

EDITOR'S INTRODUCTION

CONSTITUTIONALISM, COMMUNITY AND THE PREVENTION OF CONFLICT IN CONTEMPORARY EAST AFRICA

J. Oloka-Onyango

Introduction: And where are we now?

There is a predictable, if somewhat depressing consistency between the studies of constitutional development in the three countries surveyed in the present compendium which covers the year 2001. That consistency lies in the continuing prominence of the issue of constitutionalism to the peoples of the region—a prominence that barely a decade ago would have been described as academic at best, or misplaced and irrelevant, at worst. Whether one looks at the traditional organs of the state—the Executive, the Legislature, or the Judiciary—or to the struggles by the masses for more directive methods of representation and participation in each of the countries examined, one discerns that THE CONSTITUTION is becoming an ever more conscious site for struggle, whether of a social, political or an economic nature. Thus, state functionaries will evoke the Constitution to justify the most undemocratic and coercive measures, even as members of the opposition seek recourse in the very same instrument to advance their causes for enhanced participation, expression and access. The efforts by activists for gender equality, the recognition of minority issues, and the quest for increased attention to economic, social and cultural rights, are increasingly rooted in the idea that the

Constitution ‘shall provide.’ Consequently, the struggle over constitutionalism in the region is as much a struggle over ideas, as it is a struggle over resources, space and political accountability. Despite the numerous problems that are aptly covered by the authors of the country reports in this collection, constitutions and constitutionalism remain an issue of growing concern and relevance to democracy struggles in the region.

However, one can only be depressed at the continued failure of East African governments to meet their people’s aspirations for democratic accountability, enhanced participation and transparent methods of governance. Whether this is discerned in issues in Kenya over the ‘fight’ against corruption, in Tanzania about the tensions in the Union and the death and mayhem in Zanzibar, or with regard to electoral malpractices in Uganda, one can be led to despair by the degree to which there is a lack of serious attention or genuine adherence to the ideals of constitutional government, i.e. government that is limited (in the sense of being non-coercive), accountable, and sensitive to the idea that rules of governance must be followed whatever the short-term political expedience at stake. Moreover, it does not matter that the country in question has a relatively new instrument—as is the case with Uganda—or has a constitution that has remained largely intact over decades, the absence of the political will to be governed by anything other than individual or sectional interest is strikingly uniform.

That constitutional ‘nonchalance’ raises serious questions as to whether the dawn of what we can describe as the ‘third phase’ of constitutionalism¹ represents a sustainable and enduring agreement that the methods of arbitrary governance and

¹ The first phase witnessed the constitutions made at independence, while the second was the constitutions that sought autochothony (indigenization) and usually resulted in the formation of a single-party state. The third phase dates back to the mid and late 1980s, when a number of African states decided to enact new constitutional instruments. Others have described the third phase as the ‘new breed’ of constitutions.

dictatorship that have been an enduring characteristic of the three countries, are truly an element of the past. We need to ask ourselves, not simply whether it is constitutions without constitutionalism; but is it also not about constitutions without democracy and accountability? This clearly demonstrates that the constitution-making exercises in which all three countries have engaged are a necessary first step; however, they are *only* the first step in a long journey yet to be completed. In short, how do we reach *beyond* formal constitutionalism?

The 2001 Papers: A Synopsis

Each of the reports in this year's compendium deals with issues of constitutional relevance that have both national and regional relevance. At the same time, they give some indication of the hurdles that still remain in the quest to develop a culture of democracy and progressive constitutionalism in the region. While such issues are not unique to East Africa, there is an added dimension in that the quest for regional integration intensified over the year in review, with several notable achievements being made in the consolidation of the community. Consequently, one of the main issues that should be given attention is the degree to which the countries of the region are prepared to foster a democratic culture nationally, in order to promote the same ethos regionally. As this synopsis clearly explains, while significant advances have been made in each of the three countries, as well as at the regional institutional level, much still remains to be done to produce transparent, democratic and sensitive mechanisms of governmental and institutional accountability. Conversely, this means that the task for civil society actors,

who are supposed to be the conscience and barometer of democratic change, is made all the more difficult. This is clear from all the reports for 2001.

Lawrence Mute explores the paradoxes that have become the stuff of daily issue in Kenya, by making a particular focus of attention the issue of corruption, and the manner in which both the executive and the judiciary responded to it. The example of the Kenya Anti-Corruption Agency (KACA) illustrates this paradox in bold relief. While we could celebrate the establishment of an institution to fight a scourge that has long plagued the Kenyan body politic, the action of the Judiciary in declaring the institution unconstitutional illustrates that there is a need to ensure that constitutional fidelity is not compromised, even as the culprits of what has become a debilitating and crippling practice are brought to book. While the record of the Kenyan Judiciary has of course not been free of blemish, the KACA case and several others of serious constitutional import illustrate that the Judiciary can be roused from its slumber to make a significant contribution to the democratic struggle.

Similar issues arose in the case of Uganda. Monica Twesiimes' examination highlights the dramatic judicial battle between President Museveni and his main challenger, Col. Kizza Besigye. The case is significant for several reasons, not least of which is the fact that it was the first judicial attempt in the history of elections in East Africa to seek judicial recourse to a dispute over a presidential election. In this respect, it set the valuable precedent that an incumbent President is not infallible, and also that the courts will at a minimum give a hearing to such challenges. More importantly, although the Museveni and the Electoral Commission won the case, a close reading of even the judgments in favour of the two respondents is a damning indictment of an election that

cannot be considered free and fair by any stretch of the imagination. Again, this raises serious questions about the commitment of the state not simply to the letter of the law, but to the spirit of constitutionalism.

The case of Tanzania continued to present interesting dimensions to the union/federalism debate. As Robert Makaramba demonstrates, there is ongoing concern that this issue be accorded the attention it very much deserves. At a minimum, it requires a thorough review of the mechanisms of collaboration and oversight that were put in place when the Union was first established. Given that these tensions can be said to have contributed to the unfortunate deaths in the mosque and the subsequent political refuge of several Zanzibaris, perhaps it is time for *Muafaka* 3—another consensus agreement in which the focus will not simply be the issue of peace on the island, but the very nature and character of the Union. Such an agreement entails a re-examination of not only the mechanisms of Union, but its very presumptions.

Each of the countries examined in this year's report illustrate that the tensions between the organs of the state continue to exist; that there is a need for their peaceful resolution, and that civil society has to play a more vigilant and significant role in guaranteeing that constitutional change in the region is both sustainable and enduring. This point applies with equal resonance to the case of the Community, examined here by Khoti Kamanga. As East Africans, it is in order to celebrate the rejuvenation of the spirit of integration that was dashed on the rocks of political intrigue in the mid-1970s. However, serious limitations are apparent within the restored institution, and we need to ask ourselves the basic question: *have the factors that led to the collapse of the first*

community been addressed? If one of those factors was the democratic deficit that existed at the national level, then clearly the answer is ‘No.’

Finally, with respect to the developments over the year, the processes of constitutional reform demonstrate that while this is an important element in seeking a modification of the rules of the game, it can only be considered the initial step in a long and arduous journey for democratic accountability. Needless to say, as the case of the ‘Ghai’ Commission in Kenya illustrates, there is a serious problem with existing instruments of government that need to be changed, irrespective of the presence or absence of the necessary political will required to restore democracy to the countries of the region. Having a bad constitution is much worse than having a good constitution which has problems of political will and implementation.

A Note on the International Context

While accepting that the region is the primary focus of the reports, it is insufficient to only examine conditions within the region. The second year of the millennium has been one in which dramatic developments have taken place in the international economy, specifically with regard to the growing issues surrounding the phenomenon of globalization and global economic governance. Regional and international compacts are daily gaining in prominence, with significant implications for the processes of constitutional consolidation in individual countries. Each of the reports demonstrates that there is an internationalist dimension to the struggle for progressive constitutionalism that cannot be ignored. Globalization impacts not merely on the economic decisions that states are compelled to make in terms of the allocation of

resources and the paths adopted towards development, but also on the ‘power map.’ In other words, globalization is as much a political phenomenon as it is an economic one. Questions such as whether to privatize a public body, to reduce the size of the public service, or even over whether to fund the health or education sector (and by how much), significantly impact on the powers of the organs of government, relations between citizens and the state, and on the specific protection of groups which tend to be marginal and disenfranchised. In a nutshell, globalization is an intrinsically constitutional issue.

There is another, perhaps more insidious dimension to the phenomenon of globalization and its impact on constitutionalism that is only obliquely covered in the reports. It is that globalization and the institutions that are the main engines of its growing hegemonic control over the world (such as the IMF and the World Bank) play an ever more prominent role even in the determination of political choices and governance models that are in place in the region. This is dramatically illustrated in the case of Uganda, which stands out among the three countries in the region as the only one which does not have a multi-party system of government. Debate has raged over the merits and otherwise of Uganda’s no-party system, but the fact is that it has come to increasingly resemble a single-party state, particularly in the aftermath of the presidential elections of 2001. Further questions must be asked over the sustainability of the system after the departure of President Yoweri Museveni, or indeed, if a transition is made to multipartism, whether such transition will not simply be a reversion to the conflict-ridden and gerrymandering past that the movement was supposed to mark a departure from. Indeed, under the no-party system, the very issue of Museveni’s supposed departure in 2006 cannot be taken for granted.

Despite this concern, and the fact that the level of political repression in Uganda (through the harassment and imprisonment of political opponents and the ubiquitous use of the charge of treason) is ever on the increase, the institutions of globalization continue to parade the Ugandan case as a paragon of 'good governance,' and to praise Museveni as an exemplary model of modern African leadership. This narrow, economistic and indeed opportunistic view of conditions in Uganda severely undermines the quest for genuine democratic change in that country; even while recognizing that significant strides have been made since 1986 when the Movement came to power. The case is made worse when contrasted to the Kenyan example.

With regard to the latter, the response of the Bretton Woods institutions has been quite the reverse, with the Kenyan government being denied credit facilities and negotiations stalling over issues such as corruption and the full application of IMF/World Bank conditionality. While it is quite clear that there are numerous problems of accountability and governance in Kenya, the distinctive approach to the case of the two sister countries clearly demonstrates that the Bretton Woods institutions are not concerned with *internal* (or horizontal) accountability, i.e. accountability to the people over whom these governments govern. Rather, the main concern is whether or not there is external (or vertical) accountability to the bank and to the other institutions of global governance, which exert considerable pressure on governments to conform to their economic prescriptions. The whole issue over the 'Donde' Bill (or Act), which sought to place a limitation on the amount of interest chargeable by banks on loans and other advances, is illustrative that the institutions of global governance preach democracy, but are unprepared for its logical consequences. At the end of the day, the approach of the

Bretton Woods institutions is not a sustainable one if we are concerned with the development of constitutional methods of governance and the evolution of progressive and genuinely accountable methods of democratic oversight and control in the East African region. To make matters worse, there are no mechanisms of accountability to bring these institutions to book when the ‘miracles’ they praise today, turn into the nightmares of tomorrow.

These issues assume even greater poignancy as we turn the lens closer to home and look at the East African Community (EAC), which in microcosm stands for the same objectives as the institutions of globalization. As Kamanga points out, written into the charter of this reborn institution is the issue of democracy. Were it not so serious, this would be a laughable proposition, given the patently undemocratic practices that all of the members states of the revived community have engaged in. Even as they point to what they consider to be Rwanda’s ‘democracy deficit,’ their record makes such a charge smirk of duplicity at best, and sheer hypocrisy at worst. A critical question must thus be asked: *what are the prospects of promoting democracy and constitutionalism within a community that is made up of constituent parts that suffer from a serious ‘democracy deficit?’*

Finally, we would be remiss not to make some mention of the defining international event of 2001—the September 11 attack on New York’s World Trade Centre and the Pentagon—and their aftermath (the removal of the Taliban state in Afghanistan and the subsequent ‘war’ against terrorism). Quite clearly, this ‘war’ adds a new dimension to the struggle for democratic constitutionalism in the region. Always eager for an excuse to legalize repression and clamp down on the opposition, the

response of the American government has provided further ammunition for the governments of the region to fine-tune mechanisms of state repression and dictatorship in the name of fighting terrorism. Furthermore, the American examples of detention-without-trial, kangaroo judicial proceedings, and due process violations provide abundant excuses for the countries of the region to employ the same tactics with impunity; if the Americans can do it, why can't we?

Exploring the Link between Constitutionalism and Conflict

The belief that the end of the Cold War marked the commencement of a new era of global peace and stability was shattered in the wake of the fratricidal conflicts in the Balkans, the former Yugoslavia and several African countries. The Rwandan genocide provided the wake-up call to those who believed that with the threat of nuclear annihilation significantly diminished, the world would enter a period of relative peace and prosperity. The fact is that the scourge of conflict is very much present within the contemporary political economy, and it is the great task of humankind to ensure that internal armed conflict does not replace the cold war standoff of preceding years.

The phenomenon of constitutionalism is intimately linked to the issue of conflict, and specifically to its prevention. Indeed, the forging of a constitutional arrangement for the management of the state is itself a method of conflict prevention or resolution. It represents a *concordat*, or agreement between the state and its peoples that the individual wishes of the country's leadership would take second place to the greater interests of the country. Is East African constitutionalism on the right path to preventing conflict? Have we provided new ways in which to reinvigorate the constitutional struggle in order to

guarantee that the necessary space has been created for a flowering of contending views and for their amicable accommodation? Have the mechanisms of governance and participation we have created provided sufficient avenues for the involvement of the various contending political forces, as well as for the democratic resolution of future disputes that may arise? A reading of the events relating to constitutionalism in 2001 illustrate that we have quite clearly not.

Reaching ‘Beyond’ Constitutionalism

Against the preceding background, it is fairly evident that so much remains to be done in the struggle to achieve a new democratic and constitutionalist order within the East African countries, as well as in the Community that they are struggling to create afresh. Unfortunately, there is a surprising dearth of an ideological or conceptual dimension to this struggle; why are we concerned about constitutionalism? How will it translate into concrete mechanisms of political and economic liberation for the masses of disenfranchised populations that are present in the region? What contribution can East Africa make to a re-orientation of constitutional principles that mainly have their origin in Western liberal democracy? Answering these questions will allow for a radical reorientation of the constitutional challenge, as well as move the debate beyond merely applying principles that have been designed and nurtured for situations different from our own. In order to effectively provide for a democratic constitutionalism, we must reach beyond the constitutionalism we have inherited.

CONSTITUTIONAL DEVELOPMENTS IN KENYA:

A CRITICAL APPRAISAL OF THE YEAR 2001

By Lawrence Murugu Mute

1.0 INTRODUCTION: GRAPPLING WITH THE LOOSE ENDS

As the year 2001 dawned, constitutional discourse in Kenya was mired in a cacophony of seemingly never-ending debate on the process by which the Constitution of Kenya might eventually be reviewed. This debate - on which Kenyans had expended their wit and energy perhaps more than any other single issue since independence - had still not been resolved to their satisfaction at the conclusion of 2001. In the meantime, Parliament continued exercising its legislative functions while the Judiciary continued to interpret the law and the Executive proceeded to govern the country.

Any high expectations of political, economic or social breaks-through and resolutions that Kenyans might have had, were tempered by their experiences of how little actual change had taken place during the last few years. An optimistic shopping-list for 2001 would have seen Kenyans desiring:

- (i) A framework to pave the way for peaceful transition to genuine democracy;*
- (ii) Serious application by all parties involved to ensure that Kenyans participated in and finalised review of their constitution during the shortest possible time;*
- (iii) The creation of an enabling environment to facilitate economic growth;*
- (iv) Guarantees of government good-will in dealing with the practical issues which affected the people's quality of life, including the fight against corruption, security for all and fighting poverty, disease and ignorance; and*
- (v) The shopping-list would also desire a linkage of law as set out on paper with reality - the difference between preaching the law and living the law.*

This study seeks to assess the state of constitutionalism in Kenya during 2001 by describing the key sites within which constitutional developments or happenings in Kenya played themselves out during that year. To do this, the study analyses legal and policy positions vis a vis the constitution as defined by the Executive, Parliament and the Judiciary. It also examines in some detail the topical question of constitutional review which dominated Kenyans' thinking and action during that year.

This study has three substantive sections. This section introduces the study. Section two provides facts and themes concerning constitutional developments in Kenya during 2001. That section also provides a critique on highlighted developments. Section three draws conclusions of the study by attempting an analysis on the state of constitutionalism in Kenya during 2001 and by setting out unresolved issues.

2.0 CONSTITUTIONAL DEVELOPMENTS IN KENYA: ISSUES AND CRITIQUE

2.1 Constitutional Developments in the Fight Against Corruption

2.1.1 Context

*Fall-out from the December 2000 High Court ruling, which declared the Kenya Anti-Corruption Authority (KACA) unconstitutional, was of premium constitutional magnitude in 2001. Almost immediately after the ruling in *Stephen Mwai Gachiengo and Albert Muthee Kaburia v Republic*, queries on the ruling's aptness were raised and recriminations and conspiracy theories on the real reasons behind the ruling suggested and discussed at great length. Sitting as a constitutional court, the High*

Court had declared KACA's prosecutorial powers unconstitutional, finding that section 26 of the Constitution did not vest KACA with powers of criminal prosecutions and that these powers had first and foremost been vested in the Attorney General. The Court also found that since the Director of KACA, Justice Aaron Ringera, was also a member of the Judiciary, the doctrine of separation of powers was thereby violated.

Many commentators pointed out that even though the Court arguably stated the correct legal position, for example regarding KACA's non-compliance with the separation of powers principle, the letter of its ruling undermined the public policy good, and hence the spirit of, the law. If the Court had bothered to concern itself with the public policy good that KACA was doing, it would not have snuffed out the Authority without leaving KACA room to operate while the Government sorted out its legal basis.

As things stood at the beginning of 2001, the Government, Parliament and the Judiciary had to determine how best to deal with issues arising principally from the Court ruling but also from other events. The challenges were fairly clear, and the following issues were key:

- (i) What would happen to pending cases which KACA had instituted;*
- (ii) What would happen to the investigations which KACA had instituted;*
- (iii) What would happen to the preventive anti-corruption measures either already put or being put in place by KACA; and*
- (iv) How a holistic framework for fighting corruption in Kenya would be instituted.*

In the event, the Attorney General reassured Kenyans that all the above issues would be taken care of by the Government. In the meantime, the International Monetary Fund (IMF) postponed the release of at least Kshs 9 billion in loans because of the Government's perceived failure to undertake reforms for combating corruption.

2.1.2 The Constitution and anti-corruption legislation

The Government endeavoured to found its national anti-corruption strategy primarily around the Constitution of Kenya (Amendment) (No. 2) Bill, 2001 which intended to embody anti-corruption legislation within the Constitution. The Bill sought to re-establish the Kenya Anti-Corruption Authority (KACA), to be constituted by a Director as the chief executive and Assistant Directors appointed by the President in accordance with procedures set out by Parliament in an ordinary statute. The Authority's functions would be to:

- (i) Investigate and prosecute corruption offences by public officers as well as economic crimes and other related offences; and*
- (ii) Undertake other functions necessary, as prescribed by Parliament, for the prevention of corruption.*

The Bill also established the Kenya Anti-Corruption and Economic Crimes Board, comprising members prescribed by Parliament. The Board's functions would be to advise the Authority on the performance of its functions. The Bill guaranteed the Board and the Authority independence in the performance of their functions.

If the Constitution of Kenya (Amendment) (No. 2) Bill had been passed by Parliament, its effect would more or less have been to resuscitate the KACA, which had been declared unconstitutional in December 2000 with the additional safeguards of entrenchment in the Constitution. Yet, as soon as this Bill was published, it ran into trouble.

First, and not as innocuous a matter as it may seem, the Government made publicity gaffes which meant the Bill failed to receive endearment or popular endorsement by Kenyans. It became apparent that the Bretton-Woods institutions were the primary drafters of the Bill, something that made Kenyans extremely uncomfortable with the Bill. Dismay was expressed that the Bretton-Woods institutions had presumed to second legal experts to supervise, oversee or assist the Attorney General of a sovereign state to

draft contentious bills with profound constitutional implications. Commentators pointed out that the role of these institutions was to lend money, not to draft laws. Yet when President Daniel arap Moi was lobbying for the passage of the Bill, he said this was in Kenya's national interest since otherwise the country would be denied over Kshs 25 billion in external funding as well as vital private sector investments in-flows. In response to this, the proposed nominating organisations to the Kenya Anti-Corruption and Economic Crimes Board pointed out that: "Donor aid is not normally a free gift. It is a loan to Kenyans to be repaid by Kenyans."

Second, and more fundamental, Kenyans already had a healthy scepticism of the good intentions of the Government to fight corruption. When the Bill was initially published, Members of Parliament hesitated to entrench it in the Constitution, realising they were being invited to sign a blank cheque by entrenching into the Constitution a KACA whose defining law they had not seen. So it was that the Attorney General eventually published the Anti-Corruption and Economic Crimes Bill, 2001. In light of the distrust which many Kenyans had of their Government's intentions, it was not surprising that the Anti-Corruption and Economic Crimes Bill included provisions which were so censorious that they spurred Parliament to decline to pass the Constitution of Kenya (Amendment) (No. 2) Bill, 2001 despite great Government (including presidential) lobbying.

Politicians, researchers and other commentators pointed out that the effect of both Bills had not necessarily resolved the conflict cited in the High Court ruling disbanding KACA to ensure there was no conflict of jurisdiction between KACA and the Attorney General's office. But the most discussed aspect of this raft of legislation was the amnesty provisions in the Anti-Corruption and Economic Crimes Bill, 2001. Clauses 23(5), 39(5) and 63 proposed that persons involved in corruption prior to 1 December 1997 would be amnestied. Notably, however, this amnesty would not be applicable to persons who had acquired government land illegally or fraudulently, persons who were not in Kenya, persons who on the 22nd of December 2000 had outstanding warrants of arrest, or persons who prior to that date were being investigated for corruption or related offences.

While the amnesty debate tended to be presented simplistically in the popular press, it in fact was far more complex. Hon. Prof. Anyang Nyong'o had already suggested that the President should be amnestied for the economic ills he might have committed to facilitate peaceful transition. But, at a minimum, the President would have to acknowledge responsibility for his actions and apologise to Kenyans. Jaindi Kiseru noted that with the country in the middle of a critical transition to a post-Moi Kenya, an anti-corruption strategy which failed to address the issue of amnesty and which did not set a cut-off date for prosecutions would not see the light of day. Those guilty of corruption would not pass laws which could be used against them when they stepped down from power. Hon. Musikari Kumbo in his turn posited the pragmatic view that it would be impractical to attempt to prosecute all corruption which had happened in the country from time immemorial. An Economic Crimes Commission should be formed to determine the applicable cut-off point for economic crimes cases to be investigated. The Commission would decide what measures would be taken against the guilty, the beneficiaries of amnesty and the conditions for being amnestied. Hence, there would be no blanket amnesty.

Indications then were that Kenyans were not in principle against agreeing to amnesty. Rather, Kenyans were angered by the cynical attempt to force amnesty legislation down their throats without allowing adequate debate and without incorporating minimum standards for processing amnesties - in other words, Kenyans could envisage of amnesty as part of a transitional justice programme which the Bills in question did not provide for. The general feeling of Kenyans was that the political elite had designed the amnesty provisions as self-serving tools to protect them from future prosecution for past corruption without commensurate returns for the country. One opinion poll showed that Kenyans backed amnesty for economic crimes so long as the criminals paid for their plunder. 80% of respondents rejected blanket amnesty. 48% of the respondents desired amnesty, which was preceded by confessions. 75% of the respondents favoured a parliamentary truth and reconciliation-style commission to investigate public officials.

2001 then witnessed a repeat unravelling of the Government's anti-corruption strategy. This climaxed when the Government failed to get the 65% parliamentary support necessary to pass the Constitution of Kenya (Amendment) (No. 2) Bill. The anti-corruption law was thus left floundering with the Government resorting to relatively ineffectual strategies such as the Executive's establishment of the Anti-Corruption Police Unit.

2.1.3 Corruption and Judicial action of a constitutional nature

The public continued to be exasperated by the Judiciary's inability or hesitancy to send clear deterrent or punitive messages to those who had committed corruption crimes or those intending to do so. This judicial inertia, as had been the case for years, was similarly in 2001 best exemplified by the paucity of cases arising out of the Goldenberg Scandal, which after over half a decade of prosecutions were still meandering their way through the courts.

Significant heat was also raised by cases first instituted by KACA and which were left in a lurch after its demise. The Attorney General employed the strategy of taking over these cases, terminating them and instituting fresh proceedings on the same charges. But when he applied to take over seven cases which KACA had been prosecuting so that he could terminate them and then institute fresh charges, defence lawyers argued that the court should discharge the accused only using section 204 of the Criminal Procedure Code pursuant to which the Attorney General could not cause the re-arrest of the accused. Doing anything else, defence lawyers argued, would amount to abuse of the criminal justice system; the Attorney General had no powers to take over and terminate cases instituted by an illegal body.

While the courts initially allowed the Attorney-General to re-institute many of the cases which the former KACA had been prosecuting, the Judiciary made important if controversial constitutional interventions and interpretations in relation to these cases. This was best epitomised by the case of *R. v. Attorney General and Another Ex Parte Kipng'eno arap Ng'eny*.

Mr. Kipng'eno arap Ng'eny, then (and still is) a serving minister in the Government of President Moi, had been charged with several counts of abuse of office in the early 1990s when he was the Managing Director of Kenya Posts and Telecommunications Corporation (KPTC). When KACA was disbanded, the Attorney General caused termination of KACA's case against the minister after which the minister was immediately recharged with the same counts. Mr. Ng'eny sought a constitutional reference in the matter. In November 2001, the High Court issued an order of certiorari prohibiting all further prosecution on the counts in the indictment against Ng'eny. The Court ruled that prosecuting Ng'eny was oppressive and did not accord with his constitutional rights under section 77 of the Constitution because there was a lengthy and unexplained nine-year delay between the time of the commission of the offences charged and the initiation of prosecution by the Attorney General in April 2001.

Commentaries on this ruling have found it very problematic. First, statutes of limitations are traditionally stated expressly and are not implied. No statutes of limitations apply in criminal law relating to abuse of office offences. Second, the Court's suggestion that the Attorney General's actions were oppressive were not supported by facts. Indeed, the Court's application of section 77 of the Constitution to the Ng'eny situation was not particularly relevant. Section 77(1) of the Constitution provides: "If any person is charged with a criminal offence, then unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." Commentators pointed out that clearly under this provision, determination on whether a person has a hearing "within a reasonable time" has to be assessed from the moment that such person is charged with a criminal offence and not from the date when the alleged crime was committed. Rather than assess the length of time since Ng'eny had been charged, the Court had mistakenly taken account of the time since the commission of the offences for which Ng'eny had been charged. Ng'eny had first been charged in July 2000, then again in April and discharged in November. The Court's interpretation, commentators felt, amounted to an instance of selective justice.

2.2 The Constitution and Fundamental Human Rights

Constitutional developments in the area of the protection of fundamental human rights had several negative and positive aspects to it. Only a few illustrations are cited here for purposes of this report:

(a) The Government's unhelpful attitude towards the freedom of expression, a freedom guaranteed under section 79 of the Constitution, was evocative of the days of one-party dictatorship when self and mass expression was actively censored. During 2001, the Government published amendments to the Books and Newspapers Act which set out steep penalties on the media sector. Under the amendments, publishers or printers of newspapers would be required to execute a bond of Kshs 1 million before the publication or printing of such newspapers. A publisher or printer who failed to abide by this requirement would be fined not more than Kshs 1 million or be imprisoned for a term not exceeding three years or be liable to both fine and imprisonment. A second-time offender would be imprisoned for a term not exceeding five years as well as be barred from printing or publishing any other newspaper. Interestingly, this provision did not clarify the duration during which such a person would be barred from printing or publishing a newspaper. Even more outrageous, these amendments provided that vendors of newspapers whose printers or publishers had not complied with the legal requirements to make returns of their newspapers to the Registrar of Books and Newspapers would be guilty of an offence and liable to a fine not exceeding Kshs 20,000 or to imprisonment for a term not exceeding 6 months or both imprisonment and fine. No attention seemed to have gone into working out how a vendor would reasonably be able in each case to confirm whether the proprietors of a particular newspaper had complied with the law before collecting their newspapers for sale. The media fraternity saw these amendments as draconian and unworkable, and as intended to erode press freedom and freedom of expression. In turn, the Attorney General denied that he was intent on muzzleing the free press, saying that the Bill merely sought to curb the mushrooming gutter press that maliciously capitalised on damaging people's personality by peddling rumours and character assassination.

(b) At the same time, however, the Judiciary pleasantly surprised Kenyans in a few instances by unusually going out of its way to protect the constitutionally guaranteed rights of Kenyans. In the case of R. v. Crucial Properties Ltd and Another, the Government attempted to freeze the account of the defendants who were suspected of money laundering following the transfer of a huge sum of money - reportedly Kshs 2 billion - into the said account. The Attorney General published the specific offence of money laundering under section 221 of the Narcotics Drugs Act only after the said money had been remitted into the account. A court ruled that the defendants' rights had to be protected in view of Constitution section 77(4), which disallowed retroactive application of law. It states: "No person shall be held to be guilty of a criminal offence on account of an act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed." Hence, no lawful investigations could take place in respect of money or property of the defendants, which was acquired by them prior to the publication of the legal notice making money laundering a specified offence under the Narcotics Drugs Act.

(c) During the year, too, the Chief Justice finally published the Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 by Legal Notice No. 133 of 2001. This Legal Notice provided clear guidelines on the manner of approaching the High Court for the protection of one's constitutional rights under sections 70-83 of the Constitution. This was laudable and significant because the past had witnessed great difficulties in the enforcement of fundamental rights for want of rules.

Many Kenyans still felt that their human rights could not be protected adequately under the prevailing Constitution - a constitution whose emphasis of negative rights excluded economic, social and cultural rights. Kenyans would as yet not expect a

vintage year in terms of protecting their rights.

2.3 Balancing and Checking the Arms of Government

The cut and thrust, which defined the relationship between the Executive and the Legislature, showed that Parliament was going to proceed to reclaim its role as the law-making arm of the government. As well as the instances of tension, which this study has already outlined, several other contexts of the tension between the Executive, the Legislature and even the Judiciary are set out here:

(a) The Constitution of Kenya (Amendment) (No. 3) Bill, 2001, was published as a private member's bill. The Bill was in fact not debated during 2001; but its intention reflected the national mood respecting the President and his powers. If passed, the law resulting from this Bill would have taken away from the President control on the life and calendar of Parliament by amending sections 58 and 59 of the Constitution which give the President unfettered powers to convene, prorogue and dissolve Parliament at his own convenience. The law would have allowed Parliament to set its own calendar and thereby to control its own sittings and business. Further, in the event of the presidency being vacant, the seat would be filled in temporarily by the Speaker of the National Assembly. This provision would change the present constitutional formulation under which the Vice-President assumes power on the demise of a seating President. This Bill is likely to be debated in the year 2002 with significant consequences for the relationship between Parliament and the President - effectively removing key powers from the latter and vesting them in the former organ.

(b) The economic recession which has been a feature of Kenya during the last near-decade was not reversed in the year 2001. Debate and action on how to stimulate the economy and thereby benefit the ordinary Kenyan was joined with particular zest by Parliament in respect of the inordinate profits which some private corporations continued to make at the apparent expense of ordinary Kenyans who remained mired in poverty and economic doldrums. Parliament thus passed the Central Bank (Amendment) Bill, 2000, (popularly known as "the Donde Bill") in December 2000 as a proactive measure to protect consumers from excessive profiteering by financial corporations. The Bill sought to control or harmonise interest rates by linking them with the rates on Treasury Bonds.

At the beginning of 2001 though, President Moi declined to sign the Donde Bill into law. The President stated that the Bill's provisions should apply only to future and not present or past borrowings since that could conflict with the constitutional provisions concerning the retroactive application of law.

The express or implied constitutional significance of this Bill was threefold. First, if assented to by the President, the law would be a symbol of the increasing assertiveness of Kenya's Parliament since it resulted from a private member's bill. Second, and linked to the first matter, the Bill was passed by Parliament in the face of concerted resistance from the Government. Finally, and perhaps most importantly, the Bill was popular in the public's consciousness.

Reaction and counter-reaction to the Donde Bill brought into sharp relief the constitutionalised tension which exists between the executive and legislative branches of government. In January 2001, Members of Parliament felt that the President should recall Parliament not only to rectify the anomalies in the Donde Bill but also to deal with the consequences of the declaration of KACA as unconstitutional. While the President was exercising his powers constitutionally (as part of checks and balances), some parliamentarians still felt that this was a challenge to Parliament. At the same time, they were greatly exasperated with the Attorney General for not advising Parliament on the anomalies to the Donde Bill while the Bill was going through the parliamentary committee stages. Leading on from this, then, was the clear desire by Parliament to continue clipping the President's wings. In any case, corrections to the Bill as suggested by the President were made and it became law as the Central

Bank of Kenya (Amendment) Act of 2000.

Later, the law was challenged in court by the Kenya Bankers' Association (KBA). The KBA filed a constitutional reference seeking a declaration that the Central Bank Act, 2001 was unconstitutional. The Association argued that the Act was incapable of being implemented owing to inconsistencies with the Constitution. The Act was therefore entirely void. This suit was still proceeding at the end of the year.

(c) At the beginning of the year, it seemed as though the courts would be inundated by copy-cat suits seeking declarations on the unconstitutionality of government agencies straddling the border-line of the separation of powers doctrine vis a vis the executive-legislative-judiciary divide in such agencies. In *R. v. Kenya Roads Board and Another*, the High Court issued temporary orders on the basis that section 17(1) of the Kenya Roads Act conferring executive functions on members of Parliament in District Roads Committees was contrary to the doctrine of separation of powers. The court held the Kenya Roads Act enacted as No. 7 of 1999 was null and void to the extent it allowed parliamentarians to perform executive functions on the District Committees. Following this ruling, the High Court was accused of simplistic interpretation of the separation of powers principle, with one member of Parliament noting that Cabinet ministers who were themselves members of Parliament were allowed to implement the laws they made in Parliament in their ministerial capacities; yet ordinary members of Parliament were being barred from implementing decisions under the District Roads Committees. Ultimately, the Judiciary drew back from emasculating another agency of government when it lifted its suspension of the Kenya Roads Board, instead banning members of Parliament from sitting on the Board's district forums. This enabled the Kenya Roads Board to go ahead with its operations.

2.4 Constitutional Reform: The Story of 2001

2.4.1 Context

As I have stated elsewhere, Kenya's constitutional review exercise at the beginning of 2001 remained "characterised by near-uncountable false-starts". During the last one decade, the hopes of Kenyans had been raised, dashed, then raised again, and then this cycle had been repeated over and over again. The "merry-go-round" "soap opera" on constitutional review had up to the end of 2000 drawn on the following events:

- (i) The Constitution of Kenya Review Commission Act of 1997, an Act slipped into the 1997 Inter Parties Parliamentary Group (IPPG) Package without the notice of most members of Parliament who were more keen on fighting for reelection at the 1997 General Elections;
- (ii) The Constitution of Kenya Review Commission (Amendment) Act of 1998, an Act passed following extensive and historic extra-parliamentary negotiations amongst key players in constitution reform;
- (iii) The Peoples Commission of Kenya (PCK) established in December 1999 when it became clear that the establishment had decided to renege on the understandings legislated by the 1998 Act; and
- (iv) The Constitution of Kenya Review (Amendment) Act of 2000 which was passed on the instigation of the Raila Odinga-led Parliamentary Select Committee on Constitutional Review, despite the disapproval of major political party and other interests. This Act led to the establishment of the Constitution of Kenya Review Commission (CKRC) headed by Prof. Yash Pal Ghai in 2000.

2.4.2 Merging the parallel constitutional review processes

At the commencement of 2001, it seemed quite likely that the two constitutional review processes - the Ufungamano Initiative's Peoples Commission of Kenya and the Parliamentary Select Committee on Constitutional Review's CKRC - might eventually merge into one review process. It will be recalled that the Ufungamano Initiative had tasked the PCK with the collection and

collation of views to prepare a draft constitution, which would be debated before being subjected to a popular referendum. The CKRC as per the Constitution of Kenya Review (Amendment) Act, 2000, was to prepare a draft constitution on the basis of the synthesised views of Kenyans following which the National Constitution Conference would debate the draft constitution prior either to the draft constitution being legislated by Parliament or being subjected to a referendum process under the management of the Electoral Commission of Kenya.

Kenyans spent the first quarter of 2001 undertaking extensive and sometimes acrimonious haggling trying to tease out a satisfactory formula for merging the two constitutional review processes. Essentially, interests across the divide had acknowledged that it would be politik for a merger to take place.

While the parliamentary-led review process could cloak itself in the armour of legality and all that government backing entailed (including a clear resource-base), the parliamentary-led review initiative was pretty sensitive to accusations that it lacked legitimacy amongst the populace. For its part, the religious leaders at the core of the Ufungamano Initiative had been unwillingly thrust into the limelight by the stakeholders. By many accounts, what most of the religious leaders at the core of the Initiative hoped for when the parallel review process was mooted was that the Government would stop fooling around and banker down to more serious negotiations. Their bluff having failed, therefore, the religious leadership wanted out as quickly as possible. Not particularly charitable analyses of the actions of the Ufungamano leadership have posited that having realised that the Initiative had no resources and that it would be resisted by the Government at every turn, key players in the process (particularly the review commissioners) desired to be part of an initiative which would provide perks and safety-nets for them. The bottom-line really for the Ufungamano Initiative was this: even if the PCK managed to prepare a draft constitution on the basis of collected views from the public, that draft constitution might have legitimacy but it could not become law since it would not be passed by Parliament. At the same time, however, commentators still pointed out that since constitution-making was a political process, political means could have been used to legislate a draft constitution vouched for by the people.

The soul-searching which the establishment elite went through was as harrowing if less cogently articulated. Sound-bites from hard-line elements oozed scepticism and clear intentions to scuttle the review process, which they saw would detract on their designs for political succession at the end of the Moi presidency. Less bellicose and more realistic elements of the establishment elite still did not fathom the need for bending over backwards to include the Ufungamano Initiative into their constitutional review fold. Laws, they said, had to be made by Parliament and its agents since it was members of Parliament and not civil society types who held ultimate legitimacy - the legality of having been elected by the people. Reforming the constitution, countered the civil society types, was so important a function that it could not be left to Parliament which after all itself was a creature of the Constitution.

For the influential players on both sides, the question then was how to facilitate the merger of the two review processes without seeming to lose face. In fact, opinions differ in respect of whether what was popularly referred to as negotiations and the eventual merger were really so. Indeed, as merger became more likely, an articulate section of the Ufungamano Initiative began to point out that the Initiative was being led into an unprincipled alliance which neither followed the negotiation procedures established by the Initiative's stakeholders nor insisted on the minimum content which the Initiative had set as its negotiation position. Among other things, it was said that:

- (i) The Initiative's leadership was bulldozing stakeholders to confirm predetermined decisions without allowing them the possibility for dissent or amendment;
- (ii) The 10-member team negotiating on behalf of the Initiative had disregarded the terms of reference set for them by the stakeholders. These terms included:
 - . That the negotiating team would talk, consult or negotiate but not enter into an agreement with the Parliamentary Select Committee on Constitutional Review before such agreement was ratified by the Ufungamano stakeholders;
 - . That the Initiative would hold direct negotiations with the Parliamentary Select Committee on Constitutional Review as the

principal;

and

. That Professor Ghai would not be an impartial mediator but rather an agent of the Parliamentary Select Committee on Constitutional Review. As the Chairperson-in-waiting of the CKRC, it was feared that Ghai would cut corners to broker a deal so as to revel in the generated kudos and take up his appointment. In fact, the inside story was that Professor Ghai brow-beat members of the Ufungamano Initiative into submission;
(iii) That it was improper to link the review process with the next General Elections since that could affect the quality of the review. The period up to the next elections would prove inadequate to review the constitution properly;
(iv) That if the Constitution of Kenya (Amendment) Bill 2001 which would entrench the Review Commission into the Constitution was not passed, passage of the Constitution of Kenya Review (Amendment) Bill 2001 might be irrelevant since the latter could be challenged in court as unconstitutional, being in contravention of section 47 which sets out the basis under which Parliament may alter the Constitution;
(v) The Commission's security of tenure would not be protected from the whims of a fickle Parliament;
(vi) That presidential fiat could still be used to scuttle the review, for example, if the President dissolved the National Assembly and called elections before completion of the review; and
(vii) That the political environment was still not conducive for constitutional review. A veritable catalogue evidencing this included:
. Public meetings were still being disallowed;
. Civic education meetings were being broken up;
. The country was mired in insecurity;
. Political parties like the United Democratic Movement (UDM) were still being denied registration; and
. The public broadcaster, the Kenya Broadcasting Corporation (KBC), was still reporting partially. This did not evidence good will on the part of the government.

Some Kenyans were suggesting that a full-blown merger of the review process should also take account of the following issues:
(i) The creation of a government of national unity to steer the review process; and
(ii) That it would not be feasible to undertake comprehensive constitutional reforms within the set time (prior to the 2002 General Elections), but an interim constitution could be put in place before the elections following which comprehensive review would be finalised.

But despite this variety of suggestions, a merger eventually took place. Final say regarding the merger may be left to two counter opinions. Respecting the Ufungamano Initiative, it was noted:
"The four founding principles of the Initiative have been violated and the spirit of Safari Park which united the stakeholders in the quest for a people-driven process disregarded. The mandate of Ufungamano which was to facilitate the making by Kenyans of a democratic, just and enduring constitution has been abandoned ... An oligarchy has illegally constituted itself at the helm of the Initiative that is outrightly dictatorial and accountable only to itself."
One commentator saw Ghai's negotiated merger as representing "the forces of moderation and continuity as opposed to radicalism and extremism". This, the writer wrote, was the starting point and rallying call for gradual re-orientation of our politics and political attitudes/orientations towards the centre. The merged constitutional review process would hopefully train Kenyans on the politics of moderation and accommodation.

2.4.3 From process to content: the hiccups of reviewing the Constitution of Kenya

By the beginning of the second quarter of 2001, the Attorney General had prepared the Constitution of Kenya (Amendment) (No. 1) Bill, 2001, which sought to introduce a new chapter (XII) in the Constitution. The purpose of the Bill was simply to entrench into the Constitution the statute setting out the merger formula, the Constitution of Kenya Review (Amendment) Act, 2001. This would protect the review process from attack, for example, by passage of an ordinary parliamentary bill repealing or

amending the merged process.

This Bill was to remain in limbo for many months and eventually fall by the wayside without being legislated in 2001. Initially, following its publication on the 21st of March, the Attorney General withdrew the Bill so as to make minor technical corrections to it. After a lot of dithering, an attempt to discuss the Bill in December proved inconclusive, and it was expected that the Bill would be discussed by Parliament during its first session in 2002.

The non-passage of this Bill upset many participants in the review process. Many commentators have, fairly or unfairly, presented the Attorney-General of Kenya, Amos Wako, as a wily operator who has used his extensive experience to serve the KANU Government's needs without demur or compunction. The questions which abound are how Wako with his extensive experience would make innocuous mistakes time after time in important bills. Significantly, be it the fights against corruption or the constitution review process, commentators have usually been able to point out how the establishment elite has benefited from the Attorney General's apparent blunders. In this instance, Parliament's failure to pass the Bill during the whole of 2001 was read as a design to leave the powers that be through Parliament with an open cheque, which could be used to cash in the Commission if it failed to tow a specifically set line. The National Convention Executive Council (NCEC) argued that the constitutional review process would remain vulnerable so long as it was not entrenched in the Constitution. The process could fall foul of the courts by being declared unconstitutional a la KACA. Furthermore, the immense powers exercised by the President could be deployed to undermine the review process.

The Constitution of Kenya Review (Amendment) Act, 2001, established the organs which would review the Constitution. These were the Constitution of Kenya Review Commission, the Constituency Constitution Forums, the National Constitutional Conference, the Referendum and the National Assembly. 27 commissioners would comprise the CKRC. Its functions would be to:

- (i) Encourage and promote civic education;*
- (ii) Collect and collate the views of Kenyans on proposals to alter their Constitution;*
- (iii) Prepare a bill to alter the Constitution; and*
- (iv) Undertake research in and make recommendations for review on the make-up and organs of state, structures and systems of government, constitutional commissions, electoral system, the legal system, etc. The Constituency Constitution Forums would assist the Commission to do its work principally by mobilising people in the constituencies. These Forums would also send representatives to the National Constitutional Conference, which would debate the draft constitution prepared by the Commission. Controversial issues would be resolved through referenda. The National Assembly would then receive the draft constitution for passage into law.*

This study cannot make a definitive critique of the constitution review process (with particular reference to the CKRC and its work) since by the end of the year accomplishment of the Commission's terms of reference was in most respects still uncompleted or in some cases just burgeoning. For purposes of this critique, therefore, the following general remarks will have to suffice:

- (a) The Commission began its substantive work more or less by the beginning of the third quarter of 2001. Taking cognisance of the scepticism and unhelpful politicisation of issues which had accompanied the whole birth process of the Commission, it was hardly surprising that the Commission had to navigate a mine-field of real as well as contrived problems before it got down to the serious business of reviewing the constitution. The Commission experienced what were hoped to be teething (but what have turned out as deeper) problems regarding squabbling and factionalism within the Commission's ranks:
 - (i) Stories abounded of commissioners undermining each other or undermining Professor Ghai's chairmanship. In one instance, a rift resulted from the visit to State House of some commissioners who it seemed might have been seeking instructions from or reporting to the President on the Commission, apparently to undermine its independence of action;**

(ii) Later, it became common-place for commissioners to disagree with or contradict their chairman in public on matters such as the length of time it would take to review the constitution, on the resources allocated to the Commission and on the integrity of commissioners and their administrative systems vis a vis some commissioners' attempts to sell the Commission goods or services at great expense for their personal gain; and
(iii) Then again, the Commission was embroiled in unhelpful publicity during the war of words and eventual replacement by the Commission of its first Secretary, Okoth Owiro.

(b) In the period up to December 2001, the nature of the CKRC's work comprised public meetings, public hearings, consultations with specific sectors of the population, meet-the-people tours, conferences, seminars, caucuses and focus group discussions. This variety of strategies were used to collect views from Kenyans on a whole lot of process as well as content issues, including:

- (i) Introducing itself to the people;
- (ii) Establishing requisite statutory structures such as the Constitutional Constituency Forums;
- (iii) Meeting civic education providers;
- (iv) Raising its profile;
- (v) Chivying specific sectors to prepare memoranda;
- (vi) Actually collecting views on the content that should be in a new constitution; and
- (vii) Receiving viewpoints from local as well as international experts.

(c) As the Commission undertook its work, many critiques on the effectiveness or relevance of the work were made:

- (i) Whether the Commission's communication strategy was user-friendly (to the average Kenyan who would be ill-able to access information via information technology like web-sites - a moot question was whether and how the Commission ensured that its visits to the countryside were advertised adequately;
- (ii) The nature of reach to the populace which was the Commission's target - would visiting one locality in a constituency during one day amount to collection of views in that constituency?
- (iii) What value people's views would really have in the Commission's scheme of things as it drafted a constitution for Kenya - would the views of collectives like political parties be given far more premium than the views of individual Kenyans?

(d) Specifically respecting CKRC's role in civic education for constitutional review, issues that drove debate and action on the matter include the following:

- (i) Hard-line elements in the establishment elite desired that the CKRC should not only facilitate civic education but that it should also deliver civic education to the exclusion of traditional civic education service providers. This attitude was informed by the fact that traditional civic education providers were civil society organisations that have tended to be non-conformist and uncompliant with the partisan demands of the established order. In the event, all concerned made it clear that any civic education roles that the Commission had should not be exclusive. On this basis, commendably but perhaps not to great effect, the Chairperson of the Commission on occasion told off the provincial administration and police for disrupting civic education activities, noting that the government had a clear duty to ensure that people were informed on the on-going review;
- (ii) The correctness of giving the CKRC managerial or implementive civic education roles was questioned considering that the Commission would also collect views from citizens. Concern was raised that the commissioners might be involved in conflict of interest situations facilitating civic education as well as collecting views from the public. Some commissioners were already confusing the public by stating what they said were their personal views on the things they would like to be in the Constitution instead of focusing on collecting people's views;
- (iii) Whether the Commission had the actual capacity to conduct civic education. When CKRC invited civic education providers who wished to participate in constitutional education to register with it, it was inundated by applications from many organisations, which had never before undertaken civic education. Many individuals quickly cobbled up organisations or redefined

the terms of reference of other organisations, assuming that the Commission had huge resources which they would access following registration. The lack of civic education skills and capacities is exacerbated by the absence of resources to facilitate civic education work. CKRC allocated a paltry Kshs 47,000 for civic education work in each of Kenya's 210 constituencies; (iv) Whether civic education was ever a one-off event to precede constitutional review or whether in fact civic education should not be facilitated as a continuous process throughout the review process.

(e) The question of funding was always going to be a sore subject. The disillusionment of Kenyans with elite-driven processes was such that they thought the commissioners would be intent on minting money for themselves even as they endeavoured to review the constitution. Unfortunately, Kenyans were not disabused of this thinking when the goings-on in the Commission, such as squabbles about allowances and attempts to unduly influence decisions on choice contracts, became public knowledge. Doubts about the cost of the review began to be expressed in the same way that people in many countries have queried the cost of democracy (in elections and inconvenience). Luckily, Kenyans have as yet not balked from financing the Commission's heavy costs.

3.0 CONCLUSION: OUTSTANDING PONDERABLES AND IMPONDERABLES

3.1 The State of Constitutionalism in Kenya

The doctrine of constitutionalism seeks to ensure that all persons are bound by the rules which a society sets for itself. Under the doctrine, the basic law of a society has to include certain basic values and it has to be applied strictly as set out in that law without deviation or difference. An unapplied or unapplicable constitution is in fact no constitution at all. Key principles which operationalise constitutionalism are the separation of powers as well as the rule of law principles. These two principles are straddled by a number of critical values, which are at the core of constitutionalism - including respect for the letter and spirit of the law, limitation (checking) of power as exercised by and/or amongst various governance institutions, equality of all before the law regardless of their backgrounds or non-retroactivity.

The traditional checks-and-balances scheme as well as the other values engendered by the concept of constitutionalism have been a main concern of this study. Kenya's balance sheet on the state of constitutionalism can be summarised in the terms set out below:

(a) As a general point, the state of constitutionalism in Kenya prior to 2001 was woeful. Studies of pre-2001 Kenya show the Government's total disregard of law in its actions. For example, while the Inter Parties Parliamentary Group (IPPG) deal facilitated legislation requiring chiefs not to incarcerate persons at cells in their camps, chiefs have to a large extent not abided by this law. So too has the Government failed to respect changes in the law meant to ease conditions under which public meetings could be called.

(b) The Executive arm of government has been averse to adhering to the dictates of constitutionalism for many a year now. The Executive has become so adept at juggling and tinkering with legal interpretation that one is almost wont to sigh that in any case an old dog cannot learn new tricks - adherence to the dictates of constitutionalism. Numerous illustrations of the Executive's deadened senses in this regard can be cited:

(i) Breach of human rights in 2001 (for example regarding extra-judicial killings and police brutality) continued unabated. In the words of Amnesty International: "The killings of alleged robbers by the police is yet another indication of the authorities' disregard for the human rights of Kenyans. The lack of impartial, independent investigations into similar cases has only reinforced the view that the government actively condones excessive use of force by the police. The government has the duty and obligation to uphold both domestic and international legislation in order to protect its citizens from torture and extra-judicial executions."

(ii) The impunity with which the Executive had issued decrees left, right and centre without reference to law was illustrated by the

Attorney General's admission in Parliament that the President had decreed the creation of new districts without taking cognisance of the law. The Attorney General assured Parliament that he would take steps to deal with this matter, although he said that administrative boundaries should also be a matter to be dealt with by the CKRC. Yet only a few days later, showing total understanding or disregard for the dictates of constitutionalism, President Moi defended the districts created since 1978, saying they were created to give people more access to government offices and services, and emphasising that he adhered to democratic principles of "the voters right to choose the leader he wants".

(iii) The clamour instigated by some politicians calling for President Moi to run for a third presidential term highlighted the view that the Constitution could be overridden if that was in the interests of the powers-that-be. Advocates of a third term for President Moi seemed to be saying that if the President wished to run again, the fact that the Constitution did not allow this was neither here nor there.

(c) The current Parliament has suddenly taken upon itself the mantle of correcting the lap dog or rubber-stamp image which was the role the Executive carved out for Parliament during Kenya's onerous decades of one-party rule. Yet even this new-found courage was brittle and at times accompanied by the consequences of over-excitement, the like that a teenager experiences when his or her parent first grants his or her permission to go to the disco unchaperoned. In the year 2001, a plethora of parliamentary motions or proposals, many serious but some laughable, were mooted, proposed or, in a few cases, actually passed by Parliament, invariably with the intention to revise the country's constitutional arrangements respecting checks and balances between the Executive, Legislature and the Judiciary. Such notable motions or proposals included the following:

(i) The motion which sought to amend section 59 of the Constitution which provides for extension of the life of Parliament only when the country is at war. National Development Party's (NDP's) Otieno Kajwang wanted a clause added to allow extension of Parliament whenever the country was undertaking constitution review. A huge furore blew over this proposed motion, which in fact did not reach the floor of the House. It was pointed out that a move to extend Parliament's life would be tantamount to Parliament hijacking the power of the electorate and declaring itself a law unto itself. A constitutional change such as this one was so radical that Parliament could not properly make it on its own. There was no co-relation between war and this matter that could justify the amendment. The motion, many said, was a mere ruse to extend President Moi's term in office;

(ii) The failure of Parliament to pass a motion calling for the establishment of a truth and reconciliation commission. This, it was noted, was hardly surprising considering that those who stood to benefit from such a motion were not willing to admit they committed crimes, while those in favour of the motion sought it for vindictive purposes;

(iii) The defeat of a motion seeking to allow Parliament to fix the number of government ministries;

(iv) Parliament decided to refer a motion seeking to amend the Constitution to provide for greater participation of women and other marginalized groups in Parliament to the CKRC. The motion proposed that at least one third of members of Parliament should be women;

(v) At the beginning of the year, an MP actually had the temerity to propose that Kenya should be turned into a constitutional monarchy with President Moi as king to facilitate smooth transition from the Moi presidency; and

(vi) A motion, eventually not discussed, called for the repeal of section 9(2) of the Constitution, which limits presidential terms to 2. As we have seen, countering this proposed motion was the argument that Moi should leave the presidency since the Constitution dictated so. It would be wrong and cynical to tamper with the Constitution just to satisfy the short-term whims of a person.

(d) Arguably, the time-warp within which the Judiciary had slumbered for many a year began to fray on the edges, but very slightly, during 2001:

(i) As we have seen, the Chief Justice published rules to make it easier for persons seeking redress for breach of their fundamental rights as legislated in the Constitution;

(ii) The proliferation of high-profile judicial decisions in the year recalled to many Kenyans the possibility that the Judiciary could actually help them to resolve some of their problems. The KACA ruling of 2000 thus resulted in copy-cat actions inviting the courts to determine the constitutionality of Government institutions like the Banking Fraud Investigations Department of the

Central Bank of Kenya, the Efficiency Monitoring Unit of the Office of the President, and, as we have already seen, the Kenya Roads Board;

(iii) Yet, when it came to the crunch, the Judiciary still failed to inspire much confidence in its consumers - the people of Kenya. Judicial decisions in respect of the outlawing of KACA and the acquittal of Government minister Kipng'eno arap Ng'eny were seen either as not savvy or as being motivated by interests other than of law or public policy. Indeed, section 77(1)'s constitutional guarantees as applied by the courts in respect of Minister Kipng'eno arap Ng'eny can be contrasted unfavourably with the judicial inefficiency which saw Mr. Richard Wachira Wambugu remain in remand for 18 years since 1983 when he was arrested on a possible charge of murder. The state now said it would not charge him with murder all these years after the arrest, when for a lot of the time it was clear that Wambugu was not sane and hence could not stand trial.

(e) Economic issues usually don't come to the fore in discussions on constitutionalism. In fact, it can be argued that the economy is the engine of constitutionalism. If people have no economic basis on which to found and build their society's value systems, a good constitutional order will be hard to come by. In this regard, then, 2001 was a land-mark year in the country's process of defining its economic priorities using what the Government and international and local civil society presented as a people-centred methodology. The Poverty Reduction Strategy Paper (PRSP) was prepared by the Government and other actors with the twin objectives of poverty reduction and economic growth. The PRSP involved consultations with stakeholders to facilitate the preparation of pro-poor activities and development programmes. This process was undertaken with a lot of fanfare and at great expense, a matter which received critical scrutiny from the public. The guiding principles of the PRSP included the following:

- (i) Giving a voice to the poor;
- (ii) Participation and ownership involving poor and marginalised stakeholders;
- (iii) Transparency, openness and accountability; and
- (iv) Equitable distribution of national resources and development initiatives.

The principal objectives of the PRSP were:

- (i) Linking policy, planning and budgeting;
- (ii) Identifying national development objectives and priorities;
- (iii) Ensuring quality expenditures leading to efficiency gains;
- (iv) Harmonising the financing framework for growth; and
- (v) Monitoring and evaluating development activities.

On constitution-related matters, the Paper noted:

"It is expected that the ongoing review of the Local Government Act and the proposed constitutional review process and anticipated land reforms would provide Kenyans with a most effective framework to redress the existing gaps and weaknesses in the country's social and public policy framework."

While the PRSP process included consultations with Kenyans as had never happened before, the PRSP had not began to bear fruit by the end of the year and poverty remained the norm in most of the countryside. Creating a framework within which laws will be respected and adhered to requires actual results to compliment the rhetoric of processes such as the PRSP.

The balance sheet, then, for 2001 was rather unhealthy. Some vital signs were appreciably absent from the patient. Some progress had be made, but Kenyans were still hesitantly and plank by plank building the flag-ship which would carry their aspirations for a country governed by law to which all would abide.

3.2 Outstanding Ponderables and Imponderables

As the country drew into the year 2002, an imponderable that unrelentingly continues to rear its head is the real value of participating in political processes to catalyse change. Again and again, Kenyans have learnt the hard way that even legally binding agreements on process or even substance are not a guarantee of closure on an issue. The 1997-2000 period was replete

with examples of ostensibly sewn-up deals which the Government went back on. The non-implementation of the substance of the IPPG deal exemplifies this situation as does the refusal of the Government to honour the Bomas of Kenya/Safari Park process which led to the passage of the Constitution of Kenya Review (Amendment) Act of 1998. In 2001, even when the Ufungamano Initiative in good faith sought a basis for negotiating a merged review process, the Government did not reciprocate by ensuring that the necessary framework and right environment were in place for the purpose of constitutional review. This is a matter that will continue to play itself out in 2002.

As 2001 drew to a close, too, it became increasingly apparent that the on-going constitutional review might be exploited by the political elite (which now obviously included KANU and NDP) to service their short-term political desires. KANU and particularly NDP were fronting blueprints, which if taken up by the CKRC would enable KANU/NDP to share the post 2002 General Elections spoils of politics as bedfellows. One clearly-held notion was the redefinition of the executive arm of government now to comprise a president with executive, yet relatively limited powers, a vice-president, a prime minister and several deputy prime ministers. What was cynical about formulations such as these was the obvious intention to use constitutional reform to create political offices that would suit KANU/NDP's immediate political needs.

Linked with the above was the distinction between comprehensive constitutional reform and minimum constitutional reforms to facilitate a free and fair general election in 2002. If the CKRC divined that it could not finalise comprehensive reforms before the elections, its parent law allowed it to propose minimum reforms to facilitate the elections. Concerns were raised that the Commission would be provided with a fait accompli which on the one hand would leave it the narrow alternative of proposing minimal constitutional reforms, while on the other the Commission would have no long-term guarantees that it would complete comprehensive review following the elections.

Members of the public continued to express their frustration with the political wheeler dealing which stymied their country's potential for development. In Letters to the Editor, one writer argued that the achievement of cohesion, reconciliation and understanding in the national interest would be realised only by a government of national unity, which could bail out Kenyans from their political and economic problems. A smattering of calls for such a government were still being heard at the end of the year. Yet the political elite both in government and within the opposition was so disunited that a government of national unity was never a realistic option for Kenya in 2001. In any case, such a government was not expressly envisaged in the Constitution.

The unfinished business of Parliament was legion - from deciding how to proceed with anti-corruption legislation to how to manage the constitutional review. Finally, the Judiciary's role of interpreting and enforcing the law independently of the Executive and the Legislature would continue to be tested in 2002. For example, an interesting case in this regard was the challenge in court by two members of Parliament who argued that the creation of 28 districts by the President after 1992, having not been approved by Parliament, was illegal and should be declared as such. If the court declared these districts illegal, the decision would have extreme consequences on administrative and even electoral boundaries, thereby bringing the Judiciary into direct confrontation with the Executive.

THE STATE OF CONSTITUTIONAL DEVELOPMENT IN TANZANIA

By Robert V. Makaramba

1.0 INTRODUCTION

This Report concerns the constitutional developments that occurred in Tanzania during the year 2001. It is a contribution to the efforts of the *Kituo cha Katiba* to document the progress of constitutional development in East Africa in order to audit the progress made and the constraints faced in the region. In this discourse I shall concentrate on two major constitutional developments that took place in Tanzania over the year under review. The first was the establishment of the Commission for Human Rights and Good Governance, following the 13th Constitutional Amendment to the 1977 Constitution of the United Republic of Tanzania (Union Constitution), while the second was the political settlement in Zanzibar which gave rise to the 8th Constitutional Amendment to the Constitution of Zanzibar of 1984 (Zanzibar Constitution).

2.0 CONSTITUTIONAL DEVELOPMENT IN TANZANIA: THE HISTORICAL BACKDROP

The amendments to the Union Constitution and the Zanzibar Constitution both have had some implications on power politics within the sovereign united state of Tanzania and a bearing on the evolution of the two constitutions – the “power maps”¹ of the two entities of the union, that is, Tanzania Mainland and Tanzania Zanzibar respectively. The constitution is taken in the discussion as an instrument for legitimising state policy and sovereign existence as well as to govern the exercise of power, apart from being a legal document as well as a social contract between the governed and the governing and an embodiment of certain values according to which a democratic

¹ Okoth-Ogendo, H.W.O., (1991) “Constitutions Without Constitutionalism: Reflections on an African Political Paradox” in Shivji, I.G., (ed.) *State and Constitutionalism: An African Debate on Democracy, Human Rights and Constitutionalism Series*, No.1 Southern African Political Economy Series (SAPES) Trust, Harare, Zimbabwe

society is to be governed.² However, let us first put into perspective the evolution of the “union constitution.”

2.1 The Birth of a Union: Two Governments, Two Constitutions and One Sovereign State

The fact that Tanzania is a sovereign United Republic,³ being a “union” of two former independent countries, that is, the People’s Republic of Zanzibar and the Republic of Tanganyika,⁴ has had a bearing on how power is exercised between the two constituent units of the Union, that is, Tanzania Mainland and Tanzania Zanzibar.⁵ When Tanganyika and Zanzibar gained their independence in December 9th, 1961 and December 10th, 1963 respectively each had its own constitution – the 1961 Independence Constitution of Tanganyika⁶ and the 1963 Constitution of the State of Zanzibar.⁷ Zanzibar remained a “sovereign state” under the Sultanate until January 1964 when its government was overthrown and became the People’s Republic of Zanzibar. Three months later, the Presidents of the two countries, the Late Aman Abeid Karume and the Late Julius Kambarage Nyerere signed the Articles of the Union⁸ to form the Union of the Republic of Tanganyika and the Republic of the

² Tumwine-Mukubwa, G.P., “Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa” in Oloka-Onyango, J. (ed) *Constitutionalism in Africa: Creating Opportunities, Facing challenges*, Fountain Publishers, Kampala, 2001 at p.288

³ Article 1 of the 1977 Constitution of the United Republic of Tanzania (the Union Constitution) provides that “Tanzania is one State and is a sovereign United Republic.”

⁴ The Union of Tangayika and Zanzibar Act No.22 of 1964, Supplement No.1 to the Tangayika Gazette, Vol.XLV, No.29 dated the 26th April, 1964 ratifying the Articles of Union of 22nd April, 1964..

⁵ Article 2(1) of the Union Constitution proclaims the territory of the United Republic as consisting “of the whole of the area of Mainland Tanzania and the whole of the area of Tanzania Zanzibar, and includes the territorial waters.”

⁶ The *Tanganyika (Constitution) Order-in-Council*, S.I. 1961 No.2274 published on 1/12/61, Supplement to the Tanganyika Gazette, Vol.XLII, No.59 dated 1st December, 1961, the “Independence Constitution.” The “Independence Constitution” was promulgated by the Parliament of the Government of Her Majesty Queen Elizabeth II at the Court of Saint James in England, on the Twenty-seventh day of November, 1961 and was handed down to the newly independent government of Tanganyika as an “instrument of independence.”

⁷ The Constitution of the State of Zanzibar of 5th December 1963, which was enacted by the Constituent Assembly of the State of Zanzibar. Article 32(1) of the Constitution stated that “The Sultan shall be the Head of State and he shall bear the tile of “His Majesty the Sultan.”

⁸ The Articles of the Union were signed by Julius K. Nyerere, the President of the Republic of Tanganyika and Abeid Karume, the President of the People’s Republic of Zanzibar on the 22nd of April

People's Republic of Zanzibar and gave birth to the United Republic of Tanganyika and Zanzibar in 1964,⁹ which later on was re-named the United Republic of Tanzania.¹⁰ According to Professor Shivji, the Articles of the Union are considered to be the principal instrument and they form the legal basis for the "union."¹¹ The formation of the "union" was therefore an important landmark in the constitutional development of Tanzania.

2.2 The Form of the Union: A Continuing Debate

The validity of the Articles of the Union has been the basis of political debate and academic discourse ever since the union was born, and a lot of ink has been poured on the subject.¹² The debate however, has largely been dominated by two opposing views - the "unitarists" on the one hand and the federalists on the other. The unitarists argue that the "two governments" (the Union and the Zanzibar) system was merely a temporary expedient to allay the fears of Zanzibar being "swallowed" by Tanganyika.¹³ The actual intention was the eventual creation of a unitary state fusing all the three jurisdictions, the Government of the United Republic, the Government of Tanzania Mainland (formerly Tanganyika) and the Government of Zanzibar, by gradually shifting Zanzibar's powers over "non-union matters" to the Union

1964. The Articles of the Union are set out in the Schedule to the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

⁹ Article 4 of the Union of Tanganyika and Zanzibar Act No.22 of 1964, Cap.557

¹⁰ The United Republic (Declaration of Name) Act, 1964

¹¹ Shivji, I.G. (1990) *The Legal Foundations of the Union in Tanzania's Union and Zanzibar Constitution*, Professorial Inaugural Lecture, DUP, Dar es Salaam, 1990

¹² See for example, Bailey, M., *The Union of Tanganyika and Zanzibar: A Study in Political Integration* (Eastern African Studies IX), New York: Syracuse University, 1973; Jumbe, A., *The Partner-ship: Tanganyika Zanzibar Union – 30 Turbulent Years*, Dar es Salaam: Amana Publishers, 1994; Kabudi, P.J.A.M., (1986) *International Law Examination of the Union of Tanganyika and Zanzibar: A Federal or Unitary State?* LL.M. Dissertation, 1986, University of Dar es Salaam Library, East African Section (mimeo); Shivji, I.G., *Tanzania: The Legal Foundations of the Union*, Dar es Salaam: Dar es Salaam University Press, 1990; Sirivastava, B.P., *The Constitution of the United Republic of Tanzania 1977 – Some Salient Features – Some Riddles*, Dar es Salaam: Dar es Salaam University Press, 1983 and in Volumes 11-14 *Eastern African Law Review*, 1978-1981, p.73.

¹³ Jumbe, A. (1994) *The Partner-ship: Tanganyika Zanzibar Union – 30 Turbulent Years*, Dar es Salaam, Amana Publishers

government.¹⁴ Under the Articles of the Union, Zanzibar became a semi-autonomous polity with its own internal government in charge of “non-union matters.”¹⁵

Opposed to the unitarists’ view are the federalists who argue that the system of government envisaged by the Articles of the Union is one in which there was a clear-cut dichotomy of powers between the centre and the units.”¹⁶ According to the federalists, the Articles of the Union gave birth to a sovereign Federal Republic of a triangular system in nature, consisting of three governments, namely the Government of the United Republic, Government of Tanzania Mainland and Government of Zanzibar.

The federalists’ argument resurfaced in the Report of the “Nyalali Commission” (1992) – on the single party or multiparty system in Tanzania¹⁷ and in the Report of the “Kisanga Committee” (1999)¹⁸ – on the Government White Paper No.1 of 1998.¹⁹ The Recommendations of the “Nyalali Commission” ushered in the 8th Constitutional Amendment,²⁰ which abolished the single party political system and restored

¹⁴ Abubakry, K.B, “The Union and Zanzibar Constitutions” an unpublished paper presented at the 10th Anniversary Conference of the Zanzibar Legal Services Centre at the Zanzibar Beach Resort, Zanzibar on the 9th May 2002

¹⁵ The Articles of the Union, which were entered into between the President of the Republic of Tanganyika and the President of the People’s Republic of Zanzibar on the 22nd April, 1964 were attached as a Schedule to the Union of Tanganyika and Zanzibar Act No.22 of 1964. Article (iv) of the Articles contained only eleven matters, which were reserved to the Parliament and Executive of the United Republic. The list of “union matters”, which now appears in the First Schedule to the 1977 Constitution of the United Republic of Tanzania has doubled from the original eleven to twenty-two.

¹⁶ See Jumbe, A. and Sirivastava, B.P. (1983) *The Constitution of the United Republic of Tanzania 1977: Some Salient Features – Some Riddles*, Professorial Inaugural Lecture, DUP, Dar es Salaam

¹⁷ The Presidential Commission on Single Party or Multiparty System in Tanzania, 1991, Report and Recommendations of the Commission on the Democratic System in Tanzania, Vol. One 1992 (English Version)

¹⁸ *Jamhuri ya Muungano wa Tanzania, Kamati ya Kuratibu Maoni Kuhusu Katiba, Ripoti ya Kamati, Kitabu cha Kwanza, Mpiga Chapa wa Serekali*, Dar es Salaam, 1999 (the Report is not yet available in English)

¹⁹ The United Republic of Tanzania, *Government White Paper No.1 of 1998*, Government Printer, Dar es Salaam, 1998

²⁰ *Sheria ya Marekebisho ya Nane Katika Katiba ya Nchi*, 1992 Act No.4 of 1992 (Eighth Constitutional Amendment). See Mwakyembe, H.G., *Tanzania’s Eighth Constitutional Amendment and Its Implication on Constitutionalism, Democracy and the Union Questions*, Munster and Hamburg: LIT Verlag, 1995 for an in-depth discussion of the Eighth Constitutional Amendment.

multipartism in the country. The recommendations of the “Kisanga Committee” ushered in the 13th Constitutional Amendment to the 1977 Union Constitution.²¹ Perhaps the most significant thing about the 13th Constitutional Amendment is the abolition of the first Ombudsman on the continent, the Permanent Commission of Enquiry (PCE) of Tanzania²² and the incorporation into the Constitution of a new national human rights institution - the Commission for Human Rights and Good Governance (CHRAGG).²³ The Commission’s founding legislation applies to the Mainland and in Zanzibar.²⁴

The most controversial issue in the debate on the status of the Union has always been whether Zanzibar remained a sovereign state, and therefore exists as an integral part of the United Republic of Tanzania, in accordance with the terms and conditions stipulated in the Articles of the Union, and by the same stretch of argument, “Tanganyika” also exists as an integral part of the United Republic although fused in the Union Constitution.²⁵ The issue whether Zanzibar is a state was recently raised in the first Zanzibar “treason” trial,²⁶ and the Court of Appeal of Tanzania resolved the issue negatively.

Polemics aside, both the Union government and the Zanzibar government have been discharging their respective functions as stipulated under their respective Constitutions - the 1977 Union Constitution and the 1984 Constitution of Zanzibar.

²¹ *Sheria ya Marekebisho ya Kumi na Tatu Katika Katiba ya Nchi*, 2000, (the Thirteenth Constitutional Amendments).

²² The Permanent Commission of Enquiry (PCE) had been incorporated in the 1965 Interim Constitution. The Interim Constitution, which declared Tanzania a single party state was replaced in by the 1977 Constitution of the United Republic of Tanzania, following the merger of the Tanganyika African National Union (T.A.N.U) – the then ruling party for the Mainland and the Afro Shiraz Party (Zanzibar) to form *Chama Cha Mapinduzi* (C.C.M).

²³ The Commission for Human Rights and Good Governance of Tanzania is incorporated in Article 129 of the Union Constitution and established by Act No 7 of 2001 as amended by Act No.16 of 2001. It is a national human rights institution, which combines the functions of an ombudsman.

²⁴ Section 3 of the Commission for Human Rights and Good Governance Act, 2001, Act No.7 of 2001

²⁵ Abubakry K. op. cit

²⁶ *S.M.Z. vs Machamo Khamis and 17 others*, Criminal Session case No.7/99 High Court of Zanzibar (unreported). One of the issues before the Court was whether the offence of treason could legally be committed against the Revolutionary Government of Zanzibar.

Tanzania has continued to resolve the challenge of further democratising its political system through strengthening its “power map” by resorting to amendments in the Constitution, the latest being the 8th Constitutional Amendment of 2002 (to the Constitution of Zanzibar of 1984) and the 13th Constitutional Amendment of 2000, to the 1977 Union Constitution. Taking stock of the political gains since independence and counting on the rapid changes that have taken place since 1992 when the country restored multiparty democracy, it seems that those in power have been trying to attend to the pressing needs for political settlement particularly in Zanzibar, which is the other part of the union and where politics have always been volatile.

3.0 THE POLITICAL SETTLEMENT IN ZANZIBAR: SOME CONSTITUTIONAL ASPECTS

It is important to discuss the recent political developments in Zanzibar as they relate to the democratisation process and political settlements initiatives and their impact on constitutional development in Zanzibar in particular and in Tanzania in general. Most notable in this regard is the “political settlement” in Zanzibar, which finally gave rise to the 8th Constitutional Amendment of 2002 to the 1984 Constitution of Zanzibar. According to Bakari, political settlement means a “programme of reconciliation to eradicate or minimize suspicion and hostility.”²⁷

Zanzibar is currently faced with the twin immediate challenges, namely the urge to democratise the political system and the pressing need for political settlement. The need for political settlement arose in the aftermath of the 1995 first general multiparty elections wherein politics were characterised by intense suspicion and hostility between the two main political parties, the ruling *Chama Cha Mapinduzi* (CCM) and the opposition Civic United Front (CUF).²⁸

3.1 Politics of Hatred and the Political Settlement

²⁷ Bakari, M.A. (2002) “Democratisation and Political Settlement in Zanzibar” an unpublished paper presented at the 10th Anniversary Conference of the Zanzibar Legal Services Centre at the Zanzibar Beach Resort, Zanzibar, on the 9th May 2002

²⁸ Ibid.

Hostility between CCM and CUF has marked the political situation in Zanzibar since 1995, immediately after the first general multiparty elections. CUF claimed that the results of the presidential election were manipulated by the partisan electoral commission in favour of the ruling party, and gave a marginal victory to the CCM presidential candidate, that is, 50.2% against 48% for the CUF presidential candidate.²⁹

There was a strong feeling among the independent observers of the election that the 1995 general election in Zanzibar was seriously flawed. The rules of the game were partisan, and the final results were manipulated in favour of the ruling party.³⁰ CUF secured 24 constituency seats against 26 for the ruling CCM. CUF contested the results and refused to recognize the incumbent president who had been “re-elected” and boycotted taking part in the House of Representatives. This action had constitutional implications. In the post-1995 election, the House of Representatives was constituted of 75 members instead of 76, as provided by the Constitution of Zanzibar, as the one seat reserved for women remained unfilled. Overall, CCM had 47 members (3 members less to reach a two-thirds majority) and CUF had only 28 members.³¹ Technically neither of the parties could amend the Constitution without support from the other party.³²

In the aftermath of the October 1995 election in Zanzibar, the situation was extremely volatile.³³ The situation remained very tense and was characterised by sporadic acts of violence and allegations and counter allegations. In November 1997, 17 CUF activists (including 4 Members of the House of Representatives) were arrested and charged with “treason.”³⁴ They were accused of plotting to overthrow the Zanzibar

²⁹ Bakari, loc. cit

³⁰ Zanzibar Electoral Monitoring Group, 1995 and Bakari, loc.cit

³¹ Bakari, loc. cit

³² Article of the 1984 Constitution provides that “A Bill for an Act to alter any provisions of this Constitution shall be supported by the votes of not less than two-thirds of all Members of the House of Representatives.

³³ Bakari, loc. Cit

³⁴ *S.M.Z. Machamo Khamis and 17 Others*, Criminal Session, Case No.7/99, High Court of Zanzibar (unreported)

government as well as the Union government. The plot was alleged to be carried out by retired soldiers. The case dragged on for a long time until November 2000 when the accused persons were released after the newly elected president, Amani Karume had been sworn in.

3.2 The Commonwealth Brokered Peace Accord (*Muafaka I*)³⁵

The first initiative to mediate the Zanzibar conflict, that is, between CCM and CUF, was undertaken by the Secretary General of the Commonwealth, Chief Emeka Anyaoku who assigned this task to Dr. Moses Anafu. The Commonwealth mediation initiatives started in February 1998 and CUF endorsed the initial proposals on July 19, 1998. However, the ruling party delayed to accept the deal, which frustrated the mediator, Dr. Anafu, who decided to return to London, promising to come back only when satisfied that enough progress had been made to move forward in the reconciliation process. The Commonwealth brokered Peace Accord (*Muafaka I*) would have been signed on August 15, 1998, but due to the delay by the ruling party it was signed on June 9, 1999, at a time when preparations for the October 2000 general elections were already underway.

The Memorandum of the Commonwealth brokered Peace Accord (*Muafaka I*) were divided into three parts. The first was a preamble, which acknowledged the existence of the political impasse and its implications on the socio-economic development of Zanzibar. The two parties expressed their commitment to put the past behind them, and cooperate in the spirit of reconciliation, democratisation, promotion of human rights and good governance. The two parties to the dispute agreed on a programme of action, which involved the reform of the Zanzibar Electoral Commission (ZEC), compilation of a credible register of voters, a sustained programme of voter and civic education, a review of the Constitution of Zanzibar, and the review of electoral laws.³⁶ Under the terms of the Accord, the President of Zanzibar was also required to appoint an independent assessor to establish the validity of the claims of those who alleged

³⁵ “*Muafaka baina ya Chama xcha Mapinduzi (CCM) na Chama cha Wananchi (CUF) wa tarehe Juni 9, 1999.* (Literally “Peace Accord between CCM and CUF) of June 9th, 1999. “*Muafaka*” is a Kiswahili word for accord.

³⁶ Bakari, loc.cit

that their properties were destroyed or damaged on political grounds after the 1995 elections with the aim of suggesting measures of compensation. In order to restore normal political life, CUF members of the House of Representatives were required to resume attending House sessions, and the President was to appoint two CUF members to the House of Representatives.³⁷ In addition, an Inter-party Committee (IPC) composed of CUF and CCM members of the House of Representatives was established.³⁸

Unfortunately, the Revolutionary Government of Zanzibar and the ruling CCM did not implement the Commonwealth brokered Peace Accord. In the opinion of Mughwai, the Commonwealth Brokered Accord “ended in the dustbin” due largely to “lack of political will between the warring parties to implement it.”³⁹ The Accord also had some inherent deficiencies, one of which was the lack of an authoritative enforcement mechanism. The Inter-Party Committee (IPC) that was proposed in the Accord and given the responsibility for implementing it was merely an advisory body without constitutional or legal backing. Likewise, the Accord was merely a moral guarantor of the “gentleman’s agreement” between the two parties. Its implementation relied on the goodwill of the only authoritative bodies, that is, the Zanzibar and Union Governments, which were both the governments of the ruling party. Such goodwill was not forthcoming.

Hence the Commonwealth brokered Peace Accord (*Muafaka I*) remained unimplemented and Zanzibar entered into the second multiparty general election in 2000 without a broad consensus on the rules of the game.⁴⁰ According to the Tanzania Electoral Monitoring Committee (TEMCO) Report, the 2000 general multiparty election was much more flawed than that of 1995.⁴¹ It was considered an “aborted

³⁷ Bakari, M, loc. cit.

³⁸ Ibid.

³⁹ Mughwai, A. “Forty Years of Struggle for Human Rights in Tanzania: How Far Have We Travelled” in Mchome, S.E. (ed.) *Taking Stock of Human Rights in Africa*, Faculty of Law, University of Dar es Salaam, 2002 at p.56

⁴⁰ Ibid.

⁴¹ Tanzania Electoral Monitoring Report, Dar es Salaam University Press, 2000

election” as it did not reach its final stage.⁴² CUF refused to recognize the October 2000 general election results and demanded fresh elections throughout the Isles. Both Governments refused to heed and instead insisted that fresh elections will be held only in sixteen constituencies where election irregularities were massive.

3.3 The “Black” Friday Episode

Still aggrieved by the Government refusal to hold fresh elections as demanded, CUF announced that it was going to hold peaceful demonstrations throughout the country on 27th January 2001 to express their displeasure against the conduct of the general elections, which had been held in October the previous year. The two Governments banned the proposed demonstrations.⁴³ Some of the country’s top leaders including the Vice President, the Minister for Home Affairs and the Dar es Salaam Regional Police Commander warned the public that anyone defying their orders to stay away from the demonstration would be dealt with severely.⁴⁴ CUF refused to give in citing the Constitutional right to assemble and freely express one’s opinion.⁴⁵

On Friday January 26th 2001 two people including an Imam of a mosque in Dar es Salaam were shot dead by the police a few steps from the mosque from which they had performed the Friday prayer. This act, which was clearly an excessive use of force by state organs was carried out to ensure that the-would be demonstrators are scared from attending the earlier call by CUF for a countrywide demonstration.⁴⁶

Two days before the January 27th 2001 demonstration, some CUF followers, including their national Chairman, Prof. Ibrahim Lipumba, while proceeding to a public meeting in Dar es Salaam were severely beaten up by the police, several of

⁴² Bakari, M., loc. cit.

⁴³ Bakari, M, loc. cit

⁴⁴ Ibid.

⁴⁵ Both Article 20 of the Union and Zanzibar Constitutions provides for the freedom of every person to freely and peaceably assemble, associate and cooperate with others, express views publicly, and more specially to form or join associations or organisations for purposes of preserving or furthering his or her beliefs or interests or any other interests.

⁴⁶ Bakari, M, loc. cit.

them got injured including Prof. Lipumba himself whose arm was fractured in the ensuing fracas between the police and the marchers. Lipumba and some of his followers were arrested, detained and denied bail. Despite the naked use of force by the state authorities against the peaceful demonstrators, CUF followers were not scared and they took to the streets of Dar es Salaam, Zanzibar Town and Pemba (the strongholds of CUF) on Saturday January 27th 2001 to demonstrate as planned. In other parts of the country, demonstrations were called off.

In Dar es Salaam, a small group of CUF demonstrators were able to proceed to their destination and issued their statement in a very tricky style before they were violently dispersed by the police. In Zanzibar Town and Pemba, demonstrators could not reach their destinations as they were violently blocked by the police on their way. Several of them were left dead (23 people, including one policeman – according to government sources and over 60 according to CUF sources), several hundreds were injured and over 2000 refugees, mainly from Pemba fled to Kenya and were located at Shimoni, Mombasa.⁴⁷

Immediately after the bloody episode of January 27th 2001, police brutality continued for nearly two weeks in Pemba where there were beatings, the mass arrest of suspected “instigators” and various forms of harassment. Coincidentally, the Union President promoted some police officers, including some of those who had carried out the January operation.

Clearly the January 27th demonstrations constituted a watershed moment for post-independence politics in both Tanzania and Zanzibar. The episode was unprecedented in Tanzania’s political history. A country once hailed as the epitome of peace on the continent and as a haven for refugees found itself in a deep political crisis and producing its own share of refugees. The show of state power and the use of excessive force by state organs, tainted the image of a seemingly peaceful country and was clearly a blow to the democratisation process that had started gaining momentum since 1992, when the country reverted to multiparty democracy. The sheer use of state violence against peaceful demonstrators clearly was an abrogation of the basic norms

⁴⁷ Bakari, M, loc. cit

of constitutionalism. Surely, the use of naked state power against peaceful demonstrators was not controlled and thus it became destructive of the very values it was intended to promote. Neither can it be stated that the people consented to be governed by violent institutions, rules, values and customs that they had voluntarily put them in place.

In the aftermath of the bloody events of January 27th, donor pressure continued to mount on Tanzania to seek a peaceful solution to the long-standing Zanzibar crisis.⁴⁸ Donor pressure was supplemented by the covert pressure exerted by some sections of concerned individuals and eminent persons within the political establishment. There were fears among a significant fraction of the members of the political establishment, who were of the opinion that if the Zanzibar crisis would be left to drag on for a long time without being resolved, it could escalate and possibly lead to national disintegration and even the break-up of the union. The Union government finally took a more active position in finding a solution to the Zanzibar crisis by admitting that there was a serious crisis in Zanzibar and that it was prepared to engage in a constructive dialogue with CUF with the aim of easing the political tension and resolving the crisis.⁴⁹

3.4 The Second Peace Accord (*Muafaka II*)

In an attempt to end hostile politics between the two main parties in Zanzibar Islands, a second reconciliation accord between CCM and CUF (*Muafaka II*) was ultimately signed on October 10th, 2001.⁵⁰ The terms of *Muafaka II* were more or less similar to those of *Muafaka I* of June 1999.⁵¹ However, although both accords were negotiated and signed against the background of seriously contested elections, their context was remarkably different. The second accord was signed after the January 26/27, 2001

⁴⁸ Bakari, M. loc. cit

⁴⁹ Ibid.

⁵⁰ *Muafaka wa Kisiasa baina ya Chama cha Mapinduzi (CCM) na Chama cha Wananchi (CUF) wa Kumaliza Mgogoro wa Kisiasa Zanzibar*, 10 Oktoba 2001 (literally "Political Accord between CCM and CUF to end the Political Crisis in Zanzibar")

⁵¹ Article 1 of the Second Accord affirmed the terms of the First Accord between CCM and CUF that had been signed on June 9th 1999

bloody episode in Zanzibar, which had changed the perceptions of the two contending parties, although their interests and motives basically remained the same.

This time around both the Union and Zanzibar governments are ostensibly committed to implement the terms of the agreement.⁵² However, there was an attempt by the Zanzibar Government through the House of Representatives to change some of the agreed provisions of the accord thus raising some suspicion and protest by the opposition. Timely intervention by the Union President through a presidential decree rescued the situation. Some of the measures that have so far been taken to implement the agreement include, among others, the release of all detainees accused of cases related to the January 27 demonstration, the formation of a Presidential Commission of Enquiry to investigate the January 27/26 killings,⁵³ the appointment of the Inter-Party Commission that will help in the implementation of the accord, and the passing of the 8th Constitutional Amendment of 2002 to the Zanzibar Constitution by the House of Representatives as agreed in the accord.⁵⁴

4.0 The Commission for Human Rights and Good Governance

Tanzania has now joined a number of other countries on the continent, which have established national human rights institutions. The establishment in the year 2000 of the Commission for Human Rights and Good Governance in Tanzania has brought to twenty-five the number of countries in Africa with similar institutions.⁵⁵

⁵² The Second Accord has five annexes detailing the various activities and steps, which are to be undertaken by the parties to the Agreement in order to ensure its effective implementation. Annex One contains an implementation plan for the First Accord of June 9th, 1999. The Second Annex is a Draft Bill for the 8th Constitutional Amendment to the Constitution of Zanzibar of 1984. The Third Annex is an agreement for the establishment of a Joint Presidential Supervisory Commission (JPSC). The Fourth Annex is a Draft Bill for an Act to establish the Commission and the Fifth Annex contains details of activities and time frame for the implementation of the Agreement.

⁵³ The Commission, headed by Major General Hashimu Mbita, who once served as Chairman to the OAU Liberation Committee, has yet to conclude its work.

⁵⁴ The 8th Constitutional Amendment to the Constitution of Zanzibar of 1984 (*Sheria ya Mabadiliko ya Nane Katika Katiba ya Zanzibar ya 1984*) was tabled in March 2002 in the House of Representative as a strategy for implementing the Second Peace Accord between CCM and CUF. The 8th Constitutional Amendment contains about 39 Articles.

⁵⁵ Other African countries with national human rights institutions include Algeria, Benin, Cameroon, Central African Republic, Chad, Ethiopia, Ghana, Liberia, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Sudan, Togo, Tunisia, Uganda and Zambia. The Government of Kenya has already passed a law to establish a National Human Rights Commission.

Perhaps what is striking about the Commission for Human Rights and Good Governance of Tanzania is the way in which it was established. Earlier in 1996, the Government had appointed a Legal Task Force under the auspices of the Financial and Institutional Legal Management Upgrading Programme (FILMUP). The Task Force was headed by Mr. Mark Bomani, (the first Attorney General of Tanzania) and prepared a Report (the “Bomani Report”)⁵⁶ wherein it was recommended among other things that there should be established a Commission for Human Rights and Administrative Justice.⁵⁷ In 1998, the Government issued a White Paper, which also recommended the establishment of such institution in the country.⁵⁸

Following the Bomani Report, the Government appointed a Committee, under the Chairmanship of Justice Kisanga (the so-called “Kisanga Commission”), to collect peoples’ views on this and other issues contained in the White Paper. The “Kisanga Commission” submitted its Report to Government in 1999 and made known to the public that the majority of the people interviewed were in favour of the establishment of a national human rights institution. On the basis of the people’s views on the White Paper, in 2000 the Government tabled in Parliament the 13th Constitutional Amendment to the 1977 Constitution of the United Republic of Tanzania, which among other things established the Commission for Human Rights and Good Governance as an independent Government department with a mandate to promote and preserve human rights and duties of the society in the country. The Commission also performs an ombudsman’s function⁵⁹ as it is empowered to investigate

Previously the function of the promotion and protection of human rights was being handled by a Standing Committee on Human Rights.

⁵⁶ The United Republic of Tanzania, Financial and Legal Management Upgrading Project (FILMUP), *Legal Sector Report*, which was submitted to the Minister for Justice and Constitutional Affairs on the 25th of January, 1996

⁵⁷ *Ibid.* at page 120

⁵⁸ White Paper No.1 paragraph 48 at page 51

⁵⁹ The ombudsman is a Western concept whose roots can be traced back to the Justitieombudsman (Ombudsman of Justice) of Sweden, which was established in 1809. Its main function is to deal with complaints from the public regarding decisions, actions or omissions of public administration. Its main role is to protect the people against violation of rights, abuse of powers, error, negligence, unfair decisions and mal-administration in order to improve public administration and make the government’s actions more open and the government and its servants more accountable to members of the public. For more elaboration on the concept see Peter Vedel Kessing “Implementation of the Western Ombudsman

allegations and complaints of mal-administration and abuse of power of both public and private institutions. The powers, mandate and functions of the Commission are elaborated upon in its founding legislation, the Commission for Human Rights and Good Governance Act.⁶⁰

4.1 Some Constitutional Implications

The 13th Constitutional Amendment of 2000 to the Union Constitution, which gave birth to the Commission for Human Rights and Good Governance has created some constitutional problems in as far as its operations in Zanzibar is concerned. The founding legislation of the Commission is pan-territorial as it extends to Tanzania Mainland as well as Zanzibar, thus effectively making the Commission a “union institution.” However, there is an argument current in Zanzibar that the Commission has no jurisdiction in Zanzibar in so far as “non-union matters” are concerned, since human rights and good governance are not “union matters.”⁶¹ However, one can also argue that since the Constitution of Tanzania is also part of the “union matters” stipulated in the First Schedule of the Union Constitution and that the Constitution itself contains a Bill of Rights and Duties and applies to Mainland Tanzania as well as Tanzania Zanzibar⁶², then the Commission, which is also a union institution has jurisdiction in Zanzibar with respect to violations of human rights provisions contained in the Union Constitution.

The root of the problem bedevilling the Commission and other “union institutions” whose establishing legislations apply to the whole of the Union lies in the allocation of legislative competence between the “two legislatures.”⁶³ According to Article 64(1)

Model in Countries in Democratic Transition in Birgi Lindsnaes et al. (eds) *National Human Rights Institutions and Working Papers*, The Danish Centre for Human Rights, 2000

⁶⁰ Act No.7 of 2001 as amended by Act No.16 of 2001.

⁶¹ Some lawyers in Zanzibar raised this concern during a Human Rights Conference organized by the Zanzibar Legal Services Centre early this year and which the author of this article attended.

⁶² Article 152(1) of the Union Constitution states that “This Constitution shall apply to Mainland Tanzania as well as Tanzania Zanzibar.” However, the First Schedule to the Constitution of the United Republic of Tanzania of 1977 contains a list of twenty-two “union matters” and human rights is not on the list.

⁶³ The “two legislatures” in the Union are the National Assembly (Union Parliament) and the House of Representatives in Zanzibar respectively.

of the Union Constitution, legislative competence with respect to “*all union matters in and for the United Republic and with respect to all other matters in and for Mainland Tanzania*” ii vested in the Parliament of the United Republic (the National Assembly). The House of Representatives on the other hand has legislative powers in Tanzania Zanzibar over “all matters, which are not “Union Matters.” The Union Constitution however, contains only a list of “union matters” but not of “non-union matters.” Furthermore, the Union Constitution stipulates very clearly that a law enacted by the Union Parliament “shall apply to Tanzania Zanzibar” if it “relates to Union Matters.”⁶⁴ Otherwise a law passed by the Union Parliament that extends to Zanzibar with regard to non-union matters would be “null and void” for being inconsistent with the clear constitutional provisions reserving legislative competence over all non-union matters to the House of Representatives.⁶⁵

The Union Constitution declares categorically that in order for a law enacted by the Parliament of the United Republic “*concerning any matter*” to apply to Tanzania Zanzibar it has to state so expressly.⁶⁶ This means that the extension of the application of a union law to Zanzibar by express declaration will not be automatic. It has to be ratified by the organ with legislative competence in Zanzibar - the House of Representatives, to avoid a “constitutional conflict.”

The Commission for Human Rights and Good Governance has also been haunted by the “union” legacy. To overcome this stalemate the required procedure under the Constitution for ratifying union laws by the House of Representatives has to be

⁶⁴ Article 64(4)(c) of the Union Constitution stipulates that “Any law enacted by Parliament concerning any matter shall not apply to Tanzania Zanzibar save in accordance with the following provisions: (c) such law relates to Union Matters...”

⁶⁵ Article 64(3) of the Union Constitution stipulates categorically that “*Where any law enacted by the House of Representatives concerns any matter in Tanzania Zanzibar which is within the legislative jurisdiction of Parliament, that law shall be null and void, and likewise if any law enacted by Parliament concerns any matter which is within the legislative jurisdiction of the House of Representatives that law shall be null and void*” (emphasis supplied).

⁶⁶ Article 64(4) of the Union Constitution provides that “*Any law enacted by Parliament concerning any matter shall not apply to Tanzania Zanzibar save in accordance with the following provisions: (a) such law has expressly stated that it shall apply to Mainland Tanzania as well as to Tanzania Zanzibar or it replaces, amends or repeals a law which is in operation in Tanzania Zanzibar*” (emphasis supplied).

followed so that the Commission can claim legitimacy for its operations in Zanzibar. This means that the operation of the Commission in Zanzibar requires a special sanction by the House of Representatives through the enactment of a legislation extending its jurisdiction to Zanzibar. The House of Representatives has already given this idea some consideration and efforts are being made to fulfil this requirement so that the Commission can operate freely in Zanzibar.

5.0 CONCLUSION

In this discourse we have sketched some of the landmark constitutional developments in Tanzania in 2001. The development of the constitution of Tanzania is not different from other ex-British colonies. Being a combination of colonial legacy and the legacy of a one party state within a “union” setting, the Tanzanian constitution is characterised. Each of the constituent units of the Union has its own constitution. Apart from embodying constitutional principles and doctrines developed in Britain, the Constitution of Zanzibar has also been shaped by the politics of the revolution on the Isles, which continues to dominate the exercise of power by the various players in the political game there.

During the election turmoil in the aftermath of the general elections in 1995 and 2000 respectively, the history of the people played a very significant role in influencing the outcome of the constitution making process in Zanzibar. The problems that have occurred during the elections reflect what Tumwine-Mukubwa calls “antiquated constitutional doctrines” which are “ruling us from the grave.”⁶⁷ There is a need therefore to revisit some of the inherited constitutional doctrines and principles and create our own home grown ones, which take into consideration our contemporary African socio-political realities. The “crisis of constitutionalism” witnessed on the African continent currently is much food for thought in the thinking process while taking stock of our experiences in democracy, the rule of law, human rights and good governance.

⁶⁷ Tumwime-Mukubwa, loc. cit at p. 287

THE STATE OF CONSTITUTIONAL DEVELOPMENTS IN UGANDA – 2001*

1.0 INTRODUCTION

On the constitutional scene, the year 2001 was of considerable importance for the development of constitutional governance in Uganda. It was the year of the long awaited presidential and parliamentary elections, the last elections having been held five years previously in 1996. More importantly, it was the year where, for the first time in the history of Uganda, a loser in a presidential election petitioned court over the result instead of taking up arms to fight his way into power. The petition and the resulting judgment were perhaps the most outstanding constitutional developments of the year.

In analysing the state of constitutional developments during the year in question, attention will be paid to the events and issues that arose during the presidential elections, and the resulting petition challenging the result of the elections. The parliamentary elections, which marked the exit of the sixth Parliament of the Republic of Uganda and the beginning of the seventh, will also be looked at. The appointment of the Constitutional Review Commission was another important development during that year.

2.0 METHODOLOGY

The stories of what happened on Uganda's political scene during the year 2001 have been extensively recounted elsewhere, in the print media and reports and publications by both government and non-governmental organisations. Accordingly, this paper does not attempt to re-tell the stories, but to analyse the events that happened with a view to determining whether democratic and constitutional principles were adhered to.

The paper is the result of research that involved a thorough review of the print media, geared towards ascertaining pertinent issues of constitutional debate and development arising from the presidential and parliamentary elections. A review of relevant court decisions, in particular, the case of *Besigye v. Museveni and Anor.*, in which Col. (Rtd). Dr. Kizza Besigye sought an annulment of the result of the presidential election, was undertaken. Hansards, government publications, and reports from civil society on the election process, were also examined. Finally, some interviews with key informants on constitutional issues provided necessary insight into leading constitutional developments of the year.

In this paper, Constitutionalism does not simply represent a concern with the instrumentalities of governance,¹ but is interpreted to refer to all the various dimensions

* By Monica Twesiime, Assistant Lecturer, Department of Public and Comparative Law, Faculty of Law, Makerere University Kampala.

¹ Oloka-Onyango, J., (2001) *Constitutionalism in Africa: Yesterday, Today and Tomorrow*, in Oloka-Onyango, J., (ed.), *Constitutionalism in Africa – Creating Opportunities, Facing Challenges*, Fountain Publishers, Kampala, p. 2.

of statecraft and governance² – from issues to do with elections and the laws that govern them, to questions of fundamental individual rights.

3.0 THE PRESIDENTIAL ELECTIONS

The presidential elections took place on March 12th 2001. The period prior to the election, the election-day itself and its immediate aftermath, were extremely eventful and highlighted a number of constitutional issues which are handled in greater detail below.

3.1 The Movement System and the phenomenon of Individual Merit

Article 70 of the Constitution provides that the movement political system is broad-based, inclusive and non-partisan and shall conform, inter alia, to the principle of individual merit as a basis for election to political offices. In the run-up to the presidential elections, it became increasingly clear that this was not going to be an ordinary race. It also became evident that the “individual merit” principle had many limitations. In October 2000, Col. (retired) Dr. Kizza Besigye, a long time associate of the incumbent, and formerly personal doctor to President Yoweri Museveni, declared his intention to stand for the presidency. Besigye had begun to lose favour with the Movement during the previous year, 2000, when he published a paper criticising the movement for having seemingly lost its vision of bringing fundamental change to Uganda.

Accordingly, when he went ahead to declare that he was standing for the presidency, it was as though a spanner had been thrown into the works. Besigye made it clear that he was standing under the Movement, as a Movementist, and campaigning on his individual merit as provided for under the Constitution. Nevertheless, Museveni lost no time in denouncing Besigye, saying he could not purport to stand under the Movement when the Movement organs had not approved his candidature for the presidency. Besigye became the subject of acidic verbal attacks from Museveni and other Movementists, who said that it was wrong for him to stand without being sanctioned by the Movement.

Such statements and attacks only served to highlight the fact that the “individual merit” principle of the movement, under which leaders are presumably free to stand for office because of their personal abilities rather than their political affiliation, was a sham. It was apparent that Besigye’s “crime” was not only that he stood for the presidency, but more that he, a “fellow movementist” dared to challenge the incumbent. No mention was made of Besigye’s leadership capabilities in relation to Museveni’s or vice versa. Similarly, it revealed that the movement was no longer broad-based and inclusive enough to accommodate those with dissenting views.

The election turned into a personal contest between Besigye and Museveni.³ According to journalist Charles Onyango Obbo, it was not just a presidential race, but a “family

² *Ibid*, p.3.

³ See Onyango-Obbo, C., (2001), “Family Feud: It’s All Between the Two ‘Movement’ Men,” *The East African*, March 5-11, 2001.

feud.”⁴ The other presidential candidates, Aggrey Awori, Chapaa Karuhanga, Francis Bwengye and Muhammad Kibirige; paled into oblivion, as the election-day drew closer.⁵

3.2 Free and Fair Elections?

The 2001 presidential race provided an ideal testing ground for the premier article of Uganda’s Constitution, which provides that:

“ The people shall express their will and consent on who shall govern them and how they should be governed, through regular, free and fair elections...”⁶

There are various criteria that must be fulfilled before an election can be said to have been free and fair. Unfortunately, these criteria are not specifically expounded in the Ugandan Constitution or the electoral laws. In Uganda’s premier and only court precedent on presidential elections, the Chief Justice summarised them as follows:

- The election must be free and fair.
- The election must be by universal adult suffrage, which underpins the right to register and vote.
- The election must be conducted in accordance with the law and procedure laid down by Parliament.
- There must be transparency in the conduct of elections.
- The result of the election must be based on the majority of votes cast.⁷

The United Nations, working with a number of international non-governmental organisations dedicated to the promotion of free and fair elections all over the world, have given more specific criteria for free and fair elections.⁸ The criteria includes:

- Ensuring a level playing field
- The prevention of fraud, corruption and unfair practices or dirty tricks
- Safeguarding the right to vote
- Safeguarding of the right to freedom of expression.⁹

It should also be noted that peaceful elections do not necessarily mean free and fair elections. The emphasis should always be on whether or not the criteria for free and fair elections had been adhered to, rather than whether the elections had been “peaceful.”

⁴ *Ibid.*

⁵ See *NEMGROUP-U*, Status Report on the Presidential Election as at 5th March 2001, where it was reported that the three daily newspapers offered over half of their news coverage to only 2 candidates – Besigye and Museveni.

⁶ Article 1(4) *Constitution of the Republic of Uganda, 1995.*

⁷ *Kizza Besigye v. Y.K. Museveni and the Electoral Commission, Election Petition No. 1 of 2001, Judgment of Odoki, C.J., p. 39, certified edition.*

⁸ *IFES, UN-DESA, IDEA*

⁹ *Inter-Parliamentary Union, 1994, Declaration on Criteria for Free and Fair Elections, Article 3(4). Adopted by the Inter-Parliamentary Council at its 154th session, Paris, 26 March 1994.*

3.2.1 A level playing field

The term 'level playing field' has become common in modern English, to refer to fair competition. It is a reference to a football field, where neither side has the advantage of running downhill against opponents who are handicapped by having to run uphill.¹⁰ From the start, it was quite obvious that the incumbent had numerous advantages over the other candidates in the race; that he was running down-hill while the others were panting up-hill.

Whereas the Electoral Law made provision for all presidential candidates to receive some finances, transport and security detail for the campaign period,¹¹ it did not sufficiently provide for the curtailing of the incumbent's rights and privileges to bring him down to the level of the other candidates. One of the issues that arose in this regard was the incumbent's access to and usage of public resources for his campaigns. Section 21(3) of the Presidential Elections Act required the Minister of Public Service to lay before Parliament a statement on the utilisation of government facilities attached to the President during presidential elections. According to election monitors, the resources utilised by the President during Presidential elections included: fully facilitated State House and State Lodges, the usual transport facilities provided to the President, the usual security detail facilities, the usual personal staff and the facilities attached to the President, as well as the usual information and communication facilities attached to the President. Unfortunately, no details were provided as to what all the above "usual" facilities included.

Nevertheless, it was obvious that the incumbent was unfairly using state resources for his campaigns. For example, whereas the President's election task force had opened offices in almost every town in the country, many of his campaign agents' meetings were held at State House. In connection with this issue were the President's use of Public Servants and their offices as campaign agents and facilities respectively. Such Public Servants ranged from Resident District Commissioners (RDCs) and District Internal Security Officers (DISOs), to Local Government Councillors and Officials. Furthermore, the campaign period revealed that the Local Government System right from LC I at village level to the LC V at district level could be manipulated and used as a vast web of patronage through which the President could exercise his influence and control over the masses.¹²

Another glaring example of the unevenness of the playing field was the coverage of the presidential candidates on the State-owned radio and television. State-owned *Radio Uganda* devoted 76% of its coverage to Besigye and Museveni, and of this coverage, Museveni received 63%, which was overwhelmingly (97%) positive, compared to 13% to Besigye, which was evenly positive (48%) and negative (52%). The station offered only 11% of its coverage to the other four candidates. Private radio stations too, devoted

¹⁰ Pinto-Duschinsky, M., (1997), Administration and Cost of Elections (ACE) Project, *IFES, UN-DESA, IDEA, www.aceproject.com*, accessed 25 April 2002.

¹¹ *The Presidential Elections Act, No. 17 of 2000*

¹² See *Judgment of the Supreme Court in Besigye v. Museveni and Anor, certified edition, page 145, Odoki, C.J., on intimidation of Besigye Supporters in Kabale, Mbale, Kumi and Lira, by RDCs, DISOs and Local Council Officials.*

over half of their coverage to Museveni and Besigye, leaving out the other four candidates.¹³

State-owned Uganda Television (UTV) devoted an overwhelming 85% of its coverage to Museveni and Besigye, and only 4% to the other four candidates. Of the 85% coverage, Museveni received 69%, which was overwhelmingly 98% positive, compared to 16% to Besigye, which was overwhelmingly (81%) positive. Privately owned TV stations also concentrated on covering only Besigye and Museveni.¹⁴ Thus, the media provided Ugandans with the picture of a two-man presidential race, in a race where there were four other candidates. This was a glaring omission on the part of the media, and a contravention of the principles of free and fair elections.

3.2.2 Fraud, Corruption and Unfair Practices in the Election Process

3.2.2.1 Electoral Fraud

To avoid fraud in the electoral process, the official procedures must be reliable. Voters must be assured that only eligible voters have voted, that they have been given the chance to cast their ballots under circumstances that guarantee freedom from pressure, and that their votes have then been properly recorded.¹⁵ There must be an accurate register of eligible voters - a register that manages to include those entitled to vote, while excluding voters who have died, or who are otherwise unqualified. There must also be checks against impersonation - those presenting themselves at polling stations must be the voters they claim to be. In many parts of Africa including Uganda, a finger of each voter is marked with indelible ink to ensure against voting twice. Voters must be permitted to cast their ballots without feeling under threat of violence or under an obligation to support a particular candidate or party.¹⁶ There must be measures to ensure against the stuffing of ballot boxes with ballot papers other than those legitimately cast. Ballot boxes need to be sealed before being used, and when the voting period is over. If ballot boxes are transported from the polling place to a central location where the votes are to be counted, there must be a guarantee that the same boxes that have left the polling station are the ones that arrive at the vote counting location. Integrity of vote counting and recording must be assured.¹⁷

In Uganda's 2001 presidential election, the integrity of the result of the presidential elections was undermined by allegations of pre-ticked ballot papers, pre-stuffed ballot boxes, inflated voter registers, un-gazetted polling stations, under-age voting, multiple voting, falsification of results and other fraudulent and corrupt practices. These were prevalent mainly in Rukungiri and Kabale Districts, where numerous incidents of multiple voting, under-age voting, stuffed ballot boxes, ballot boxes that were kept at a Minister's residence on the eve of polling day, and so on, were reported.¹⁸ It was also later proven that there were malpractices in the counting of votes, many of which were geared towards benefiting the incumbent. For example, it was proved that in Makindye

¹³ NEMGROUP-U, *Status Report as at 5th March 2001*, published in *The New Vision*, 5th March 2001.

¹⁴ *Ibid.*

¹⁵ Pinto-Duchinsky, M., 1997, Administration and Cost of Elections Project, IFES, UN-DESA & IDEA, www.aceproject.com, accessed 28 April 2002.

¹⁶ *Election violence and intimidation are considered in greater detail below, page 7.*

¹⁷ *Ibid.*

¹⁸ NEMGROUP-U, *Monitoring Report of Uganda's 2001 Presidential Elections*, pp. 50, 55-57.

Division, Kampala, there was an excess of votes by 97,787.¹⁹ These practices undermined the integrity of the election and made it doubtful whether or not the results actually reflected the true will of the people of Uganda.

3.2.2.2 Electoral Corruption

Corrupt electoral practices include bribery of voters, raising campaign funds by making promises of illegal benefits (such as favourable government contracts) as payoffs to donors, bribing opposing candidates to withdraw, and (where there are legal limits on permitted campaign spending) fiddling election expenses in order to exceed the limit.²⁰

In his petition to the Supreme Court, Besigye alleged that Museveni bribed voters by inter-alia, offering gifts to bribers, promising to raise teacher's salaries, and abolishing cost-sharing in hospitals. However, Besigye's arguments were unsuccessful, and the defence that the alleged "bribery" was simply implementation of government policy was up-held.²¹ There were unproven allegations that Charles Ssenkubuge, who had declared his intention to stand and even went ahead to be nominated, withdrew from the race because he had been bribed. Ssenkubuge denied the allegations, citing intimidation and threats to his life as the reasons for his withdrawal.²²

Unfortunately, the Presidential Elections Act does not provide clear boundaries on the issue of raising campaign funds. Neither does it provide limitations on the amount of money that can be spent by a presidential candidate during campaigns. The only limitations provided for are the use of state resources during campaigns,²³ and limitations on private funding of campaigns from foreign governments, institutions or persons hostile to Uganda.²⁴ Museveni later revealed that he had spent about thirteen billion Uganda shillings (13,000,000,000) for his campaigns (an average of 60 shillings per constituency), but still had debts to clear at the end of it all.²⁵ One can only speculate as to how he raised this money, and how he and/or his agents spent it. The Supreme Court Judgment in the Besigye Petition acquitted the President of wrong doing, saying that it had been proved that election malpractices committed by his agents had not been committed with his knowledge or approval.²⁶ Nevertheless, Museveni's agents themselves were not cleared of wrong doing, and the allegations of wrong doing on their part only served to mar their candidates victory with stains of corruption and fraud.

¹⁹ Besigye v. Y.K. Museveni and the Electoral Commission, *judgment of Odoki, C.J, certified edition, p.36. The Court did not make much of the issue, saying that the respondent had explained that this was simply due to arithmetic error.*

²⁰ Pinto- Duschinsky, M., *op.cit.*

²¹ Besigye v. Museveni and Anor, *op.cit.*

²² See "Senkubuge opens campaign with pomp," The New Vision, Tuesday January 16th 2001, p. 1 and "Senkubuge quits race," The New Vision, Saturday 20 January 2001, p.1

²³ Section 21 Presidential Elections Act.

²⁴ Section 20 (4), *Ibid.*

²⁵ President's State of the Nation Address to Parliament, 27th July 2001.

²⁶ Besigye v. Museveni and Anor, *op.cit.*

3.2.2.3 Unfair Practices

“Unfair practices” refers to negative campaigns and 'dirty tricks.' Whereas electoral fraud and electoral corruption are clearly undesirable and illegal, 'unfair practices' are harder to define and more controversial. What is 'unfair' to some is merely 'robust electioneering' or 'negative campaigning' to others.²⁷ Perhaps the most outstanding incident in this regard were the remarks made by the President, Museveni, to a reporter from *Time Magazine*, alleging that “Besigye has AIDS.”²⁸ In his election petition, Besigye stated that this was a false statement, made maliciously with intent to portray Besigye as a person in poor health and therefore unfit to govern the country. The Supreme Court, by a majority of 3-2, held that Museveni had made the statement believing it to be true and was therefore not at fault.²⁹

3.3 Violence and Intimidation – The Role of the Military in Uganda’s 2001 Presidential Elections

The campaign period, polling day and the aftermath of the elections were marred by incidents of violence in various parts of the country, which further undermined the integrity of the elections. Although there had been palpable currents of tension beneath the surface since Besigye declared his candidature, this tension began to mount as the campaigns progressed. There were shootings,³⁰ violent demonstrations, and killings.³¹ Assaults,³² arbitrary arrests, illegal detentions³³ and threats³⁴ were also common.

Whereas some of the violent incidents were perpetrated by civilian supporters of Museveni against civilian supporters of Besigye and vice versa, it was particularly disturbing that a good number of clashes involved the military and security organisations. The deployment of the Presidential Protection Unit (PPU) in Rukungiri raised concern that the election process was being unnecessarily militarised. Indeed, evidence that was later adduced during the hearing of the petition challenging the result of the election showed that the highest concentration of intimidation, violence and harassment took place in Rukungiri District, which incidentally, was Besigye’s home turf. These acts interfered with the petitioner’s campaigns in those districts.³⁵ Intimidation took a number of forms, including the closing of branch offices, tearing posters, dispersing rallies, abductions, arrests, and causing injury or death to agents and supporters. On polling day, intimidation consisted of ordering voters to vote for Museveni, and harassing Besigye’s polling agents.

²⁷ *Pinto-Duschinsky, op.cit.*

²⁸ *Time Magazine, “Three’s a Crowd in Love and Politics- An ex-friend and an ex-lover challenge the eastern African Nation’s Strongman” 12 March 2001.*

²⁹ *See Besigye v. Museveni and the E.C., op.cit.*

³⁰ *See “Besigye Task Force Shot at,” The New Vision, Tuesday 9th January 2001, p.5.*

³¹ *See “Police battle against Sebaggala Fans,” The New Vision, Tuesday January 9th 2001, p.3; “Museveni Campaign Manager shot dead,” The New Vision, Friday 12th January 2001, p.5; and The New Vision, March 5th 2001, p.1. See also “Hit and run car kills three Besigye supporters,” The New Vision, February 5th 2001, p.1.*

³² *“Major Beaten,” The New Vision, February 4th 2001.*

³³ *“Rabwoni arrested,” The New Vision, February 21st 2001,*

³⁴ *“Besigye taxi-men cry foul,” The New Vision, Wednesday January 31st 2001, p. 10.*

³⁵ *See page 145, certified edition of the judgment in the petition.*

Sections of the military acted with impunity and had no qualms about showing which candidate they supported. For example, a group of UPDF soldiers calling itself the Kalangala Action Plan (KAP), headed by Major Kakooza Mutale, a Senior Presidential Advisor, gained notoriety for its role in harassing and arbitrarily arresting supporters of Besigye. Its activities continued unabated despite pleas from local election observers and the Electoral Commission.³⁶ Similarly, the military police was involved in the illegal arrest of major Okwir Rabwoni, head of Besigye's youth desk.³⁷ Such behaviour was clearly contrary to Article 208(2) of the Constitution, which states that,

The Uganda Peoples' Defence Forces shall be non-partisan, national in character, patriotic, professional, disciplined, productive, and subordinate to the civilian authority as established under this Constitution.

However, the Army sought to legally justify its involvement in the election process, arguing that Article 209 of the Constitution outlines one of the functions of the army as being to assist the Police or any other Civilian authority in emergency situations.³⁸ The "emergency situation" referred to here was clearly the campaign period:

...As Ugandans campaign... our intelligence information indicates that some negative forces against peace are planning assassinations, riots, demonstrations, acts of violence, looting, and other criminal acts during and after elections...

Whether or not the Army Commander's interpretation of the Constitution was correct is another matter. Article 209(b) provides: "The functions of the UPDF are ... to cooperate with the civilian authority in emergency situations and in cases of natural disasters." According to his statement, the deployment of the army was pre-emptive or pre-cautionary, whereas the very nature of an emergency situation is that it can rarely be predicted.

The Army Commander's justification statement went on to say that the army was getting involved in the election process mainly because the police was ill-equipped to handle to a task of such great magnitude:

...On top of this demand on the Police, there are presently 17,000 polling stations which require policing... Police is required to escort electoral materials, officials, ...safeguard presidential candidates, above the normal police schedule of duties. With all this to be done, there is no doubt that a 15,000 strong Police Force would not even be adequate to man all the polling centres and keeping peace and security. Hence the need for the UPDF to lend a hand.³⁹

He then went on reassure the nation that,

³⁶ See NEMGROUPE-U, *Status Report as at 5th March, 2001*, in *The New Vision*.

³⁷ "Rabwoni arrested," *The Monitor*, February 21st 2001, p.1.

³⁸ *Press Statement by the Army Commander Major General Jeje Odongo on March 9th 2001*.

³⁹ *Ibid*.

...the UPDF has not, and does not intend to usurp anybody's role, but is serving as a STAND-BY (*sic*) force that will come in only when the National Security Task Force in conjunction with the EC identifies a security need for it to.⁴⁰

This was, of course, not true. The presence of army men at various polling stations in Rukungiri on the day of the election, despite a clear request from the EC that the armed forces be withdrawn from the process, is testimony to this. In Rukungiri, soldiers chased Besigye's agents away from the polling station.⁴¹ In Kampala, the Military Police was present at various polling stations.⁴² Especially in Rukungiri, it can be reasonably inferred that the army was being partisan, and had been deployed with a view to denying or minimising Besigye's votes. This view is reinforced by the fact that some individual members of the army, far from being non-partisan, exhibited open hostility towards Besigye and his supporters, and openly showed their support for the incumbent, Museveni.⁴³

Despite the fact that the presence and activities of the army were happening in broad daylight for all to see, the government continued to vehemently deny any wrong doing on the part of the army. When Members of Parliament expressed concern over the matter, the army representatives in Parliament were quick to reiterate that no army unit had been ordered or given instructions to go and cause violence against innocent citizens, and that any indiscipline was caused by individual errant soldiers.⁴⁴ The Prime Minister, too, pointed out that any person alleging state inspired violence, should produce evidence and take the matter to court.⁴⁵ Despite the fact that it was later proved in Court that there had been State inspired violence in some parts of the country during the presidential elections⁴⁶, top members of government insisted that any violence that had occurred was actually perpetrated by Besigye Supporters.⁴⁷ Such denials were a clear indication of government's determination not to take any responsibility for the wrongs perpetrated by the army during the elections. On the other hand, there is no doubt that whether or not the government had sinister intentions in deploying the army, the deployment of the army caused more harm than good and will remain in history as one of the factors that caused doubt as to whether the 2001 presidential elections were free and fair.

3.4 The Administration of the Elections

Proper administration of an election is crucial for maintaining the integrity of the election result. Integrity requires a political will for good governance and "clean"

⁴⁰ *Ibid.*

⁴¹ NEMGROUP-U, *Monitoring Report on Uganda's Presidential Elections 2001*, p. 50.

⁴² *Ibid.*, pp. 50-51.

⁴³ See "(Brigadier) Kashaka probed over Besigye supporter," – "Brigadier Kashaka is being probed by police for threatening violence by forcing a Besigye supporter to remove his T-shirt and wear that of candidate Museveni...." *The New Vision*, February 16th 2001, p.1. See also NEMGROUP-U, *Status Report as at February 6th, 2001*.

⁴⁴ *Official Report of the Proceedings of Parliament, First Session, fortieth sitting, first meeting of the Seventh Parliament of the Republic of Uganda, Wednesday 31 October 2001, (unbound hansards).*

⁴⁵ *Ibid.*

⁴⁶ Besigye v. Museveni and Anor, *op.cit.*, *Judgment of Odoki, C.J.*, pp. 144-145.

⁴⁷ Amama Mbabazi, *quoted in The New Vision*, 18th March 2001, p.41.

elections. Given the factional nature of politics and society particularly in Uganda, integrity cannot be taken for granted. Mechanisms to safeguard and enforce integrity need to be built into the electoral framework, electoral administration and conditions for participation. These include checks and balances on election administration within the electoral management body, oversight by another agency or branch of government, independent monitoring of the process by civil society and the media, and enforcement of rules and regulations through administrative or legal action.⁴⁸

Uganda's EC, established under the 1995 Constitution, is charged with the responsibility of ensuring regular, free and fair elections, organising, conducting and supervising elections, demarcating constituencies, ascertaining and publishing results, compiling and maintaining a voters' register, hearing and determining election complaints before and during polling, carrying out civic education, and any other functions prescribed by law.⁴⁹

Prior to and during the presidential elections, the EC committed a number of errors, including a flawed voter registration exercise, which did not allow for a "clean" voter's register. This was caused in part by the late passing of the Presidential Elections Act 2000, which made it impossible for the Commission to commence the necessary activities on time.⁵⁰ As a result of the late passing of the Act, the exercise of updating the voter register, which is supposed to be continuous, could not be done because the Ministry of Finance could not release funds without the election law being in place. The failure to display the voter's register on time, was worsened by the fact that the number of days for displaying the register was then reduced from 21 to 5, thereby rendering the display exercise ineffective. In addition to this, the Commission failed to deliver cards to all the voters that were entitled to them. The Commission then went on to declare a last-minute change in the election date, from 7th to 12th March, which only helped to lend credence to the view that the Commission was inefficient, incompetent and ineffective. Nowhere was this ineffectiveness more visible than in its powerlessness to stop the violence and intimidation caused by the army. Calls from the Chairman of the Commission demanding the withdrawal of the army from the election process went unheeded. After the elections, the same chairman was heard justifying the role of the army, saying the army had acted within the law to maintain peace and security. This was not only a contradiction, but made it seem that despite its constitutional mandate and independence over elections, it was not the EC calling the shots.

Further evidence of the EC's incompetence was the failure to Gazette all the polling stations to be used on election day. By election day there were 1,176 new polling stations, while 303 were missing although originally published in the Gazette. As a result, most candidates were not able to have agents at all the polling stations.

⁴⁸ Nelson, S., 2000, The Administration and Cost of Elections (ACE) Project, *IFES, UN-DESA, IDEA*, www.aceproject.com, accessed 28 April 2002.

⁴⁹ Article 60-61, *Constitution of Uganda, 1995*.

⁵⁰ *The Presidential Elections Act was passed by Parliament on 28 November 2000 and assented to by the President on 8 December 2000. Under the electoral law, the elections had to take place during the first thirty days of the last ninety days before the expiry of the term of the President. The last President had been sworn in on 12 May 1996, therefore 12 March 2001 was the latest day on which elections could take place.*

These anomalies had the cumulative effect of undermining public confidence in the EC. It appeared as though the EC was not truly independent, but was merely dancing to the tune of the government. Indeed, one commentator has observed that,

...the administration of an election is no simple matter, and accidents occur at the intersection between political suspicion and technical incapacity. Many elections fail because one party interprets 'technical irregularity' as politically inspired by its opponents, whereas it might be due to administrative failures.⁵¹

Furthermore, it was inexcusable for the EC to fail to publish the enabling subsidiary legislation laying down the election procedure, in accordance with section 39 of the Electoral Commission Act, which provides that the Minister (of Justice), may, in consultation with the Commission, by Statutory Instrument, make regulations for the effective performance of the Commission's functions. Although the requirement for subsidiary legislation is not mandatory, it is necessary to improve the administration of elections and to standardise the procedures involved in conducting a free and fair election.

Although it cannot be doubted that the Commission did its best to make the most of a bad situation, the manner in which the presidential elections were administered left a lot to be desired and revealed that Uganda has quite a long way to go in organising and administering elections so as to ensure a free and fair result.

3.5 The Presidential Election Petition: Kizza Besigye v. Y.K. Museveni and the Electoral Commission⁵²

With all the pitfalls and anomalies that characterised the election, it came as no surprise when Kizza Besigye, after losing the election, decided to petition the Supreme Court of Uganda over the result. While it was not a surprise, it was definitely a novel way of doing things on Uganda's political scene. In the past, losers of presidential elections took up arms to fight the government. The fact that Yoweri Museveni himself took to the bush to fight a guerrilla war after losing in the 1980 elections, and that he came to power through the gun and not the ballot, is no secret.

Accordingly, the move by Besigye to petition the Supreme Court came as a breath of fresh air. It was a giant leap for Ugandans in their journey towards democratic governance, and enhanced Constitutionalism in Uganda. As observed by the Chief Justice of Uganda in delivering his judgment in the case,

The petition symbolised the restoration of democracy, constitutionalism and the rule of law in Uganda. It demonstrated the fundamental democratic values contained in the 1995 Constitution, which include the sovereignty of the people, the right of the people to choose their own leaders through regular, free and fair elections, and the peaceful resolution of disputes...⁵³

⁵¹ Pastor, R. A., (2000), *The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research*, p. 3.

⁵² *Election Petition No. 1 of 2001*.

⁵³ *Ibid*, judgment of Odoki, C.J., p.9.

In his petition, Besigye sought for an order that Museveni had not been validly elected, and that the said election be annulled. The grounds for the petition were that the Presidential Elections Act 2000 and the Electoral Commission Act 1997 had not been complied with, and furthermore, that the respondents and some of their agents and / or servants, committed illegal practices and offences under the Act. The respondents denied these allegations. At the beginning of the hearing, Counsel agreed on the following issues for determination by the court:

- (i) Whether there was non-compliance with the provisions of the Presidential Elections Act 2000.
- (ii) Whether the election was not conducted in accordance with the principles laid down in the provisions of the said Act.
- (iii) Whether if the first and second issues are answered in the affirmative, such non-compliance with the provisions and principles of the said Act, affected the result of the election in a substantial manner.
- (iv) Whether any illegal practice, or any other offence under the said Act, was committed, in connection with the said election, by the first respondent (Museveni) personally, or with his knowledge and consent or approval.
- (v) What reliefs are available to the parties.

The findings of the Supreme Court on the above issues, by a majority of three to two, were as follows:

- (i) That during the election the second respondent (the Electoral Commission) did not comply with the provisions of the Presidential Elections Act. In section 28, as it did not publish in the Gazette 14 days prior to his nomination of candidates, a complete list of polling stations that were used in the election; and in section 32(5) as it failed to supply the Petitioner with an official copy of the voter's register for use on polling day.
- (ii) That the said election was conducted partially in accordance with the principles laid down in the Act, but that-
 - (a) In some areas of the country, the principle of free and fair elections was compromised;
 - (b) in the special polling stations for the soldiers, the principle of transparency was not applied,
 - (c) there was evidence that in a significant number of polling stations, there was cheating.
- (iii) By a majority of three to two, that it was not proved to the satisfaction of the court that the failure to comply with the provisions and principles of the Act as found in issues one and two, affected the result of the election in a substantial manner.
- (iv) By a majority of three to two, that no illegal practice or other offence under the said Act, was proved to the satisfaction of the court to have been committed in connection with the said election, by the first respondent personally, or with his knowledge and consent or approval.

- (v) By a majority decision, the petition was dismissed.

The reasons for these findings were given in a detailed judgment, probably the longest judgment ever in the history of Uganda, running to over 1,000 pages. The petition itself was record-breaking. The petitioner filed 174 affidavits in support of his petition, and in reply to the affidavits of the first and second respondents, who in turn filed 133 and 88 affidavits respectively.

The judgment and the reasons therefore raised a number of pertinent issues related to Uganda's constitutional development, particularly with regard to the evidential law governing election petitions, and related to this, the standard of proof required to show whether an election has been free and fair. Also of crucial importance, is whether, once it has been proved that there were irregularities in an election, such irregularities can be shown to have affected the result in "a substantial manner" so as to justify nullifying the result of the election. For whereas all five judges were agreed on the issues that there was non-compliance with the Act and that the principles of a free and fair election had been compromised, the crux of the matter eventually rested on whether the result of the election was thereby affected "in a substantial manner." Three judges held that the result was not thereby affected and there was thus no need to nullify it, while two were of the view that it had been affected, and accordingly, the election should have been nullified.

The issues that are raised in this regard beg the question as to whether our electoral laws promote and safeguard free and fair elections, or whether they need amending to ensure that the country is not derailed from the path to democratic governance.

3.5.1 Evidence in Presidential Election Petitions

Regarding the law on evidence applied in the petition, the pertinent issue was the advantages and disadvantages of evidence by affidavit in election petitions. According to the Presidential Elections Act, evidence in the petition could only be submitted by affidavit and cross-examination of the deponents could only be by leave of court.⁵⁴ The advantage of this procedure lies mainly in the fact that it allows for a petition to be disposed of in as short a time as possible. Under the Presidential Elections Act, the Supreme Court was required to deliver its judgment within 30 days from the date the petition was filed. Needless to say, examination and cross-examination of witnesses would not have allowed this requirement to be complied with. On the other hand, as observed by the Chief Justice, the procedure,

...has serious drawbacks. The main one is that the veracity of all the witnesses who deposed to the affidavits cannot be tested by examination by the court or by cross-examination by the opposite party... This therefore calls into question, in my view, the wisdom of depending entirely on affidavit evidence in an inquiry such as the present...⁵⁵

⁵⁴ Section

⁵⁵ *Certified Edition of the Judgment*, pp. 203-204.

The implication was that ultimately, it was left to a judge's personal opinion to believe or disbelieve a particular deponent. Indeed, the court disbelieved much of the evidence submitted by those who deposed to various instances of irregularities in the vote counting, saying there were inconsistencies in the depositions. There is no way of telling whether the deponents would have been more believable if they had given direct evidence. One can only speculate as to whether direct evidence would have given the petitioner a better chance to meet the required standard of proof on the crucial issue of whether or not the irregularities affected the result of the election in a substantial manner. As it were, the majority found that the petitioner had not sufficiently proved this allegation.

3.5.2 Whether non-compliance affected the result in a substantial manner

A close look at the judgment shows that the decision of the court to dismiss the petition, in many ways, turned upon the issue of whether or not non-compliance with the electoral law affected the result in a substantial manner so as to justify a nullification of the result.

Unfortunately, the electoral law is silent about the test for determining a "substantial manner." Thus, it was left to Counsel for both parties to convince the Court as to what the correct test to be applied in this regard was. Counsel for the petitioner argued that it was not a question of numbers. He proposed that in determining whether the non-compliance affected the result is a value judgment, a qualitative decision not based on quantities. He went on to submit that numbers cannot be used as a criterion to determine whether an election was free and fair. If it is shown that the election is not free and fair, then it is invalid and should be nullified.

On the other hand, Counsel for the respondent emphasised the issue of numbers. He pointed out that the petitioner had obtained 27.8% of the vote, a big percentage, which could only be scored where the election was free and fair. He emphasised that the difference in votes between Besigye and Museveni was more than three (3) million votes, a colossal number which could not have been obtained through cheating and irregularities in some parts of the country.

In the end, the quantitative test carried the day. The majority of the Supreme Court found that substantial effect must be calculated to really influence the result in a significant manner.

In order to assess the effect, the court has to evaluate the whole process of the election to determine how it affected the result, and then assess the degree of the effect. In this process of evaluation, it cannot be said that numbers are not important... numbers are useful in making adjustments for the irregularities...
... there must be cogent evidence, direct or circumstantial, to establish not only the effect of non-compliance or irregularities, but to satisfy the court that the effect was substantial....

In this petition, the petitioner has proved that there was non-compliance... no doubt these irregularities and malpractices had some effect on the results one

way or another... there is no evidence to show how the non-compliance affected the results of each candidate... including the petitioner, no adjustments or calculations based on these irregularities was done... the fact that these malpractices were proved to have occurred is not enough.... The Petitioner had to go further and prove their extent, degree, and the substantial effect they had on the election...⁵⁶

Therein lay the dilemma of the petitioner. The implication of the above statement was that the Petitioner should have produced cogent, presumably, mathematical evidence to show that the irregularities had a substantial effect. Presumably, such evidence would have required a Mathematics/Statistics expert to make calculations, adjustments, approximations and deductions to illustrate the net effect the malpractices could have had on the election result. Whereas there is no telling whether it was an oversight on the petitioner's part to adduce such evidence, one is immediately made to wonder how such mathematical and statistical evidence could have been adequately presented in form of an affidavit. Granted, there would have been leeway for such an affidavit to have annexures with calculations, graphs, and whatever other mathematical and statistical illustrations would have been necessary to show the effect that the malpractices had on the result of the election. Nevertheless, such a method would still have required the expert to make some presumptions and assumptions as to how voters' mental states were affected by issues such as intimidation and harassment, causing them to vote one way or another. It is therefore evident that a quantitative test would still not be fool-proof in determining the effect of non-compliance.

By contrast, the minority opinion of the Supreme Court favoured the qualitative or the value judgment over the quantitative one. In his judgment, Oder JSC said,

...It is my considered opinion that in deciding what effect the non-compliance ... had on the result of the election... the arithmetical numbers or figures are not the only determining factors... Figures are the outcome of one day's exercise, the polling day. The indications of which candidate won and which one lost are the result of the margin between the two.... Numbers or figures, of course, are terribly important, but to me, they are not the only yard-stick for assessing the quality or purity of an election. Whether non-compliance affected the result... is a value judgment. Figures cannot tell the whole story... figures and numbers would not show, for instance, the effect on the result of the failure to compile the voters' register, failure to gazette all polling stations, failure to display the voters register for 21 days; they would not show the effect of armed soldiers or others at polling stations; they would not show the effect on the result of intimidation, harassment and threats by PPU, UPDF, DISOs, and supporters of the first respondent (Museveni).... figures would not show the effect the result of chasing away the petitioner's agents from polling stations or forcing them to sit where they could not see what was happening at the presiding officers table... I am also doubtful whether numbers would show the effect on the result of stuffing ballot boxes, multiple voting, and voting by under-age voters... I doubt whether numbers would show the effect on the result of mis-tallying of votes...

⁵⁶ *Judgment of Odoki, C.J. certified edition, pp. 160-161.*

In my considered opinion... the sum-total of the non-compliance... is the value yardstick for measuring the effect of the non-compliance... my opinion is that such non-compliance affected the results in a substantial manner... I would nullify the election of the first respondent as President...

3.5.3 The significance of the petition and the ruling thereon

Although the majority opinion carried the day on the crucial issue of non-compliance, the argument for a quantitative test to determine whether such non-compliance had a substantial effect on the election leaves a sour taste in the mouth, if only because it tends to justify election malpractices and irregularities, so long as they are not so widespread as to affect the overall result of an election. The Supreme Court's ruling seemed to have its premise largely on the fact that the margin (more than 15%) between votes won by Museveni and those of Besigye was too wide to justify nullifying the election. Whereas this argument holds some water, its undoing lies in the fact that it does not propose how narrow the margin should be to justify a nullification.

Similarly, whereas it is conceded that it is impossible to organise a perfect election anywhere in the world, especially in a developing country and a fledgling democracy like Uganda, it may not be in the best interest of democracy to allow people to get away with election malpractices. Thus, whereas Besigye's petition was a landmark and a milestone for Constitutionalism in Uganda, the resulting judgment is somewhat disturbing because it appeared to allow people to get away with numerous lawless deeds which had otherwise been proved to the satisfaction of the court. Seen from another point of view, the judgment appeared to justify what was clearly an election whose integrity was greatly marred by violence, intimidation and fraud.

In the aftermath of the petition, there was speculation that the Supreme Court's decision had been influenced by the fear of plunging the country into chaos and bloodshed. One commentator said that the judgment was just a balancing act by the judges after realising that a ruling in favour of the petitioner (Besigye) would plunge the country into anarchy.⁵⁷ The Chief Justice himself seemed to make reference to the magnitude of the implications of the case when he said,

...This is not an ordinary case but an important case involving the election of the President of the Republic of Uganda. It raises serious constitutional and legal issues... The effect of the decision on the governance and development of the country, and on the well-being of the people of Uganda, cannot be over-emphasised ...⁵⁸

Prior to the hearing, there were a number of insinuations that the Court was not truly independent of the Executive, and there were comments that there was no way the Court could decide in favour of Besigye. One of the Presidential candidates, Aggrey Awori, spoke for many when he said,

⁵⁷ "Views on the petition," Talk of the Town, The New Vision, Wednesday 25th April 2001.

⁵⁸ Besigye v. Museveni and the E.C., *op.cit.*, Judgment of Odoki, C.J., p. 20.

Everybody knows that there was rigging, but you know the stomach dictates on what the brain decides. These judges are presidential nominees and hence will not help Besigye's case.⁵⁹

Regardless of the outcome, the Besigye candidature and resulting petition were important developments for Uganda. His candidature caused a lot of excitement and raised hopes for a change in government after fifteen years of movement rule under Museveni. His campaign slogan "reform now," as opposed to Museveni's "no change" echoed the hopes and aspiration of many Ugandans who were fed up with the corruption, nepotism and war-mongering that have characterised Museveni's rule, particularly in latter years. In addition, it raised hopes that the country would soon return to pluralism, for this was one of Besigye's specific campaign promises. It was therefore no surprise that political parties and civil society organisations such as *The Free Movement*, who have long been advocating for democratic governance under a multi-party system, threw all their weight behind Besigye and openly expressed their support for him. The election results showed that Besigye was supported by the middle class educated Ugandans, the so-called "elites" of Ugandan society, who reside mainly in the capital city Kampala and in other towns too. Some Members of Parliament, prominent businessmen, as well as politicians, formerly known as supporters of Museveni, also threw in their lot with Besigye and openly supported his candidature.⁶⁰ On the other hand, Museveni's stronghold of support is the peasantry. Shortly after the election, Museveni boasted about this, castigating the print media houses to harp on his weaknesses and decampaign him,

... Pike... and Wafula Oguttu... do not reach 600,000 people, that is why I defeated them. You remember they were insulting me here, they thought they were decampaigning me; they did not know that most of my supporters have never heard of them... they were really wasting a lot of time, maligning Museveni in *The New Vision*, *The Monitor* – they did not know that my supporters have never heard of them, because their approach is elitist.⁶¹

Despite Museveni's win, Besigye's candidature shows that the winds of change have begun to blow in Uganda, and will continue to blow until the country attains full democracy. Without the support of the middle class, (the elite); Museveni's hold on power is much the weaker for that, and is an indication of the change that has taken place since 1996, when Museveni won the election with well over 75% of the vote. The reduction to 62% is an indicator of that change.

Furthermore, the petition by Besigye served to show the need to amend the electoral law in order to provide for a number of gaps therein, for example, how campaign money may be raised and spent, what constitutes a free and fair election, and what level of malpractices or margin of votes should justify nullifying an election. These are pertinent issues that must be dealt with before the next round of Presidential elections in 2006.

⁵⁹ "Awori tells Besigye to abandon petition," *The New Vision*, March 10th 2001, p. 5.

⁶⁰ Winnie Babihuga, formerly Woman MP for Rukungiri District, and James Musinguzi Garuga, lawyer and Businessman.

⁶¹ State of the Nation Address to Parliament, 27th July 2002. (William Pike and Wafula Oguttu are, respectively, the editors in chief of the *New Vision* and the *Monitor*, two of Uganda's leading newspapers).

On the downside however, events that followed the ruling of the Supreme Court on the petition showed that it was early days yet to celebrate a victory for democracy and the rule of law in Uganda. Besigye continued to be hounded by State Security agents. He was stopped from leaving the country and accused of having connections with dissident Ugandan soldiers.⁶² His wife, Winnie Byanyima, M.P. for Mbarara Municipality, faced great difficulty in her re-election bid, with the President himself telling people not to vote for her.⁶³ Some well-known supporters of Besigye who had government jobs, were sacked in unclear circumstances. In early August 2001, Besigye fled the country, citing political harassment and persecution by the State.⁶⁴ He has now turned into a “roving ambassador” for *The Reform Agenda*, the political pressure group/non-governmental organisation which he formed together with a number of young Ugandan politicians who are eager to see a change in Uganda’s government and politics.

4.0 THE PARLIAMENTARY ELECTIONS 2001

The parliamentary elections followed closely on the heels of the presidential elections, and took place on June 27th 2001. In many ways, they mirrored the presidential elections. Once again, the movementists contravened the individual merit principle which they had coined, propounded and entrenched in the 1995 Constitution. The violence, intimidation and threats that had proved to be useful tactics during the presidential election, were called upon and used by many parliamentary candidates. Malpractices and rigging of elections were rampant, and inevitably the High Court was flooded with election petitions in the aftermath of the elections.

4.1 President Museveni’s role in the Parliamentary Elections 2001

By the time the Parliamentary elections came round, the writing on the wall, clear for all to see, was that the Movement had split into two parts. One part, which has come to be known as the “moderates,” consisted of those who have expressed support for a return to multi-party politics in Uganda, and some of whom supported Besigye’s bid for the President. The other part, known as the “die-hards,” consists of those who denounce political parties as the source of all Uganda’s political woes, and are determined not to let political parties rule Uganda in the near future, and who supported Museveni during the presidential elections.

From the start of the parliamentary campaigns, Museveni made it quite clear that he wanted only Movementists in Parliament; not just any Movementists, but only those who had supported him and campaigned for him during his presidential campaign. His argument was that he needed people in Parliament who would help him to pass laws that were in line with and favourable to his manifesto, and not people who would oppose his programmes. In contravention of the principle of individual merit, Museveni

⁶² See “Besigye blocked at Entebbe Airport,” *The Monitor*, May 26th 2001, p.1.

⁶³ “Museveni blacklists several parliamentary candidates who should not be elected to Parliament,” *The New Vision*, June 13th 2001, p.8.

⁶⁴ “Besigye in South Africa,” *The New Vision*, August 23rd 2001, p.1.

publicly named the people he did not want voted into Parliament.⁶⁵ Similarly, the government, working through the Movement Secretariat, funded pro-movement candidates, with what many assumed was money from government coffers and therefore public funds. This not only helped to create an un-even playing ground, but was a violation of the Constitutional principle that all parliamentary candidates should receive equal treatment from public officers and public institutions.⁶⁶

Among those Museveni opposed were Winnie Byanyima, wife of Kizza Besigye, and Winnie Babihuga, Women's MP for Rukungiri, who had supported Besigye's campaign bid. Museveni was so opposed to their candidature that he personally went to Mbarara and Rukungiri to decampaign them and to canvass votes for the candidates of his choice, Ngoma Ngime, against Winnie Byanyima, and Winnie Matsiko against Winnie Babihuga. Ironically, Ngoma Ngime was not a "son" of Mbarara Municipality, but originates from Busoga in Eastern Uganda. Museveni, in his attempts to convince the people of Mbarara to vote for Ngime, relied on the individual merit, non-sectarian principle of the movement, which he was openly flouting by decampaigning Winnie, whose obvious crime was not her personal inadequacy to represent the people, but her 'wrong' political affiliation. According to the President:

Winnie Byanyima and Winnie Babihuga gave us headache during the March presidential elections, now they must go on leave and we work with those who supported us in elections.⁶⁷

Other black-listed parliamentary candidates included "multi-partyists" like Cecilia Ogwal and Yona Kanyomozi, long time members of Uganda Peoples' Congress (UPC), Ken Lukyamuzi, a known critic of the Movement and a member of the Conservative Party (CP), and Wasswa Lule, a member of the Democratic Party.

James Musinguzi, who was running against Amama Mbabazi, the incumbent, a long time close associate of Museveni's, was also on the black list. Musinguzi was formerly one of Besigye's top campaign managers. Museveni took a trip to Kinkizi to convince voters to vote for Mbabazi, seeming to entice them with a thinly veiled suggestion that Mbabazi was "Vice-President material."⁶⁸ Some of the black-listed candidates, including Winnie Byanyima and Ken Lukyamuzi, went ahead to win the elections. This was a positive development, because it reflected independence and maturity of the voters, who made up their own minds and did not allow themselves to be influenced by the President.⁶⁹

This kind of talk from the President generated a debate on whether or not it was lawful or proper for him to campaign for some of the candidates while decampaigning others. Is the Presidency a Public office? According to Article 175 of the Constitution, a public officer is any person holding or acting in any office in the public service. Public Service means service in any civil capacity of the Government, the emoluments for which are

⁶⁵ See page 19, *infra*.

⁶⁶ See Article 67(4) of the Constitution, section 22 of the Parliamentary Elections Act.

⁶⁷ See, *The New Vision*, June 14th 2001, p.10.

⁶⁸ *Ibid*, p.1.

⁶⁹ Others like Winnie Babihuga and James Musinguzi lost, but have since successfully challenged the results in Court.

paid directly from the Consolidated Fund or directly out of moneys provided by Parliament. Article 106(3) provides that the President's salary, allowances and other benefits shall be charged on the Consolidated fund.

It is therefore a question of interpretation whether or not the President is a Public Officer. If so, it was unlawful and improper for the President to show preference for some parliamentary candidates over others, because the law specifically required that all public officers and institutions give equal treatment to all Parliamentary candidates. Furthermore, the President was showing that it was no longer the individual merit of the candidates that mattered, but their political affiliation, that is, their loyalty to the Movement and to him as an individual.

It was now clear that the idea of the Movement as a "broad-based, inclusive and non-partisan" system, based on the principles of participatory democracy, accountability and transparency, accessibility to all positions of leadership by all citizens; and individual merit, existed only in name. Although these noble ideas were enshrined in the Constitution,⁷⁰ the Movement, its leaders and its members, treated them with contempt, trampled on them, and flouted them with impunity showing that they themselves no longer believe in these ideals. In plain language, the Movement was now behaving more and more like a political party, while at the same time, continuing to pour scorn on political parties and those who support them. Such opportunistic behaviour may be interpreted as an indication that Museveni has no intentions of retiring in 2006, despite his many reassurances that he will do so. And indeed, if past behaviour is anything to go by, there is some basis for the view that come 2006, the Movement will turn itself into a political party. With Museveni still at its helm, it will contest and possibly win the elections. In this manner, he will be able to legitimise a third term as President of Uganda.

4.2 Violence and intimidation during the Parliamentary Elections

The violence and intimidation that characterised the presidential elections was carried over into the Parliamentary elections. Again, the military played a decisive role, intimidating and harassing supporters of disfavoured "anti-movement" or "anti-Museveni" candidates. This happened in the districts of Mbarara and Rukungiri, where the army, particularly the Presidential Protection Unit, interfered in the election process by intimidating voters of Winnie Byanyima and James Musinguzi respectively. In Gulu, some candidates' supporters were blocked by soldiers from attending campaign rallies.⁷¹

Tension turned into drama, with some parliamentary candidates themselves drawing guns at opponents and /or their supporters,⁷² slapping them, and in one extreme case, a

⁷⁰ *Constitution of Uganda 1995, Article 70.*

⁷¹ Refer generally, to NEMGROUP-U, *Final Monitoring Report of Uganda's Parliamentary Elections 2001*, pp. 12-16.

⁷² See, for example, "Dr. Ajeani, Arua Municipality MP draws his pistol at three youth who attempted to disrupt his rally," *The New Vision*, June 9th 200, p. 2, and "Woman candidate for Kyenjojo District complains to Police that incumbent MP drew a gun at her supporters..." , *The New Vision*, June 20th 2001, p.5.

parliamentary candidate was charged with murder.⁷³ In Mbarara, a military escort of Ngoma Ngime, the Movement-backed, Museveni-endorsed candidate, shot and seriously injured a supporter of Winnie Byanyima, after an argument.⁷⁴ In Tororo, one parliamentary candidate was arrested for shooting at a crowd of his rival's opponents.⁷⁵ Similar incidents involving the shooting of civilians were reported in Hoima and Kapchorwa.⁷⁶

The violence and intimidation infringed on the right of voters to vote for a candidate of their choice, and people's rights to liberty, security and freedom of movement.

4.3 Electoral fraud, corruption and the commercialisation of politics

The parliamentary elections were widely characterised by the bribing of voters. It was widely reported by election observers that vote-buying, and the buying of voters cards were rampant during the parliamentary elections. In his State of the Nation Address delivered to the newly sworn in Members of the seventh Parliament, the President lamented this state of affairs and the commercialisation of politics. He appealed to politicians to reduce the high cost of politics, because the high cost meant that people could not countenance the loss of an election. This in turn fuelled election violence and corruption, because people felt they had to win at all costs so as to assume office and "recover" election costs. Money spent on buying votes is seen as an investment which must be recovered.⁷⁷

The politics of "individual merit" have been blamed for the commercialisation of politics. As one Member of Parliament put it,

I would like to say that the cause of this cost if a result of individual merit. When you have ten candidates; all of them having the same basic merit; that means that they all belong to the Movement. The voters cannot assess the merit, so the candidates themselves have got to invent a 'meritable' measure and that is bribing voters...⁷⁸

Although the causes and factors influencing vote-buying and the commercialisation of politics are complex, there is no doubt that the trend is a detriment to the democratic and constitutional development of Uganda. The implications for the welfare and development of Ugandans are far reaching because ultimately, it will not be the most capable, most deserving people that are elected into office, but those who have the money to buy votes. It erodes the rule of law and the voice and sovereignty of the people, because ultimately, "money talks." This trend must be curtailed through civic

⁷³ See "Parliamentary Candidate for Bubulo West Edward Wesonga charged with Murder of UPDF Private Wasswa," *The New Vision*, June 26th 2001, p.1.

⁷⁴ See, *The New Vision*, June 8th 2001, p.1.

⁷⁵ See, *The New Vision*, June 27th 2001, p.2.

⁷⁶ NEMGROUP-U, *Final Report of Uganda's Parliamentary Elections 200*, pp. 33-40.

⁷⁷ *President's State of the Nation Address to Parliament*, 27th July 2002.

⁷⁸ Hon. William Kiwagama, MP for Bunya County West, Mayuge District, contributing to a debate in reply to the State of the Nation Address, first session, sixteenth sitting, first meeting of the seventh Parliament (unbound Hansards).

and voter education, so that voters will be wise enough to vote those that are capable and not just those who can bribe them with the most gifts.

Other corrupt practices included impersonation of voters, ferrying voters, including foreigners, to polling stations by candidates, multiple voting, stuffing of ballot boxes by election officials, and signing declaration forms before the close of polling.⁷⁹

These election malpractices led to a plethora of election petitions in the High Court of Uganda. One of the most outstanding petitions in this regard was filed by Spencer Turwomwe against Richard Nduhura, challenging the result of the election in Igara Constituency, Bushenyi District. Turwomwe challenged the election on various grounds, including, inter alia, that the respondent had committed a number of election offences including voting twice. This allegation was proved to the satisfaction of the court and the election was nullified and a by-election ordered.⁸⁰ Nduhura still went ahead to win the by-election, and his Ministerial post as State Minister for Trade and Industry was unaffected by the fraud that was proved against him.

This case was outstanding because it raised a serious moral issue of constitutional importance. It showed that moral character and integrity are irrelevant considerations in the election of Members of Parliament and the appointment of Ministers. Indeed, a close look at the Constitution reveals that there are no references to character and integrity in the qualifications of the President, MPs, and even Judicial Officers.⁸¹ Any wonder then, that the entire fabric of Ugandan society is so corrupt that Uganda has been ranked the third most corrupt country in the world.⁸²

4.4 Voting for Women Representatives in Parliament: Universal Adult Suffrage versus Electoral Colleges

One of the most contentious issues that arose during the parliamentary elections was the procedure for electing District Women Representatives into Office. According to the Parliamentary Elections (Interim Provisions) Statute of 1996, District Women Representatives were to be elected by electoral colleges composed of Women Local Council Officials, as opposed to Universal Adult Suffrage. When the Parliamentary Elections Bill 1998 was being debated in Parliament, there was a proposal from the Legal and Parliamentary Committee that the system be changed in order for District Women Representatives to be elected by Universal Adult Suffrage.⁸³

The case against electoral colleges was mainly that electoral colleges due to the small number of voters involved could be easily manipulated and/or bribed to vote for a particular candidate over another. It was further argued that District Women's Representatives represented the whole District, and therefore it did not make sense for them to be elected by only a small fraction of the people they represent; that it was

⁷⁹ See generally, NEMGROUP-U, *Final Report of Uganda's Parliamentary Elections 2001*.

⁸⁰ See *The New Vision*, August 24th 2001, p.9.

⁸¹ See articles 80, 102, and 143 of the Constitution of Uganda, 1995

⁸² *Transparency International, 2001 Corruption Index*.

⁸³ *Official Report of the Proceedings of Parliament, 5th Session, 2nd meeting, Issue No. 42, 23rd January 2001 – 20th February 2001, p. 11750*

unfair not to give the majority of voters a chance to decide on which Women Representative they want to represent them.

Inevitably, the debate took on another dimension – did District Women Representatives represent the whole District, both women and men; were they in Parliament as representatives of just the women in their Districts, or were they in Parliament simply as Women Members of Parliament, whose presence in the House was more about the implementation of the affirmative action policy and redressing the gender imbalance in the House? Does women representatives mean representatives of women, or representatives who are women?

The Vice President, was of the view that District Women Representatives are not representative of anybody, but are brought on board to be role models. Another MP then retorted that if this was so, that is, if they are simply role models, why not just nominate and appoint role models instead of wasting national resources on elections?⁸⁴

Unfortunately, the 1995 Constitution is unclear on this issue, and hence the debate continues. There was a general outcry from many women politicians, who argued that it was manifestly unfair to expect women parliamentary candidates to traverse an entire district in search of votes, whereas the established constituencies for ordinary members of Parliament are much smaller. They further argued that women are generally under-resourced compared to men, they are less experienced in the management of public affairs, and it was therefore not fair to expect them to have the same political abilities as men. Some proposed that it was necessary to carry out a proper study to assess which of the two systems (electoral colleges and universal adult suffrage) would be better.

Although Parliament went ahead to pass the Bill with the amendment providing for women representatives to be elected by universal adult suffrage, the President refused to assent to the Bill and sent it back to Parliament for reconsideration. His arguments were that universal adult suffrage was too expensive for women, especially new entrants into politics, and that it would mean an extra burden for the Electoral Commission and therefore the treasury.⁸⁵ Upon further debate on the issue, the members reconsidered the Bill and did away with the requirement for universal adult suffrage. The general view in Parliament was that there was a need to formally assess the system of electoral colleges before doing away with them.

The NGO Election Monitoring Group of Uganda (NEMGROUP-U) heeded this call. During the process of monitoring the parliamentary elections, the group tried to find out the public's views on electoral colleges. They found that the election of district women representatives through electoral colleges is not favourable to many people, including members of the electoral colleges themselves, for the following reasons:

- The small size of electoral colleges means that Local Council Executives and candidates can easily identify those voters who are not in their favour and eliminate from the register those they know are not in their favour.

⁸⁴ *Hansards, Issue No. 43, Fifth Session, second meeting of the sixth Parliament, Reconsideration of Parliamentary Elections Bill, 20th March 2001 – 26th April 2001, p. 12015.*

⁸⁵ *Ibid.*

- Most Local Council Officials subscribe to the Movement, and this influences the result of electoral college elections such that candidates who do not favour the movement cannot be elected. The Local Council system is a government/ movement structure and does not support people who do not subscribe to the movement.
- Furthermore, many women representatives feel that they owe their allegiance to the Movement government and particularly, to the President, and then the Local Council Members who elect them. They do not owe allegiance to the ordinary voters and ordinary women who play no part in their election.
- The system is easy to manipulate through bribes, or where there are influential Local Council Chairpersons, they can be used to influence the voting pattern of a college.
- Electoral colleges limit the participation of the populace.⁸⁶

According to NEMGROUP, the general public is of the view that district women representatives should be elected by all the women in the districts, Electoral Colleges are not representative enough, and since district women representatives are supposed to represent women, they should be elected by all the women in their respective districts.⁸⁷

To sum up this issue, it may be said that whereas it is recognised that the women aspiring to political office face unique difficulties, it is not proper to promote affirmative action at the cost of democracy, whose essence is direct participation of the people in their own governance, through their chosen representatives. Electoral colleges, to some extent, undermine democratic principles because they allow people to be elected into political power through the decision of a minority. There is therefore a need for Parliament to re-visit this issue and make appropriate laws that will uphold the principle of affirmative action as well as the principles of democracy.

5.0 ISSUES ARISING FROM THE PRESIDENTIAL AND PARLIAMENTARY ELECTIONS

5.1 The Cost and Timing of Elections

Apart from the matters mentioned above, one of the issues that arose from both the presidential and parliamentary elections was the expense of having presidential and parliamentary election on two separate days. Needless to say, the elections cost the country a lot of money, most of which came from donors. Nevertheless, there were many calls that in future, the presidential and parliamentary elections be held on the same day.

Related to this was the issue of voter fatigue. Many elections were conducted during 2001. The presidential election, the parliamentary election for ordinary members of Parliament, the election for District Women Representatives of Parliament, election of disabled, youth and workers' representatives to Parliament, all of which took place on

⁸⁶ NEMGROUP-U, *Final Monitoring Report of Uganda's Parliamentary Elections 2001*, pp. 26-27.

⁸⁷ *Ibid.*

different days. It was observed that voter turn-out decreased as time went by. Hence, there is a need for consolidating elections in the country as much as possible, so as to minimise voter fatigue.

5.2 The Role of Civil Society Organisations (CSOs) in the election process

Despite the many shortfalls of Uganda's 2001 presidential and parliamentary elections, credit must be given to the active involvement of CSOs, who acted as election observers throughout the campaign period, polling day, and during the aftermath. This provided an important check on the government, the commission, and the various presidential and parliamentary candidates. In this regard, the NGO Election Monitoring Group (NEMGROUP) Uganda, deployed a number of observers and monitors throughout the country, and compiled and published regular reports about the campaign and election process in the media. Comprehensive final reports on both elections, detailing events that happened at national and at grassroots level, provide an invaluable record, which not only serves as evidence, but will hopefully prove useful for future reference so that the country can learn from its mistakes. NEM-GROUP offered fairly objective criticism on various issues, including the deployment of the army, violence and intimidation, the role of the President during the parliamentary elections, and the overall responsibility of the EC.⁸⁸

6.0 THE CONSTITUTIONAL REVIEW COMMISSION (CRC)

The CRC was appointed under the Commissions of Inquiry Act,⁸⁹ on February 7th, 2001 during the heat of the campaigns for Presidential Elections. Because of this, the CRC was dismissed as a ruse on Museveni's part, geared towards winning him votes.⁹⁰ On the other hand, it was timely because the 1995 Constitution had then been in operation for 5 years, and therefore a review was necessary to establish the changes in people's views since the days of the Odoki Constitutional Commission.

The Commission was due to start its work on 10th March 2001, but was initially hampered by a lack of funds, which made it impossible for the Commission to operate. The critics interpreted this as evidence of Government's lack of commitment to the constitutional review process. However, funds were later released and the Commission embarked on its work.

The terms of reference for the Commission were:

- (a) to examine the consistency and compatibility of the constitutional provisions relating to the sovereignty of the people, political systems, democracy and good governance and make recommendations as to how best to ensure that the country is governed in accordance with the will of the people at all times;

⁸⁸ See NEMGROUP – U, *Report of Uganda's 2001 Presidential Elections, and Final Election Monitoring Report of Uganda's Parliamentary Elections 2001*.

⁸⁹ *Legal Notice No. 1 of 2001, Commissions of Inquiry Act, Cap. 56*.

⁹⁰ See comments by Besigye and Awori, *The New Vision*, February 15th 2001, p.31.

(b) having regard to the need for effective and democratic governance of the country, to review the provisions relating to executive authority and its obligations on the one hand and the powers of Parliament on the other, and to make recommendations to the necessity or otherwise of conferring powers on the President to dissolve Parliament and thereby appeal to the people by way of general election or referendum if the Executive Authority and Parliament are deadlocked and cannot agree on a matter of fundamental executive or legislative importance;

(c) to review the system of decentralisation of government and consider:

(i) whether Federalism should be introduced, where required; and

(ii) to recommend measures to make the system more efficient, having regard to the extensive powers and services devolved on the local government units and the human and financial resources available and the procedure for removal of elected local government leaders from office.

(d) to review the separation of powers among the Executive, Parliament and the Judiciary and recommend changes to improve functional effectiveness and accountability of the three arms of Government;

(e) to review the composition, powers and privileges of Parliament and recommend an affordable but efficient and strong Parliament, bearing in mind the need for the effective representation of the people;

(f) to review the qualifications and disqualifications of members of Parliament and of the President and in particular article 80 (1) (c) which requires a minimum formal education of Advanced Level Standard or its equivalent and article 102 (c) and make appropriate recommendations;

(g) to examine the operation of article 88 (Quorum of Parliament) in the light of the experience of Parliament since the coming into force of the 1995 Constitution and make recommendations as to whether or not the Quorum should be reduced;

(h) to examine the electoral system with a view to recommending whether Presidential and Parliamentary elections should be held at the same time and whether local government elections should be conducted by lining up of supporters behind candidates;

(i) to consider and recommend measures intended to improve the access to and efficiency of the courts and in particular, the desirability of establishing a unified judicial service by transferring administrative and support staff from the Public Service Commission to the Judicial Service Commission;

(j) to review the relationship between the Inspector General of Government and the other institutions or organs designed to make the Government and public institutions transparent and accountable and recommend improvements in their

efficiency and effectiveness and co-ordination;

(k) to review the constitutional bodies and assess their desirability and affordability and to delineate their functions and powers in order to reduce duplication and conflict;

(l) to re-examine the provisions relating to the acquisition and loss of citizenship and recommend whether dual citizenship should be allowed, particularly with regard to Ugandans living in the Diaspora;

(m) to review article 162(2) relating to the functional independence of the Bank of Uganda, vis-à-vis particularly the Ministry of Finance and make recommendations;

(n) to review aspects of land relating to the necessity for Government to acquire land for public purposes or use and the desirability and affordability of the various land management and dispute resolution mechanisms;

(o) to review the role and funding of traditional or cultural institutions and make appropriate recommendations;

(p) to review the provisions relating to the rights of children and young people and propose comprehensive and effective measures to protect children and young people against violence and abuse;

(q) to consider and recommend whether Uganda is ready to adopt a national or second official language;

(r) to review the Bill of Rights and consider, in particular, whether the death penalty should be abolished or whether the age of minority should be increased from 16 to 18 for purposes of employment;

(s) to consider and propose a programme and modalities for efficient, effective and expeditious implementation of the Constitution;

(t) generally to consider any other matters significantly relevant to the Constitution for good governance, the rule of law and affordability by the country of the implementation of the Constitution and make relevant recommendations.⁹¹

Although the CRC's terms of reference are extensive, some of the matters to be looked into have generated more debate and excitement than others. The pertinent issues of constitutional debate to which people are hoping for concrete, realistic recommendations from the CRC, are considered below.

⁹¹ *Legal Notice No. 1 of 2001, Terms of Reference, section 4.*

6.1 Movement versus Multi-party

This debate has occupied the minds of Ugandans for a very long time, but more so since the promulgation of the 1995 Constitution, when the movement system entrenched itself as the only legitimate system of government for Uganda, and reinforced the ban on political party activities in Uganda. The debate gained momentum in the days leading to the June 2000 referendum on political systems, the results of which showed that 93% of those who voted opted for the continuation of the movement type of government. Despite this big show of support for the movement system, the voices of those advocating for the multi-party system have not been silenced, and it is therefore appropriate that this issue receives adequate attention from the CRC.

During the year 2001, it emerged that there is, within the movement government itself, what has been called “progressive” thinking from some members of the Movement, who believe it is time to open up political space in Uganda. These people believe that it is time the Movement turned itself into a party and competed on level ground with other parties. Surprise comments from some movement leaders⁹² to this effect caused anger within the movement, with their views being variously dismissed as “imaginary” and “wrong.”⁹³

Thus, despite the results of the June 2000 referendum, the issue of political systems has obviously not been settled and is one that cannot be swept under the carpet. It can only be hoped that the findings and recommendations of the CRC on this issue will reflect the true views of the people, and that the government will take them seriously. There are indications that the ruling movement will, however, not be fazed by the findings of the CRC, even if they show that the populace is beginning to change its mind and favour the return of party activities. President Museveni has mentioned that the issue can only be resolved by another referendum:

... a lot of heat is being generated by some elements for the creation of political space for political parties. Let me remind you that the right to choose and adopt a political system is vested in the people of Uganda either through elections or referenda...⁹⁴

The prospect of yet another referendum to resolve this issue is daunting because it takes Uganda back to square one on this issue. Any such move would reek heavily of opportunism and read as yet another attempt by the movement government to perpetuate its hold on power. Furthermore, the arguments that were raised against the first referendum on the issue would still hold, the chief one being that it is illegitimate because political space is an inalienable human right which is inherent and not granted by the state, and can therefore not be subjected to a vote. Without a doubt, there is a

⁹² The New Vision, December 18th 2001, p.2.

⁹³ The New Vision, December 20th 2001, p.1-2, quoting president Museveni, December 6th 2001, p.1, quoting Maj. gen. Kakooza Mutale.

⁹⁴ Address to Members of the National Executive Committee of the Movement at Kyankwazi, The New Vision, December 23rd 2001, p.3.

need for the issue of political systems to be resolved as soon as possible, in a peaceful manner that will promote the welfare and interests of all Ugandans.

6.2 Separation of Powers

One of the CRC's main tasks is to look into the relationship between the various arms of government, and to recommend changes to improve the functional effectiveness and accountability of the three arms. Some of the fundamental issues in this regard are; what happens in case the Executive and the Legislature fail to agree on a matter of importance; and whether or not the President should be given power to dissolve Parliament if there is a disagreement on an issue of fundamental political importance.⁹⁵

Presently, the Constitution gives Parliament power to pass a law without the assent of the President, thereby making the Parliament sovereign over the President in case of a deadlock. Needless to say, such a scenario has not yet arisen in Uganda's politics, with a Parliament dominated by Movementists who are usually willing to compromise and pass laws that are in tandem with the wishes of the President. Examples of this are the Parliamentary Elections Bill, which the President returned to Parliament for the re-consideration of the issue whether or not District Women MPs should be elected by Universal Adult Suffrage or by Electoral Colleges. Parliament had passed the Bill with a provision for Universal Adult Suffrage. However, later on, the Bill was passed a second time with a provision for electoral colleges, in line with the President's wishes.

The proposal that the President be given powers to dissolve Parliament should a deadlock arise on an issue of fundamental political importance is disturbing. It smacks of dictatorial and tyrannical tendencies, whereby the wishes of one individual, the President, are allowed to prevail over the wishes of the elected representatives of the people. It is therefore necessary that the CRC's recommendations on this matter should be straightforward, convincing and in line with democratic principles of government.

6.3 Federalism versus Decentralisation

Uganda's 1995 Constitution currently provides that the system of local government in Uganda shall be guided by the principle of decentralisation. The principle is expounded and enshrined in the Local Government Act 1997,⁹⁶ which lays down the system, structure, and workings of local government. Under the system, local governments are given a significant level of autonomy to handle various matters relating to social and economic welfare, although matters such as defence and security are the preserve of the central government.

Despite the significant level of autonomy for local governments created by decentralisation, there are still certain sections of Ugandan society that advocate for a federal system of government. Proponents for federalism argue that it is the best way of reducing ethnic tension and the resulting political instability in Uganda, because it is the

⁹⁵ *CRC Guidelines for Submission of Memoranda, guideline No. 2.*

⁹⁶ *Act No. 1 of 1997.*

only cure for the malady caused by the artificial creation of the nation of Uganda by the colonialists.

Unfortunately, the issue of federalism has come to be seen by many Ugandans as a ploy by Baganda to increase the powers of their monarchy, and to consolidate the pre-colonial kingdom of Buganda, at the expense of the now-existing state of Uganda. It has taken on a life of its own as a Buganda issue, and is popularly known as “federo.” The perception that it is a Buganda/Baganda issue has tended to cloud the real issues in the debate, which is no longer about the advantages or disadvantages of federalism, but has instead been reduced to a tribal war of words.⁹⁷ It is therefore hoped that the CRC will help to bring out the real issues in this regard, and the views of Ugandans thereon, and make appropriate recommendations that will put the matter to rest once and for all.

6.4 The Death Penalty

The 1995 Constitution upholds the death penalty as a legitimate sentence for certain crimes.⁹⁸ There have been a number of proponents for the abolition of the death penalty, particularly from human rights NGOs which argue that the penalty violates the right to life and simply gives the State a licence to kill. On the other hand, sections of the Ugandan population support the retention of the death penalty as the only way of deterring criminal acts such as murder and robbery with violence. At present, it is difficult to tell what the general feeling in the country is, and the findings of the CRC on this issue will therefore be welcome.

6.5 Citizenship

Article 15 of the 1995 Constitution prohibits dual citizenship. No Ugandan can hold the nationality of another country; if they so wish to take up citizenship elsewhere, they have to renounce their Ugandan nationality. This article has not gone down well with a number of Ugandans, particularly those in the Diaspora. They argue that the provision is self-defeating, because there is nothing unique about being a citizen of Uganda. They further argue that dual citizenship would make it easier for Ugandans in the Diaspora to make remittances to Uganda, substantially boosting the economy. They would also have a greater sense of belonging (to Uganda) and yet retain the security they need to live abroad. This would compel them to invest more skills and capital in their own country.

All in all, the CRC has a crucial role to play in mapping the way forward on various crucial constitutional issues. The CRC has the status of a Commission of Inquiry and past experience with such commissions is that their findings may or may not be publicised, and there is no guarantee that the recommendations will be implemented. It can only be hoped that the findings and recommendations of the CRC will be taken seriously, publicised and implemented.

⁹⁷ *On-line discussion on constitutional review issues, at <http://www.enteruganda.com/bulletinboard/>, accessed 25 April 2002.*

⁹⁸ *Article 22 of the 1995 Constitution.*

7.0 CONCLUSION

The year 2001 brought to the fore a number of pertinent constitutional issues, especially with regard to electoral laws and practices in Uganda, that need to be dealt with in order to ensure the continued growth of democracy and the rule of law in Uganda. These issues should not be swept under the carpet until 2006 when the next elections are due, but should be dealt with as soon as possible so that come 2006, there will be a marked improvement and significant progress towards achieving a free and fair election in Uganda.

Some of the issues that must be dealt with in this regard include the need for our laws to define specific criteria for what constitutes a free and fair election. Such a law must reflect accepted democratic principles and practices that uphold human rights and the rule of law. The right to vote, the right of candidates to access the electorate on a level playing field, as well as the right to run for political office must be borne in mind. Specifically, the Presidential Elections Act must be amended to ensure clarity as to what facilities pertaining to his or her office the President may use for his or her campaigns. There is also a need for legislation on the raising and spending of campaign funds. Finally, the involvement of the military in elections should be specifically prohibited, in order to minimise violence and intimidation.

The petition filed by Besigye challenging the result of the presidential election was a positive and commendable development that marked a step forward for democracy in Uganda. By choosing to challenge the result in a peaceful manner rather than taking up arms to fight the government, Besigye showed a level of political maturity hitherto unknown in Uganda's politics. The petition was not just politically significant, but also provided an opportunity for Uganda to develop a jurisprudence on presidential election petitions, an area that Uganda's Judiciary had never tackled. It provided an opportunity for the law in this area to be tested, revealing its strengths and weaknesses. For example, it brought to light the inadequacies of the provisions on evidence by affidavit. It revealed the loop-holes inherent in trying to prove cases of this importance without giving the opposite party a chance at cross-examination. It also revealed the difficulty of meeting the high standard of proof using affidavits. These issues must be dealt with in order to ensure that in future, cases of this nature are resolved in a satisfactory and convincing manner.

Furthermore, there is a need for the law to determine the level of malpractices, electoral fraud and corruption that would be deemed to affect the result of an election in a substantial manner so as to justify nullifying the result. Should it be a quantitative issue, to be resolved by numbers, statistics and percentages, or should it be a value judgment? For while it is recognised that it is impossible to have a perfect election, it is a matter of great constitutional and moral importance whether the result of an election which is heavily tainted with intimidation, fraud and corruption should be allowed to stand.

The year 2001 also brought to the fore the weaknesses inherent in the movement system of government, particularly with regard to the principle of individual merit. The attitude

adopted by the leaders of the movement during both the presidential and parliamentary elections showed that the principle is not workable, and that political affiliation does matter in an election. Individual merit is difficult to measure and determine, especially since the movement itself has never proposed criteria by which candidates for political office should be assessed. Is it their educational qualifications, oratory skills and abilities, their health, or economic status? This dilemma is evidence of a crisis in the movement philosophy, and goes to the very root and foundation on which the system is built. It is therefore high time we resolved the issue of whether to continue with the movement, or whether to open up political space and allow a multi-party system of government.

The appointment of the CRC presents a good opportunity for the generation of ideas on how all these issues should be resolved. The CRC was given eighteen months to do its work, and its report is due by the end of the year 2002. It is hoped that its report will provide useful insights on how to resolve these issues in a manner that will promote democracy, good governance, and hence constitutionalism in Uganda.

REFERENCES

Kibwana, K. et al, (2001), *Constitutionalism in East Africa- Progress, Challenges and Prospects in 1999*, Kituo Cha Katiba Studies Series 1, Kampala, Fountain Publishers

Mamdani, M., (1996), *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton, N.J., Princeton University Press

NEMGROUP-U, (2001) *Final Monitoring Report of Uganda's Parliamentary Elections 2001*.

NEMGROUP-U (2001), *Monitoring Report of Uganda's Presidential Elections 2001*.

Oloka-Onyango, J. (ed.) (2001), *Constitutionalism in Africa – Creating Opportunities, Facing Challenges*, Kampala, Fountain Publishers.

Tusasirwe, B. (2001) *The State of Constitutional Developments in Uganda- 2000*

Walubiri, P. M., (1998) *Constitutionalism at the Crossroads*, Kampala, Uganda Law Watch.

Ghai, Y., (1996) *The Theory of the State in the Third World and the Problematic of Constitutionalism*, in Steiner and Alston (eds) *International Human Rights in Context: Law, Politics and Morals*, Oxford, Clarendon Press.

Uganda Law Reform Commission, (1998), *Report on Rape, Defilement and Other Sexual Offences*.

SOME CONSTITUTIONAL DIMENSIONS OF EAST AFRICAN COOPERATION

Khoti Kamanga, Senior Lecturer in Law, Faculty of Law, University of Dar es Salaam. Paper prepared for presentation to *Kituo cha Katiba* within the 'State of Constitutional Development in East Africa' project.
Email: kkamanga@ucc.ac.tz

Table of Contents

Highlights in East African Regional Cooperation

INTRODUCTION

EAST AFRICAN COMMUNITY: 1967 – 1977

- Origins of the East African Community
- EAC Treaty, 1967
- Rise and Fall

REVIVING THE COMMUNITY: GENESIS & EARLY DEVELOPMENT

- *The Umbricht Clause*
- Permanent Tripartite Commission
- Participatory Law-making

TREATY FOR THE ESTABLISHMENT OF THE EAC, 1999: THE ‘3-M’ TREATY

- Overview
- Strengths
- Weaknesses

Conclusion

Highlights in East African Regional Cooperation

- 1897-1901 Customs Collection Centre between Kenya and Uganda set up and the Mombasa-Kisumu railway line completed.
- 1905 East African Currency Board, East African Postal Union launched.
- 1909 Court of Appeal for Eastern Africa established.
- 1917 Customs Union between Kenya and Uganda commissioned. Extended to include Tanganyika two years later.
- 1926 East African Governors' Conference established.
- 1940 East African Income Tax Board, Joint Economic Council established.
- 1948 East African High Commission (EAHC) launched.
- 1961 EAHC is replaced by the East African Common Services Organization (EACSO).
- 1965 Kampala Tripartite Agreement on addressing imbalances of the existing common market system.
- 1966 Tanzania withdraws from the Currency Board, introduces own currency and establishes a national central bank, the Bank of Tanzania.
- 1967 Treaty for East African Cooperation is signed.
- 1971 General Idi Amin Dada seizes power in Uganda and soon after orders mass expulsion of Asians. Tension between Dar es Salaam, Kampala and Nairobi worsens.
- 1975 East African Ministerial Commission attempts to revive the Community.
- 1976 President Amin makes noisy territorial claims against Kenya. Second attempt at salvaging the Community is launched and headed by the World Bank.
- 1977 (June) East African Partner States fail to approve the General Fund Services budget thus deal the community the *coup de grace*.
- 1977 (August) Kenyan Government publicly acknowledges the collapse of the Community.
- 1977 (September) East African Finance Ministers sign a memorandum of Understanding in Washington, D.C., pledging to seek a solution with the aid of a mutually accepted Mediator.
- 1978 (December) The EAC Headquarters in Arusha cease to function. Dr. Victor H. Umbricht, a Swiss diplomat is accepted as the Mediator.
- 1984 Mediation Agreement (Agreement for the Division of Assets and Liabilities of the former East African Community) is signed in Arusha by Nyerere, Moi and Obote. Article 14 commits them to "explore and identify further areas for future cooperation".
- 1993 Agreement for the Establishment of the Permanent Tripartite Commission (PTC) is adopted.
- 1996 Secretariat of the PTC is launched.
- 1997 Decision taken to upgrade into a Treaty the Agreement for the Establishment of a PTC.
- 1999 The Treaty Establishing the East African Community, the '3-M Treaty' (following coinciding first letters of the Presidents' surnames) is signed by Mkapa, Moi and Museveni in Arusha.
- 2000 Having been duly ratified by Partner States, the Treaty acquires the force of law.

SOME CONSTITUTIONAL DIMENSIONS OF EAST AFRICAN COOPERATION

What are the most fundamental historical tasks facing the African continent today?" I would answer ... consolidation of national unity within individual African countries and promotion of inter-African cooperation and unity. This will solve the problem of fragmented markets and weak political entities"

Yoweri K. Museveni, **What is Africa's Problem?** 1992, p. 52

INTRODUCTION

To study and to evaluate regional integration in East Africa (EA, for short) and indeed the emerging EA Community Law without considering the determinant historical, political and economic forces would be to gain a very limited understanding of the subject.

The paper accordingly begins by tracing the origins of pre-independence institutional formations, their aims and objectives, legal framework, and demise. It will be contended that the Community's genesis lies in the British colonial strategy of imperial domination of the region, with Kenya as the hub of regional British imperial power.

Inherent to this colonial economic integration system was inequity and inequality in benefits accruing to Partner States a fact amply exhibited by remonstrations from Tanganyika and Uganda, as early as the last century.

Discussion then turns on post-independence initiatives, the East African Common Services Organization (EASCO) and the 1967 East African Community as established by the 1967 Treaty for East African Cooperation¹. This is followed by a critical re-examination of the Community's demise. While acceding to the decisive role played by the lack of political will it is argued that the colonial legacy is a factor worth considering more closely given the worrying similarities one sometimes notices between the present Community and erstwhile initiatives.

As for the current regional cooperation initiatives, these are constitutionally traced to the ‘Umbricht Clause’ in the Mediation Agreement of 1984². The paper further gives credit to the Community Secretariat for the unique attempt, whatever its limitations, at popular participation in the law-making process.

The third and final substantive part of the paper focuses on the 1999 Treaty for the Establishment of the East African Community (for short, 1999 TEAC) with the principle objective of keeping alive the discourse on matters requiring continued critical attention. Among the prominent matters falling in this category are two: the East African Legislative Assembly (EALA) and the interrelationship between EAC Law and Domestic Law of Partner States.

In the final part of the paper, modest proposals as regards the way forward are given.

EAST AFRICAN COMMUNITY: 1967-1977

Origins of the East African Community

The process of integration may be said to have begun with the commissioning of the Uganda Railway in the late 1890s. In the wake of this first inter-territorial service, was the East African Currency Board which was in turn followed by establishment of the Postal Union and ultimately, a Customs Union. Other common institutions to appear during this period include the Court of Appeal for Eastern Africa, Kenya–Uganda Railways and Harbours, East African Meteorological Department and the East African Posts and Telegraphs Department³.

But it was in the period after World War II that East Africa saw a lavish proliferation of common services institutions. No less than 5 were commissioned. Prominent amongst these were: the East African Industrial Research Organization, East African Airways Corporation, the Directorate of Civil Aviation, the East African Customs and Excise Department, the East African Tobacco Company, the University of East Africa and finally, the East African Railways and Harbours. On the recommendation of a colonial White Paper (Inter-Territorial Organization in East Africa) of 1945, a common supreme body, the High Commission, was also established in 1948.

The East African Common Services Organization (EACSO) was established in 1961 to replace the High Commission (formed 1948), now rendered politically unacceptable following one of the territories (Tanganyika) having attained 'independence' from Britain. It is not without significance to note that Kenya (namely, Nairobi) remained at all times the seat, of nearly all the integration institutions named above⁴. The observation Mbogoro makes in this respect, is pertinent:

“Tanzania was of marginal interest to the British colonizers. Tanzania in effect was regarded as an extension of the colonial economy in East Africa whose headquarters were in Kenya, Nairobi”.

There can be no denying that Britain's initial interest in East Africa was influenced by the anti-slavery crusade⁵. It cannot be denied however that soon, the more decisive, enduring impetus became the desire to secure “control of the headwaters of the Nile in order to protect [the British] position in Egypt and the ... Suez Canal”, in particular⁶.

There were several other benefits from occupying East Africa. German's imperial designs in the region would be checked and opening up the Kenyan hinterland by rail transport would introduce the lucrative large-scale farming. No wonder that from a mere British sphere of influence subject to direct British rule, East Africa quiet rapidly became a fully fledged, *de jure* colonial possession. And indeed, for avoidance of doubt, the “East African Protectorate” was in 1920 ‘elevated’ to the ‘Kenya Colony’⁷.

To summarise, three key observations are worth stressing. The structural measures at ‘regional cooperation’ introduced during this period “were initiated or directly introduced by the Colonial Office in London” either on the basis of Orders in Council or “mere instructions by the Colonial Secretary”⁸. Secondly, the overriding impetus of such measures was “British interest”⁹. Thirdly, and finally, was the untenable lop-sided nature of benefits for the regional partners. Umbricht puts it this way: “The common market system within East Africa favoured the Kenyan industrial base which was able to exploit considerably more to the neighbouring countries than vice versa; this led to marketing difficulties for Ugandan and Tanzanian products and to bitter complaints”¹⁰

One relevant outcome of this were sharply contrasting levels of economic developments, Kenya exhibiting a conspicuous head start in nearly all the key indicators, with Tanzania trailing behind her 2 ‘cousins’. Whether within the EAHC or EACSO, one member continued to enjoy a relatively superior level of economic development (and infrastructure) thus attracting more investments with the ultimate result of not merely becoming a “principal beneficiary” of the integration scheme but the ‘dominant’ factor. And as Mwase¹¹ seems to suggest, leading to arrogance on the part of the Member State. Put simply, a distribution of benefits takes place that is not equitable. Drawing on the experience of Tanzania, Mbogoro, quantified the skewed nature of benefit distribution. Pertinent to our discussion are his observations that:

“While Nairobi experienced a mushrooming of industries under common external tariffs during colonial times, Tanzania remained on the periphery as a limited market, in terms of number and effective demand, for manufactures from Kenya. Industrial development produced employment opportunities in Kenya, but led to economic stagnation and underdevelopment in Tanzania¹².”

But an integration scheme characterized by an acutely unfair distribution of gains was not the only legacy passed down by colonialism. The inherited integration model was essentially predicated on the dominant economic, political and ideological perceptions of British imperial rule. And as Guruli points out, “as long as the economies of the developing countries remain under the domination of foreign monopolies, real and proportional economic development cannot be ensured.¹³ Rather than usher in genuine economic advancement of the colonized the strategy was to perpetuate the existing relations of economic domination.

What economic development and prosperity, did the colonial integration scheme known as the federation of Rhodesia and Nyasaland bring to the countries we now call Malawi and Zambia? None worth writing home about. To the contrary, McMaster¹⁴ and the renowned Harvard historian, Robert Rotberg¹⁵ conclude that the Federation was an economic disaster and accounts to a large extent to the nationalist struggles of the time. Babu points out, in this respect, the acute desirability of looking beyond these inherited colonial institutions where he cautions, that:

“neither the Western model of relying on the “invisible hand” of the market nor the Soviet model of lopsided development of heavy industry and indiscriminate nationalization, is any good for us”¹⁶.

Hazlewood’s findings are revealing in showing how far back into history the problem of unequal distribution of gains goes within East Africa. It would appear, “Uganda had a grievance against Kenya over customs matter”¹⁷ from the inception, in 1917, of the Customs Union. Uganda was later to be joined by Tanganyika in making “persistent claims” over the unfair advantage given Kenya within the Union¹⁸.

The **Armitage – Smith report**¹⁹ was sympathetic, recommending that:

“Tanganyika should ... cease to deplete her revenue and impoverish her citizens by protecting the products of her neighbours”.

So manifestly unfair to Uganda and Tanganyika was the trend that in the early 1950’s the Customs Union was distinctly divided between those that wanted it ‘dismantled’ – Tanganyika and Uganda and - Kenya, which wished to have the *status quo* retained. Because, as Hazlewood concludes, an understanding had been reached that if the integration scheme were to survive, radical adjustments had to be introduced in the manner benefits were distributed. As things stood then, Tanganyika and Uganda increasingly felt that "the customs union was designed for the [exclusive] benefit of Kenya."²⁰

EAC Treaty of 1967

This is an attempt at presenting in a nutshell pertinent highlights of the 1967 Treaty for East African Cooperation (1967 Treaty, for short) which must be distinguished for the Treaty Establishing the East African Community, 1999 (henceforth, the 1999 TEAC).

It need be pointed out too that the immediate genesis of the 1967 Treaty probably lies in the “Philip Commission”²¹. A major term of reference of the Commission was to draw a blueprint of an integration system that addresses the shortcomings of the EACSO discussed earlier in this paper.

These could be summarised in the following manner: inequitable fiscal redistribution of gains, inter-territorial imbalances in trade, currency system disharmony, absence of political good will, and lastly, constitutional impediments.

Signed on June 6, 1967 the 1967 Treaty acquired the force of law on December 1st 1967 and formed the legal basis for what was loosely called the “Community”. Among the pivotal organs it established were:

- East African Authority
- Committee of East African Ministers
- Secretariat
- East African Legislative Assembly
- Ministerial Councils
- East African Development Bank

The Community further ‘took over’ nearly the entire range of joint services institutions belonging to the erstwhile EASCO. These in turn may be classified into two groups: East African Community Corporations, and General Fund Services. To the former belonged such services as the Railways, Posts and Telecommunications, Airways, Cargo Handling Services. To the later, is a far broader category of services, ranging from research and training institutions to the Auditor-General’s Department.

Structurally, at the apex of the organogram was the Authority and which comprised the respective Heads of State, assisted by a Committee of Ministers permanently residing in Arusha.

The Committee’s primary function was to serve as an advisory body to the Authority in respect of the day to day management and decision-making. Each country appointed one Minister who at the same time enjoyed the status of a Cabinet Minister in his respective home government thereby ensuring robust linkages between the Community in Arusha with Governments of Partner States (in Dar es Salaam, Kampala and Nairobi).

The East African Ministers worked in further close concert with two other organs – East African Legislative Assembly (EALA) on the one hand, and the 5 Ministerial Councils²², on the other. They sat along with their respective Deputies, in the EALA and were entitled to also sit on the Councils.

One fundamental change the 1967 Treaty introduced was the relocation from Nairobi to Dar es Salaam and Kampala, of the headquarters of a number of Community Corporations²³. Prior to this, headquarters of all the corporations were located in the Kenyan capital.

In the words of one close observer of the EAC at the time the 1967 Treaty “was a forward-looking, comprehensive and courageous document of political wisdom and statesmanlike vision. It demonstrated the benefits and advantages of cooperation and integration in East Africa”²⁴. It is however a fact that barely 4 years into its existence the Community began to be assailed and ultimately collapsed in 1967. In the section that follows an attempt is made to identify the factors accounting for that tragic turn in events.

Rise and Demise of the EAC

The hypothesis here is that the EAC’s constitutional foundation was fundamentally flawed and not sufficient effort had been expended in making a clean break from the debilitating global economic system.

A third factor is the lack of good will. Nyerere put it aptly:

“The only reason why the Community broke up was a lack of political will to deal in a spirit of unity and in the awareness of our interdependence with the inevitable difficulties of international cooperation between poor countries. I think we have now learnt this basic lesson.”²⁵

The previous section has largely overshadowed this discussion because of the ‘organic’ link we have already managed to establish between the EAC and such colonial creations as the East African High Commission (EAHC) and the East African Common Services Organisation (EASCO). Pertinently, it was observed how certain principled criticisms, Tanzania and Uganda had, with regard to the EAC, trace their origins to the colonial East African Customs Union! In addition to the ‘colonial legacy’ asserted by this paper, four other factors have been identified as explaining the EAC’s collapse. These are: inequitable fiscal redistribution of gains, inter-territorial imbalances in trade, currency system disharmony, absence of political good will, and lastly, constitutional impediments.

The first 4 have received extensive coverage elsewhere²⁶. We therefore confine our attention to the last factor, and that is to say, constitutional impediments and the interconnected issue of the correlation between community and municipal law.

It is however fair to recapture, albeit briefly, the highlights to the disintegration process. It need be borne in mind that whether it is the pre-1967 Customs Union or the Common Market, two Partners were consistently disenchanted.

According to Umbricht the collapse of the Community can be traced to tardiness in implementing the provisions of the 1967 Treaty a development which in turn was fueled by 3 categories of factors: political, economic and institutional²⁷.

Politically, the Partner States were pursuing divergent paths with the resulting tensions immeasurably exacerbated by the assumption of power in Uganda of the maverick Al Haj Field Marshall Idi Amin Dada. Besides a decline in trilateral trade and foreign private investment resulting from heightened mutual criticism and suspicion, the East African Authority, from 1971 the supreme body, was not able to meet anymore.

On the economic plane, “forces of economic nationalism” took over. Each of the Partner States effectively withdrew from the common currency, each introducing its own currency along with a central bank. This played havoc with inter-State remittances leading to a further decline in intra-East African trade (through restrictions on trade and financial transfers) and thus undermining the bedrock of the common market system.

But there were institutional shortcomings too and which were not unrelated to the ‘inability’ of the Authority the supreme policy making body to meet. At the centre of these institutional problems were the influential East African Ministerial Committees and Councils. If any meetings were ever held, decisions took inordinately long to be reached or matters were simply left in abeyance. As a consequence individual Partner States found themselves intervening directly in the day to day operations of what was designed to be an autonomous institution with distinct legal personality²⁸.

The *coup de grace* however came in June 1977 when Partner States withheld approval of the General Fund Services budget for the year beginning July 1 1977. “The severance of access,” writes Umbricht, “to funding marked the final demise of what had been a truly

great concept. Staff members returned to their home countries and the [East African] Headquarters in Arusha ceased to function”²⁹.

And now to the constitutional problem of the interface between Community Law and municipal laws of the Partner States.

The prevailing legal system in the Partner states was and remains *dualist* in nature. It accordingly draws a ‘China Wall’ between rules of international law on the one hand, and national laws, and with two consequences. In the event of conflict, national laws shall prevail and that to become applicable on the national territory, rules of international law must mandatorily be first ‘domesticated’ Case law from Kenya is explicit on this.

This is in reference to Kenya High Court judgement in *R. v. Charles Okunda Mushiya* and *R. v. Donald Meshack Ombisi* as well as Court of Appeal judgement in *East African Community v. the Republic of Kenya*³⁰ In both cases, the court was seized of the problem (pertinent to our discussion) of conflict between the (Kenyan) Constitution and EAC law, in the form of the Official Secrets Act. The High Court decided, and the Court of Appeal upheld, that in the event of conflict between the Kenyan Constitution and Community law, in such circumstances, the Constitution prevails, Community law having been rendered “invalid and of no effect in Kenya”.

The High Court’s decision was premised on the interpretation of the Kenyan Constitution which reads:

“The Constitution shall have the force of law throughout Kenya and, ... **if any other law is inconsistent with this Constitution, this Constitution shall prevail** and the other law shall, to the extent of the inconsistency, be void.”³¹

It was, in the material case, the court’s view, that community law answers to the notion of “other law” as stipulated in the Constitution. Justices Newbold, Duffus and Spry found the appeal “incompetent” and ordered it “be struck out”. The Court of Appeal not only

reiterated the ‘Constitutional paramouncy’ principle stated by the High Court, but went on to state:

“The courts are the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are interpreted by the Court.”

Two additional justifications were given. Firstly, it was the Court’s view that it may not question the validity of the Constitution and secondly, in amplifying the constitutional paramouncy’ doctrine, it held that:

“If the provisions of **any Treaty** ... are in conflict with the Constitution, then to the extent of such conflict such provisions are void.”

The inference here, and hopefully a correct one, is to regard binding rules of international law as at all times being subordinate to national laws. As the High Court makes it explicit:

“If we did have to decide a question involving a conflict between Kenya law on the one hand and the principles or usages of international law on the other,... and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenya law prevailed.³²

Such a position appears to conflict with the principle reflected in the **Vienna Convention on the Law of Treaties**³³ (1969) whose purport is precisely to deny States the loophole of invoking national laws as an excuse for violating obligations voluntarily assumed through agreements, such as that, one would say, establishing the East African Community. And indeed there is ample authority for this assertion. Professor Lauwaars, in his aptly titled work ‘Lawfulness and Legal Force of Community Decisions’, and relying on Belgian case law (re *Belgian State U.S.A. Fromagerie Franco-Suisse* “*Le Ski*”, 1971), quotes the bench as stating:

“[in the event of a] conflict ... between a rule of domestic law and a rule of international law having direct effects within the domestic legal order, the rule established by the treaty must prevail [and that] its pre-eminence follows from the very nature of international law.³⁴

Applied to the East African scene, what the cited authorities seem to be saying is that in the event of conflict between Community laws of direct applicability and the national laws of individual Community members, the former should prevail. And this would appear also to appeal to logic and common sense. For, how would it be possible to implement community decisions if the very ‘grounds’ where such decisions are to find implementation, and that is to say, the national territories of member States, will remain ‘out of bounds’, so to speak?

In drawing attention to the problem of incongruity between national laws and Community legislation, we seek to emphasize the desirability of:

It is finally our submission that where national laws and the Constitution are not in alignment, serious legal disputes should be anticipated. And practice seems to show that in such disputes, court rulings tend to favour the Member State concerned, to the detriment, in our view, of Community interests.

REVIVING THE COMMUNITY: GENESIS & EARLY DEVELOPMENT

The ‘Umbricht Clause’

In accounting for the revival of institutionalized regional cooperation in East Africa which efforts culminated in the signing of the 1999 Treaty for the Establishment of the East African Community, one cannot ignore the Mediation Agreement of 1984.³⁵

Amidst intense mutual acrimony following the collapse of the Community in 1977 Tanzania, Kenya and Uganda were still able to ‘agree to disagree’. They did so in the

form of a Treaty, the Agreement for the Division of Assets and Liabilities of the Former East African Community (popularly referred to as the Mediation Agreement of 1984).

As the name bears witness, the Mediation Agreement gave legal articulation to the commitment to have the collapse of the Community handled amicably. In the preambular part are the following words: “Conscious of the need to achieve a rational settlement of the Community’s affairs, the States engaged the services of the Mediator”.

The Agreement was the outcome of 7 years of relentless work by Ambassador Victor Umbricht who brought to East Africa his vast experience in international mediation³⁶.

Besides providing an acceptable framework for the resolution of mutual claims, the Agreement also laid down the basis for subsequent initiatives on the revival of the current Community.

The pertinent and innocuous provision of the Mediation Agreement reads as follows:

“The States agree to explore and identify further areas for future co-operation and to work out concrete arrangements for such co-operation”³⁷

As is to be expected of diplomats, Ambassador Umbricht attributes the insertion of the clause to the Partner States and not to himself. Given the poisoned status of relationships between the Partner States at the time it is not wholly unreasonable to suggest that there existed no sufficient good will for the States to insert such a ‘good will clause’.

And to the contrary, Ambassador Umbricht, who prior to East Africa had succeeded in negotiating settlements in Indo-China might have been better placed to appreciate the potential for inserting such a clause.

At any rate, the ‘Umbricht Clause’ served as a building stone for subsequent initiatives at reviving the Community. Indeed there is explicit acknowledgement of the ‘Umbricht Clause’ in both the 1999 Treaty for the Establishment of the East African Community, and in other official texts of the EAC.³⁸

Permanent Tripartite Commission

As the discussion that is to follow will be able to show, the ‘Umbricht Clause’ did indeed have a trigger effect in so far as revival of East African co-operation is concerned. It is acknowledged that the clause facilitated³⁹ a summit meeting which then set into motion a number of developments all key to the eventual establishment of the EAC in 1999.

It is common knowledge that as a direct consequence of the commitment made under the terms of the ‘Umbricht Clause’, a meeting of the Heads of State of Tanzania, Kenya and Uganda was held in Nairobi in 1986. Among the major decisions of the summit meeting was the agreement to “establish a mechanism to rekindle the spirit of co-operation among the three countries”

A follow up meeting 5 years later “directed [the] respective Ministers in charge of Foreign Affairs and International Co-operation to work out a programme to reactivate and deepen co-operation ... and draw up an **appropriate institutional framework** for this purpose” (emphasis added)

This directive was given fulfillment on November 30, 1993 with the signing of the Agreement Establishing the Permanent Tripartite Commission, and with the launch 3 years later, of the Secretariat of the Permanent Tripartite Commission (PTC)⁴⁰. Created as a coordinating body with decision-making powers it comprised Ministers responsible for agreed areas of co-operation and headed by the Ministers responsible for regional co-operation.

Participatory Law-Making

The work of drawing a draft Treaty for the Establishment of the East African Community (Draft Treaty), fell on the Secretariat of the PTC. In a unique constitutional development in the region, the deliberate decision was taken to disseminate widely a copy of the draft among East Africans with the view of eliciting comments. This was particularly striking considering the prevalent reticence in the region with regard to popular participation in national constitution-making exercises⁴¹.

Incidentally, besides the Secretariat, a number of locally based NGOs undertook a host of activities at facilitating public debate of the draft treaty. The Confederation of Tanzania Industrialists (CTI) and the Tanganyika Law Society (under the auspices of the East African Lawyers Association) for instance, were particularly active as were the German Foundations - Friedrich Ebert Stiftung, Friedrich Naumann Stiftung and Konrad Adenauer Stiftung.⁴²

The author was privileged to be involved in several of these initiatives but the more pertinent was the written submission made directly to the Secretariat in 1998. This was accompanied, by publication of a number of public-oriented writings.⁴⁴

In essence, the greater part of the following part of the paper, in addressing the strengths and weaknesses of the 1999 TEAC, draws on these earlier writings.

THE 1999 TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY

Overview

The 1999 TEAC is a vast document, far more comprehensive and bold than the 1967 Treaty. Its 153 provisions are grouped into 29 chapters address all conceivable important issues a constitutive and political document of its type may contain. This is far from stating an opinion on the adequacy or otherwise, with which such issues are addressed. And indeed as the unfolding discussion attempts to show, one finds bold, forward-looking provisions in the 1999 TEAC but equally, one is confronted with questionable clauses.

A distinct mark of the Treaty is the caution, extreme caution some would add, with which the question of integration is generally approached. Integration will be achieved through a gradual process involving all the major economic integration systems known and these are (excluding a Free Trade Area), a Customs Union, Common Market, Monetary Union and a Political Federation⁴⁵. To add to this, the launching of each of these stages shall be regulated by a special treaty, a Protocol to be adopted at an unspecified time⁴⁶.

Two clusters of issues are of particular concern. The sustainability of the Community given the fairly limited space it creates for the common man and woman, the political bedrock of regional co-operation. On the other are institutional and procedural weaknesses made even more acute by indecisiveness and/or lack of clarity on the delicate issue of the interrelationship between EAC Law and the Domestic Law of individual Partner States.

Strengths

Among the strengths of the 1999 TEAC is the boldness and resolve with which the Treaty sets out the direction and ultimate goals of cooperation. Initially, a Customs Union will be created and this is to be followed by a Common Market these being transitory arrangements since the ultimate objective is to establish a Monetary Union and finally, a Political Federation.⁴⁷

Given the tragic experience with integration in 1977, the explicit and candid acknowledgement (in the preambular part of the 1999 TEAC) would appear to be another evident strength. And so too, is the attention given to such topical issues as the environment, gender and civil society⁴⁸. To the list of strengths is finally, and pertinently, a commitment, expressed in a number of provisions, to principles of good governance, the rule of law and the to the promotion and protection of human rights⁴⁹. More importantly, membership to the Community is made conditional upon adherence to “universally acceptable principles of good governance, democracy, rule of law observation of human rights and social justice⁵⁰”. One commentator did point out in the course of the debates of the draft treaty that the ‘good governance’ conditionality appeared applicable to potential Community members without there being an equally unambiguous requirement for existing Partner States (Tanzania, Kenya and Uganda)⁵¹.

Happily, this is no longer the situation following the insertion of a new proviso into the provision on ‘Operational Principles’ The additional proviso states as follows:

“The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights”⁵²

Whatever the institutional formation under discussion, the legislative body within such a framework is indubitably pivotal, particularly in the context of constitutionalism. Some of the provisions in the 1999 TEAC can not but invite probing questions. And here are some of them.

Weaknesses

When, to its credit, the East African Community (EAC) Secretariat, invited comments on the Draft Treaty one commentator⁵³ did address himself to the question of the East African Legislative Assembly (EALA). Sadly, while some aspects, and namely the peremptory shortness of provisions was addressed, other fundamental issues were simply ‘shoved under the carpet’.

The Draft Treaty was both curt and perfunctory. It ran for a modest three lines in which the glorious and legitimate scope of the Assembly’s business was stated as being: “to discuss all matters pertaining to the Community” and to “liaise with the legislatures of the Partner States on matters pertaining to the Community”.⁵⁴

The ominous brevity aside, 27 elected members in a Community of 3 Member States (Tanzania, Kenya and Uganda) seemed to suggest that each Member State would be entitled to 9 seats⁵⁵. This rigidity would be a source of problems, given the EAC’s impending expansion on the one hand, and the unequal population sizes of Partner States on the other.

Rwanda is poised to join while Burundi and the Democratic Republic of Congo (DRC) have not concealed their interest in seeking membership. In an interview given to the media, President Kagame and Cabinet have been particularly candid if not blunt. The Rwandese Minister for Foreign Affairs & Regional Co-operation is on record as stating that “we have just applied to join the East African Community” where, in the Minister’s view, Rwanda ‘belongs’⁵⁶.

Once admitted, the new Partner State would most certainly expect if not demand as of right, representation in the EALA, which would then trigger the necessity for amending the Treaty to accommodate the new Partner State’s representative(s). In this way, with each new admission either the original 27 seats have to be, with the aid of amendments to the Treaty, ‘increased’ or ‘redistributed’.

The question then is, whether the cumbersome rituals and the inherent unpredictability is one which East Africans must live with. Would it not have been reasonable if a more flexible formula was adopted? There by all means should be agreement on the size, that is to say the total number of seats in the EALA and 50 may be a figure worth considering.

Following this the allocation of seats to Partner States, in terms of percentages of the total number of seats in the House (in this case, 50) and also having regard to a Member State's population size.

Let us digress slightly but with the '27 seats rule' as the backdrop. Legislative bodies the world over, transact a considerable amount of their business while constituted as Committees and the Treaty 'concedes' just as much. Now, whether with 27 elected members the Assembly has the manpower necessary to efficiently carry out the anticipated voluminous legislative functions, is to be seriously doubted.

At least Edwin Mtei, a former CHADEMA (*Chama cha Demokrasia na Maendeleo*) party leader and erstwhile Tanzanian Finance Minister and Bank Governor holds serious reservations. Addressing a Workshop in Arusha⁵⁷ he expressed concern and justifiable concern at that. Practice has been such that a modest Committee would comprise 5 persons the Chair/Convenor inclusive. With 27 members, it follows that the maximum number of Committees would be 5.4 or simply, 5 (an MP is in no more than 1 Committee).

To appreciate Hon. Mtei's argument one has to recall the awesome legislative tasks sitting in wait for the Assembly. Leaving aside the routine responsibility of enacting House Rules and Procedure⁵⁸, there are the numerous key Protocols which the Assembly is expected to enact. These include one on a Customs Union, Standardisation and Free Movement⁵⁹.

Finally, the Assembly is empowered to "consider annual reports on the activities of the Community, annual audit reports of the Audit Commission and any other reports referred to it by the Council"⁶⁰. Needless to say, it is Council, that shall, under the terms of the Treaty "initiate and submit Bills to the Assembly". Given⁶¹ this power of legislative initiative on the one hand, and Council's fairly vast mandate, that is to say, as the "policy organ of the Community", it is not unreasonable to imagine how preoccupied the Assembly, as the Community's "legislative organ" would be. A 27-member House doesn't appear to be too reassuring.

As indicated earlier, while the EAC Treaty contains far more elaborate provisions than the Draft Treaty did, the '27 seats rule' was retained. In so doing, the probability of avoidable recurrent amendments to the Treaty has been with sadness, enhanced. The retort to this could be that this is an 'academic argument' or that 'we'll cross the bridge when we get there'. The rejoinder can and should be that it is always the height of irresponsibility to ignore symptoms today on the argument that there exist curative measures however advanced the illness is.

For example, at the time that the Draft Treaty was in circulation, it was pointed out that the divergent political party systems among the EA States is likely to be a bone of contention in future. These (that is, political parties) precisely are the entities (though not the only ones) the Treaty requires to be represented. As matters stand now, Tanzania and Kenya can more readily be related to a 'multiparty system' than can Uganda with its maverick 'No-Party' or 'Movement' political system. When the hour comes, the argument then went, it is to be seen how Uganda will proceed to ensure the *representativeness* of (Ugandan) political parties, that the Treaty expressly requires.

What constitutes the bone of contention in the current exchanges with regard to representation of Tanzanian political parties in the Assembly? The sticking point is in essence the '27 seats rule' and more precisely the manner in which Parliaments of the respective Member States are required and have elected representatives to the EA Assembly. The relevant provision of the Treaty reads as follows:

*The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, **shades of opinion, gender and other special interest groups in that Partner State**, in accordance with such procedure as the National Assembly of each Partner State may determine (emphasis provided)⁶²*

Tanzanian authorities, the Speaker of the National Assembly in particular, have proceeded and quiet justifiably, to interpret Art. 50 as empowering Parliament to establish the procedures by which the House would elect candidates to represent Tanzania in the EA Assembly. What is contentious is the basis for the assumption that the 'balance of power' in *Bunge* deserves to be transplanted on the EALA, the consequence

of which *CCM* is entitled to 8 and the 4 Opposition parties (*CHADEMA*, *CUF*, *NCCR* and *CUF*) in *Bunge* have to make do with 1.

One commentator⁶³ attempted to explain this otherwise curious situation. *CCM*'s standing in the Tanzanian parliament (*Bunge*) accounts for 88% of the 295 seats while the Opposition's share is 12%. The (arithmetical) argument then is that *CCM* and the Opposition parties (as a group) be awarded a share of the 9 seats set aside for Tanzania in the EA Assembly, commensurate with their respective standing in *Bunge*. This translates into 7.92 for *CCM* and 1.08 EA Assembly seats for the Opposition.

Whether the equation underpinning this allocation of seats rests its authority in the Treaty, is debatable. Even more questionable, one would imagine, is to confine Tanzania's representation in the EALA exclusively within the context of political parties. This approach barely strikes me as a faithful implementation of the letter and spirit of Article 50, and the Treaty in general. The '*representativeness*' that the Treaty seeks to achieve, transcends political parties, extending as it were, and including "shades of opinion, gender and other special interest groups in that Partner State"

If this were not the case, it would be exceptionally difficult to explain the Treaty's special recognition of such sections of society as the "Business Organisations and Professional Bodies", Women, and "Civil Society" in general. Or, no less importantly, the (declared operational principle) of a "people-centred" EAC.

Even without the privilege of access to the *travaux preparatoires* to the Treaty, it is still possible to guess why it was found appropriate to explicitly provide for representation of entities other than political parties. It is an open secret that quiet a significant section of the citizenry has no conscious affiliation whatsoever with any of the 13 registered political parties. In the last general elections a paltry 10,112,365 stood up to fulfil one of their most important political duties as citizens. Dar es Salaam, whose estimated population hovers above 3 million attracted only 981,976 potential voters.

Let us face it, which of the political parties today can be said to promote or express in any consistent, articulate and vigorous way, the aspirations of the *baba kabwela* (the common among common people), growing mass of disillusioned pensioners, retrenchees, *machinga* and such other folk eking a living on the economic fringes of mainstream life?

Existing political parties can therefore barely claim to be microcosmic of all existing “shades of opinion” (and not that they need to be), and therefore denied the precise factor on which to stake claim to monopoly over representation.

In their wisdom, East Africans may one day decide they have no qualms to having political parties monopolise popular representation in the EA Assembly. As we write these lines, such a decision has yet to be made and Lord forbid. In the circumstances, it can only be fair and reasonable to insist on a more rigorous interpretation and faithful implementation of the ‘representativeness’ nature of the EALA, which in fact is required by the Treaty.

And stated quiet simply, the EALA should reflect as much “as it is feasible” the rich, political, economic and social spectrum of our society, paying generous attention to the *have nots*, and dissenters, and for whom the existing political parties are perhaps not the most appropriate representative. There must therefore be grave doubts as to the suggestion that the EALA was meant to reflect no more than the balance of power or ‘market share’ political parties enjoy in their respective National Assemblies.

CONCLUSION

Regional economic integration in East Africa has come a long way and traces its roots to British imperial strategies (beginning with the Uganda-Kenya Railway of the late 1890s) which serves to explain the weak constitutional foundations and unsustainable character of the early cooperation institutions. Sadly, one cannot state confidently that the post-independence EACSO or the 1967 EAC were free from the infantile disorders of their predecessors.

Indeed, the same ailments afflicting the pre-independence institutions resurfaced in the post-independence period leading to the collapse of the EAC in 1967. But amidst the intense mutual acrimony and poisoned relationship between the Partner States (their Presidents in particular), wisdom and statesmanship prevailed thanks to the able intervention of Ambassador Umbricht, and an agreement was reached to disagree. The inclusion in the Mediation Agreement of 1984 of the ‘Umbricht Clause’ had an

unsuspected salutary effect on the revival of regional cooperation and whose fruits we are witnessing today.

The 1999 Treaty for the Establishment of the East African Cooperation (1999 TEAC) is on the one hand a bold, forward-looking and comprehensive legal and political text, for which East Africans have every reason to be proud. Its drafting involved an appreciable level of popular participation and it unequivocally presents ‘political federation’ as the *raison d’etre* of the staggered economic integration it seeks to establish.

It is at the same time a text with provisions that bring to question the sincerity of its crafters as regards resolve in seeing the declared objectives achieved in the foreseeable future. Two questions are particularly disturbing. The truncated, precarious roles of such pivotal organs as the Council and East African Legislative Assembly (EALA), and the ambiguity with which the issue of the interrelationship between EAC Law and the Domestic Law of individual Partner States are provided for.

If these and other similarly fundamental issues are addressed timely and adequately, East Africa could regain its status as one of the leading examples of economic and political integration and with the additional important distinction of being genuinely “people-centred”.

END NOTES

-
- ¹ Agreement for the Division of Assets & Liabilities of the former East African Community. Reproduced in V.H Umbricht, *Multilateral Mediation: Practical Experiences and Lessons*, Dordrecht: Martinus Nijhoff Publishers, 1988
2. There is tremendous confusion in existing literature with regard to the dates on which these agencies were established. The respective date for the Uganda-Kenya Railway is variously given as 1894, 1896, 1901,1903, and that of the Customs Union: 1900,1917, 1919, 1927
 3. Besides being the HQs for the East African Governors Conference, Kenya for long hosted the seat of such corporations as the Railways & Harbours, Posts & Telecommunication, and Airways.
 4. For a critical study on the subject see B. Davidson, *The African Slave Trade*, Boston: Little, Brown & Co., 1980
 5. Umbricht, *ibid.* p. 7
 6. *Ibid*, p.8
 7. *Ibid*, p.10
 8. *Op. Cit.*
 9. *Ibid* p.12
 10. N. Mwase, "The East African Community: A Study of Regional Disintegration, " Paper 77.10 ERB, University of Dar es Salaam, 1979 p. 6
 11. D.A.D Mbogoro " The Common Market Concept & Economic Development: Tanzania's Experience," "Paper 77.8 ERB, University Dar es Salaam, 1978, pp 20-21
 12. Quoted in Mwase, *ibid*, p 4
 13. McMaster, C., *Malawi foreign Policy and Development*, London: Friedman, 1974
 14. Rotbeg,R., *The Rise of Nationalism in Central Africa: The Making of Malawi and Zambia*, Cambridge (Mass.): Harvard University press, 1967
 15. A.M Babu, "An Economic Strategy for the Second Liberation of Africa, 1994, p.30
 16. Hazlewood, A., *Economic Integration: The East African Experience*, 1975, p.23
 17. *Op.cit.*
 18. Report by Sir Sydney Armitage-Smith on a Fincancial Mission to Tanganyika, as quoted in Hazlewood, 32fn
 19. Hazlewood, *ibid*, p25
 20. Umbricht, *ibid.*, p 13
 21. Umbricht, *ibid.*, p 13
 22. These were: Common Market, Communications, Economic Consultation & Planning, Finance, and Research & Social
 23. See fn 4 *supra*
 24. Umbricht, *ibid*, p 16
 25. Speaking as Chairman of the Heads of State Meeting at the signing ceremony of the Mediation Agreement, May 14, 1984 in Arusha as quoted in Umbricht, *ibid*, p. 194
 26. Including in the studies by Hazzlewood, Mwase, Mbogoro and Umbricht
 27. *Ibid*, pp 16-19
 28. *Ibid*, p 18
 29. *Ibid*, p 19
 30. Reproduced in Vol. IX No 3. *ILM* (1970)556

-
31. section 3 of the Constitution of the Republic of Kenya
 32. Vol IX No. 3 *ILM* (May 1970)559
 33. Reproduced in I. Brownlie, *Basic Documents in International Law* (4th ed), Oxford: Oxford University Press, 1995, p 388
 34. Lauwaars, R.H. *Lawfulness & Legal Force of Community Decision*, 1973 p 19. For a more detailed treatment of the problem see:
Kamanga, K., "The Doctrine of Supremacy of European Community Law: Issues & Trends," Vol III 1 *ELSA SPEL* (1997) 23, P.Graig & Crainne de Burca, *EC Law: Text, Cases and Materials*, Clarendon Press, 1996, especially at pp 151-199
 35. See fn 1 *supra*
 36. The Swiss diplomat had negotiated settlements in Vietnam and among India, Pakistan and Bangladesh in the 1970
 37. Article 14.02
 38. See the preambular part of the 1999 TEAC, as well as, Proceedings of the 1st Ministerial Seminar on EA Co-operation, EAC, Arusha, March 25-26, 1999, pp 24 36
 39. Secretariat of the PTC for EA Co-operation, *EA Co-operation Development Strategy (1997-2000)*, pp 3-4
 40. Vide Protocol Establishing the Secretariat
 41. See in this regard K.Kibwana *et al*, *Constitutionalism in East Africa: Progress, Challenges and Prospects in 1999*, Kituo cha Katiba Studies Series 1, Fountain Publisher, 2001 and J.Oloka-Onyango *et al* (eds), *Law and the Struggle for Demo in EA*, Claripress, 1996
 42. The Friedrich Ebert Stiftung has for an example caused the translation from English into Kiswahili of the 1999 TEAC
 43. An abridged version of which published under the rubric "EA Treaty: Many in Haste, Repent at Leisure," *The East African*, June 14-20, 1999, p.26
 44. Including the rejoinder " 27 EA MPs Are Hardly a Crowd" *The East African*, April 16-22, 2001, p 10 and the presentation entitled 'A People-Centered EAC in Practice: Some Thoughts," Regional Workshop organised by the Friedrich Ebert Foundation and the Nation Media Group, Arusha, Nov 7-8, 2000
 45. Articles 2, 5 (2)
 46. Articles, 75(1), 76 (1) & (2)
 47. See fn 44 above
 48. Articles 111, 112, 113, 114, 121, 122 and 127 respectively
 49. These include Articles 3 (3) (b), 6 (d), 7(2), 121, 122 and 123 (3) (c)
 50. Article 3 (3) (b)
 51. See fn 44 above
 52. Art 7(2)
 53. See fn 44 above
 54. Art 45
 55. This formula has probaly been mechanically transported from the 1967 Treaty
 56. *The East African* (Suppl), April 9-15, 2001, p 5. Rwanda's application was first considered in January 1999
 57. Regional Workshop on Good Neighbourliness, co-organized by FES and the Nation Media Group, Arusha, Nov 7-8, 2000
 58. Article 49(1)
 59. Article 75(1), 81(4), 104(2)
 60. Article 49(2) (c)
 61. Article 14(3) (b)
 62. Article 50
 63. See fn 44 above

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

38
39
40
41
42
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63