Constitutionalism in East Africa

Progress, Challenges and Prospects in 2004

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Lawrence M. Mute

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Abbreviations and Acronyms

ACEG	African Centre for Economic Growth
ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
APSEA	Association of Professional Societies in East Africa
ASP	Afro-Shirazi Party
AU	African Union
CBG	Consensus Building Group
CCM	Chama Cha Mapinduzi
CID	Criminal Investigations Department
CKRC	Constitution of Kenya Review Commission
CMI	Chieftancy of Military Intelligence
CNU	Coalition of National Unity
COMESA	Common Market for East and Southern Africa
CRC	Constitutional Review Commission
CSO(s)	Civil Society Organisations
CUF	Civic United Front
DN	Daily Nation
DP	Democratic Party
DRC	Democratic Republic of Congo
EABC	East African Business Council
EAC	East African Community
EACJ	East African Court of Justice
EACS	Secretariat of the East African Community
EACT	Treaty for the establishment of the East African Community
EACU	East African Community Customs Union
EAHRI	East Africa Human Rights Institute
EALA	East African Legislative Assembly
EALS	East African Law Society
EAMJA	East African Magistrates and Judges Association

EASUN	East African Support Unit for NGOs
ECOVIC	East African Communities Organisation for Management of Lake Victoria Resources
ECOWAS	Economic Community of West African States
EU	European Union
FDC	Forum for Democratic Change
FM	Frequency Module
ICC	International Criminal Court
ICC	International Criminal Tribunal for Rwanda
ICT	Information Communication Technologies
IGG	Inspector General of Government
IPPG	Inter-Parties Parliamentary Group
ISO	Internal Security Organisation
IUCEA	Inter University Council for East Africa
JATF	Joint Anti-Terrorist Task Force
KANU	Kenya African National Union
Kshs	Kenya Shillings
LC	Local Council
LDP	Liberal Democratic Party
LRA	Lords Resistance Army
LVBC	Lake Victoria Basin Commission
LVDP	Lake Victoria Development Programme
LVEMP	Lake Victoria Environmental Management Programme
LVFO	Lake Victoria Fisheries Organisation
MP(s)	Member of Parliament/s
NAK	National Alliance Party of Kenya
NARC	National Rainbow Coalition
NCA	National Constitutional Assembly
NCC	National Constitutional Conference
NCCR	National Convention for Construction and Reform
NCEC	National Convention Executive Council
NEPAD	New Partnership for Africa's Development

NGO	Non Governmental Organisation
NGOCEA	Non Governmental Organisation Coalition for Eastern Africa
NRM	National Resistance Movement
NRM-O	National Resistance Movement Organization
OAU	Organisation of African Unity
AU	Organization of African Unity
RDC	Resident District Commissioner
RECINET	Regional Integration Civil Society Network for East Africa
SADC	Southern African Development Community
TANU	Tanganyika African National Union
Tshs	Tanzania Shillings
UHRC	Uganda Human Rights Commission
UN	United Nations
UN	United Nations
UPDF	Uganda Peoples Defence Forces
URT	United Republic of Tanzania
VCCU	Violent Crime Crack Unit
ZEC	Zanzibar Electoral Commission

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1
Introduction: When State Elites Adulterate Constitutionalism and Constitution-making

Lawrence M. Mute

Ever so often in the histories of a state or region, a congenial trajectory of gradual democratisation is put to a shuddering stop by circumstances more often than not designed by state elites rather than chanced or dictated by the masses. When this happens, the masses are left wondering how it is ever possible for their political leaderships to change so dramatically – from fervent espousal of adherence to constitutionalism and the rule of law to contempt for its principles.

By the end of the year 2004, the rapid expansion of democratic space within the East African region was experiencing jitters which, if not contained, could have resulted in an anticlimactic diversion away from the path of democratisation and constitutionalism. This condition was most apparent within the context of Kenya's drawn-out constitution-making process; but it was clearly present in Uganda too. In Zanzibar, legislative changes were employed in a cynical way to ensure electoral success for the incumbent *Chama Cha Mapinduzi* (CCM) government

In fact, Tanzania was the only state which, in the assessment of this publication, sought legislative changes genuinely intended to benefit the masses. Perhaps because Tanzania had experimented least with neo-liberal constitutional reform, 2004 had the potential for laying significant foundations for further democratisation. Significantly, for example, the proposed Fourteenth Amendment to the Constitution of the United Republic of Tanzania included the landmark proposal of ensuring that at least one third of Tanzania's members of parliament would be women, a feat which Kenya had not succeeded to achieve, despite many years of huffing and puffing about the possibilities.

On the contrary, Kenyans and Ugandans alike had, by 2004, spent at least a decade interacting with the consequences of the truism that constitution-making entails enabling the people to exercise their sovereign right to determine how they may be governed. In overall terms, constitution review in Kenya had heralded a dramatic apparent capture of political space by the people from the undemocratic tendencies of the Kenya African National Union (KANU) Party regimes of the past. Prior to the 2002 general elections, the whole gamut of actors ranged in opposition against KANU would have defined themselves as "the people" or otherwise as representing the people. Yet, when large elements of these "people" constituted the post-Moi National Rainbow Coalition (NARC) government, it was patent that they could no longer be defined as representing the people. Instead, these were elites whose political or capital bases demanded the execution of self-interest policies and legislation; as a consequence of which the reconstituted state leadership "recaptured" the constitution-making process with the intention of ensuring that it would legislate their wishes rather than the wishes of the masses.

In Uganda, megalomania, irredentism and aggrandizement – words difficult to employ in a single thought – best describe how the National Resistance Movement (NRM) which had liberated Uganda from decades of cataclysmic chaos and led them through a decade of far lower violence; an NRM which had enabled the enactment of a relatively benign and, by East African standards, very progressive constitution, was now transforming itself to epitomise classic African dictatorships. President Museveni's aim is now to entrench himself as president for a few more terms by changing the constitution while, at the same time, bullying the judiciary and the legislature to such an extent that they could no longer undertake their traditional checks-and-balances roles with any effectiveness.

Amazingly, as this publication shows, in all that the East African states did in 2004, the rhetoric of constitutionalism, including checks and balances, remained an often-stated (or at least not abandoned)

aim. This contradiction of statement versus action is nothing new. In fact, it is a phenomenon that all ruling elites over the centuries stand accused of – employing the rhetoric of constitutionalism to effect self-serving aims.

This fact may be illustrated aptly by a study of the way the concept of human rights has over the years been deployed in practice throughout the world. Hardly a month passes by without some state being told off by the "international community" for breaching its people's human rights. But this global human rights language rings less true every time United Nations fora and universal rights standards are used as proxies through which international power mongers settle scores with weaker pariah states.[1] Hence, even while effective and fair-minded enforcement of the International Bill of Rights would lead to some level of global order and equity, the same human rights instruments have been abused by the states whose power make them the world's elites. Selective enforcement of human rights standards has happened in diverse countries. Rights that are supposedly universally acceptable have been undermined by the West which itself was the initiator of these same rights. The fight against genocide, which both developed and developing countries abhor, as evidenced by rights treaty obligations, is one such area of concern.

It is true that the political elites of East Africa behave in self-interested ways akin to the practices of global powers. What lessons, then, may the people of East Africa learn from the ways in which their leaderships have been behaving during 2004?

Writing about human rights, Mutua[2] notes that it would be a mistake for African human rights activists and reformers to accept

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1 This state of misuse of human rights for political reasons can be seen in the United States Congress' passage of bills placing restrictions on citizens from third countries who invest in Iran, Libya and Cuba. Countries like Israel and Kuwait, which are arguably hardly better respecters of human rights, continue to have amicable relations with the Unites States, largely because of their ideological, strategic or economic importance.

2 Makau Mutua: "Human Rights Discourse: African Viewpoint", in, Richard Reoch (Ed): *Human Rights: the New Consensus*, Regency Press, London, 1994, p.97.

the limited definition of rights discourse[3] conceived and practised by the West. Apart from defeating today's dictators, he notes that these core rights may be ill able to assist Africans in their endeavours to roll back centuries of malevolent, abusive and repressive governance. Mutua further notes that, if anything, the human rights discourse is inherently political. The human rights movement must recognise that formal declarations of rights may be incapable of uncovering disempowerment which is already implied by power relations.[4]

Since human rights are a core element of constitutionalism, Mutua's argument can be broadened to capture the subject of constitution-making and constitutionalism. The overall general lesson for East Africans, therefore, is that they must realise that all flesh can be gouged from the concept of constitutionalism, to leave it an empty shell not deserving of its name. Discernment is required to appreciate the fact that many constitution-making efforts by politicians are nothing more than initiatives to enable them to entrench power to themselves. It is clearly true that the power which initially resides in the people is far too often and easily hijacked by forces of state or forces of class. While one cannot discount some level of benevolence in the actions of certain groups or nations, rights talk by an erudite or influential class or nation in many respects simply serves as the vehicle through which domination and self interest can be perpetuated.

More specific lessons follow from the foregoing. First, people are not protected by a constitution per se. One is apt to over-rate the vital character of the constitution, but a mere constitution is of itself not a sufficient protector of the aspirations and desires of the citizens. Constitutions may be made and unmade, but much more must be realised before East Africa's citizenry can revel in a climate

3 He (p.97) defines this discourse as relating to a core of rights which posit civil and political rights as key norms which are absolute and whose violation is completely prohibited. He points out that it is these core rights (like the freedom from torture, extrajudicial executions and arbitrary arrests and detention) that become the paradigm on which northern rights NGOs are based. These rights form the rhetoric of rights so usefully deployed against dictatorial regimes.

4 *Ibid*, p.99.

of protected rights. Any constitution must become a living document appreciated and defended by all its citizens.

Second, people are protected by knowledge, awareness or consciousness of the devious potential which laws and lawmakers have. Healthy scepticism of politicians and public institutions encourages people to be on their guard. Candid information moves people to wrest governance into their own hands. People feel they may delegate only those tasks they must to public institutions. They keep and themselves exercise the remaining powers.

Third, people should know that, once they give up their rights, the duplicity game with the custodians of those rights has necessarily started. People should be encouraged to seek and to exploit all opportunities offered by public institutions to their benefit.

East Africa has a proliferation of informed and easy to read constitutional booklets and election manuals. If the purpose of these books is merely to inform, then they miss the point. These books and manuals must enable people to take action. Such action has the potential to cause fundamental change. Fundamental change does not imply that the tables are turned, that the strong become weak while the weak become rulers. Fairy tale endings hardly happen in real life, but people can progress.[5] For example, East Africa's most pressing woes are poverty, unemployment, ethnic suspicions, disintegration of social fabric, absence of basic amenities like water and transportation etc. The political elites will be doing East Africans a great service if they educate citizens on methods of countering these maladies.

The elite's vested interests necessarily feature strongly in any national or regional agenda. Some relevant questions in this regard are: What vested interests do the elite have? Are the elite too preoccupied with themselves or do they consider others' problems too - rural education, water, roads, etc.?

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5 African-Americans are no longer slaves, but, in relative terms, they still remain the poor relations of their former white masters.

Words like consultation, dialogue and consensus mean little if they are mere charades for rubber stamping already sealed packages. Use of these phrases masks the fact that a defined side is always at a disadvantage. It seems as though the local elite supports grassroots consultation on the understanding that grassroots opinions will tally with the decisions or compromises already struck among the elite. No wonder the Nyalali Commission recommended a multiparty system for Tanzania, against the wishes of the majority of the people who made submissions to it.[6]

Conventions may therefore come and go and bills may be repealed or amended, only to leave rural folk none the wiser of intellect or richer of pocket. General elections and the concomitant hype and spending during the campaign period may replace one uncommitted candidate for another similarly unendowed personage. Each candidate or conference must have a vision which can reasonably be fulfilled.

It is problematic to forecast in the short term that the leaderships of East Africa will offer citizens visionary guidance. The NRM leadership has, by many accounts, led in gradual but grating disappointment for the people of Uganda's and their aspirations to constitutionalism. NARC failings have been far more dramatic – as witnessed by its continued inability to deliver a constitution by the end of 2004, when the pledge was to deliver it within three months of its election in December 2002.

Yet, despite the stark assessments made here, East Africa's public institutions including institutions of the East African Community (EAC) should gradually gain ground in the people's consciousness as the best way of guaranteeing their security and livelihoods. Pressures for concerted regional and national struggles against bad governance should eventually force crucial interest groups in society to merge around nascent public institutions, like revitalised parliaments,

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6 Despite the Nyalali Commission's findings that 80% of Tanzanians wished that the one-party system should continue, the commission recommended the introduction of pluralist politics.

rejuvenated civil services, independent judiciaries and efficient enterprise to enable the region to develop sustainably.

This is only a very small picture of the analysis expounded in the chapters of this publication. The chapters cover constitutional developments in East Africa's countries of Tanzania, Zanzibar, Kenya and Uganda, and include a chapter on developments at the East African regional level.

2
Constitutional Developments in Tanzania

Sifuni Mchome

Introduction

The Union of Tanzania has, since 1964 when it was formed, undergone tremendous transformation – including the move from a one-party to a multiparty state, economic liberalisation and gradual endeavours to adhere to constitutionalism. For the past two decades, Tanzania has also witnessed a number of changes in its constitution aimed to bring its governance system in line with democracy and principles of the rule of law. Activities in this direction continued in 2004, with a bill being tabled before the national assembly to amend a number of articles in the Constitution of the United Republic of Tanzania, 1977.

On the other hand, the year under review did not experience significant judicial actions in relation to constitutional developments in the country. There were signs, however, that some of the issues which were topical during the year would lead to landmark constitutional rulings being sought by Tanzanians in future years.

This chapter looks at the significant changes or proposed changes, both in the constitution and other laws of Tanzania, which arose in 2004, in order to highlight the trend with regard to constitutionalism in the country. These changes took place at a time when the country was preparing itself for the general elections to be held in October 2005. Debates had already started regarding potential candidates for the various posts both at the national and civic levels.

Implications of the Proposed 14th amendment of the Union Constitution

The proposed 14th Amendment of the Constitution of the United Republic of Tanzania aimed to enact several provisions which would

amend or modify the Constitution of the United Republic of Tanzania, 1977 (hereinafter "the Union Constitution"). Below is an analysis of the impact of these proposed amendments on the Union Constitution.

Basic Rights

The 14th Amendment made a number of proposals for the better exercise of civic rights by individuals:

Religion

It proposed to declare that the United Republic of Tanzania should not identify with any religious faith or sect.[7] If this proposal became law, Tanzania would be a secular state in which diverse religious beliefs, denominations and sects would subsist. Whereas individuals would be free to join and propagate any religious doctrines of their choice, Tanzania and her government would be prevented from aligning with or being seen to favour any faith. However, the proposed amendment did not bar the government from outlawing any religious faith which, in its opinion, jeopardised the public interest and safety or for other legitimate reasons under the Union Constitution.[8]

The proposed 14th Amendment fortified the freedom of religion by declaring that an individual had the right to participate in religious affairs without any restrictions imposed by other laws.[9] The person could propagate his or her religious beliefs and convictions without interference from any quarter. This implied that the government could not meddle in the conduct of religious affairs. By the same token, any statutory law which purported to empower the government to interfere with religious matters would become unconstitutional to the extent of the inconsistency with the Union Constitution.

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7 See Articles 3 and 4 of the 14th Amendment of the Constitution of the United Republic of Tanzania, Bill 2004, which proposed to amend both the Preamble and Article 3(1) of the Union constitution.

8 Article 30 of the Constitution of the United Republic of Tanzania, 1977.

9 *Ibid*, Article 19(2).

Right to information and freedom of expression

Moreover, the proposed 14th Amendment was hailed for extending the scope of the right to information to all persons, including non-citizens residing in the country.[10] This right was only valid where such information was essential for the wellbeing of the person or community. Currently, this right is available only to the citizens of the United Republic of Tanzania. Further, the proposed amendments would remove the encumbrance which required that the granting or exercise of freedom of expression was subject to non-contravention of other laws in force in Tanzania.[11] However, this did not mean that freedom of expression was without fetters. In terms of Article 30 of the Union Constitution, no person should exercise his or her rights in a manner that interferes with the rights of other persons or the public interest.

Freedom to associate

Nevertheless, under the proposed 14th Amendment, every person would be free to associate peacefully with other persons for the purpose of expressing his or her beliefs and ideas. This provision marked a significant expansion of the basic freedom of association, since the right to associate would no longer be subject to other laws as was previously provided. Arguably, the proposed amendments would enable a group of people to hold a meeting without reference to the government. In the same vein, no person would be forced to join any party or organisation and no such party or organisation would be denied registration solely because of its policies and manifesto. Currently, the right of an individual to join a party or organisation is subject to other laws. This means parliament can conceivably pass legislation compelling an individual to join a party or organisation

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10 *Ibid*, Article 18, as proposed to be amended by Article 5 of the 14th Amendment of the Constitution of the United Republic of Tanzania, Bill 2004.

11 *Ibid.*

against his or her own volition. The proposed changes would broaden the scope of an individual's right to join any party or organisation of his or her own choice.

Right to participation

All citizens have the right to participate in the governance of Tanzania by standing for or voting in elections. Under the 14th Amendment as proposed, the exercise of the foregoing right would not be subject to Article 5 which provides for the right to vote.[12] The right of a citizen to stand for elections or to vote others into elective offices is made subject to, among others, Article 47 of the Union Constitution, which establishes the office of the vice president and the attendant powers and functions of the holder of that office.

Property

The 14th Amendment proposed that the right of every individual to own and preserve property would not be subject to any conditions imposed by other laws.[13] However, such ownership and preservation of property would be done according to law.[14] It can be argued that when ownership and preservation of property is managed according to law, then the enjoyment of these rights may properly be made subject to conditions contained in law. This means that Article 9 of the proposed 14th Amendment was inconsequential, since ownership and protection of personal property may still be subject to conditions contained in other laws. All in all, this proposal was a welcome move towards enabling the effective enjoyment of the right to property by people.

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12 Article 21 of the Constitution of the United Republic of Tanzania, 1977, as proposed to be amended by Article 8 of the 14th Amendment of the Constitution of the United Republic of Tanzania, Bill, 2004.

13 Article 24(1) of the Constitution of the United Republic of Tanzania, 1977, as proposed to be amended by Article 9 of the 14th Amendment of the Constitution of the United Republic of Tanzania Bill, 2004.

14 *Ibid.*

The Government of the United Republic of Tanzania

The 14th Amendment proposed that if the office of the president fell vacant by reason of mental or bodily illness such that the president could not effectively discharge presidential duties, the vice president must be sworn in as president to complete the remainder of the president's term.[15] This provision would effectively disqualify the speaker of the national assembly and the chief justice of Tanzania from assuming the president's functions if the president was mentally or physically incapacitated. The idea of this stipulation was to strengthen separation of powers between the three arms of the state so that executive functions would be carried out by the executive without the assistance (or what could be termed the interference) of any of the other two arms of the state. This would serve to prevent a power struggle between the vice president, speaker of the national assembly and the chief justice. However, the 14th Amendment also proposed that if the president could not discharge his or her functions for reasons other than illness, the vice president, speaker of the national assembly or the chief justice of Tanzania, in that order, would assume the president's office in an acting capacity.[16] According to the Union Constitution, the prime minister may only assume the functions of the president if he or she has been nominated as such by the president. The 14th Amendment as proposed required that if the prime minister assumed the duties of the president, then he or she would be bound to relinquish the functions of the president the moment either the president or the vice president returned to the country, or when the president's health had improved such that he or she could discharge presidential duties.[17] Indeed, the prime minister was not duty bound to relinquish the assumed presidential duties to either the speaker of the national assembly or the chief justice, even if the two were available.[18]

15 Article 10 of the 14th Amendment of the Constitution of the United Republic of Tanzania Bill, 2004.

16 *Ibid*, Article 10(b).

17 Article 37(4) of the Constitution of the United Republic of Tanzania, 1977 as proposed for amendment by Article 10(c) of the 14th Amendment of the Constitution of the United Republic of Tanzania Bill, 2004.

18 See Article 37(7) and 37(8) of the Constitution of the United Republic of

The proposed 14th Amendment reserved the post of attorney general for members of the civil service eligible for admission to the bar or who had been admitted to the bar for a period of not less than 15 years.[19] It has been contended that this proposed provision runs the risk of disqualifying competent lawyers engaged in private legal practice. Exception has further been taken against the proposed 15 years ceiling, since the position of attorney general does not necessarily require 15 years experience in legal practice. However, many people agree that sufficient experience as a legal practitioner and adviser, whether in civil service or private practice, is necessary for someone who will serve as the attorney general of the country.

Further, the amendments were significant for proposing the positions of deputy attorney general and director of public prosecutions. The holders of these two offices are currently presidential appointees, but their offices are not constitutional offices. The deputy attorney general would discharge functions assigned to him or her by the attorney general.[20] It was proposed that no person shall be eligible for appointment to the office of director of public prosecutions unless he or she was a member of the civil service and he or she had been eligible for admission to the bar or had been admitted thereto for a period of not less than 10 years.[21] The director would continue to be vested with the authority to institute, prosecute and superintend criminal prosecutions in the country.[22] In the exercise of the above powers, he or she would operate independently of any control by any person or institution and he or she would have to bear in mind the public interest and have desire to administer criminal justice. In respect of the foregoing, the proposed Article 59B would effectively make the office of the director of public prosecutions a constitutional office. This is significant in the

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Tanzania, 1977.

19 Article 59(2) of the Constitution of the United Republic of Tanzania, 1977, as proposed for amendment by the 14th Constitutional Amendment Bill, 2004.

20 *Ibid*, Article 59A.

21 *Ibid*, Article 59B.

22 Article 59B(1) of the Constitution of the United Republic of Tanzania, 1977.

sense that any other law which is in conflict with the said Article 59B would be unconstitutional to the extent of that inconsistency.

Women Members of Parliament

The 14th Amendment intended to strengthen the level of women representation in parliament. Proposals intended to empower political parties represented in parliament to nominate to parliament women totalling not less than 30 percent of the number of all categories of members of parliament.[23] These categories comprised legislators directly elected in their respective constituencies, five members of parliament elected by the Zanzibar Representative Council, the attorney general and not more than 10 members of parliament nominated to parliament by the president. In the same vein, the president, under the proposed Amendment, was directed to include not less than five women amongst the 10 members of parliament whom the president was required to nominate to the legislature.[24] A political party would not be able to nominate women to parliament unless that party participated in the general elections and garnered not less than 5 percent of the valid votes cast for members of parliament.[25] The number of women members of parliament nominated by any political party would nominate would be proportional to the popularity of the party in the general elections as exemplified by the votes which the party garnered. In effect, more popular parties would get more representation in parliament, while parties which performed poorly in elections would get proportionally smaller numbers of women members of parliament or none at all. Furthermore, a member of parliament elected in a constituency unopposed would be deemed to have garnered the sum of the votes which were cast in the constituency

23 Article 66(b) of the Constitution of the United Republic of Tanzania, 1977, as proposed for amendment by the 14th Constitutional Amendment Bill, 2004.

24 Article 66(e) of the Constitution of the United Republic of Tanzania, 1977, as proposed for amendment by the 14th Amendment of the Constitution of the United Republic of Tanzania Bill, 2004.

25 *Ibid*, Article 78(1).

of the contestant's party presidential candidate. In case the contestant's party did not sponsor a presidential candidate, he or she would be deemed to have garnered 51 percent of the total votes registered in his constituency.[26] It can be argued that the criteria for quantification of the votes of members of parliament elected unopposed can prove useful in calculating the proportional strength of parties in a general election.

The Electoral Commission of Tanzania

The 14th Amendment proposed that the chairperson of the Electoral Commission of Tanzania would be a judge of the high court or court of appeal or any person eligible for admission to the bar for a period of not less than 15 years. Similar requirements were proposed to apply to the vice chairperson of the electoral body.[27] The proposed amendments provided an avenue for a person who was not a judge to be appointed to head the electoral body, provided that person had been qualified, for at least 15 years, to be enrolled as an advocate. This meant that such person would not necessarily be practicing law for the said period.

Administration of Justice

The 14th Amendment, as proposed, declared that the judiciary had final say over the administration of justice in Tanzania.[28] This was the principle of the independence of the judiciary. These proposals further increased the number of judges of the high court of Tanzania from 16 to not less than 31 (the principal judge inclusive). The president would now be required to consult the Judicial Service Commission before appointing any person judge of the high court.[29] However, although the president would be required to seek the opinion of the Judicial

26 Article 78(2) of the Constitution of the United Republic of Tanzania, 1977, as proposed for amendment by the 14th Amendment to the Constitution of the United Republic of Tanzania Bill, 2004.

27 Article 74(1)(a) and (b) of the Constitution of the United Republic of Tanzania, 1977.

28 *Ibid*, Article 107A.

29 *Ibid*, Article 109(1).

Service Commission on the person suitable to be judge of the high court, he or she would not be bound to comply with the Commission's opinion. This was seen as a hurdle to the powers of the Commission to recommend a suitable person to the position of judge.

In terms of the proposed amendments, no person could be appointed a judge of the high court unless he or she possessed any of the "special qualifications" for a period of not less than 10 years.[30] The special qualifications entailed that the person would be a holder of a Bachelor of Law degree from a recognised university. In addition, the person could have been employed in the civil service as a magistrate or otherwise at a time when that person was eligible for admission to the bar. Alternatively, the person could have been enrolled as an advocate or be eligible for such enrolment for a continuous period of not less than 10 years.[31]

From the foregoing, 10 years working experience, either in the civil service or in the legal profession as a magistrate or advocate, was a condition precedent for recruitment to the office of judge of the high court. Thus, the proposed amendments would indeed introduce relatively more stringent conditions for recruitment of high court judges. Nevertheless, the president had the option of appointing any person lacking the special qualifications to be judge or acting judge of the high court. To exercise that authority, the president would have to be satisfied that the person was capable, skilled and suitable to be judge or acting judge of the high court of Tanzania.[32]

In terms of security of tenure, it was proposed that any judge of the high court would have the right to retire after reaching the age of 55 years. However, the exercise of that right could be denied if the president directed that the concerned judge should not retire until a

30 *Ibid*, Article 109(6).

31 See Article 109(7) of the Constitution of the United Republic of Tanzania as proposed for amendment by the 14th Amendment to the Constitution of the United Republic of Tanzania Bill, 2004.

32 Constitution of the United Republic of Tanzania, 1977, Sub-articles (8) and (10)(b) of Article 109.

specified duration of time had elapsed.[33] Exception has been taken to this provision since it may force judges to remain in employment against their own will. This implies that judges of the high court may be compelled to work against their conscience. Since an employee cannot force himself or herself on an employer, the latter should, in turn, not force an employee to remain in a contract of service.

In terms of the proposed amendments, the court of appeal of Tanzania would consist of the chief justice and not less than 4 judges of appeal.[34] Currently, the number of judges of the court of appeal is pegged at not less than three (excluding the chief justice). Further, the proposed amendments would change the designation of the "chief justice of the court of appeal" to "chief justice of the court". Apparently, this change of designation aimed to limit confusion that the authority of the chief justice was restricted to the court of appeal of Tanzania. The chief justice would also need to possess the special qualifications discussed above for a period of not less than 15 years.[35]

Security of Tenure for Judges

The proposed amendments sought to secure the tenure in office of judges of the high court and court of appeal of Tanzania. The president could remove a judge from office if the judge could not effectively discharge his or her duties by reason of illness or other causes.[36] In the same vein, a judge could lose his or her job owing to improper conduct or for breach of the Code of Conduct for Public Servants.[37] Indeed, the president could not relieve a judge of his or her duties unless such dismissal had been recommended by a commission after investigating the complaint against the concerned judge.[38]

A judge of the court of appeal would have the option to retire from public service after reaching the age of 60 years. However, the right

33 *Ibid*, Article 110.
34 *Ibid*, Article 118(1).
35 *Ibid,* Article 118(3) read in tandem with Article 109.
36 *Ibid*, Articles 110A(2) and 120A.
37 *Ibid*.
38 *Ibid*, Article 110A(2) read in tandem with Article 110A(4).

to retire could be denied if the president directed that the concerned judge would not retire until a specified period of time had elapsed.[39] The critique made in 2.5 above respecting high court judges also applies to court of appeal judges.

Judicial Service Commission

Under the proposed amendments, the Judicial Service Commission would be charged with the task of advising the president on the recruitment, disciplinary measures and emoluments of judges of the high court and court of appeal of Tanzania. Further, the Commission would enjoy the exclusive authority on the recruitment, discipline and removal from office of magistrates in Tanzania mainland.[40]

In spite of having the right to vote during a general election, judges, magistrates and registrars of all categories of courts would be prohibited from joining any political party.[41] It is noteworthy that the proposed amendments included court registrars amongst the judicial officers who would not be permitted to join any political party.

Other Developments With Constitutional Implications

In 2004, parliament passed a number of statutes with implications on the Union Constitution. These laws govern issues such as tertiary education, environmental conservation, national and local elections and the transfer of prisoners. This part of the chapter assesses the constitutional implications and propriety of these statutes.

The right to education

In principle, the Union Constitution does not bestow on Tanzanians the right to education since that right is not contained in Tanzania's Bill

39 Article 120(2) of the Constitution of the United Republic of Tanzania, 1977, as proposed for amendment by the 14th Amendment to the Constitution of the United Republic of Tanzania Bill, 2004.

40 *Ibid*, Article 113.

41 Article 113A of the Constitution of the United Republic of Tanzania, 1977.

of Rights. Instead, this fundamental right is relegated to Section II of the constitution which lists the fundamental objectives and directive principles of state policy.[42] This means that the right to education, as stated in the Union Constitution is a mere policy statement and indeed it is not justiciable under Tanzania laws[43] since it is only the basic rights and freedoms in the Bill of Rights in the Union Constitution that can be enforced. However, Tanzanians have been accessing education on the basis of various laws such as those regulating primary, secondary and tertiary education.

Tanzania has ratified numerous international instruments which provide for the right to education for all. According to the Universal Declaration on Human Rights, 1948, the acquisition of elementary education shall be compulsory whereas higher education shall be made accessible to all individuals based on academic merit.[44]

Out of its concern to establish a mechanism for the full realisation of the right to education, parliament enacted the Higher Education Students' Loans Board Act, 2004.[45] This legislation established the Higher Education Students' Loans Board to administer the granting and recovery of loans advanced to students.[46] In principle, only students who have been admitted to accredited institutions to pursue advanced diploma and degree courses are eligible for the loans.[47] It is a condition that a student shall not benefit from loan advances unless he or she has procured a guarantor for his or her loan advances.[48] However, most Tanzanian parents are generally poor and can barely stand as guarantors to their children who have secured admissions in higher learning institutions and whose fees per year are in the range

42 Article 11 of the Constitution of the United Republic of Tanzania, 1977, states that the government shall take the necessary measures to enable every person realise the right to education.
43 Section 4 of the Basic Rights and Duties Enforcement Act, No. 33 of 1994.
44 Article 26 of the Universal Declaration on Human Rights, 1948.
45 The Higher Education Students' Loan Board Act, No. 9 of 2004.
46 *Ibid*, Sections 4 and 6.
47 *Ibid*, at paragraph (b) of Section 17.
48 *Ibid*, Section 17(c).

of Tshs. 800,000. This raises the question of whether the Higher Education Students' Loans Board Act runs the risk of breaching the students' basic right to education in Tanzania.

Since the right to education is not part of the Bill of Rights as established in the Union Constitution, the Act cannot thus be said to impinge a non-existent constitutional right. Therefore, when a student who has failed to obtain an education loan solely for want of a guarantor drops out of school, he or she cannot claim that his or her right to education has been violated. It remains to be seen how these provisions will operate when the Act comes into effect in the year 2005.

The right to take part in general elections

The Union Constitution confers on every citizen the right to take part in the governance of the country.[49] In that context, a Tanzanian citizen is entitled to participate in national and local elections by directly offering himself or herself for elections or by voting other persons to elective offices. Nevertheless, the right of citizens to take part in elections is exercised pursuant to other laws of the land.[50]

National and local elections within the United Republic of Tanzania are specifically governed by the Elections Act of 1985[51] and the Local Authorities (Elections) Act, 1979 respectively.[52] These two statutes have been widely castigated for impinging on the constitutional rights of citizens to vote.[53]

In 2004, the Union Parliament enacted the Electoral Laws (Miscellaneous Amendments) Act, 2004,[54] which amended the two electoral statutes. The amendments introduced included the introduction of the Provisional Voters' Register as a precursor to the

49 *Ibid*, Article 21.
50 *Ibid*, Article 21(1).
51 Act No. 1 of 1985.
52 Act No. 4 of 1979.
53 Tanzania Human Rights Report, 2004, p. 24.
54 Act No. 13 of 2004.

establishment of the Permanent National Voters' Register.[55] Under the new law, the National Electoral Commission is charged with the task of keeping, maintaining and updating the voters' register. It is further significant that the voters' register is available for public inspection, and objection may be raised as to the registration or non-registration of any voter.

The creation of a Permanent National Voters' Register will be a boost to the citizen's right to vote in both national and local polls. The availability of the register for public inspection and scrutiny may facilitate the removal of ineligible voters from the register and vice versa. The upshot of this is that only eligible citizens will be registered for polls and the outcome of the elections will reflect the genuine wishes of Tanzanians. If properly used, the voters' register will go along way in barring ineligible voters from voting in polls.

The right to work

The right to work is guaranteed to every person, citizens and non-citizens alike, in terms of the Union Constitution.[56] Be that as it may, Tanzanian citizens are entitled to equal opportunities and the right to hold any office or discharge any functions under the state authority.[57] Thus, the Union Constitution establishes the right to work but it does not provide for adequate protection of employees.[58]

The constitutional right to work does not necessarily mean that every citizen must be given employment come what may. It merely requires the employer to give equal opportunity to all job applicants without discrimination. This right is now reflected in the Employment and Labour Relations Act of 2004[59]. This labour statute reinforces the right to work by enjoining employers to avoid discriminatory

55 Section 11A of the Elections Act, 1985, as amended.
56 Constitution of the United Republic of Tanzania, 1977, Article 23(1).
57 *Ibid*.
58 *Supra* footnote 44, Article 23.
59 Act No. 6 of 2004.

recruitment of employees based on, among others, colour, gender and political opinion or religion.[60] The Act further clarifies that it is not discriminatory if the employer prefers or excludes any job applicant owing to the inherent requirement of the job.

The provision of the Act on the right of citizens to employment without discrimination is commendable. Further, it is commendable that the Act prohibits unfair termination of contracts of employment in circumstances which constitute discrimination under the Act.[61] In spite of the foregoing clear provisions, it is on record that many employees infected with HIV/Aids are being discriminated against by their employers and some of them are dismissed from work.[62] It is necessary to develop policies and programmes that will protect people with HIV/Aids from being discriminated against in places of work. Some public and private companies have already started developing such policies and programmes. These include Tanzania Electricity Company and Tanzania Breweries Company.

At this point, the significance of the Labour Institutions Act, 2004,[63] in creating dispute settlement organs, should be mentioned. The newly created Labour, Economic and Social Council can be useful in advising the government on labour matters and policy.[64] Moreover, the Council for Mediation and Arbitration[65] can facilitate amicable settlement of industrial disputes between employees and employers. Notably, too, the Labour Institutions Act has created the Labour Division of the high court as the court of first instance to hear and determine labour disputes.[66]

Parliamentary immunities and privileges

The Union Constitution confers on parliament, parliamentary committees and members of parliament immunity from legal

60 *Ibid,* Section 7(4).
61 *Ibid*, Section 37(3)(b)(iii).
62 *Supra* footnote 53, p. 56.
63 Act No. 7 of 2004.
64 Section 3 of the Labour Institutions Act, No. 7 of 2004.
65 The Council is established by Section 12 of the Labour Institutions Act, 2004.
66 *Ibid*, Section 50.

prosecution over any undertaking that takes place in parliament.[67] Thus, no action may be brought against any member of parliament pertaining to what the member said or did during parliamentary debate. The Constitution further stipulates that the foregoing parliamentary immunity and privileges shall not be questioned in any forum or institution.[68] Pursuant to its legislative authority,[69] parliament enacted the Parliamentary Immunities, Powers and Privileges (Amendment) Act of 2004,[70] thereby amending the extant Parliamentary Immunities, Powers and Privileges Act of 1988.[71]

In spite of the immunities which members of parliament and even witnesses at parliamentary committees enjoy, certain acts and statements were deemed offences under the Parliamentary Immunities, Powers and Privileges Act of 1988.[72] Thus, in case of commission of these offences, courts of law would rightly intervene. The amendments of 2004 require the attorney general to report to the speaker of the national assembly on any steps he or she has taken against a person suspected of having committed an offence under the foregoing legislation.[73] Further, a certificate which is issued to witnesses at a parliamentary committee who made full disclosure can now be subject to objection and even cancellation if it was issued erroneously.[74] Normally, the certificate would operate as a bar to any civil or criminal prosecution of the witness concerning the evidence he or she presented before the parliamentary committee. It is apparent that by giving room to the cancellation of the certificate above, the amendments have exposed the witness to possible prosecution. On the one hand, this may result in increased attempts by witnesses to

67 Article 100 of the Constitution of the United Republic of Tanzania, 1977.
68 *Ibid*, Article 100(1).
69 Article 101 of the Union Constitution authorises parliament to enact a law that will enable courts of law to preserve and protect the parliamentary freedom of expression and discussion.
70 Act No. 3 of 2004.
71 Act No. 3 of 1988.
72 See Part IV of the Act for a list of the offences.
73 *Ibid*, Section 12(5).
74 *Ibid*, Section 20.

make full disclosure of information at their disposal. Yet, the risk of prosecution may dissuade potential witnesses from volunteering information within their knowledge.

In terms of the amendments, any member of parliament who commits contempt of the national assembly may be reprimanded by the speaker or suspended from the service of parliament.[75] In case of suspension, the member would be entitled to payment of half his or her salary for the period of suspension. The legal position obtaining under the amendments is laudable. The parliamentary immunities and privileges which members of parliament enjoy should not be limitless. A member who treats the assembly with contempt should be reprimanded by the speaker. If he or she proves recalcitrant, the member should indeed be suspended at the pain of halved salary. Actually, this penalty is preferable to outright expulsion or even legal prosecution of the legislator. The penalties of reprimand and suspension would inform legislators to conduct themselves with decorum and civility and it will not unduly impinge on freedom of expression and discussion in the assembly.

People interviewed on these provisions, however, have expressed different views. Some have seen the provisions as attempts to bar the public from criticizing the national assembly for passing laws or indulging in debates which do not address the needs of the people. There was, for example, an occasion when considerable time was devoted to discussing whether the inspector general of police should be brought to the national assembly for contempt after he had criticised the parliament for not adequately addressing the needs and predicaments of the police force. Some commentators believe that the proposed provisions are aimed at preventing such criticisms. In fact, matters of adjudication on rights and responsibilities of individuals should be left to courts of law, since the accepted constitutional norm is that nobody should be the judge of his or her own cause and the national assembly is not omnipotent, hence beyond criticism.

75 *Ibid*, Section 30A.

Transfer of Prisoners

In 2004, the Union Parliament passed the Transfer of Prisoners Act[76] to regulate the transfer of convicted prisoners between the United Republic of Tanzania and other countries. The object of such transfer is to ensure that an individual is punished according to the laws and prison conditions of his or her country of origin. Moreover, the Act clarifies that every convicted person has the constitutional right to humane treatment and equality before the law.

The Transfer of Prisoners Act provides a mechanism for the transfer of convicted persons from Tanzania to a designated country and vice versa. Usually, the prisoner or a representative is required to consent in writing to the transfer.[77] If the minister responsible for prison affairs accepts an application for prisoner transfer, he or she is under an obligation to issue a warrant of transfer of the concerned prisoner.[78] Every application for prisoner transfer must be made in writing. Nevertheless, a convicted citizen who has been transferred back to Tanzania may benefit from remission of his or her sentence in accordance with Tanzanian laws or the laws of the designated country.[79] Besides that, the prisoner may obtain presidential amnesty in terms of the Union Constitution.[80] Actually, a prisoner who has been transferred to Tanzania may obtain presidential pardon if the sentence is by its nature and duration incompatible with any law of the United Republic of Tanzania.[81]

It is remarkable that the Transfer of Prisoners Act enables the Government to administer criminal penalties under Tanzanian laws to citizens convicted in foreign jurisdictions. Where the convict is

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76 The Transfer of Prisoners Act, No. 10 of 2004.
77 *Ibid*, Section 5(3)(a).
78 *Ibid*, Section 6(1)(b).
79 *Ibid*, Section 10.
80 *Ibid*, Section 13 read in tandem with Article 45 of the Constitution of the United Republic of Tanzania, 1977.
81 *Ibid*, Section 16.

sentenced under foreign laws for acts or omissions which are not punishable in Tanzania, the person may be pardoned or benefit a reduction of sentence.

The right to clean environment

Judicial authorities have been hard pressed to hold that the right to clean environment is related to the right to life. In *Festo Balegele and 784 Others v. Dar es Salaam City Council*,[82] the high court ruled that any act of a public authority or an individual which pollutes the environment, thereby endangering people's health, is contrary to Article 14 of the Union Constitution. This constitutional provision establishes the right to life and protection of human life. In 2004, the Union Parliament enacted the Environmental Management Act[83] which now provides directly for the right of every person living in Tanzania to a clean and healthy environment.[84] Thus, any person who feels his or her right to a clean environment is threatened or interfered with may bring an action if that act or omission may cause harm to human health or the environment.[85]

The Environmental Management Act prescribes fundamental principles, rules and institutions which are crucial to effective environmental management. It legislates the precautionary principle, public participation principle and the polluter pays principle which, if implemented actively, will greatly foster environmental conservation.[86] It is commendable that the foregoing statute criminalises any act or omission which pollutes the environment.[87] Pollution is committed if any activity violates the stipulated environmental standards. The Act further sets out comprehensive rules governing the management of solid waste, effluent and hazardous waste. The environmental legislation

82 High Court of Dar es Salaam, Misc. Civil Cause Number 90 of 1991 (unreported).
83 Act No. 20 of 2004.
84 *Ibid*, Section 4.
85 *Ibid*, Section 5.
86 *Ibid*, Section 7.
87 *Ibid*, Section 106.

further creates several administrative institutions, including the National Environmental Advisory Committee, National Environment Management Council and the City, Municipal, District and Town Council Environment Management Committee. The functions of these environmental organs range from advising the government on environmental matters, reviewing and monitoring environmental impact assessment, to promoting environmental awareness among members of the public.

Conclusion

This chapter has illustrated how Tanzania is working to promote constitutionalism in the country through the proposed 14th constitutional amendments. The proposed amendments, if accepted, will, albeit slightly, reduce the restrictions which stood in the path of the enjoyment of basic rights by individuals. This is visible in the provisions which relate to the freedom of association, religion and the right to information. Further, the rights of an individual to own and protect property and not to be coerced to join any political party will no longer be as restricted, as it is currently. In the same vein, the proposed amendments will, if passed, radically change the Union Constitution to ensure that only persons who are serving in the public service can rise to the posts of attorney general, deputy attorney general and the director of public prosecutions. Moreover, if the president is incapacitated by illness, these amendments demand that only the vice president is entitled to take over from the president. The number of women members of parliament, judges of the high court and court of appeal will be increased considerably. Again, besides judges and magistrates, court registrars will be prohibited from joining any political party.

It should be emphasised that legislation such as the Higher Education Students' Loans Board Act, 2004, may present a hurdle to the full realisation of the right to education, if not properly monitored and implemented. The fact that the right to education in Tanzania

is not enforceable in courts of law is indeed unfortunate. It is only proper that the foregoing right should be made justiciable. On the whole, much of the legislation reviewed in this chapter adds impetus to the realisation by individuals of their respective constitutional rights. The Environmental Management Act of 2004 indeed marks a legislative milestone in environmental conservation and protection. Further, the Transfer of Prisoners Act, 2004, will be significant in administering humane punishment to Tanzanian citizens who have been convicted in a foreign country before being transferred back to Tanzania. The Electoral Laws (Miscellaneous Amendments) Act, 2004 will ensure only citizens are entitled to vote in general and local elections. The comprehensive Employment and Labour Relations Act of 2004 will also go far in entrenching equal treatment and fairness in the recruitment of employees.

3
The State of Constitutionalism in Zanzibar

Mahadhi J. Maalim

Introduction

The notion of constitutionalism produces numerous and often conflicting responses.[88] Constitutionalism has been seen "as a process of political rules and obligations, which bind both governors and the governed, both kings and ordinary citizens."[89] At the same time, constitutionalism is concerned with the instruments of governance, ranging "from the Constitution itself and other legally constructed documents that have been created to support it, to the structures and institutions that are established under their framework".[90] A further understanding of constitutionalism posits it "as the conduct of government within a system of checks and of accountability".[91] Finally, it has been argued that "constitutionalism revolves around the twin issues of individual rights and limited power of government. These issues make room for the rule of law, separation of powers, periodic elections, independence of the judiciary, and the rights to private property among other critical issues".[92]

While responses on what constitutionalism entails differ, a key common denominator is that constitutionalism involves limited government, with institutions performing their roles according to

88 Joseph Oloka-Onyango, *Constitutionalism in Africa: Creating Opportunities, Facing Challenges,* Fountain Publishers, Kampala, 2001, p.2; Julius O. Ihonvbere, *Towards a New Constitutionalism in Africa,* Centre for Democracy and Development, London, 2000, p.13.

89 A. Mazrui, "Constitutional Change and Cultural Engineering: Africa's Search for New directions", in Joe Oloka-Onyango (ed), *ibid*, p.35.

90 Oloka-Onyango, *supra* footnote 88.

91 J.B. Ojwang, "Constitutionalism in Classical Terms and in African Nationhood", in Rembe and Kalula (eds), *Constitutional Government and Human Rights in Africa,* Lesutu Law Journal, Roma, 1991, p.58.

92 Ihonvbere, *supra* footnote 88, p.15.

predetermined and acceptable norms and where individual rights are respected. Hence, having a constitution is not the same as having constitutionalism. As Mazrui points out, constitutions are the product of the 20th century while constitutionalism existed long before that time.[93]

The first constitution of Zanzibar was written by the British in 1963. This constitution had many sound provisions, acceptable in any democratic society. For example, it contained a Bill of Rights yet which, at the time, was lacking in the constitutions of many other countries.

The Zanzibar Revolution of 1964 abrogated the 1963 constitution, following which the country was ruled by presidential decrees. The Constitutional Government and Rule of Law Decree vested legislative power in the Revolutionary Council. The concept of separation of powers was abolished and, in its place, the Revolutionary Council, which had judicial, legislative and executive powers, introduced.

The period 1964-1979 heralded 15 years of autocratic leadership with neither a written Constitution nor elections. The Revolutionary Council was the centre of each and everything and the people of Zanzibar were recipients of its policies and directives. In this period, constitutionalism atrophied.

A political event which influenced and shaped the Constitution of 1979 was the merger in 1977 of the Afro-Shirazi Party (ASP) of Zanzibar and Tanganyika African National Union (TANU) of the Tanzania mainland to form Chama cha Mapinduzi (CCM). This was the beginning of "Chama kushika hatamu" – party leading the way. The 1979 Constitution was modelled after the Union Constitution and like the Union Constitution did not have a Bill of Rights.

This constitution functioned until 1984 when the demand for a new constitution was accepted by the government and the Constitution of Zanzibar of 1984 was adopted. This constitution opened a new era of

93 *Supra* footnote 89

constitutionalism in Zanzibar. The constitution did not only repeal the 1979 constitution[94], but also re-enacted the Bill of Rights.

The Constitution of 1984 has been amended nine times, but the most important amendments, as far as constitutionalism is concerned, were made by the Eighth Amendments in 2002. These amendments were made after the signing of the second CCM-CUF accord of 2001. The amendments established the office of the director of public prosecution[95] to whom the function of prosecution was vested from the attorney general. A provision[96] to entrench the separation of powers between the executive, judiciary and legislature was introduced. The amendment laid down the right to approach the high court when any right in the Bill of Rights or constitution, in general, was violated or was about to be violated.[97] An independent Judicial Service Commission was re-established,[98] and the Zanzibar Electoral Commission was reformed.[99] The amendments established the Voters' Permanent Register,[100] increased the number of women members appointed in the House of Representatives by their parties[101] and introduced the right against torture, degrading and inhuman punishment[102]. The right to join human rights societies was entrenched.[103] The effect of the limitation clause (claw-back clause) was reduced so that certain rights thereafter could not be limited or derogated.[104]

This chapter dwells on the constitutional developments which took place in Zanzibar in 2004. The chapter examines how the three state

94 The repealing provision was omitted in the 1984 Constitution. It was inserted by the constitutional amendment made in 2002 via Act No. 2 of 2002.
95 Constitution of Zanzibar as amended by the Eighth Amendments, 2002, Section 56A.
96 *Ibid,* Section 5A.
97 *Ibid*, Section 25A.
98 *Ibid*, Section 102A.
99 *Ibid*, Section 119.
100 *Ibid*, Section 7.
101 *Ibid*, Section 67, pursuant to which the number of women was increased from 10 to 15.
102 *Ibid*, Section 13(2).
103 *Ibid*, Section 20.
104 *Ibid*, Section 24.

organs - the executive, legislature and judiciary - functioned to protect the constitution of Zanzibar.

The Legislature and the Executive: Tussling for Turf

The legislature in Zanzibar is called the House of Representatives (hereinafter "the House"), established by Section 63 of the Zanzibar Constitution, 1984. Members of the House comprise those directly elected from the 50 constituencies of Zanzibar, 10 nominated by the president under Section 66, female members appointed by their parties (who are 30% of directly elected members), 5 regional commissioners and the attorney general.

The House is empowered by the Zanzibar Constitution to pass legislation on all matters not within the jurisdiction of the parliament of the United Republic of Tanzania. These powers are recognized by Article 4 of the Union Constitution of 1977. Article 4(2) states:

> …the organs vested with legislative and supervisory powers over public affairs shall be the Parliament of the United Republic and the House of Representatives of Zanzibar.

For its part, the executive is the centre of everything in Zanzibar. At its helm is a president with extensive powers. He appoints all top officials down to the level of directors of government departments. Below the president is the chief minister who together with other ministers and attorney general, form the Revolutionary Council. The legislature can be influenced by the executive because, first, the majority of its members are from the ruling party. Second, all the ministers and deputy ministers, regional commissioners and the attorney general are members of the executive as well as being members of the House.

Zanzibar is divided into five regions, three in Unguja and two in Pemba, governed by regional commissioners. Each region is constituted by districts headed by district commissioners. The regional commissioners and the district commissioners are all appointed by the president. Each district is divided into constituencies, each of which has one member of parliament (Union) and one member of the

Zanzibar House of Representatives. The smallest unit existing in the district is the shehia,[105] headed by the sheha,[106] who deals with minor administrative matters.

All these organs receive policies and directions from the centre. They do not enjoy any administrative or financial autonomy. Even the members of staff who serve in these offices are employed by the central government. Hence, Zanzibar has a system of government in which powers are concentrated at the centre, something which is anathema to the growth of democratic institutions.

In exercise of its legislative function, the House passed 13 statutes in 2004. At the same time, the executive sought to stamp its authority over the country by managing the manner in which legislation was passed or how the legislature conducted its business. A number of illustrative cases are set out in this chapter.

The House of Representatives Service Commission Act

The Constitution of Zanzibar provides for the establishment of the House of Representatives Service Commission. Section 77(2) provides:

> There shall be the House of Representatives Service Commission which shall have the power to employ officers and civil servants for the House, to appoint persons to hold office, to exercise disciplinary action and the power to do any other thing provided for under legislation concerning civil servants of the House, save the Clerk of the House who shall be appointed by the President in accordance with Section 76 of this Constitution.

This provision, while being included in the constitution since its inception, had never been used and no House Service Commission had ever been created. Rather, the House used the Civil Service Commission until 2003, when allegations arose that some employees of

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105 A shehia is similar to a ward.

106 The sheha is the leader of the shehia and is appointed by the regional commission. The sheha is supposed to be non-partisan and is responsible for discharging minor government functions in the shehia.

the House were involved in leaking secrets of the House to opposition political parties. A committee was formed to investigate the matter and, although its findings were not conclusive, three employees allegedly involved in the alleged incident were transferred to other government departments. One of the employees challenged the transfer decision in the high court of Zanzibar,[107] suing the chairman of the House together with three other officials for the transfer, at the time, no House Service Commission existed. It was in response to that suit, albeit before its determination, that the legislature passed the House of Representatives Service Commission Act in 2004.

The punitive nature of executive power in the legislature

During the House budget session in June/July 2004, the member of the House of Representatives for Chambani Constituency (CUF), Pemba, who was also shadow minister of finance and economic affairs, Hon. Abbas Muhunzi, criticised the government about the ECOTEC-GAPCO saga. ECOTEC had entered into an agreement with the government of Zanzibar to become the sole supplier of petroleum products. Following the enactment of the Petroleum Levy Act,[108] the petroleum business had been liberalised, thereby frustrating ECOTEC's monopoly. GAPCO, another oil importer, took over the supply of petroleum products, replacing ECOTEC. Hon. Muhunzi criticised the whole arrangement and mentioned that the president of Zanzibar was involved. A House Committee was formed to investigate the matter and Hon. Muhunzi was suspended from attending the House for one year when the investigating committee, comprising a majority of CCM members, found his allegations to be unfounded.

Two pertinent issues arose from this incident. The first, was whether the speaker of the House had the power to dismiss a member of the House. Since the constitution of Zanzibar as well as the House of

107 *Mwanaisha Said* v. *Chairman House of Representative Service Commission,* High Court of Zanzibar Civil Case No. 58/2003 (unreported.)

108 Act No. 7 of 2001.

Representatives (Immunities and Privileges) Act, 1990, did not make provision for that punishment, the speaker relied on the regulations of the House made under Section 86(2) of the constitution, which gave him power to suspend a member as a result of certain incidents. The case in question did not involve the grounds mentioned in the regulation. Indeed, when Hon. Muhunzi challenged the decision of the House in the high court of Zanzibar,[109] the high court ruled in his favour, and ordered his reinstatement, observing that the House had acted outside its mandate.

The second issue related to legislative oversight. The majority of members working in parliamentary committees of the House of Representatives were members of the ruling party who were never critical of government policies and/or actions. No member could criticise the government for fear of retribution. The Committees' role of overseeing the government and making its officials accountable to the people could, therefore, not be performed satisfactorily and, in the long run, this did not help the democratisation process in Zanzibar.

The Zanzibar flag

It was mainly supporters of the opposition who expressed a need for Zanzibar to have its own flag to express its identity inside the Union, though some members of the ruling party were also in favour the idea.

Zanzibar had its own flag when it attained its independence in the early 1960s, but when the Union arrangement between Tanganyika and Zanzibar was adopted, Zanzibar lost its sovereignty and its flag was abandoned in favour of the Union flag. Since then, the Union flag had been used in all offices in Zanzibar, irrespective of whether they are offices of the Union or of the Zanzibari Government.[110]

In 2004, the House of Representatives took cognisance of Section

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109 H*on. Abbas Juma Muhunzi v. Hon. Speaker of the House of Representatives and 2 others*, High Court of Zanzibar Misc. Civil Cause No. 10 of 2004 (unreported).

110 Significantly, too, before the merger of TANU and ASP in 1977, the ASP had its own flag. But the merger of these two political parties to form CCM resulted in the adoption of one flag for the ruling party.

3 (2) of the Zanzibar Constitution of 1984, which provides that the government of Zanzibar shall have the power to prescribe anything which shall be a symbol of the government and as may be approved by law enacted by the House of Representatives. Using this provision, the Zanzibar Flag Act was passed, and now the flag of Zanzibar is used in all offices of the Zanzibar government, in Zanzibar or on the mainland. Union offices, such as police and immigration offices, fly both Union and Zanzibar flags. However, similar offices on the mainland fly only the Union flag. The flag is also used by Zanzibar athletes when they represent Zanzibar.

The flag of Zanzibar has not only returned the self-esteem of many Zanzibaris, but has also, to a certain extent[111] established the identity of Zanzibar. Significantly, the establishment of the Zanzibar Flag has exerted a strain on the Tanzania Union. Some Tanzanians, especially from the mainland, interpret the step as a move to sabotage the Union and as a statement on Zanzibar's movement towards her own freedom.

In another development, the president of Zanzibar who, since 1985 had been using his own flag and seal, decided to pass legislation to recognise the practice. The Presidential Flag and the Seal of the President Act was enacted in 2004 with retrospective effect from 12 January 1984.

The identity of Zanzibaris and dual citizenship

The move to establish the identity of Zanzibaris was further supplemented by a bill which was passed by the House of Representatives entitled the Registration of Zanzibaris Act. The bill is awaiting presidential assent before it becomes law. Its aim is twofold: to register all Zanzibaris and provide them with identity cards; and to prepare Zanzibaris for the changes which are about to come with the establishment of the East African Community.

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111 The flag cannot be used officially outside Tanzania as foreign relations and international affairs are Union matters in which the Union government represents the whole Union.

This law was long overdue. The Zanzibari Act of 1985 outlined who a Zanzibari was and how a person could be recognised as a Zanzibari. But for political reasons - CCM fears that the Union would split - the Zanzibari Act was never implemented. Hence, when the Registration of Zanzibaris Bill becomes law it will open a new chapter in the constitutional development of Zanzibar. During the past two general elections there have been allegations from both the opposition and the ruling party that people from the mainland have been "planted" in Zanzibar for the purpose of voting. By law these people are not entitled to be registered, and therefore, the Registration of Zanzibaris Act would enable the registration and voting exercises to be conducted without much controversy.

Being a Zanzibari is not about citizenship; it is an identity. The Zanzibari Act, 1985, laid down criteria for being a Zanzibari. One requirement was that a person must be a Tanzanian citizen. The Union Constitution does not recognise dual citizenship. Consequently, someone could satisfy the other criteria of being a Zanzibari, for example, by being a child born of parents who are both Zanzibari, but if he or she acquired citizenship of another country, then he or she would also lose their identity as a Zanzibari, together with all rights and privileges. If Tanzania would permit dual citizenship,[112] it would have great impact on Zanzibaris. Not only would this affect who would be recognised as a Zanzibari, but it would also affect the election laws and who would have a right to vote.

Establishment of Special Departments

Section 121 of the Constitution of Zanzibar, 1984, allows the government of Zanzibar to create its own forces, which are called special departments. The section provides:

(1) There shall be established Special Departments for Zanzibar whose duties and functions shall be as provided under the Acts establishing them.

112 In 2004 , the Law Reform Commission of Tanzania issued a position paper on the introduction of dual citizenship in Tanzania after collecting views of the people regarding dual citizenship and its possible models.

(2) The Special Departments referred to in subsection (1) of this section are:
  a) Jeshi la Kujenga Uchumi[113]
  b) Kikosi Maalum cha Kuzuia Magendo[114]
  c) Chuo cha Mafunzo[115]
(3) The President of Zanzibar may, in addition to Special Departments specified under subsection (2) of this section, establish other Special Departments from time to time as he may think fit.

The president of Zanzibar had exercised his power under Subsection (3) in 1999 by establishing a fire brigade,[116] and in 2004 by establishing Kikosi cha Valantia.[117] This was a volunteer brigade, which has now been re-established as a special department. During the reign of ASP (1964-1977), the Valantia were soldiers of the party. When the ASP and TANU united, Valantia became the soldiers of CCM but with decreasing significance.

Now the Valantia have joined the ranks of special departments, comprising soldiers in all but name, working with the police and the armed forces of the Union. The Act stipulates the duty of the volunteers as:

> To cooperate with defence and security forces or any other institution in the defence of the United Republic of Tanzania or security of the citizens and their properties or to undertake other duties for which "Valantia" is responsible under any existing law.[118]

Valantia are not party soldiers any more; in fact it is an offence for any Valantia to be a member of a political party, attend meetings, demonstrations, wear emblems or clothes affiliated to parties, insult political leaders or show any sign of political affiliation. A convicted service person shall be dismissed from the force.[119]

113 The National Service established by Act No. 5 of 1979, re-enacted as Act No. 6 of 2003.
114 A special Anti Smuggling Unit established by Act No. 13 of 1979, re-enacted as Act No. 1 of 2003.
115 Officially referred as "Educational Centres," established by Act No. 5 of 1972.
116 Act No. 7 of 1999.
117 Act No. 5 of 2004.
118 *Ibid*, Section 4(a).
119 *Ibid*, Section 28.

Further, Valantia have powers of search and arrest[120] and the right to bear and use arms.[121] They are granted immunity against any act or omission done in the bona fide exercise of their duties.[122] Valantia are also supposed to be trained militarily.

The establishment of special departments has created friction in the Union. Under article 147 of the Constitution of United Republic of Tanzania, 1977, it is only the Union Government which has the mandate to establish armed forces of any kind. This constitutional dilemma was explained by the court of appeal of Tanzania in *Machano Khamis Ali and 17 others v SMZ*[123]. The question that lingers is whether the government of Zanzibar has the mandate to establish its own "armed forces" by whatever name called.

Be this as it may, the creation of this special department is a blow to democracy in Zanzibar. There is a strong feeling that special departments are, in many instances, being used by the government to further its interests. A relevant question is whether Zanzibar needs another special department, especially when it faces economic hardship to the extent that civil servants sometimes remain unpaid for over a month. The irony of this is the importance which is given to this special department. The annual budget of the Kikosi cha Valantia is Tshs. 1.4 billion, while the budget of the judiciary, the third pillar of democracy, is only Tshs. 600 million. Quite clearly, the creation of Kikosi cha Valantia has not enhanced constitutionalism in Zanzibar.

Zanzibar Electoral Commission

An important aspect of democracy is free and fair elections. For elections to be free and fair, good supervision is needed in all its stages, including the appointment of election officers, registration of voters, nomination of candidates, election campaigns, voting procedures, counting of votes and announcement of results. In order to ensure the

120 *Ibid*, Section 16.
121 *Ibid*, Section 19.
122 *Ibid*, Section 17.
123 High Court of Zanzibar Criminal Appeal No. 7 of 2000.

success of this process, good legislation and a strong and independent organ to supervise the process are required.

The election process in Zanzibar is supervised by the Zanzibar Electoral Commission (ZEC) and the laws which guide the process are the Constitution of Zanzibar and the Election Act.[124] The Election Act has been amended eight times to make the law relevant to Zanzibar's political, constitutional and administrative changes.[125]

ZEC is established under section 119 (1) of the Constitution of Zanzibar and Section 4 of the Election Act. The functions of ZEC are stipulated in Section 120 of the Constitution and Section 5 of the Election Act. Some of the duties of ZEC are:

- To supervise election of the president of Zanzibar, members of the House of Representatives and councillors;
- To divide Zanzibar into constituencies; and
- To undertake civic education and voter education.

The holding of free and fair elections has been a problem in Zanzibar since the establishment of multiparty democracy in 1992. The 1995 general elections were marred by serious irregularities. Commonwealth observers described the 2000 general elections as a shamble. Voting had to be repeated in 17 constituencies in the Urban West region of Unguja[126] after they were nullified, and counting for the rest of the country was suspended for a week after the voting.

ZEC was reformed following a constitutional amendment in 2002. Presently, it comprises seven members appointed by the president, including two members appointed on the recommendation of the head of government activities in the House of Representatives, and another two on the recommendation of the opposition leader in the House. One member must be a judge of the high court and one is the chairperson of the Commission. The aim of this reform is greater independence and impartiality for the ZEC. The test case for a reformed ZEC was the 2005 general elections.

124 Act No. 11 of 1984.

125 In 1990, 1992 (twice), 1995, 2000, 2001, 2002 and 2004.

126 Unguja is the main island which together with Pemba island form Zanzibar.

Free and fair elections in Zanzibar were also dependent on a number of factors witnessed developments in 2004.

Permanent Register of Voters and Residence Requirements

The Constitution of Zanzibar provides that any Zanzibari who has attained the age of 18 years is entitled to vote unless he or she is disqualified by any law.[127] In line with the second CCM-CUF Accord of 2001, the procedure for registering voters were changed following the constitutional amendment[128] establishing the Permanent Register of Voters. The Election Act was also amended[129] to comply with the constitution. The Permanent Register of Voters is intended to include the names of all Zanzibaris who are entitled to vote in a particular constituency so as to create an environment where free and fair elections can be held.

Registration of voters in the Permanent Voters register started in December 2004 in Pemba South region then proceeded to the North Region of Pemba. The registration exercise encountered problems in its very first week.

The first was the use of shehas in the registration exercise. Under the Election Act,[130] shehas were agents of ZEC entrusted with the role of identifying persons who qualified to be registered. But in most cases, shehas were affiliated to the ruling party, and consequently, objected to the registration of supporters of the opposition. On the other hand, shehas encouraged registration of supporters of the ruling party, even if they did not qualify for registration. This led to chaos in the registration centres.

The second problem arose from the residency requirements stipulated by the Election Act.[131] For a person to be registered in a particular

127 Section 7.
128 Eighth Constitutional Amendment, Act No. 2 of 2002.
129 Act No. 12 of 2002.
130 Section 11A.
131 Section 12(6).

constituency, he or she must have resided in that constituency for 36 consecutive months.[132] This was to create many problems because no documentary evidence is issued when a person moves from one constituency to another. Many people were refused registration for their apparent failure to meet this residential requirement. When these people returned to their old constituencies, they were again refused registration on the same grounds of failing to meet the residential requirement, as they had moved out of the constituency. These people were not provided any written explanations from the shehas to explain why they could not register. The result was the disenfranchisement of Zanzibaris who were entitled to be registered and to vote.

The third problem also related to the residency requirements. There were strong objections to the registration of Union armed forces and members of the Zanzibar special departments. The law did not require members of the armed forces or civil servants and their families to comply with the 36 months residential requirement. They would be entitled to register and vote in whichever constituency they were transferred to, regardless of the period they had stayed there. This provision was abused in some cases, as armed forces were transferred to particular areas to increase the numbers of voters there in order to tilt the balance in favour of a particular party.

An incident took place in Pemba when local residents objected to members of a special department registering in their constituency. In response, members of the armed forces opened fire, killing one civilian and wounding two others.

In spite of these irregularities and problems, the two major parties in Zanzibar, CCM and CUF, are supportive of the Permanent Register of Voters. It is hoped that if the registration process continues relatively well, the next general elections will have fewer controversies.

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132 Following the amendment of the Election Act in 2002, the residency requirement was reduced from 5 years to 36 months.

Division of Zanzibar into Constituencies

Section 120 of the Constitution of Zanzibar empowers ZEC to divide Zanzibar into constituencies for election purposes. The constitution further provides that the constituencies shall not be less than 40 and not more than 55. In undertaking this division, ZEC has to ensure that all constituencies contain equal numbers of inhabitants. The division should not be made in a way that specifically favours or undermines a political party.

In 2004, constituencies were re-organised. In this process, ZEC was confronted by the URT constitution's provision that requires the number of members of parliament from Zanzibar not to be increased or decreased without the consent of at least a two thirds majority of the Zanzibar's parliament.[133] ZEC met this provision by ensuring that the re-organisation left the total number of constituencies unaltered. Before this re-organisation, there were 21 constituencies in Pemba and 29 constituencies in Unguja, making a total of 50 constituencies. The re-organisation reduced the number of constituencies in Pemba to 18, while in Unguja, the number of constituencies was increased to 32. ZEC's reason for this re-organisation was that the number of inhabitants in Pemba had decreased while the number of inhabitants in Unguja had increased. The opposition complained about this re-organisation, claiming it was a strategy for the ruling party to win the elections. Pemba was the stronghold of the CUF and the reduction of constituencies meant a reduction of seats in both the House of Representatives and Parliament.

The Election (Amendment) Act [134]

Another development which took place in 2004 is the amendment of the Election Act, to among other things, grant the presiding officer powers to announce election results at his or her polling station. With this amendment, interested groups (including the media and political parties) would be able to tally the votes from each polling station and

133 Item 8 of list Two of the Second Schedule.
134 Act No. 3 of 2004.

prepare an unofficial result before the announcement of the result by ZEC. This was expected to reduce the possibility of results being doctored, thereby encouraging democracy and transparency.

The State of Political Parties

The introduction of multiparty democracy in 1992 necessitated the amendment of several laws to allow the multiparty system to function. Among the amended laws were the Constitution of Zanzibar and the Election Act. A specific provision was introduced in the Constitution to provide for the multiparty system as follows:

> Zanzibar shall be a state of multiparty democracy which shall respect the Constitution, the rule of law, principles of human rights, equality and justice.[135]

One of the requirements for the registration of a political party was for it to have a presence both in Zanzibar and on the mainland. Presently, 18 political parties are registered by the office of the registrar of political parties. However, only CCM and CUF are strong in Zanzibar. No other political party secured a seat in the House of Representatives or the parliament of the United Republic from any constituency in Zanzibar in the last two multiparty general elections (1995 and 2000) and the several by-elections. The performance of the small parties has not been encouraging in the Isles. This was evidenced in the 2003 by-elections in Pemba, where the disqualification of all CUF candidates, other opposition parties failed to secure a single seat, leaving CCM to win, as it were, by default.

In 2004, the office of the registrar of political parties was opened in Zanzibar. Henceforth, grievances and complaints of political parties could be submitted to this sub-office and leaders of political parties no longer had to travel to Dar es Salaam to meet the registrar. A Zanzibari was also appointed deputy registrar of political parties. Unfortunately, his office is based in Dar es Salaam rather than Zanzibar, where he would have been better positioned to follow political happenings in Zanzibar.

135 Section 5.

In 2004, the freedom to form political parties was tested. Three parties with temporary registration were deregistered. Safina Political Party, which had a strong base in Zanzibar, was removed from the register because of its failure to resolve internal conflicts. The Sasa Safi Political Party and the Soft Political Party - based in Zanzibar - were de-registered because they failed to obtain 200 sponsors from each of the ten regions of Tanzania - two regions from Zanzibar and eight regions from Tanzania mainland - thereby failing to satisfy one of the requirements of obtaining permanent registration.

By and large, while the Election Act and the constitution have been amended to promote democracy and constitutionalism, this did not sufficiently liberalise Zanzibar to allow parties and individuals to exercise their rights to the full. For example, independent candidates are still not recognised under Zanzibar laws. This limits the people's rights to select and be selected for public leadership positions.

The Judiciary

For any state to observe principles of democracy and the rule of law, it must establish and maintain an independent and impartial judiciary. The judiciary is established under Chapter Six of the Zanzibar Constitution. It is headed by the chief justice of Zanzibar. The judiciary is not a Union matter; hence each party to the Union has its own judiciary. The two parts of the Union, however, share a common court of appeal since 1979 when the court of appeal of Tanzania was established following the demise of the East African Court of Appeal.

For a long time now, the judiciary in Zanzibar has been facing a shortage of judges and magistrates. In the period 1995 to 2000, judges were recruited from Nigeria to serve in the high court of Zanzibar. The government was criticised for this state of affairs as it could easily have recruited judges from Tanzania mainland or from other East African countries. The cost of retaining Nigerian judges was very high. Eventually, the contracts of these judges were not renewed and the last Nigerian judge left Zanzibar in 2003. Currently

one judge who had been recruited from Tanzania mainland, is working under contract. A number of law graduates have joined the judiciary as regional magistrates and, at the moment, there is no shortage of magistrates. However, the shortage of judges persists.

Enforcing decisions of the courts against the government of Zanzibar or people who have the backing of individuals in government is problematic.[136] A decision may be delivered, but the judiciary may be reluctant to enforce it. In 2004, a demolishing order was issued in the case of *Abdalla Ahmed and Yamu Ahmed v. Khatibu Abdalla Makame and two others*.[137] The order was against the interests of powerful persons, including a former head of intelligence in Zanzibar and a former regional commissioner. The police force failed to effect execution on the pretext that whenever they visited the site, they found people with machetes guarding the property. The irony is that the police force is notorious for mercilessly persecuting people when it has orders from the executive to do so, or when the force perceives the interests of the executive to be in jeopardy.

Following the second CCM-CUF accord of 2001, it was agreed that the judiciary should be reformed so that its independence and integrity are not be compromised. It was also agreed that the capacity of the judiciary should be rebuilt. Accordingly, the Judicial Service Commission[138] has been re-established and, for the first time ever, one commissioner is elected by the president from members of, and upon recommendation from, the Zanzibar Law Society. The Commission has the power to advise the president on the appointment of the chief justice, puisne judges, magistrates, kadhis and other senior officers of the court.

Besides executive interference in the judiciary, many other factors have contributed to the judiciary's lack of independence. Corruption, inefficiency and lack of resources, have all prevented the judiciary from

136 See *Serena Inn v. P.S. Ministry of Finance,* High Court of Zanzibar Civil Case No. 12 of 2001 (unreported); *Vega Media v. Ministry of Finance*, High Court of Zanzibar Civil Case No. 14 of 2001 (unreported).

137 High Court of Zanzibar Civil Appeal No 4 of 2003.

138 Constitution Section 102.

providing expeditious and fair trials and from being fully independent and impartial. However, it should be noted that while the judiciary has been criticised for its pro-state attitude, it has, in some cases, demonstrated impartiality and boldness against the government.

An important constitutional decision was made in December 2004 in the case of *Omar Ali Jadi and five others V. Zanzibar Electoral Commission.*[139] The applicants were CUF candidates for different constituencies in the Pemba by-elections held in May 2003. The applicants were challenged by NCCR Mageuzi's candidates from contesting seats of the House of Representatives on the grounds that the law barred them from doing so for the next five years as they had been dismissed from the House. The objection was upheld by ZEC. The high court heard the matter and reversed the decision. The full bench of the high court[140] having analysed various provisions of the Zanzibar Constitution and Election Act, concluded that the petitioners had not been dismissed from the House, but had decided to withdraw from the business of the House. The court held:

> We are of the opinion that the ZEC was wrong in its finding that the petitioners were dismissed from leadership and as a result they were not allowed to contest for seats in the House until the expiration of five years. The finding of the minority members of the ZEC was, in our view, the correct finding, to the effect that the petitioners did not fall within the provisions of Article 69(4)(c) of the Constitution as they ceased to attend the sittings of the House of Representatives on their own volition.[141]

Another important and bold decision delivered against the government in 2004 is that of *Dr. Mohamed Kaumbwa and 176 others v Ministry of Health and two others.*[142] In this case, a judgement was delivered to the effect that the Ministry of Health and two others, were jointly and severally liable to pay the amount of Tshs. 35 million to the plaintiffs, who had been defrauded of their money, advanced to the defendants,

139 High Court of Zanzibar Miscellaneous Application No. 8 of 2003.

140 Justice S. Dahoma, Justice Mshibe A. Bakar and Justice S.S.S. Kihiyo.

141 Page 6 of the typed judgment.

142 High Court of Zanzibar Civil Case No. 26 of 2003 (un reported).

for the purchase of motor vehicles. During execution, the court ordered the attachment of a bus belonging to the College of Health which falls under the Ministry of Health. Following this, the Ministry prepared a plan to pay the decree amount.

Freedom of Expression

Section 18 of the Constitution of Zanzibar guarantees freedom of expression. In order for the media to discharge its obligation of providing information to the public, it must have freedom and space to do its work. In Zanzibar, information has been considered to be the property and monopoly of the government, which decides what information should or should not be disseminated to its citizens.

Private media started to emerge after the first multiparty election in 1995. The first private newspaper was Jukwaa, which is still a registered newspaper although it has stopped publication. This newspaper had many backers in the ruling party, and the opposition believed that it was a mouthpiece of the ruling party - CCM. The other private newspaper was Dira, that was banned less than two years after its first publication. Similarly, people, especially CCM followers, considered Dira to be an opposition newspaper. All electronic media are owned by the government.

When Dira was banned, its directors challenged the decision of the high court in *Managing Director Dira Newspaper and another v Ministry of State (Chief Minister's Office) and another*.[143] Dira argued that the order of the minister was illegal and violated the rule of natural justice as Dira had not been given the right to be heard. Dira also argued that the order was arbitrary and violated the rule of law and good governance. In suspending and prohibiting the publication of Dira, the government relied on Section 30(1) of the Newspaper Act[144] which provides:

> Where the Minister is of the opinion that it is in the public interest or in the interest of peace and good order so to do, he may by order

143 High Court of Zanzibar Civil Case No. 20 of 2003 (unreported).
144 Act No. 5 of 1988.

> direct the suspension of the publication of the newspaper named in the order and such newspaper shall cease publication as from the date (hereinafter) referred to as effective date specified in the order.

Section 30(2) requires the notification of the said order to the Advisory Board within seven days, which shall as soon as practicable, advise the Minister on whether to prohibit the publication of the newspaper named in the order or to allow its publication with or without any instruction.

The interesting part of the case is that when Dira applied for registration on 11 November 2002, the board was not in place, and the registration was granted the next day. When Dira was suspended on 24 November 2003, the board was yet to be constituted. Realising the effect of its omission, the government constituted the Advisory Board on 13 January 2004, and gave it retrospective powers with effect from November 2003. It is obvious that the board was established for the sole purpose of legitimising the actions already taken against Dira.

To the surprise of many, the high court supported the prohibition of Dira albeit for different reasons. It held that since the Advisory Board had not yet been constituted when the application of Dira was made, and hence, had not advised the minister in accordance with Section 5(a) of the Newspaper Act, the procedure for granting the publication was not followed. It held:

> The application was locally [sic!] made and locally [sic!] granted. The provisions of the law … were totally ignored. The only remedy on ignoring the provisions of the law of the land is to declare the order legally ineffective. Hence, the granting of the application was illegal and of no effect and the order of the Minister to suspend and prohibit Dira is also ineffective because it was against a non-legal [sic!] existing newspaper."

The high court decision is, in fact, erroneous since it is premised on a false assumption. Section 5(a) does not lay down a procedure to be followed in the application. It merely lays down one of the functions of the advisory board, which is to consider applications and advise the

minister. The provision does not say what will happen if the minister does not take advice or consult the board. It appears that the provision does not lay down a condition on the minister to consult the board in the application; he has discretion. Furthermore, the applications are submitted to the registrar, not to the board. Failure of the board to advise the minister does not make the decision illegal. To the contrary, under Section 30(2) it is mandatory that the board be notified within seven days about the order of suspension. Section 31 stipulates that it is mandatory for the minister to consider the advice of the board before prohibiting the newspaper. The same cannot be said of Section 5(a), on which the court based its judgement.

In this case, clearly, the court failed to uphold the freedom of expression guaranteed by the constitution. The Newspapers Act, one of the most repressive legislations in Zanzibar, was once again used by the court as a tool to suppress press freedom.

Conclusion

The year 2004 witnessed progress regarding the development of constitutionalism in Zanzibar. Constitutionalism, however, has not yet taken root. The past still looms over the shoulders of Zanzibaris and attitudes of the ruling elite, who use the law and the constitution as instruments for perpetuating and maintaining power, has not changed much.

The year 2004 also witnessed continuing implementation of the CCM-CUF political accord, which was reached in 2001 and followed by the Eighth Constitutional amendments in 2002. These amendments were unique compared to the previous ones. They enhanced democratisation, transparency and human rights. It is no exaggeration to say that the future of constitutionalism in Zanzibar looks much brighter than the past.

4
Constitutionalism under a “Reformist” Regime in Kenya: One Step Forward, Two Steps Backwards?

Morris Odhiambo

Introduction

The umbilical cord that connected the end of 2003 to the beginning of 2004 regarding constitutionalism in Kenya was the vexed question of making a new constitution. Though the National Constitutional Conference (NCC) continued its sittings during the first three months of 2004 at the Bomas of Kenya (what was referred to as “Bomas III” in subsequence to two earlier sittings), prospects for Kenyans enacting a new constitution arguably became dimmer on a backdrop of political squabbling and an elusive search for consensus on major issues. Thus, the main irony of Bomas III was that whereas it was supposed to move Kenyans closer to realising a new constitution, in actual sense, it pushed these hopes further into an indeterminable distant future.

The problem during this period hinged over various issues (of content), christened as “contentious”, by one or the other political “camp” in the historic talks. The political nexus to the “politics of contention” could be discerned in a number of ways. The quarrelsome National Rainbow Coalition (NARC), for instance, had predicated its power sharing arrangement on non-legislated positions such as the post of a prime minister. To this extent, Bomas III became an alternative arena for NARC’s internecine wars whose origins were the hurriedly packaged pre-election Memorandum of Understanding signed between the National Alliance Party of Kenya (NAK) and the Liberal Democratic Party of Kenya (LDP).

Whereas the principal players within the LDP were seen to be focused on using the review process to realise the pre-election power sharing pact, the NAK wing of NARC seemed to be set on securing their narrow gains by not allowing encroachment on the powers of the presidency. In effect, therefore, issues became contentious depending on political allegiances. To demonstrate this, NAK whose membership included the Democratic Party of Kenya (DP), had during submissions to the Constitution of Kenya Review Commission (CKRC) demanded devolution of power and the creation of a prime minister's position in a new constitutional dispensation. This perspective changed radically during the NCC.

Second, elite from the former ruling party, the Kenya African National Union (KANU), still reluctant to fully assume their place in the opposition and now wearing "reformist" garb, saw an opportunity to push for positions that would enhance their post reform political agenda. In the constitution review battlefield, therefore, lay the possibility of using the executive's excessive powers for purposes of perpetuation; it also presented the opportunity to rationalise the arrangement of executive power so as to even out post reform political contests.

In this context, the interests of the political elite seemed to have been clear enough. What was not clear was whether or not the interests of the majority of Kenyans were properly defined in this conundrum. Civil society organisations (CSOs) representing different interest groups, as well as representatives of groups such as women, youth and people with disabilities, laboured in this environment to defend their collective gains. However, the politicians seemed to have the upper hand, if not in terms of input, then in catching the eye of the Press and securing headlines.

Conceptual Issues

"Constitutional development" presents a huge arena for analysis. There are indeed many perspectives from which constitutional developments can be examined. As Kivutha Kibwana puts it (Onyango, 2001: 2):

> Whenever a country makes a new constitution, one can analyse all the processes and activities which feed into and shape such constitution-making. Secondly, constitution making concerns the way in which the citizens relate to a new or existing constitution. Those activities accompanying the changing or amendment of a constitution similarly provide another aspect of constitutional development. The other key component concerns the implementation of the existing constitution by the executive, judiciary and also the legislature.[145]

De Smith (1964: 106),[146]has written that constitutionalism is evidenced in a country where

> The government is genuinely accountable to an entity or organ distinct from itself, where elections are freely held on wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.

The above definitions are sound. Kibwana's definition expresses a wider perspective of constitutionalism, while De Smith points out the kind of activities whose presence or absence may signify adherence or non adherence to constitutionalism.

The fight for constitutionalism in Kenya has been waged on many fronts. The writing of a new constitution for the people of Kenya has clearly been one of the key facets of this struggle in the last one decade. The struggle for recognition of the centrality of human rights, the implementation of legal frameworks for the enhancement of human rights and the enactment of human rights friendly legislation have all been important elements of the fight for constitutionalism. From a one party system before the advent of the 1990s, Kenyans have struggled for inclusive electoral processes. In 1991, this struggle recorded a major milestone – restoration of the multiparty system of politics.

The many facets of constitutionalism underline the importance of setting out clearly the parameters on which analysis of constitutionalism in Kenya should be undertaken. This chapter examines constitutional

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145 Prof Kivutha Kibwana, "Constitutional Development in Kenya", In J. Oloka Onyango (Ed), (2001) *Constitutional Development in East Africa for Year 2001,* at p. 2.

146 De Smith, S.A. (1964), *The New Commonwealth and its Constitutions,* at p. 106.

developments in Kenya during 2004. It begins with an exhaustive examination of the final leg of the NCC, and analyses the circumstances, including a number of court cases, that led to the stalemate in constitution making; it then explores the nexus between the process of constitution making, the content of the Bomas Draft Constitution and the possibility of a better human rights regime for Kenyans. To complete the review, other issues of relevance to constitutionalism and human rights during the review period are outlined and analysed.

Contextual Issues

In the introduction to *Constitutional Development in East Africa for Year 2001,* Prof J Oloka-Onyango notes the following:

The efforts by activists for gender equality, the recognition of minority issues, and the quest for increased attention to economic, social and cultural rights, are increasingly rooted in the idea that the constitution "shall provide". Consequently, the struggle over constitutionalism in the region is as much a struggle over ideas, as it is a struggle over resources, space and political accountability.[147]

The above assertion might seem obvious at first glance. However, examination of some common assumptions underlying the constitution making process in Kenya especially among *wananchi*[148] shows that indeed Kenyans have come to believe that the constitution is supposed to deliver them from their situations of want. For the last few years, the struggle for a new constitution has meant more than the rationalisation of political processes such as electoral contests, which in many cases, is a concern of elites positioning for political power. The process has found confluence with the aspirations of Kenyans caught up in varying situations of deprivation.

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147 J. Oloka Onyango, "Constitutionalism, Community and the Prevention of Conflict in Contemporary East Africa," In J. Oloka Onyango (Ed), (2001), supra footnote 145 at p. (i) – (ii).

148 In this context, the term *mwananchi* may be taken as a socio-economic construct connoting those of a lower status or the majority, roughly what former President Daniel arap Moi referred to as *Wanjiku.*

The social indicators in the country for the last decade have continued to portend minimal optimism for the majority while a minority have continued to reap maximum benefits.[149] At present, up to 56 per cent of Kenyans are said to live below the poverty line and, even if the figure does not tell the actual tale, the suffering of the majority is apparent. An ever shrinking job market, rising rates of crime and general insecurity as well as increasing incidents of family conflicts, are among the indicators that contextualise this situation.

From this perspective, perhaps one gain of the struggle for accountable governance is the firm establishment in the minds of the citizenry about the nexus between constitutionalism and governance generally with obtaining material conditions.[150] In line with Prof. Oloka's thinking, there is a sense in which Kenyans believe that a new constitution, apart from removing structures of oppression such as an "imperial" presidency and providing a better human rights framework, will also solve their immediate "bread and butter" problems.

The end of 2004 marked two years since the coming to power of what was initially thought to be a reformist government; a government upon which Kenyans banked hopes of salvation from many of the ills mentioned above. Even though the parameters of reform may not have been clear to all, the constitution review process, with its promise of leading to fundamental renewal, featured very prominently on the reform menu. The assumption was that with the former regime out of the picture, the review process would be smoothened.

149 For instance, Kenya's members of parliament are today not only (arguably) the most well paid legislators in the East African region but are perhaps the only class of employees with the power to determine their own level of remuneration. The lawmakers have also put in place the Constituency Development Fund (CDF) to provide for projects at the constituency level, which many analysts see as a slush fund for campaigns. The constitutionality of the CDF Act has also been questioned.

150 This position, clearly, needs further interrogation. However, there is a noticeable backlash against the political elite across the political and ethnic spectrum on suspicions of involvement in corruption and profligate spending of public resources, for instance, which indicates that attitudes towards the wielding and use of power are changing. Ethnic barons now have to work extra hard to push the belief that their being in positions of influence and enjoying various privileges is actually good for their ethnic constituencies.

However, political happenings generally and especially the events that led to the stalemate in the review process indicate that the political class has once again succeeded in trashing one of the key premises agreed upon by popular consensus during the initial stages of constitution making: that the participation of the common (wo)man – *Wanjiku* – in constitution making was paramount. In this sense, Kenyans have gone back many steps, which is not surprising since the fight for an inclusive process of constitution making generally tends to go against the wishes of the political elite who could, therefore, be expected to scuttle it at any moment.[151]

Finally, just before the 2002 election, there was an underlying assumption that the country would undergo a significant transition after years of human rights' abuse and economic plunder. Kenyans believed that a new constitution would create mechanisms to anchor reform actions on more solid ground. Indeed, some of the actions that the regime has taken so far were clearly provided for in the Bomas Draft Constitution. For instance, on the question of land reform, the Draft Constitution had provided for mechanisms such as the National Land Commission to anchor land reforms, while on dealing with corruption, provision had been made for various institutions including an Ethics and Integrity Commission. Critics have wondered, therefore, whether the NARC regime favours a piecemeal approach to change as witnessed by laws enacted and institutions put in place so far.[152]

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151 A perspective to this is given by Oloka-Onyango when he asserts that: the history of the three (East African) countries reveals that governments and ruling parties have made concerted efforts to keep the people at bay in the process of constitution making. … these histories reveal that governments and ruling parties are averse to popular autonomous participation in constitution making"; (J. Oloka Onyango, "Constitutionalism, Community and the Prevention of Conflict in Contemporary East Africa" In J. Oloka Onyango (Ed), (2001) supra footnote 145, at p. viii].

152 See generally, Morris Odhiambo, "There is need to sort out leadership crisis", *Daily Nation*, 29 March, 2005, at p. 9.

Bomas III: Creating an Impasse

The last phase of the NCC convened on the 12th of January 2004. On the 15th of March 2004 delegates adopted the Draft Constitution of Kenya, 2004. The document, however, was robbed of some legitimacy by the events preceding its adoption. With politicians, mostly the opposing camps in NARC, fighting a bare knuckled battle to secure their interests, the interests of the majority of Kenyans took a back seat in the process. On 16th March, 2004 a number of MPs and ministers engineered a walkout from Bomas of Kenya when matters got a little too heavy. The important events leading to the controversial "government" walkout are presented below:[153]

153 Only issues of process and those involving consensus building efforts pertaining to various issues dubbed as contentious are presented here.

Events leading to the 16th March walkout from the NCC by ministers and MPs

Date [2004]	Event	Comment
12th January	Bomas III resumes	The stage was set for the final leg of the constitution review process. According to the initial Constitution of Kenya Review Act, if consensus was to be arrived at Bomas, that product would immediately be proclaimed as the new constitution for Kenya. Bomas III was, therefore, going to be a major battlefield.
13th January	**Bomas delegates vow to fight off experts –** *Njeri Rugene and David Mugonyi [DN, 1]* Delegates vow to fight for their right to complete the constitution review. They vow to safeguard the National Constitutional Conference and condemn those out to hijack the process.	This was in reaction to a position taken by several politicians that the delegates could not manage the remaining stages of the review. Specifically, one politician had remarked that the delegates had reached their intellectual limit. The quest for experts is reminiscent of president Moi's position that a new constitution for Kenya could only be midwifed by constitutional experts.

14th January	**Breakthrough as Bomas backs Prime Minister's slot** – *Odhiambo Orlale [DN, 1]* Delegates agree to retain the president as head of government in a new power structure. In the new arrangement, the president will share executive power with a prime minister. Further, the president will chair cabinet meetings, which shall be attended by ministers and the prime minister.	The issue of executive power was probably the most significant point of divergence at Bomas. The Bomas draft suggested an arrangement where power was shared between the president and the prime minister. However, a section of politicians saw this arrangement as creating a "ceremonial" presidency. The issue of executive arrangement was to haunt Bomas throughout its sittings.
15th January	**Bomas trims president's powers to close House** – *Odhiambo Orlale [DN, 1]* Delegates resolve as follows: (i) The new constitution will bar the president from dissolving parliament and also set a ceiling on the number of cabinet ministers he can appoint at a go; and (ii) Limit the number of cabinet ministers and their deputies that the president will be allowed to appoint from a list of nominations drawn up by the prime minister. Members of the technical committee on the executive set the number of ministers and their deputies at 15.	Cutting down the powers of the president, which had increased over many years of constitutional amendments, was clearly one of the key premises in reviewing the Constitution of Kenya. However, after securing power, sections of the political leadership who had termed Moi's presidency as "imperial" presidency, was no longer interested in acknowledging this fact. A minister had even commented that constitutional review was about removing former president Moi from power.

16th January	**Now Churches plot a constitution takeover –** *Njeri Rugene [DN, 1]* The Ufungamano Initiative releases its own draft constitution and says it wishes the draft to be presented to Kenyans. It remains unclear on what legal basis this can be done.	Once seen as champions of a participatory review process, the Ufungamano Initiative did not find it ironic that they could come up with a "boardroom" constitution and try to force it onto the people. The action of this group was seen as an attempt to derail the review process. Politician Raila Odinga and CKRC chairman Yash Pal Ghai are the only notable stakeholders who criticised Ufungamano's move. The reaction was in line with the contours of political polarisation in Bomas.
24th January	**MPs plot to break up Bomas ends up in failure –** Benard Namunane *[DN 1]* An attempt to rally MPs behind a secret plot to scuttle the Constitution review process fails. The MPs had sought to join forces to block a recall clause empowering voters to call back "lazy" and inefficient MPs.	This was a clear message that MPs would not countenance any provisions in the constitution that would empower citizens to demand accountability from them. In this case they acted in typical fashion by rejecting the recall clause. In a similar move, they also voted against the clause requiring the president to appoint cabinet ministers from without parliament.

28th January	**MPs put Muite on the spot over bid to scuttle Bomas** – *Njeri Rugene [DN 1]* The Parliamentary Select Committee on Constitution Review attributes their lackadaisical performance at the National Constitutional Conference on the chairman, MP Paul Muite, whom they accuse of being partisan and belonging to a "powerful clique" set on scuttling the process of reviewing the constitution.	The "neutrality" of the Parliamentary Select Committee on Constitution Review under the chairmanship of Hon. Muite was questioned a number of times due to his close affinity with one of the factions of the ruling coalition. This state of affairs led to suspicion and further intrigue. Muite did not contest his position when the Select Committee was being reconstituted.
28th January	**Njoya moves to halt Bomas** – *Wathome Thuku, Odhiambo Orlale, David Mugonyi, Tony Kago and Cyrus Kinyngu [DN 4]* Reverend Timothy Njoya and eight others appeal to the high court to amend* sections of the Constitution Review Act that are inconsistent with the constitution	This was probably the boldest move to halt the NCC. In its aftermath, there followed a number of court actions either meant to stop the Bomas process or to secure it from such legal attacks. The court ruling in the "Njoya" case virtually brought the review process to a halt.

1st February	**MPs support new move to curb Bomas** *– Muriithi Muriuki [DN 4]* MPs support the Parliamentary Committee on Constitutional review's suggestion that parliament be allowed to change the draft constitution that eventually comes out of Bomas. The move was seen as an attempt by the MPs to regain ground they had lost at the NCC where they were booed and even man-handled by delegates resentful of their partisan politics.	The political elite sought to take advantage of every opportunity to take the constitution review process away from the people.
4th February	**Case against review fails to take off** *– Odhiambo Orlale, Thomas Kagoh and Julius Bosire [DN 6]* A case filed to suspend the Bomas review of the constitution fails to take off after one of the applicants applies to be struck off.	
5th February	**Group opposes MPs plans over final draft** *– Patrick Mayoyo, Odhiambo Orlale, David Mugonyi, Cyrus Kinyungu, Muriithi Muriuki and Tony Kagoh* The National Convention Executive Council (NCEC) opposes plan by MPs to alter the Bomas draft constitution. The group says MPs have vested interests in the outcome of the review and, therefore, cannot be trusted to be impartial arbiters in their "own case'.	
6th February	**Ghai rejects calls for changes in review Act** *– Tony Kago, Odhiambo Orlale and Wilson Kimani* The chair of CKRC Prof Yash Pal Ghai dismisses calls for changes to the Constitution of Kenya Review Act saying the Act is not flawed and, therefore, should not be altered.	

8th February	**Mutava resigns from Bomas review talks** – *[Sunday N 1]* The National Council of Churches of Kenya General Secretary, Mutava Musyimi, who was also the chairperson of the Ufungamano Initiative, "resigns" from the National Constitutional Conference and is replaced by another member of the clergy.	It was instructive that this action came after the Ufungamano Initiative released their own draft constitution. Rev. Musyimi would subsequently be seen as a key ally of those intent on scuttling the review process.
9th February	**Bomas III illegal, says Githae** – *George Munene and David Mugonyi [DN 6]* Assistant Minister for Justice and Constitutional Affairs, Robinson Githae, dismisses the NCC as illegal and says the National Assembly be reconvened to discuss the conference to give it legal backing.	Hon. Githae's statement represents what the political elite and especially the NAK have stood for since assuming power– a parliament driven as opposed to a pro-people constitution review process.
10th February	**Now Ghai seeks to meet Speaker over stand off** – *Tony Kago [DN 3]* The chair of the CKRC seeks to meet the speaker of parliament Francis ole Kaparo to discuss the proposal made by the parliamentary Select Committee on constitutional review to give parliament powers to change the draft constitution by amending section 47 of the constitution. The speaker had chaired a meeting in which this position was taken by 147 MPs.	

11th February	**Fresh bid to hijack Bomas fails** *– David Mugonyi and Benard Namunane* MPs from the LDP and Kanu rebuff a plan to "snatch" power from NCC delegates. They dismiss claims by the Speaker that MPs had agreed to set up an expanded Parliamentary Select Committee on the constitution to resolve the impasse. They further fault the Speaker for claiming that a majority of MPs supported amending section 47 of the constitution and the Constitution of Kenya Review Act to empower parliament to have a final say on the draft constitution.	
17th February	**300 want to join review suit** – *[DN 4]* More than 300 constitutional review delegates apply to be enjoined in a case filed by a pressure group to stop the Bomas conference.	
21st February	**Parties strike deal over prime minister** *– David Mugonyi and Muriithi Muriuki [DN 1]* "Tense" talks between the National Alliance Party of Kenya (NAK), Liberal Democratic Party (LDP) and the Coalition of National Unity (CNU) organised by the Consensus Building Committee agrees on a presidential system of governance modelled on the Tanzanian model that allows the president to retain executive powers and reducing the prime minister to a "chief minister".	

1st March	**House will have the final word on constitution, says Muite** – *[DN 40]* The chairman of the Parliamentary Select Committee on the constitution insists that the august House would have the final say on the constitution, saying parliament would not abdicate its duty to delegates. Hon. Muite further accuses delegates of being partisan and having the mistaken belief that they were members of a constituent assembly with more powers than MPs to write a new constitution.	
9th March	**New constitution delayed as MPs take over draft** – *David Mugonyi [DN 1]* A cabinet meeting chaired by the president approves two Bills – the Constitution of Kenya (Amendment) Bill and the Constitution of Kenya Review (Amendment) Bill, setting out a new programme of constitution review to take up to 7 months. The gist of the amendments is to give power to parliament to make changes to the Bomas draft.	

10th March	**Now rebel MPs vow to block reform Bills** – *Njeri Rugene and Tony Kago [DN 1]* Hostility, anger and suspicion meet the cabinet's decision to wrest constitution making powers from Bomas delegates as 78 MPs from across the political divide vow to shoot down the proposed reform Bills in parliament.	
11th March	**MPs storm out as debate on power sharing kicks off** – *Muriithi Muriuki [DN 2]* Health minister, Charity Ngilu, Assistant minister in the Office of the President, Danson Mungatana, MPs Muchiri Gachara and P. G. Mureithi, storm out of Bomas among jeers and boos, throwing the meeting temporarily into confusion.	
12th March	**Kadhi's courts are retained in the draft constitution** – *[DN 4]* Delegates vote overwhelmingly to retain the Kadhi's courts in the constitution as subordinate to the high court of Kenya.	The issue of whether or not Kadhi's courts should be provided for in the constitution became one of the "contentious" issues in the process. The decision to retain them as provided in the present Constitution led to court action by a section of Christian churches' leadership.

15th March	**Its make or break for Bomas in vote today** – *[DN 1]* After a weekend of intense lobbying delegates geared for a pivotal vote on the compromise ironed out by the Bishop Sulumeti Consensus Committee. Delegates reveal that senior politicians were offering cash for a vote for the Sulumeti report.	The Bishop Sulumeti Consensus Committee was created to deal with contentious issues especially executive power and devolution arrangements. Its report was rejected by delegates leading to a walk out by a number MPs and Ministers.
16th March	**VP leads Bomas walkout: But Raila stays after consensus is voted down** – *[DN 1]* VP Moody Awori leads ministers and delegates including some MPs to walk from the NCC to protest against the rejection of the report of the Bishop Sulumeti Consensus Committee. The conference had decided to revert to executive provisions in the Zero draft, which significantly reduced the president's powers.	

Emerging Issues and Lessons from Bomas III

Kenya's constitution making initiative has been one of the most protracted on the continent. Observers attribute this fact to the "impracticality" of making a constitution in peace time. They aver that a constitution is better made during times of strife, with the constitution becoming a "ceasefire" document. Wade and Bradley state:[154]

> In the modern world, the making of a constitution normally follows some fundamental political event – the conferment of independence on a colony; a successful revolution; the creation of a new state by the union of states which were formally independent of each other; a major reconstruction of a country's institutions following a world war.

The two scholars could not envisage a situation where a constitution could be written for an existing state in peacetime. Another scholar

154 Wade and Bradley, *Constitutional and Administrative Law* (Longman A.W. Bradley and K. Ewing 11th edn.), at 5.

has written thus in an attempt to state the conditions that will normally impel the writing of constitutions world over (Brazier, 1991: 1):[155]

Constitutions have, of course, been granted or adopted for many different reasons. New constitutions have marked stages in a progression towards self government (as in most British colonies before independence); they have established a system of government in a newly independent state (as with the United States of America in 1787), or in a reconstituted state (such as Malaysia in 1963 or Tanzania in 1964); they have marked a major change in the system of government (as in Spain in 1978); they have been adopted in order to rebuild the machinery of government following defeat in war (as with the Federal Republic of Germany in 1949); and they have declared a new beginning after a revolution, or after the collapse of a regime (as in France in 1791 and in 1958).

None of these factors have operated in Kenya. The Kenya constitution making experience must, therefore, be both unique and uncommon. The secretary of the CKRC has described the process thus:[156]

The ongoing review of the constitution of Kenya is a historic process and the culmination of a tedious struggle by the people of Kenya to redefine their political organisation and aspiration and to reengineer themselves to all spheres of public life.

The argument by pundits that writing a new constitution is not tenable in peacetime, therefore, holds sufficient water. This school of thought prescribes that a major consensus over constitutional issues is most unlikely because the peaceful conditions hitherto prevailing in Kenya do not offer a chance for level-headed or sober discussions and agreements. The accuracy of this observation is neither here nor there in the current review. One thing is clear though: the constitution-

155 Rodney Brazier, (1991), *Constitutional Reform, Reshaping the British Political System*, Claredon Press, Oxford at 1.

156 P.L.O. Lumumba, “Some Thoughts on Constitutional Principles in the Review Process”, in Tom Ojienda (Ed), *constitution making and democracy in Kenya*, at 1.

making process in Kenya has to a large extent been captured by the political elite for the advancement of narrow interests. The following are the key issues that have emerged from the process:

Content vs Process

Bomas III delegates fought over both the content and process of constitution making. The intersection came at the point where disagreements over issues of content led to attempts to discredit the process. As recorded, an assistant minister of government opined that the process was illegal, the irony of the assertion not withstanding, given the extent to which the process had progressed.[157] This assertion, among others, was seen as an attempt to discredit the process by a section of politicians who did not like the direction discussions were taking.

Members of Parliament versus Other delegates

Members of parliament formed the biggest block of delegates at the NCC. A lot of the time, their views seemed to conflict with those of other delegates. The legislators tended to take common positions on matters of their self-interest. This happened, for example, when they voted against the "recall" clause as well as the requirement for the president to appoint cabinet ministers from non-MPs. This was one of the reasons for the rift between the MPs and other delegates; on many occasions MPs found themselves being heckled by other delegates when presenting their views.

The influence of conflicts within Narc on Bomas

The internecine wars involving the ruling coalition constituted a significant reason for the stalemate over the constitution review exercise. The pre-election power sharing arrangements codified in the Memorandum of Understanding signed by NAK and LDP were of utmost concern to the politicians even as they discussed the

157 "Bomas III illegal," *Daily Nation,* 6th March 2004, p. 6.

draft constitution. Furthermore, towards the end of Bomas III, the ruling coalition was caught up in its own wrangles over a new party constitution.[158]

Introduction of constitutional drafts other than the Bomas draft

When the Ufungamano Initiative presented its draft constitution to the public on the 15th of January, this was seen as yet another attempt to derail the Bomas process. This was more so because the chairman of the Ufungamano Initiative, Rev. Mutava Musyimi, resigned as an NCC delegate on the February 7th 2004.[159] The irony of this situation was not lost on many: The Ufungamano Initiative, the citadel of people led constitution review, was now advocating a "boardroom" process. The Ufungamano draft constitution could not measure up with the CKRC draft constitution on the legitimacy test.[160]

Change of positions on fundamental issues

Throughout the NCC's sittings at Bomas of Kenya, stakeholders from political parties continually shifted their positions on specific issues. These shifts depended on whether or not the issue at hand had the potential to advance particular group interests. Specifically, the issue of executive power and devolution of power presented areas of concern. Quite clearly, constitution making during the immediate years preceding the 2002 election had come to be associated with dismantling the Moi regime and system. Understood in this sense, the pro-reform rhetoric by former opposition political parties had a narrow aim: replacing the then political elite. With the advantage of hindsight, it can further be argued that the aim was to kick out the principals but

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158 "NARC talks: Riddle of 5 Constitutions," *Daily Nation*, 6th February 2004, p.1.

159 "Mutava resigns from Bomas review talks," *Sunday Nation,* 8th February 2004, p. 1.

160 It is not very clear how Ufungamano put together its document. However, the Bomas process in spite of all its shortcomings was more elaborate at least in terms of collecting the people's views. If this is a measure of legitimacy, then no other draft constitution could possibly measure up to the Bomas draft.

maintain the superstructure that allowed bad-governance to fester in the country.

Post Bomas III: The Court Arena

The most significant legal challenge to the NCC was instituted by the Rev. Timothy Njoya, the national spokesman of the National Constitutional Assembly (NCA), and eight other applicants.[161] This court case, which caused a stir around the country due to its implications for the review process, was also of major significance to the country's jurisprudence. The applicants, in their originating summons, sought a total of 19 orders[162] from the three judge bench of Justices Aaron Ringera, Benjamin Kubo and Mary Kasango.

The applicants questioned the constitutionality of the Constitution of Kenya Review Act, Cap 3A, Laws of Kenya,[163] in a number of respects. The judges considered the following issues for interpretation:

- The proper approach to constitutional interpretation;
- The constitutional status of the concept of the constituent power of the people and its implications for the constitutional review process;
- The constitutional right to equal protection of the law and non discrimination;
- The scope of the power of parliament under section 47 of the Constitution of Kenya and whether Section 28 (3) and (4) of the Act are inconsistent therewith; and

161 High Court of Kenya Miscellaneous Civil Application No. 82 of 2004 (OS). The other applicants were Kepta Ombati, Joseph Wambugu Gaita, Peter Gitahi, Sophie Ochieng, Muchemi Gatahi and Ndung'u Wainaina. The respondents to the suit were the Attorney General of the Republic Hon. Amos Wako, the Constitution of Kenya Review Commission (CKRC), Kiriro wa Ngugi and Koimatet ole Kina [1st, 2nd and 3rd] respondents respectively. The Muslim Consultative Council and the Chambers of Justice appeared as 1st interested party and 2nd interested party respectively.

162 A preliminary application by one of the applicants led to the striking off of most of the orders sought so that only 7 orders were entertained by the court.

163 The Act was enacted "to facilitate the comprehensive review of the constitution by the people of Kenya, and for connected purposes". The law was enacted after a lengthy process of negotiations after the then KANU regime grudgingly welcomed the necessity to review the constitution and published the Constitution of Kenya Review Act of 1997.

- The appropriateness of an injunction to stop the review process in the circumstances of the case.

The judges acknowledged that the issues presented for interpretation especially with regard to the constituent power of the people and the question of whether parliament could in exercise of its amendment power (Constitution Section 47) repeal a constitution and enact a new one in its place were novel and without precedent.[164] This issue indeed presented a rare opportunity for juridical interpretation and development.

First, was the question of proper approach to constitutional interpretation, an issue that is central to any jurisprudence. The question before the judges was whether or not the constitution ought to be interpreted like any other ordinary legislation. To this Ringera J., observed as follows:

> The Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles. …[165]

This critical assertion by Ringera J, was a fundamental departure from an earlier precedent where the court had held:[166]

> We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense.

In an interesting dissenting opinion, Kubo J, argued that the two schools of thought were not mutually exclusive. He observed that where the words were clear and unambiguous, the constitution could imply and apply as it read. But where the wording of the constitution is too sketchy, nay, skeleton as to warrant some flesh, the court should always give it.

164 A. G., Ringera, Judgment p. 24

165 Nairobi, High Court Misc. Civil Application Number 82 of 2004.

166 *Republic v. El Mann* (1969) E.A. 357. (As shall be seen later, this ruling is of considerable import in human rights observation).

Second, on the question of the constituent power of the people, the prevailing *ratio decidendi* was that such power is in deed vested in the people even if the constitution does not expressly provide so. The sound reasoning here, which is a clear bedrock for future constitutional interpretations, was that institutions of state including parliament are creatures of the constitution and, therefore, cannot themselves be greater than the constitution. The power to make a new constitution consequently must reside in an organ that is greater than these institutions and the constitution itself. That prior "organ" is the people whose desires are expressed through their collective "constituent power". According to Ringera J, it is superfluous for the constitution to state expressly that the power to rewrite the supreme law resides in the people. Whenever a people decide to say this in the express provisions of the constitution, they are simply exercising extreme caution. With or without express provisions in this regard, it is to be implied that the constituent power is with the people, especially at a point of writing a new constitution. The meaning of the people's constituent power is understood in the following sense as defined by Nwabueze (Nwabueze, 1974: 392):

> It is power to constitute a frame of Government for a community, and a Constitution is the means by which this is done. It is a primordial power, the ultimate mark of a people's sovereignty. Sovereignty has three elements: the power to constitute a frame of Government, the power to choose those to run the Government, and the powers involved in governing. It is by means of the first, the constituent power, that the last are conferred.[167]

Nwabueze goes on to explain that the constitution confers power of government and also defines the extent of those powers and their limits. Since the constitution is a direct result of the people's constituent powers, the relationship between the constitution and the power of government is the "relation of an original and a dependant

167 Nwabueze, B.O., (1974), *Presidentialism in Commonwealth Africa*, L. Hurst and Company, p. 392.

or derivative power, between a superior and subordinate authority" (*Ibid*).

If the people's participation had not been properly conceptualised at the beginning of Kenya's constitution making, this reasoning did just that: it properly established the link between the people's sovereignty and the quest for a new constitution and constitutionalism. Two issues in Kenya's context make this conclusion necessary. First, is the fact that since the constitution of Kenya was a product of negotiation between British settlers and a few Kenyan political leaders, it did not have the people's constituent power as its basis of legitimacy. Second, is the fact that the "partial legitimacy" that that constitution had has been eroded through years of arbitrary amendments most of which were in conflict with the aspirations of the people or never took their welfare into consideration and, therefore, rubbished any notion of their constituent power.

In line with the above understanding of the notion of constituent power, the issue of whether or not parliament has the power to write the new constitution on behalf of Kenyans and particularly the interpretation of the word "alter" (Constitution Section 47) seems to have been settled. Parliament being an organ created consequent to the people's constituent power through which they constitute the frame of government, this body cannot pretend to make a constitution for the people. This is in line with the fact that at the NCC, members of parliament were but one of the "stakeholders" recognised by the review Act. Secondly, even the most skewed interpretation of the word "alter" cannot be interpreted to give the August house powers to unilaterally decide what Kenyans want in a constitution.[168]

The uproar that followed the *Njoya ruling* took a line that was purely partisan, thus camouflaging the real import of the ruling.

168 Section 47 (1) of the Constitution of Kenya provides that parliament may alter the constitution. The true interpretation of this section has been subject of a heated debate ever since the constitution making process started in earnest during the regime of former president Daniel Moi who at one point insisted that parliament be the organ to make the new constitution.

Those, especially politicians, who reacted to the ruling took a typical party line. The feud over the ruling almost became an annex to the fight for supremacy by the political elite which had been experienced during the NCC and especially Bomas III. Whatever the interpretation, however, it is an inescapable fact that the ruling threw the constitution making process into complete disarray. A lawyer and regular newspaper commentator, Kibe Mungai, opined that the ruling had "in one fell swoop exposed the glaring legal contradictions of the review process…."[169]

The writer concluded that the review legal framework had been flawed from the beginning. For instance, in the initial Constitution of Kenya Review Act, 1997, which was enacted under the aegis of the Inter-Parties Parliamentary Group (IPPG) reforms[170] package, sovereignty was assumed to repose in Parliament and not in the citizenry. This was, therefore, one of the initial contradictions in constitution making. As the writer noted:

> Stated differently, under the 1997 Act, Wanjiku was deemed a part of but not the Sovereign. Sovereignty was presumed to repose in Parliament if not entirely but ultimately (*Ibid*).

The subsequent amendments to the 1997 Act seemed to have maintained this unconstitutional position and way of thinking. The final Constitution of Kenya Review Act carried forward this notion and failed to provide for a referendum or constituent assembly through which the people would promulgate a new constitution. This became one of the legal challenges made through the *Rev. Timothy Njoya & 7 Others vs. A. G., and Another,* case.[171]

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169 See Kibe Mungai, "Legal Obstacles to the Constitution Review Process", paper written on behalf of the Centre for Law and Research International (CLARION)and presented during a workshop to discuss the Constitution of Kenya Review Bill, 2004 [mimeo].

170 The IPPG reforms were undertaken in 1997 as the KANU regimes strategy of taking the reform initiative from civil society groups that had mobilised Kenyans for mass action in many parts of the country.

171 Nairobi High Court Miscellaneous Civil Application No. 82 of 2004.

Apart from the Njoya Case, other cases that were instituted in regard to the review and which are also of great constitutional import include the case of *Njuguna Michael Kungu and Others vs. Attorney General and Another.*[172] In this case, Njuguna Michael Kungu, Gacuru wa Karenge and Nichassius Mugo Njoka, challenged the legal validity of the procedure used by 320 of the 629 delegates to the NCC in a controversial sitting on 13th March 2004 to adopt the draft constitution before all amendments made as of that day had been incorporated.[173]

The overall effect of the various legal challenges to the NCC was to change the focus of constitution making at that point in time from concentration on the content of the draft constitution as debated at the NCC to debate on the process. The next arena, therefore, became parliament, which was expected to come up with appropriate legislation to facilitate the completion of the process.

From Content to Process: Dealing with the Njoya ruling

Before the end of the NCC and the adoption of the draft constitution, 2004, the minister for justice and constitutional affairs, Kiraitu Murungi, had published two Bills in February 2004 that sought to address the process of constitution making. The Constitution of Kenya (Amendment) Bill, 2004, sought to amend Section 47 of the Constitution to empower Kenyans to replace the current constitution through a referendum. The Constitution of Kenya Review (Amendment) Bill, 2004, sought to empower parliament to consider, audit and change the Draft Constitution passed by the NCC.

The *Njoya ruling* as well as the other cases brought to the courts had laid bare the contradictions that the process envisaged by the Review Act had in regard to principles of constitution making. The publishing of the two Bills was taken to be an attempt to introduce a mandatory referendum in case the NAK faction of the ruling NARC

172 Nairobi High Court Miscellaneous Application No. 309 of 2004.

173 See Kibe Mungai, "Legal Obstacles to the Constitution Review Process," paper written on behalf of the Centre, … *supra* footnote 169

lost at the NCC. That the court ruling in the *Njoya case* was in line with this position became a politically sensitive issue.

On the 28th June 2004, president Kibaki directed Hon. Kiraitu Murungi to withdraw the two Bills amid tension sparked by activists of the Bomas Katiba Watch lobby. The lobby group had planned mass protests in the city if the deadline given by president Kibaki – 30 June – for the realisation of a new constitution failed to materialise.[174] With the lobby group getting support from KANU and the LDP wing of the ruling coalition, the nation geared itself for the real possibility of reverting to the mass action synonymous with pre-2002 constitution-making in Kenya. The two bills were withdrawn forthwith – the president explaining that his commitment to realising a new constitution by June 30 was done in "good faith".

On the 28th of June 2004, Hon. Kiraitu Murungi again published the Constitution of Kenya Review [Amendment] Bill 2004 after a "consensus building" process undertaken under the aegis of the Consensus Building Group [CBG]. In defiance of the *Njoya ruling,* the CBG proceeded on the assumption that parliament has a special mandate in the review process.[175]

This Bill was passed by parliament, but refused assent by the president. The reasons for this refusal were not clear. As expected, the president's action drew criticism because it was seen to take a partisan position on the issue.[176] The president sent the Bill back to parliament with his recommendations as is required by the law and in November 2004 the amended version was passed by parliament.

174 "Kibaki acts to head off July 3 protests," *Daily Nation,* 29 June, 2004, at 1.

175 Upon close scrutiny this new bill was a replica of the Bill published by minister Kiraitu Murungi before the closure of the NCC – with the same intention of providing for a mandatory referendum and the opening up of the Bomas document for scrutiny and amendment by parliament. The perception that the chairman of the CBG, Mr. John Koech was a mere pawn in the minister's game became a self fulfilling prophesy when he was appointed to the cabinet two days after the Bill was published.

176 See generally, Mitullah, W., Odhiambo, M. & Ambani, O., (eds.), (2005), *Kenya's Democratisation: Gains or Loses? Appraising the Post KANU State of Affairs, 2005,* Claripress: Nairobi, p. 71.

According to a notice published in the local dailies by the minister for justice and constitutional affairs, on the 24th of December, 2004, the Constitution of Kenya Review (Amendment) Bill, 2004, had by then been assented to by the president. The minister in the notice sought to present the new "road map" for the final phase of constitutional review. In responding to the *Njoya ruling,* the Bill provides for a mandatory referendum through which the people of Kenya will enact their constitution.

However, the new law failed the test of key principles of constitution making in a number of ways. It goes against the *Njoya ruling* in as far as it empowers the national assembly to make changes to the Bomas Draft Constitution. Further, by requiring that whoever seeks to contest the outcome of a referendum must deposit with the court five million shillings (5,000,000) in security for costs, a host of public spirited persons are denied the possibility of enforcing their rights simply because they may not raise this amount of money. This bit of law directly goes against the spirit of section 84 (1) of the constitution which provides as follows:

> … If a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him … , then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

In fact, the final Act allegedly assented to by the president actually pegs a mandatory cost of five million shillings (5,000,000) to any litigation regarding the constitution review process.[177] Quite to the contrary, Parliament is mandated by section 84 (5)(b)(i) of the constitution to:

> … Make provision for the *rendering of financial assistance to any indigent citizen of Kenya* where his right under this Chapter – Chapter V – has been infringed or with a view to enabling him engage the services of an advocate to prosecute his claim.

177 See, 'Republic of Kenya, the Constitution of Kenya Review (Amendment) Act', 2004, *Daily Nation,* 2005.

Clearly, in dealing with the legal obstacles to constitution making, Kenya's law makers have chosen to act against the constitution. This is quite an irony in the present context: ignoring constitutional provisions while making a new constitution raises the question as to whether the new constitution will in fact be obeyed at all since a precedent of non compliance will have been established. However, it confirms the fact that when it comes to constitution making, the political elite will go to great lengths to controvert the people's recognised constituent powers.

Other Developments of Constitutional Importance

During the period under review, other matters touching on constitutionalism which arose included the failure to respect civil rights, the pronouncement of court rulings that had a bearing on human rights, and the introduction of legislation sensitive to constitutionalism and human rights.

Protecting civil liberties

During the period under review, the state and its agents continued to treat the civil and political rights of the citizenry as luxuries. Thus, the 10th of January 2004 saw a crackdown on the alternative press, the so-called "gutter press", by officers of the Criminal Investigations Department purportedly for commenting on the personal lives of influential personalities. In scenes reminiscent of the crackdowns of the early 1990s, CID officers carried away copies of *The Independent*, *The Ego* and *The People Daily* newspapers. (See Mitullah, Odhiambo & Ambani, *supra footnote 176*).

Available evidence shows that during the reporting period freedoms such as those of freedom of assembly and association are yet to be accorded their rightful place in Kenya's constitutional practice. During the period under review, councillor Lekina Ole Santeyo was, for example, arrested for demonstrating against the grabbing of a stadium

in Kajiado, prompting fellow councillors, on Jan 31st 2004, to storm the police station to demand his release.

In a case that brought into sharp relief power asymmetry in politics, the public was stunned when on the 6th of April 2004, a member of parliament, Hon. Joseph Kamotho, alleged that the minister in charge of Internal Security, Hon. Chris Murungaru, had sponsored thugs to disrupt his political rally; the two belong to the rival NARC camps. Further, the state on the 3rd of July 2004 violently broke up a rally called by members of the Bomas Katiba Watch lobby group to press for the enactment of the draft constitution adopted during the NCC. In Kisumu, several protesters were shot dead by police on the same day.[178]

The right to life was also under attack during the reporting period. An incidence on the 28th of September 2004 where prisoners were tragically killed in Meru G.K. prison is a case in point. Later inquiries into this fatal incident revealed the terrible conditions in which prisoners are incarcerated in that prison and in prisons generally. It was established that the prison, designed to hold 500 prisoners, was at the time accommodating 243 prisoners, 8 condemned prisoners, 740 "ordinary" remandees, 166 robbery remandees, one mental patient and two civil debtors – making a total of 1,414 inmates – a staggering 282.8% of its capacity.

The Rule of Law: An Unbinding Doctrine?

A democratic society is governed by laws, which are obeyed by all. Court orders are sacrosanct and are supposed to be observed to the letter. 2004 witnessed unprecedented incidences of defiance of court orders especially by cabinet ministers. Some instances of that defiance are produced below:

- On the 12th of March, 2004, Mr. Justice Isaac Lenaola issued an order cancelling the nomination of Shakeel A. Shabir as a councilor

178 "Day of Chaos: Night of violence leaves one dead after day long battles in Nairobi as police stop pro-Katiba rally," *Sunday Standard*, 4 July, 2004, p. 1.

in Kisumu City Council. Hon. Karisa Maitha declined to heed this order;

- On 20th April, 2004, the Minister for Tourism and Information, Hon. Raphael Tuju, declined to terminate the activities of a committee constituted by him to investigate the conduct of a local radio station, KISS FM, despite a court order to that effect;
- On 30th August, 2004, Hon. Ali Makwere chose to ignore court summons to appear before a city magistrate to answer to claims of neglect of official duties; and
- On 28th November, 2004, cabinet ministers Kalonzo Musyoka and Raila Odinga counseled former President Daniel Moi to defy a court order requiring that he attends the Goldernberg proceedings in person.

Judicial Enforcement of Human Rights

In the *Rev. Dr. Timothy Njoya and 6 Others v. The Attorney General and 4 Others*[179] case, the high court made it clear that in enforcing the Bill of Rights, the judges would not limit themselves to the letter of the law. The ruling elevated judicial enforcement of fundamental human rights to a new level. This judgment was a fundamental departure from an earlier precedent where the court had held:[180]

> We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense.

This important precedent was corroborated by a tribunal established by president Kibaki to inquire into the conduct of *puisne* judges alleged to be corrupt.[181] Responding to a submission that the tribunal

179 *Supra*, footnote 171.

180 Republic V. El *mann*, *Supra,* Footnote 166.

181 The tribunals were constituted by the president following a purge after findings by the Integrity Committee of the Judiciary set up to investigate corruption in the institution came up with a list of names of supposedly found to have involved themselves in the vice.

should interpret the constitution just like any other act of parliament, the bench observed as follows:[182]

> Rules of interpretation in case of a Constitution which is not an Act of Parliament may, therefore, be different from those in case of an Act of Parliament. We are, therefore, strongly inclined to go with the decision of the constitutional court in the case of *Crispus Karanja Njogu v. Attorney General.* We will interpret the Constitution in a liberal and broad manner within the precincts of common sense and the object of that particular section.

In another development of equal importance, the high court while determining public interest litigation, declined to be held back by the procedural trappings of *locus standi* preferring instead to delve into the merits of the case. Though in lamentation, the court observed:[183]

> The Applicant as is required by Order 53 Rule 3 gave Notice to the Registrar but did not attach a Verifying Affidavit or statement to the Notice. I would have dismissed the Application at that point… invoking powers granted by the proviso thereto, I however excused failure to do so on grounds that the matter was urgent and of great public importance…

In another critical instance, the high court of the Republic of Kenya, in *Samuel Muciri W'njuguna v. R,* Nairobi H.C. Misc. Criminal Application No. 710 of 2002, granted the applicant an anticipatory bail even where the express provisions of the constitution were silent. In arriving at the innovative conclusion, the tribunal observed:

> When the statute is silent, this court cannot become a toothless watchdog of the constitution which we have sworn to defend. Furthermore, the constitution having itself granted wide discretion to the High Court presumably to fill the gaps which the statutes left…

There are numerous other decisions of significant value made during the period under review but which this chapter cannot carry. Such

182 In the Matter of Section 62(5) of the Constitution of Kenya and in the Matter of the Tribunal of Inquiry established vide Kenya Gazette Notice No. 8829 of 11th December 2003, to Investigate the Conduct of *Puisne* Judges and in the Matter of Rule 9(1) of the Rules of Procedure of the Tribunal, formulated and published in Kenya Gazette notice No. 96 of 6th January 2004 – Tribunal Matter No. 1 of 2004.

183 In the High Court of Kenya at Nairobi Misc. Civil Appl. No. 224 of 2004.

decisions include George *Ngothe Juma and Two Others v. The Attorney General* (Nairobi High Court Misc. application No. 34 of 2001) where the court explored the rights of accused persons and observed that they must be afforded ample time in court including being availed all information in prosecution hands a *priori*.

These cases and many others represent the fact that the judiciary has, in 2004, been vigilant when interpreting the provisions of the constitution pertaining to fundamental human rights and has seized every opportunity that has availed itself to develop human rights and democratic jurisprudence. Critics, however, argue that the events of 2003 and 2004 where the president was able to change almost 3/5 of the entire judiciary reflect very badly on the independence of the judiciary in Kenya.

Developments in Legislation

One of the most significant Bills to be published during 2004 was the *Constitution of Kenya (Amendment) (No. 2) Bill,* 2004, proposed by Hon. Charles Keter, member of parliament for Belgut Constituency. This Bill is a culmination of previous efforts to strengthen the national assembly. Several actors, including civil society organisations, have continuously called for the empowerment of the legislature to enable it function more effectively. This Bill had several implications in terms of empowering the legislature and is seen as apt for the following reasons.

First, it is agreed in constitutional theory that only an autonomous and sovereign national assembly can act as a genuine check to the executive in a government operating under the principle of separation of powers. The chances of the executive abusing its powers increase with a more disempowered legislature.

Second, the history of Kenya is rife with evidence that a weak legislature is, at best, amenable to executive manipulation and, at worst, becomes an uncritical and consistent rubberstamp of executive

agenda. Kenyan heads of state have, in the past, used their immense powers under the constitution to prorogue and dissolve parliament on a whim sometimes to the detriment of important national imperatives.

Finally, a multi-party democracy should ideally be predicated upon effective representation of a people in an assembly of sorts (in our case the National Assembly) that not only is a sovereign entity but also one that is recognised by the existing laws and legitimate structures as being exactly that. Legal recognition of independence is, therefore, normally evidence of the sanctity that is very much needed if Kenya's national assembly is to be said, at all, to be a politically legitimate host of the peoples' representatives.

The aforementioned Bill is therefore appropriate because of three main aspects. One, having the national assembly in charge of its own calendar – whether or not and when to adjourn or summon; where to meet and when – is a major step forward and a key boost to the doctrine of separation of powers. Such a provision will certainly enable the House to discuss national issues in its own timeframe without outside interference. The amendment is also likely to enable parliament address an emergency, say, during dissolution.

Two, clause 59(1) of the Bill, which fixes the exact date when parliament shall stand prorogued as the 30th of November every year, clause 59(2), which states the exact date when parliament shall stand dissolved as the 30th of November every fifth year and clause 59(3) which mandates the speaker of the national assembly to convene the first session of the new parliament on the first Tuesday of February year after dissolution, will be accompanied by certainty in the electoral and political process. By dint of these stipulations, instances akin to those when heads of state have used their powers to dissolve parliament as a secret political/electoral weapon will be a thing of the past; hence levelling the political battlefield. Certainty in the dates of dissolution of parliament will also extinguish any extra-legal temptation to attain or cling to political power; let alone prepare stakeholders adequately for impending elections.

Three, clause 59A of Keter's Bill which seeks to provide a framework for a vote of no confidence in the government of the day without affecting the life of parliament clearly unties the august House from currently prevailing manacles of dependence. Only such a provision can enable proper check of the executive. Tying the life or session of the Legislature to that of the president has, in the past, been a major hindrance to the autonomy of parliament. This is why calls have been made for separating presidential elections from parliamentary elections. De-linking the life of parliament from that of the president will be an excellent starting point for cogent parliamentary sovereignty in this country.

Conclusion

The year 2004 saw mixed fortunes for Kenyans in the fight for constitutionalism. The constitution review process recorded minimal gains while the conduct of the state in respecting and implementing human rights provisions under the law did not measure up to required standards.

5
State of Constitutionalism in Uganda: Challenges in Observance

Zahara Nampewo

Introduction

Constitutionalism is the idea that government can, and should, be legally limited in its powers, and that its authority depends on observance of these limitations. Any state must have some acknowledged means of constituting and specifying the limits (or lack thereof) placed upon the three basic forms of government power: legislative power (making laws), executive power (implementing laws) and judicial power (adjudicating disputes under laws).[184]

Huge constitutional challenges confronted the Ugandan government in 2004. The National Resistance Movement (NRM) government faced a crisis of legitimacy and credibility on a number of issues arising from court judgments and its army's involvement in conflict. The northern Uganda based civil conflict led to gross human rights violations, resulting in thousands of people being forced to suffer deplorable conditions in internally displaced people's camps. Cases of unlawful detentions, unfair trials and torture were also reported. Around the country, people continued to suffer extreme poverty and social injustice, while the government proceeded to spend freely on items such as arms.

This chapter reflects these and many other constitutional challenges faced by the country in 2004, and summarises distinct trends. It also celebrates the achievements in areas of constitutionalism and human rights that were of importance during this period. It begins by introducing the principles of constitutionalism upon which the issues discussed in the chapter will be based.

184 *Stanford Encyclopedia of Philosophy, 1995,* Stanford University, P. 44.

Essence of Constitutional Government

Constitutional government is limited government based on a prescribed division of powers among public officials. The leading principle of constitutional government is known as the *rule of law*. This signifies that no political authority is superior to the law itself. When and where the rule of law is in force, the rights of citizens are not dependent upon the will of rulers; rather, their rights are established by law and protected by independent courts. Individuals, thus, have a secure area of autonomy and have set expectations of having their rights and duties pre-established and enforced by law.

Related to the principle of the rule of law is the doctrine of the *supremacy of law*. This is a fundamental concept which requires generality in law. It is a further development of the principle of equality before the law. Laws should not be made in respect of particular persons. The idea of supremacy of law requires a definition that must include the distinction between law, executive administration and prerogative decree. Failure to maintain the formal differences between these issues would lead to a conception of law as being nothing more than authorisation for power, rather than the guarantor of liberty equally to all.[185]

Principles of government are normally associated with the rule of law and include *independence of the judiciary* and the right of redress for injustices perpetuated by the state. Security of tenure for judges, the judges' own distinguished traditions of learning, integrity and technique as well as the law of contempt, ensure that proper judicial review processes can take place. *Judicial review* empowers a court to invalidate the acts of a legislative body or executive officer. Without these powers of the judiciary, the most elaborate system of rights, remedies and procedures would be of little use.

Further, structural principles exist that determine the forms of constitutional government. The principle of *separation of powers* is

185 *Ibid.*

premised on the basis that when a single person or group has a large amount of power, it can threaten citizens. Separation of power is a method of checking the amount of power in any individual or group's hands, making it more difficult to abuse such power. Protection of the people against misuse of power by the state itself is, in the first instance, secured when the functions of the government are kept separate and when ultimate power of the state vests, in the final analysis, with the people, who exercise it through election of representatives in regular, free and fair elections. The principle of separation of powers relates to the very heart of constitutional government, which is to structure political institutions with the requisite powers and independence to make judgments that respect equal rights of free people, while at the same time promoting the public good.

As a feature of constitutionalism, rules imposing limits upon government power must be entrenched, either by law or by way of constitutional conventions. In other words, individuals whose powers are constitutionally limited must not be legally entitled to change or expunge those limits at their pleasure. Where a government is entitled to change the very terms of its constitutional limitations at its discretion, it is questionable whether there would, in reality, be any constitutional safeguards for the public.

The letter of the constitution by itself is neither enabling nor constraining. For constitutional provisions to operate meaningfully and effectively institutional and cultural apparatus to implement, enforce and safeguard the constitution must be in place. The rule of law is one key components of the constitution's implementing and safeguarding apparatus. An independent judiciary and the notion of the supremacy of law all work together to ensure that the letter and spirit of the constitution are honoured in the workings of a constitutional government.

It is against this background that this chapter discusses the observance of fundamental constitutional principles with regard to

the three state organs mandated to uphold minimum constitutional guarantees in protection of its citizenry.

The Executive: Performance of Duties in 2004

Introduction

The constitution of Uganda enables the executive to function without being checked at every turn. In 2004, the president continued to combine a wide range of powers. He was the head of state and head of government, commander in chief and part of the parliament. A bill passed by parliament could not become law without his consent. He appointed a wide range of officials, including ministers and the vice president who, together, constitute the cabinet. He chaired cabinet meetings and his ministers were responsible to him.

During the reporting period, there were many instances of excesses of power by, and even within, the executive, as illustrated below.

The White Paper and Related Issues

Efforts to review the constitution of Uganda were a major event in 2004. The Constitutional Review Commission (CRC) was mandated to review the constitution, including reviewing the separation of powers between the executive, parliament and the judiciary, and recommending changes to improve functional effectiveness and accountability of the three arms of government. The CRC instituted the processes of gathering views on constitutional issues and presented them in a report. In turn, the government made its responses through a White Paper presented to parliament in September. These responses were very instructive of the government's attitude to governance.

The CRC recommended that presidential term limits stipulated in the constitution should be lifted, a contentious issue that had been advocated by the state. Dispensing with term limits was seen as a strategy to give the president further opportunities for remaining in power. The idea of lifting term limits was not widely accepted by Ugandans. A

number of groups marching to oppose this proposal were dispersed by the police and prevented from distributing leaflets opposing the lifting of presidential term limits.[186] Even the chairperson of the CRC, Prof. Frederick Sempebwa, wrote a minority report opposing the lifting of the term limits. This matter has far-reaching repercussions for the state of constitutionalism and observance of rights in Uganda.

On another matter, while the CRC had recommended that Uganda should retain the executive form of government but that the president should not exercise any legislative powers, the government proposed that the president should exercise limited legislative powers in matters relating to investment, environment, public health and historical and archaeological sites; and that the right to exercise such power should be granted to the president through an act of parliament without requiring amendment of the constitution. This recommendation raises concern that the president would be given powers, albeit limited, to make laws, thereby undermining the principle of separation of powers and the role of parliament.

Security Agencies and Respect for Rights

The role of the army as part of the executive still raises concerns. Although the NRM government has in relative terms endeavoured to discipline and professionalise the army, its role in elections and its presence in parliament still raise questions.

The government, in its White Paper, rejected the CRC's proposal to refrain from deploying the army to keep peace during elections. In view of the history of the army in usurping power in the country, the government's position caused concern, particularly since no efforts had been made to staff the police or to provide resources to enable them play this role instead.

During 2004, four members of parliament from northern Uganda were assaulted by a unit of the Uganda Peoples' Defence Forces (UPDF)

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186 "City Police Disperse Anti Third Term Rally", *The Monitor*, 9 March 2004, p.4; "Police stop rally", *The Monitor,* 1 March 2004.

at Acholi Bur, Aruu County in Pader. The members of parliament (MPs) were planning to address residents about the government's White Paper, a role falling within their legislative mandate. The president partly blamed the incident on lack of training of some army officials. In mitigation, however, he noted that the UPDF soldiers had used canes and not guns, like former state armies![187]

Actions of other security agencies, which form part of the executive, illustrated excess use of power by the state. The CRC had recommended that every person who is arrested and detained has a right to bail and to be housed in properly gazetted areas during custody. However, throughout 2004, illegal places of detention, referred to as "safe houses", continued to be used. Ugandan security and intelligence agencies tortured detainees to coerce them into providing information or to make confessions, they detained suspects in "safe houses" for weeks or months without ever charging them with any crime. Methods of torture included suspending suspects from a ceiling – known as *kandoya* (tying hands and feet behind the victim), severe beatings and kicking, and attaching electric wires to the male genitals. Agencies accused of torture included the UPDF's Chieftaincy of Military Intelligence (CMI), the Internal Security Organisation (ISO), the Violent Crime Crack Unit (VCCU) and *ad hoc* agencies such as the Joint Anti-Terrorist Task Force (JATF.) In October, the Uganda Human Rights Commission (UHRC) found that torture continued to be a widespread practice amongst security organisations in Uganda, being commonly used to humiliate and break down suspects during investigations.

The head of the CMI defended the presence of "safe houses" by stating that it was necessary because of the lack of public confidence in the judicial process. In fact, this state of affairs not only interfered with the right to due process, but the statement was an attack by the executive on the functioning of the judiciary, implying that the judiciary was not doing its work. This public criticism of the judiciary by the

187 "MP Beaters for Court Martial," *The Monitor*, 3 December 2004, p.1.

executive would tend to weaken public confidence in the system and would infer that one organ has power over the other.

The torture and illegal detentions in safe houses seemed related to military intelligence and security force suspicions that the detainees, who were often involved in political opposition activities, were linked to armed rebel movements. Many previously or currently politically active suspects were charged with terrorism or treason, both of which carry the death penalty. By constitutional provision, detainees in such cases may be held for up to 360 days without being charged with any crime, although they must be held in legal places of detention.

Functions of Public Officers

Public officials in Uganda owe their allegiance to the president rather than to the state. Indeed, many such officers cannot be appointed to their offices without the president's approval. This is a matter that raises concern about whether such officers owe allegiance to the state or to the president, and hence whether they can question actions of the president that are not in the national interest.

In fact, during the reporting period, the president interfered blatantly with and attacked the work of some public officers. The president warned the Inspector General of Government (IGG) against interfering in the work of the solicitor general, ordering him to withdraw an arrest warrant issued against the solicitor general. He stressed that the IGG should not interfere with, or involve himself in, the decision- making processes of government ministries or institutions. Related to this was the defiance shown by the ministry of lands over a directive by the IGG to refrain from paying a sum of 756 million shillings to Basangira Building Contractors, a company that had been involved in a failed dam project. The payment came at a time when the ministry was in dire financial constraints. Documents obtained from the ministry indicated that officials used money from other key sectors to settle the claim. No attention was paid to the IGG's directive. Significantly, the White Paper recommended that the powers of the IGG be curtailed,

thereby illustrating the fact that the executive intended to undermine government watchdog bodies which sought to check excesses of public officials.

Excesses of Power: Overstepping permissible limits with the Judiciary?

The executive publicly attacked the work of the judiciary during the reporting period. On 27 June, the president rejected a constitutional court ruling that nullified the 2000 referendum, saying that the government would not accept the contents of the ruling. President Museveni said that a closer look at the ruling revealed an absurdity and shocked the general moral of common sense:

> "We restored constitutionalism and the rule of law. That is why judges can rule like this against the government. There were times when if a judge made such a ruling, he would not live to see tomorrow. The ruling will not work. It is simply unacceptable. Judges say Article 74 has evaporated. Article 74 is not dead. The movement system is not dead. We are all here."[188]

The courts were forced to close, resulting in cessation of their work, when the public, after hearing these statements, took to the streets and demonstrated to oppose the ruling. The president made matters worse when he inferred that the judiciary was not impartial. In a public address, he stated that the Democratic Party (DP), which had filed the petition on the legality of the referendum, always filed weak cases only to be helped by "their friends the judges".[189] He thereon pledged to "sort *out*" the judges and stated that the days for "biased" courts in the Ugandan judiciary were numbered. He stated that judges were hiding behind the principle of separation of powers to mete out injustice to the people.

On another occasion, a government minister, unhappy with proceedings in the high court, wrote to the chief justice protesting

188 "Museveni rejects Referendum Ruling," *The Daily Monitor,* 28 June 2004, p 1.

189 "Judges Favour Semo," "Museveni says to residents of Mawokota county at Butoolo headquarters," *The Daily Monitor*, 30 June 2004, p 4.

a judge's actions, inferring that the judge's ruling interfered with the running of her ministry. Her complaints related to the granting of prayers of a request by four senior former ministry officials who had been suspended by the minister during the preceding year. The officials had approached court to obtain permission to sue the attorney general for unfair dismissal, and this had been granted by the court. The court's ruling on this matter was in line with international human rights standards of natural justice, yet the minister protested to the chief justice instead of resorting to due process and procedures set for appeal of the ruling.

A further illustration of interference in the judiciary by the executive relates to the actions of resident district commissioners (RDCs). Numerous examples exist where RDCs have infringed on the roles of other public offices, for example, they have ordered the police to stop working and have interfered with the functions of local council (LC) officials. One RDC stated that judges hate the movement system.[190] This provocation of the people by one organ of government against another is contrary to the principles of constitutionalism.

Armed Conflict and Infringement of Rights

The war in northern Uganda, which started when president Museveni and the NRM took power 18 years ago, in 1986, continued unrelentingly in 2004. Violence and related human rights abuses abated somewhat by mid-year, yet predictions of an imminent military solution to the conflict proved unfounded.

In February, the Lords Resistance Army (LRA) committed the worst massacre of the entire conflict in an eastern district by attacking Barlonyo internally displaced persons camp, near Lira, which was defended by only a small local defence unit, and killing more than 330 people. The attack on Barlonyo camp was followed by a protest demonstration by more than 10,000 people, angry at the lack of

190 "Judges hate movement, says RDC," *The Daily Monitor*, July 5, P.6;

government protection in the camps. The population questioned the willingness and effectiveness of the UPDF regarding protection of civilians against the LRA, claiming that it was often absent or slow to respond to LRA attacks. In the event, president Museveni apologised for UPDF's failure to stop the massacre.

In December 2003, president Museveni had taken the unprecedented step of referring the LRA for investigation and possible prosecution by the International Criminal Court (ICC) for alleged egregious crimes against the civilian population.[191] The ICC agreed to investigate the complaint, but peace activists in Uganda suspected that president Museveni would manipulate the ICC into punishing his foes, thereby diminishing chances of a negotiated settlement, while avoiding investigation of abuses perpetrated on the population by the UPDF.

Abuses perpetrated by the UPDF on civilians in 2004 included arbitrary detention, torture, rape and theft. UPDF soldiers were rarely criminally prosecuted for abuse of civilians. The failure to protect civilians in the north was persistent. The Human Rights Committee, a body that monitors state compliance with the International Covenant on Civil and Political Rights, noted in its concluding observations on Uganda the failure of the state "to ensure the right to liberty and security of persons affected by the armed conflict in northern Uganda".

Violation of Other Human Rights

In 2004, the government, through the Broadcasting Council, closed down a television station and four radio stations, apparently due to unpaid licence fees. An official of the Council stated that about thirty radio stations and three television stations faced closure over unpaid license fees. This raises the question of deliberate hiking of licence fees by the government, thereby forcing broadcasters off

191 Crimes committed by the LRA included the abduction of children, whom it used as soldiers and forced sexual partners for its forces. By 2004, more than 20,000 children had been seized by the LRA over the course of the war. Furthermore, more than 1,300,000 civilians were living in government-controlled camps for displaced persons.

the air and limiting peoples' rights to expression and information. Later, police closed a Soroti-based private FM radio station, *Kyoga Veritas,* allegedly because it defied a ministerial directive to refrain from broadcasting news about LRA attacks in the region. This was a clear infringement of rights enshrined in the constitution, harming constitutional development in the country.

At the same time, the government interfered with the people's right to free association by limiting the ability of political parties to undertake their work. Government officials attacked political parties.[192] A clear instance of differential treatment involved the failure of the registrar general to gazette the Forum for Democratic Change (FDC) after party officials submitted the required papers for registration. Yet, by September 2004, the registrar had registered seven other new parties including president Museveni's National Resistance Movement Organisation (NRM-O). When the registrar's office was asked how it had verified signatures of other parties when it claimed that it lacked money to verify signatures for the FDC, it had no comment.[193]

The temporary closure by the army and police of the independent *Monitor* newspaper in late 2002 had had a chilling effect on that newspaper and on free speech generally. Journalists from the paper continued to come under attack in 2004; two of them were publicly denounced as "rebel collaborators" by a spokesman of the UPDF. This was intended to intimidate the journalists into ceasing to report freely on the war in northern Uganda.

The death penalty still exists on Uganda's statute-books, being mandatory for capital crimes such as murder and treason. At least 432 people were under sentence of death during the year. No executions of civilians took place but government and military officials repeated their readiness to execute soldiers as a disciplinary measure to

192 "Nankabirwa Raps UPC on Transition," *The New Vision,* 27 May 2004, p.7. Nankabirwa stated that the dictatorial rule of UPC and Rwanyarare will never return to Uganda.

193 It was reported that the registrar required Ushs. 75 million to verify the authenticity of signatures that had been solicited to register various political parties.

safeguard state security. At least three soldiers were executed. In July, 398 death row inmates, including 16 women, filed a petition before the constitutional court, challenging their death sentences on the grounds that they were unconstitutional, inhuman and degrading. The petition was based on Articles 24 and 44 of the constitution, which prohibit any form of torture or cruel, inhuman or degrading treatment and punishment. The attorney general opposed the petition.

The Question of Political Participation

In 2004, the political system continued to restrict prospective candidates, obliging them on an all-inclusive "movement" platform. This system is based on the idea of one supposedly all-inclusive "movement" in which individual candidates stand for election based on their personal merit. The system was introduced by the victorious rebel forces led by Museveni in 1986. In practice, this "no-party" system has significantly curtailed the civil and political rights of those who are in political opposition. A legal challenge to the legitimacy of the movement system in Uganda was successful in the constitutional court in June. The court ruled that a referendum held in 2000, which had confirmed that one-party rule was null and void. However, following an angry outburst from president Museveni, the decision was subsequently overturned by the supreme court in September.

Registration of political parties was accepted in 2004 when the constitutional court nullified certain sections of the Political Parties and Organisations Act and also ruled that political parties should register as required by the Act. The parties had petitioned the court for a ruling that the requirement for registration was unjustified and repressive. The ruling rejected the petitioner's claim that the Act was designed to establish the National Resistance Movement (NRM) as a one party state. Taking this argument further however, NRM organs continue to be funded by the national treasury. This differential treatment was not availed to other parties. In fact, funding of NRM organs was contested by an association of Lawyers for Constitutionalism, who argued that

the court ruling on political parties implied that the movement system should be independent and seek its own external funding – like any other political party.

Legislation and Public Participation

During the reporting period, laws and bills that infringe on rights gained positive state audience and attention. One such bill was the Non- Governmental Organisation (NGO) Bill. The Bill proposed stringent provisions for regulating the work of NGOs. Requirements, such as annual registration and license fees, put NGOs in an awkward situation. The Bill generally failed to recognise NGOs as partners in development with government. It sought to deny permits to NGOs whose development plans or activities might be against or contradict government policies.

The Legislature and Observance of Constitutional Guarantees

Introduction

Following the promulgation of the Constitution in 1995, Uganda opted for a presidential and parliamentary democracy. The main emphasis of the constitution was to ensure that the sovereignty of the people was exercised through a democratically elected representative body called the legislature.

Most functions by the executive branch of the government are accountable to parliament. Parliament is supposed to exercise control over the executive arm of government through legislative business. Besides ministers, including the president, are answerable to parliament for their actions. Therefore, parliament has a significant role to play in improving the quality of governance.

In 2004, parliament was generally seen as assertive and its actions upheld the rationale for constitutional governance. However, sometimes the executive arm of government was reluctant to accept in good faith resolutions of parliament as an autonomous body. In

these instances, the executive made deliberate moves to influence parliament's decisions directly, for example, by invoking party sentiment or political patronage when it came to voting on contentious issues.

Law in the Making

In 2004, parliament had many bills pending before it, some of which had been carried over from 2003. A number of these bills had a direct impact on constitutional development in Uganda:

Local Council Courts Bill, 2003[194]

This Bill intended to repeal and replace the Executive Committees (Judicial Powers) Act. It introduced local council courts as a separate body from the Local Council Executive Committee at town, divisional and sub-county levels. It thus proposed to create another institution which was, in a way, responsible for promoting public good and yet had to operate within recognised constitutional principles.

The Amnesty (Amendment) Bill, 2003[195]

The Bill sought to deny amnesty to leaders of the rebellion against the government. The object of the bill was to amend the existing Amnesty Act and also to provide for the granting of amnesty to abducted persons, those coerced into rebellion and other applicants for amnesty. It required applications to be made in reasonable time, in good faith and to be granted to applicants who had demonstrated repentance. The Bill thus catered for protection of persons formerly involved in armed conflict and aspired to mete out some sort of justice.

The Prisons Bill, 2003[196]

This Bill, among other things, provided for regular inspection of prisons by magistrates, judges and members of the Ugandan Human

194 Tabled on 12 February 2004.
195 Tabled on 8 April 2004.
196 Tabled on 11May 2004.

Rights Commission and other human rights groups, to assess conditions in the prisons. It also merged the administration of central and local government prisons. Once passed, these changes would have an impact on constitutional development, as they impacted on the efficiency of the executive.[197]

The Access to Information Bill, 2004[198]

This Bill sought to operationalise Article 41 (1) of the Constitution, which provided that "every citizen has a right of access to information in the possession of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person".

It prescribed the classes of information and procedures for obtaining access to such information. The Bill also aimed to promote an efficient, effective, transparent and accountable government; and to promote transparency and accountability in all organs of the state by providing the public with timely, accessible and accurate information.

Before this Bill was presented, a similar bill had been tabled under the private members procedure.[199] The government, through the prime minister and minister of state for information, objected to the introduction of the Bill on the basis that the government would introduce a similar bill in future. Interestingly, when the government presented its Bill, it was a near replica of the bill presented earlier. In as much as the private members' bill encouraged the government to expedite the process of tabling a similar bill, the failure of the former to be accepted on the objection of the government had far- reaching implications for relations of the executive and the legislature. It led to tension between the two organs and, in a way, could be taken as an infringement on the right of an MP to move a private members bill.[200]

197 Refer to the official Report of Parliament, Hansard of 13 April 2004.
198 Tabled on 14 April 2004.
199 Prepared by Hon. Katuntu Abdu, Hansard of 17 February 2004.
200 See Article 94 (4) (b) of the Constitution.

Checks and Balances

Parliament has a watchdog function which is normally exercised most effectively under the specialised committee system through which it scrutinises and evaluates the performance of other organs of government, especially the executive. In the exercising of these checks and balances, parliament asserted its authority in several regards:

- Parliament rejected the appointment of an MP who had been nominated by the president for a ministerial post.[201] In addition, parliament complained that the then minister of defence and MP, Hon. Amama Mbabazi, could not be appointed by the president as the attorney general without vetting by the Appointments Committee.[202]
- Further, the electorate attempted to recall Hon. Sam Lyomoki from his seat in parliament. In Ugandan history, no MP had even been subjected to the recall process. The petition was received by the speaker of parliament, who referred the matter to the Electoral Commission for public inquiry. This process was of such importance to constitutional development because it checked MPs who abandoned or failed to represent and account to their constituents.[203]
- The minister for justice and constitutional affairs was invited to explain the delay in gazetting the application of the FDC for registration as a political party.[204] Similarly, the minister for energy and natural resources was summoned to explain the fuel crisis and the subsequent rise in prices.[205]

Independence of Members

Another landmark constitutional issue was that of money paid to selected MPs who support the Movement. This money was given to MPs to "facilitate"' them to mobilise their constituencies with regard to

201 Hon. Wanjusi Wasieba.

202 Refer to "Mbabazi defends KG." *The New Vision*, 20 August 2004.

203 See Article 84 (2) c of the Constitution.

204 "Mukwaya Ordered to explain FDC papers," *The New Vision,* 22 October 2004, p.5.

205 "MP's summon Bbumba," T*he New Vision,* 21 January 2004, p.5:

the White Paper.[206] This public allocation of cash attracted considerable debate among the general public,[207] and some MPs publicly denied having received the money.

The major issue of the controversy involved not merely the source of the funds, but also why it was given to certain specially chosen MPs in secret. The money was generally viewed as a bribe to support the No Term Limits project. The president defended MPs who had received the money, saying that the money was meant to enable members to travel and convene meetings in their constituencies to explain the White Paper to the population. He stated that the insinuation that the money was meant to influence the MPs to support the proposed lifting of presidential term limits was an insult.

The mere act of selectively favouring some and not all MPs in such a venture seriously tainted the independence and integrity of parliament. It raised the question of parliament's ability to employ checks to root out corruption when it was similarly tainted, and the need to examine constitutional provisions that give parliament powers to make laws on any matter for the peace, order, development and good governance of Uganda.[208]

Observance of Human Rights

MPs were concerned with the continued conflict in northern Uganda and the gross human rights atrocities it generated. A number of MPs visited war-torn northern Uganda and made recommendations to declare it a disaster zone. This was, however, rejected by the cabinet.

Furthermore, UPDF soldiers assaulted four MPs from Acholi in northern Uganda. The MPs were assaulted in Aruu County, where they had gone to consult local residents on the White Paper.[209] The actions

206 "Third Term MP's get Shs. 5 Million", *The Daily Monitor*, 28 Oct. 2004, p.1.

207 A case in point is when Hon. Byaruhanga criticised Movement MPs or pro-third term legislators who received the money for facilitation to carry out consultations on the White Paper, as having lost and surrendered their moral authority to fight corruption in the country; "Byaruhanga Blasts Movement MPs over 5M", *The New Vision,* 30 November 2004.

208 The Constitution of Uganda, under Article 79, allows parliament to make laws.

209 "Soldiers beat up Acholi MPs", *The New Vision*, 23 November 2004.

of the UPDF officers infringed on rights such as those to freedom of expression and assembly.

Parliament and the White Paper

The White Paper contained several recommendations by the government which had a direct bearing on the role and function of the legislature. While the CRC explicitly rejected the exercise of any legislative power by the president, the White Paper suggested limited legislative powers with respect to investment, environment, public health as well as historical and archaeological sites.

In addition, the CRC proposed that any member of parliament holding a ministerial position should be an ex-officio MP. This would have ensured reduced patronage from the executive. However, this proposal too, was rejected by cabinet.

Another CRC proposal was that the presence of a quorum required for transacting parliament business should be 50%, but the White paper was of a divergent view.

The Judiciary

Introduction

The role of the judiciary should not be underestimated in any constitutional government. The principles of constitutionalism, such as rule of law and separation of powers, are rooted in an independent judiciary. The most elaborate system of rights, remedies and procedures would be of little use if there is no independent, impartial and competent judiciary. Constitutionalism as a system of government is based, among other things, on judicial independence and protection of rights. The government operates within limits set by law, specifically under a constitutional structure through which judicial independence is implemented by judicial review. The judiciary is an important organ of government, because it ensures the existence of a just system that guarantees citizens' rights, by allowing aggrieved parties to seek remedies or redress.

Relating to the Executive

In 2004, the relationship between the judiciary and the executive was strained. On several occasions, public attacks were made by the latter on the former. Further, the judiciary's work was intentionally frustrated on a number of occasions. One such incident was the failure of the state to make resources available through the consolidated fund to recruit and facilitate judicial work. An independent judiciary results from an effective and efficient system not hampered by a backlog of cases resulting from too few judges. When there are too few judges delays in the dispensation of justice are likely, which has a negative impact on constitutional development. The chief justice had previously asked the government to recruit 29 judges and 159 magistrates as one of the core reforms necessary for the delivery of justice. This request was denied.[210] However, the president later named five new judges. The nominees included a former minister of state for defence.[211]

Public attacks by one state organ against another are inconsistent with the proper functioning of the state since it implies that one organ is stronger than another. One example in this regard was the president's scathing attack on a judge of the supreme court during an address to local leaders in Sironko. The judge had stated that peasants cannot determine the country's destiny.[212] The president was quoted publicly warning judges about "biased judgments."[213]

The gravest attack on the judiciary, however, occurred when the president reacted harshly to the judgment of the constitutional court which had nullified the Referendum Act. The judgment had far reaching consequences for Uganda's constitutional developments.

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210 The minister of justice and constitutional affairs was reported to have informed parliament that, despite the demand for more judges in the judiciary, the ministry had no funds to facilitate them. See *The New Vision*, 12 January 2004.

211 *The New Vision,* 31 July 2004.

212 "General Museveni slams Judge Kanyeihamba," *The New Vision,* 22 March 2004.

213 "President Museveni yesterday warned Judges that if they do not stop delivering biased Judgments they will be dealt with constitutionally. Museveni said the Judges were not above everybody,." *The New vision,* 16 July 2004.

The president's robust reaction resulted in NRM supporters and RDCs countrywide mobilising and instigating people to demonstrate against the Judiciary. There had never been such state instigated demonstration against the judiciary in the constitutional history of Uganda. Court business was paralysed as most judicial officers lay low to avoid the public demonstrations.[214] This was a serious blow to constitutional and democratic progress in the country.

The White Paper: Arising Issues

The CRC took a strong position when it recommended that constitutional guarantees for the independence of the judiciary be maintained. The government noted that this was already the constitutional position. However, close observation of events such as direct attacks on the judiciary as well as subtle encouragement that the public to do likewise, seem to suggest otherwise.

The government proposed that if an act is repealed, expired or has had its full effect at the time of delivery of judgment, the constitutional court should not declare such act of parliament or any other law inconsistent with the constitution. In addition, the government proposed that if the constitutional court declared any act of parliament inconsistent with the constitution, the declaration would not affect anything unduly done or, suffered, or any right, privilege, obligation or liability acquired, accrued or incurred under the act. The above proposals relied on the doctrine of prospective over-ruling and arose because of the decision of the constitutional court, which struck down the Referendum Act as being unconstitutional.

Indeed, this situation is a reflection of the uncomfortable relationship that the government has had with courts since the enactment of the 1995 constitution. As has been noted:

> "..the proposal was not only an unjustified attack on the discretionary powers of the judiciary, but it also countenanced the full effect that legislation, which has been repealed, spent or expired could have on

214 "Kampala High Court re-opens under tight security,." *The New Vision,* 1 July 2004.

> the protection of basic rights. In other words, the state proposed a position where a law can have implications that extend well beyond its expiry."

This position was copied from developed constitutional democracies, such as Canada, and was not ready to be applied by developing states such as Uganda. This proposal further attempted to create parliamentary sovereignty, to the extent that parliamentary decisions could not be questioned. It was in direct contravention of the 1995 constitution which, being the supreme law, cannot be subject to the whims of a sitting parliament. Whichever form the executive and parliament tried to entrench themselves in, it would always be the duty of courts to protect the citizenry against misuse of power, by remaining the final arbiters and implementers of the constitution.

The White Paper proposed that special courts be established for trials of the offence of terrorism. However, the creation of such tribunals would have had far-reaching implications for the role of the judiciary. Although formal courts in Uganda have a semblance of independence, the proliferation of various court- like institutions, which are neither independent nor competent, would dilute the independence of the judiciary. Such institutions had been shown to be structurally prone to ideological manipulation and could be externally influenced to make decisions based on ideologically determined criteria. These proposed "terror courts" would be control systems that would progressively replace the existing system of independent adjudication based on formal rights. Their establishment would also lead to usurpation of judicial jurisdictions at the expense of constitutionalism.

On the CRC's proposal that judges' income be taxed, the government recommended that judges' allowances remain part of the administrative expenses of the judiciary, charged to the consolidated fund.

The state however proposed that judicial officers should, like other citizens, pay taxes to the state. It proposed to exempt judges from having to pay back taxes for the years the exemption subsisted.

This had serious negative implications for the judiciary, as it would affect proper dispensation of justice. In the absence of financial independence, members of the judiciary could be influenced and manipulated, leaving them susceptible to corruption and unbecoming financial behaviour.

Case Law: Judicial Decisions and Precedents

In 2004, judges continued to interpret prior laws and statutes, subject to constitutional provisions.

The constitutional court struck down sections of the Leadership Code Act[215] for inconsistency and contravention of the constitution.[216] Similarly, the supreme court reiterated the role of the court – having the duty to uphold and protect the people's constitution. This decision overturned the majority decision of the constitutional court, which had ruled that once parliament has passed a constitutional amendment that amendment became part of the constitution and thereafter could not be questioned in a court of law.[217]

As a key custodian and protector of the constitution, the constitutional court came out strongly when it held that the Referendum (Political Systems) Act, 2000, was null.[218] The constitutional court declared:

- that the passing of the Act was in contravention of Articles 89, 90 (1) and (3) of the constitution;
- that the holding of the referendum before passing law under Article 269 to legalise political organizations contravened Article 69 of the constitution; and
- that parliament had no authority to pass the Referendum (Political Systems) Act 2000 after the expiry of the period stated in Article 271 (2) without first amending the said provision of the constitution;

215 Ss. 19 (1), 20 (1), 35 (b) and 35 (d).

216 In *Fox Odoi & James Akampumuza v. AG* (Constitutional Petition No. 08 of 2003).

217 In *Paul K. Ssemwogerere, Zachary Olum and Juliet Rainer Kafire v. AG*, Constitutional Appeal No. 1 of 2002.

218 *Ibid*.

This landmark decision was evidence of constitutional growth of the country's courts. However, the decision irked the president that he publicly attacked the judiciary on national television. This posed a serious setback to the independence of the judiciary as well as the constitutional role of the court in upholding the constitution. Consequently, the government appealed against the decision in the supreme court, which upheld parts of the constitutional court's decision but overturned other declarations. The decision on appeal is, however, believed to have been reached as a result of political pressure.

The supreme court applauded the rights to freedom of expression and of the press when it decided in favour of journalists who had been charged in 2002 with spreading false information and publishing information prejudicial to national security. The charges related to an article alleging that the LRA had shot down an army helicopter in northern Uganda. The court set aside the majority decision which it held to be inconsistent with Article 29 (1) (a) of the constitution.[219]

The constitutional court also found sections of the Divorce Act to be discriminatory and, therefore, unconstitutional because it provided for different grounds of divorce for men and women. It held that the sections in issue which enumerated the various grounds of divorce should be applied equally to both parties to a marriage[220] and that the provisions relating to naming of the co-respondent, compensation, damages and alimony should apply to both women and men.[221]

These decisions clearly portrayed that courts as chief custodians of the constitution were still committed to upholding the constitution and that there was still public confidence in courts of law despite the set backs suffered during the period.

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219 In *Charles Onyango Obbo & Andrew Mujuni Mwenda v. AG*, (Constitutional Appeal No. 2 of 2002).

220 S.4 (1) and (2).

221 In *Uganda Association of Women Lawyers & Others v. AG* (Constitutional Petition No. 3 of 2003).

Conclusion

The year 2004 brought with it successes and challenges for Uganda's constitutional undertakings. Successes related mainly to progressive rulings of the judiciary. Parliament endeavoured to fulfil its legislative function; but overarching these two arms of government, the executive clearly remained intent on ensuring that neither the judiciary nor parliament took actions to undermine its political aims. In doing this, the executive sometimes used arbitrary means.

As mentioned, constitutionalism involves rules that impose limits upon government power which are entrenched in some way, either by law or by way of constitutional conventions. Proposals made by the government in the White Paper, in many respects, sought to denigrate the checks and balances in the constitution of Uganda. Dialogue amongst all Ugandans must continue to ensure that the three organs of the state are strengthened and that mechanisms for enabling independent and effective functioning of each one of them are not eroded.

6
Constitutionalism and the East African Community in 2004

Donald Deya

Introduction

This chapter presents a chronicle and analysis of developments within the East African Community (EAC) in the year 2004 from the perspective of constitutionalism.

The term "East Africa" means many things to different people. For example, in the context of the African Union (AU), East Africa includes Burundi, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Somalia, Sudan, Tanzania and Uganda. This chapter takes a narrower view of East Africa, focusing on the three EAC partner states of Kenya, Tanzania and Uganda.

The chapter looks at the activities of the EAC and those of the private sector and civil society actors that work within the region. It focuses deliberately on the role and potential of private sector and civil society organisations in regional integration,[222] with the aim of catalysing action and discourse by and about East African citizens in regional integration. Nevertheless, at the outset, it would clearly be very difficult for the ordinary citizen to engage an institution or "project" as large as the EAC; and hence the chapter also focuses on the various forms of associational vehicles through which East African citizens can engage the EAC, whether from a purely trade/economic perspective or from other more holistic or "altruistic" perspectives.

222 Past annual reports of Kituo Cha Katiba as well as the majority of research and publications on the EAC have tended to focus on the "hard", formalistic and legalistic aspects of integration – the treaties, protocols, laws and policies which have been negotiated, signed, ratified and/ or implemented. They have focused on how the various formal organs, institutions, agencies and offices of the EAC have performed their tasks. Chronicles or analyses of the place, role or performance of East African citizens - the ultimate drivers and beneficiaries of regional integration - have been largely absent from most of this discourse.

Thus, the chapter views private sector and civil society associational activity as itself catalytic of a more people-centred and people-driven EAC.

The chapter is divided into four parts:

- The interface between constitutionalism and regional integration;
- Developments at the EAC level – the formal intergovernmental agency;
- Contemporary societal developments, especially those emanating from the private sector and civil society; and
- The EAC in a wider context.

The Interface Between Constitutionalism and Regional Integration

Regional integration, even regional economic integration, anywhere in the world entails some surrender of sovereignty. States have to cede some freedom to enact law or policy to the regional entity. In purely economic integration models, such as free trade areas and customs unions, this "limitation of sovereignty" is usually in the realm of economic laws and policies covering matters such as taxation, competition, cross-border commerce and contracts, and subsidies to agriculture or industry. This limitation of sovereignty may, however, extend to criminal or quasi-criminal justice issues, for example, where the regional entity defines – and punishes – customs offences. An example of this is the North Atlantic Free Trade Area. More ambitious integration models aim to create a common market or a monetary union, for example, the Economic Community of West African States (ECOWAS) the Common Market for Eastern and Southern Africa (COMESA) or the Southern African Development Community (SADC). Under such models, the incursions on national sovereignty are more far-reaching, traversing into areas of free movement of persons and labour, rights of establishment and residence, and even requiring basic guarantees on issues of governance and democracy. The most ambitious integration models aspire to a confederation of

states, or even a single, ultimate federal state. The most prominent example of this is the European Union (EU). The EAC is yet another region which eventually aspires to evolve itself into one federal state.

Since some national sovereignty has to be ceded whatever the integration model, national constitutional arrangements have to "share" some of their supremacy with the regional entities to which the states have acceded. The more ambitious the regional integration project, the more far-reaching the "incursion" into the national constitutional dispensations.

Regional integration entities have tended to model their governance regimes along the lines of national governance regimes. An important concept that has been "imported" into regional integration is separation of powers. Most regional integration models envisage at least a law and policy-making and implementing organ, distinct from a judicial/ quasi-judicial organ that is mandated to adjudicate disputes and/or settle questions of interpretation. COMESA, for example, has an executive structure made up of an assembly of heads of state (largely ceremonial) and a council of ministers, and a judicial structure, made up of a court of appeal and a court of first instance. Some of the more ambitious regional integration models have adopted a completely tripartite separation of powers, with distinct legislative, executive and judicial organs. This is the model adopted by both the EU and the EAC. The EAC is made up of:

- An executive superstructure consisting of a summit of heads of states, a council of EAC ministers, sectoral councils, a co-ordinating committee (of permanent secretaries), sectoral committees and the EAC secretariat;
- A legislative organ, the East African Legislative Assembly (EALA); and
- A judicial organ, the East African Court of Justice (EACJ).

The EAC Partner States have even established a set of "fundamental" and "operational" principles, which 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 African Charter of Human and Peoples' Rights.[223]

It has been noted[224] that the (partner states) reiterated the essence of this commitment where (they) stated:

> 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.[225]

These are constitutional principles recognised by and binding on the three East African states, even without the EAC Treaty, by virtue of the provisions of each state's own constitution as well as their commitment to various international instruments to which they are parties.[226] Thus, by the very act of signing and ratifying the EAC Treaty, the partner states have integrated constitutionalism into it. This is further fortified by their desire, also encapsulated in the Treaty, to ascend into a single, federal state in the shortest time possible.

Developments at the EAC

The Treaty for the Establishment of the East African Community (the EACT) was signed by the three heads of states of the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda, presidents Daniel Toroitich arap Moi, Benjamin William Mkapa and Yoweri Kaguta Museveni respectively, on 30 November 1999. It came into force in July 2000, upon completion of the required ratification procedures by the partner states.

The regional co-operation and integration envisaged in the EACT is broad-based. Art. 5(1) states that:

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223 Article 6(d), EACT.

224 B. Tusasirwe, "The East African Community and Constitutional Developments in 2002, 2003, (www.kituochakatiba.co.ug/eac).

225 Article 7(2) (3), EACT.

226 *Supra* footnote 224.

> 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.

The EACT intends that the community will develop in a systematic and sequential manner, starting with a customs union and then a common market, as transitional stages to and integral parts of a subsequent monetary union and ultimately a political federation.

Preceding the signing of the EACT, the partner states' governments had, as early as 1993, concluded an Agreement Establishing the Permanent Tripartite Commission for East African Co-operation, which, among other things, established a Permanent Tripartite Commission for East African Co-operation. The Commission was charged with promoting co-operation in various fields. This Commission evolved into the Secretariat of the East African Community (EACS), one of the community's seven key organs.[227] The other key organs are:

- The summit (of heads of states or governments);
- The council (of ministers of the partner states responsible for regional co-operation and such other duties as deputed by the respective governments);
- The co-ordination committee (of permanent secretaries in the ministries of the partner states responsible for regional co-operation and such other duties as deputed by the respective governments);
- Such sectoral committees as established by the council, on the recommendation of the co-ordination committee;
- The EACJ;
- The EALA; and
- Such other organs as may be established by the summit.

Whereas the nucleus for the EACS existed at the time when the Treaty was negotiated and signed, the other organs had, more or less, to be set up subsequent to the Treaty's ratification. In this regard, the court and the assembly were inaugurated in November 2001, after being

227 Article 9(1), EACT.

constituted as provided for under the EACT. Thus, 2004 was the third year in which the EAC operated with all its key organs fully in place.

The performance of EAC's key organs is set out below.

The East African Court of Justice

Judges of the court

Subsequent to the signing of the EACT, the EACJ was formally established and launched in November 2001, with the following six judges:

- Moijo Mataiya ole Keiwua (Kenya) – president;
- Joseph Mulenga (Uganda) – vice president;
- Augustino Stephen Lawrence Ramadhani (Tanzania) – judge;
- Solomy Balungi Bossa, (Uganda) – judge;[228]
- Kasanga Mulwa (Kenya) – judge; and
- Joseph Warioba (Tanzania) – judge.

Subsequently, the EAC appointed Dr. John Eudes Ruhangisa as its registrar.

In the course of 2004, the court concluded its wide consultations on – and unveiled – its rules of procedure and arbitration rules. It also undertook various awareness-raising, research and learning initiatives, including a colloquium in Nairobi in June, which was, at least in part, a follow-up of a learning mission to the European court of human rights and other institutions of the EU in 2003. The court was also an influential participant in the 2004 annual conference and general meeting[229] of the East Africa Law Society (EALS), which afforded it a premier forum for educating and engaging with the East African legal profession.

Meanwhile, in the course of the year, there was increased public

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228 Justice Bossa was also subsequently appointed by the United Nations General Assembly as *ad litem j*udge of the International Criminal Tribunal for Rwanda, which also has its seat in Arusha, Tanzania.

229 On the theme: "Building Bridges: from the East African Community to the African Union and the New Partnership for Africa's Development." This took place in October 2004, in Mombasa, Kenya.

spotlight on the continued stay of the two Kenyan members of the court, despite the fact that they had been forced off the bench in their own country following allegations of corruption against them being reported in the Ringera Report[230] and their subsequent suspension by president Mwai Kibaki, who appointed two tribunals to investigate their conduct.[231] Significantly, there is no automatic "right of recall" in the EACT, which would require the two judges to step down from the EACJ due to a change in their circumstances in Kenya, from where they had been nominated. Article 26 of the EACT provides that:

(1) The President of the Court or other Judge shall not be removed from office except by the Summit for misconduct or for inability to perform the functions of his or her office due to infirmity of mind or body.

(2) Notwithstanding the provisions of paragraph 1 of this Article, a Judge of the Court shall only be removed from office if the question of his or her removal from office has been referred to an *ad hoc* independent tribunal appointed for this purpose by the Summit and the tribunal has recommended that the Judge be removed from office for misconduct or inability to perform the functions of his or her office.

(3) The tribunal appointed under paragraph 2 of this Article shall consist of three eminent Judges drawn from within the Commonwealth of Nations.

This matter would have been rendered moot if the two judges had opted to resign or stand down from the EACJ, if only to remove the possibility of this nascent court starting on a controversial note. The two judges did not take this path, perhaps hoping instead to be availed the opportunity of "reiterating" their continued suitability for this court via an independent tribunal. It is a matter of public knowledge within the East African region that there have been significant reservations with regard to the fairness or quality of the process that led to the "naming and shaming" of members of the Kenyan judiciary. Indeed, many people feel that due process was not followed, and it could

230 "An Anatomy of Corruption in the Kenyan Judiciary: The Report of the Integrity and Anti-Corruption Committee of the Judiciary."

231 By a special issue of the Kenya Gazette, Vol. CV No. 101 of 15 October 2003 (Gazette Notices Numbers 7280, 7281, 7282 and 7283).

very well be that some of the judges so named were innocent of the accusations raised against them. Nevertheless, this matter may almost inevitably be the subject of a preliminary motion – or even inquiry – should a litigant approach the EACJ.

Jurisdiction of the Court

As currently established under the EACT, the court has the following jurisdictions:

- Treaty interpretation, application and compliance (which, arguably, extends to interpretation of matters of constitutionalism and human rights, and hence is addressed separately below);[232]
- Labour jurisdiction in disputes between the EAC and its employees (which, again, can be used to set persuasive precedent on best practice on labour matters in the Eastern African region);[233] and
- Jurisdiction over arbitration, in regard to disputes between the partner states, or disputes between the EAC (or any of its institutions) and third parties, or in disputes between third parties where those parties have conferred an arbitral jurisdiction on the EACJ.[234]

The court promulgated the final version of its rules of court (rules of procedure) and arbitration rules in July 2004.[235] It was then fully ready to hear cases and/or make arbitrations. Nevertheless, no cases were brought before the court in the rest of 2004, and the challenge remained on East African lawyers and human rights advocates to define which of their or their clients' matters would be best pursued in this judicial forum and to avail themselves of it.

A Bill of Rights for the EAC?

The year also saw the continuation of public discourse on the possibility of holding the partner states' governments to account on

232 Article 23 of the EACT, highlighting the role of the EACJ, says it "shall be a judicial body … which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty." This is also reiterated in Article 27.

233 Article 31, EACT.

234 Article 32, EACT.

235 The EACJ had circulated various drafts for comment since 2002.

matters of governance and human rights, in the regional, continental and other international courts, tribunals, commissions and other bodies, including the nascent African Court of Human and Peoples' Rights, the African Commission on Human and Peoples Rights, the UN treaty-reporting bodies or the EACJ itself, of which a case in point is made below.

At a first glance, one could conclude that the EACT has no Bill of Rights and that the EACJ has no human rights jurisdiction. This position seems to be fortified by Art. 27, which highlights the current and potential future jurisdiction of the EACJ. Art. 27(2) provides that:

> The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalise the extended jurisdiction.

However, there is a persuasive school of thought that the EACT indeed has a Bill of Rights, and that the EACJ, along with the other organs, institutions and officers of the EAC, are obligated to enforce and apply this Bill of Rights. A brief synopsis of this is attempted below.

The EACT, both in its preambular and substantive sections, repeatedly commits the partner states as well as its organs, institutions and officers to a dispensation of constitutionalism, democracy and good governance, just rule of law and the advancement, promotion and protection of all human rights of all peoples in East Africa.

Art. 3(4), in setting out the matters to be taken into account in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the EAC, stipulates that the criteria shall include that foreign country's:

> (b) Adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice.[236]

236 In several fora it has been argued that it may not be in the place of governments, which themselves are accused of violating human rights or principles of constitutionalism, democracy, good governance, etc to sit in judgment of sister

> Art. 5, which sets out the objectives of the EAC, includes, under its sub-article 5(3):
>
> e) the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development;
>
> f) the promotion of peace, security and stability within, and good neighbourliness among the Partner States;
>
> g) The enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development; …

Art. 6 (fundamental principles of the community) states as follows:

The fundamental principles that shall govern the achievement of the objectives of the community by the partner states shall include: …

> (d) 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.

Art. 7 (operational principles of the community) meanwhile states as follows:

> 7 (1)The principles that shall govern the practical achievement of the objectives of the Community shall include:
>
> (a) people-centred and market-driven co-operation;
>
> (b) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure;

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states applying to join the EAC. Does Uganda, whose military still runs illegal "safe houses" where "suspects" are tortured, or Kenya, whose government's commitment to constitutional reform is, at best, wavering, have the moral authority to "judge" Rwanda's commitment to similar principles? There has been a suggestion that a clean bill of health by the African Peer Review Mechanism (APRM) would suffice as a more objective measure of suitability to join the EAC.

(c) the establishment of an export-oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology;

(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.

Thus, not only do the partner states repeatedly commit themselves to actively practise and promote the above tenets in the most obligatory language ("shall"), they also commit themselves:

- To the maintenance of universally accepted standards of human rights; and
- To apply the provisions of the African Charter of Human and Peoples' Rights as the human rights standards.

In order to ensure constant observance of the above provisions, Article 11 (functions of the summit) provide, in sub-article (3) that:

(3) The Summit shall review the state of peace, security and good governance within the Community and the progress achieved towards the establishment of a Political Federation of the Partner States."

The Procedure to be employed to achieve the recognition, promotion and protection of human and peoples' rights

The EACT enables any East African citizen or group(s) of citizens to directly approach the summit, council of ministers, EALA or the secretary general. This could be by way of memorandum or letter (open or limited circulation), public hearing or any other appropriate advocacy tool. The EACT also provides for references to the EACJ by partner states[237], the EAC secretary general[238] or by any legal or natural person[239]. Its specific wording is:

30. Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may 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

237 Article 28, EACT.
238 Article 29, EACT.
239 Article 30, EACT.

that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

Thus, one can make a treaty interpretation reference application to the EACJ in a similar manner to a constitutional reference application to the national courts. This territory, however, remained uncharted in the course of 2004, and East Africans are challenged to explore it.

The East African Legislative Assembly

Subsequent to the signing of the EACT, the EALA was formally established and launched in 2001. The EALA comprised 32 legislators – with nine legislators "elected"[240] from each of the three partner-states as well as five ex officio members, being the three partner states' ministers in charge of the EAC[241], the EAC secretary general (Hon. Nuwe Amanya Mushega) and counsel to the EAC (Hon. Wilbert Kaahwa).

Since its inauguration, EALA has held several sittings as a Plenary in Arusha, Kampala and Nairobi. During these sittings, EALA has:

- Adopted its Rules of Procedure;
- Elected the speaker of the Assembly[242];
- Recommended to the council of ministers the appointment of the officers of the assembly;
- Approved the budgets for EAC for the 2002/2003, 2003/2004 and 2004/ 2005 financial years;

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240 The term "elected" is used here advisedly since the 27 legislators were really selected or nominated by the national legislatures, rather than through direct elections with the respective electorates. The national Legislatures did not really consult or involve any other stakeholder. (See Ang'ila F., 2004, *Processes for Elections to the East African Legislative Assembly*, Nairobi: Friedrich Ebert Stiftung.

241 In the course of 2004, these were:
- Kenya: Hon. Stephen Kalonzo Musyoka, minister for foreign affairs and international co-operation, until the last quarter of the year when Hon. John Kipsang' arap Koech was appointed minister for the East African community and regional co-operation;
- United Republic of Tanzania: Hon. Jakaya Mrisho Kikwete, minister for foreign affairs and international co-operation; and
- Uganda: Hon. James Wapakabhulo, minister for foreign affairs and international co-operation (who passed away in the third quarter of the year), and Hon. Tom Butime who replaced him.

242 Hon. Abdulrahman O. Kinana.

- Asked the council of ministers over 30 questions, which were duly answered;
- Adopted over 6 Resolutions;
- Held seminars on a wide range of issues in relation to their mandate;
- Organised several meet-the-people-tours within the region; and
- Passed at least 8 Bills into law.
- The committees have continuously met; been briefed by the secretariat and given advice with regard to progress in the implementation of the Treaty; deliberated and tabled reports which were adopted by the plenary; and initiated and scrutinized Bills referred to them.[243]

The following had been passed by the assembly by the end of 2004:

	Act	Assented to?
1	The Community Emblems Act, 2003	Yes
2	The East African Legislative Assembly (Powers and Privileges) Act, 2003	Yes
3	The Acts of the East African Community Act, 2003	Yes
4	The East African Community Appropriation Act, 2002	Yes
5	The Laws of the Community (Interpretations) Act, 2003	Yes
6	The East African Community Appropriation Act, 2003	Yes
7	The East African Community Appropriation Act, 2004	Yes
8	The East African Community Customs Management Act, 2004	Yes

243 Text excerpted from the assembly's web site (http://www.eac.int/eala)

In addition, the East African Trade Negotiations Bill, 2003, initially tabled as a Private Members' Bill, had already gone through the first reading. However, the council of ministers then sought to take it over, and it had not been brought back to the assembly by the close of the year. In the course of 2004, the following Private Members' Bills were introduced in the House:

- The Inter-University Council for East Africa Bill, 2004;
- The East African Community Budget Bill, 2004; and
- The East African Community Immunities and Privileges Bill, 2004.

As with the East African Trade Negotiations Bill, 2003, the above Bills had not progressed much by the close of the year. Even more perturbing is that it is very difficult for East Africans to obtain copies of bills or laws tabled before or passed by the EALA. The EAC does not have its own printing facility; having to rely on the partner states' government printers. These latter agencies are seldom able to satisfy even their own domestic demand for partner states' laws, policies and other publications and, as such, they are manifestly incapable of meeting another layer of "regional" demand. Whereas some of the partner states' legislatures have taken the progressive step of publishing their laws and bills on their web sites, the EAC has, thus far, only managed to publish the Treaty and not more than three protocols on its own web site.[244]

Shortly after its inception, the assembly established seven standing committees which serve for a two-and-a-half year term. The first committee "term" for the inaugural assembly ended and new committees were appointed on 1 June 2004. These were[245]:

244 http://www.eac.int

245 Arranged in alphabetical order.

	Committee	Chairperson
1	Accounts	Hon. Said B. Jecha
2	Agriculture, tourism and natural resources	Hon. Wanyoto Lydia Mutende
3	Communication, trade and investment	Hon. George Nangale
4	General purpose	Hon. Rose W. Waruhiu
5	House business	Hon. Abdulrahman O. Kinana (EALA Speaker)
6	Legal, rules & privileges	Hon. Med Kiwanuka S. Kaggwa
7	Regional affairs and conflict resolution	Hon. Lt. General Adan Abdullahi

As already noted, by the end of 2004, EALA had only passed bills brought to the house by the "executive" arm of the regional government (i.e. the council of ministers and the secretariat.) None of the three bills[246] tabled by individual members had gone beyond the first reading. This may be due partly to the fact that EALA (as well as EACJ and the EAC secretariat) are chronically underfunded and understaffed. The national governments are content to grant sufficient resources to pay salaries and other emoluments, hold the formal sessions and perhaps for some regional travel, but not sufficient to cover the research, documentation and developmental work for enabling the legislators to translate their intentions into tangible laws and policies that reap positive and practical benefits for the people of East Africa. The organised private sector and civil society within the region have been exhorted to engage the EALA more proactively and innovatively: whether in its full plenary, or with the various committees, or even with individual legislators who may be more proximate. These bodies should engage the EALA to catalyse and stimulate discourse and

246 These were: The Inter-University Council for East Africa Bill, 2004; The East African Trade Negotiations Bill and The East African Community Immunities & Privileges Bill.

ultimately law and policy-making on matters of interest to them. It is also clear that budget literacy and budget advocacy should form an integral part of future capacity- building initiatives for the private sector and civil society, both at national and regional levels.

The Secretariat, the Council of Ministers and the Summit

The secretariat has been the most vibrant organ of the community, serving the summit, council, sectoral councils, co-ordination committee and sectoral committees and convening meetings of several groups of law and policy-makers from the three partner states.

It has, for example, played a crucial role in the conclusion of several protocols to the EACT. Protocols concluded by the close of 2004 included:

	Name	**Date of Conclusion**
1	Protocol on Combating Drug Trafficking in the East African Region	13/01/2001
2	Protocol on Standardisation, Quality Assurance, Metrology and Testing	15/01/2001
3	Protocol on Decision-making by the Council of Ministers	21/04/2001
4	Protocol on the Establishment of the Inter-University Council for East Africa (IUCEA)	13/09/2002
5	Protocol for Sustainable Development of the Lake Victoria Basin	29/11/2003
6	Protocol on the Establishment of the East African Community Customs Union	02/03/2004

The Protocol for Sustainable Development of the Lake Victoria Basin deserves special mention since it came into force in December 2004 upon completion of the ratification processes by the three partner

states.[247] It spells out the objectives and areas of envisaged co-operation, and establishes a "body for the sustainable development and management of the Lake Victoria Basin to be known as the Lake Victoria Basin Commission."[248] This is a positive development since the lake and its basin is the most prominent shared resource among the three partner states. In fact, if one views the lake, its basin, the River Nile and its valley as one unit, then together they form the most prominent shared trans-national resource north of the equator, stretching all the way to the Mediterranean Sea and intimately tying together at least nine states.[249] Hence, the lake basin forms a good piloting and testing ground for real, practical, people-to-people regional co-operation and integration. It is perhaps for this reason that the Lake Victoria basin was identified by the EAC as a priority economic growth zone as early as 1999.

The commission, once fully fledged, will inherit: -

- The Lake Victoria Development Programme (LVDP) Unit that has existed under the EAC secretariat;
- The Lake Victoria Fisheries Organisation (LVFO), currently based in Jinja, Uganda; and
- The Lake Victoria Environmental Management Programme (LVEMP) (of which the first phase has been concluded successfully, and of which the second phase should commence soon.)

All these are positive developments for the region, in that the entire governance and management of this vast resource will now be brought under one roof, and will be closer to the people who live on – and survive off – it. It also provides East Africans with an opportunity to deliberate and enact region-wide modern water and environmental

247 Ref. Article 151, EACT on the process of formulation, conclusion and ratification of protocols.

248 Article 33 of the Protocol.

249 The Lake Victoria basin encompasses five countries: Burundi, Kenya, Rwanda, Tanzania and Uganda. The Nile Valley encompasses the following countries, which are all members of the intergovernmental agency known as the Nile Basin Initiative: Burundi, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania and Uganda. Eritrea and Djibouti have observer status.

laws and policies. It also affords East Africans a platform to jointly renegotiate the contentious Nile Treaties as a unified bloc.

At the same time, the partner states signed a protocol establishing the East African Community Customs Union – after much discussion and last-minute hitches – on 2 March 2004, and ratified it in December 2004. Also enacted were a number of annexes to the Protocol, key among them:

- The EAC Common External Tariff;
- The Programme for the Elimination of Internal Tariffs;
- The EAC Rules of Origin; and
- The EAC Safeguard Measures.

The Customs Union came into force on 1 January 2005, and will inevitably change life, society and the economy, as we currently know it, profoundly. The Customs Union was adopted as the major milestone and starting point for intensive regional integration, leading on to a common market, a monetary union and, ultimately, a political federation.

On the basis of the Protocol, the EALA enacted (and the summit assented to) the East African Community Customs Management Act, 2004, in December 2004. The Customs Union commenced operations on 1 January 2005.

The key elements of the customs union are:

- Implementation of a three-band common external tariff (at 0% for primary raw materials, essential drugs, medical equipment, plant and machinery, agricultural goods and other special goods which were already exempted; 10% for intermediate goods/inputs; and 25% for finished goods);
- Elimination of internal tariffs (over a five-year period, based on the principle of asymmetry); and
- Establishment of a directorate of customs at the EAC, headed by a director general of customs and trade[250], whose mandate it will be to initiate, co-ordinate and monitor policy on customs and related trade matters in the EAC.

250 The Director General of Customs and Trade at the EAC is Mr. Peter Kiguta, a Kenyan economist who has worked at the EAC for several years.

While the customs union is of immediate benefit to industrialists and business people, it is hoped that its obligation to simplify customs procedures at borders will ease travel and movement of East Africans between borders, and also make it easier for small traders and artisans to transact across borders.

The council of ministers had resolved that, once the customs union came into force, one of the next key milestones would be the negotiation and conclusion of a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence, which is provided for in Article 104 of the EACT. They envisage that this would come into force by early 2007.

There is a significant school of thought that membership in multiple regional economic communities is at worst impossible and at best difficult to implement. Kenya and Uganda are members of COMESA[251] while Tanzania is a member of SADC.[252] A different – albeit smaller – school of thought posits that one can manage dual (if not multiple) memberships, so long as the states-parties deal with implications of unfolding commitments in each of the regional economic communities and strive to harmonise their various obligations in both negotiation and implementation. Whichever way one looks at it, there is definite need for harmonisation and rationalisation between the policies and economic programmes of the various regional economic communities that the EAC partner states are members of.

Finally, in this section of the chapter, there is need to focus the committee on fast tracking the East African federation. On 28 August 2004, the EAC heads of states, at a special summit held in Nairobi, Kenya, established a committee:

251 Tanzania opted out of COMESA a few years ago, but there is now a strong lobby, driven by some Tanzanian manufacturers and business-people, for rejoining COMESA. They complain that they are losing more than they are gaining by being out of it.

252 Tom Ojienda (lawyer, law lecturer and member of the governing councils of both the Law Society of Kenya and the East Africa Law Society) has recently written an exploratory article on the East African Customs Union that compares it with the Southern African Customs Union (SACU).

> to examine ways and means to expedite and compress the process of regional integration so that the ultimate goal of political federation is achieved through a fast track mechanism.[253]

The EAC Fast Tracking Committee, as it was commonly referred to, consisted of:

- Hon. Amos Wako (Kenya) - chairman of the committee;
- Prof. Haidari K. Amani (Tanzania) - vice chairman;
- Dr. Ezra Suruma (Uganda) – secretary;
- Ms. Margaret Chemengich (Kenya) - associate member;
- Prof. Sam Tulya-Muhika (Uganda) - associate member; and
- Mr. Mohamed Fakih Mohamed (Tanzania) - associate member.

The committee traversed East Africa and held consultations with and received memoranda, submissions and views from a diversity of East African individuals and institutions. They also held a number of brainstorming sessions with groups of experts and academics. Manifestly, the time and opportunity allowed to East Africans to interact with the committee was short, perhaps due to the relatively short time that the committee was given to collate views and ideas and report back to the summit.

Ultimately, it presented its Report of the Committee on Fast Tracking East African Federation to the heads of states, at their ordinary summit, held in Arusha, on 26 November 2004. In receiving the report, the summit echoed the views of many East Africans, that a strong federation was only possible if the people of East Africa were comprehensively consulted and involved, and if they owned the federation themselves, "through effective and informed participation from the very beginning of the process up to the end."[254] They noted, however, that the principles of acceleration and federation are "warmly welcomed by the people of East Africa who need it sooner rather than later."[255]

253 Communiqué released by the summit on 28 August 2004, (http://www.eac.int/) on 18 October 2004, 11.00

254 "Summit reaffirms vision of Federation: Will of the People of East Africa to prevail", in *The Community – Magazine of the East African Communit*y, Issue 3, June 2005, p. 1.

255 *Ibid.*

Contemporary Societal Developments

As has been alluded to above, there were no significant developments among the rank and file citizenry with regard to the EAC in the year 2004. The sole attempt at interfacing with the citizenry was through the EAC fast tracking committee (the Wako Committee). But, perhaps because of the brevity of its mandate (in terms of time), even this committee interacted mainly with organised and prominent private sector and civil society organisations. Thus, the only significant societal interaction with the EAC in 2004 was through the private sector and civil society.

Private Sector and Civil Society in the East African Community

In 2004, a number of civil society and private sector institutions were active at the regional level. These included:

- The Association of Professional Societies in East Africa (APSEA);
- The East African Business Council (EABC);
- The East African Communities' Organisation for Management of Lake Victoria Resources (ECOVIC);
- *Kituo cha Katiba;*
- The East Africa Law Society;
- East African Magistrates' and Judges' Association (EAMJA);
- The East African Human Rights Institute (EAHRI); and
- The East African Support Unit for NGOs (EASUN).

These (and other) organisations undertook research, publication, training and dialogue activities for their members, stakeholders and/or the public at large; lobbied or engaged in advocacy with the national and regional governments; and also engaged in networking with each other, with other East Africans and sometimes with stakeholders or institutions further afield. Many intervened in or interacted with the Committee on Fast Tracking East African Federation in the process of negotiating, concluding and unveiling the East African Community Customs Union.

There were attempts by a number of civil society players to revive the moribund Non-Governmental Organizations' Coalition for Eastern Africa (NGOCEA), which had been established a few years previously. These efforts were ongoing at the close of the year.

Meanwhile, a number of East African civil society institutions formed the Regional Integration Civil Society Network for East Africa (RECINET), whose main objective is to create knowledge and collaboration networks amongst East African civil society organisations (CSOs) that are working on/interested in regional integration. The Network held a meeting/workshop with the East African legislative assembly in Nairobi in April 2004, and a number of other planning/confidence-building activities in the course of the year.

The emergence of a strong and vibrant regional civil society is vital if East Africa is to achieve its ambitious goals of a community that is economically prosperous, and in which constitutionalism, democracy and good governance, a just rule of law and an efficient and efficacious administration of justice are the norm; and in which the human rights of all peoples (especially social, economic, cultural and developmental rights) are observed, respected, protected and promoted. To that end, emergent regional institutions – as well as national and sub-national institutions with a regional agendum – must ally with each other to have a positive impact on the unfolding new world. They need to share information and initiatives, offer each other solidarity, support, networking and partnerships, and even formulate joint advocacy or action plans. The more professionals, entrepreneurs, civil society and other groups of citizens associate at the East African level, the faster this region will begin to acquire a meaningful East African identity.

The East African Community in a wider context

The core of the EAC (Kenya, Tanzania and Uganda) has been a relative bastion of peace.[256] These countries are, however, in the vortex of one

256 This is apart from Kenya's "tribal clashes" in the 1990s; Tanzania's political violence in Zanzibar in January 2001 and thereafter; and Uganda's 18-year war in the north.

of the most sustained, violent and complex conflict systems in the world. Virtually each and every one of the other states in the larger Eastern Africa region has been – or still is – at war: with itself or with its neighbours.

In 2004, Somalia began the year as a failed state. There were, however, commendable efforts, commenced by neighbouring East African states to resolve the conflict. By the end of the year, not only had peace agreements been signed, but a transitional president, parliament and government had also been elected. What remained was for that young government to relocate from Kenya and set up in Somalia.

Ethiopia and Eritrea have conducted a searing border dispute, characterised by an uneasy peace and often conflagrating in war. In the course of the year, the uneasy peace continued, although with disturbing rhetoric from political leaders on both sides. A binding decision on border demarcation by a United Nations-appointed tribunal – which was meant to be final – remained unimplemented, since Ethiopia refused to accept it.

Sudan had been at war for almost twenty years, pitting the government and militia in the (mainly Muslim) north against rebels/ freedom fighters from the (mainly Christian or traditionalist) south. Sustained efforts at resolution, in which Kenya and Uganda were key facilitators, bore fruit with the signing of a comprehensive peace agreement in December 2004. The crucial year in implementation of the provisions of the peace accord was 2005. The agreement was to include incorporation of the Southern Sudanese Liberation Movement into the national government, as well as the establishment of self-government in the south. Unfortunately, another war, which the United Nations has characterised as the world's worst humanitarian disaster, broke out in the west, in Darfur, again pitting government-backed Muslim militia (the Janjaweed) against the region's indigenous populations. This caused consternation, not only within the East African region, but

also at the African Union and the United Nations, with some states/ observers terming it as "genocide." The AU and the UN were keen to take a central role in addressing the matter of Darfur.

Rwanda continued to make appreciable political and socio-economic progress in the course of 2004, following its experiences of genocide in the early to mid 1990s. Among other things, it submitted itself as one of the four pioneering states to undergo the African Peer Review Mechanism (APRM).[257] The world, especially Africa, is hopeful that this peace will be sustainable in the long run. Meanwhile, the prolonged and beleaguered peace process in Burundi trudged on, steered by the former deputy president of the Republic of South Africa, Mr. Jacob Zuma. Nationwide elections were scheduled for 2005. Similarly, the situation in the Democratic Republic of Congo (DRC) had not attained normalcy. Nevertheless, the transitional government of national unity, which incorporated most of the opposing factions was in place, and was working towards a new national constitution, followed by elections.

These conflicts undoubtedly have had – and will continue to have – grave social, cultural, political and economic ramifications for the EAC member states. The states have to host huge numbers of refugees and asylum-seekers. The porous borders, coupled with the proliferation of armed insurgents and small and light weaponry have contributed to instability and insecurity in the region.

The EAC partner states' governments have dedicated significant resources to the various peace processes in the region. Pertinent questions in this regard include an exploration of what role the East African citizenry, including its civil society can play in conflict resolution and socio-economic reconstruction in the Horn of Africa and the Great Lakes region. How can the considerable human and intellectual resources of the faith-based movements, civil society and the private sector be leveraged to promote peace, justice, conflict

257 The other three pioneering states were Ghana, Kenya and Mauritius.

resolution and the just rule of law as a strong basis for economic stability in the region?

Already, a number of East Africans are participating in the redressing of the Rwandan genocide, in various capacities, at the UN International Criminal Tribunal for Rwanda (ICTR). Several others advise and represent institutions and corporations participating in the reconstruction of, at least, the Rwandan and South Sudanese economies or provision of relief, humanitarian, development and ancillary services. Many more may be required – at least in Southern Sudan and Somalia –to reconstruct central and local government and the civil service, and to empower and strengthen civil society in those areas. Ultimately, the response of East African citizens and civil society to the challenges and needs of the larger Great Lakes and Horn of Africa region remains an open question that begs discourse.

Tentative Proposals for the Way Forward Regarding Constitutionalism in East Africa

Afro-Pessimism and Afro-Cynicism

Many Africans, especially intellectuals, are quick to dismiss or pour cold water on any emerging initiative to address African problems. Almost as soon as an idea – such as NEPAD – is mooted, the nay-sayers, doomsday prophets and armchair philosophers go into over-drive, criticising and prophesying that it cannot succeed. Indeed, no idea is perfect at inception. Also, granted, often, the impetus for change or development could have been externally inspired, especially in the increasingly wired world or global village. But that in itself may not be a good enough reason to dismiss wholesale, and with a casual wave of a hand, an idea that the people can appropriate, adopt, adapt and improve from the inside. Almost every continent and subcontinent in the world has a regional or continent-wide co-operation or integration initiative. It has become part and parcel of international relations and socio-economic development. It is a potentially powerful way

of harnessing and consolidating gains, and staying afloat in an increasingly competitive world.

The EAC that had existed in one form or another since the beginning of the 20th century collapsed in 1977. The Organisation of African Unity (OAU), which was founded in 1963, also did not meet all of its lofty ideals, especially as regards fostering peace, stability and democracy on the continent. African – and other developing – states underwent severe ideological and socio-political turmoil in the 1960s, 1970s and even 1980s. Nevertheless, there has been significant change and progress since then. There are millions of more educated and informed Africans than was the case before. Bold African innovators and entrepreneurs are venturing into virtually every nook and cranny of human enterprise. Independent and vibrant civil society, an idea that did not exist in the Africa of the 1960s and 1970s, has taken root, sprouted and is growing from strength to strength all over the continent. East Africa is a good case study of the metamorphosis and potential strength of civil society. This civil society, as well as African intellectuals, professionals and other educated persons, have adopted and adapted the monumental revolutions in the information and communications technologies (ICTs) arena, in order to learn more, communicate more, collaborate more, do more. They are more aware, more capable and more involved in their governance and their development than they were ten, twenty or thirty years ago. If they engage, they are more likely to assure achievement of the lofty ideals of the 1960s than their predecessors ever were. East African citizens, intellectuals and the diversity of for-profit and non-profit organisations must engage the EAC more optimistically, proactively and robustly in years to come.

Networking within Civil Society

Several international, regional, national and community-based institutions, as well as individuals, are interacting and collaborating with various organs, agencies and officers of the EAC, in various

ways. In many instances, the respective institutions and individuals do not know each other, or what each is pursuing. This could have a number of effects:

- Similar objectives are pursued separately, when combining forces (or at least knowing who else is doing what) might produce faster, more comprehensive or more efficient results;
- Each institution or individual has to learn the ropes from first principles, thereby unnecessarily reinventing the wheel, when they could have learnt from each other. This wastes the time, energy and resources of these stakeholders as well as the various EAC organs, agencies and officers, who/which are already quite stretched;
- Sometimes, stakeholders pursue contradictory or competing objectives, which may have been obviated – or at least harmonised or negotiated – had each known what the other wants; and
- Opportunities for consolidating a broad and deep body of knowledge and platform for engagement with the EAC are significantly reduced.

Some efforts have been made towards improving networking, sharing knowledge and consolidating objectives or activities by private sector and civil society organisations constellating around the EAC. These efforts need to be expedited. The regional caucuses of civil society could, for example:

- Identify the sectoral councils or committees of the EAC which may be their entry points, depending on their specific areas of interest or niche competence;
- Similarly, identify EALA committees which may be their entry points; and
- Identify precedent-setting cases fit for the EACJ.

Budget Literacy and Budget Advocacy

Several stakeholders – as well as EAC officers themselves – have lamented that the EAC is under-resourced in human, financial and technical terms.[258] The partner states do not allocate enough resources to enable the organs of the EAC, especially the assembly, the court and the secretariat, to undertake their mandates effectively and accomplish

258 See, for example, the East Africa Law Society's memorandum to the EAC Fast Tracking Committee, presented 21 October 2004 (http://www.ealawsociety.org)

tasks which, ironically, are demanded of them by the same partner states. Even after the partner states have allocated resources to the EAC in their annual budgets (unveiled each June), these are disbursed in *ad hoc*, piecemeal instalments throughout the year, a practice that is clearly inconvenient and counter-productive to the EAC. This is despite the fact that East African citizens and other stakeholders have put the EAC organs – especially the assembly, court and secretariat – under uncompromising scrutiny, as they wait to see the practical, tangible benefits of regional integration.

East African citizens and institutions should analyse and monitor the budgetary processes of the EAC more comprehensively, asking themselves:

- What are the stages in the negotiation processes for the EAC budget, and what opportunities – if any – are afforded to the various organs, and to civil society and the private sector to contribute?
- How much is actually allocated to the EAC by the partner states?
- Is it enough? If not, what can be done to ensure that the partner states allocate enough resources to the EAC?
- How much is allocated to the EAC – in grants or loans – by bilateral and multilateral institutions and partners?
- What practical financial sustainability measures can the EAC undertake on its own?
- What financial, material or other contributions can East Africa's private sector and civil society make to the EAC?

This analysis will entail formulating and implementing budget literacy and budget advocacy programmes. It will be useful since the same focus is required at national and community levels.

Public-Private Partnerships for the EAC

Article 127 of the EACT obligates the partner states to provide an enabling environment for the private sector and civil society to take full advantage of the EAC. It specifically requires the formulation of strategies to achieve this. Paragraphs (3) and (4) therein articulate:

3. The Partner States agree to promote enabling environment for the participation of civil society in the development activities within the Community.
4. The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.

It is important to focus on the core obligations of the various organs, agencies and offices of the EAC, especially towards civil society and the private sector. What has not been sufficiently explored is what East African individuals and institutions can do for the EAC project, bearing in mind that the EAC is resource-strapped. Further, even if advocacy to ensure greater budgetary allocations from the partner states is successful, those partner states are themselves ultimately cash-strapped, and do not have enough resources to fully meet their obligations to their citizenry.

Civil society and the private sector need to innovatively explore practical ways for helping to advance East African regional integration. Some examples already exist:

- Publishing and disseminating the laws, policies and other documents of the EAC, including in their full-text form, popular/ pocketbook versions, local language translations, illustrations, posters and booklets. The pioneer in this endeavour was Kituo cha Katiba, which published a simplified pocket version of the EACT as early as 2003. In the course of 2004, the East Africa Law Society published the East African Court of Justice's Procedural and Arbitration Rules.[259] By the end of the year, the court had not published the said rules in any form; thus the EALS publication remained the only source of those rules. Similarly, a private company, Lawafrica Publishing Limited, has been publishing and commercially distributing the East Africa Law Reports, in print, CD-Rom and online (internet) versions. Article 126(2) (c) of the Treaty obliges the EAC to "revive the publication of the East African Law Reports or publish similar Reports (and) Journals (…)."

259 In its Compendium of Codes of Legal Practice, Conduct, Ethics and Etiquette in East Africa.

- Holding training workshops and dialogue fora for East Africans to learn about and contribute to the EAC, such as have been convened by, among others, Kituo cha Katiba, East Africa Law Society, East African Communities' Organization for Management of Lake Victoria Resources (ECOVIC), etc. Several of these have been co-hosted with the EAC or the partner states' governments. In other instances, key EAC and partner states officials have been incorporated as trainers, facilitators or guests.
- Carrying out training and trade promotional activities for East African entrepreneurs and traders, such as has been undertaken by the East African Business Council (EABC) and the EAC Jua Kali/ Nguvu Kazi informal sector exhibitions, that have been supported by a private company, British American Tobacco Ltd.
- Promoting research on issues germane to the EAC and regional integration, such as has been undertaken under the auspices of the Inter-University Council for East Africa,[260] the Economic and Social Research Foundation (of Dar es Salaam), and the African Centre for Economic Growth (ACEG), of Nairobi, among others.

These initiatives need to be replicated, and new, bolder ones explored. In the final analysis, it is these kinds of initiatives that will catalyse and sustain a vibrant, people-centred and people-driven East African Community.

260 An independent institution of the EAC.

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