DEMOCRACY AND CONSTITUTIONALISM

IN EAST AFRICA: TAKING CRITICAL STOCK

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I.

The Opening and the Closure

The post-cold war liberal model of democracy was swallowed lock, stock and barrel by a large majority of East African scholars, including its radical wing. As a consequence, ten years down the line, there is cynicism and skepticism across the social spectrum. The so-called "international community", to use the grossly inaccurate term for the Western hegemonic powers, is utterly disgusted with the performance of the "new" African democracies. If they continue to pay them lip-service, it is because they would not want to lose their recaptured backyard to the uppity Asian lion (China) or the South East Asian tigers. African politicians-in-power and the African masses did not take the promise of the new democratic El Dorado seriously, albeit for different reasons. While the power elite dragged its feet or made 'paper' reforms, the masses were sidelined as spectators of the unfolding drama of multi-party squabbles, rigged elections and doctrinal constitutional changes.

In East Africa, President Moi of Kenya once again proved to be the 'artful dodger', to the chagrin of his former Western backers. Nevertheless, Kenyans have proven their resilience. The discourse on constitutional review continues unabated. Moi has even appointed a Constitutional Review Commission under the chairmanship of a well-respected East African intellectual, Professor Yash Ghai.

More than discussing and debating, Kenyan intellectuals have risen to their traditional reputation of superb organizing. The NCEC (National Convention Executive Council), which manages to get together elected delegates numbering in hundreds from all over the country and from different walks of life to hold their assemblies, is no mean feat. Yet the debate remains frozen, primarily in the liberal constitutional mode. Their Ugandan counterparts are avowedly perhaps more of political

actors and less of patient organizers. Ugandan intellectuals, by and large, seem to ensconce their critical vision in the demand for a multi-party system of government. A substantial number of them remain in self-exile in the US and elsewhere having been part of the Diaspora during the Amin period, while Museveni endears himself to the Americans.

As a darling of the Americans, Museveni was able to stick to his 'no-party' guns until he turned his guns against a fellow American darling, President Kagame of Rwanda. Nonetheless, perhaps to the credit of his political Machiavellism, Museveni's was the only regime in this part of the world, which followed the textbook prescription of constitution making - a constitutional commission followed by an elected constituent assembly - to adopt Uganda's 1995 Constitution. This was a major departure from the East African tradition under which new constitutions were made through converting pre-existing legislative bodies into constituent assemblies, and thus fatally eroding their political legitimacy.

Yoweri Kaguta Museveni may not have the political charisma and charm of the person whom he considers his mentor, the late Julius Kambarage Nyerere, but he has certainly learnt Mwalimu's political lessons well. While conceding a constituent assembly, Museveni played his decisive cards close to the chest. The Constituent Assembly (CA) was free to decide anything, including an elegantly crafted bill of rights, except to reinstall kingdoms or multi-party system. If they did dared to, Museveni empowered himself to call a referendum over the heads of CA delegates. In the event, that possibility never came to pass. Everyone knew, including the erstwhile delegates, that Museveni would win a referendum, if not by hook then certainly by crook. (Indeed, in a later referendum and 2000 Presidential elections, Museveni proved himself as adept at the ballot box in demolishing his former friends-turned-rivals, as he had proved with the bullet, when his former-comrades-turned-challengers dared confront him.) Just as Julius Nyerere could not stand being outshone by an intellectual-politician, so Yoweri Museveni would not brook Kizza Besigye's-moves on the political chessboard. He would rather sweep clean the chessboard itself than surrender even a single pawn. Besigye now finds himself in exile.

The introduction of a multiparty system in Tanzania was an entirely different ball game, thanks to Nyerere's "fatherhood". Mwalimu's political virility could steer the return to multipartism in 1992 with relative ease, just as it had spawned the one-party system a generation ago – and still remain the father of the nation! Astute as he was, Nyerere saw the writing on the wall. Multipartism was

inevitable. The rehabilitation of Western imperial hegemony (after the colonial wars of liberation) would ensure it. The masses too were desperate. The more articulate among them would grab the liberal opening to put people's democratic demands on the agenda, whose outcome no one could predict. Contributions by the people in villages and elsewhere before the Nyalali Commission left no one in doubt that the nation across the board was crying out for a fundamental democratic change beyond multiparty. An anecdote will suffice to make the point.

The Nyalali commissioners typically heard a host of grievances and problems narrated by people, particularly in the rural areas, which ranged from shortage of medicine in dispensaries to the grabbing of village land by parastatals and investors. In one such meeting, an elderly peasant stood up, (perhaps typically spit on the side and leaned on his walking stick), and began a long harangue on the problems that villagers face. At the end, he rhetorically asked, 'Honourable commissioners, you have asked us: what do we want, single party or many parties? Of course, single party. With one party we have so many problems, with many parties, we'll have double the problems!" 80 per cent of Nyalali's sample wanted one-party yet the Commission recommended multi-party and the National Conference of the ruling party 100 per cent voted for multiparty.

The Nyalali commission reasoned that although the large majority sampled wanted single party, it was also true that the kind of changes that the majority was demanding could only be effected in a multi-party system. Call it non sequitur, naïve or politically expedient, what is certain though is that, like their appointing authority, the Nyalali Commissioners had already made up their mind to recommend multiparty. What is also certain is that the Commissioners singularly failed to understand that the old man who wanted single party was rejecting the idea of parties, but not the phenomenon of democracy. This becomes clear when one examines the evidence given by villagers to another Presidential Commission on Lands, which was holding public hearings during the same time as the Nyalali Commission. There the overwhelming battle cry of the people was that they had not been involved ("*hatukushirikishwa*") in the decision-making processes on the allocation and use of land. They were demanding to be involved, to be consulted, in short they were demanding democracy! By swiftly introducing multiparty at the stroke of a pen, Nyerere pre-empted the development of a debate and deeper discourse on the meaning, content and a bottom-up struggle for meaningful democracy.

Stuck in the constitutionalist mode, East African intellectual discourse seems increasingly sterile and fruitless, leading to despondency among intellectuals and despair among activists. Yet East African intellectuals, including lawyers, who are not otherwise known for intellectual profundity, have a rich tradition of interdisciplinary thought, critical outlook and deep commitment to the exploited classes and oppressed masses. Why then in the democracy debate, which was undoubtedly an opening to spearhead a sustained discourse on the future of our societies, is proving to be a closure on deeper reflection and critical understanding of our societies? Why have our debates tended to go round and round the same doctrinal principles of constitutionalism and liberal models of democracy without querying whether these principles and models have a real relevance to our societies? For an answer we need to turn the intellectual searchlights on ourselves!

II.

A note on the East African Constitutionalist Discourse

Lest we belittle ourselves and give credit to the devil where it is not due, let us refresh our memories that the discourse on democracy was not introduced and initiated by the West. It was part, albeit the tailend, of the great intellectual ferment of the 1960s and 1970s for which the campus of the University of Dar es Salaam was well known. And this was not a Tanzanian affair only. It was East African. (Many a leading intellectual light of East Africa today, including a president and ministers, traces his/her intellectual antecedents to "the Hill," as the University of Dar es Salaam campus was fondly known.) On the occasion of the centenary of Marx's death in 1983, East African participants at a workshop in Dar es Salaam declared, 'The central question of the African revolution today is democracy.' And University students and faculty fired the first salvoes in the struggle for democracy and freedom to organise.

However, the discourse of the 1960s and 1970s had a distinct character and this is where one notices a curious disjuncture between it and the current constitutionalist discourse. The earlier discourse sought to understand our social order analytically and did not shy away from theory and theorising, in the belief that 'there is no royal road to science'. It prided in asking larger questions about our societies and social order: how did it get to be where it is, what does it do to those who live under it and in what direction is it moving? We used the methods of political economy and the approaches of historical materialism to interpret and understand our society with a view to changing it for the

better. We had a grand vision of building a humane society. We thought in epochal terms and painted our dreams on the broad canvass of whole humanity. We derided the compartmentalization of knowledge and a historical and asocial bourgeois law and social science. While agreeing with Marx that, 'Philosophers have only interpreted the world in different ways, the point is to change it,' we equally reminded ourselves with Amilcar Cabral that, 'if it is true that a revolution can fail even though it be based on perfectly conceived theories, nobody has yet made a successful revolution without a revolutionary theory.'

The constitutionalist and democracy discourse of the current period is fundamentally different. It eschews analysis and pooh-poohs theory. It is descriptive, prescriptive, eclectic, both in theory and practice, and politically hegemonic, where hegemonies are beyond intellectual enquiry, or, at least, not part of the mainstream discourse. Once upon a time, NGO activists used to say, 'Think globally, and act locally'. Nowadays, our erstwhile benefactors tell us, 'Don't think, only act - and we shall fund both!" But can we act without thinking? In what direction shall we act and for whose benefit? Aren't these precisely the questions that we, the intellectuals, are supposed to ask, address, think and theorise about? Yet the liberal discourse is intellectually debilitating. The NGO-human rights activity is singularly prone to draining militancy. The constitutionalist debate is pre-eminently accommodative and ultimately legitimises and preserves the status quo. This is not to say that all this has no place in any progressive struggle for liberation and emancipation. Yet, the point is to identify and recognise the place of any struggle for reform in the larger struggle for transformative change. For there is reform and there in reform. There is reformist reform and there is revolutionary reform. My point is that our current discourse is devoid of such social and political considerations, and devoid of, not only a grand vision, but also a definite theoretical direction.

I want to suggest that our current frustrations, despair and disappointments are partly inherent in the nature of our current intellectual discourse and lack of a vision grounded in a socially emancipatory project. The least that can be said, therefore, is that we need to revisit and deeply reflect, collectively as an intellectual body, on the liberal constitutionalist project.

III.

<u>The Contents</u>

The survey of constitutional developments in the three East African countries in the year 2000 richly documents important constitutional and electoral changes. They once again illustrate the hopes, fears and frustrations I have noted in this introduction. There are a few positive developments but significantly more setbacks. 'One step forward, two steps back' seems to be the norm in the countries of the region. Yet all steps - forward or backward - cry out to be interpreted, analysed and understood in relation to the larger trajectory of national liberation and social emancipation.

Tusasirwe on Uganda vividly shows the tension between a bold court and a timid, executive-dominated parliament. At the least, it is illustrative of a truism that a fine, professionally crafted constitution in itself can produce little by way of democratic polity, if the state itself is not democratically organised nor is the political economy supportive of democratic practices. The tug-of-war between the courts and parliament is perhaps a symptom of the larger question, the organisation and structures of our states in Africa.

For Kenya, Kioko's piece reinforces our faith in the people. That is a silver lining. Petty bourgeois intellectuals may despair and give up hope but the people have no choice. They continue to struggle for that is their mode of existence. But how do the struggles of the petty bourgeois relate to those of the people: What is the standpoint of such struggles, in whose interest and for whose benefit? Only such deeper questioning can get us out of the sense of impasse' and stalemate which has become so pervasive.

Mallya's piece on Tanzania shows the longstanding stubbornness of the ruling party there to reconsider the constitution generally, and in particular, the 35-year-old union between Tanganyika and Zanzibar. For the first time in the recent political history of the country, we had dozens of deaths in cold blood at the hands of the police on the island of Pemba. Signs of bloodletting by the recalcitrant police, particularly its paramilitary wing, the FFU (Field Force Unit), were already there when it killed four people at Mwembechai in front of TV cameras in 1998. Regrettably, no one was held accountable. The government stubbornly refused to investigate the incident.

The government tried to shove the constitutional question under the carpet by producing a White Paper and appointing its own committee under a Court of Appeal judge, Mr. Justice Kisanga, to co-ordinate the views of the "people" on the White Paper. The Committee's recommendations satisfied neither the people nor the rulers. The President of the Republic rejected Kisanga Committee's

recommendation that a federal structure with three governments deserved consideration with anger. Instead, we saw the introduction of the 13th Constitutional Amendment discussed by Mallya. Among other things, it brought back nominated members of parliament; did away with the necessity of 50% or more votes for the election of the President, thus opening doors for a minority president and, for the first time, defined "*Ujamaa na Kujitegemea*" ('socialism and self-reliance') in the interpretation section of the Constitution. By that definition, one would be hard put to find any country in the world, which does not swear by the policy of *"Ujamaa na Kujitegemea*"! Curiously, when *Ujamaa* was the actually existing state ideology, no one felt the need to define it. Now that it has been ditched, as everyone knows, the rulers feel the need to define it.

Maria Nassali in her detailed piece on the East African Community makes a clarion call for the construction of an East African Civil Society. A noble sentiment. But where are the forces to carry through such project. Pardon me for saying so, but the erstwhile world of FFUNGOS (foreign-funded NGOs) does not have a political vision, a coherent ideology backed by a robust theory or the stamina for protracted struggle to envisage such a project. NGOs agenda revolve around 'awareness raising' and 'human rights advocacy', all of which may be well-intentioned and good, but hardly a vision and a programme conducive to social emancipation and national liberation from the clutches of imperialism, rechristened globalisation. Just as you cannot bite the hand that feeds you, one cannot use the master's weapons to pull down *his* house!

The seeds for a people's conception of an East African Society were planted as long ago as 1937 when the militant trade union leader from Kenya, Makan Singh, formed the Labour Trade Union of East Africa. According to its constitution, one of the duties of its members was:

To attain class consciousness and for the betterment of the labour class to promote such class consciousness in others and never to miss an opportunity of gaining their trust. (Class consciousness is that stage when a worker begins to feel the difference between a capitalist and himself; when he comes to know that in fact he is being robbed by capitalists and when he begins to make propaganda against such robbery.)

Perhaps such a project was pre-mature and ahead of its time. Makan Singh's East African pretensions were nipped in the bud by the colonial state. The Labour Trade Union of East Africa never made much headway in Tanganyika and Uganda and became defunct until it was finally

removed from the register in the 1940s. We have perhaps to plant these seeds afresh in our own conditions . However, are we, the constitutionalist intellectuals, up to it?

IV.

Concluding Remarks: Once more, the 'Committment of the Intellectual'

In this discussion I have been assuming that there is a significant body of intellectuals in East Africa, in different disciplines and walks of life, who share a common commitment to the oppressed masses and exploited classes and who want to understand their society so as to change it to a more humane and rational social order. That is the minimum 'commitment of the intellectual' which I have taken for granted. If so, the issues I have been raising essentially interrogate not our commitment (which is assumed) but our current intellectual and activist work and whether our mode of operation, so to speak, correspond to our commitment.

We, therefore, need to reforge our theories and reconstruct our discourse from the standpoint of the oppressed masses and the exploited classes. We need to interrogate our constitutionalist, democracy and human rights discourse, theorise it, contextualise it and understand deeper social and political interests and the national and global contests which underlie it. For, needless to say, these discourses are historically constructed ideologies. And ideologies are contested paradigms, not absolute or eternal truths.

So while we survey constitutional developments and the state of governance and human rights in our countries, we should not lose sight of the basic 'commitment of the intellectual' and always find ways and means of operationalising our commitment in the specific historical and social context of our countries, societies and communities.

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THE STATE OF CONSTITUTIONAL DEVELOPMENT IN KENYA

Wanza Kioko[i]

INTRODUCTION

This report concerns itself with Constitutional Developments that took place in Kenya during the year 2000. The historical context of such developments is that the country has been going through constitutional reforms intensely since 1991. 1997 was a particularly active year and any developments since that time have had the effect of either building on or eroding the 1997 gains. In this way, 1997 marked a milestone in the country's constitutional history. The reforms passed by the Inter-Parliamentary Parties Group ((IPPG) were the genesis of the review process now underway. It is trite to conclude that although there were several positive constitutional developments during the year, there have also been major erosions, reversals and general developments that undermine the struggle for progressive constitutionalism in Kenya. The conduct of government mocked the constitutional review process through which Kenyans hoped to bring about a new political and moral order. Understanding this process is central to any analysis of constitutional developments in the year, although the report considers other issues and frontiers of constitutional development.

Another major conclusion of this report is that the attitude of the ruling elite to the constitution as an instrument of perpetuating and maintaining power, has not changed. This attitude has informed constitutional amendments in this country since independence. To quote Prof. Yash Ghai, "The constitution in practice is not seen as an empire above the political struggle, but as a weapon in that struggle which can be used and altered in order to gain temporary and passing advantages over one's political opponents.'[ii] It is an unfortunate view of the constitution because it continues to frustrate the dawn of a new Kenya. To make matters worse, it is the attitude of those that still want to scuttle the constitutional reform process.

The current need is to have the constitution facilitate the Moi succession. For instance, in February 2000, cabinet minister Shariff Nassir called for a constitutional amendment to bar Vice President George Saitoti from succeeding Moi for the interim period of 90 days before the country is able to elect a new leader.[iii] Similar calls have been made to amend the constitution to enable President Moi to rule beyond 2002 when his constitutional term comes to an end.[iv] This is to enable the

forces sympathetic to the ruling Kenya African National Union (KANU) benefit from the new constitutional framework.

The report notes with great concern the robust growth of private 'armies' (organized political gangs) during the year as they impacted negatively on the democratisation process and more specifically on political organization. Ethnic clashes and a general rise in violence in society aggravated their effect on democratisation and political organization. Their long-term effect, for example, as harbingers of state failure can not be credibly assessed now.

On political organization, this reports finds that Kenya's political parties have either witnessed zero or negative growth in 2000. Most of them are ethnic groups tightly controlled by small groups of persons. They are low on social ideology and high on ethnic chauvinism. They suffer serious intra-party wrangling and have not held any internal party elections. There is no internal democracy. The country's democracy would benefit immensely from properly functioning political parties. Ethnic chauvinism and lack of party democracy robs the electoral process of a vitality that would propel Kenya's democracy to greater heights.

There is continued vibrancy within the civil society, though fragmented, which limits their impact. The report cautions that there is great temptation to co-opt civil society by political parties. The civil society has a vital role to play in advancing constitutionalism in Kenya and should, therefore, resist attempts to be co-opted. Civil Society must remain distinct from political parties for the simple reason that political parties will always focus on capturing state power. They have an understandable knack to subordinate any higher ideals to the need for electoral victory.

On corruption, the Kenya Anti-Corruption Authority (KACA) was effectively abolished by the *Gachiengo* ruling.[v] There have been calls to establish a revamped KACA. This reports finds the re-establishment of KACA unnecessary with the observation that Kenya does not lack the institutional infrastructure to battle corruption. That KACA was a duplication of the mandate vested in the Attorney General's office and an unnecessary proliferation of institutions. What these institutions need is a re-orientation towards more prevention instead of prosecutorial duties. What is needed is the political will to fight corruption. It suggests that Kenyans look for a political solution to the struggle against corruption.

Since the establishment of the Parliamentary Service Commission, Parliament has attempted to assert itself. In the year 2000, members brought several motions and bills before the house in furtherance of human rights and democracy. However, until the political parties organize effectively, parliament will not serve as an effective check on the excesses of the executive. The report notes a failure by government to match political practice with the reality of a nation negotiating a new constitutional order. The government continued to violate key constitutional freedoms like those of assembly and association breaking recently passed pro-democracy laws. This shows that the country is yet to embrace the culture of constitutionalism.

Constitutionalism is a mode of state governance that belongs to the liberal democracy model. It is a system that ideally should guarantee government accountability to its people in very basic terms by ensuring periodic free and fair elections in a multiparty system and to limit the powers of the organs of state through a system of checks and balances and the separation of powers. This must include an independent judiciary. The Judiciary ensures that the government governs within the rule of law.[vi] Constitutionalism is about limited government. The basic question is whether the Constitution places sufficient limitations on state power; whether public affairs are conducted according to pre-determined rules; whether the manner in which the country is run is the antithesis of despotic power, autocratic and arbitrary rule. For it is trite to note that constitutions can create dictatorships.[vii]

In answering the question whether there were any constitutional developments in 2000, the report will use constitutionalism as the framework of analysis. It is noted that in terms of specific steps to achieve greater democracy, the year might not have recorded many developments. If anything, one may say the country marked time or witnessed major reversals on earlier developments like the hard won freedoms under the Inter Parliamentary Party Group (IPPG) package.[viii] What should be noted optimistically is the fact that the country engaged in intense constitutional debate whose gains may not be tabulated because they are not tangible.

THE REVIEW PROCESS

The process stalled for much of the year. This was occasioned by the stalemate that followed the establishment of the Parliamentary Select Committee (popularly known as the *Raila Group*). The group proposed the enactment of a law that would cure the problems that emerged from the Safari Park Process.

The Safari Park process had been put in place by the Constitution of Kenyan Review Act of 1997, as amended in 1998. The proposals of the group were later enacted into law in the Constitution of Kenya Review Act 2000. The 2000 Act watered down the key strengths of the Safari Park process. The Safari Park Process was strong on people's participation. It provided for district forums whose constitution was going to involve many people since all locations in Kenya would have sent three delegates - one woman, one youth and one other person - to the District forum. It was going to involve the clergy of the district and local members of parliament and councillors. The District forums had a strong civic education and mobilization mandate. The National Forum was also very strongly pro-people since all stakeholders identified in the Act were to be represented. Each district was to send one woman, one youth and one other person to the national forum. The review commission under the Act also comprised of nominees by the stakeholders named in the Act.

Under the 2000 Act, instead, the Parliamentary Select Committee made itself the appointing authority whilst giving the President the power of veto. District forums were scrapped and replaced with Constituency Forums whose manner of constitution is unclear under the Act. This was seen as fertile ground for rigging the process. The National Constitutional Conference was 'slender on power' since its resolutions had no binding effect and could therefore be vetoed by parliament.[ix] The *Ufungamano Group* found this unacceptable and constituted a parallel process. Each of the two groups threatened to carry on with the process to the exclusion of the other.

The latter months of 2000 were dominated by the Ghai-led negotiations to merge the two parallel processes. The tussle for the control of the processes continued. It was characterized by violence either by police or private gangs. The President in April 2000 declared that he would call in the youth to help if anyone organized mass action against the Parliamentary Select Committee.[x] This was a continuation of the private gangs such as *Jeshi la Mzee* that have continued to characterize the

negotiations over constitutional reform since 1997. A reluctant merger was achieved in early 2001. Whether this was positive or negative is not within the timeframe of this report.

All these events were taking place within the backdrop of the debilitating economic situation that has prevailed in the country to date. It was also a time of great political suspicion fueled by the new alliances forming around the Moi succession and the coming 2002 general elections. Demands were still being made that Moi state unequivocally that he was going to stand down when the time comes in the midst of mixed signals sent by the president about his retirement. President Moi has said more than once that he cannot see a worthy successor amongst the country's political leaders. On one occasion he said that it was up to Kenyans to decide whether his time was up or not.[xi] The president is ambivalent about this constitutional question and it would be crucial for him to indicate that he is leaving.

OTHER SITES AND ISSUES OF CONTISTUTIONAL DEVELOPMENT

PARLIAMENT

Historically Kenya's parliament has been subordinated to the executive. [xii] Since independence, the Kenyan government has been characterised by a very strong executive with an extremely powerful president at the helm. The year has witnessed attempts to further reclaim parliament's independence. These attempts were through mainly private members' motions, the most crucial being the attempt to build on the establishment of a Parliamentary Service Commission (PSC) in November 1999.
Some of the motions tabled before the house included the following:

1. A motion to abolish the death penalty was defeated in the house in September 2000. The government did not support it.
2. A motion for the enactment of an affirmative action law.[xiii]
3. A motion for the enactment of a Freedom of Information law.
4. A motion for the establishment of a Truth and Reconciliation Commission.
5. A motion to allow parliament to control its calendar. This was to strengthen the already established Parliamentary Service Commission. In November 1999 a law amending the constitution to establish the PSC received presidential assent. The new section 45B of the

constitution establishes the PSC. This motion followed key proposals by a Parliamentarians Seminar which proposed amongst other things: ·

- That the Power over the Parliamentary Calendar be removed from the President and re-vest in the PSC. ·
- To take over from the AG the powers of drafting new laws and prosecuting the powers of prosecuting people named and criticized in parliamentary watchdog committees. ·
- Prepare all financial estimates for approval by the house and establish a fund into which such committees shall be paid.
- The PSC to establish a tender board to deal with government contracts.[xiv]

If the proposed changes concerning control over the parliamentary calendar are finally passed, they would have removed a key power of the President to prorogue and dissolve parliament, a power that is critical to the subjugation of the legislature to the executive. This arrangement violates both the principle of separation of powers and that of checks and balances. For example, parliament lost a bid in December to override the President over the proroguing of parliament. The House wanted to discuss the entrenchment of the Constitution of Kenya Review Commission into the Constitution so as to cushion it from a KACA-like assault, which remains a potential weapon of those against the review process.[xv]

Parliament is yet to get a firm grip over financial issues. The reports of the Parliamentary Investment Committee (PIC) and the Parliamentary Accounts Committee (PAC) were ignored yet again. These two committees are the only opportunity parliament gets of checking government expenditure which is a key constitutional mandate for parliaments. This is the case because the abolition of the Estimates Committee by the IPPG reforms package meant that parliament only approves government expenditure after budgeting and with the help of very little information and therefore uninformed debate. It is also an opportunity to rein in governmental corruption. This is only possible if their reports are acted upon. Other parliamentary committees have however demonstrated a new assertiveness by summoning government functionaries to appear before them to explain their actions or omissions. Parliament is still far from being an independent organ of government.

Parliament as an arena for democratization. In the year 2000, parliament served more as an instrument of marginalization in the democratisation process than an instrument of change. By enacting the Constitution of Kenya Review Commission Act 2000, which, as explained above, further marginalised the Kenyan people from the centre of the review process, parliament took the country a step backwards. It significantly helped to erode a robust culture of broader participation in political decision-making that had begun to characterize the negotiations for a new constitutional order.

Parliament will not aid the democratisation process effectively because of structural limitations. Despite a multiparty legislature, the manner in which Kenya's political parties are organized has meant that policy formulation and agenda setting is still done under the shadow of political patronage. Patronage undermines the independence of the legislature for, if individual legislators are not independent and free from the shackles of a client-patron based political system, parliament cannot be independent. Patronage has survived a decade of multi-party politics because the people do not own our parties. They are financed by individuals who use them as personal tools to power or actually sell them to those that need political vehicles to power. This has meant that the party membership does not determine its leadership. The financier is the leader, or the financiers determine the party leader.

The resource deficiency is coupled with the ethnization of Kenya's multi-party politics where the elite style themselves as the big men/women of a tribe, form a political party as the vehicle to power of the sons and daughters of the tribe and also for negotiating with other tribal elite. This has meant that for one to win elections in certain regions, one has to be backed by the big man/woman of the 'tribal party'. It is therefore difficult for members of parliament to take independent positions and the party establishments do not have to capitulate and negotiate with them. One is, therefore, able to be a 'rebel' in one party, join another and still find his/her independence severely limited. The party establishments could be seen as one level of political operation where party distinctions are quite blurred. The scenario is such that one can easily 'pocket' the legislature if one offered adequate incentive (monetary or otherwise) to the tribal elite or the party financiers.

The above analysis, if correct, points to several possibilities:

1. Parliament can easily become a conveyor belt in which only the interests of the elite are taken care of through legislation thereby subjecting Kenya to a tyranny by the legislature. The current series of increments in the allowances of legislators has had some commentators warn of a possible parliamentary dictatorship.[xvi]
2. There is a possibility of a multi-party legislature with no opposition. Kenya could return to having a one-party legislature. The one party parliament is another way of emasculating the legislature.

These are dangers, though appearing farfetched, that every democracy must want to protect itself from. For parliament to be independent and play an effective role in Kenya's democratisation process without the threat of a return to authoritarianism, Kenya's political parties must organize on a different set of ethos. For this to happen, the government needs to reduce the cost of organization significantly by allowing the greater formation of civic groups and not fettering them by either demanding registration, where it is unnecessary, or denying them registration, where it is demanded, of such groups. One of the reasons why the parties have quickly embraced the tribe as the unit of organization is that the tribe is cheap to target and mobilize because it already exists. This is so in the absence of civic groups, whose work revolves around ideas, that forms the vision of the party and therefore would easily form the substrata for most of the parties. This state of the organizational life of Kenyans is due to years of repression during the one-party era. In a multi-party era this ought to change.

The parties also need state financing. Other countries have worked formulae for financing political parties, the most common being in proportion to a party's parliamentary presence. Ultimately, Kenyans have to fund their political parties. State funding can only be supplementary. Reliance on state funding would still mean that our parties will be grossly under-resourced and will therefore continue taking shortcuts at political organization. Further, parliamentarians need more support to set up secretariats and research units that would enable them to be more effective.

THE EXECUTIVE

The executive branch of the government pervades Kenyan political life. One key pillar of the executive is the provincial administration. This is a colonial heritage which, as has been argued, helps

to perpetuate dictatorship and helps in the rigging of elections. The provincial administration has been criticized for ruling Kenya's rural areas with an iron fist. Proposals have been made that the provincial administration be abolished. In March 2000, the permanent secretary in the Office of the President, Mr. Zachary Cheruiyot, announced that: ·

- The office of the Assistant Chief would be abolished and that the phase out would start in July 2000.
- Duties of District Commissioners (DCs) would be trimmed. · DCs would not collect any land board fees or other moneys.
- The office of the District Officer (DO) would be abolished.
- DCs will be appointed on the basis of their ability to resolve conflict.
- Chiefs and Assistant chiefs would not collect public moneys.[xvii]

These were hailed as long overdue changes though some argued that nothing short of abolishing the whole provincial administration would be satisfactory. The decision was to be quickly reversed by the Chief Executive, President Moi, when he announced that assistant chiefs and chiefs would retain their jobs. Instead of phasing them out, he proposed that they be trained to cope with modern Kenya.[xviii] He later said the number of District Officers would be reduced.[xix] This reversal was most unfortunate because Kenyans have been demanding some degree of local autonomy for quite some time. This is an issue that the current review process will have to address, in conjunction with the question of devolution of power.

THE JUDICIARY

Perhaps, one of the rulings of the High Court that will be long remembered after 2000 is the case of *Stephen Mwai Gachiengo and Albert Muthee Kahuria v Republic.[xx]* The High Court sitting as a Constitutional Court held that the Kenya Anti-Corruption Authority (KACA), as then constituted, was unconstitutional and therefore void in law. The facts of the case were that KACA instituted legal proceedings against two senior civil servants in which the two were charged with abuse of office.

The two made a constitutional application asking the Constitutional Court to determine:

- Whether it was unconstitutional and contrary to the principle of separation of powers for KACA to be headed by a high court judge;
- Whether the fact that the KACA director was a judge compromised the accused person's right to a fair trial before an impartial court under section 77(1) of the constitution;
- Whether the Attorney-General's consent to the prosecution is valid under the constitution;
- Whether the Act establishing KACA violated section 26 of the Constitution, which, according to the applicants, vests the power to prosecute solely in the Attorney General's office.

The court found that the fact that a judge headed KACA violated the principle of the separation of powers but this did not in any way prejudice the accused persons' right to a fair trial. It also found that the Attorney General's consent to the prosecution was invalid under the constitution and that the provisions of the Prevention of Corruption Act establishing KACA were unconstitutional as they purported to appropriate the power of the Attorney General to prosecute.

The ruling was a major setback not only in the war against corruption (to be discussed below) but also constitutionally. This was a clear case of the judiciary disregarding clear provisions of the constitution. The court's finding that the Attorney General is the only one vested with the power to prosecute is constitutionally delinquent. A reading of section 26(6) clearly shows that the constitution clearly envisaged that any body or person can prosecute. The section provides:

"The powers conferred on the Attorney-General by paragraphs (b) and (c) of subsection (3) shall be vested in him to the exclusion of an other authority: Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court. (Emphasis added.)

It is clear that section 26 envisaged prosecution by other authorities and persons in addition to the AG. It is unfortunate that courts can ignore clear constitutional provisions. This poses the danger that the text of the constitution in future may be ignored to serve certain interests. This is to say that

it might not be of any consequence how beautifully worded the constitution the review process may yield. The courts may still disregard the constitution.

THE WAR ON CORRUPTION

Corruption fetters democracy because it disenfranchises citizens and affects the efficiency of political organization. It hinders the capacity of democratic institutions to be of greater service to society and impedes institutional accountability. The Kenyan government is not as a whole accountable to the Kenyan people. Ten years of multi-party democracy have failed to yield accountability for the Kenyan people. Corruption was yet again a vexing national issue in this year. The *Gachiengo* ruling effectively abolished KACA. Though there has been widespread moaning of the demise over the Kenya Anti-Corruption Authority, this paper takes the view that KACA is not necessary in the fight against corruption. Indeed, it is an indication of the unnecessary proliferation of institutions. It is also a duplication of the mandate vested in the Attorney General's office. What lacks in Kenya are not the institutions to fight corruption but rather the lack of political will to battle corruption. For years PIC and PAC have generated volumes of reports detailing corrupt activities and recommending action against individuals named in those reports. Nothing happens. The Auditor and Controller General has his own volumes detailing governmental corruption. The Attorney General does not prosecute and he is still very secure in his job. Which other institutions that is more powerful than the Attorney General's office does Kenya need to fight corruption?

The other problem with the war on corruption in Kenya is that most campaigners and commentators are obsessed with prosecutions and do not think about curative measures. KACA was cast, first and foremost, as a prosecutorial institution and therefore many thought that its demise was a very sad thing since no prosecutions would take place. Litigation takes a very long time in the Kenyan courts. The *Goldenberg* case is instructive here. This case has been before the courts since 1994.[xxi] We cannot fight corruption through the courts. Kenya's judicial machine is very slow due to many reasons, but specific to corruption is the fact that the beneficiaries of the status quo do not want to have cases related to corruption solved.

In 2000, some high public officials were named by the Public Investments Committee, a parliamentary watchdog committee, as unfit to hold office.[xxii] To date, these people are in

government, one cabinet minister amongst them, Kipng'eno arap Ng'eny now facing a fraud case where he is accused of defrauding the now defunct Kenya Posts and Telecommunications Corporation of about K. Shs.186 million.

In May 2000, the Parliamentary Anti-Corruption Committee released its report on Corruption in Kenya containing most notably, the infamous List of Shame. The government has not to date prosecuted or even sacked those named in the List of Shame. The List of shame contained names of prominent Kenyans who have persistently been implicated in corrupt activities in government. Parliament voted against the inclusion of the List of Shame in the Committee Report on which the now defunct KACA was to be obligated to act upon. [xxiii] It has been argued that the failure to adopt the List of Shame was the legally correct route to take since those named in the report hadn't been found guilty by a court of law, and second, that they had not had a chance to defend themselves. Why were they then not prosecuted, which would have enabled them to prove their innocence?

Over the year, no significant developments were made towards battling corruption. It has been mainly a game of musical chairs, played largely to entertain the international donor community. The country must refocus national energies towards preventive measures like declaration of wealth by public officials. The right to information ought to become a pillar of our democracy so that watchdogs, such as the media and the parliament, become more effective with greater access to governmental information. That is why the passing by parliament of the motion to enact a Freedom of Information Law is laudable and ought to be followed to its logical conclusion. It should be enacted into law to buttress the constitutional freedom of expression that would remain a half right if there were no right to information.

NATIONAL SECURITY, POLITICAL VIOLENCE AND CRIME

During the year, most Kenyans must have continued to fear for both their personal and national security. Lack of security has serious implications on the government's duty to protect the right to life. In Kenya, insecurity is also used to control political organization and expression, both very key constitutional issues. This is done by politicians both in government and opposition with government complicity.

The government seems to have acquiesced in the privatization of violence. This is best illustrated by the fact that the authors of ethnic clashes have gone unpunished since 1992. In 2000, fresh flare-ups of ethnic violence occurred in Laikipia district. Ten people were reported dead. [xxiv] In the same vein, private gangs attack groups or persons whose political ideas they do not share and are therefore opposed to such ideas. This prevents political mobilisation around issues difficult. Citizens' participation is limited and many political decisions by citizens are by coercion or intimidation.

A by-election characterised by electoral violence took place in Kwanza in April to replace the late Kwanza MP, George Kapten.[xxv] Negotiations around the review process were marred by violence. For example, just about the time the Parliamentary Select Committee and the *Ufungamano* Group went parallel, there was a lot of street violence which largely targeted opposition politicians allied to the *Ufungamano* group. An example is an attack on the opposition MPs James Orengo and Shem Ochoudho outside parliament allegedly because they did not support the Raila Group. [xxvi] Another occurrence is that a Provincial Convention Assembly meeting of the NCEC (National Convention Executive Committee) for Nyanza province was violently dispersed by thugs alleged to be allied to Raila Odinga.

The crime rate in Kenya is very high, and law enforcement agencies have failed to get a handle on it. The people have lost confidence in these government institutions and are now taking the law into their hands. Cases of mob justice are high. Gangs operate overtly and with great confidence. In April, the *Mungiki* sect attacked Nyahururu police station to free some of their colleagues who had been arrested by the police. The raid involved 3000 sect members.[xxvii] In September, *Mungiki* sect members again raided the police station in Muranga where they stole a gun.[xxviii] The underworld has developed new confidence, partly blamed on corruption and the low morale in the police force. Some police officers are alleged to belong to crime gangs. On February 26,th three people were executed by a gang on a soccer pitch. [xxix] On March 2nd 2000, some 500 villagers stormed a police station in Kendu Bay demanding that a robbery suspect be handed over to them to administer mob justice. They accused the police of protecting criminals.[xxx] This trend is indicative of state failure. It is important that law enforcement agencies are seen and perceived by the Kenyan people as serious about law enforcement. They must not be seen to apply the law selectively. The cases of

violence involving politicians are the ones that send negative signals to Kenyans. In short, they imply that:

1. Violence, though illegal, is a legitimate form of negotiating for goods in society, and
2. One can get away with violence since the law enforcement machinery is impotent or unwilling to act.

The rise in violence has greatly demobilized Kenyans thereby impeding significantly their ability to organize politically. Political repression is taking a new form where violence is meted out by private armies that seem to enjoy state protection or are backed by powerful politicians. We are witnessing a reinvention of the violent state; this time round through privatized violence.

THE FREEDOM OF ASSOCIATION, ASSEMBLY AND EXPRESSION

The freedom of association, assembly and expression was most flagrantly violated in this year, undoing gains that were achieved through the IPPG reforms package. Under the IPPG reforms, one only needs to give a three-day notice to police of an intended meeting for the purposes of ensuring security for the meeting. The police do not have the power to cancel a meeting or issue a license except that they may say 'no' to a venue where another such meeting is scheduled to take place for security reasons.

From August onwards, the government persistently and consistently dispersed violently *Muugano wa Mageuzi* (Alliance for Change) rallies.[xxxi] This was done on the President's express directive to the police to the effect that *Muugano wa Mageuzi* must not be allowed to take place.[xxxii]

The Press

In January 2000, *Citizen Radio* was ordered by the Communications Commission of Kenya (CCK) to stop broadcasting out of Nairobi. It was the first radio station to broadcast out of Nairobi. The CCK switched off transmissions to Nyamebene, Nyahururu, Nanyuki and Rongai. *Citizen Radio* remained on in Nairobi.[xxxiii] *Royal Media,* the *Citizen Radio* proprietor, has sued the government and has a number of cases pending in court. This harassment by the State of *Citizen Radio* is in tandem with an unstated government policy of liberalizing the media (especially electronic media) in urban centres (mostly in Nairobi).

The reasoning behind this policy is suspected to be that liberalizing the media in Nairobi does no harm to the ruling party's stranglehold on rural Kenya through propaganda transmitted via the Kenya Broadcasting Corporation (KBC). Liberalizing the media in Nairobi and other major urban centres is like preaching to the converted. The government is, however, very keen on fencing off rural Kenya to protect it from 'outside' influence. Most citizens in rural Kenya have no other source of information other than what they receive through KBC. This is particularly undermining of multi-party politics since opposition parties have no way of reaching the electorate. They are given negligible coverage by KBC despite the fact that the IPPG reforms package made it a policy that all parties should be given equal coverage by KBC.

In August 2000, President Moi ordered the Attorney General and the Minister for Communication to outlaw radio broadcasts in vernacular. This was in reference to the launch of the now very popular radio station, *Kameme FM.[xxxiv]* It mostly broadcasts in Kikuyu. Though the radio station was eventually allowed to operate, the ban issued by the president for fear that radio stations that broadcast in vernacular will fan tribalism, is indicative of the nervousness with which the government has gone about liberalizing the media. This illustrates that the government is still fearful of a truly open and democratic society.

The Right to Information

Kenyans, through a civil society-led campaign, have been demanding that the constitution provide for a Right to Information.[xxxv] This should be made operative by a Freedom of Information Act which would outline the enforcement procedure marking a departure from the history of rights enforcement in Kenya. The lack of enforcement mechanisms has made Kenya's bill of rights inoperative for most of its history.[xxxvi] This demand has been based on the belief that government secrecy is the antithesis to democracy. There are those who argue that the right to information is part of the constitutional freedom of expression. The demand for information was taken a step further in March 2000 when the Law Society of Kenya sued the Kenyan government asking for an order that the government releases the Akiwumi Commission Report on Land Clashes.[xxxvii]

This is not the first commission to have its report not published or acted upon. There are many others. The view has been that many of these commissions are supposed to achieve delay, buy into

national amnesia and thereby cool the political temperature without the government taking any remedial action. If these reports were published in good time, the government would have had to explain the issues that were supposed to be inquired into, thereby ensuring government accountability to the Kenyan people.

CONCLUSION

The constitutional review process was central to analyzing any constitutional developments that took place in the year 2000. No significant progress was made with regard to constitutional reforms during the year. Political bickering over the 2000 Act and the protracted stalemate that this caused dominated much of the year. Late in the year, negotiations for a merger that was to happen in early 2001 dominated the process. On this point alone, the conclusion that no developments worth the name happened and therefore the country only marked time is very attractive. The point to note, however, is that the country engaged in a very intense debate about the mechanics of the process implied by a conceptualization of constitution-making that has the engendering of democracy as its primary objective. This was a positive development.

It follows that whether there were any constitutional developments in 2000 is a question that is likely to be controversial. The better way of analyzing the year is through asking the same question differently. The question to answer is whether we have made steps towards achieving the political aspirations of the Kenyan people. The Kenyan people aspire to organize their politics and economy in a more efficient and socially stable way. Though it is important to ask how far Kenyans are from having a new constitution, the more pertinent question to ask is how far away from constitutionalism we are, as opposed to the promulgation of a new constitution and new laws. The social and political experience of the Kenyan people should count more in assessing the country's constitutional progress than the amount of legislation passed by the Kenyan parliament.

The report has recorded government conduct and that of other political players, which contrasts starkly with the reality of negotiating a new constitutional order. A recurring demand of Kenyans has been that the government conducts business in a manner that indicates its commitment to the rule of law thereby creating a political environment in which the Kenyan people can optimally participate

in the review process. This demand has not been met especially with regard to security and political violence.

The report concludes that gains are few partly because the pro-democracy forces were highly fragmented with no unity of vision. Second, is Moi's dispersal politics based on the age-old principle of divide and rule. The opposition has been ethnically divided and therefore does not present an organized force to appropriate any constitutional gains that would accrue through the different frontiers of the struggle for constitutional reform in Kenya.

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ENDNOTES

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[ii] See Ghai, Y, P. and McAuslan, J.P.W.B., *Public Law and Political Change in Kenya* (Nairobi/London/New York: OUP, 1970)p.511.

[iii] See the *Daily Nation* February 12th, 2000 p.1.

[iv] See the *Daily Nation,,* January 9th 2000 p.1, July 10th 2000 p.1 and November 16th, 2000 .p. 28

[v] See *Stephen Mwai Gachiengo and Albert Muthee Kahuria V Republic.* High Court Miscellaneous Application No. 302 2000.

[vi] See Steiner, H.J., and Alston, P., *International Human Rights in Context* (Oxford: Clarendon Press, 1996) pp. 710-718.

[vii] For a discussion on constitutionalism see Nwabueze, B.O., *Constitutionalism in Emergent States* (London: Hurst &Co, 1973.) pp. 1-2.

[viii] The IPPG reforms were passed through The Statute Law (Repeals and Amendments) Act, 1997.

[ix] See Wachira Maina 'Review Document Creates More Problems than it Solves' in *The Daily Nation* May 28th 2000 p.9.

[x] See *Daily Nation* 19th April 2000 p.1.

[xi] See *The Daily Nation* April 19th p.1.

[xii] See Nwabueze, B. O., *Presidentialism in Commonwealth Africa* (New York: St. Martin's, 1974) pp.255-294.

[xiii] See *The Daily Nation,* April 20 p.17.

[xiv] See *The Daily Nation,* February 16th 2000 p.1.

[xv] See the *East African Standard* December 14th p.1.

[xvi] See Kuria, K, G., 'The Future of Constitutional Reform in Kenya' Paper present at a Centre for Research International (CLARION) workshop held on 9th-10th November 2001 p.11.

[xvii] See *The Daily Nation* March 14 2000 p.1

[xviii] See *The Daily Nation* March 16th 2000 p.1.

[xix] See *The Daily Nation* March 18th 2000 p.1.

[xx] High Court Miscellaneous Application No. 302 of 2000.

[xxi] See Kibwana, K., Wanjala, S., and Owiti, O., *The Anatomy of Corruption in Kenya* (Nairobi: Claripress, 1996). Pp. 207-216.

[xxii] See *The Daily Nation,* February 10, 2000 p.1.

[xxiii] See *The Daily Nation* 10th may 2000 pp.1-2, The *Daily Nation* 19th July 2000 p.1 and 20th July 2000 p.1.

[xxiv] See *The Daily Nation* Jan 21 2000 pp. 2-3, *The Daily Nation* Jan 24th 2000 pp.1-3.

[xxv] See *The Daily Nation* April 9th 2000 p.3, April 10th p.1 and April 14th p.1.

[xxvi] See *The Daily Nation* Jan 14 2000 p.1.

[xxvii] See *The Daily Nation* April 24th 2000 p.1.

[xxviii] See *The Daily Nation* September 25th P.40.

[xxix] See *The Daily Nation,* February 27th 2000 p.1.

[xxx] See *The Daily Nation* March 3rd 2000 p.1.

[xxxi] See *The Daily Nation* August 20th 2000 p.1; December 10th 2000p.1; December 13th 2000p.1; *November* 12th p.2. and December 18th, 2000 p.1.

[xxxii] See *The Daily Nation* October 8th p.1.

[xxxiii] See *The Daily Nation,* January 26th p.1.

[xxxiv] See *The Daily Nation* September 2000 p.1.

[xxxv] See International Commission of Jurists-Kenya (ICJ-Kenya), *The State of Freedom of Information in Kenya* (Nairobi: ICJ-Kenya, 1999).

[xxxvi] See Kuria, K.G., 'Litigating Kenya's Bill of Rights' in Kibwana, K., (Ed.) *Human Rights and Democracy in East Africa* (Nairobi/Kampala/Dar-es-Salaam: East Africa Law Society, 1997) pp. 67-128.

[xxxvii] See *The Daily Nation* March 9th 20000 p.1.

THE STATE OF CONSTITUTIONAL DEVELOPMENT IN TANZANIA – 2000

Ernest T. Mallya+

INTRODUCTION

The decade that ended in the year 2000 witnessed many debates on, demands for and actual amendments to the constitution of the United Republic of Tanzania. In part, this can be linked to the reintroduction of multiparty politics in Tanzania in 1992; but also because of the growth and strengthening of civil society in the aftermath of economic and political liberalization. The policies that were followed prior to the liberalization of the economy in 1986 stifled the initiatives that could have come from civil society in that the non-profit sector was never given an opportunity to emerge. This sector was seen by the state as a competitor to the party-state-controlled mass organizations. With the opening up of political space in 1992, many more politically oriented civil organizations came up including those formed to campaign for human rights as well as gender equality and children's rights. Of more importance are of course, the new political parties.

The second important event for the year 2000 in Tanzania is that it was a general elections year. General Elections are held every five years and the last were held in 1995. The experience of the 1995 elections raised several constitutional issues, which were also seen in the 2000 elections. This was much more so as far as Zanzibar was concerned, where the parity between the two main contending parties in the results, the interpretation of some Elections Act provisions, and the role and powers of the National Electoral Commission and the Zanzibar Electoral Commission, among other issues, brought about several controversies. We shall discuss these two issues – the constitutional amendments and the Zanzibar elections – in the following sections of this chapter.

The reintroduction of multiparty politics in Tanzania was considered by many as a huge historical event that necessitated the rewriting of the constitution. This was spearheaded by the political parties in opposition, in most cases with regard to the need to have the Tanzanian political game played on a level playing field. There was also need to shake off the legacies and vestiges of the outgoing single-party state, which tended to have oppressive laws, dictatorial policies, and undemocratic means to access political and other elective offices. However, the establishment could not agree to everything that came from the civil society or other (political) actors. This is explained, in part, by the fact that the issue of writing a new constitution has always been thrown out, and the "*viraka*"[i] (patches) approach has been the way to change the constitution. This has raised concern on the part of the opposition and other activists, making the need for a new constitution one of the key demands in such demonstrations as the one held in Dar-es-Salaam on January 27, 2001. In the confrontation between the police and demonstrators, lives were lost in Zanzibar and many people were injured in both Zanzibar and on the Mainland.

BACKGROUND TO THE 2000 CONSTITUTIONAL CHANGES

Up to the year 2000 the Constitution of the United Republic of Tanzania had undergone twelve amendments. The 2000 amendment was the thirteenth (13th) since the constitution was written in 1977. Some amendments came well before the re-introduction of multiparty politics in 1992, but four more came after the eighth which accommodated the multiparty political system in 1992. One of the sources of the ideas about the need for constitutional change was the Nyalali Commission.[ii] This was formed by former President Ali Hassan Mwinyi in 1991 in order to look into the kind of political arrangement that Tanzania could follow in the aftermath of the collapse of the Eastern Bloc, among other reasons. It was the recommendation of this Commission that Tanzania should adopt a multiparty system of democracy. But the Commission went further and identified obstacles to such a political arrangement. Some of those obstacles identified included the constitution itself, and several pieces of legislation. The Commission identified 40 such laws and they were termed oppressive and/or unconstitutional. It was recommended that they should either be repealed or amended if they were to conform to the democracy that was to be built under the multiparty system.

The demand for a completely new constitution did not prevent its seekers from identifying the weak points of the current constitution. The weak areas of the current constitution were clearly identified. With incessant demands from the various stakeholders including donors, the government compiled the demands, then outlined its stand with regard to each of the demands, in a White Paper (No. 1 of 1998) for the public to give its opinion. The task of gauging this opinion was given to the (Justice) Kisanga Committee[iii]. The government's position was that it would amend the constitution (or institute the process of writing a new one) depending on the ideas that came from the people through the White Paper. There were nineteen (19) general issues that were outlined by the government as the ones that the new constitution movement wanted addressed. However, these have many sub-issues, some of which needed to be addressed independently. Below we shall present some of the issues and demands, giving the government's position and whether or not some action (in the form of constitutional amendment or changes in other pieces of legislation) has been taken. In some cases, we shall also indicate the stand of the Kisanga Committee, which comprised professionals (lawyers) as well as politicians.

SPECIFIC AREAS NEEDING CHANGES

A NEW CONSTITUTION

Those demanding that a new constitution be written have argued that given the changes in the political landscape – especially the 1992 re-introduction of multiparty politics – a new constitution was necessary. They argued that the current constitution was operational under the one-party state framework, which was completely different from the current framework. There were also claims that the current constitution was written without letting the people participate. This camp also argued that every time there was a big political change in Tanzania (and Tanganyika) there was a new constitution. These changes included Independence in 1961, the Republican Constitution of 1962, the Interim Constitution after the union between Tanganyika and Zanzibar in 1964, and so on until the 1977 constitution was written, and to which amendments are being made to date.

The government's stand was that the claims for a new constitution were baseless because the new constitutions mentioned by those demanding a new constitution were written only when there was a change in sovereignty – 1961 Independence, 1962 Republic and 1977 to complete the Union agreement between the two parts of the Union. The two existing political parties also merged to form the only party in Tanzania. There was no change of sovereignty in 1992 or thereafter. As for the argument that the Nyalali Commission proposed the writing of a new constitution, the government noted that this would have been so if the form of the union had been changed into a three-government format. The government also noted that the current constitution prescribes how the constitution should be changed – through parliament. The position of the government was that the laid-down procedure shall be followed, namely that of using parliament. This implied the patching procedure would continue. The changes that were effected thus shall be discussed below under the relevant demands.

THE UNION BETWEEN TANGANYIKA AND ZANZIBAR

The structure of the Union was another issue. One camp of those who wanted changes proposed that the two-government structure was faulty in that the Tanganyikans did not have their government while Zanzibaris did. As such, they proposed a three-government structure, where there would be a Tanganyika Government, Zanzibar Government and a Federal Government. Another smaller camp was of the opinion that there should be only one government – The Union Government. There was also a demand for a referendum to determine the legitimacy of the Union itself.

The government's position was that according to the Articles of the Union, "*The Republic of Tanganyika and the People's Republic of Zanzibar shall be united into one sovereign Republic*". As such, the Zanzibar government was intended to deal with those matters that did not fall under the Union

while that of the Union covered all matters in Tanganyika and those under the Union in Zanzibar. The issue of three governments was dismissed mainly on cost considerations and that this issue was also considered in 1964. The government did not budge on this issue and there was no constitutional amendment.

The issue of a referendum was also dismissed by the government noting that the agreement between Tanganyika and Zanzibar was reached by the two leaders first, and the agreement was presented before the two houses – *bunge* and the Revolutionary Council – which were the competent law-making bodies of the time. This fact is noted by Shivji (1990: 3) as he says that there was strict adherence to the provisions of Article (viii) of the Articles of the Union, which required these bodies to ratify the agreement. According to the government, there is, therefore, no need to confirm the presence and legality of the union.

THE POWERS OF THE PRESIDENCY AND PRESIDENTIAL APPOINTMENTS

The cry for the reduction of the powers of the executive president Tanzania was nothing new. It has always been seen that the presidency was too powerful and if a dictatorial person occupied the office it could pose danger to the population as a whole. These powers include the preventive detention powers, emergency powers and powers to appoint a series of high-ranking government officers.

With regard to emergency and detention powers, the government was of the opinion that in the presidential system in Tanzania, the president needed those powers in order to safeguard national security, ensure peace and security of the people and property. But the limitations laid down by law as to how these powers should be used must be adhered to. The Kisanga Committee agreed with the government on the need for the President to use emergency powers but these powers should be used as per the constitution and not as per the Emergency Powers Act of 1986. However, the Committee disagreed with the position that the president should continue having the preventive detention powers.

As far as appointments are concerned, there are three areas. The first one is that of senior government officers. The government's position was that, among other things, an executive president needed all those powers and given that the president was the one finally accountable to the electorate, it would be rational if s/he continued having the chance to pick key government functionaries. However, the government agreed that the number of posts to fall under this category could significantly be reduced.

In the 13th constitutional amendment, the issue of appointees was looked into and some changes were made. Article 36 now restricts presidential appointments to only those positions that can be defined as being responsible for charting out policies in government departments and institutions as well as top executives responsible for supervising government departments and institutions.

Although the 13th Constitutional Amendment has significantly reduced the list of offices requiring presidential appointments, the reduction in itself may not have gone far enough. For example, the President will still appoint regional and district commissioners, who hold powerful political and administrative positions in the regions and districts. These politico-administrative cadres comprise officials who have been subjects of complaints by the opposition as some of those leading in the misuse of public resources, the disruption of opposition rallies and a general harassment. It has been argued that, if not elective, these positions should be public service positions to which professional public servants would be appointed by the appropriate service commission.

The second area in which the President has appointing powers is with regard to Members of Parliament. The government proposed that the President should be allowed to appoint a number of MPs basically aimed at capturing certain "talents" who did not come into parliament through the ballot box. The pro-democracy activists saw this as a step backward in the multiparty political framework. The Kisanga Committee agreed with this idea.

The 13th Constitutional Amendment, therefore, through Article 66(1)(e) the President has been empowered to appoint not more 10 Members of Parliament. On the one hand, this move has been seen by some as a reverse of the reduction of presidential powers, now the executive has an added major hand in the composition of the parliament, since s/he can appoint up to 10 people to it. On the other hand, this provision can enable the President to nominate MPs to represent disadvantaged groups such as disabled, women and youth. However, some argue that the disadvantaged groups could have elected their representatives through electoral colleges constituted by the disadvantaged groups themselves and not through the President. The issue of tapping talent is also seen as not so strong in that the parliament is nowadays full of educated elected MPs of all disciplines.

The third area is that of members of the National Electoral Commission. The issue of the independence or the lack of the National Electoral Commission and its connection to the appointing authority came up. There have always been accusations that the National Electoral Commission cannot be impartial especially with regard to the ruling party and in which the President is a member. This is so because it is the President who appoints the Commissioners. A change in the law was therefore called for so as to make the Commission be, and be seen to be, independent. Some political parties wanted political parties to be represented in the Commission. The powers to appoint, so the activists thought, should be shared with the legislature.

The Kisanga Committee agreed with the government stand that the powers should remain with the President. No party representation would be effected as this would lead to party-politics in the Commission, and that no sharing with the legislature was required. Only insofar as the independence of the Commission did the 13th Constitutional Amendment made some changes. Article 74(7) of the constitution now clearly pronounces the National Electoral Commission as an independent organ.

This partly enhances the confidence of the National Electoral Commission. However, the amendment does not ascertain how the National Electoral Commission is going to exercise this independence especially in matters relating to financing. It is one hundred percent dependent on the government and we should once again note that the President is the one who appoints it.

THE ELECTORAL SYSTEM

The Simple Majority Issue

The first issue with regard to the presidential election was whether the President should win by only a plurality and not a majority of over 50%. The argument was that the requirement that the winner should get more than 50% of the votes was appropriate under the one-party system where only one candidate stood for election. The winner needed to prove that s/he is popular to the majority of the people. Under multiparty politics more than one candidate can stand. A win by simple majority would allow the avoidance of run-off elections, which are costly in the first place.

The Kisanga Committee preferred a majority of 50% plus rather than a simple majority.

In the 13th Constitutional Amendment (2000), this issue was addressed in favour of a simple majority. According to Article 41(6) a presidential candidate now only needs a simple majority to win the presidency and not more than 50 percent of the votes as was the case in the past. The changes to the constitution brought about by the 13th Amendment is that a President may now be declared elected merely on a plurality victory, as opposed to the requirement of winning with over 50% majority. It has been argued that this reduces the high costs associated with elections where a winning candidate gets 50% or lower. Its shortfall is that Tanzania may now have a minority President. While the provision on winning by simple majority can save the taxpayer from paying for run-off elections, this provision will create room for the country's possibility an elected president who does not have wide popular national support. In a country like Tanzania, where the president commands enormous power, having a president elected by the minority could be extremely dangerous, in fact it constitutes a contradiction in terms. Further, in Tanzania we could have a President elected only by a certain big ethnic group or people from only one part of the country, which would not augur well with the quest for national unity, that is being sung in so many local fora.

Other areas of the amendment worth noting include the fact that the constitution now empowers the legislature to enact a law establishing the procedure for the creation of a permanent register of voters. This is a response to sections of the public who have called for such a register as a means of reducing costs and of cheating in registrations that are done at every election. It is not entirely certain that a permanent register is the solution to those problems. The amendment also bars from contest any presidential or vice-presidential candidate with a conviction for tax evasion in the five years leading up to an election. This is a step in the direction of excluding crooked politicians, especially those with ill-gotten wealth, from important national offices. Article 5(3) of the Constitution now empowers the Parliament to enact an electoral law outlining the procedure for the creation of a National Voters Register for the United Republic of Tanzania. The law shall specify how to go about correcting the contents of the register and the registration of new voters. This provision was necessitated by the need to reduce the costs incurred during the registration of voters. It was also intended to reduce the possibility of doctored figures and names of registered would-be voters under the system. Critics see the permanent voters register as not a solution to the second reason for its existence because it can very well be a subject of abuse. The current capacity of the National Electoral Commission is nowhere near an organization that can trace those who have died, those who have just qualified to enter the register, those who have been disqualified for one reason or another, and so on.

Petition against Presidential Election Results: Confirmation and Petition

The status quo has it that the judiciary is barred from inquiring into the results of a presidential election. Similarly, there is no need for the announcement of the results of the presidential election to be confirmed by the High Court. The government believes that this is a healthy situation and it should be maintained. The main reason given is stability. Court proceedings take long. If a petition against presidential elections were allowed, there would be uncertainty and anxiety in the country while the petition is being heard. As such there is no need for changes. The Kisanga Committee agreed with the government's position; the 13th Constitutional Amendment made no changes to these items either.

Independent Candidates

The public has been demanding that independent candidates be allowed in all elections – presidential, parliamentary and councillorship. Barring independent candidates is seen by some as a denial of the basic human right to seek elective posts simply because they do not belong to a political party. The Kisanga Committee proposed that independent candidates should be allowed in all elections except the presidential one.

The government's position has been that this is not healthy for Tanzania's politics because this would weaken the "young" political parties, which have just been allowed back into the political system. The 13th Constitutional Amendment made no changes to this item. While the argument that the weak political parties could be rendered weaker by the independent candidate provision, there is another side to it. The strong parties like the Chama Cha Mapinduzi (CCM) also fear the implication of having independent candidates. This is because such parties also have internal factions, which can lead to members who are not nominated to break away and contest elections against nominated members. This is more so when popular (and rich) politicians are not nominated. There would also be a possibility of an independent candidate winning the presidency. This is would make it difficult in making bold policy decisions in parliament. However, this reservation notwithstanding, there is still the possibility with the present arrangement in that, a candidate from a party that does not control the parliament can win the Presidency.

Proportional Representation

It has been argued that the proportional representation allocation of parliamentary seats would better reflect the real situation of the parties' strength rather than the first past the post system

currently in use. Secondly, the current constituency-based way of getting representatives (with all the processes that go with it including registration, supervision, transportation of materials etc.) is seen as being very expensive.

The government's position is that an MP elected directly by the people is better attached to that constituency than what the system of proportional representation can produce. After all, it is the system Tanzania is used to just like other Commonwealth countries. Furthermore, the proportional approach – proportional to the number of constituency seats won by a political party – is used in the allocation of special seats for women. The Kisanga Committee recommended the adoption of proportional representation; there was no change to this item in the 13th Constitutional Amendment.

Government Officers and the Administration of Elections

Although the Elections Act still empowers the National Electoral Commission to appoint any other person, it has designated the highest-ranking officers of Local Government to be the constituency managers of elections as returning officers. This creates some controversy. In the lead-up to the 1995 elections, the prevalent charge against such officers who had the experience of managing elections, was that they were partisan and supportive of the incumbent ruling party. The response of the government then was to allow free and advertised recruitment, as it were, by the National Electoral Commission, of any suitable person. In the event ,many of the new recruits were inexperienced, short of financial and material resources, and generally lacking co-operation from government officials. It was widely believed that a large part of the irregularities of elections in 1995 were a result of this. It appears that the present statute reflects a quiet consensus on the need to continue tapping the experience and vast resources at the disposal of government officials in the administration of elections. The problem of suspected partisanship on the part of local government officials, it seems, has been sidelined but not resolved. The same officers, except the city director – who is replaced by the deputy city director – are designated returning officers in wards by the amendment of the Local Authorities (Elections) Act.

GENDER, WOMEN'S SPECIAL SEATS AND THE FILLING OF VACANCIES

There was a proposal that the number of women MPs through the special seats should be increased. Also when they fall vacant they should be filled using the party preferential list. The Kisanga Committee was in agreement with this suggestion. The 13th Constitutional Amendment addressed these issues through Article 66(1)(b). The number of women with special seats in Parliament has been increased from 15 percent to a number that shall be between 20 and 30 percent of all the legislators. This number shall be increasing from time to time and will be announced in the Government Gazette by the National Electoral Commission after securing the consent of the President.

The amendment is regarded as an affirmative action measure at redressing part of historic gender inequalities. This provision will boost the participation of women in the law-making body. It goes a long way in realizing a resolution by SADC countries, which recommends that women should make up at least 30 percent of the Members of Parliament. However, the exact percentage of the special seats should not have been left to the National Electoral Commission and the President to decide. This is so because, depending on the President of the day, and the strength of the party he or she is leading, he or she may play with the numbers to the advantage of his/her own party in parliament! Also, another weakness is that once the seats are allocated to parties, the parties nominate the MPs thereby making these MPs loyal to their parties rather than to some constituency in the country.

The 13th Constitutional Amendment through Article 78 (4) provides for a way to fill vacant special seats for women. Parliamentary special women seats at any time of the life of the Parliament will be filled from a list of candidates (derived from the intra-party preferential votes) presented to the

National Electoral Commission for the purposes of the General Elections. The good thing about this provision is that it does away with the ad hoc arrangements that parties could have improvised, and provides for a systematic procedure for filling vacant women special seats. However, this arrangement denies new members who joined a political party after the last general election the right to be nominated to fill the special seats.

Linked to the two issues above is that the constitution has now specified that no one shall be discriminated against on the basis of gender. Change to Article 13(5) on discrimination was one of the proposals by activists in order to cover the female gender as far as human rights are concerned. Highlights in this area include the amendment to Article 13(5) to include gender discrimination in the list of examples/forms of discrimination. This makes the pursuit of justice based on this firmer, clearer and easier than when it was merely assumed without an unequivocal pronouncement. The other achievement in this area is the raising of the percentage of special parliamentary seats for women as a fraction of all other parliamentary seats. The number of women elected through contests in the electoral constituencies is still woefully small, though there is a slight increase, and the attitudes of people about electing female legislators is significantly less negative now as research has shown (TEMCO, 2000: 132).

THE PCI AND THE HUMAN RIGHTS COMMISSION

The Permanent Commission of Inquiry (PCI) was formed, among other things, to check the misuse and abuse of power by various governmental actors. The PCI was established in 1965 and was incorporated into the Interim Constitution as an alternative to the incorporation of a Bill of Rights. In 1984, a Bill of Rights was incorporated into the constitution. However, the enforcement of these rights was hampered by the many oppressive and unconstitutional laws, some of which were identified by the Nyalali Commission. The government had for sometime, been under pressure to form a Human Rights Commission. Also there were demands for the removal of the claw-back clauses contained in the constitution with regard to some of the human rights provided for in the constitution. The Kisanga Committee disagreed with the government stand on the need to retain some of the laws, which effectively derogate from some constitutional provisions with regard to human rights.

In the 13th Constitutional Amendment this issue was rather comprehensively addressed.

Through Article 129 of the constitution, the Permanent Commission of Inquiry has been replaced with the Commission for Human Rights and Good Governance. The Commissioners and Assistant Commissioners of this commission shall be appointed by the President, after consultation with an Appointment Committee, comprised of the Chief Justice, Speaker of the National Assembly, the Zanzibar Chief Justice, the Speaker of the National Assembly and the Deputy Attorney General. The Chairman of the Commission will be appointed from among the persons qualified be appointed a judge. If the Chairman is appointed from Tanzania Mainland then the Vice-Chairman will be appointed from Zanzibar and vice versa. The commissioners whose number is limited to five will be appointed from among the people with enough experience and expertise in human rights, law, governance, politics and social issues.

Apart from promoting human rights and disseminating human rights education in the country, Article 130 of the constitution stipulates that the commission may institute an investigation into any area of violation of human rights. Those liable for investigation include civil servants in both governments, political party leaders, commissioners and workers of government commissions, parastatals, private companies, societies, and cooperatives. This section will not apply to the Union President or the leader of the Zanzibar Revolutionary Government. The commission is also empowered to send cases to a court of law to either stop acts of the violation of human rights or to rectify the anomaly resulting from the violation of human rights. This is seen by many as a way of

enhancing the effectiveness of the commission. The provision will not, however, help to curb the denial of human rights related to court proceedings.

This has been all good news but there are also areas where hitches are likely to appear. According to Article 131, the Commission for Human Rights and Good Governance shall not institute investigation in any area of breach of human rights in matters before a court of law, concerning the relationship between governments or between a government and an international organization, concerning the presidential amnesty, and any other issue as stipulated in the laws.

The Commission is, however, not allowed to investigate a court ruling; it is also not allowed to disregard directives given by the President. This provision is meant to protect the freedom of the judiciary as well as other matters deemed to be in the interest of the nation. Allowing the commission to inquire or investigate decisions by the courts would be tantamount to interference with judicial independence. This is especially so because the judiciary has been vested with powers to decide cases. However, not all directives of the President can be defended since our President is an executive one. S/he is head of state and government, and chief of the armed forces. His/her directives can affect the impartiality or independence of the commission since some of the complaints might be leveled against his government or some organs, which s/he may not feel comfortable to be investigated by the human rights commission! Also, the fact that the commissioners will be appointed by the President makes the whole commission accountable to the executive instead of the people. The Commission should have been made accountable to the Parliament.

The decision to form a Human Rights Commission was partly an answer to a long outcry about the ineffectiveness of the previous commission and the need for a human rights watchdog. Now Tanzania has a human rights watchdog that incorporates the previous functions of the Permanent Commission of Inquiry. But it appears to suffer from some of the shortcomings that befell the previous commission, including the authority of the President to order it to stop any investigation. Others have also argued that the commission should be supervised by parliament, not the presidency. In its favour we can mention the fact that at least a commission is now in existence. In addition, the complaint aired over many years that ordinary individuals cannot pursue their rights in the High Court because of the legal complexities and fees involved, may now be met in part by the commission, which will have petitions brought to it and may prosecute offenders. Previously, these two actions would not have been possible.

INDEPENDENCE OF THE JUDICIARY

The 13th Constitutional Amendment through Article 107A (1) now clearly states that the authority to dispense justice in the United Republic of Tanzania shall be vested in the judiciary and that no other organ of either the executive or legislature will have a final say in the dispensation of justice. In the course of dispensing justice the judiciary shall be obliged to adhere to the following:

(a) To ensure justice for all without regard to a person's social or economic standing.
(b) Not to delay justice;
(c) To provide the relevant compensation to those injured by actions and/or omissions of others;
(d) To promote dispute settlement; and
(e) To dispense justice without undue regard to technicalities.

Article 107 B of the constitution now declares that in the course of dispensing justice the courts will be free and that they will only be obliged to follow the procedures and norms outlined in the Constitution and the laws of the land. These constitutional provisions, which now pronounce the judiciary the ultimate authority in the dispensation of justice, also carry with them the obligation placed on the judiciary not to delay justice, and to expedite the dispensation of justice without recourse to any possible impediments, including professional or technical impediments. Whether

this can be carried out effectively in practice is another matter, since it may depend on resources available, as well as interpretation. But at least the formal pronouncement of it in the constitution will force the judiciary to act in some way, and give hope to many people who have continuously complained about delayed justice in Tanzania. This enhances the integrity of the judiciary and builds confidence of the people in search of justice. These provisions also strengthen the judiciary in the administration of justice vis-à-vis other state organs. It is now difficult to circumvent the judiciary in favour of other organs when it comes to administration of justice. This is also in line with the doctrine of separation of powers, as well as that of checks and balances.

AMENDMENT/REPEAL OF THE FORTY "OPPRESSIVE" LAWS

One of the areas that the pro-democracy activists have been calling for change is with regard to the forty laws that the Nyalali Commission considered either oppressive or a hindrance to democracy. Most of the laws have been amended (though not necessarily to the satisfaction of the activists) and some have been repealed. In the year 2000, one piece of legislation among these was also repealed. This is the Tanzania News Agency Act (Act no. 14/1976). The Swahili name for the Agency was Shirika la Habari Tanzania (SHIHATA). The criticisms waged against this law by the Nyalali Commission were that some provisions of this Act violated Article 18 of the Constitution (Freedom of the Press and Expression). The Commission cited section 7, which provided that no person other than the Agency, should collect, distribute any news within Tanzania. It also barred other people from distributing news or news material collected outside the country.

The Nyalali Commission recommended that the monopoly over news collection and distribution by SHIHATA should be abolished. The provisions of the Act that violate freedom of expression and free press should be repealed. As a first step, the Act was amended in 1992 by the Written Laws (Miscellaneous No. 2) Act, 1992 to remove the monopoly of collecting and disseminating news (Makaramba, 1997: 94).

The Law Reform Commission on its part recommended that the law should be retained but provisions should be made to enable the Agency to regulate other news agencies, their functions and responsibilities. It also recommended that SHIHATA should be strengthened in terms of staffing and working facilities to enable it tackle its new challenges. The Tanzania News Agency Act, 1976 was repealed by the Tanzania News Agency (Repealing) Act, 2000. The functions and powers, which were conferred on the agency, have been vested in the Information Division (MAELEZO) of the Prime Minister's Office.

"UJAMAA" AND "KUJITEGEMEA" IN THE CONSTITUTION

In 1967 the Arusha Declaration suggested that Tanzania was going to build socialism in the "ujamaa" ideology. It also mentioned "kujitegemea" meaning self-reliance. In principle, these two terms were considered by many as irrelevant in the advent of the liberalization of the economy and the opening up of political space. However, the two terms have been retained in the constitution and now they are defined to fit the current politico-economic developments. Under Article 151 of the Constitution (after the 13th Amendment), to quote the Swahili version of the constitution, " 'Ujamaa' au 'Ujamaa na Kujitegemea' maana yake ni misingi ya maisha ya jamii ya kujenga taifa linalozingatia demokrasia, kujitegemea, uhuru, haki, usawa, udugu na umoja wa wananchi wa Jamhuri ya Muungano". The author's translation would read as follows: "Ujamaa or Socialism and Self Reliance means the foundations for a way of life that aims at building a nation that holds dear democracy, freedom, justice, equality, comradeship and unity of the citizens of the United Republic". This is definitely a departure from the socialism that was promulgated in the Arusha Declaration in 1967 – which actually had some principles of scientific socialism such as public ownership of the means of production, and the dominating and ubiquitous state in the development process. Actually, every state in the world could claim to be doing what is claimed in the new definition of the two concepts of "Ujamaa" and "Kujitegemea".

THE CONTROVERSIAL ELECTIONS IN ZANZIBAR

The elections in Zanzibar in the year 2000 had interesting constitutional dimensions. First of all, the incumbent President, Dr. Salmin Amour wanted to have the constitution changed so that he could seek a third term. The provision is that any one individual can have two five-year terms. Salmin managed to get a lot of support from within Zanzibar, especially from CCM leaders. But for the Mainland this was not the case. Theoretically and within the constitutional framework of the time, he could have asked the House of Representatives to change the constitution so that he could have the third term; and this would have been legal. Practically this could not have happened anyway because of the following reason. At that time, the Chama Cha Mapinduzi (CCM) did not have a two-thirds majority in the House of Representatives, being the minimum number needed for the changing of the constitution of Zanzibar. This is why amendments to the constitution of Zanzibar could not be effected without the Civic United Front (CUF) participation. CUF was the second largest and only other political party during the 1995 – 2000 House of Representatives. That time round, before Dr Salmin could effect his proposal to change the constitution, the CCM managed to stop him through the party organs. The CCM National Executive Committee meeting in Dodoma ruled that the two-term condition for a president was a party policy, which nobody should disregard or tamper with. As such, Salmin was directed to respect party policy. He was, therefore, stopped by the party and not the constitution – a constitution that he was in a position to manipulate and have changed in his favour. A constitutional issue – that of the status of the Zanzibar and Union constitutions vis-à-vis strong party organs – arises here. Since these constitutions are changed by the respective legislatures, and since both legislatures are controlled by the same party i.e. CCM, which at the moment is strong in both parts of the union, it is very difficult, if not impossible, for the constitution to be changed without CCM's approval. The relationship between CCM and the constitutions during the multiparty is not different from what it used to be during the one-party era. The same procedures for formulating laws are followed; i.e. party proposals followed by cabinet decisions then bills, which end up being enacted as laws!

The second issue is that of the nullification of all elections in Zanzibar. There were five elections in the general elections for the Zanzibaris. These were elections for: the Union President, the Zanzibar President, and the (House) Representatives, the Union parliament members and local government representatives. Due to some mismanagement of the electoral processes, the exercise was chaotic in Zanzibar with some polling stations not getting electoral materials, some with no officials, some with would be voters who were not known to the locality and so on. In the end, the Zanzibar Electoral Commission (ZEC) nullified all the elections in some sixteen constituencies. This means the nullification affected also the election of the Union President and the Union parliament. In Tanzania there is the National Electoral Commission (NEC) which has the mandate to administer all national elections. The ZEC is mandated to administer elections in Zanzibar. In the 2000 event, the ZEC in Zanzibar was acting as an agent of the NEC. The questions that arose included whether the ZEC had the mandate to nullify the two elections, which were concerned with a wider jurisdiction – Tanzania as a whole. The NEC on its part, as if it never expected to see such a scenario arising, was dumbfounded for some days before it could explain the chaos and its powers in relation to the powers of its agent in Zanzibar. The statement issued much later remarked that as an agent of the NEC, the ZEC should have consulted before taking that action. The ZEC did not consult on the grounds that the matter was urgent and things were getting out of hand such that there was no time for consultation. The elections were rerun at a later date under the supervision of both the NEC and the ZEC. One wonders, therefore, whether the constitution should not have this gray area cleared. While one would want to see a stronger and independent electoral commission for what ZEC did in Zanzibar as far as the Union elections were concerned was contrary to law. however, since NEC decided to ratify ZEC's decision, then NEC has to take all the blame. In law a

Principal is not obliged to ratify the decisions or actions of his or her Agent; but once s/he ratifies them, s/he is responsible for whatever happened.

HIGHLIGHTS OF RECENT CHANGES IN THE ELECTORAL LAWS

One of the main areas in which changes were effected in the year 2000 was that of the electoral laws. Changes were made to both the Elections Act of 1985 and the Local Authorities (Elections) Act of 1979. As mentioned in the section on the background to the constitutional changes for the year 2000, the electoral system had a lot of complaints from various stakeholders, including political parties and individual politicians. As such, the two Election Acts were accordingly amended, although not necessarily to the liking of all stakeholders. The flaws in the electoral laws were also raised by the Nyalali Commission. It noted, among other things, that candidates for both Presidential and Parliamentary elections had to be members of the ruling party (CCM) as first qualification for eligibility. This was unconstitutional since citizens who were not members of the party were denied this right. The electorate comprises party and non-party members. However in 1992, through the Political Parties Act, the government allowed other political parties into the system thereby leaving only those who did not belong to any political party being affected by this situation. Since then, the government has undertaken several amendments to make the electoral laws conform to the new political system in the country. The amendments were effected in both the Election Act of 1995 and the Zanzibar Election Act of 1984 and the Local Government Election Act. Those effected in the year 2000 were through Act No. 4 of 2000 and Act No. 10 of 2000.

In the early sections of this chapter, we alluded to the creation of a conducive environment for electoral competition that was ushered in with the multiparty amendment. Some amendments were also made as far as candidature was concerned including the retention of party membership as a condition for candidature. We have already discussed the drawbacks related to this provision. We have also indicated the commendable direction that the constitution has headed to as far as women representation in parliament is concerned.

Related to elections also are the following amendments. Firstly, the constitutional authorization of the Parliament, through an enactment, to take away a citizen's right to vote because s/he has been convicted of electoral offences (Art 5). This is apparently a response to increasing corrupt practices in electoral processes. In addition, as we noted elsewhere, the National Electoral Commission is required to prepare a National Voters' Register. This is not likely to cure all ills related to registration but it will help, at least, to minimize registration complaints and partly relieve the taxpayers of the burden of paying for new registration every time elections are held.

There is a controversial amendment with regard to when the term of a parliamentarian ends. The constitution still maintains that the term ends with the dissolution of the parliament but maintains that the duties and rights of a parliamentarian end only when new elections have been completed. This will add to the government bill, but also increases the chances for the incumbents to regain their parliamentary membership. This is in terms of financial gains and time to prepare. Some amendments were also concerned with the National Electoral Commission. The way elections are administered determine the freeness and fairness of those elections. The issue of loyalty to the appointing authority and financial dependence on government have been aired by, among others, the opposition politicians. When elections are badly administered then these issues gain even more currency. At this point, we can mention the point of the use of regional government officers as election officers, as mentioned earlier in this chapter. Accusations, in most cases by the losers, are leveled against the officers claiming that they will always favour their paymaster – the government in power. To minimize possible problems, the Commission is now required to be more transparent and demonstrate professionalism of the highest order, and when an officer is convicted of causing disruption to elections can now be imprisoned, heavily fined or both [Art. 74 (6)].

Another area is that of using ethnic, racial, religious, regional etc. differences to gain advantage over competitors in elections. Both electoral acts show clearly that one of the grounds for nullifying an election is if it is proved to the satisfaction of the High Court that a candidate, or someone on the candidate's behalf and with his or her knowledge and consent or approval, uttered statements intended to exploit identity differences. The 1985 Elections Act as amended in 2000 states that:

> . . .statements [were] made by the candidate, or on behalf, and with his knowledge and consent or approval, with the intent to exploit tribal, racial or religious issues or differences pertinent to the election or relating to any of the candidates, or, where the candidates are not of the same sex, with intent to exploit such differences

Another area of interest is the issue raised about the legitimacy of a stoppage of demonstrations or rallies that may be ordered by the police, in apparent defiance of the constitutional protection of the fundamental freedoms of expression and association. The laws in question are section 7 of the Political Parties Act and section 40 of the Police Ordinance, both of which previously required the permission of a politically appointed official, the District Commissioner, for holding a rally or a demonstration.

Sections 41, 43 and 52 of the Police Ordinance were apparently approved by the court as constitutional, and these refer to the need and the authority of the police to determine a potential breach of the peace and stop a rally or demonstration from taking place. It has been argued that in terms of the philosophy of human rights the freedom of expression, as indeed any other freedoms, to the extent that they are deemed fundamental, should be untrammeled. On the other hand, there is the usual argument that rights of individuals or groups ought to be exercised in consideration or even deference to the rights of others, and the need for the state to put in place laws and mechanisms for implementing that requirement. This is why most constitutions have claw-back clauses accompanying the declaration of certain rights.

The derogating provision in the Tanzanian constitution is Article 30(1), (2) a-b. The Article refers to the imperative of exercising the rights of individuals with reference to the rights of others or the interest of the (national) community as a whole in Article 30(1). In Article 30(2)(a) it legitimizes a statute instituted for purposes of ensuring that the rights of others or the interests of the community are not harmed by the exercise of an individual's rights. In Article 30(2)(b) the constitution empowers the legislature to enact a law that may limit the exercise of an individual's right to ensure defense, public safety, public order, public morality, etceteras. The provision goes on and lists many other public acts for which an individual's right might be abridged.

The freedom of expression is provided for in Article 18 and a part of Article 20, which is devoted mainly to the freedom of association. However, in both these Articles there are claw-back clauses, which spell out clearly that the rights have to be exercised within the context of other laws of the land. The demonstration incidents may have therefore spoken louder about the need to re-examine the particular expression of parts of or the entire Tanzanian Bill of Rights.

CONCLUDING REMARKS

The 13th constitutional Amendment in Tanzania was of its own kind compared to the earlier twelve other amendments, in that it came with the government white paper. It also involved a sizable number of constitutional issues – about nineteen constitutional issues. With the prevailing internal and external politico-economic conditions, it seems more constitutional changes are inevitable. The good governance movement – which involves issues of democratization, transparency, human rights and other constitution-related issues, will only intensify the calls for more changes in the Tanzanian constitution. Not only that, but the movement towards regional bodies like the East African Cooperation, the Southern African Development Coordination (SADC) and the new African Union will definitely make some parts of the current constitution either irrelevant or necessitate their amendment.

The year 2000 was quite hectic as far as the constitution of Tanzania is concerned. There were some gains for both the government and for activists. The government had stated its stand on some issues in the white paper that came before the amendments themselves. For activists, where some of the issues they raised made sense, it was only logical for the legislature to go their way as well where some important decisions were made in the direction they had campaigned for. As one may expect, constitutions must be dynamic as the environment around them always is. The constitution of Tanzania is no exception and we expect more changes in the coming years. These changes can go either way when it comes to the question of democratization – indeed as the 13th amendment has proven. In it there were some changes which went the democratization way – as was the case with the reduction of the powers of the president in some aspects. Other changes, however, were detrimental to the democratization process – such as the revival of the nominated MPs by the President and the fact that now there is a possibility of Tanzania having a minority President!

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ENDNOTES

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[i][i] The government has always insisted that if there is need to change something in the constitution, then that particular item should be addressed and no more. This has been the practice since 1979 when the first amendment was made to the constitution. The constitution states how it should be changed, however, through the parliament. The activists for a new constitution do not want amendments but a new constitution.
[ii] A Presidential Commission on Single or Multiparty System in Tanzania; formed in 1991 and recommended, among other things, the shifting from one-party system to multiparty system in the country.
[iii] This was a Presidential Committee charged with the task of gathering opinion on the Government's own White Paper.

THE EAST AFRICA COMMUNITY AND THE STRUGGLE FOR CONSTITUTIONALISM: CHALLENGES AND PROSPECTS

INTRODUCTION

> *Conditions in contemporary Africa are simply terrible. The deteriorating economic, political, social conditions of the region have generated a lot of Afro-pessimism…Africa is likely to remain the backwater of the global economy…the forth world of the forth world…The African crisis is no longer defined in technical and economic terms but as problems of human rights, social and political impasse…The total suffocation, fragmentation and encapsulation of civic society, containment of democratic civil pressure and the depoliticisation of civil society have frustrated growth, stability, peace and development. The erosion of the security and stability of Africa is one of the major causes of continuing crises and acts as a major impediment to the creation of sound economies and the establishment of an effective system of intra and inter-African cooperation.*[i]

The role of regional institutions in promoting constitutionalism is best appreciated against the backdrop of the above quotation. Promoting economic co-operation among developing countries is now an acceptable part of international development, to the extent that over the past two decades more than a dozen trade zones, monetary unions, common markets, free trade zones and other regional co-operative arrangements have been proposed, or established in Latin America, Africa and Asia.[ii] While the process of regional integration is inextricably linked to the quest for economic development, it is the argument of this paper that economic development cannot be achieved in a state of constitutional crisis and without addressing the root causes of underdevelopment.

The term "regional institutions" refers to those organisations that comprise of states drawn together in the common pursuit of economic or political aspirations. All regional organisations seem to have always had synergy in strategic visions and prospects for economic development. The East African Community (EAC) is the regional inter-governmental organisation of the republics of Kenya, Tanzania and Uganda, with its headquarters in Arusha. The EAC aims at widening and deepening co-operation among the partner states, through the creation of a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation.[iii] The EAC acknowledges that it is no longer fashionable to regard regional organisations as being primarily institutions for economic development, geared towards the creation of a single market.[iv] With greater acceptance of limited state sovereignty as a basis for any development, regional organisations are addressing issues of human rights, environmental management and constitutionalism. With the imperatives of contemporary globalisation, it has become clear that regionalism must address issues of development, the environment, political stability, rights and governance.

While it is agreed that the constitution is the supreme law of any country, the definition of constitutionalism, as is the case with the term "democracy", is subject to different perspectives given specific social and historical contexts. Constitutionalism goes beyond the mere existence of a constitution and governance according to the Constitution.[v] Constitutionalism is premised on the assumption that the constitution is a social contract between the people and their leaders, that defines democratic governance, guarantees individual rights, and empowers the citizenry to use it as a living document that reflects their needs and aspirations in furtherance of their day to day life struggles.[vi] In this respect the paper suggests that the EAC has a significant role to play in the development of a culture of constitutionalism, as well as in stimulating popular participation of the

people of the region in the matters that affect them. All over the sub-region, NGOs, activists and scholars as well as politicians are advocating good governance and constitutional rule. The EAC can serve as a regional platform for networking, monitoring, research and policy on these and related issues. In this way it would be providing additional support and coverage for articulating and implementing regional policies on democracy, governance and constitutionalism. Finally, by playing a critical role in these areas, the EAC would be cultivating a regional culture of constitutionalism with far-reaching implications for democratic politics, by stimulating popular participation of the people in the region in matters affecting them. In the next section, I offer a background to the EAC to highlight the imperative of popular participation by East Africans.

BACKGROUND TO THE EAC

With the end of the First World War, Tanganyika became a British Mandated Territory and the idea of a joint administration was strongly advocated by Kenya. It is noteworthy that first calls for regional integration were made by the white settlers in Kenya who sought to see their economic influence extended over the wider East African region.[vii] Kenya was colonially managed as a centre of development in East Africa, thus industries were set up there to supply the other territories. Nevertheless, there had always been some kind of unity among the three East African states in their trading and commercial relationships.[viii] There was a deliberate development in the 1920s to encourage closer and more formal union. For example, in 1929, the East African shilling was established replacing the rupee and was in use up to 1966. In 1924, the Ormsby-Gore Commission was formed to study the benefits of a territorial federation.[ix] It reported that the proposed federation was premature, taking into consideration the lack of communication and geographical conditions, and instead recommended the establishment of a Governor's Conference, composed of the governors of Tanganyika, Kenya and Uganda as an informal body to oversee East African co-operation. The reports of the Governors' Conference were accepted and immediately implemented by the colonial office by administrative direction.[x] The main function of the Conference was to coordinate, and in some cases facilitate through its Secretariat, an inter-territorial common services that were already in existence.[xi] In 1917, Uganda and Kenya formed the Customs Union, which Tanzania finally joined in 1947.[xii] Likewise, there were a number of common services in the region. The first common service was the Uganda Railway from Mombasa to Kampala, which was built in 1895, and was later renamed the Kenya-Uganda Railway. Tanganyika Railways was amalgamated with the Kenya-Uganda system in 1948, giving birth to East African Railways. In the 1890s, The Imperial East African Company established the Post and Telegraphs in each of the three countries. In 1933 the three services were amalgamated to form the East African Post and Telegraphs. The East African Airways came into being in 1946 also on the recommendation of the Governor's Conference. The Harbour services of Tanganyika were amalgamated with those of Kenya giving rise to the East African Railways and Harbour.[xiii]

In 1945, the Colonial Office issued a White Paper, aimed at re-organising the East African Common Services structure. The Colonial Office had appreciated the need for more public involvement in the functioning of the common services, due to the resistance against the federation by Africans. It therefore argued that,

> functions without public debate or discussions and decisions are normally based in materials available only to governments concerned and not the general public…By its nature the Governor's Conference is not well designed to enlist the support of public opinion and to take full advantage of the considerable body of expert knowledge and

> experience which is available in East Africa. In fact it must be admitted that although it has served an important purpose, the Governors Conference in its present form is no longer an appropriate nor effective means of discharging the important responsibility."[xiv]

Therefore, the White Paper proposed the establishment of the East African High Commission, a body consisting of three governors, official advisers as well as a Central Legislative Assembly, which came into force in 1948. The white settlers of course dominated it. As a result of the majority membership of white settlers in the East African High Commission, feelings of nationalism in Uganda and Tanzania for fear of white domination were ignited, thus denting the spirit of East Africaness within the region.[xv] In 1949, the East Africa Common Market was born with the bringing together of the Customs and Excise offices. In 1960-1961, The Raisman Commission was established to undertake the first thorough study of the functioning of the East African Common Market and Common Services. As a result of the recommendations of the Raisman Commission, the East Africa High Commission was disbanded and replaced by the East African Common Services Organisation (EACSO).[xvi] The EACSO was a major development for it placed decision making under the ambit of East Africans. Prior to this, all major decisions on East African co-operation were in effect made by one central authority, based at the White Hall colonial headquarters in London.[xvii] With the establishment of EACSO, the responsibility for ordinary policy decisions was placed in the hands of the Committee of Territorial Ministers called 'the triumvirates'. The responsibility for the administration of the organisation was entrusted to the Secretary General assisted by three senior officials. The Central Legislative Assembly was established to legislate over the common services and a Distributable Pool Fund put in place as an independent source of revenue for the activities of the EACSO.

While, prior to independence, Africans were against the federation for fear of white domination, there was enthusiastic embrace of the idea of federation on independence. East African leaders sought a federation for purposes of unity and for remedying the trade and industrial imbalances created during the colonial era. In 1966 the Phillip Commission, comprised of three ministers from each of the three countries, was established. The report of the Commission became the basis for the Treaty of East African Co-operation. In the spirit of pan-Africanism, the postcolonial leadership of Julius Nyerere, Jomo Kenyatta and Apolo Milton Obote formed a loose association of economic interests, EAC, in 1967. The EAC was the best example of cooperation among developing countries. At the time of its demise, the EAC employed about 100,000 people and had assets valued at 500 million Kenyan pounds. The cooperation went beyond the traditional concerns with trade liberalisation and industrial harmonisation to include joint training and research institutions.[xviii] Despite being an exemplar of regional cooperation, the EAC collapsed in 1977. The EAC failed to survive the political differences of its leadership, the perception of unequal economic gain and a good deal of external manipulation and individual egoism.[xix] Additionally, other factors leading to its demise included poor leadership, which manifested itself in greed, intolerance, vengefulness, lack of foresight and the absence of honest analyses of problems.[xx] In other words, it collapsed because it was purely a state affair, with no organised civil society to buttress it.[xxi]

During the existence of the EAC there was reduction in foreign imports by the East African countries and increased inter-state trade among them.[xxii] All the three East African countries have witnessed serious economic decline since the collapse of the EAC.[xxiii] The mid-1980s and 1990s were characterized by global economic crises and Structural Adjustment Programs. Programs of commercialisation, privatisation, de-

subsidisation and other supply side prescriptions largely failed to meet the expectations of the people of East Africa. This was largely because they ignored existing social networks of vulnerable communities and the existing distrust between those in power and the people. Lacking a social contract therefore, SAPs precipitated conflict, violence, disillusionment, the weakening of the state and coping strategies that ran contrary to the market realities. Once again the need for regional co-operation was intensely felt.

In the era of globalisation, there is a great scope for co-operation among countries that share a common heritage. Thus, on November 13th 1993, the three countries signed an agreement for the establishment of the Tripartite Commission for Cooperation, charged with the responsibility of coordinating the economic, social, cultural, security and political issues for closer East African cooperation. The Treaty for the East African Community came into force on July 7th 2000, and the revised institution was officially launched on January 15th 2001.

CHALLENGES

It is futile to evaluate an organisation in its infancy, as most of its ideals are yet to materialise. This paper therefore seeks to present the dilemmas, challenges and hopes for a vibrant people-centred community. In the next section, I consider the EAC in a more critical perspective. It outlines the challenges faced by the EAC particularly against the backdrop of the expectations of the East African citizenry.[xxiv]

The establishment of the EAC was intended to be people-driven. For that reason the East African Commission put the draft Treaty to public debate from May 1998 to April 1999. Unfortunately, to the question posed by the inaugural Secretary General, Ambassador Francis Muthaura,[xxv] "are the people of East Africa involved adequately in the formation of the EAC policies?" the answer remains a resounding NO! The establishment of the East African Community has largely been a top-down process involving the governments of the region, with the grassroots communities barely informed, educated or consulted about the process. The language and the style of the body remains bureaucratic and elitist. Only the urban based and educated have been marginally involved. There are no comprehensive and well-funded institutions in place to generate and package information for dissemination to the people. The masses of women, peasants, workers and the youth, in their respective organisations and communities, have not been brought into the process. Even NGOs have only been peripherally involved. Indeed, there is no evidence that the power elite in East Africa wish to alter fundamentally the existing traditional patterns of regionalism. Although the East African person is presented by governments as the beneficiary of cooperation, the same governments have conceptualised a child-like individual, who has no ability to contribute to the growth of cooperation, but rather is expected to accept, whatever the paternalistic governments decide.[xxvi]

The perspectives of the political leadership notwithstanding, the unity and development of East Africa is too important to be left to the regimes of the region. For the Community to be sustainable, there must be considerable involvement of the people of the region in determining the content and context of their governance. There is no doubt that the popular will of the people has to be fully harnessed and involved in the creation of a stable, vibrant and closer cooperation and interaction between the East African countries and peoples.[xxvii]

Socialisation of the EAC

Despite the emphasis by East African leaders that the Community must create wealth, jobs and guarantee peace and security, these objectives continue to remain a myth. The notion of regional integration is controversial and has witnessed mixed feelings. On the one hand, there is the acknowledgement that the countries of East Africa have enjoyed close historical, commercial, industrial and cultural ties. They share a similar educational background and a common law jurisdiction. There is also the realisation that no single nation on the continent can achieve economic development in order to meet all the aspirations of its citizens without collaboration with the others. For example, between 1990-1997, of the three East African countries, only Uganda managed to maintain an average real GDP growth rate of higher than 3% annually, with the rest either in decline or at best stagnant.[xxviii] Hence the revived impetus for reintegration. On the other hand, there are sentiments of worthlessness and apprehension on the part of the ordinary person about the real (economic) benefits of regional co-operation where the playing field is not level. This can be captured from the rhetorical questioning, 'why should the East African countries *integrate abject poverty*?'[xxix] Hence, for a start, regional cooperation must be a vehicle for nation building and for the satisfaction of basic needs. This ought to be the starting point and the primary concern of regional co-operation.[xxx] For any integration to succeed, each partner must benefit. No government would convince the populace that it has to sacrifice its interest to those of the group as a whole, when there are no tangible benefits forthcoming.

The pessimism is compounded by the difficulty in assessing the value or achievement for economic integration because many of the factors cannot be quantified. Costs are immediate, while benefits accrue in the long term, as is the case of ECOWAS.[xxxi] For example, the growth rates are not very promising: Tanzania is the only economy which recorded a growth rate of 4.8% compared to 4.0% in 1998. In Kenya the GDP growth rate continued to decline from 2.8 in 1997, to 1.8 in 1998 to 1.4 in 1999, while in Uganda, the GDP recorded a growth rate of 5.1% which was lower than the projected rate of 7.0 %.[xxxii]

The above is exacerbated by the increased disillusionment of the populations with their governments. The realities of the poor as they face abject poverty, lack of basic services and poor governance, compounded by the yawning gap between the rulers and the governed, contribute to the sense of powerlessness of the people.[xxxiii] If the relationship between the state and the people is characterised by hostility, why should people accept an additional layer of suppression and oppression without real benefit? While the issues of poor governance may concern many, they are so frustrated that they have minimal expectation of their leaders. The truth is that African leaders have a horrible record of keeping promises. The masses have been mis-ruled, misled and abused for so long by regime after regime. Possibilities for growth, development and creativity have been steadily eroded and the vast majority is yet to see the fruits of so-called "independence." The peasantry continues to sustain the economies with no benefit for their toil. Instead they have to continue to sustain irresponsible and non-accounting governments. In Tanzania, agriculture contributes 48.9 % to the GDP and provides employment to 85% of the population;[xxxiv] while it contributes 25% of GDP for Kenya[xxxv] and in Uganda it is estimated to be over 50%. Despite this fact, agriculture receives meager financing from all the governments. For example, in Uganda, according to 1998-99 estimates, agriculture received a meager 1.8% of the total budget.[xxxvi]

The skepticism about the benefits of cooperation and misgivings about the future of the treaty are so real that a workshop was held to promote the public relations and marketing plan of the EAC.[xxxvii] The EAC must create public confidence in and respect for its institutions so that they become legitimate in the eyes of the partner states and their people.

PROMOTION OF A CULTURE OF CONSTITUTIONALISM

For any form of cooperation to be successful, it must be founded on an agreed minimum political framework embodying democratic freedoms. As observed by the inaugural Council of the East Africa Law Society (EALS), in each of the three East African countries there is an urgent need to secure a greater acceptance of pluralism in order to guarantee equal and meaningful participation in public affairs and accountability of the governors to the governed.[xxxviii] Indeed, African leaders in

The African Charter for Popular Participation, Development and Transformation, resolved that there must be an opening up of the political process to accommodate freedoms of opinion, tolerate differences, accept consensus on issues as well as ensure effective participation of the people and their organisations and associations.[xxxix] Ironically, political practice in East Africa has been the opposite of the ideals expressed in that instrument.

Although at independence all three East African countries inherited constitutions with the checks and balances characteristic of constitutional government, between independence and 1970, the political leadership in all the three countries had established one party states. Both Kenya and Tanzania operated a constitutional one party state, while in Uganda all political parties, other than the ruling Uganda Peoples' Congress, (UPC) had been declared unlawful societies.[xl] Legal efforts have been undertaken to free political space in both Kenya and Tanzania. In 1991, Kenya amended Article 2A of its constitution, introducing multi-partism, while in 1992 Tanzania enacted the Eighth Amendment to the Constitution that introduced multi-partism. Nonetheless, in both countries there is considerable repression of political pluralism, while in Uganda, a one-party-cum-movement has been institutionalised under the 1995 Constitution.[xli] None of the current constitutional regimes in East Africa, permits meaningful democracy. The right of the *wananchi*[xlii] to participate in politics is severely restricted, with limited rights to organise and constricted freedom of assembly and expression.[xliii] In Kenya, the government has relied on the Public Order Act to criminalise any form of public gathering under the pretext that it incites violence.[xliv]

Since a government can only be founded on the consent of the people, the revival of the EAC must go hand in hand with the correction of the lack of constitutionalism that has plagued each of the countries that are members of the organisation.[xlv] A viable political framework is the lynch pin for economic development.[xlvi] In fact, governments must see regionalism as a veritable weapon in the fight to restructure their economies and political systems. If Africa in general, and East Africa in particular, is to alter the existing patterns and relationships of underdevelopment, dependence, foreign domination, poverty and general social and technological backwardness, a holistic approach to regionalism must be adopted. More importantly, there is a critical need to understand and appreciate the need for dismantling the neo-colonial states and building new structures that enhance democracy, participation, inclusion and social justice. While multi-partism on its own cannot guarantee constitutional development, it provides a framework for the struggle and expansion of democratic freedom, to further enable the citizenry of the three countries to interact at various levels in a secure, and mutually-acceptable, political environment.[xlvii]

The above factors are exacerbated by the fact that in most African countries, governments tower over civil society in a relationship of subordination and patronage.[xlviii] People are consulted with the main objective of finding out whether they can simply say "YES" to what is being proposed.[xlix] Additionally, there is gross failure to observe constitutional provisions even when they have been in existence for many years. For example, despite the fact that Uganda has had a Bill of Rights for thirty years, it has been flouted with impunity.[l] Furthermore, within the East African region a constitution is used more as a *power map*[li] to define the roles and responsibilities of different organs of state. The rulers have used the constitution as a tool to entrench themselves in power or have totally disregarded its existence.[lii] Although, in some instances, the rulers have followed the constitution to the letter, where they are frustrated by the constitution, amendments have been engineered.[liii] Constitutionalism has been readily adopted as opportunistic strategies to close democratic space, contain popular rights and negate even traditional cultures, tolerance and popular involvement in decision-making. The rulers have perfected the art of brutal and inhuman

politics with a desire to retain power and keep the *wananchi* out of politics and constitutional development.

Governments have assumed the exclusive mandate to speak for and on behalf of the people, even where that mandate has been fraudulently secured. Where civil society engages in advocacy that challenges the status quo, the Government has effectively used law as a tool of oppression and issued threats, instituted diversionary cases against activists and, in some instances, detained them. Again, all three countries have legislation to control the actions of NGOs, with express prohibitions on political activities.[liv] As a result, many human rights and pro-democracy NGOs have shunned activism. Rather, they work quietly behind the scene, or engage in non-controversial issues.[lv] However, politics cannot be separated from economics and development, since both require the making of choices, which invariably involves politics.[lvi] In the contemporary world of globalisation, governments cannot afford to contain the democratic and creative energies of the people. The NGO community needs to be mobilised. Their networks, resources, global ideas and connection could be of critical use to the process of regionalisation.

It is hoped that the EAC will mediate the many tensions between civil society and the state and work towards constitutionalism and mutual accountability. The question is, do we have, or, at least hope to have, a regional institution that can act as a watchdog for universally acceptable principles, or should we always run to the "North" to decide for us, or worse, tell us what we already sub-consciously know? The OAU has been criticised for being a club of heads of state, a paper tiger, a toothless organisation, a club more content with celebrating its past achievements, than on marshalling the creative energies of their peoples.[lvii] The EAC should act differently, but can it? Its performance so far is not promising. For example, in the recent electoral violence in Uganda and Zanzibar, the EAC has been conspicuously absent. And yet, conflict, unrest and economic development are not good bedfellows.

The EAC may face the fate similar to many such institutions in developing countries, where regional integration is over-politicised, resulting in a slowing down of the pace for integration, if not total disintegration. Political nationalism has been a major impediment to regional integration.[lviii] Likewise, local political issues seem to preoccupy leaders with a prioritisation on national economic development. As a result, policies and actions for cooperation are informed by their implications for the domestic political arena.[lix] Again, there has been a concern about the poor commitment of the political leadership to the EAC due to their continued interest and loyalties to other regional blocks.[lx] Another profound fear expressed by the citizenry is the fact that the defunct EAC collapsed due to politics, thus the future of the current EAC would be promoted by reduced government intervention in the affairs of the EAC.[lxi]

Unfortunately, the mandate of the EAC to implement the Treaty is limited, for lack of an East African Community jurisprudence. Although Article 8(2) obliges partner states to recognise the Treaty as part of their law, an enabling law is yet to be effected. Unlike in the European Community, where Community law is superior and binding upon member states in furtherance of human rights,[lxii] the position in East Africa is yet to be clearly resolved. Despite having a common law background, there are disparities in the legal systems of the three East African countries. The harmonisation of the law is an uphill task impeded by conflict of laws and a lack of legislative basis.[lxiii] Again, the lack of real decision making powers of the EAC, coupled with problems of financing the process of regional integration, further militates against its effectiveness in advancing constitutionalism. Yet this is the only way that governments can demonstrate a break with the past, a commitment to new ideas and a willingness to engage in a radical reconstruction of the political foundations of economic growth and development.

BROADENING THE MANDATE OF THE EAC

The primary focus of the EAC is to establish an economic union with particular emphasis on the private sector. The private sector, by definition, is primarily profit oriented and liable to subscribe to narrow economic interests at the cost of good governance and human rights protection. While the Treaty provides for the establishment of the East African Court of Justice (EACJ), as the supreme court of the region within twelve months from the date of signing the Treaty, its jurisdiction has been limited. The EACJ was intended to ensure adherence to law in the interpretation, application and compliance with the Treaty, as well as to have original, appellate and human rights jurisdiction. The decisions of the court on the interpretation and application of the Treaty shall take precedence over national courts on a similar matter (Article 33(2). Decisions of the Court shall be final, binding and conclusive and not open to appeal (s. 35), except where new facts have come to light. Any person who is a resident of East Africa may petition the court against any act or omission, which is unlawful or infringes the provisions of the Treaty. Unfortunately, the human rights jurisdiction has been deferred to a date "as will be determined by the Council."[lxiv] For many observers, this deferment only shows that the political will to go the distance in the contemporary human rights era is still very much lacking. Those in power are still very uncomfortable with promoting human rights, especially the so-called second-generation rights.

Ironically, civil society has not appreciated its urgent role in engaging the regional process. In contrast, it has argued that the fact that the jurisdiction of the East African Court in matters of human rights has been deferred has rendered its role obsolete, as it is purely a trade agreement.[lxv] On the contrary, the activism of civil society is of immediate necessity for the same reason. Each country has to balance out a range of divergent interests as decisions about trade and development are made. There is need for regional advocacy to pressure governments to widen the scope of jurisdiction of the EACJ to handle human rights issues. There are many legal and human rights issues that will affect the rights of the *wananchi* under the Common Market. People's interests are better served when their economic and cultural rights such as the right to work, to a clean and healthy environment and to earn a living (which shall be directly affected under the Common Union) are protected as a matter of priority.

Cooperation and interaction between countries and peoples are possible only on the basis of commonly accepted norms and standards of human rights, which regulate the conduct of the people as they pursue their interests. However, there is still considerable resistance against the recognition and protection of human rights. Among the many arguments are that human rights are foreign in origin and not germane to our people. Secondly, it is argued, human rights are of secondary importance to the basic needs of Africans such as food, health, shelter and clothing.[lxvi] As rightly argued by Nyalali, the simple historical truth is that the independence of African states was grounded in human rights.[lxvii] Development must not be pursued at the cost of human rights. In comparison, although the Treaty on European Union does not contain a charter of basic rights, the Maastricht Treaty explicitly declares that the Union shall respect the fundamental rights as guaranteed by the European Convention for the protection of human rights and fundamental freedoms signed in November 4th 1950. Hence, respect and promotion of basic human rights is a paramount responsibility of state parties.[lxviii] It is such guarantees and respect for human rights that will facilitate the nurturing of a regional sense of community and purpose in the East African context.

THE ISSUE OF FORCED DISPLACEMENT

As the people and governments of East Africa are moving towards closer collaboration, there are serious implications for the movement of persons, especially the protection of the marginalised populace. Historically, the East African region has been both a major producer and recipient of persons forcibly displaced from their traditional places of abode.[lxix] Ethnic and racial clashes in neighbouring countries of East Africa have had far reaching effects on the region in terms of the number of forced migrants generated. The 45-year-old Sudan war between the North and the South has had many serious consequences, not to mention the Tutsi/Hutu divide and genocide in Rwanda. It is estimated that there are 1,253,000, refugees in the Great Horn Region; about half of all refugees on the African continent.[lxx] The region has experienced increased conflicts in Sudan, Uganda, Somalia, Ethiopia, Zanzibar and the neighbouring Congo, which inevitably aggravates the estimates.

Additionally, refugees and displaced persons are generally viewed as a security risk, thus the massive involvement of the military in dealing with their problems and their settlement near borders. It is therefore

not surprising that all three countries have been guilty of refoulment. They have also used the military to 'clean up' foreigners, as was the case in Tanzania in 1997, the nullification of permits issued by UNHCR in Kenya in 1998 and the allegation of cross border rebel activities in Uganda.[lxxi]

Although all three East African countries are signatories to the international conventions on refugees and human rights, there is a serious lack of appropriate municipal legislation in Kenya. Uganda's and Tanzania's legislation, on the other hand, is not in conformity with international standards. Furthermore, response to the displacement question is largely dependent on international aid and foreign experts who provide short term relief aid. Furthermore, there are serious limitations at the level of policy formulation, legislative harmonisation and practical enforcement. Most of the policies are developed in *ad hoc* fashion with only meager resources available. The law is arcane, inadequate, incomprehensive and with primary focus on the control of such persons, rather than their protection.[lxxii]

GENDER MAINSTREAMING

The EAC Treaty recognises the role of women in the enhancement of socio-economic development[lxxiii] and the role of women in business.[lxxiv] Further, in 1998, the process of establishing a Regional Gender Programme was started with the aim of creating a mechanism for ensuring the incorporation of gender in the EAC framework.[lxxv] As a result, a Gender and Community Development Committee was established. However, the Treaty is silent on the place of women in the political arena. And yet, the lack of women's participation in the political arena has immensely contributed to their marginalisation, domination, exploitation, and disrespect as a constituency in Africa. The political stage is pre-determined by men, and there is male patronage in the choice of women leaders. There are very few states that have attempted to "re define the power map" from a gendered perspective.

In Tanzania, out of the current Parliament of 275 members, only 45 are women, constituting a mere 16.3% of the total. There are only 3 full women Ministers out of 23 Cabinet Ministers. There are only 4 women out of the 23 Permanent Secretaries.[lxxvi] In Uganda in 1998, there were only 7 women out of the 47 Cabinet ministers, 51 women out of the 226 Members of Parliament.[lxxvii] The current cabinet has 4 women out of 22 ministers and 12 out of 44 deputy ministers.[lxxviii] In Kenya, there was no woman elected to Parliament between 1963-1969. In 1969, only one woman was elected while another was nominated by the President. In 1992, there were six women parliamentarians. Out of the current parliament of 222 members, only 4 are women.[lxxix] More than any other East African country, the political leadership in Kenya continues to demonise and derogate women. Clearly, in spite of the rhetoric about women and development, the governments in East Africa are yet to appreciate fully the critical importance and role of women in the future of the region. Aside from breaking down existing political, economic, social and cultural barriers to

effective mobilization and involvement of women in all spheres of society, there is still a great need to construct relevant structures and institutions to reverse the current exploitative tendencies and relationships, which reproduce the status quo. Massive public education, institutional reforms, progressive legislation and policy reforms are needed to reverse the current situation.

The EAC must place gender at the center stage of debates on and about constitutionalism. There is a need to generate a solid conceptual framework upon which to understand issues relating to the phenomenon of democratic governance, and as an anchor upon which women's struggles against oppressive socio-economic and political systems in the region, may be based.

OPPORTUNITIES

Amidst the rampant Afro-pessimism, the real issue is not the unavailability of workable solutions but rather the absence of the required political will and appropriate political environment to implement them. Policies of Africanisation, indigenisation, nationalisation, import-substitution, joint ventures, partnerships, SAPs have had limited effects on the quality of life, and political stability. Furthermore, these measures have failed to enhance the declared projects of nation building or the meeting of the basic needs of the vast majority of the people.[lxxx] As far back as 1990, The *African Charter for Popular Participation in Development and Transformation*, guided by the Economic Commission on Africa (ECA) and a joint initiative of NGOs, grassroots and governments, adopted a human-centred approach and emphasised that popular participation is central to all proposals of development, because it encourages people to accept the fact that sacrifices have to be made. It is noteworthy that this Charter was borne out of the initiative of NGOs, grassroots and governments.[lxxxi] A people centred approach also builds legitimacy for public programs, promotes the mobilization of the people and lays a foundation for collective development and shared experiences. Again, the World Bank's Berg Report prescribes that good governance is a prerequisite for poverty reduction, and in turn good governance can only be safeguarded by civil society.[lxxxii] It is gratifying that among the EAC's recognised fundamental principles[lxxxiii] is the promotion of good governance and constitutionalism.

The participation of civil society in the regional agenda must be strengthened, because it is the civil society that bears the brunt of the effects of those decisions. Moreover, in democratic societies, the state exists to serve the people and not vice versa. On close examination, it is clear that it is the leaders who subvert constitutionalism. People are the guarantors of constitutionalism to compel leaders to adhere to the spirit of the constitutional culture or ethic.[lxxxiv] Governments are not going to give up power and influence easily. Hence, bridging the gap to promote mutual accountability and shared values of constitutional development depends on the relative power of civil society to organise itself and seek its rightful space in a respectful partnership.

Throughout the Treaty-making process, the need for a people driven and people centred development has been underscored. The Treaty has provisions for the creation of an enabling environment for the involvement of the private sector and civil society, and enhancement of cooperation among business organisations and professional bodies.[lxxxv] The Permanent Tripartite Commission Council of Ministers in its 13th meeting in September 1999, laid out clear and specific

guidelines for giving NGOs observer status. This was adopted by the EAC. Accordingly, an observer may participate in the proceedings of the meeting to which they are invited, make a statement on a matter of particular concern to them, provided that the Secretary General receives it prior to the meeting. Furthermore, the observer may have access to documents of the Community provided that they are not of a confidential nature and they deal with matters of interest to the observer concerned.[lxxxvi]

Issues of constitutionalism are alive within the region. Citizens within the region have engaged in the democratisation process, despite the efforts to lock them out. In Tanzania, in response to the government's White Paper,[lxxxvii] a directed and controlled constitutional reform process, civil society formed the Citizen's Coalition for the New Constitution (CCNC), as a more participatory approach to the formulation of the constitution by collecting the views of the people.[lxxxviii] In Kenya, popular interest culminated in the creation of the Citizen's Coalition for Constitutional Change (4Cs), and the parallel constitutional making process, through the *Ufungamano* Initiative led by religious leaders which resulted in the publication of the Peoples' Constitution.[lxxxix] We are yet to see the outcome of the state dictated constitution process, which one critic has referred to as a *circus*.[xc] Civil society groups in Kenya continue to complain about marginalisation and manipulation of timing of the constitutional review process. In Uganda, the sustainability of the no-party state experiment is under serious threat for locking out political participation.[xci] All this notwithstanding, despite the existence of mutual distrust between the state and civil society, it is the resistance to manipulation, repression and gross human rights violations, which has encouraged the emergence of several popular organisations, which provide options for the future.[xcii]

Strengthening regional activities

There is a need to strengthen regional institutions that shall design long-term perspectives on constitutional issues, and to consider them within the framework of general constitutional development. The collaborative exchange and mutual development across borders should be warmly received and promoted. Indeed, the people of East Africa continue to cooperate amongst themselves, in businesses as well as professional associations, such as Kituo Cha Katiba: the East African Centre for Constitutional Development; the East Africa Law Society; the East Africa Human Rights Network; the East African University Academic Network; the East African Women Parliamentary Union (EAWPU) and the East African NGO Council, to mention but a few. Furthermore, *The East African*, a weekly paper covering issues of regional interest, has been in circulation for some years. More paramount, the peoples of East Africa have been trading among themselves to such an extent that annual informal trade yielded about US$, 200-300 million for each country.[xciii] The recent introduction of the East African passport has the potential of easing movement of persons, and it should be readily availed to all East Africans. Additionally, there is the removal of border charges for private passenger vehicles and the easing of border crossing formalities. At a governmental level, Uganda has established a Ministry for Regional Co-operation solely responsible for cooperation issues. It is the central organ to facilitate the focusing of regional economic development in national policies and development programmes, as well as provide an apparatus for monitoring and coordinating integration development.

Regional institutions are uniquely and strategically placed to seek the promotion of positive constitutional reform and adjustment without facing the travails of national institutions and NGOs. Such lobbying and advocacy would include the conceptualisation of issues of constitutional importance, and the development of people-centred agendas. Given the establishment of the East

African Community, numerous issues of an international and regional nature are going to require domestic and regional constitutional reflection and resolution. These include the issues of migration and refugees, the control of shared natural resources and the management of conflict within the region and beyond. At the domestic level, each of the countries face significant constitutional issues regarding ethnicity, gender, and various rights and freedoms, that are under continuous threat and require to be tracked down and publicised.

There is great potential for civil society organizations to mobilise and raise civic awareness of the *wananchi*, to understand that regional cooperation is intended to, among others, raise the standard of living of the people, maintain and enhance economic stability and foster closer and peaceful relations among the East African States. It must be understood that the current marginalization of the common East African is aggravated by globalization and the undemocratic nature of international institutions like the World Trade Organization (WTO), thus the need for a regional bloc to enhance East Africa's lobbying and advocacy power. Greater networking of East Africans is needed to ensure that a regional agenda finds space in the global processes and concrete strategies are developed for ensuring a more human-needs centred approach. It is hoped that regionalism would enhance the equitable, proper and transparent utilisation of resources, compliment the demand for accountable and democratic governance with responsible governments that protect the rights of the individual. Clearly, one major challenge is how to bring regional treaties and agreements to the understanding of the citizenry. In this area, Kituo Cha Katiba (KCK) in collaboration with the EAC is simplifying the EAC Treaty to make it readily understandable by the *wananchi,* who are the ultimate beneficiaries of the fruits of regionalism.

Additionally, as a regional center for constitutional development, KCK has taken the initiative to document the State of Constitutional Development in East Africa. It reviews court rulings, government policies and Parliamentary legislation, among others, in order to audit the progress made, and constraints faced, in the region, to ensure that constitutional questions gain publicity and popular usage and discourse. It is hoped that the review shall act like a mirror and resource through which civil society will examine itself, compare and coordinate levels of organization and activities, celebrate the milestones on the road to constitutionalism of their respective countries and press more urgently and coherently for reluctant states and ruling parties to pursue positive change.

As recommended by the World Bank, the reversal of the decline of Africa must happen from within Africa. "*Like trees, countries cannot be made to grow by being pulled upwards from the outside; they must grow from within, from their roots;* [xciv] *from the people of Africa.* (Emphasis added)

ENDNOTES

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[i] Ihonvbere Julius,: Africa in the1990 and Beyond : Alternative Prescriptions and projection, *Futures Vol. 28, No 1* (1996), p16-17
[ii] S.K.B.Asante ,: 'Regional Economic Cooperation and Integration: the Experience of ECOWAS', in Anyang Anyong' (ed) *Regional Integration in Africa : The Unfinished Agenda* (Academy Sciences Publishers 1990) p. 99
[iii] The Preamble and Art 5 of the Treaty for the Establishment of the East African Community
[iv] Wilbert Kaahwa : Perspectives on Racism, Racial Discrimination, Xenophobia and Related Intolerances : The role of the East African Community, a paper presented at the East Africa Law Society Regional Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, at Arusha, August 2001.
[v] See Wachira Maina : Constitutionalism and Democracy, in Kivutha Kibwana et al (ed) *In Search of Freedom and Prosperity*, (Claripress)1996, 1-6, and
[vi] Julius Ihonvbere : *Towards a New Constitutionalism in Africa*, CDD Occasional Paper Series April 2000 p-13-15
[vii] Edwin Mtei and Paulo Sebalu (et al) : Lessons from the Rise and Fall of the East African Community: No 1 Series in the East African Cooperation Forum Series, Lessons from African Integration, 1995, Unpublished, Fredrick Ebert Stiftung p.2
[viii] ibid p.1
[ix] Note that at this time the white settlers sought to federate the territories where the British had influence. This federation therefore was to extend from, Kenya, Tanzania, Zanzibar Uganda, North-East Rhodesia and Nyasaland
[x] ibid p.3
[xi] ibid p.4 : These included Customs, Common Market, Meteorological Services, Common Currency, Court of Appeal, Inter-territorial Language Committee, Post and Telegraphs, Income tax and Statistics.

[xii] Ibid p.12-13
[xiii] ibid p.19-24
[xiv] White Paper on Inter-Territorial Organisation (Colonial Paper no 191) quoted in ibid 25
[xv] ibid p27
[xvi] ibid 31
[xvii] ibid p.30
[xviii] Dominico Mazzeo : The Experience of the East African Community: Implications for the theory and practice of regional cooperation in Africa, In African regional Organisations,
[xix] This is a common observation made by most critiques on the EAC. For further information ref : Edwin Mtei and Paulo Sebalu (et al) : Lessons from the Rise and Fall of the East African Community: No 1 Series in the East African Cooperation Forum Series, Lessons from African Integration, 1995, Unpublished, Fredrick Ebert Stiftung: Also Dominico Mazzeo : The Experience

of the East African Community: Implications for the theory and practice of regional cooperation in Africa, In African regional Organisations, See Kituo Cha Katiba Concept paper 1995.

[xx] Mtei and Paulo Sebalu, p.xxvi

[xxi] The Preamble to the Treaty for the Establishment of the East African Community

[xxii] Mtei and Paulo Sebalu, pxxiv

[xxiii] Bakari Mwapachu : The Spirit of East Africa (Tanzania Minister for Justice and Constitutional Affairs) Address at the Inaugural Conference of East Africa Law Society In Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa,* (Claripress 1997) p 9

[xxiv] Kituo Cha Katiba Conference Report recommendations to the EAC , *Citizens, Communities and Constitutionalism*, Arusha July 2000.

[xxv] Amb Francis Muthaura : Statement by the Executive Secretary *In Perspectives on Regional Integration and Co-operation in East Africa*; (Proceedings of the 1st Ministerial Seminar on East Africa Cooperation, March 25-26) 1999, p.7

[xxvi] Gibson Kamau Kuria : The Constitutional Implications of East African Cooperation in Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa*, (Claripress) 1997, p.35

[xxvii] Francis Nyalali : Human Rights as the Basis for East African Cooperation, Address by the Chief Justice of Tanzania, at the Inaugural Conference of East Africa Law Society 1997, in Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa*, (Claripress) 1997, p12

[xxviii] Chris Ackello- Ogutu : Prospects for trade in agricultural products within the East African Co-operation Region, in *Perspectives on EAC*,(1999) p.45

[xxix] Spectrum Radio One, a call in Programme to discuss current affairs in Uganda, November 2001

[xxx] Dominico Mazzeo : The Experience of the East African Community: Implications for the theory and practice of regional cooperation in Africa, In African regional Organisations, p.163

[xxxi] S.K.B. Asante : Regional Economic Cooperation and Integration : the Experience of ECOWAS in Anyang Anyong (ed) Regional Integration (1999), p. 108

[xxxii] East African Community Annual Report 1998/99-1999/2000

[xxxiii] Ezra Mbogori : International Collaboration and Regional Networking, a paper presented at the Regional Conference on *Citizens, Communities and Constitutionalism*, Arusha July 2001.

[xxxiv] EAC Annual Report 1998/99-1999/2000p.6

[xxxv] EAC Annual Report1998/99-1999/2000p. 13

[xxxvi] background to the budget 1999/2000. The total amount spent on agriculture in 1998/99 was 19.82 Billion out of 1112.99 billion.

[xxxvii] *The East African:* October 16th -22nd 2000 p.7 see Vitaks Omondi : Now EAC to get Brand Image

[xxxviii] Benna Luttta : By Way of Introduction in Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa* p.3

[xxxix] African Charter for Popular Participation in Development and Transformation, 1990 United Nation General Assembly August 1990, 45th session Items 12 and 85 of the provisional agenda

[xl] Unlawful Societies Order SI 233/1969

[xli]John Jean Barya : Constitutional Reform In Uganda: A focus on Human Rights, Citizenship and Land Within the East African Co-operation Ideals, in EALS Report : *Constitutionalism, Human Rights and Regional Integration* (1996), p 59 and J. Oloka Onyango : Reflections on the Process of Constitutional Development in Uganda : In EALS Report : *Constitutionalism, Human Rights and Regional Integration* (1996), p 49

[xlii] A term used to refer to the grassroots person in East Africa. Simultaneously used to mean citizen.

[xliii] Gibson Kamau Kuria : The Constitutional Implications of the East African Cooperation in Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa,* p. 34, 38 also see John Jean Barya Opcit footnote 30
[xliv] James Orengo : Member of Parliament Ugenya, interview :Kituo Cha Katiba Fact Finding Mission September 20th 2001.
[xlv] op cit footnote 15
[xlvi] P. Anyang Anyong' (ed) *Regional Integration in Africa : The Unfinished Agenda* (Academy Sciences Publishers 1990) p.8
[xlvii] John Jean Barya : Constitutional reform opcit p. 59
[xlviii] Kayode Fayemi : Building a Regional Network for Constitution making : Prospects and Challenges in West Africa, a paper presented at the Conference on Constitution Making in West Africa, organized by Committee for the Defense of Human Rights, Sept 13-15 2000, Nigeria
[xlix]Solomy B. Bossa : Welcome Address at an EALS Conference, in EALS Report : Constitutionalism, Human Rights and Regional Integration (1996), p 1
[l] ibid
[li] Okoth Ogendo : Constitutions without constitutionalism : Reflections on an African Political Paradox, Issa Shivji (ed) *In State and Constitutionalism, An African Debate on Constitutionalism*, SAPES BOOKS 1991
[lii] The word ruler is deliberately used reflecting the arbitrariness of the governments as opposed to leaders who are perceived as more democratic.
[liii] Kivutha Kibwana : Constitutional Development in Kenya : 1999, in Kituo Cha Katiba : State of constitutional Development in East Africa 1999 unpublished.
[liv] Under s.1(1) no NGO shall operate in Uganda unless it is duly registered and government have the powers to cancel any registration. Other East African countries have similar provisions.
[lv] Oloka Onyango : *Civil Society, Democratisation and Foreign Donors : A conceptual and literature review,* CBR Working paper 56, May 2000, Bazara Nyangabaki : *Contemporary Civil Society and True Democratisation in Uganda : A preliminary exploration*, CBR Working paper 54 2000, Mahmood Mamdani and Peter Otim : *NGOs in East Africa: a report on the survey of Training Needs*: Consultancy report prepared for MS / Danish Association for International Development.
[lvi] Jeggan Senghor : Theoretical Foundations for Regional Integration in Africa: an Overview In Anyang Anyong (ed) Regional Integration (1990), p.22
[lvii] Shivji Issa : *The Concept of Human Rights in Africa*, Oloka Onyango :Promotion of Human rights and Conflict Resolution, a key note address at AWLA and FIDA Conference on Engendering the Peace Process, Feb 1999; P. Anyang Anyong : *Regional Integration in Africa: an unfinished agenda*, (Academy Science Publishers (1990) p.4
[lviii] Joseph Nye : Pan Africanism and the East African Integration, Cambridge: Harvard University Press 1965
[lix] Jaggen Senghor : *Theoretical Foundations* In Anyang Anyong (ed) Regional Integration (1990), p.24
[lx] *The East African* September 25th –October 1st 2000, Uganda was reported to have enrolled into Southern African Development Community (SADC), while in *The East African* July 31st –August 6th p.36, President Mkapa is quoted to have said that Tanzania preferred membership to COMESA and SADC. It was however, clarified that Mkapa's interest in SADC was aimed at entering the economic bloc.
[lxi] *The East African:* October 16th -22nd 2000 p.7 see Vitaks Omondi : Now EAC to get Brand Image
[lxii] Prof Kay Hailbronner : What Form Can A Constitution for the East African Co-operation Take? Experiences from German and the European Union EALS Report : Constitutionalism, Human Rights Nad Regional Integration, (Konrad Adeneur Stiftung and EALS, 1996)p.110

[lxiii] Wilbert Kaahwa opcit p 9-12
[lxiv] Article 27(2) The Treaty for the Establishment of the East African Community
[lxv] Critique given at the EALS Council meeting in October 2001.
[lxvi] Francis Nyalali : Human Rights as the Basis for East African Cooperation, Address by the Chief Justice Tanzania, at the Inaugural Conference of East Africa Law Society 1997, in Kivutha Kibwana (ed) *Human Rights and Democracy in East Africa*, p13 Also See Issa Shivji : The Concept of Human Rights in Africa
[lxvii] ibid
[lxviii] Kay Hailbronner : What forms Can a Constitution for East African Co-operation take: Experiences from German and the European Union, in EALS : Constitutionalism, Human Rights and Regional Integration (1996), p 110
[lxix] Barbara Harell Bond : Concept Paper for the International Development Research Centre
[lxx] Global world Refugee Survey (1997) p.4
[lxxi] Official letter by Human Rights Watch to Ministry of Home Affairs Tanzania February 6th 1999,
[lxxii]Harrell Bond, Hannah : Scientific Progress : Research on Policy Issues in Refugee Health Care in Sub-Saharan Africa, a Refugee Studies Programme University of Oxford , England September 1998, Also Sylvia Tamale and Joe Oloka Onyango : Forced Displacement and Gender Violence in Uganda : The Case of Refugee Women, A research Paper written for a project on Displacement and Gender Violence in a Refugee Camp, and supported by a grant from the Netherlands Embassy 1997, Also ref Hannah Gary: The Enjoyment of Rights by Refugees in Uganda : A socio-legal study: Annual Progress Report to the Norwegian Government and Nuffield Foundation July 1998
[lxxiii] Art 121 of the EAC Treaty
[lxxiv] Art 122 of the Treaty.
[lxxv] EAC Annual Report 1998/99- 1999/2000 p.28
[lxxvi] Meena Ruth : : Gender Issues in Constitutional Developments in Africa a paper presented at the Conference on Constitutionalism in Africa, Oct 5th 1999. The figure may have risen to 62 women Parliamentarians constituting 25% of the Parliament, after the recent elections.
[lxxvii] . Women and men in Uganda, Facts and Figures 1998, Ministry of Gender and Community Development and Statistics Department: Ministry of Planning and Economic Development.
[lxxviii] New Vision Cabinet Chart July 24th 2001
[lxxix] Kivutha Kibwana: Women, politics and gender politicking, in J.Oloka- Onyango (ed) Constitutionalism in Africa: Creating Opportunities, Facing Challenges (Fountain Publishers 2001) p.201.
[lxxx] Julius Ihonvbere : Africa in the 1990s and Beyond : Alternative Prescriptions and Projections, *Futures* Vol. 28 No 1, (1996) p 18
[lxxxi] Preamble to the African Charter for Popular Participation in Development and Transformation, 1990 United Nation General Assembly August 1990, 45th session Items 12 and 85 of the provisional agenda
[lxxxii] ibid, p 19-22
[lxxxiii] Art 6 of the Treaty for the Establishment of the East African Community; These include:

- Mutual trust, political will and sovereign equality,
- Peaceful co-existence and good neighbourliness
- 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 people's rights in accordance with the provisions of the African Charter on Human and People's Rights
- Equitable distribution of benefits

- Co-operation for mutual benefits.

[lxxxiv] Fredrich Jjuko: Editorial : State of constitutionalism in East Africa (Kituo Cha Katiba) 1999

[lxxxv] Art 127-129 Treaty for the Establishment of the East African Community

[lxxxvi] Art 5 of the PROCEDURES FOR GRANTING OF OBSERVER STATUS IN THE EAST AFRICAN COMMUNITY

[lxxxvii] White Paper Government Notice No 1 of 1998

[lxxxviii] Chris Maina Peter : Constitutional Development in Tanzania: 1999, in State of constitutionalism in East Africa (Kituo Cha Katiba) 1999 unpublished

[lxxxix] Kivutha Kibwana : Constitutional Development in Kenya: in State of constitutionalism in East Africa (Kituo Cha Katiba) 1999 unpublished

[xc] Lawrence Mute : Overview and Reflections on Constitutional Reform in Kenya : A paper presented Dialogue on the Constitutional Review Process in Uganda p.4. While the use of *circus* may sound extreme, it is noteworthy that Kenya has since 1991 adopted the same pattern of constitutional reform. In effect, the reform process has been linked to elections, thus minimal reforms are made on the pretext that the elections must be completed and thereafter a comprehensive review made. The pattern undergoes another vicious circle. This was a common submission by Kenyan stakeholders to the Fact finding mission undertaken by Kituo Cha Katiba in September 2001.

[xci] Art 269, The 1995 Constitution of Uganda, restricts the activities of political Parties.

[xcii] Julius Ihonvbere : *Nigeria: The Politics of Adjustment and Democracy*, (Transaction Publishers, New Brunswick-USA and London -UK 1994), p 5

[xciii] Chris Ackello- Ogutu : Prospects for trade in agricultural products within the East African Co-operation Region, in *Perspectives on EAC* (1999), p.51-52

[xciv] World Bank : *Sub Saharan Africa, From Crisis to Sustainable Development* (Washington World Bank, 1989), p.194