legislate on crucial laws, albeit negatively impacting on human rights and democratisation in Uganda. However, the judiciary continues to suffer from the endemic problems of lack of adequate logistics and personnel, leading to delay in the handling of cases or dragging of cases for months or even for years. The overbearing executive is the most constraining factor towards the performance of these two organs. The executive continues to influence and sometimes arm-twist the judiciary and parliament to achieve its political goals. To this extent, the executive has on several occasions been viewed as authoritarian. Yet for constitutionalism to thrive, the government, especially the executive, has to be seen to be acting within the bounds of the rule-of-law and the principles of separation of powers. Whether the executive will do so is the subject in the preceding years.

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7

The State of Constitutionalism in Zanzibar in 2009

Salma Maoulidi[*]

Introduction

Constitutionalism has a variety of meanings, but in simple terms; constitutionalism constitutes the principles, spirit or system of government that is in accordance with a constitution, whether written or according to convention.[475] It connotes the limits to the exercise of government powers and ability to observe those limits. The spirit of constitutionalism in Zanzibar can be appreciated by looking at three important provisions of the 1984 constitution:

Article 5:

> Zanzibar is a multi-party State which upholds the rule-of-law, human rights, equality, peace, justice and equity.

Article 8:

> The government has a duty to and responsibility to observe principles of independence, justice and peace.

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[475] http://www.merriam-webster.com/dictionary/constitutionality.

Article 9(1):

> Zanzibar shall be a state that adheres to the principles of democracy and social justice.

These provisions will serve as a beacon in assessing the state of constitutionalism in Zanzibar for the year 2009. In particular, the extent to which different state organs were able to adhere to these provisions will be assessed considering that 2009 was a definitive year in Zanzibar's politics. It marked the end of the first decade of the 21st century as well as the end of the sixth phase of the government of President Amani Karume. During this period, there was high expectation to achieve political certainty in the build up to the 2010 general elections. Unresolved constitutional matters in the islands, as well as the Union's policy signaling the challenges ahead as the country prepared for the 2010 general elections were the major issues that dominated the year.

This paper details and analyses the social and political atmosphere in which issues of constitutional significance arose, were discussed and tackled. The analysis is informed by a careful examination of reports of parliamentary debates (Hansards) during four legislative sessions held between January to October, 2009 in the Zanzibar House of Representatives. Additional insights were obtained through informant interviews and a review of media coverage of events and debates during the period under examination. Lively and informative debates of the *kero* (problems) that are at the heart of the polity within Zanzibar and its Union partner, Tanganyika, are discerned from the discussions in the House.

The Zanzibar House of Representatives is established under Article 63 of the 1984 constitution. Fifty of its members are elected directly while ten members are nominated by the president. The constitution also provides for not more than 30% female representation in the House, a quota met by requiring all political parties serving in the House to appoint 3% of their female members.

The rest of the representatives are political appointees, that is, five regional commissioners and the Attorney General (AG). Currently, the opposition camp in the House comprises only one opposition party, the Civic United Front (CUF), to the exclusion of other smaller political parties.

The House has jurisdiction to pass policies and legislation not within the jurisdiction of the national assembly (Article 4(2)). A number of policies and laws were brought before the House in 2009. Many of these led to great discussion in parliament as well as in the general population over the principles contained in Articles 5, 8 and 9 (i) of the constitution. Similarly, representatives had to grapple with a number of human rights concerns such as the right to vote and participate in the political process, the right to a national or residency card, the right to livelihood and economic progress, among others, during the period under review. A more comprehensive list of issues, policies and laws before the House are appended at the end of this paper.

This paper comprises three parts. Part one analyses constitutional developments of a purely national nature, that is; those questions that squarely fall within the ambit of the Revolutionary Government of Zanzibar. Part two looks at constitutional developments of a Union character, that is; questions whose constitutional dimension and implication cross the national boundary and fall within the ambit of Union matters. The last part will generally explore the status of human rights during the course of the year.

Each part and the subsections under it details and analyses the core constitutional issues that formed public debates during 2009. In addition to demonstrating the constitutional pulse in the isles during 2009, where appropriate, the paper will highlight the specific implications of the constitutional challenges reviewed.

National Constitutional Concerns

Zanzibar is a semi-autonomous state within the United Republic of Tanzania (URT). The island's autonomy is appreciated by the fact that, Zanzibar has her own legislature in the *Baraza la Wawakilishi* (House of Representatives), judiciary (the High Court of Zanzibar) and the executive in the *Serikali ya Mapinduzi* with exclusive jurisdiction over the island's affairs. A number of issues, specific to the Zanzibar constitution and state, arose in 2009. This part of the paper highlights four main issues relating to the free exercise of the right to vote and the process in which this is realised; the quest for statehood through national symbols; defining the new political climate through a home-grown political accord; and upholding the rule-of-law in a legal regime beset with governance challenges. Each will be examined at some length below.

The Voters' Registration Saga: The Potential to Disenfranchise Voters

Elections in Zanzibar are governed by the constitution and the Elections Act No. 11 of 1984 (as amended).[476] Article 7(3)(a) of the constitution empowers the House to enact a law and make provisions for the establishment of a permanent voters' register and outline the procedure of correcting its content. The registration of permanent voters began in 2004. Since voter registration was a contentious issue when verifying election results in 2005, the CUF asked for an independent verification of the voters' roll as a trust-building measure, but their proposal was rejected by their counterpart in the political accord, CCM.

Hence, the permanent voters' register remained one of the most contentious issues in the island's political and electoral landscape chiefly because the registration of voters is fraught with violation of

[476] Maalim, J. Mahadhi (2007), *The State of Constitutionalism in Zanzibar* in Lawrence Mute, Constitutionalism in East Africa: Progress, Challenges and Prospects in 2004, Kampala: Fountain Publishers 2007 pp. 29-50.

the laws and regulations, some of which will be discussed below. One of the key concerns over voter registration was that it would not only affect the outcome of the 2010 general elections, but also the local government elections held throughout the country on 25 October, 2009. The fact that many valid voters were denied registration, while non-Zanzibari nationals were registered, raises concerns about the legitimacy of the 2010 presidential elections.

This part will highlight key constitutional and legal concerns arising from the voter registration saga, mainly the potential for Act 7 of 2005 to disenfranchise voters; conditions and practices that border on conflict of interest and abuse of office; and the threat of civil unrest as a result of human rights violations, notably the denial of the right to political participation. Spirited discussions on these concerns dominated the House and media coverage, indicating the seriousness with which this issue is approached across Zanzibar's political spectrum.

(a) Act No. 7 of 2005: The Potential to Disenfranchise Eligible Voters

According to Jabir Idrissa,[477] political analysts in Zanzibar estimated that about 170,000 potential voters would not be registered as voters and, thus would not be able to exercise their constitutional right to vote and choose their leaders. Ally Saleh, a political analyst and activist, on his part contended that about 400 people in Stone Town alone were not registered for various reasons, but mainly because they did not have residency identity cards (IDs). He alleges further that *mbinu chafu* (dirty tricks) were used to corrupt the voters' register (*Daftari la Mpiga Kura)* by the agency responsible for issuing voter IDs.

The threat to disenfranchise voters was echoed by numerous representatives who confirm dealing with cases involving the registration of members of their constituencies. Most report that their

[477] Jabir Idrissa, "Kalamu ya Jabir Idrissa- JK angalia boriti jichoni mwako ndipo", *Mwanahalisi,* 7-13 October, 2009 p. 13.

constituents as well as their relatives were being denied residency IDs without which they were unable to register as voters. Muhyddin M. Muhyddin, the representative from Mtambile, Pemba Island, for example, claimed that his daughter was denied a residency ID. Hon. Haji Faki Shaali, the chief whip of the opposition in the House, and representative from Mkanyageni constituency, similarly alleged that in his constituency alone, there were 147 cases of names that had been implanted and 64 cases of underage registration.

The chairperson of the Zanzibar Electoral Commission (ZEC) admitted to cases of *kupandikizwa* (planting of) voters in northern Unguja and Pemba.[478] This practice is, however, not new in the island's political culture. For example, it was also an issue in the 1995 and 2005 elections[479] and during the first four elections in Zanzibar between 1957 and 1963.[480] Sheikh Thabit Kombo Jecha, the former secretary general of Afro-Shirazi Party (ASP), alleges that the Zanzibar Nationalist Party (ZNP) participated in rigging elections by planting people and registering them twice in the voters register, enabling them to vote more than once. What is different today is that it is the ruling party that is accused of the practice.

Nevertheless, it is not just members of the opposition party who were affected by the residency requirement for registration. Shaali contends that the residency requirement has boomeranged on CCM after they tried to register their candidate for Mkanyageni with no success. The candidate lived abroad for many years before being invited to return and join politics. Upon his return, he was immediately given a resident permit in Unguja, but it was harder

[478] REDET, First Meeting on the Political Situation in Zanzibar- The Zanzibar We want, Bwawani Hotel 22-23 December, 2009.

[479] Mpangala, P. Gaudens, (2009) *"Tathmini ya Chaguzi katika kipindi cha mfumo wa Vyama Vingi* Zanzibar", paper presented at First Meeting on the Political Situation in Zanzibar- The Zanzibar We Want, Bwawani Hotel 22-23 December, 2009, REDET.

[480] Mdundo, O. Minael-Hosanna, (1999), *Masimuzili Ya Sheikh Thabit Kombo Jecha*, Dar es Salaam: DUP (1996) Ltd.

to justify the same in Mkanyageni. Being his home town, everyone knew he had not been a resident there or in Zanzibar for some time.

Amid the public outcry over Act No.7 of 2005, the AG of Zanzibar, Iddi Pandu Hassan, responded that the Act was legitimate since it was passed by the House, an institution empowered to do so.[481] Instead, he invited sound legal challenge to the law pursuant to Article 25 (A) of the constitution which allows any person to open a case in the High Court to protect the constitution, if they feel any provision of the constitution was being breached, or was likely to be breached.

Moreover, while the law may meet the intended (legislative) purpose, the problem lies in its implementation as evidenced by media reports and individual submissions regarding the difficulties faced in the voter registration process.[482] The applicants, just as many others critical of the law, argue that the pre-condition in the Elections Act that entitles only those people with a residency identification card to be registered in the permanent voters' register, is unconstitutional since the constitution does not provide for this condition. At the time of writing this paper, the court had not ruled on the petition.

On 13 October, 2009, a group of interested Zanzibari citizens took up the AG's offer and lodged a case in the High Court to challenge *Sheria ya Mzanzibari Mkaazi* [The Registration of Zanzibari Residents' Act No. 7 of 2005]. This was the second time the applicants tried to seek a judicial review in the High Court to challenge the controversial law passed in 2004 just before the 2005 general elections.[483] They oppose the requirement that one must

[481] (2009), "Uzanzibari na Ukaazi: Msingi wake Kisheria na kikatiba mtazamo wa ndani"

[482] Khamis, Mahmoud Makame (2009), "Uzanzibari na Ukaazi: Msingi wake Kisheria na Kikatiba: Mtizamo wa nje."

[483] The first case was lodged as Miscellaneous Civil Suit No.13 of 2009, but

hold a Zanzibar resident identity card under section 12 of Act No. 7 of 2005 to be eligible to vote.[484]

Hamad Mussa Yussuf

Dadi Kombo Maalim

Ali Omar Juma

v.

Director of ZEC and

The AG Zanzibar

Miscellaneous Civil Cause No.16 of 2009

- That the director of ZEC refused to register eligible Zanzibaris to vote as per the constitution
- That the implementation of the Elections Act No 11 of 1984 as amended by Act No.5 of 2005 Section 12 (1) (b) contravenes Article 7 (1) (2) (d) of the Zanzibar constitution and Article 5 (1) (2) (d) of the URT constitution.
- That section 15 of Act No. 7 of 2005 amends and inserts section 4A in Act No. 5 of 1985 and Section 12 (1) (d) of Act No. 11 of 1984 is unlawful and void.
- The continued use of the residency ID card in the voters' registration process wouldl deny the 2010 General Elections to choose the president of Zanzibar a national character as required under the constitution.

What then does residency got to do with a voters' registration? The residency requirement originates in Section 12 (6) of the Elections Act No. 11 of 1984, which outlines a residency requirement of three consecutive years in a constituency, to be eligible for registration in a constituency[485]. However, in view of the fact that no proper

it was later withdrawn upon advice. Applicants re-filed the case again as a Miscellaneous Civil Cause No.16 of 2009.

[484] Section 12(11) (e) requires a person to produce an ID card before a registration officer.

[485] Residency laws were a product of census exercises e.g. in the Census Act 1954

records are kept of peoples' movement from one geographical place to another, it becomes difficult to confirm previous residential status. This increases the likelihood of leaving out genuine people who are unable to prove their residency status.

Fatma Fereji, the Representative of Stone Town, demonstrates another aspect of the absence of reliable and verifiable data with regard to registered voters. She observes that census figures of 2002 indicated the number of voters to be 500,486, but projected figures, as of April, 2009, were 505,000 despite the fact that many Zanzibaris were yet to be registered as evidenced by media reports and testimonies.[486] Such concerns give heed to claims of ghost voters or planted voters which challenge the authenticity of election results.

There is, however, another constitutional dimension to the registration saga, namely, the question of the Zanzibari nationality in local politics, and with it ethnic, nationalist and partisan sentiments, which have been part of the Island's political legacy. Nationality laws were shaped by different interests as observed by their legislative intent. One of the first pieces of legislations to confer status on Zanzibari subjects was the Registration of Birth Decree No. 13 of 1909 which required every child born of legitimate parentage in Zanzibar to be registered within seven days of birth. This was followed by the Nationality Decree of 1911 (reviewed in 1952) which defined a Zanzibari by virtue of their birth and parentage. One could also become a Zanzibari by naturalisation.

Nationality laws in Zanzibar underscored the politics of the time, racial and ethnic divisions in the island. Besides that, they were deeply gendered. Section 7(1) of the Nationality Decree of 1952 granted women married to Zanzibari subjects, whether or not of full

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that feature as an important criterion in the constitutional changes of 1957, the precursor to Zanzibar's quest for self-rule. The debate around the residency requirement also contains elements of the suppressed Zanzibari identity in the Union setup.

[486] Hansard 2 July, 2009; p. 118.

age and capacity, citizenship through their husbands. Thus, men in colonial Zanzibar had an automatic right to confer citizenship status to their wives, but female subjects did not enjoy similar rights. The Zanzibari nationality was forgone after the Union with Tanganyika in 1964. All Zanzibaris became Tanzanians, their identity being asserted only by where they resided, either on the Mainland or the Island. Even then, there was an initiative through the Registration of Citizens and Residents Decree of 1966 to revisit the nationality question, albeit it was also used as a strategy by Abeid Karume, Zanzibar's first president, to exert political influence amid mounting opposition to his rule.[487]

The preoccupation with the nationality question cropped up again after Zanzibar reverted to constitutional rule in 1984. *Sheria ya Mzanzibari* No. 5 of 1985 [The Zanzibari Act], passed in 1986, defined a Zanzibari through rules aimed at identifying and registering non-Zanzibaris. This was later amended by Act No. 7 of 2005. Section 2 of the 2005 law defines a Zanzibar resident as someone whose permanent dwelling is in Zanzibar. Section 3(1) defines a Zanzibari as a citizen of Tanzania residing in Zanzibar before or up to January, 1964; or born in Zanzibar from April, 1964 and whose parents are both Zanzibaris; or a citizen born before 1964 who has not lost his or her Tanzanian citizenship.

Nevertheless, the provisions remain vague and do not give a clear-cut answer as to what amounts to Zanzibari citizenship, more so considering the added complexity of the Union citizenship. If citizenship under the law can be acquired through various means, then proof of acquiring the same makes one a citizen. However, the problem is that there is rarely documentation to prove citizenship claims and this failure to seek documentation is at the heart of contestations when proof is required before asserting one's right.

[487] It was amended by Decree No. 7 of 1969.

The residency requirement is indeed perplexing considering that there is already an existing provision for nationality. Thus, why include the requirement on residency? Some informants believe that it was included to stop Zanzibaris abroad from contesting elections or voting. A significant percentage of the Zanzibari diaspora are people that left during, after or because of the revolution or its aftermath, and are thus believed to be opposed to the ruling regime[488].

A noted satirist, Adam Lusekelo, argues that the repeal of arcane laws that deny people their fundamental democratic right to vote is crucial to pursue. His viewpoint is supported by Dr. Lwaitama, who notes that if existing residency laws seem to get in the way, then these laws ought to be repealed immediately as a matter of urgency.

Conditions and Practices that Border on Unconstitutionality: Conflict of Interest and Abuse of Office.

To the common person, the constitutional dilemma that arises from the voters' registration is unfathomable considering that the right to vote is constitutionally guaranteed. The matter is, however, not as straight forward as explained by the AG who asserts that the Elections Law of 1984 outlines the procedure of realising the constitutional right to vote.[489]

Article 7(2) of the constitution states that the right to vote can be denied, if a person does not show their national identification. Since there are no national IDs in Tanzania or Zanzibar, the AG argues that the identification being referred to is the Residency ID.[490] Section 10 of the Registration of Zanzibari Residents' Act No.7 of 2005 requires that a certificate or ID be issued to a Zanzibar resident.

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[488] This includes the actual revolutionaries who in the aftermath of the revolution were imprisoned or exiled.

[489] Hassan, Pandu Iddi, (2009), "Uzanzibari na Ukaazi: Msingi wake Kisheria na kikatiba mtazamo wa ndani", paper presented at First Meeting on the Political Situation in Zanzibar- The Zanzibar We Want, Bwawani Hotel 22-23 December, 2009, REDET

[490] ibid, p.14-15.

Section 3 provides for the Zanzibar ID Cards Registration office) to facilitate registration and appoint a director of registration under Section 4.

Under Section 12 of Act No.7 of 2005, the director may refuse to issue IDs to any person who is not a Zanzibari and resident in Zanzibar. The person who can confirm the applicant's residency status is the *sheha*. The problem is that many residents complain that their *shehas* fail to vouch for them for various reasons, including partisanship, thus denying them the right to obtain a residency ID that would facilitate their registration in the voters' register. *Shehas* may also fail to register certain voters on the pretext that they have no registration forms, which can only be obtained from the regional commissioner's office.[491] Some political commentators believe these unnecessary hurdles are a political ploy by the ruling CCM.

But, from where do the *shehas* derive so much power with respect to elections? The Regional Administration Authority Act No. 1 of 1998, Section 15 provides for the office of the *Sheha*. The *sheha* administers over a *shehia*, the lowest tier in the local government governance structure. Section 17 (1) describes a *sheha* as a government employee, who is accountable to all laws, circulars, policies, and directives of the government. The *Masheha* are, therefore, central to most contestations surrounding voter registration and the chaos that ensues.

Abdalla Juma Abdalla, the representative of Chonga and the shadow minister for regional administration and special units, asserts that few people are able to register once they get to the *shehas*.[492] Moreover, it so happens that all *shehas* are CCM members, although the law does not oblige them to be so. This creates a conflict of interest as pointed out by Makame, a legal expert with the Zanzibar Legal Services Centre (ZLSC), who observes that the

[491] Private communication with Hamadi Mussa Yussuf, 11 February, 2010.
[492] Hansard 2 July 2009: p. 125.

use of *shehas* in the voter registration exercise is problematic from the start because they are affiliated to the ruling party by virtue of their employment[493].

This led Hon. Muhyddin M. Muhyddin to shift the onus of producing the IDs on the government since they instituted the requirement. Under Section 14 (1) (a) of Act No. 7 of 2005, it is an offence for residents not to be registered. Muhyddin urged all Zanzibaris without IDs to voluntarily report to Police stations en mass to be charged with the offence. By doing so, he expected to force the government to face the registration dilemma head-on considering that they had placed a condition, yet they were not ready to help citizens to meet it.[494]

This issue is an instance where the government places a condition to ease the realisation of a constitutional right, but fails to put in place a mechanism to claim and exercise that right. In effect, a catch-22 scenario is created, where citizens are damned, if they register and doomed, if they do not. In the end, the law comes across as being punitive instead of benefiting citizens who may wish to realise their constitutional right. This fact alone poses serious questions over the constitutionality of such a condition.

Shaali recommends residency to be disassociated from the voters' register to defeat the political and legal impasse. Instead, the criteria should be citizenship as outlined in the constitution. Makame offers a more lasting solution to the constitutional impasse over the right to vote. He recommends removing the right to vote from Part II of the constitution and put it in Part III so that it can be justifiable in case it is denied.

But, perhaps a bigger legal concern relates to the amount of power given to public officials, in this case the *sheha,* while the average citizen has been disempowered from checking such power. Ally Vuai Haji,

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[493] Makame;17.

[494] Hansard 30 June 2009: p. 71.

a lecturer at the State University of Zanzibar (SUZA), for example, thinks *shehas* have too much power politically, economically, and socially, and few checks to curb excesses they may commit.[495] Critics like Vuai want *shehas* to be held accountable by the citizens they serve, not their superiors, who happen to be political appointments, understandably operating more readily within the party structure, and not the civil service structure.

To overcome this conflict of interest, Vuai proposes that district commissioners and regional commissioners should cease to be political appointments. Rather, the posts should be advertised on a contract basis to promote efficiency and minimise partisanship at local levels, especially over matters that are politically sensitive, such as elections.[496]

(c) The Non-Registration of Voters and the Threat of Civil Unrest

Ally Saleh, a political analyst in Zanzibar, warns that the presence of irregularities in the voters' register and in the registration process, will result in continued disturbances and incidents of vandalism as people protest against human rights violations and the denial of their right to political participation. Saleh's concern is verified by Serengeti Media Advisers whose media analysis shows that the turbulence around the Zanzibar voter registration exercise dominated news coverage for fifteen days in September, 2009 alone. Among incidents of unrest related to the permanent voters' register which made headlines in various media as well as on the House floor, was arson and acid attacks carried out against shehas. The state minister in the office of the chief minister, Hamza Hassan Juma, confirmed knowledge of these reports.[497]

[495] Sadly this is the reality with almost all laws in Zanzibar.

[496] Vuai, Haji Ally, (2009), "Nafasi ya Asasi za Kiraia katika Kujenga Maridhiano ya Kitaifa Zanzibar; Uzoefu wa REDET", paper presented at First Meeting on the Political Situation in Zanzibar- The Zanzibar We Want, Bwawani Hotel 22-23 December 2009, REDET.

[497] Hansard, 23 October 2009; 7.

Subeit Khamis Faki, representative of Micheweni in Pemba Island, depicted the hostile manner in which voter registration was conducted in Konde constituency. He claimed that the Tanzania People's Defence Forces (TPDF) as well as the Serikali Mapinduzi Zanzibar (SMZ) special units, were dispatched there in military style with war canons and other military regalia as if there was a war, yet it was just registration of voters in the permanent register. To him, the use of the army in the voters' registration exercise was evidence of absence of good governance.[498]

Although some representatives wanted to sanction Faki purportedly for exaggerating the situation, media coverage substantiated some of the allegations made. *Majira* (September, 2009) linked escalating violence in Pemba to the Field Force Unit (FFU) and soldiers against angry protestors, resulting in civilian casualties. *The Guardian* of 14 September, 2009 covered scuffles that broke out at polling stations between the riot police and local residents, leading to the suspension of the registration exercise. A few days later, *Mwananchi* wrote about minor altercations developing into full blown violent protests, leading to the police using teargas and rubber bullets. Retaliatory attacks were common as unidentified people razed a house belonging to the North Pemba regional police commander, Yahya Hemed Bugi. A witch-hunt against opposition sympathisers ensued consuming law enforcement agencies and communities in incessant tit-for-tat attacks.

After making some controversial statements over the *vurugu* (disturbances), the National Electoral Commission (NEC) spoke out against inconsistencies related to the voters' register in Zanzibar, citing them to be human rights violations and against the principles of good governance.[499] CUF criticised the head of NEC, Justice Lewis Makame, for reneging on his duties and for being disingenuous

[498] Hansard, 6 July 2009; p. 65.

[499] The statement is attributed to Human Rights Commissioner Joaquina De Mello.

over the voter registration crisis in Zanzibar. NEC being the primary body, under which ZEC operates, could not absolve itself from responsibility, CUF argued.[500] In sum, they demanded that in principle, NEC adopts a more objective stand with regards to practices that compromise constitutional rights and guarantees within their mandate.

Pemba, the opposition stronghold in the isles, was the epicentre of the registration unrest, a fact that may have influenced the harsh response and lack of government or NEC accountability. The director of elections, Salum Kassim Ally, blamed leaders of political parties for the unrest. He accused them of misinforming their members by often using a language that incites violence. Shaali on his part, avers that the source of the unrest was lack of freedom, justice and equality.[501]

However, reports of the disturbances did not dissuade the government from an overtly aggressive posture nor did it compel the government to redress the situation until pressurised when the EU mission in Tanzania visited Zanzibar. Official indifference by both the government and the Union government, led numerous political and social commentators in local dailies to go on the offensive, criticising their readiness to protect and abide by the constitution in so far as guaranteeing the principles of independence, justice and peace is concerned.

Dr. Azaveli Lwaitama, a senior lecturer at the University of Dar es Salaam's department of development studies, for instance, accused the CCM leadership of focusing more on "Machiavellian political machinations" than the actual process of governing. Lwaitama decried the Zanzibari government's use of the security and military apparatus against its own people, arguing that it was a reflection of

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[500] "NEC hawawezi kujitoa kutoka kinachotea Pemba – CUF" [*NEC cannot remove themselves from the events of Pemba*], *Nipashe,* 19 September, 2009.

[501] Hansard, 23 October, 2009: p. 9.

the undemocratic character of the government. Mbunda[502] expressed similar concerns over the undemocratic character of the Zanzibar government, accusing it of colluding with the armed forces to suppress human rights. Hilal K. Sued a journalist with *The African*, likened the Union Government's position to the ulsterisation of the Isles– the approach first used by the British in the 1960s to quell sectarian unrest in one part of its union – Northern Ireland'.

President Kikwete was equally criticised for failing to fulfill his commitment, made upon assuming office in October, 2005, to solve the Zanzibar political impasse. Moreover, he was faulted for failing to assert himself as the chief of the army since defence forces appeared to collude with those attempting to disenfranchise voters. Lwaitama felt that Kikwete's government could have seized the opportunity to prevent the impending political catastrophe in Zanzibar when the CCM central committee and the national executive committee met in Dodoma. Instead of standing on the sideline, Hilal K. Sued urged the Union Government to show leadership in solving the issue.

Satirist Adam Lusekelo wondered whether 'we are going to witness violence after violence every five years in Zanzibar' and warned the Zanzibar government that 'the last thing they want is to face the people with their backs to the wall'. He believes that beating people, spraying them with tear gas and denying them from their democratic right to vote will only lead to their radicalization. Of course, this is an outcome that all players in Zanzibar's body politik abhor: It will not only challenge Tanzania's image as an island of peace in the region, but will also resurface strong nationalist sentiments that were purportedly quelled by the Revolution and Union with Tanganyika[503].

[502] Mbunda, R., (2008) "Zanzibar Statehood and the basis for the Union Department of Political Science and Public Administration: Paper presented for FES Youth Forum held on 16 August, 2008, Dar es Salaam.

[503] I have in mind here the argument that Zanzibar's radicalisation by the youth of the Umma Party persuaded Nyerere to collaborate with Karume on the Union project.

Sports: A Medium to Assert Zanzibar's Statehood and Identity

Almost universally, sports is seen as an important tool to bring people together, but in so far as the union between Zanzibar and Tanganyika is concerned, sports is divisive. The question of the identity of Zanzibar within the Union has not only arisen in traditional political spaces, but also in the arena of sports, leading Zanzibar, at various occasions, to assert itself with her own flag as well as her own national anthem.[504] Whether Zanzibar is a country or not, has been an issue in case of football and Zanzibar's quest to participate equally with the Mainland in sporting events.

Sports, National Symbols and Statehood

Since 1985, the president of Zanzibar has been using his own flag and seal before legislation to legitimise, basing on the 2004 the presidential Flag and Seal of the president Act. [505] Although unpopular in the Mainland, Mahadhi contends that a separate flag has raised the Zanzibari self-esteem and aided to reassert Zanzibar's identity, especially among athletes.[506] The House periodically touches on the question of the national flag[507] as critical to underscore Zanzibar's sovereignty in local matters and her equal status in Union matters.

Sports do not fall within the ambit of Union matters. Yet, Zanzibar's sovereign status is not recognised in global sports bodies, resulting in a situation where Zanzibar is deprived of representation in sports forums as well as related benefits. Zanzibar, for example, does not get a share of the $250,000, the world football body, the Federation of International Football Associations (FIFA) allocates annually for the development of soccer in the country. Nor was the Brazilian coach, Marcio Maximo, recruited to groom the national

[504] The Zanzibar Flag Act No. 12 of 2004.
[505] This Act applied retrospectively.
[506] Maalim, J. Mahadhi *supra note* 480 p.36.
[507] Hansard of 29 October, 2009.

team compelled to enlist Zanzibari players, a decision he was mercilessly touted for after Tanganyika Stars lost to Zanzibar in the 2009 Central and Eastern African Football Associations (CECAFA) Cup.[508]

Zanzibar's precarious situation in the field of sport can be appreciated when it seeks to play with other national teams. Zimbabwe, for example, invited the Tanzanian national team, Taifa Stars, for a friendly game, but Taifa Stars declined. Zanzibar, being part of the Union, requested to represent Tanzania instead of Taifa Stars, but Zimbabwe's national team objected because the FIFA regulations do not allow them to play with non-FIFA members. Nevertheless, Zanzibar plays with players who are in national teams in the CECAFA Challenge Cup and in the Confederation of African Football (CAF).

Shaali explains the disparity as a result of the failure of the Union government to spell out the rights and responsibilities of each side in view of omissions in the current Union setup. Ally Saleh opines that the problem emanates from the start. When Zanzibar joined Tanganyika to form the Union, Zanzibar failed to assert its rights to global sports bodies with the exception of the English Football Association.

The Quest for Membership in Global Sports Bodies

Zanzibar has been proactive to address this anomaly and in the last two decades, has embarked on a relentless diplomatic campaign with various sports bodies to plead its case. The process of lobbying CAF and FIFA has been ongoing for over a decade with delegations from Zanzibar being dispatched to key soccer loving countries, such as Egypt and in Europe, to meet with football authorities.[509] The deputy

[508] Maximo argues that the organisation of the league in Zanzibar does not follow the schedule of other leagues making it impossible for him to inspect and recruit players.

[509] One of my informants Farouk Karim was among the official lobby.

speaker and representative from Rahaleo, Hon. Kamal Basha Pandu, could not contain himself during House deliberations in October when he urged efforts towards granting Zanzibar's full membership of FIFA to press on.[510]

Relentless advocacy has ensured that the Zanzibar Football Association (ZFA) is an associate member of CAF since 2004 and full member of CECAFA. Zanzibar is a full CECAFA member because it was a founder-member. To argue its case internationally, Zanzibar has tried to draw parallels with Great Britain where England, Scotland, Wales and Northern Ireland have an autonomous status in FIFA as do some states of the former Soviet Union. Farouk Karim, the former head of ZFA. explains that this is because these nations constitute FIFA founder members. When CAF presented before FIFA the motion to grant Zanzibar membership, the football body distinguished the case of Zanzibar and the membership of Scotland, Wales and Northern Ireland and some states of the former Soviet Union in view of their constitutional history.

FIFA's position with respect to Zanzibar has been denounced as inconsistent. Steve Menary, a freelance writer and journalist, who is sympathetic to Zanzibar's plight, for instance, argues that the criteria FIFA uses to admit countries to the world body is irregular since it ends up admitting "countries" that would not qualify under the UN or Commonwealth rules/principles for membership. Consequently, there are more FIFA members than there are UN member countries.

Nevertheless, although the situation appears bleak, Zanzibar remains upbeat. Ali Juma Shemhuna, the information, culture and sports deputy chief minister informed the House of a joint delegation of the Tanzania Football Federation (TFF) and ZFA in conjunction

[510] Hansard, 22 October, 2009: p. 36.

with sports ministers, to speak to FIFA President Joseph (Sepp) Blatter to consider Zanzibar for associate membership.[511]

And, while a CECAFA tournament evidenced tensions between Zanzibar and Tanzania in the diplomatic realm of sport, both sides had in the past taken deliberate steps to foster good relations in the area of sports between the two parts of the union. The Union League, for example, has taken different forms during its life time in an attempt to balance representation of local teams in regional tournaments and, according to Ally Saleh, to somehow minimise the dominance of Yanga and Simba, both Dar es Salaam-based teams, in the national league.

Surely, the role of MPs from Zanzibar in advocating for the island's interests comes under scrutiny amid this impasse. For a long time, Hon. Seif Khatibu, one of the presidential candidates for Zanzibar since the 2005 elections and the longest serving minister in the present Union Cabinet, served a lengthy term as the Union minister responsible for information culture and sports. One wonders how far he advised the Zanzibar Government, and the Union Government and their respective football associations on the matter to bring about progress instead of political competition.

Hope for Zanzibar: The 2009 Home Grown Political Accord

In an unexpected development, President Karume of Zanzibar met with CUF secretary general Seif Sherrif Hamad at the State House on 5 November, 2009 on what was widely publicised as an effort to arrive at an accord to build a new political dispensation in the island's interest (*kwa maslahi ya Zanzibar*). At least two informants suggested that the meeting was an initiative of a former revolutionary government member, Hassan Nassor Moyo, following the death of another veteran isles politician, Shaaban Mloo, both of whom were

[511] Hansard 22 October, 2009: p. 37.

keen to see that the political impasse in Zanzibar comes to an end.[512] They hoped to do away with the legacy of violence marring successive elections since 1957.[513] The outcome of the meeting was a home grown accord. The accord was significant and timely considering that Zanzibar has been in a political crisis since the 1995 elections. In fact Prof. Othman (2006) and Lofchie (1965: 205) argue that since the riots of June, 1961, and the revolution of 1964, violence was being accepted as a way of solving political conflict. Thus, a power-sharing agreement reached before the 2010 general elections herald election outcomes devoid of social disturbances.[514]

Uneasiness about the Karume-Hamad Détente

One month after announcing the accord to chart a new political destiny for Zanzibar, the leaders met again to review the progress of their newly found political will. Initial reactions of the accord were mixed. Political cynics interpreted the accord between Karume and Seif Shariff Hamad, as a strategy to protect the president against prosecution for excesses committed during his rule. CCM supporters fear a possible break with the ranks by Zanzibaris amid mounting Union grievances. CUF members thought that their secretary general, hungry for power, had betrayed them in the run up to the general elections. Other opposition parties were at a loss contemplating what the recent development meant for their own

[512] The chairperson of CUF, Prof. Ibrahim Lipumba, confirmed this during a private discussion at the MO Ibrahim Foundation when the talks were first announced and this was later confirmed by the chief whip, Hon. Shaali.

[513] The agreement is dubbed the *Maridhiano ya Wazanzibari* in view of the fact that they were initiated by internal actors and not by external actors, including from the Mainland. The late Mloo defected from the ruling party to join the opposition early on serving in its executive.

[514] Hamad, Yahya (2010). *The State of Constitutionalism in Zanzibar, 2008* in Khoti Kamanga (eds) Constitutionalism in East Africa; Progress, Challenges and Prospects in 2008, Kampala, Fountain Publishers 2010 p.169-200.

survival in Zanzibar, while the common person tried to keep up with the fickle political terrain.

Certainly, as Karume would step down, such an accord would accentuate the leadership tussle in the ruling party in the isles. CCM hardliners accused Karume of departing from CCM policy outlined at Butiama in March, 2008 with respect to the future of the Zanzibar Political Accord (*Muafaka* III). The CCM national executive committee recommended at Butiama that the option of forming a government of national unity in Zanzibar be decided by a referendum as a precursor to the anticipated constitutional changes in Zanzibar. CUF, on the other hand nopposed the referendum arguing that the House of Representatives had the mandate to decide on the matter.

Therefore, Zanzibar's political hopes were pinned on Muafaka III. Uninterrupted talks between CCM and CUF for 14 months between January, 2007 and February, 2008 raised hopes of a positive outcome. *Raia Mwema (2009),* for example, suggests that the CCM deputy secretary general, George Mkuchika, was alarmed about the purported statement attributed to the Zanzibar statement that he is for free and fair elections and was not opposed to the idea of the Zanzibar president coming from Pemba since it is also part of the country.

The suspicions the accord generated were warranted. After all, immediately after the 2005 general elections, CUF announced that it did not recognise Karume. To show their displeasure with government policies, CUF in protest withdrew its members at various times from key bodies, including the House and ZEC. Thus, for the talks and accord to take place, CUF had to recognise Karume as a necessary step to legitimise future talks. Abubakar Khamis Bakary, the head of the opposition in the House, interprets the current development favourably more so when the Zanzibar president appointed two opposition members to the House of

Representatives, Juma Duni Haji and Nassor Ahmed Mazrui,[515] following CUF recommendations, something he had hesitated to do in 2001 under *Muafaka* II of 2001.

Defining the New Political Climate in Zanzibar

This political accord comes at a time when the 1st *Muafaka* sealed in 1999 under the auspices of the Commonwealth, the 2nd *Muafaka* signed in 2001, and the 3rd *Muafaka* in 2007, were implemented by the concerned parties (CCM and CUF), but were yet to produce the intended results. *Muafaka* II, in particular, was expected to resolve some of the sore points between the two parties since it was supported by legislation to give it clout. Professor Maliamkono lists the promotion of joint measures towards a full civil society as among the requirements of *Muafaka* II.

Additional demands of *Muafaka* II were the establishment of a judicial service commission to advise the president on a range of public affairs and appointments, including the appointment of the chief justice of Zanzibar and the reform of the ZEC. It also called for the creation of a permanent electoral roll and a government of national unity. Most of these changes were accommodated in the 2002 constitutional amendment and in other legislative reforms thereafter, but obviously with some unintended outcomes.

The political scene was radically altered in 2008 at Butiama when CCM unilaterally decided to call for a referendum to determine the political fate of Zanzibar, a demand that did not form part of the original points of negotiations in the 14-month uninterrupted Muafaka talks between the two parties. CUF interpreted the move as a ploy to buy time and denounced CCM in different quarters for betraying *Muafaka* III. Zanzibaris braced for the possibility of a renewed stalemate.

Therefore, the simple act of Karume and Seif Sheriff Hamad meeting and agreeing to begin a new chapter in the isle's politics,

[515] Announced by various news channels on Monday 14 December, 2009.

has pulled Zanzibar out of a political abyss and radically changed the political dynamics in the isle. CUF is building the momentum with Ismail Jussa, the CUF director of external affairs who coincidentally accompanied Seif Sherrif Hamad in the maiden meeting with Karume, requesting for the extension of Karume's term so as to allow him to set the stage for the needed constitutional reforms. For Karume, such a request was a strategic move since if it had come directly from him or the ruling party, it would have seemed suspicious.

Similar demands were voiced a few days earlier by a number of participants at the Research and Education for Democracy in Tanzania (REDET) meeting discussing recent political developments in the isles. In attendance were politicians, clerics, academicians, and representatives from NGOs and CBOs in Zanzibar, who expressed a strong desire to see Zanzibar's political history used not to fuel conflict, but to open a new chapter. They pressed for the postponement of the next general elections scheduled for October 2010 because they wanted Karume and Seif Sharrif Hamad, to have ample time to lead Zanzibar towards major reforms before the elections were held.

The Legality of a Government of National Unity

There are mixed opinions on whether the present constitution of Zanzibar allows the formation of a government of national unity. Two divergent opinions could be discerned from informants. For example, there were those who said it did not and wanted its provisions amended to allow for the same, while others argued that the constitution was silent on the issue. Indeed, Article 9(3) of the constitution encourages the revolutionary government to promote a government of national unity. However, according to the CCM *wakereketwa* (diehards), the accord between Karume and Seif raises doubts among the island's opposition as to whether it is indeed open to the formation of a government of national unity.

The formation of a government of national unity in Zanzibar is not novel. In the runup to Zanzibar's independence, the political reality required two or more parties to form a coalition government in order to obtain the necessary majority to govern. It is a coalition government that steered Zanzibar to independence. The fear in adopting this route with a CCM majority in the House was the risk of allowing the incumbent president, whose term was due to end in 2010, to be eligible to stand for office in a new constitutional setup, as was done in Namibia with Sam Nujoma.

Ally Saleh thinks the crux of the political accord between Karume and Seif Sherrif Hamad is a question of constitutional integrity. There is need to change the legal and constitutional framework in order to achieve the preceding. Article 28 (3) of the constitution indicates the president's term of office as two consecutive terms of five years each. Allowing a postponement would mean Zanzibar would be out of schedule with the general elections scheduled in the Mainland and the elections of the Union president, which follow the Zanzibar presidential elections.

Specific demands from the opposition to legitimise the extension of the presidential term is a commitment to improve the system of registering voters; the appointment of an independent ZEC; and the building of a democratic culture in the isles, especially during elections. Equally crucial, is the question of representation in view of the fact that with CCM and CUF becoming political bedfellows, other political parties which have presently failed to make it into the Zanzibar legislature will be further marginalised.

Governance Challenges in Zanzibar

Good governance is a broad agenda that encompasses effective government policies and administration; respect for the rule-of-law; protection of human rights; the efficient utilisation of natural resources and environmental management; and an effective civil

society[516]. It is relevant to the social, political and economic sphere since it includes proper management of the economy as well as transparency and fair competition in business. Kabdudi argues that to be effective and sustainable, the concept must be anchored in a vigorous working democracy which respects the rule-of-law, a free press, energetic CSOs and effective and independent public bodies, such as the Commission for Human Rights and Good Governance (CHRAGG), the Prevention of Corruption Bureau and the Fair Trade Commission, so as to enhance government transparency and accountability.

On numerous occasions, members of the house Representatives questioned what appears to be a conflict between secondary laws and rules with principal legislation. One example is Act No. 7 of 2005 which was discussed a few times. Representative Said Ali Mbarouk advances that the constitution, the source of all laws, grants all Zanzibaris over 18 years of age the right to vote. It is, therefore, inconceivable that a subsidiary law would place undue restrictions in the exercise of a right enshrined in the constitution even if passed by the House. This is a contrary view to that expressed by the AG who maintained that any law passed by the House was legitimate.

Scrutinising Laws against Constitutional Standards

The Zanzibar Constitution 1984 Article 24 (1) reads:

The rights and freedoms, whose basic contents have been set out in this constitution, may be limited by a law enacted by the House of Representatives provided that such limitation is necessary and justifiable in a democratic society. In any case, such limitation;

- shall not in any way infringe the right to freedom from torture, inhuman or degrading punishment and or treatment; or

[516] See Dr. Palamagamba John Kabudi (undated) "Good Governance: Definition and Implications" available at http://www.fes-tanzania.org/doc/good-governance.pdf

- shall not curtail the essential content of the right itself; or
  shall not result in greater harm to society than that which it is aimed to prevent.

Zakiya Omar Juma, a women representative in the House, singled out laws which give rights with the right hand, but take them away with the left, going against the spirit of the supreme law, resulting in the deprivation of basic rights. Also, commenting on the curtailment of the right to vote, she maintains strongly that it is a constitutional right that should not be unduly restricted to such extent that it becomes illusory. For Omar, the legal standard to assess the validity of laws is not just the Zanzibar constitution, but also other international human rights agreements that Zanzibar and Tanzania are party to.[517] Faki thinks that the job of bringing all laws in line with the Constitution remains with the newly constituted law reform commission.

Representatives also singled out institutions that failed to apply the law in line with the constitution. Other than the failures of ZEC and the department of identity registration over the voter registration saga, representatives also spoke strongly against the performance of Kadhis courts, leading some to question their relevance and utility. Anecdotal evidence was provided during the 2009 budget speech of the ministry of state (presidents' office) for constitutional affairs and good governance detailing incidents resulting in the denial of rights and general impunity exercised by Kadhis on matters deemed 'religious'.

Act No. 3 of 1985 establishes the Kadhis' courts to exercise jurisdiction in the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess Islam. However, legislators questioned the constitutionality of procedures adopted by Kadhis courts such as the absence of legal representation. Claimants, as well as defendants,

[517] Hansard, 6 July 2009: p. 43.

thus have to represent themselves, a situation that results in a denial of justice, especially for women who may be intimidated in a male space and in a deeply patriarchal setting.

Principles of justice and constitutional guarantees are rarely met by Kadhi's courts as argued by Zakia Omar Juma. To substantiate her argument, she uses her experience when trying to negotiate her sister's divorce. To expedite her divorce, her sister not only had to buy her divorce by returning her dowry, but was also forced to pay off her husband's debts as a ransom for her freedom from a marriage that had irreparably broken down for many years.[518] Women caught up in such situations feel they have few options since the ruling comes from a religious court. There is little attempt to underscore the fact that kadhis operate under the ambit of the constitution, such as by upholding the right to be heard, equality before the law and fairness. Equally, there are few mechanisms to check the practice of religious bodies as well as other administrative bodies in light of constitutional and legal standards.

The Legislative Model, Separation of Powers and Good governance

Ame Mati Wadi, the Matemwe Representative and Salmin Awadh Salmin, the Magomeni Representative, launched a fierce critique attacking the suitability of the Westminster model as falling short of the requirement demanding for the separation of powers in a constitutional order.[519] Article 5A of the constitution provides for separation of powers between three 'authorities'; the legislature, the executive and the judiciary. However, under the current setup, separation of powers is elusive mainly due to reasons Wadi and Salmin pointed out. They criticised the fact that ministers, their deputies and regional commissioners, who comprised the executive,

[518] Hansard, 6 July, 2009: p. 48.
[519] Hansard, 23 June, 2009: p. 17.

also served as legislators, undermining the constitutional requirement of separation of powers.

Vuai argues that the demarcation of powers between the different arms of governance is one way to separate politics from governance, promote democracy and bring about national unity.[520] Such an arrangement also presented conflict of interest in view of the fact that Article 10 (8) requires organs and officers of the government to be accountable to the people, either directly or via their elected representative. In the house, it is the performance of ministers that is being appraised, but they are able to sit in, discuss and vote on decisions some of which concern them. In upholding the separation of powers, such an arrangement is problematic.

Part of the problem could be due to the fact that even in the current multi-party setup, both the Tanzanian and Zanzibar constitutions are framed with a strong legacy of a single powerful party. The expectation is that only a single party will be dominant throughout the Union territory, a reality that only CUF has seriously challenged in Zanzibar since 1992. To overcome this bias, representatives from the opposition propose that Articles 17 and 18 of the Zanzibar constitution be amended and that 'the winner takes all' formula be abandoned considering that sometimes the election results are too close to call.

For democracy to take root in Zanzibar, there must be a democratic constitution and an independent electoral commission to oversee free and fair elections. Opposition figure Juma Duni Haji, now a legislator, averred that under the 1984 constitution, the president has wide powers. The president, even if contesting in elections, appoints ZEC members. This means that the president can dismiss ZEC officials who may not be to his or her liking, and appoint those he or she likes, a prerogative that is too great for a president. This anomaly is acknowledged by the director of elections

[520] Hansard, 23 June, 2009: p. 21.

Salum Kassim Ally (Ally: 4). Of course, such an admission puts the spotlight on the requirement of impartiality and freedom of action for bodies (and their members) that fulfill public functions such as monitoring the electoral process, since this comprises an essential part of confidence building measures.

The ZEC is a creature of the Zanzibar constitution under Article 119. Although it is affiliated to NEC, it is envisaged as an independent and democratic body able to realise justice. This ability raised serious questions when *The African* of 15 September, 2009 reported the discovery of burnt identity cards dating from 2007/08. The discovery forced the CUF deputy director of public relations and publicity, Ashura Mustapha, to emphasise the need for an independent electoral commission.

A less obvious dimension of the concept of separation of powers on the House floor pertained to the discussion on the introduction of the Constituency Development Fund (CDF).[521] The CDF was initially proposed and adopted on the Mainland amid great opposition from CSOs which questioned the implication of the fund to the notion of separation of powers. Activists argued that parliamentarians would effectively be implementers of development projects, a role envisaged for the executive arm of government. Their objections fell on deaf ears in view of the fact that MPs consider CDF a lifeline since increased benevolence on the part of MPs would ensure that their popularity at the base remains intact.

In the case of Zanzibar, CDF possesses an additional challenge. Zanzibar has both parliamentarians and representatives representing constituencies, but the CDF was initially intended for parliamentarians and other local government functionaries, leaving representatives out of the picture. In view of the impending elections in 2010, representatives were concerned about this omission, considering that under the Zanzibar constitution, they are the legitimate

[521] Hansard, 23 June, 2009: p. 24

representatives of Zanzibari citizens. Thus, the CDF not only poses conflict between different arms of government, but also potentially between the different categories of community representatives provided for in the constitution.

Union Matters

This part of the paper will focus on constitutional matters and challenges that fall within those matters that are designated as Union matters in the constitutions of the United Republic and that of Zanzibar. The discussions are, therefore, not confined to Zanzibar but are much wider in scope. This section is divided into three main parts, looking at the core issues of constitutional, political and legal importance, that informed discussions at different quarters. A recurrent theme is that of the legal snags over the union. This forms the crux of what is known as the '*Kero za Muungano*' (Union grievances). The other two issues explored relate to Zanzibar's status in pan-territorial bodies, a current topic as the region experiments with greater integration which has constitutional ramifications for Zanzibar's status; and the question of Zanzibar's sovereignty over its natural resources, a discussion that underscores the island's quest for economic independence. These issues will be explored in greater detail.

Zanzibar's Status in Pan-Territorial Bodies

Zanzibar's membership in pan-territorial bodies is not only relevant in the case of sports, but also in the political arena. The question of Zanzibar's status in the EAC assumed great prominence during the period under review.[522] Zanzibar is very wary of plans to fast-track the East African Federation since there are a number of unresolved matters in the Union with Mainland Tanzania. The establishment

[522] Zanzibar's sovereign status is not as obvious in other regional and continental bodies like SADC or the African Union (AU).

of the federation will most likely add another layer of complication to an already loaded and complex chest of unresolved issues.

At the moment, the Zanzibar president only has observer status in the EAC, although there has been an effort to select Zanzibaris to the EALA as part of the URT. Zanzibar's ability to assert herself and gain recognition within the EAC is on account of the region's history. Until its union with Tanzania, Zanzibar was a full member of the EAC since 1929.

The communication and transport minister, Machano Othman Said, in a June, 2009 House session identified controversial issues for Zanzibar in the then ongoing discussions over the East African Common Market regarding the free movement of people; the harmonisation of tariffs;[523] and the ownership of land.[524] The question of Zanzibar's ability to have a say in the EAC matters was equally emphasised. Giving an example of talks he had recently attended with ministers Samia Suluhu Hassan and Hamza Hassan Juma, he observed how Zanzibar ministers were sometimes forced to take a back seat because it were the Representative from the Union who was formally recognised in the body.[525] Even so, legal advisers at the House feel Zanzibar has not yet pursued the question of its status in the EAC seriously considering the absence of a resolution with political or legal force reflecting the concerns shared on the House floor. The former EALA project co-ordinator, Algeria Akwi Ogojo, explains that Zanzibar's place is determined by the rules and practices emanating from Tanzania and not dictated by the EAC Treaty. She clarified:

> "Zanzibar is understood to be part and parcel of the United Republic of Tanzania. Sensitivity is accorded to Zanzibar, however,

[523] To note is that Mainland Tanzania and Zanzibar have different tariff rates.

[524] See the Treaty establishing the EAC Art 5(2); Art 76 and Art 77: and The Protocol on the Establishment of the East African Community Common Market, especially Part E.

[525] Hansard, June, 30, 2009: p. 56 and pp. 88-89.

> by recognising its president, Speaker and or Clerk and other officials whenever such need arises. Among the 9 EALA members from the United Republic, there is always a member or two from Zanzibar. The EALA holds sessions in the Zanzibar parliament as part of its operational practice of holding the EALA plenary sessions on rotational basis in the partner states. All EAC sectoral councils, committees, working groups, etc., include members from Zanzibar as part and parcel of the representation from the United Republic."[526]

The question of Zanzibars representation in pan-territorial and global bodies is, however, not new. Rather it has been accentuated by the merging in 1977 of the two political parties that led Zanzibar and Tanganyika respectively towards independence. This shifted the power balance from the Revolutionary Council, which is the supreme governing body in Zanzibar, to the then supreme party central authority. Thus, at the heyday of single party rule from 1977 to 1992, Zanzibar lost its autonomy to act as a nation, the same having shifted to the all-powerful party. The political fragility of Zanzibar has meant that such concerns were stifled, lest they legitimise accusations levied against the Revolutionary Government. However, the expansion of the democratic spaces has resurfaced the issue both within the ruling party and the opposition.

Accordingly, within the ruling party, there is a faction that campaigns for Zanzibar's autonomy and unique identity within the Union, while the opposition seeks political advantage by pointing out that Zanzibar has been sold out to the Mainland and reduced to one of the regions of the Mainland instead of its status as a state. Such sentiments influence the scope of discussions over participation and inclusion, not just in global and panterritorial bodies, but also in Union bodies as will be appreciated below with the operations of institutions such as Tanzania Revenue Authority (TRA) and the Bank of Tanzania (BOT). What is key to appreciate is that

[526] Email communication, January, 2010.

Zanzibar's displeasure is not just superficial, for example, at the level of representation, but more fundamental, for example, having a stake in informing and shaping policies before the same is presented in regional and global fora.

Sovereignty over Oil: The Unlikely Unifier of Political Difference

The exploration and ultimate exploitation of Zanzibar's natural resources dominated House deliberations on a non-partisan basis in 2009. The Zanzibar House and later the Revolutionary Council unanimously voted to keep research and the drilling of oil and natural gas, inshore and off shore, out of the list of Union matters. Both are equivocal that Zanzibar should have the exclusive right to exploit its resources to advance its interests and right to economic development.

This position was supported by both the ruling party and the opposition, and may have preceded the good will that culminated into a new atmosphere of dialogue between CCM and CUF. The popularity this issue attracted should be understood in the context of the energy crisis and economic difficulty experienced in Zanzibar for some time now. Efforts to draft an energy policy began in March, 2008 and the first draft was completed in January, 2009. Between this time, a number of things happened. A consultant was recruited with the aid of the Norwegian government to advise on the appropriate course of action to ensure that oil is exploited and preserved for Zanzibar's interest. An inception report was prepared and discussed during a seminar at the House in September, 2008.

Mansoor Yussuf Himid, the minister for water, infrastructure, energy and land, explained that a revised draft of the report was later submitted to the Government in October, 2008, upon which the ministry prepared a *waraka* (Circular No.225/2009) that was presented before the Revolutionary Council in March, 2009 to get

the government's position on the issue. According to the minister, the Council made the following recommendations:

- That all activities related to the research and drilling of oil and natural gas in Zanzibar's territorial and inland waters are to be administered by the government of Zanzibar;
- That the government of Zanzibar should create a body to oversee all matters related to oil and gas research and excavation; and,
- With respect to the area that falls in the Exclusive Economic Zone (EEZ) in the main seas, that Zanzibar should negotiate with the Union Government to be an equal partner and not under the present Union agreement.

In addition, the Revolutionary Council directed that the question of oil be removed from the list of Union matters being discussed by the committee to address Union grievances; that all matters related to oil and gas be removed from the administration and control of EEZ; and that the ministry prepares a policy and law on oil for Zanzibar.[527] The Zanzibar oil policy was expected to be presented before the House during the October, 2009 session.

Many, including President Kikwete, expressed amusement at the fuss the question of oil raised even before the official discovery of oil in Zanzibar. Prospects of oil in Zanzibar are not new, but began in 1952 and drilling was attempted by British Petroleum. At that time, two wells were drilled, but found to be dry. New hope has been rekindled with the discovery of huge gas deposits in the coast of southern Tanzania and Zanzibar claims not to have benefited from it under the Union arrangement. Instead, it has resolved to explore its own energy resources.

Political analysts, as have some politicians, however, question Zanzibar's seemingly unilateral action over a matter that falls under the ambit of Union matters. In the past, Mohammed Seif Khatibu,

[527] The Hansard of 8 July, 2009.

the representative of Uzini in Unguja Central district, silenced the Zanzibar legislature when it cried foul over the Union's usurpation of energy matters indicating that it was within its mandate in view of the fact that the Union Parliament had included the relevant provision in the constitution since 1968 at which time Zanzibar raised no objection. Besides, for constitutional amendments to take effect, there must be approval of two-thirds of Zanzibari parliamentarians, and the same proportion of legislators from the Mainland, is required.

Ally Saleh agrees with Khatibu's argument drawing on the doctrine of acquiescence. He believes that instead of acting unilaterally, the proper procedure would be for the Union Parliament to amend and remove energy matters from the articles of union. Nevertheless, one can also challenge the application of the said doctrine during the period in question, where any criticism against government policy both in Zanzibar and on the Mainland led to political suicide, long prison sentences or death.[528]

At the time of putting together this report, President Karume in his 12 January, 2010 speech marking 46 years of the Zanzibar Revolution, revealed that the Union president was open to the possibility of removing oil from the list of Union matters. Some interpreted this as a tactical move to bind President Kikwete to the position adopted by Zanzibar. In essence, Kikwete would have reiterated the position of the constitution like was contained in the Nyalali Commission to allow for the possibility of dialogue on any matters that may prove difficult for Zanzibar and her economy to go on.

[528] From 1965, both Tanzania and Zanzibar show features of an authoritarian state, where dissent was violently suppressed.

Qualms over the Union between Tanganyika and Zanzibar

The nature of the union between Zanzibar and Tanganyika has been the subject of lengthy discussion elsewhere.[529] Largely, scholars have dealt with the features of the constitution and the constitutional makeup of the Union and related issues. During the period under review, tensions arose over Zanzibar's proper status: is it a country, a state, a nation or a territory? The Zanzibar constitution, in various articles, refers to Zanzibar as a state. Although the Court of Appeal in *S.M.Z v. Machano Khamis Ali and 17 other Zanzibaris* ruled that Zanzibar is not a state, at least in so far as committing the crime of treason is concerned, there is a strong lobby in the general population and in the House that challenge the ruling.[530]

Unsettled Grievances in the Union

Among 10 items on the list of Union grievances until May, 2009, only four items were discussed and solved, mainly;

- The administration of justice and human rights.
- Fishing on the main sea.
- Implementation of the Merchant Shipping Act in the Union and Zanzibar joining the International Maritime Organisation (IMO).
- A fourth issue relating to the question of budgetary assistance and loans was already under implementation.[531]

The general tone of deliberation in the House is, however, not reassuring and there is general frustration expressed over the slow pace of progress of the *kero za muungano*. They claim that few cases in

[529] Among them Srivastastava (1978-81); Mgongo Fimbo from the Faculty of Law of the University of Dar es Salaam (UDSM) (1981); Wolfang Dorado, former AG of Zanzibar (1983); Mvungi opposition leader and lecturer at the Faculty of Law UDSM (1983); P. Kabudi the present Dean of the Faculty of Law (1985); Prof. Issa Shivji (1990), Mbunda (2008) and Prof. H. Othman (2006) from the Institute of Development Studies (IDS).

[530] Criminal Appeal No 7 of 1999 (unreported.)

[531] Hansard, 26 June, 2009: p. 1.

courts as well as key grievances over Union matters have been solved. More disconcerting for representatives are the reckless statements attributed to top national and party leaders. Representative Hija Hassan Hija from Kiwani, for example, reports that prime minister Mizengo Pinda was quoted in a local daily stating that "Union grievances will end when there is only one government".[532]

Kikwete fares no better. Mahadhi, the principal secretary of the ministry of state (president's office), Constitutional affairs and good governance in Zanzibar, notes that the president directed that the structure of the Union should not be discussed during ongoing Union negotiations, as he does not believe that there is a problem with it. This statement is perceived as a non-starter since by so stating, he is effectively limiting the scope of negotiations in view of the reality that most contentious issues originate from the Union structure. Moreover, since Zanzibar is part of the Union, it is inevitable that any political discussion will touch on the structure of the Union.

There is, thus, a sense that the government and the ruling party are not ready to revisit the articles of the Union for fear of opening up a political pandora that could raise more questions than answers, including the legality of the additions to the original articles. Conversely, the reluctance of key political authorities to act makes it harder for technical advisers and implementers to act. In the end, the lack of progress over Union matters validates local sentiments that Tanzania, and more specifically CCM, holds the future of Zanzibar hostage.

Is the Union Swallowing up Zanzibar?

The question of Zanzibar's visibility and identity within the Union emerged earlier on in the rift and was noted by the Nyalali Commission.[533] The Commission collected view points as to whether

[532] Hansard, 16 October, 2009: p. 21.

[533] Created in 1991 and named the Presidential Commission on Single Party or Multi-party System in Tanzania.

Tanzania should adopt multi-party democracy and went on to suggest constitutional changes to the governance model in a multi-party setup in light of the country's unique union between two states; Zanzibar and the Mainland. In their dissenting opinion, a number of commissioners observed that constitutional problems created an impression that Tanganyika had swallowed Zanzibar, something that required corrective measures.[534] To enhance Zanzibar's national identity, especially in non-union matters, including external affairs,[535] they suggested making the necessary modifications in the political system such as in the representation in parliament and Union bodies, in financial and taxation matters, and the co-ordination of union affairs.[536]

There, however, exists a wide gap between the law and the reality in a number of matters pertaining to the Union. It is very likely that people are disgruntled and actually complain about legal provisions that seem oppressive to Zanzibar, yet in reality the weakness could arise from the lack of enforcement. For example, ports and harbours are a Union issue, but in practice both the Mainland and Zanzibar administer their ports independently (Tanzania Ports Authority, and the Zanzibar Ports Authority) with separate policies governing each authority.

Importantly, while the Union Constitution considers ports and harbours a Union matter, Article 2(1) of the Zanzibar constitution defines the area of Zanzibar as including "territorial waters that before the Union formed the People's Republic of Zanzibar" which effectively usurps jurisdiction over ports and habours that are within territorial waters. But, in view of the importance of ports in raising revenue, a formula has been worked out to avoid conflict over jurisdiction and earnings.

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[534] See The Dissenting Opinion of the Nyalali Report paragraph 4.1 (ii).
[535] ibid paragraph 3
[536] ibid paragraph 4

Another area of increased co-operation is maritime transportation. In January, 2009, the Zanzibar Maritime Authority Act 2009 was presented before the House to oversee the implementation of the Maritime Transport Act 2006, a role envisaged for Surface and Marine Transport Regulatory Authority (SUMATRA) under the Union setup.

Khatib S. Bakari, the deputy minister, confirms that the area of the main seas is part of the United Republic pursuant to Act No. 3 of 1989. But, he does not think that this gives the Union government exclusive rights over the matter since if an issue is a Union matter, it means that it is dealt with by both governments and not just one government.[537] Such a position clearly demonstrates prevailing sentiments in the Isles that they are not subordinate to the Union, but an integral part of the union despite their small size. Thus, attempts to subsume Zanzibar under the rubric of the Union are contested as an attempt to annex a small state within a bigger nation.

Maritime safety is critical in view of the mounting accidents in Zanzibar's territorial waters. SUMATRA was compelled to seize *Sepideh* speed boat for overloading, 75 passengers were not in the passenger manifest. When queried, the captain claimed the unaccounted were children, an answer that did not please many representatives who queried if children were expendable[538] suffice to mention that SUMATRA is a body that operates with unlimited jurisdiction all over Tanzania while *Sepideh* is a speed boat originating from Zanzibar. The fact that vehicles are registered in one part of the Union, and therefore, under different laws, has posed problems over jurisdiction. Since bodies like SUMATRA are better financed and equipped to perform their services, Zanzibar feels ever more emasculated.

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[537] Hansard, 22 June, 2009: p. 22

[538] Part of deliberations as the House was receiving the official report on the Official Commemoration of the Day of the African Child in Hansard, 24 June, 2009

Economic Sovereignty: A Sore Thorn in the Union

Most representatives believe that the Union, as it is, constrains Zanzibar's economic development. Consequently, most complaints over the Union arrangement are over financial matters, for instance, questions of tariff harmonisation; payment of taxes, especially for Union employees working in Union institutions like the Bank of Tanzania (BOT), *Jeshi la Wananchi wa Tanzania na Zanzibar* (JWTZ), the police, immigration, and revenue. Upon close inspection, Union matters seem to replicate matters that were under the mandate of the former East African Common Services Organisation, later renamed the East African Community in 1967, such as harbours; posts and telecommunications; transport and currency.

Under the Union Constitution, URT's government revenue is to be distributed to both sides of the Union. Also, a consolidated fund of the Union government, the Joint Financial Account- is to be kept in which monies contributed by the two governments is to be held in reserve.[539]However, representatives feel they are getting the short end of the stick.

The case of BOT is constantly being referred to as an example of the raw deal the Union arrangement subjects Zanzibar to. BOT is a Union matter and there are BOT offices in Zanzibar. One of the deputy governors is from Zanzibar. The creation of BOT means that Zanzibar's own Bank, the People's Bank of Zanzibar, lost its former status as a national bank and currently operates as a commercial bank like countless others competing for clients.

According to Said Ali Mbarouk, the shadow minister for finance, and Representative from Gando, the Zanzibar share in the former East African Currency Board (EACB) was 11.2% which was used to begin BOT. However, Zanzibar now only receives 4.5% from profits accrued as well as from budgetary aid received. Representatives think that the amount is too small considering Zanzibar's status as a former

[539] Article 133 in the 1977 Constitution of the United Republic of Tanzania

state. Moreover, they argue that even if Zanzibar was treated like a region of Tanzania, it would be entitled to 4.7% of the profits, considerably more than what it is getting now.

The adverse economic situation and, especially the tax regime, has forced many Zanzibari companies such as Zantel, another financial powerhouse, to move its base of operations to Dar es Salaam. Some representatives argue that revenue collection is not a Union matter and that the Tanzania Revenue Authority (TRA) should not operate in Zanzibar because the tax rates it imposes present problems for trade in Zanzibar. Rather, they see the Zanzibar Revenue Board (ZRB) as the sole agent for government to collect taxes under the following laws: The Value Added Tax (VAT) Act No. 4 of 1998; The Stamp Duty Act No. 6 of 1966; The Hotel Levy Act 1 of 1995; The Port Service Charge Act No. 2 of 1999; The Petroleum Levy Act No.7 of 2001; The Property Tax Act No.14 of 2008; and the Trade Licence Act 3 of 1983.[540]

During House deliberations on money laundering, Said Ali Mbarouk questioned the utility of passing a law in Zanzibar when the Union Parliament passed a similar law in 2006 bearing in mind Article 132 (1) of the Union Constitution which provides for laws passed by the Union Parliament in relation to Union matters.[541] Nonetheless, Section 17(1) of the Interpretation of Laws and General Provisions Act No. 7 of 1984 provides that the Acts of the URT shall not extend to Zanzibar unless it is specifically on a Union matter and passed under constitutional provisions. Even then, Section 17(2) requires the relevant ministry to lay the same before the House.

It is for this reason that the principal Act of the Commission for Human Rights and Good Governance Act No. 7 of 2001 was extended to Zanzibar by the Commission for Human Rights and Good Governance (Extension) Act No. 12 of 2003. Section 3(1)

[540] Hansard, 22 June, 2009: pp. 48-9.
[541] Hansard, 26 October, 2009.

(c) of the Act requires the minister responsible for human rights, for Union matters, when making regulations under the Principal Act, to consult and agree thereto with the responsible minister for human rights in Zanzibar, perhaps to keep them in the loop. In practice, however, Zanzibar officials complain of being ignored by their counterparts.

Zanzibar's economic woes have put it in a much weaker bargaining position than was the case in 1970s' where the economy was stronger and had more political clout. While the monocrop economy contributes to the poor economic performance, Zanzibar believes economic sacrifices made during the Uganda-Tanzania war depleted its reserves. Similarly, others attribute Zanzibar's failure to become a tax-free haven to deliberate policies to expand the ports in Tanga, Dar-es-Salaam and Mtwara, while undermining the port in Zanzibar. Because Zanzibar's economy is historically built on trade, such a policy has had dire consequences for the local economy.

The Status of Human Rights in 2009

At the beginning of this paper, we visited the main articles in the Zanzibar constitution under which principles of constitutionalism can be inferred. In the course of the paper, we also appreciated the dimensions in which these principles are interrogated or contested in different spaces. This part of the paper will attempt to highlight those dimensions that raise human rights concerns during the period under review.

Human Rights principles were reintroduced in the 1984 constitution, providing greater guarantees (Bakari, 2001). In fact, the reintroduction of the Bill of Rights in the constitution signalled Zanzibar's reintegration with the international community after aligning itself with the Eastern Bloc ideologically and economically. Importantly, it promised greater observance of human rights principles which had been seriously compromised after the revolution.

The dimensions of human rights concerns unveiled here were mostly from first-hand accounts and life experiences of members of the House and their constituents. Also, they are derived from media coverage and policy themes in public spaces. The human rights concerns pertain to bodily integrity and freedom from violence; the right to association and participation; equal protection and prohibition against discrimination; the right to live in dignity and earn a livelihood encompassed in the concerns with widespread corruption; and the assurance that the state will take requisite measures to translate the spirit of all rights guaranteed in the constitution and enforce them.

The NGO Act, 2009: Threat to the Freedom of Association, Expression and Participation

The right to association, and specifically to initiate human rights NGOs, is provided for under Article 20 of the Zanzibar constitution. The tabling of the NGO Act, 2009 Bill, thus, promised to raise a vibrant constitutional debate as was the case on the Mainland a few years prior when a similar policy and law was proposed. Nevertheless, CSO advocacy over the introduction of an extremely sensitive law in so far as basic civil liberties are concerned was rather muted, leaving most of the debating to legislators. This, however, is testament to the taps on political expression most civil society bodies are forced to compromise to be able to operate in Zanzibar. More grave, most CSOs in Zanzibar are registered under the Societies Ordinance, which is a more restrictive mode of constraining civic organisation and action.

House discussions of the NGO Act, 2009 Bill indicated an interest to regulate NGOs in Zanzibar. Explaining what motivated the Bill, the Regional Commissioner (RC) for South Unguja revealed that the requirement for the compulsory registration of NGOs is to nab briefcase NGOs such as those being ran by Europeans, who want

to take advantage of the poverty of local populations to fundraise for their own benefit. An example tendered by the RC was of an Italian woman who made many promises to citizens in South Unguja, while there is no way to make such people accountable for the funds they collect in the name of the poor. Thus, the government has an interest in tracking how much money is being raised on behalf of its people and hopefully to see that those funds are used to the benefit of the intended beneficiaries.

Even so, the passage of an NGO law is worrisome, more so in Zanzibar, where CSOs are not as strong or organised as in the Mainland. The fear is that CSOs, and particularly human rights NGOs which seek to be critical of the government or wish to engage in activities that promote the government and citizens' accountability, may face restrictions once government intrusion is legalised through legislation. Conversely, the fact that Zanzibar typifies pseudo Governmental NGOs (GONGO), it is also feared that government officials will manipulate NGOs to their agendas, thereby compromising the essence of CSO integrity and action.

Similar concerns were raised on the Mainland when a similar policy was drawn up and a law to regulate NGOs was enacted in 2002. Inevitably, the law touched on rights like the freedom of association, expression and assembly, leading Mvungi to describe some of its provisions as 'flying in the face of constitutionality'.[542] Moreover, such laws often lack checks and balances in case an arbitrary decision is taken against an NGO by a government entity, in this case the registrar. This happened in 1995 with *Baraza la Wanawake* (BAWATA)[543] on the Mainland and most recently with *Haki Elimu*

[542] Mvungi, Seng'odo (2005) *Constitutional Development in Tanzania 2002* in Fredrick W. Jjuuko, Constitutionalism in East Africa: Progress, Challenges and Prospects in 2002 Kampala: Fountain publishers 2005 at p. 106.

[543] For more on this see Salma Maoulidi (2007) "Critical Analysis of the Land Laws in Tanzania" available at http://www.hakiardhi.org/HA-Docs/THE%20GENDER%20DIMENSION%20OF% 20TANZANIA% 20LAND%

when government genies tried to arbitrarily deregister CSOs for political gain[544]. In the first instance, BAWATA was perceived to be a threat to the *Umoja wa Wanawake Tanzania* (UWT), the women's wing of the ruling party, while the case of *Haki Elimu,* which the education ministry took issue with an independent critique of a report they had published.

Perhaps a welcome development for CSOs generally is those members of the House increasingly recognise the importance of inviting members of NGOs to provide expert opinion and to contribute to different bills being proposed in the House.[545] House deliberations suggest that some ministries, such as that responsible for tourism and investments as well as for labour, youth, women and children development, aver to have consulted widely as they proposed amendments to policies, laws and procedures. The practice of the House is to acknowledge and cite those who contributed to the development of different bills before reading them out. The challenge remains whether the government takes key recommendations on board even when they do not seem to originate from the ruling party or to favour lable.

Gender-Based Violence

Gender-Based Violence (GBV), in its multifaceted forms, continues to be a site for gross human rights violations.[546] The local media continues to report, on a regular basis, incidents of child sexual abuse, especially of pubescent girls, although there are also increased

20LAWS%20By%20Salma%20Moulid.pdf note on page 30 and Dr. Ernest Mallya (2001) Development of Women NGOs: Case Studies of Land and Sexual Harassment Legislation, REDET p.10.

[544] See for example CIVICUS Civil Society Watch Programme (2005) "TANZANIA: Ban on NGO violates civil society's freedom of expression" available at http://www.civicus.org/new/content/BanonNGO.htm

[545] Hansard, 16 October, 2009: p. 72.

[546] Salma Maoulidi (2009), *Zanzibar GBV advocacy: important lessons for future legal reform strategies*" ACSA.

incidents of young boys being sodomised. The legal breakthrough, in the name of the Sexual Offences Special Provisions Act (SOSPA), has proved to be largely ineffective in Zanzibar in view of the low prosecution rates and conviction rates. Cases that make it to court rarely end in a conviction for a variety of reasons, such as insufficient evidence, late prosecution and collusion between law enforcement officials and perpetrators. In the end, the rights of victims and survivors of violence are compromised.[547]

Domestic violence in the island is also rife with the Zanzibar Female Lawyers Association (ZAFELA) recording 41 cases, while the ministry responsible for gender received 30 complaints as reported in the ZLSC, 2009 Zanzibar Human Rights report. The ministry responsible for gender as well as religious bodies receive more cases concerned with maintenance issues considering the high rates of desertion and divorce in the isles[548]. The situation is rendered more complex by the dual legal system in the island, where religious courts operate side by side with regular courts, and the lack of specific family laws. The expectation is that religious laws will address aspects of family law issues, but as a body of law, it is grossly inadequate to consider present legal challenges.

Ten cases of homicides were reported in 2009, two of which involved female victims. Some of the cases involved close relatives and the use of lethal instruments, underscoring the intentional use of violence, especially against women. Some of the homicides involved cases of mob justice, which although still rare in Zanzibar, mostly end in death. Mob justice is an indication of the absence of the rule-of-law and confidence in justice institutions, leading people to exercise their own notions of retributive justice. Otherwise some

[547] Salma Maoulidi (2009), *Searching for the will to conscientiously prosecute sexual crimes in Zanzibar,* ACSA.

[548] Salma Maoulidi and Usu Mallya (2007), Study on GBV prevalence in Zanzibar, Ministry of Labour, Youth. Women and Children Development. Zanzibar

informants express skepticism with the legal order and system as being unsuitable to the context.

On a related issue that forms a key advocacy concern for human rights organisations in Zanzibar, the death penalty, although still recognised in the law, was not carried out in 2009. However, this is not to say that figuratively the death penalty is not in force in that needless deaths occur in hospitals during deliveries or routine operations due to the negligence of medical personnel; or on roads due to negligent driving and non-enforcement of traffic laws. Sadly, there is little advocacy on these violations.

The Place of Minorities in Zanzibar: The Case of the Comorian Community

Zanzibar has significant minority populations either on account of their ethnicity or religion. One group that has been targeted since the older Karume's time is that of the Comorian community, popularly known as the *Wangazija*. *The Guardian*[549] of August 27, 2009 carried a story in which they alleged that the immigration commissioner, Mwinchum Hassan Salum, demanded members of the Comorian community in Zanzibar to register as lawful residents or risk deportation. Prior to this, a number of individuals, who had sought a renewal of their passports, were denied the service on the pretext that they were not citizens even though many were second or third generation Zanzibaris[550]. The Comorian community Organisation (*Wakfy*) has taken up the issue with the home affairs ministry and is awaiting a response.

It is not clear why the immigration office in Zanzibar decided to pursue such a policy at that time. Some speculate that the move was purported to be linked to stop a popular CCM aspirant with a Comorian background from assuming power, very much the way

[549] Published by IPP Media in Tanzania

[550] Private communication with the late Prof. Haroub Othman of the ZLSC and Hamza Rijal of the Wakfy at various times in 2009.

Karume tried to neutralise Abrahman Babu, the Umma party leader in the mid-sixties, who was also partly Comorian.[551] It is also plausible that it was linked to the *Asha Mohamed Ahmed* case involving a former female government employee who misrepresented her place of birth and, thus, her identity when she applied for a passport to travel.[552] In records at the immigration office, she presented at different times birth certificates that indicated that she was born in Kenya and another in Zanzibar. This raised suspicion that there might have been people living and working in the civil service who were not nationals as required by law.

Corruption

Corruption is pervasive in most institutions as kickbacks or bribes are demanded to authorise or facilitate basic services. In some cases, high level corruption has been complicit in impoverishing the majority from their livelihoods such as access to fishing grounds, dispossession of landed property and offering substandard services. Unfortunately, the newly established corruption tracker in Tanzania does not cover Zanzibar and, thus, information about official corruption cases could not be obtained.[553]

Nevertheless, the question of corruption came up in discussions involving the ministry of state (president's office) for constitutional affairs and good governance in the January session of the House. In particular, the judiciary was criticised for not being impartial because it operated by *kupenyezewa vikaratasi* (slipped instructions). Moreover, unnecessary case delays suggested the possibility of corruption.[554]Zakiya Omar Juma, recommended the enforcement

[551] Details are contained in Clayton, Anthony, (1981), The Zanzibar Revolution and its Aftermath, London: C. Hurst and Co. Publishers Ltd.

[552] *Asha Mohammed Ahmed v. the Deputy Director of Immigration*, Miscellaneous Cause No. 16 of 2008. Asha filed the suit to appeal the denial of travel documents.

[553] Please visit www.corruptiontracker.or.tz.

[554] Hansard 27 January 2009; 6 July, 2009: p. 50.

of leadership ethics and the institution of an anti-corruption commission which is lacking in Zanzibar.

The risk of corruption is regularly highlighted during discussions of the AG's report for the financial year. Specifically, there is great discontent over the implementation and supervision of *The Finance Act of 2005* and *The Public Programme Act of 2005*. A lot of government funds are unaccounted for due to the absence of supporting documents for payments, asset registers or unregistered businesses. In addition, there are too many institutions responsible for issuing licenses and hence to collect revenue, but there is a system to ensure that these are linked. This provides fertile ground for corrupt practices to thrive. In such an instance, impunity will reign, leaving little room for the principles of justice to reign.

Checking Executive Excesses

Kabudi discusses executive excesses as an aspect of abuse of power that involves the transgression of constitutional or legal limitations by the executive as well as the legislature. He argues that the recognition of fundamental freedoms and rights is fundamental to the realisation of good governance.[555]

In April, 2009, the voluntary retirement age of the current chief justice (CJ) came up and he opted to retire. Karume, however, asked him to stay on until the term of his government ended so as to allow the next president to choose his own CJ. Concerns were, however, raised in some quarters over the procedure in which this was done, the key question being whether the CJ was offered a new appointment or did it concern an extension of his old contract?

The Zanzibar constitution requires that any new appointment of the CJ be done in consultation with the Judicial Service Commission (JSC).[556] Also, that before assuming office, the CJ is to take an

[555] See Dr. Palamagamba John Kabudi (undated) "Good Governance: Definition and Implications" op cit.

[556] See Zanzibar Judicial Services Commission Act No. 13 of 2003.

oath. While there is no indication to show that the president in fact did follow the procedure in reappointing the CJ, his oath was administered in low key following grumbling from various quarters.[557]

Additional queries, where executive action has been contested, have featured in the earlier part of this work. Additionally, there have been cases against senior government officials, particularly over arbitrary revocation or annexation of land rights. One prime case that is still being heard, *the Tomondo Kwarara* case, concerns powerful government officials whose authority and impunity common citizens have decided to challenge.

Human Rights Claims

Citizens show greater diligence in asserting their right to earn a livelihood. Retired members of the defence forces also took the government to court over the pension deductions and the deduction of their house allowance which they argue was contrary to the law.[558] Also, a family sued the employer of their "son, husband, fiancé, father; for loss of life style; loss of subsistence and school fees; loss of life; loss of company, guidance and comfort," accusing the employer of wrongful death. [559] Moreover a number of cases in the High Court registry are filed against the state body which administers estates suggesting that individuals are contesting some of their ruling even if purportedly made on religious grounds.

Certainly, the legal challenge posed is a marked departure in the assertion of individual and group rights in the island. It shows a growing maturity in applying human rights concepts and an increased willingness to invoke human rights in both civil and

[557] Interview with Mahadhi and Hon. Shaali, January, 2010 Zanzibar.

[558] *Capt. Lali Mfamali Ali and 58 others vs. the PS Ministry of Finance and Economic Affairs Zanzibar and 5 others*, Civil Appeal No. 30 of 2009.

[559] *Grace Makiko (Administrator of the Estate of the late Mackson Mwemezi Makiko) vs. GM Kiwengwa Strand Hotel*, Civil Appeal No. 63 of 2009.

criminal suits. Unfortunately, most of these developments happen outside the watch of advocacy organisations who are unable to capitalise on the trend to further impress a human rights culture in key institutions and in the larger society.

(a) Public Official Sanctioned over their Actions and Inactions

As mentioned above, the general public is showing increased audacity by taking on the government, especially where they feel that their rights have been violated. For example, residents in Matemwe jointly accused the minister responsible for lands and other ministers, of fraudulently transferring their *shambas*.[560] This is not the only incidence when public officials are sued for their actions or inactions in safeguarding the interests of the population.

The RC for Unguja West, a member of the House, also has a case pending against him. He was sued with other public officials over the demolition of houses in Tomondo Kwarara area five miles from Zanzibar town in defiance of a court injunction.[561] Asha Mohammed Ahmed on her part sued immigration officers for denying her citizenship application and a passport.[562] While not all the cases mentioned here were decided by the time of compiling this paper, the fact that citizen's dared to take action speaks volumes about individual awareness over human and legal rights.

Such sanction was not only evident in courts, but also in the House. The speaker of the House, Pandu Ameir Kificho, informed the House that Abdallah J. Abdallah, the representative of Chonga, was accused of verbal assault against the sheha of Pujini. The incident purportedly took place at the office of district commissioner of Chake. While it is noteworthy that public officials are now swiftly brought to justice in cases where they violate the law, this announcement is interesting for various reasons.

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[560] Civil Appeal No. 3 of 2009.

[561] The case was filed in the Land Tribunal in February, 2009.

[562] The case is referred to in the section about the rights of minorities.

Abdallah J. Abdallah was the shadow minister for regional affairs. The fact the he was in the presence of the district commissioner with a *sheha* suggests strongly that the matter discussed may be related to voter registration or the issuance of residency IDs. Also, the announcement may have not just been in the course of House business, but also intended to put the opposition on the spot considering the saga over the voters' register at the time.

The opposition leader in the House, Abubakar Khamis Bakary, accused that RC of Pemba North, Dadi Faki Dadi, also a member of the House, of appropriating government land rendering citizens landless and using prisoners to cultivate it for him.[563] Some legislators moved beyond making mere allegations and actually took one another to court. Two opposition legislators, Asaa Othman Hamad and Abbass Juma Muhunzi, were embroiled in a suit for the recovery of a loan and for breach of contract. Asaa Othman Hamad was the Representative from Wete and the shadow minister for agriculture, livestock and environment, while Abbass Juma Muhunzi was the Representative from Chambani and the shadow minister responsible for finance and economic affairs. Muhunzi was accused by his fellow members of misappropriating their money.[564]

Campaigning for Equal Representation

A proposal has been floating to increase women's seats to 50 from the current 30% in accordance with Article 12 of the SADC Protocol on Gender and Development. The 50-50 campaign has taken root in Tanzania since 2007 and women human rights organisations are campaigning for it aggressively. UWT took the matter up in its general conference, resulting in a number of top officials making contradictory pronouncements on the issue.[565] It is purported that

[563] *Mwananchi* 4 July, 2009.

[564] *Asaa Othman Hamad v. Abbass Juma Muhunzi*, Civil Appeal No.18 of 2009

[565] While some were in support they were also quick to raise doubts as to whether women were politically mature for the challenge. Others called for the

similar discussions were held by CCM Zanzibar and they agreed on the concept in principle,[566] but going beyond is precarious at this time since it would warrant a constitutional amendment to effect something that is not ideal in view of opposition claims at the moment.

Equal representation under the current electoral system will be hard to realise considering the nomination requirements and stages. CUF also maintains that under the present constitution, ZEC cannot ensure free and fair elections. Moreover, they assert that the basis of the home-grown accord between the president of Zanzibar and the CUF secretary general requires key constitutional provisions to be revised to enhance the formation of a government of national unity. The possibility of opening up the constitution for review before the 2010 general elections was disconcerting for some members of the ruling party since it meant contesting on an even playing field, exposing their political vulnerability.

Concluding Thoughts

Zanzibar's unique reality within the URT raises multiple possibilities for vibrant constitutional debates to emerge and principles of constitutionalism to be examined and promoted. However, hitherto, these possibilities are stifled by partisan politics in Zanzibar and the lack of diversity constituting the opposition in the House.

Moreover, the backbenchers from the ruling party present little challenge to their own party in the House in sharp contrast to the case in the national Parliament, where the government has come under intense scrutiny during parliamentary debates, despite enjoying a comfortable parliamentary majority. In fact, CCM backbenchers in the Union legislature are competing with the opposition in regard

disbanding of the proportional system of representation to give effect to the Protocol.

[566] Private communication with Salama Talib, deputy UWT secretary general Zanzibar.

to demanding for government accountability and safeguarding the interests of Tanzanians by upholding the Constitution. In Zanzibar, a proactive role by the backbenchers is suspect and may be perceived as betrayal against the party to aid the opposition.

The lifting of the political impasse that gripped Zanzibar since the experience with multi-party democracy has raised the stakes, leading to innovative diplomacy and politicking to take place. It was, thus, with great expectation that the news of the accord between the Zanzibar President and CUF secretary general, was received. If backed by the requisite political and good will, it was undoubtedly expected to advance the cause of constitutionalism in the isles in 2010.

Debates in the Zanzibar House on the whole provide refreshing reading in so far as how the different camps in the House understand the constitution and attempt to compel the observance of the constitution. In spite of the spicy debates over issues of a constitutional import, it is noteworthy that in most cases the same fizzles out on the House floor in view of the fact that members of the House rarely adequately use the facility of instituting private motions available to them. Furthermore, it has been easy for members of the House to rely on anecdotal evidence to support (or reject) issues being presented before the House. In some cases, their responses to the challenges raise great concern about their own understanding of the constitution and legislation passed in the House.

Thus, while there is no dearth of constitutional and human rights issues raised in 2009 before the Zanzibar House, much of the discussion was part of the *Mazungumzo ya Barazani* [baraza talk] (pun intended). The fact that submissions are not backed by legal or policy force means that no organ under the Zanzibar constitution is obliged to take them up and incorporate House directives/resolutions in their practice.

The 2009 review of constitutional developments in Zanzibar observed numerous legal breaches by members of the House, such as being accessories to crimes, but there is no indication that the AG or minister responsible for legal and constitutional affairs or other legislators, cautioned fellow House members on the rule-of-law. Conversely, government officials misrepresent facts, but are rarely brought to order over the misrepresentations.[567]

Therefore, the reality is that it is hard to contemplate how constitutionalism beyond pulpit politics, mostly over first generation rights that unduly focus on political and civil rights, can flourish in Zanzibar. Therefore, the legal challenge posed on calling for a judicial review of the constitutionality of sections of Act No.7 of 2005 is not only an exciting development in so far as solving a legal quagmire over voting rights is concerned, but promising because it presents an opportunity to shape the future of Zanzibar expound on a constitutional matter that is at the heart of democratic justice- the right to vote and choose a legitimate government.

[567] Both the minister responsible for land and the AG claim the absence of cases against the government over their respective jurisdictions when in fact such cases have been filed as demonstrated in this review.

List of Policies, Laws and Human Rights concerns before the Zanzibar House of Representatives in 2009

	Policies	**Laws**	**Human Rights**
14th Session of the House; 21-30 January, 2009		Film Censor Board Bill	
		Karume Institute for Science and Technology Bill	
		Maritime Transport Agency Bill	
15th Session of the House; 25 March – 8 April, 2009	Employment Policy		Right to a decent livelihood
	Zanzibar NGO Policy		Freedom of association; the right to organise
	National Transportation Policy 2008		Rights of pregnant women and newborns
16th Session of the House (Budget Session) 17 June -3 August, 2009		Bill to amend certain laws related to financial matters related to government revenue	Rights of the Child
		Appropriations Bill	Infringement of the Right to register as a voter

17th Session of the House; 15 October- 30 October, 2009		Zanzibar Tourism Bill	Right to obtain a residency Identity Card (ID)
		An Act to Amend the Zanzibar Revenue Board No.7 of 1996 Bill	Rights in marriage
		An Act to control the trafficking of drugs and narcotic substances	Right to economic progress
		An Act to amend the Zanzibar National University Act No. 8 of 1999	

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NOTE: I am skeptical about citing sites like Wikipedia and Facebook posts in works of this nature.

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